Jardine, Logan & O'Brien, P.L.L.P.

JLO legal • ease

Fall 2010

Qualified Litigation Attorneys

Statute of Limitations - Improvement to Real Property
by Jason A. Koch

Minnesota Statutes § 541.051 sets forth both a statute of limitations and a statute of repose for lawsuits arising out of an improvement to real property. A statute of limitations bars an action if a plaintiff does not file suit within a set period of time after a cause of action accrues. *See U.S. Home Corp. v. Zimmerman Stucco & Plaster, Inc.*, 749 N.W.2d 98, 102 (Minn. App. 2008). A statute of repose bars a suit a fixed number of years after the defendant has acted, regardless of when the injury was discovered.

Minnesota Statutes § 541.051 was enacted in 1965. The Minnesota Supreme Court held the statute unconstitutional in 1977. *See Pacific Indem., Co. v. Thompson-Yaeger, Inc.*, 260 N.W.2d 548, 555 (Minn. 1977). In 1980, the legislature amended the statute to cure the constitutional defects. The most recent amendment to Minn. Stat. § 541.051 came in May 2007, following the Minnesota Supreme Court decision in *Weston v. McWilliams & Associates, Inc.*, 716 N.W.2d 634 (Minn. 2006). The 2007 amendment allows an action for contribution or indemnity to be brought within two years after the cause of action for contribution or indemnity had accrued, regardless of whether it accrued before or after the ten-year statute of repose.

I-35W Bridge Collapse Litigation

In two separate decisions regarding claims for contractual indemnity and common-law contribution and indemnity in lawsuits arising out of the August 2007 collapse of the I-35W Bridge, the Minnesota Court of Appeals recently analyzed the 2007 amendment to Minn. Stat. § 541.051.

In 1962, the State of Minnesota entered into a contract with the engineering firm Sverdrup & Parcel & Associates, Inc. ("Sverdrup") which designed the I-35W Bridge. Construction of the bridge was completed in 1967. Through a series of name changes and mergers, Jacobs Engineering Group ("Jacobs") became Sverdrup's successor in interest. *See In re Individual 35W Bridge Litigation*, 786 N.W.2d 890, 892 (Minn. App. 2010). In 2003, the Minnesota Department of Transportation ("MnDOT") contracted with URS Corporation ("URS") to inspect the bridge and recommend repairs. In 2007, MnDOT contracted with Progressive Contractors, Inc. ("PCI") to perform repairs to the bridge. The repair project began in June 2007 and was scheduled to be completed in September 2007. The bridge collapsed on August 1, 2007. More than 100 separate lawsuits arose out of the bridge collapse.

Common Law Contribution and Indemnity

In one recent decision, the plaintiffs sued URS and PCI. URS and PCI asserted third-party claims for contribution and indemnity against Jacobs, claiming its predecessor negligently designed the bridge. *See In re Individual 35W Bridge Litigation*, 786 N.W.2d at 892-93. Jacobs moved for dismissal based upon the ten-year statute of repose. The district court denied that motion. The issue on appeal was whether Jacobs was entitled to a dismissal from the contribution and indemnity claims asserted against it based upon the ten-year statute of repose set forth in Minn. Stat. § 541.051.

Jacobs argued that it was entitled to a dismissal of the contribution claim because URS could not prove that it and Jacobs shared a common liability to the plaintiffs because of the statute of repose. To establish a claim for contribution, a party must prove there is common liability. *See American Auto. Ins. Co. v. Molling*, 239 Minn. 74, 76, 57 N.W.2d, 847, 849 (1953). Here, Jacobs and its predecessor could not be sued for damages arising out of the defective and unsafe condition of the bridge after the ten-year statute of repose had expired. The court ultimately held that because Jacobs could not be held liable for

Limitations *continued on Page 3*

IN THIS *issue*

Subscription Information

A *referral* is the best compliment you can give an attorney. If you know of anyone who may be interested in receiving this newsletter, please complete the section below and return it via fax to 651-223-5070. You may also use the section below for a change of address, etc. Alternatively, you may e-mail the information to us at jlolaw@jlolaw.com.

Name:
Company:
Address:
City:
State/Zip:
Phone:
E-mail:

Comments or inquiries may be directed to Shannon Banaszewski.

