ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY

CITY OF PHOENIX v. GLENAYRE ELECTRONICS, INC., et al.
CV-16-0126-PR

PARTIES:

Petitioner: The City of Phoenix ("the City")

Respondents: Chi Construction and Continental Homes, Inc.; Jeff Blandford Investments Inc.; Swengel-Robbins Contracting Co., Inc.; Pulte Home Corporation; Del Webb Corporation; William Lyon Homes, Inc.; JNC, Inc.; UH Holdings, Inc.; Aztec Construction, Inc.; KB Home Holdings, Inc.; Richmond American Homes, Inc.; MDC/Wood Inc.; UDC Homes, Inc. now known as Shea Homes of Phoenix (FN); Elliott Homes, Inc.; Glenayre Electronics, Inc.; Los Paisanos Development, Inc.; Wittman Contracting Company (collectively, "the Defendants")

Amici Curiae: Apache, Cochise, Coconino, Graham, Greenlee, La Paz, Maricopa, Navajo, Pinal, Yavapai, and Yuma Counties; the Town of Gilbert; The League of Arizona Cities and Towns; and the Arizona Municipal Risk Retention Pool

FACTS:

Statutes at Issue: Two statutes are at issue. The first is A.R.S. § 12-552, a 1989 statute creating a statute of repose for construction claims. Three parts of the statute are relevant:

> **A.** Notwithstanding any other statute, no action or arbitration based in contract may be instituted or maintained against a person who develops or develops and sells real property, or performs or furnishes the design, specifications, surveying, planning, supervision, testing, construction or observation of construction of an improvement to real property more than eight years after substantial completion of the improvement to real property.
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> **F.** In this section an action based in contract is an action based on a written real estate contract, sales agreement, construction agreement, conveyance or written agreement for construction or for the services set forth in subsection A of this section. This section shall not be construed to extend the period prescribed by the laws of this state for bringing any action. If a shorter period of limitation is prescribed for a specific action, the shorter period governs.
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> **G.** With respect to an improvement to real property that was substantially complete on or before September 15, 1989, the eight and nine-year periods established in subsections A and B of this section shall begin to run on September 15, 1989. Notwithstanding the provisions of subsection E of this section and § 12-505, subsection A, this subsection applies to claims that accrued before the effective date of this amendment to this section.

The second statute is A.R.S. § 12-510, which creates an exception to the statute of limitations for claims asserted by the government. Last amended in 1987, it codifies or partly codifies the earlier common law doctrine of *nullum tempus occurrit regi*—"time does not run against the king" and supersedes a series of nearly identical state statutes that date back to statehood. The statute provides that: "[e]xcept as provided in § 12-529, the state shall not be barred by the limitations of actions prescribed in this chapter." A.R.S. § 12-552 is in the same statutory chapter as A.R.S. § 12-510.

Factual Background: This matter arises from a 2013 lawsuit filed by Carlos Tarazon against the City and other defendants, alleging he developed mesothelioma from long-term exposure to asbestos while installing asbestos cement pipe and conducting repairs on City infrastructure projects and other defendants' projects. He contended that the City was aware of the inherent dangers of asbestos exposure and was negligent in failing to adequately warn him of, and protect him against, those risks.

In response, the City filed a third-party complaint seeking defense and indemnification from 82 developers and eight contractors allegedly responsible for the planning, designing, and constructing the allegedly harm-causing projects between 1968 and 1993. It contended that the developers and contractors were solely responsible for the selection, installation, and disposal of any asbestos-laden products used in their projects, and were therefore required to indemnify the City against Tarazon's claims.

The City contended that the right to indemnification from the contractors arose from their construction contracts with the City. Specifically, each of the City's contracts with the contractors provided that "[t]he Contractor agrees to indemnify and save harmless the City of Phoenix . . . from all suits . . . of any character or nature arising out of the work done in fulfillment of the terms of th[e] contract."

The City's also based its indemnification claims against the contractors and developers on the terms of right-of-way permits they were required to obtain from the City before beginning construction. Among other things, the permits state that the permittee "agrees to perform all work in accordance with" certain agreed-upon plans and specifications, and the permit is issued "on the express conditions that every agreement and covenant contained in th[e] permit is faithfully performed." The City alleged that the agreed-upon plans and specifications incorporated Maricopa Association of Governments specifications requiring the permittees to "observe and comply with all such laws, ordinances, regulations, codes, orders, and decrees." Among those referenced City ordinances is Phoenix City Code § 31-40, which (according to the City) imposes an indemnification obligation on a permittee:

> The permittee agrees to indemnify and save harmless the City of Phoenix . . . from all suits . . . of any character or any nature arising out of or in connection with any act or omission of the permittee, his agents and employees, and of any subcontractor.

