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SUPREME COURT OF ARIZONA

CITY OF PHOENIX, Third-Party Plaintiff/Appellant, v. GLENAYRE ELECTRONICS, INC., *et al.*, Third-Party Defendants/Appellees.	Arizona Supreme Court No. CV-16-0126-PR Court of Appeals Division One No. 1 CA-CV 14-0739 Maricopa County Superior Court No. CV2013-001762

SUPPLEMENTAL BRIEF OF THIRD-PARTY PLAINTIFF/APPELLANT

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Limitations of actions do not apply to Phoenix, and A.R.S. § 12-552 is no exception to that rule. As noted in the Petition, the legislature must speak expressly and specifically when it intends to limit a city's right to assert a cause of action. The legislature did not do so when it enacted § 12-552. Nothing in the legislative history of either A.R.S. § 12-510 or § 12-552 indicates otherwise.

The *nullum tempus* doctrine applies to a statute of repose such as § 12-552, not just to statutes of limitation. Statutes of both limitation and repose are time limitations, or "limitations of actions" under § 12-510, and therefore the limitations in A.R.S. § 12-552 do not apply to Phoenix.

In the alternative, the claims against the developers fall outside the scope of § 12-552 because Phoenix's action is not "based in contract." Rather, the indemnity claims are securely grounded in Phoenix's inherent authority to protect the public; the incidental use of the word "agree" in the Phoenix ordinance does not alter that conclusion.

I. Nothing in the legislative history of either A.R.S. § 12-510 or § 12-552 indicates that the legislature intended that § 12-552 would apply to government entities.

The legislature must speak clearly when it intends to limit a city's right to assert a cause of action. *See State ex rel. Dept. of Health Servs. v.*

Cochise Cnty., 166 Ariz. 75, 78 (1990). The legislature did not expressly state its intent to limit Phoenix's right to assert a claim when it enacted § 12-552, and nothing in the legislative history surrounding either § 12-510 or § 12-552 indicates otherwise.

A. The history of A.R.S. § 12-510 reinforces the broad scope and effect of the *nullum tempus* doctrine.

The *nullum tempus* doctrine exempting government entities from limitations on actions is a longstanding common-law doctrine. Section 12-510 was enacted in 1887. *See* Rev. Stat. Ariz. Territory § 44-2306 (Sec. 10) (1887) ("The right of this territory shall not be barred by any of the provisions in this act."). This Court subsequently concluded that § 12-510 "does not add to nor subtract from the common-law [*nullum tempus*] rule, but is merely a legislative recognition and approval thereof." *City of Bisbee v. Cochise Cnty.*, 52 Ariz. 1, 8 (1938).

The Court got it right in *Bisbee*, and the developers and contractors do not assert otherwise. In Arizona, a statute may only abrogate the common law when the legislature expressly manifests its intent to do so. *Pleak v. Entrada Prop. Owners' Ass'n*, 207 Ariz. 418, 422 ¶ 12 (2004) (citing A.R.S. § 1-201); *Tucson Gas & Elec. Co. v. Schantz*, 5 Ariz. App. 511, 515

(1967) (holding that a statute regarding stockholder inspection rights did not abolish related common-law rules because "the courts do not hold the common law to be repealed by implication, unless the intention is obvious"). Nothing in the text or history of § 12-510 reveals an express and specific intent to displace or supersede the *nullum tempus* doctrine. If anything, by partially codifying *nullum tempus*, the legislature revealed its intent to *protect* Phoenix and other government actors—not to make them susceptible to generic catch-all provisions such as § 12-552. This Court therefore correctly held that § 12-510 approved of, and did not abolish or displace, the common-law rule of *nullum tempus*. *Bisbee*, 52 Ariz. at 8.

The contractors and developers do not contend that *Bisbee* was incorrectly decided. Instead, they suggest that newly enacted statutes always supersede related common-law doctrines. (*See* Joint Resp. at 11-12.) Not so. When the legislature intends to contradict or change the common law, then a statute may supersede and displace the common law. But when the legislature intends to codify or protect the common law, the resulting statute generally is consistent with and may coexist with the common law.