The 2003 Comparative Fault Statute Amendment: Where Are We Now?

by Susan S. Tice

The principles of joint and several liability are designed to allow plaintiffs to receive full compensation for their injuries by shifting the burden of collecting payment to liable defendants. *See EMC Ins. Co. v. Dvorak*, 603 N.W.2d 350 (Minn. Ct. App. 1999), *rev. denied*. However, injured plaintiffs should not be able to recover more than they are entitled. Defendants should only pay for those injuries which their actions caused. Such are the competing interests which have historically driven the changing landscape of joint and several liability.

The Old Rule

Joint and several liability had been the law in Minnesota for more than 100 years. The Comparative Fault Act, Minn. Stat. §§ 604.01 and 604.02, controls the apportionment of fault in civil cases. Minn. Stat. § 604.02 governs joint and several liability and loss reallocation.

For claims arising from events occurring prior to August 2003, the previous version of Minn. Stat. § 604.02, subd. 1 will apply. That version provides that when two or more persons are jointly liable, contributions to awards shall be in proportion to the percentage of fault attributable to each, except that each is jointly and severally liable for the whole award, subject to certain exception under Minn. Stat. Chpts. 18B, 115A, 115B, 115C, and are subject to certain percentage caps.

Under this version, joint and several liability was the general rule when two or more persons were jointly liable. The starting premise is that jointly liable defendants are on the hook for all of Plaintiff's damages so each defendant was individually liable but also jointly responsible for Plaintiff's entire harm, subject only to reallocation and the percentage cut-offs in the statute.

The New Rule

In 2003, the Minnesota Legislature amended Minn. Stat. § 604.02, subd. 1. It became a "drastic" and "sweeping" statutory change that significantly limits the application of joint and several liability. The amendment left Minn. Stat. § 604.02, subd. 2 & 3 unaffected.

Minn. Stat. § 604.02, subd. 1, affecting all claims arising out of events occurring on or after August 1, 2003, provides that when two or more persons are severally liable, contributions to awards shall be in proportion to the percentage of fault attributable to each, except that the following persons are jointly and severally liable for the whole award when: (1) fault is greater than 50%; (2) two or more persons act in a common scheme or plan that results in injury; (3) an intentional tort is committed; or (4) liability arises under Minn. Stat. Chpts. 18B, 115, 115B, 115C, and 299J, or any environmental or public health ordinance or program of a municipality as defined in Minn. Stat. § 466.01.

Under the new version of the statute, several liability is the general rule and joint and several liability is the exception. For liability to be several, the starting point needs to be a single indivisible injury or harm caused by the defendants who acted jointly, concurrently or successively in causing the injury or harm. *See* Michael K. Steenson, *Joint and Several Liability in Minnesota: The 2003 Model*, 30 Wm. Mitchell Law Rev. 845, 861 (2004). In the usual case where two or more defendants have tortiously caused indivisible injury to the plaintiff, proportionate liability applies so each defendant will be responsible for only that defendant's percentage of damages.

Perhaps the most ambiguous exception to several liability is the statute's provision that two or more parties who act in accordance with a "common scheme or plan" will be jointly and severally liable for the whole award. The phrase is not defined in the statute nor has it yet been interpreted by Minnesota courts.

The statute regarding the allocation of uncollectible verdicts and judgments has not changed and the statute still permits re-allocation of uncollectable amounts among the other defendants according to their respective percentages of fault, subject to the right to seek contribution. *See* Minn. Stat. § 604.02, subd. 2. Though the loss reallocation provision was not directly changed by the 2003 amendment, its role was substantially diminished through the adoption of several liability because elimination of joint and several liability in favor of a general rule of several liability only removes the need for reallocation in many cases.

Judicial Interpretation of the 2003 Amendment

Very little litigation has occurred at the appellate level leaving some potentially ambiguous language in the 2003 amendment uninterpreted. Of the four 2003 statutory exceptions to the general rule of several liability, only one has been judicially interpreted.

In *Staab v. Diocese of St. Cloud*, 780 N.W.2d 392, 394 (Minn. Ct. App. 2010), the court of appeals noted that this case was the "first opportunity to construe this [amended] statutory language." In *Staab*, while visiting a parish school, a woman broke her leg after she fell out of a wheelchair that was being pushed by her husband. The woman filed a personal injury action against the school but not against her husband. At trial, the special verdict form asked the jury to decide whether the school and the husband were negligent in causing the injuries and to apportion the fault between them if both were negligent. The jury found that both parties were each 50 percent negligent. The district court ordered the school to pay 100 percent of the damages awarded.