The Defendants (including both the contractors and the developers) moved to dismiss the City's complaint, contending that the Arizona construction statute of repose, A.R.S. § 12-552(A) barred its claims. The City argued that as a governmental entity, it was exempt from the statute of repose. It also argued that the statute did not apply to the developers because its indemnification claim was not "based in contract." After holding oral argument, the trial court granted the motion to dismiss and later entered judgment in the Defendants' favor, certifying the decision under Civil

Procedure Rule 54(b). The City then appealed.

The Court of Appeals Opinion. The Court of Appeals affirmed, ruling that "the City's claims against [the Defendants] are time-barred" because "A.R.S. § 12-552 applies to government entities and that the City's claims are based in contract within the meaning of A.R.S. § 12-552(F)."

A. Exemption for Government Entities? The court first turned to whether governmental entities like the City are exempt from A.R.S. § 12-552. It noted that the City relied on the common law doctrine of *nullum tempus* recognized in *City of Bisbee v. Cochise Cty.*, 52 Ariz. 1, 18, 78 P.2d 982, 984-85 (1938). It also explained that this doctrine had been codified in A.R.S. § 12-510, which says that except as provided in A.R.S. § 12-529 (a statute not applicable here), the State "shall not be barred by the limitations of action prescribed in this chapter."

The court noted that A.R.S. § 12-552(A) "states that, '[n]otwithstanding any other statute,' no action may be filed more than eight years after substantial completion of the improvement to real property." It agreed with the Defendants that the "notwithstanding" phrase means that the governmental entity exemption in A.R.S. § 12-510 does not apply to the statute of repose in A.R.S. § 12-552(A). "Consistent with the commonly understood meaning of the phrase," the court explained, courts interpret "notwithstanding any other statute" and similar phrases "'to indicate that a particular provision will trump any conflicting statutes.'" The court consequently concluded that "A.R.S. § 12-552(A) explicitly renders inapplicable the *nullum tempus* doctrine reflected in A.R.S. § 12-510."

While the City argued that under *City of Bisbee*, a government entity is subject to a limitations period only upon an "express[] and definite [] declar[ation]" from the legislature, and that no such exception appears in A.R.S. § 12-552(A), the court rejected that contention. It first noted that a more recent decision by the Arizona Supreme Court had held that "a governmental entity may be made subject to a limitations period either 'by express inclusion in such a limitation *or by necessary inference*.'" (Quoting *State ex rel. Dep't of Health Servs. v. Cochise Cty.*, 166 Ariz. 75, 78, 800 P.2d 578, 581 (1990) (emphasis added).) Second, it had no need to rely on "necessary inference" here because the court was "convinced the language in A.R.S. § 12-552(A) is express and definite"—the statute's "plain and unambiguous language directs that the repose period applies to *all* actions or arbitrations based in contract 'notwithstanding' the provisions of A.R.S. § 12-510."

The court also said it presumed the legislature was aware of A.R.S. § 12-510 when it enacted A.R.S. § 12-552(A). Because of that, it reasoned that "[h]ad the legislature intended the exemption in A.R.S. § 12-510 to apply to the claims defined within A.R.S. § 12-552, it would have undoubtedly said so, rather than expressly providing in A.R.S. § 12-552 that the newer statute would control 'notwithstanding any other statute.'"

The City also contended that applying A.R.S. § 12-552(A) here would lead to an absurd result because it would prevent the City from acting on the public's behalf and for the public's benefit. The court rejected the argument because it ignored the statute's specific purpose—"'to establish a limit beyond which no suit may be pursued.'" (Quoting *Albano v. Shea Homes Ltd. P'ship*, 227 Ariz. 121, 127 ¶ 24, 254 P.3d 360, 366 (2011).) The statute, the court continued, was "specifically enacted to provide a finite period during which an action against persons engaged in the development or construction of real property could be brought and reflects a policy determination to relieve those persons from what was previously 'an indeterminable period of liability exposure.'" (Quoting *Albano*, 227 Ariz. at 126 ¶ 19, 254 P.3d at 365.) While the court

acknowledged that "the City's interest in acting for the public benefit is valid," it also "assume[d] the legislature considered that interest when it declined to exempt the City and other governmental entities" from the statute.