For example, the contractors and developers cite *State ex rel. Conway v. Glenn*, 60 Ariz. 22 (1942) for the proposition that § 12-510 broadly supersedes the common-law *nullum tempus* doctrine. (Joint Resp. at 11-12.) But unlike here, where § 12-510 is consistent with the common-law *nullum tempus* doctrine, *Conway* involves a statute that directly contradicts a common-law rule. In *Conway*, the legislature had enacted a statute requiring patients to pay for care if they were able. *Id.* at 26–27. The Court observed that, at common law, "no charges were made for the care of the insane," but because this common-law rule was directly inconsistent with this statute (as well as the constitutional provision under which it was enacted), the Court concluded that the inconsistent statute superseded the common law. *Id.* at 30.

In sum, the *Conway* Court followed the well-established rule that the common law is "the rule of decision in all courts of this state" unless it is "repugnant to or inconsistent with . . . the constitution or laws of this state." A.R.S. § 1-201. But when, as here, the legislature enacts a statute *consistent* with the common law, the statute will only supersede the common law if the legislature made its intent to do so clear and express. *See, e.g., Hayes v. Cont'l Ins. Co.*, 178 Ariz. 264, 273 (1994) (absent "a very

clear statement of legislative intent or, better yet, a clear statement in the statute's text" courts will generally decline to find that the statute preempts the common law); *Jones v. Manhart*, 120 Ariz. 338, 340 (App. 1978) ("This court must follow the principle that 'statutes are not to be construed as effecting any change in the common law beyond that which is clearly indicated.'").

Here, when the legislature adopted § 12-510, it enacted a statute that is completely consistent with the *nullum tempus* doctrine. Because the legislature did not express any intent to displace the common law, this Court correctly held that § 12-510 "does not add to nor subtract from the common-law rule, but is merely a legislative recognition and approval thereof." *Bisbee*, 52 Ariz. at 8.

Furthermore, A.R.S. § 1-245 (Joint Resp. at 11-12) is not to the contrary. That statute expresses a basic rule that a more recent statute may expressly or impliedly repeal a prior statute if both relate to the same subject matter. But this statute has not been applied to hold that the legislature may repeal the *common law* by implication. A.R.S. § 1-201, not A.R.S. § 1-245, addresses legislation's implicit effect on the common law. As discussed above, when the legislature enacts a statute that is consistent

with a common-law doctrine, the common-law doctrine remains "the rule of decision in all courts of the state." *See* A.R.S. § 1-201; *see also Country Mut. Ins. Co. v. Hartley*, 204 Ariz. 596, 598 ¶ 9 (App. 2003) ("The mere fact that the statute and the doctrine may apply to a single event does not mean that the statute has abrogated the doctrine."); *Jones*, 120 Ariz. at 340 ("We conclude that the purpose of the dog-bite statutes was to expand the common law protection, not to diminish it.").

Thus, as this Court has already held, § 12-510 did not expressly or implicitly repeal or otherwise displace the common-law doctrine of *nullum tempus*. And the doctrine continues to exist in both its common law and statutory forms.

B. A.R.S. § 12-552's history does not establish that the legislature ever intended that it would apply to Phoenix.

Section 12-552 was enacted in 1989—more than a century after the *nullum tempus* doctrine was established in Arizona,[1] and 51 years after this Court decided *Bisbee*. The legislature is presumed to be aware of other statutes regarding limitations on actions, and also to be aware of related

[1] The *nullum tempus* doctrine's common-law roots extend back centuries to cases decided in the 1700s in the United States. *See, e.g.*, *State v. Lombardo Bros. Mason Contractors*, 54 A.3d 1005, 1017–18 (Conn. 2012).

precedent. *See State v. Garza Rodriguez*, 164 Ariz. 107, 111 (1990); *State v. Pennington*, 149 Ariz. 167, 168 (App. 1985) ("It is presumed the legislature is aware of existing case law when it passes a statute, . . . and that it is aware of court decisions interpreting the language of the statute . . . .") (citation omitted)). The Court therefore presumes that the legislature knew of A.R.S. § 12-510 and the well-settled interpretation of that statute in *Bisbee* when it enacted § 12-552.