The court of appeals determined that, because the jury found the school to be 50 percent negligent, the district court erred in ordering the school to pay all of the damages. A joint and several tortfeasor is only found to be responsible for the entire award if he or she is greater than 50 percent at fault. *See* Minn. Stat. § 604.02.

Conclusion

The amended statutory language in Minn. Stat. § 604.02, subd. 1 represents tremendous change in how courts will be able to allocate damages in cases involving two or more tortfeasors. In looking at the *Staab* decision, the court of appeals' decision seems to follow the intention of the amended language: limit the application of joint and several liability and allow plaintiffs to recover only the proportionate share from each co-defendant. However, *Staab* is just one case.

Comparative fault principles attempt to balance two competing goals: allowing the plaintiff to rightfully recover the full amount of damages and preventing the defendants from having to pay more than their proportionate share. The amended statutory language represents a shift to protect defendants from paying more than what they are responsible for. It remains to be seen how Minnesota courts will enforce the goals of the 2003 amendment. •

Special thanks to Sarah Kirby for her contributions to this article.

Limitations *continued from page 1*

damages to the plaintiffs arising out of the bridge collapse, Jacobs and URS did not share a common liability, and any damages that URS paid to victims of the bridge collapse would not relieve Jacobs of any liability. Consequently, URS could not seek contribution from Jacobs. *See In re Individual 35W Bridge Litigation*, 786 N.W.2d at 895.

In response, URS argued that, under the 2007 amendment to Minn. Stat. § 541.051, it brought its contribution claim against Jacobs less than two years after the plaintiffs brought their claims for damages. But the court noted that the ability to bring a contribution action within the limitations described in Minn. Stat. § 541.051, Subd. 1(b) and 1(c) did not, by itself, mean that a cause of action for contribution had accrued.

The court went on to explain that a common liability was an essential element of a contribution claim. *See In re Individual 35W Bridge Litigation*, 786 N.W.2d at 895-96. The court indicated "[f]or the cause of action to accrue, it must be possible for URS to establish common liability, and, as URS has conceded, the ten-year repose period in Minn. Stat. § 541.051, Subd. 1(a), barred any direct claim by the plaintiffs against Jacobs. Therefore, it is not possible for URS to establish common liability with Jacobs, and no cause of action for contribution has accrued." The court also rejected URS' additional arguments.

The 2007 amendment to Minn. Stat. § 541.051 allows actions for contribution and indemnity to be brought within two years after the cause of action for contribution or indemnity had accrued, regardless of whether it accrued before or after the ten-year statute of repose. But, despite that amendment, the ten-year statute of repose can destroy common liability, a necessary element of a contribution action. Therefore, an action for contribution cannot be brought against a party if the ten-year statute of repose prevented direct claims against that party.

Contractual Indemnity

The court of appeals also analyzed the 2007 amendment to Minn. Stat. § 541.051 to claims for contractual indemnity. Under the same facts set forth above, and following the bridge collapse, legislation was passed to compensate survivors of the collapse. *See* Minn. Stat. §§ 3.7391-.7395 (2008) (the compensation statutes).

The legislation allowed the state to recover payments made pursuant to the compensation statutes from any liable third-party. *See In re Individual 35W Bridge Litigation*, 787 N.W.2d 643, 646 (Minn. App. 2010). The original contract between the state and Sverdrup contained a clause requiring Sverdrup to indemnify the state for "any and all claims, demands, actions or causes of action of whatsoever nature or character arising out of or by reason of the execution or performance of the work… provided for under this agreement." The state asserted claims against Jacobs seeking contractual indemnification pursuant to the compensation statutes and the subcontract agreement. Jacobs moved to dismiss based upon the ten-year statute of repose. The district court denied Jacobs' motion, and the issue was appealed. Id. at 646-47.

