ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY

William Wayne Roubos, Derrick Stephen DeNomme and KTTL Enterprises-Pacific Beach Club, Inc., v. City of Tucson; 2 CA-SA 05-0080; CV-06-0181-PR

PARTIES AND COUNSEL:

Petitioner: The City of Tucson is represented by Michael G. Rankin, Laura Brynwood, William F. Mills, and Dennis P. McLaughlin, of the Tucson City Attorney's Office

Respondents: William Wayne Roubos, Derrick Stephen DeNomme, and KTTL Enterprises-Pacific Beach Club are represented by John Munger and Laura Chiasson of Munger Chadwick PLC.

FACTS:

The City filed complaints in Tucson City Court against Respondents Roubos et. al., doing business as DV8 Nightclub alleging that they violated a Tucson City Code provision prohibiting loud or unruly gatherings on their property. Respondents successfully defended against the actions the City filed against them. The City court denied Respondents' request for attorneys' fees under A.R.S. §12-348, finding that the cases were not civil cases and therefore did not fall under the statute's purview.

Respondents sought review in superior court on the attorneys' fees ruling. The superior court affirmed the city court's denial of the attorneys' fees request, finding that because the penalty for violating the ordinance is a fine, the proceedings brought by the City against Respondents to enforce the ordinance were criminal rather than civil in nature.

Respondents filed a special action. The court of appeals accepted jurisdiction, concluding that the Respondents were entitled to an award of attorneys' fees. The court of appeals vacated the city court's ruling and granted relief. The court noted that the applicable portion of §12-348(A) reads as follows:

> In addition to any costs which were awarded as prescribed by statute, a court shall award fees and other expenses to any party other than this state or a city, town, or county which prevails by an adjudication on the merits in any of the following:

> 1. A civil action brought by . . . a city . . . against the party.

The court noted that §12-348(H) lists a number of exceptions to that statute's mandate. The exception at issue here, and the one on which the respondent judge based her ruling, states §12-348 does not "[a]pply . . . to criminal proceedings brought by a city, town or county on ordinances which contain a criminal penalty or fine for violations of those ordinances." §12-348 (H) (8). The court noted that the City ordinance in question, Section 16-32(e) of the Tucson City Code, provides: "An unruly gathering is unlawful and constitutes a civil infraction."

The court reasoned that in order to decide whether §12-348 entitles Respondents to recover attorneys' fees from the City, one must first determine whether the legislature intended that proceedings brought by a city to enforce a "civil infraction," be characterized as "civil actions" under §12-348 (A) (1) or as criminal actions pursuant to §12-348 (H) (8). The court determined that the legislature intended that such proceedings be considered civil actions. The court noted that the legislature has, since the original of our state, expressly used the term "civil action" to describe the very type of civil enforcement proceedings at issue here. Current A.R.S. §22-406, which uses nearly identical language in its relevant parts to precursor provisions dating back to at least 1909, states: "The city or town may maintain a *civil action* in the municipal court for the recovery of a penalty or forfeiture provided for the violation of an ordinance. The action shall be brought and conducted as *civil actions* in justice of the peace courts." (Emphasis added).

The court rejected the City's argument that a more specific statute, A.R.S. §9-500.21. articulates the procedure by which municipality may pursue ordinance violations as "civil offenses." Section 9-500.21, enacted in 2001, specifically stated that it did not "require changes to procedures in effect before [its] effective date." 2001 Ariz.Sess.Laws, ch. 257, §2. The City contended that the offenses here are "civil offenses" under §9-500.21, rather than "civil actions" under §22-406. Thus, the statute did not independently enable cities to bring a specific series of "civil offense" actions to enforce ordinances, but instead imposed procedural requirements on civil actions that were already permitted. The court determined that §22-406 is the pre-existing enabling legislation allowing those civil actions. Therefore, properly interpreted, §9-500.21, imposing inherently civil procedures on actions to enforce ordinance violations, provides additional evidence that the legislature considered such actions to be "civil actions."