Based on the state of the law, if the legislature intended that § 12-552 would override both § 12-510 and the common-law *nullum tempus* doctrine, it knew that it was obligated to expressly communicate that intent. *See Cochise Cnty.*, 166 Ariz. at 78 ("It is an ancient rule of statutory construction, . . . that the sovereign is not bound by a statute of general application, no matter how comprehensive the language, unless named expressly or included by necessary implication."). Under this Court's precedent, the legislature's decision to use the generic phrase "notwithstanding any other statute" is not enough to establish that the legislature intended to subject government entities to the limitations in § 12-552.

The legislature's decision to amend § 12-552 in 1992 does not change this conclusion. The 1992 amendment did not resolve the question of

whether § 12-552 applied to government entities despite § 12-510 and the common-law *nullum tempus* doctrine. Rather, the 1992 amendment was a specific means to accomplish a specific end that did not deal with *nullum tempus* at all.

In 1992, the Central Arizona Water Conservation District ("CAWCD") filed a multi-million dollar lawsuit against several development firms based on theories of negligence and breach of warranty. *See* S. Fact Sheet (May 27, 1992), S.B. 1478, 40th Leg., 2d Reg. Sess. (Ariz. 1992). The defendants argued that the statute of repose, § 12-552, barred CAWCD's claims. (*See* IR 438 at 28–29.) CAWCD responded in two ways. First, it argued to the court that it was exempt from the statute of repose based on the *nullum tempus* doctrine as memorialized in § 12-510. (*Id.*) Second, it asked the legislature to amend § 12-552 to extend the time to file its claims and therefore guarantee that its case would continue to move forward. Minutes of S. Comm. on Judiciary at 30–33 (April 7, 1992), 40th Leg., 2d Reg. Sess. (Ariz. 1992). The legislature agreed to improve CAWCD's litigation chances by enacting a retroactive amendment that permitted the statute of repose to begin running on September 15, 1989 for projects that were substantially complete before that date. 1992 Ariz. Sess.

Laws ch. 240. In doing so, the question of the applicability of the *nullum tempus* doctrine to CAWCD's lawsuit or any other litigation remained an issue for the court.

The 1992 legislative history does not establish that the Legislature intended § 12-552 to apply to claims asserted by governmental entities.

To determine if § 12-552 barred CAWCD's claims, the district court originally considered whether A.R.S. § 12-510 applied to proprietary as well as governmental functions and whether CAWCD was "the state" for the purposes of that statute. (IR-438 at 41.) But one year after the legislative amendment to § 12-552, this Court rejected the governmental-proprietary distinction in *Tucson Unified Sch. Dist. v. Owens-Corning Fiberglas*, 174 Ariz. 336, 339 (1993). So the district court reconsidered its earlier decision and ruled that § 12-510 "applies to section 12-552," and held that the statute of repose did not run against CAWCD. (IR-438 at 41.) Ultimately, those legal principles, not the 1992 amendment, permitted CAWCD's lawsuit to proceed.

Moreover, § 12-552's 1992 legislative history cannot establish the legislature's intent in 1989. *See San Carlos Tribe v. Super. Ct.*, 193 Ariz. 195,

209 (1999); *Joffe v. Acacia Mortg. Corp.*, 211 Ariz. 325, 334 ¶ 38 (App. 2005). Sometimes a subsequent amendment is interpreted as a clarification, rather than a change, to a recently enacted law. *E.g.*, *State v. Sweet*, 143 Ariz. 266, 271 (1985) (amendment one year after legislation approved was a clarification, not a change). But that is not the issue here. The motivation for the 1992 amendment does not inform the proper interpretation of the legislation enacted in 1989 on an issue that is unrelated to the language approved in 1992. The statutory construction issue here involves the 1989 legislation, not the 1992 amendment.