Jacobs argued that the state's indemnity claims became barred ten years after substantial completion of the bridge. The court noted that the resolution of the issue hinged upon whether the 2007 amendment to Minn. Stat. § 541.051 applied retroactively to revive the state's indemnity claims. The legislation that amended Minn. Stat. § 541.051 specifically indicated that the amendment would be "retroactive." The legislature's power to enact retroactive legislation extends to the revival of claims that have already been barred by the passage of time. *See Gomon v. Northland Family Physicians, Ltd.*, 645 N.W.2d 413, 417 (Minn. 2002). The court held that the retroactive application of the 2007 amendment to Minn. Stat. § 541.051 revived the state's indemnity claims against Jacobs. *See In re Individual 35W Bridge Litigation*, 787 N.W.2d at 651.

Jacobs further argued that the retroactive application of the 2007 amendment to Minn. Stat. § 541.051 violated its vested right to repose, that the compensation statutes unconstitutionally impaired the 1962 contract between Sverdrup and the state, and that the state could not seek reimbursement for payments made under the compensation statutes because those payments were voluntary. The court of appeals rejected each of those arguments and held that the district court properly denied Jacobs' motion to dismiss the state's claims.

Conclusion

The primary distinguishing factor between these two decisions is the requirement of common liability. Common liability is a necessary requirement of a claim for contribution. And common liability is destroyed if the ten-year statute of repose bars a claim against a defendant. Accordingly, following the recent decision, the 2007 amendment to Minn. Stat. § 541.051 will have little practical effect on claims for contribution. But, in an action based upon statutory indemnity, common liability is not a required element. And the court recently held that the 2007 amendment to Minn. Stat. § 541.051 applies retroactively to revive claims based upon statutory indemnity, so that those claims can be brought within two years after the claim accrues, notwithstanding the expiration of the statute of repose. •

Firm News

Congratulations to **Pete Regnier, Jim Golembeck and Sue Tice!**

After the third appeal in more than seven years of litigation, the Minnesota Court of Appeals in *Dayspring Dev. LLC v. City of Little Canada*, (filed August 24, 2010) reversed the Ramsey County District Court and ruled that Dayspring had no standing to pursue a regulatory takings claim against the city.

The alleged temporary takings claim ripened on August 27, 2003 when the city denied final plat approval. Dayspring's sole owner had an equitable interest in the property as of January 2003, however he did not transfer his property interest to Dayspring until March 2006, after final plat approval was granted in 2005. Because there was no evidence that the sole owner ever made an enforceable assignment to Dayspring of his right to compensation for the taking, any right to assert a takings claim remained with the estate of the sole owner, subject to the applicable statute of limitations. Dayspring, therefore, lacked standing to pursue the alleged takings claim. •

E-Mail Option: JLO now offers the **JLO *legal* • *ease*** in an electronic format. If you would like to receive this publication via e-mail in a PDF format, please e-mail your information to **jlolaw@jlolaw.com**. If you would like to continue receiving the **JLO *legal* • *ease*** by mail, you do not need to do anything. •

JLO *legal • ease*

Jardine, Logan & O'Brien, P.L.L.P., is a mid-sized civil litigation law firm that has handled some of the region's largest and most difficult disputes with outstanding results for clients. Litigation has always been our primary focus. With trial attorneys admitted in Minnesota, Wisconsin, North Dakota, South Dakota, and Iowa, our firm has the ability and expertise to manage cases of any size or complexity. We are trial lawyers dedicated to finding litigation solutions for our clients.

About The Authors

Jason A. Koch

jkoch@jlolaw.com
651-290-7415

Jason is a senior associate at Jardine, Logan & O'Brien, P.L.L.P., and practices primarily in civil litigation, including the areas of construction law, general liability/negligence, health law, employment law and motor vehicle liability. Jason is a 2003 graduate of the University of Minnesota Law School.

Susan Steffen Tice

stice@jlolaw.com
651-290-6571

Sue is a senior associate with Jardine, Logan & O'Brien, P.L.L.P. Ms. Tice's practice focuses on civil litigation, with particular emphasis on municipal law/government liability/civil rights and general liability/ negligence/ insurance issues. Sue graduated in 1981 from Creighton University School of Law.

Coming in the Winter 2011 Issue...

Spoliation

Pleading the 5th Amendment

If you have any questions about the subject matter of the articles in this newsletter, please feel free to contact the authors.

JARDINE
LOGAN & O'BRIEN
ATTORNEYS AT LAW
P.L.L.P.
8519 Eagle Point Boulevard
Suite 100
Lake Elmo, MN 55042