The court also indicated that although it need not consider the statute's legislative history, "the history of A.R.S. § 12-552(A) is particularly compelling." It noted that a year after the statute's 1989 adoption, the Central Arizona Water Conservation District ("CAWCD"), a municipal corporation, discovered leaks in the 336-mile Central Arizona Project ("CAP"), which was built twelve years before. It further noted that minutes from the Arizona legislature's Senate Judiciary Committee indicated that some legislators believed that unless action was taken, Arizona taxpayers would be required to pay up to $150 million in repair costs. In response, it continued, the legislature added subsection (G) to the statute providing that the eight-year period under subsection (A) would not begin to run until September 1989 for projects that were substantially complete before that date. That amendment gave CAWCD an additional five years to bring suit and, the court reasoned, "reflected the legislature's understanding that A.R.S. § 12-552 would have otherwise barred CAWCD's claims." "Simply put, there would have been no need for the legislature to amend A.R.S. § 12-552 to extend the repose period to allow CAWCD to bring suit over the CAP defects if the statute did not apply to government entities."

B. Based in Contract? The court then turned to the City's argument that because A.R.S. § 12-552(A) applies to only to claims "based in contract," it does not apply to its claims against the developers because those claims arise from City permits rather than contracts.

First, the City argued that A.R.S. § 12-552(F) "expressly defines specific contracts to which it applies" and "noticeably absent from the exclusive list" are permits or documents "related to" those specified. The court disagreed with that characterization, noting that "the legislature did not mention any particular document by name within A.R.S. § 12-552(F)." It further explained that "the omission of a specific type of agreement is not dispositive given the legislature's broad language and obvious intent to encompass any 'written agreement . . . for the services set forth in subsection A.'" (Quoting A.R.S. § 12-552(F).) Thus, the court concluded, "[t]he nature of the instrument bearing the indemnification agreement—here, a permit—is immaterial to whether a claim under the agreement is based in contract."

Second, the City argued that the issuance of a permit lacks the essential elements of a contract, "i.e., the permits were not 'dickered deals' reflecting offer, acceptance, mutual assent, and a sufficiently detailed statement of its terms." The court disagreed, explaining that although the permits were not negotiated, a contract does not need to be negotiated to be enforceable. The court reasoned that the conditions in the permit were akin to an adhesion contract. "The Developers' agreements to indemnify the City were part of the *quid pro quo* toward the issuance of the permits. When the Developers accepted the permits, they accepted and agreed to abide by the City's conditions," including the obligation to indemnify the City. And that analysis did not change, the court concluded, merely because the agreement was "'dictated by ordinance, not dickered as a deal.'" (Quoting the City.)

Third, the City argued that its third-party indemnity claim was an exercise of its police power to enforce a permit, and was not premised on a contractual right. The court disagreed. It noted that the underlying ordinance did not apply to the public generally, and that the City was not seeking to revoke a permit or impose a fine based on a perceived violation of a City ordinance. As such, the court concluded, the City's claim was not "an exercise of police power intended to

provide 'for the promotion of public safety, health, morals, and for the public welfare.'" (Quoting *Dano v. Collins*, 166 Ariz. 322, 323, 802 P.2d 1021, 1022 (App. 1990).) Instead, the court stated, "[t]he City's claim is for the performance of a promise, made in furtherance of a commercial activity, memorialized in writing, and designed to allocate risk among the parties."

Fourth, the City argued that its permits could not be considered "contracts" because they did not legally obligate the developers to construct anything, and never mention the words "develop," "development," "sell," "real property," or "services." The court disagreed, explaining that "A.R.S. § 12-552(A) is much broader than the City recognizes." It noted that the statute applies to anyone who "develops or develops and sells real property, or performs or furnishes the design, specifications, surveying, planning, supervision, testing, construction or observation of construction of an improvement to real property." Further, it noted, "to the extent the Developers chose to exercise their rights under the permits to design and build improvements, the permits required them to provide those services in accordance with the City's specifications and standards."

In sum, the court concluded that "the permits forming the basis of the City's claims against the developer defendants are 'written agreements for qualifying services' and those claims therefore are 'based in contract' for the purposes of A.R.S. § 12-552(A)."

ISSUES:

The City is asking the Arizona Supreme Court to address the following issues:

(1) "Under *nullum tempus*, a statute of repose does not run against [a] state or local government unless the legislature expressly and specifically declares that the statute applies to the government. A.R.S. § 12-552 (the construction statute of repose) states that it applies 'notwithstanding any other statute' but does not expressly or specifically declare that it applies to the state or to cities. Does this statute of repose bar Phoenix's claims against the developers and contractors?"

(2) "A.R.S. § 12-552 applies only to actions 'based in contract.' Phoenix did not enter contracts with developers that built private projects in city limits but rather issued permits and enforced them as required by the city code. Is Phoenix's enforcement action 'based in contract' and therefore subject to the statute of repose?"