Divining legislative intent is never an exact science. *See Hayes*, 178 Ariz. at 269 ("Divining Congress' intent by examining legislative history has been derided by Justice Scalia as 'the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends.'"). Here, although we presume the legislature knew of the *nullum tempus* doctrine, knew of § 12-510, and knew of this Court's decisions related to both, the legislature never addressed the *nullum tempus* doctrine, either directly or indirectly, when enacting § 12-552 in 1989 or when amending it to accommodate CAWCD's concerns in 1992. Instead, the legislature's silence leaves it to the courts to resolve the tension between § 12-552 and

the *nullum tempus* doctrine. This Court should resolve that tension by holding that § 12-552 does not expressly apply to government entities and therefore the *nullum tempus* doctrine exempts Phoenix from the statute of repose.

II. The *nullum tempus* doctrine applies to all time limitations, including time limitations imposed by statutes of limitation and statutes of repose.

The *nullum tempus* doctrine provides that *time* does not run against government entities. The doctrine does not differentiate between a time limit triggered by the accrual of a cause of action (as with a statute of limitation) or a time limit triggered by actionable conduct (as with a statute of repose). *See Trimble v. Am. Sav. Life Ins. Co.*, 152 Ariz. 548, 554–55 (App. 1986) (concluding that the *nullum tempus* doctrine renders the state immune from a three-year repose period).[2] Thus, when the legislature adopted and codified the *nullum tempus* doctrine (over 100 years ago) in § 12-510, it

[2] The contractors and developers inaccurately classify A.R.S. § 44-2004(B) as a pure "statute of limitations" (Joint Resp. Brief at 10), but at the time the court reached its decision, § 44-2004(B) included a three-year repose period ("and in no event shall such action be brought more than three years after the fraudulent practice occurred"), which the trial court had applied to the state's action. *See Trimble*, 152 Ariz. at 554 (reversing the trial court's decision to deny relief to all those who were damaged more than three years before the state filed its lawsuit).

accurately characterized the doctrine's broad scope: "[T]he state shall not be barred by the limitations of actions prescribed in this chapter." The statute thus expressly applies to all "limitations of actions," which includes statutes of limitation as well as statutes of repose. *See Albano v. Shea Homes Ltd. P'ship*, 227 Ariz. 121, 126 ¶ 19 (2011) ("The Legislature enacted § 12-552 to limit the 'time period during which action may be brought against those engaged in the development or construction of real property and activity related to the construction of real property.'").

The difference between a "statute of repose" and "statute of limitation" does not alter that conclusion. A statute of limitation is "[a] law that bars claims after a specified period . . . based on the date when the claim accrued." Black's Law Dictionary 1450–51 (8th ed. 2004); *accord Albano*, 227 Ariz. at 127 ¶ 23. A statute of repose is "[a] statute barring any suit that is brought after a specified time since the defendant acted." Black's Law Dictionary 1451; *accord Albano*, 227 Ariz. at 127 ¶ 23. In other words, a statute of limitation runs from the time the claim accrued while a statue or repose runs from the time the conduct occurred. The broader phrase "limitation of action," however, encompasses both types of statutes: a "limitation of action" is "[a] statutory period after which a lawsuit or

prosecution cannot be brought in court" regardless of when the limitations period begins to run. *See* Black's Law Dictionary 947–48.

By broadly exempting the government from all "limitations of actions," the legislature expressed its intent that government entities would not be subject to either statutes of limitation *or* statutes of repose. *See Commw. ex rel. Pross v. Bd. of Supervisors*, 303 S.E.2d 887, 889 (Va. 1983) (*nullum tempus* applies to statutes of repose where the statute incorporating the *nullum tempus* doctrine "makes no distinction between" statutes of limitation and statutes of repose).

Albano does not conflict with these principles. There, the Court evaluated whether "*American Pipe* tolling"—a common-law tolling doctrine that applies to class actions—applied to the statute of repose at issue here, A.R.S. § 12-552. *Albano*, 227 Ariz. at 127 ¶ 29. The Court noted that *American Pipe* tolling was a procedural rule while § 12-552 was a substantive rule. *Id.* at 127 ¶ 26. It then concluded: "when a constitutionally enacted substantive statute conflicts with a procedural rule, the statute prevails." *Id.*

Here, however, the *nullum tempus* doctrine is not a mere "procedural rule" akin to a common-law tolling doctrine; it creates a right in the public

to seek remuneration regardless of limitations that would bar similarly situated private plaintiffs. *See Bisbee*, 52 Ariz. at 9–10 (describing the *nullum tempus* doctrine as a "right[] of sovereignty"); *Trimble*, 152 Ariz. at 555 (*nullum tempus* applies when "the governmental unit seeks to assert . . . a right belonging to the general public"). Thus, contrary to Respondents' assertions, *Albano* does not hold that statutes of repose always prevail over common-law doctrines. And *Albano*'s reasoning does not justify refusing to apply *nullum tempus*, which the legislature recognized more than 100 years ago.