The court concluded that in promulgating §22-406 and its precursor provisions, the legislature intended to authorize a municipality to use civil as well as summary criminal proceedings to enforce its ordinances. Therefore, the legislature was enabling precisely the type of enforcement proceeding, pursued through a civil process, as addressed in §9-500.21, the statute at issue here.

The court noted the legislature has enabled municipalities to enforce their ordinances through criminal or civil proceedings and has specifically characterized civil proceedings used to enforce such ordinances as "civil actions." §22-406.

A.R.S. §22-406 states that a city or town may maintain a civil action in the municipal court for the recovery of a penalty or forfeiture provided for the violation of an ordinance. The action is to be brought and conducted as a civil action in justice of the peace courts. The statute plainly comprehends that the city or town must establish the violation and also the municipality's entitlement to the penalty or forfeiture. The court rejected the City's argument that the court should construe that statute as requiring a bifurcation in proceedings, *i.e.,* as requiring the municipality to first bring one action to establish the violation and then to bring a subsequent action to collect for the violation.

Here, the City has unambiguously exercised its option to enforce a violation of the specific ordinance through civil proceedings. Accordingly, the action brought by the City against the Respondents was a "civil action" as the legislature defined that term. The court noted that the Tucson City Court was created by chapter XII, §1 of the City Charter. Section 2 of chapter XII describes the court's jurisdiction as follows:

> It shall have and exercise exclusive original jurisdiction of all proceedings of a criminal nature for the violation of any ordinance of said city, *and of every action of a civil nature* for the enforcement of a penalty, or the recovery of a penalty or forfeiture imposed by any ordinance of said city for violation thereof. . . (Emphasis added).

The court of appeals held the superior court judge erred in ruling that proceedings to enforce the ordinance could not be civil actions because the Tucson City Court lacks authority to hear civil matters. Here, the Tucson City Code § 8-8 says "Local Rules of Practice and Procedure in City Court Civil Proceedings. . . apply to all . . . actions for civil violations or civil infractions of this Code." The court also held that this action does not fall within one of the numerous exceptions in §12-348(H).

Finally, the court rejected the City's assertion that an attorneys' fees award would result in "havoc . . . upon city code enforcement of other civil infractions such as building and fire safety violations or public nuisances . . . potentially gutting the ability of cities and towns to provide and enforce regulations for the public welfare." The court noted that it was cognizant of such concerns and does not trivialize them. Although reasonable minds might differ concerning whether attorneys' fees should be awarded to the prevailing party under the circumstances in this case, it is the legislature's role to make such public policy decisions.

The court noted that in promulgating §12-348, the legislature intended to ameliorate "the disparity between the resources and expertise of . . . individuals and their government" and to reduce the "economic deterrents to contesting governmental action." 1981 Ariz.Sess.Laws, ch. 208, §1. It is the legislature's province, not a court's, to determine whether its stated remedial goals are outweighed by the City's public policy concerns. The court noted that the legislature has not hesitated to adopt exceptions to §12-348 in order to strike what is, in its view, an appropriate balance. Moreover, the City may proceed by criminal actions if it chooses, albeit subject to an elevated burden of proof, thereby avoiding the provisions of §12-348. *See* §12-348 (H)

Because Respondents' special action challenges an action by a municipality, not the state, the court declined to award attorneys' fees under A.R.S. §12-348 (A)(4) (requires that a court award attorneys' fees to any nongovernmental party that prevails by an adjudication on the merits of "[a] special action proceeding brought by the party to challenge an action by the state against the party.") §12-348(I) (3) defines "State" in this context as "this state and any agency, officer, department, board or commission of this state."

ISSUES: "1. Do summary civil infraction proceedings constitute "civil actions" for purposes of awarding attorney's fees under A.R.S. §12-348(A) (1)?
2. Alternatively, are they exempted under §12-348(H) (8)?"