Importantly, *nullum tempus* was designed to protect the public fisc. *See In re Diamond Benefits Life Ins. Co.*, 184 Ariz. 94, 97 (1995) (*nullum tempus* applies to "effort[s] by the state to protect the public"); *Cochise Cnty.*, 166 Ariz. at 77–78 (*nullum tempus* protects public funds); *see also Rowan Cnty. Bd. of Educ. v. US Gypsum Co.*, 418 S.E.2d 648, 657 (N.C. 1992) ("concern for the rights of the public supports retention of *nullum tempus*, as that doctrine allows the government to pursue wrongdoers in vindication of public rights and the public purse"). To realize this purpose, the doctrine applies to all time limits for bringing a cause of action regardless of whether the

time began to run when the conduct occurred or when the cause of action accrued.

Finally, numerous other state courts agree that the *nullum tempus* doctrine applies to all limitations of actions, including both statutes of limitation and statutes of repose.[3] This Court should similarly hold, consistent with the plain text of § 12-510, that Arizona's *nullum tempus* doctrine applies to all limitations of actions.

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[3] *See, e.g.*, *Lombardo Bros.*, 54 A.3d at 1012 ("We agree with the state that the doctrine of *nullum tempus* is well established in this state's common law and that the doctrine exempts the state from the operation of [a statute of repose]."); *People v. Asbestospray Corp.*, 616 N.E.2d 652, 655 (Ill. App. 1993) *("*We hold that the repose provision of section 13-213(b) of the Code does not bar the State from proceeding with its cause of action."); *Rutgers, State Univ. of N.J. v. Grad P'ship.*, 634 A.2d 1053, 1055 (N.J. Super. App. Div. 1993) ("We can find, however, no basis for limiting *nullum tempus* to only what might be characterized as pure statutes of limitation" rather than statutes of repose); *Rowan Cnty. Bd. of Educ.*, 418 S.E.2d at 657–58 ("[D]espite the fact that statutes of repose differ in some respects from statutes of limitation, they are still time limitations and therefore still subject to the doctrine that time does not run against the sovereign."); *Pross*, 303 S.E.2d at 889 (Virginia's *nullum tempus* statute applies to "so-called 'pure' statutes of limitation (those which time-restrict the availability of a remedy) and 'special' limitations (those prescribed by statute as an element of a newly-created right)").

III. A claim based on an indemnity requirement imposed by ordinance is not "based in contract," and the use of the word "agree" in the ordinance does not change the claim's essential nature.

There is nothing magical about the word "agree." If using the word "agree" in a statute or ordinance establishes a right "based in contract," lawmakers or other authorities could unilaterally create "contracts" by simply providing that their constituents "agree" to otherwise mandatory laws, rules, or provisions. For example, A.R.S. § 16-906(B)(6) requires political action committees to sign a statement that they "agree" to comply with campaign finance laws, but that language does not transform the regulatory scheme to an obligation based in contract. Likewise, Arizona's reasonable and prudent speed statute, A.R.S. § 28-701, could be amended to provide that any person with a driver's license "agrees" to drive at a speed that "is reasonable and prudent under the circumstances." The word "agree" would not change the effect of the statute—licensed drivers would still be required to go reasonable speed on Arizona's streets. The statute would remain an exercise of the state's power to protect the public, and the word "agree" would not transform the driver-state relationship into one that is "based in contract." On the other hand, if the Court were to hold that "agree" has special significance, Phoenix could simply avoid

§ 12-552 by amending the ordinance to provide that the "permittee *shall* indemnify" the city. This result is untenable. *See State v. Estrada*, 201 Ariz. 247, 251 ¶ 17 (2001) (the Court will not interpret statutes in a way that leads to irrational, unnatural, or inconvenient results).

Similarly, indemnity claims are not inherently contractual in nature. "[I]ndemnity is a remedy, not a cause of action. The right to indemnity must be based on a legal theory of recovery which specifies the legal reason why one party is responsible to hold another party harmless." *Freeport Inv. Co. v. R.A. Gray & Co.*, 767 P.2d 83, 85 (Or. App. 1989). In other words, to support an indemnity claim, a plaintiff must establish that a duty to indemnify existed, but need not establish that the duty to indemnify arose out of a contract.

Rather, absent a contract, the duty to indemnify may be established by statute or by the common law. *See Unique Equip. Co., Inc. v. TRW Vehicle Safety Sys., Inc.*, 197 Ariz. 50, 55 ¶ 19 (App. 1999) (A.R.S. § 12-684 imposes "an independent statutory obligation to indemnify a third party" on employers); *Tucson Elec. Power Co. v. Dooley-Jones & Assocs., Inc.*, 155 Ariz. 340, 344 (App. 1987) (distinguishing statutory indemnity from common-law indemnity: "When a claim for indemnity is based on a statutory right,

it is the statute that determines the effect of the indemnitee's own negligence."); *see also* Restatement (Second) of Torts § 886B cmt. j ("The duty to protect the indemnitee from liability may arise under a contract or be imposed by statute or the common law."). It follows that a legal duty to indemnify may be established by—and thus be "based in"—a city ordinance.

Phoenix, acting in the interest of its residents, imposed an indemnification duty on the developers. Creating that obligation was not an action "based in contract" under § 12-552—it was based in Phoenix's municipal authority and responsibility to protect the public fisc and the safety of its residents. Therefore, § 12-552 does not bar the City's indemnification claims against the developers.

CONCLUSION

For the reasons set forth above and in the Petition for Review and the briefing in the Court of Appeals, the lower-court decisions should be reversed to reinstate Phoenix's indemnification claims. Doing so properly applies this court's precedent to resolve the tension between A.R.S. § 12-552 and A.R.S. § 12-510.

In the very least, Phoenix's claims against the developers should be reinstated because those claims are not based in contract and, therefore, are not subject to A.R.S. § 12-552.

RESPECTFULLY SUBMITTED this 10th day of January, 2017.

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SUPREME COURT OF ARIZONA

CITY OF PHOENIX, Third-Party Plaintiff/Appellant, v. GLENAYRE ELECTRONICS, INC., ET AL. Third-Party Defendants/Appellees.	Arizona Supreme Court No. Court of Appeals Division One No. 1 CA-CV 14-0739 Maricopa County Superior Court No. CV2013-001762 **CERTIFICATE OF SERVICE**

I hereby certify that on the 10th day of January 10, 2017, the Supplemental Brief of Third-Party Plaintiff/Appellant was electronically filed with the Clerk's Office and pursuant to ARCAP 4(g), a copy was e-mailed to:

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SUPREME COURT OF ARIZONA

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Third-Party Defendants/Appellees.

Arizona Supreme Court
No. CV-16-0126-PR

Court of Appeals
Division One
No. 1 CA-CV 14-0739

Maricopa County
Superior Court
No. CV2013-001762

CERTIFICATE OF COMPLIANCE

1. This certificate of compliance concerns:

☐ A brief, and is submitted under Rule 14(a)(5)

☐ An accelerated brief, and is submitted under Rule 29(a)

☐ A motion for reconsideration, or a response to a motion for reconsideration, and is submitted under Rule 22(e)

☐ A petition or cross-petition for review, a response to a petition or cross-petition, or a combined response and cross-petition, and is submitted under Rule 23(h)

☐ An amicus curiae brief, and is submitted under Rule 16(b)(4)

☒ A supplemental brief submitted under Rule 23(k)

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RESPECTFULLY SUBMITTED this 10th day of January, 2017.

OSBORN MALEDON, P.A.

By /s/ Mary R. O'Grady
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Attorneys for Third-Party Plaintiff/Appellant

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