SUPREME COURT, STATE OF COLORADO

CASE NO. 90SC645

BRIEF OF AMICI CURIAE THE COLORADO MUNICIPAL LEAGUE AND COLORADO ASSOCIATION OF MUNICIPAL UTILITIES IN SUPPORT OF PETITIONER CITY OF COLORADO SPRINGS' MOTION FOR REHEARING

CITY OF COLORADO SPRINGS, a Colorado Municipal Corporation

Petitioner,

v.

TIMBERLANE ASSOCIATES, a Colorado General Partnership, INVESTMENT BUILDERS CORPORATION, a Colorado Corporation; JOHN W. DAWSON and JOSEPH M. BIRDSELL, Individually,

Respondents

Certiorari to the Colorado Court of Appeals
No. 88CA0076

EN BANC
JUSTICE VOLLACK delivered the opinion of the Court

HON. BERNARD BAKER, El Paso County District Court Trial Court Judge

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I. THE DECISION OF THE COURT OVERLOOKED THE APPLICATION OF ARTICLE V, SECTION 38 OF THE COLORADO CONSTITUTION, THEREFORE AS THE DECISION IS A VIOLATION OF THE COLORADO CONSTITUTION, REHEARING IS REQUIRED.

The conclusion of this Court is to "reject the common law immunity" of nullum tempus occurrit regi. Opinion, page 5. However, Colorado codified the common law doctrine in Article V, Section 38 of the Colorado Constitution. Although this Court can abrogate the common law doctrine of nullum tempus in order to apply statutes of limitations against a local government, it cannot abrogate the Constitution of the State of Colorado by holding statutes of limitations applicable to local governments. Therefore, the portion of the decision changing the rule of law in Colorado that statutes of limitation do not apply to local governments is invalid and rehearing is required to decide the issue on the Colorado Constitution.

Article V, Section 38 of the Colorado Constitution provides:

> No obligation or liability of any person, association, or corporation, held or owned by the state, or any municipal corporation therein, shall ever be exchanged, transferred, remitted, released, or postponed or in any way diminished by the general assembly, nor shall such liability or obligation be extinguished except by payment thereof into the proper treasury. This section shall not prohibit the write-off or release of uncollectible accounts as provided by general law.

In Hinshaw v. Dept. of Welfare, 157 Colo. 447, 403 P.2d 206, 209 (1965), this Court recognized the applicability of Article V, Section 38 to imposition of statutes of limitation against the state. See also, City Real Estate v. Sullivan, 116 Colo. 169, 176, 180 P.2d 504 (1947). By its express terms, this constitutional provision applies to local governments as well as the state. Statutes of limitations are not derived from the common law but are

statutory creations. Hinshaw v. Dept. of Welfare, 157 Colo. 447, 403 P.2d 206 (1965).

The issue of the application of this constitutional provision to limitations of actions by a governmental entity has not been squarely addressed by this Court, nor by courts in other states with similar constitutional provisions.[1]

The Court's decision in this case relies heavily on New Jersey Educ. Facility Auth. v. Gruzen Partnership, 592 A.2d 559 (N.J. 1991), particularly in Parts III.A. and IV.B. However, the New Jersey court specifically found that the nullum tempus doctrine "is not found in any statute, 'nor does it spring from any constitutional provision.' It is strictly a creature of common law." at 563. That is not true in Colorado.

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[1] See Alabama Constitution Article IV, Section 100, Illinois Constitution of 1870 Article VI, Section 23 (Illinois' new Constitution of Article 1970 did not contain a corresponding provision), Kentucky Constitution, Section 52, Louisiana Constitution Article VII, Section 15, Mississippi Constitution Article IV, Section 100, Missouri Constitution Article III, § 39(5), New Mexico Constitution Article IV, Section 32, Oklahoma Constitution Article V, Section 53, and Utah Constitution Article 6, § 27 (eliminated by amendment in 1972).

Although the many states having similar constitutions have not specifically addressed the constitutionality of applying statutes of limitations to municipalities, many hold on other grounds that statutes of limitations do not apply to the political subdivisions of the states. See e.g. Enroth v. Memorial Hospital at Gulfport, 566 So.2d 202 (Miss. 1990) (Miss. Const. Art. IV, § 104 and statutory counterpart making statutes of limitations inapplicable to state and its political subdivisions in civil cases applies to a city owned community hospital), and City of Shelbyville v. Shelbyville Restorium, 451 N.E.2d 874 (Ill. 1983)(municipalities immune from statutes of limitations when asserting public rights because "the public should not suffer because of the negligence of its officers and agents in failing to promptly assert causes of action which belong to the public.").

II. THIS COURT MISAPPREHENDS THE STATUS OF LOCAL GOVERNMENTS IN COLORADO IN DECIDING STATUTES OF LIMITATIONS RUN AGAINST LOCAL GOVERNMENTS.

Local governments in Colorado have long been recognized by the Colorado Constitution and this Court as being equal to or the same as the state[2], or fulfilling responsibilities of the state[3]. In making its decision, this Court relies heavily on its decision abrogating sovereign immunity in Evans v. Board of County Commissioners, 174 Colo. 97, 482 P.2d 968 (1971). The Colorado General Assembly immediately responded to the Evans decision by adopting the Colorado Governmental Immunity Act, §§24-10-101, et seq., granting the same immunity to both the state and local governments. The citizens and taxpayers are the same for state and local governments, and they do not distinguish between the levels when seeking governmental services. For instance, law enforcement services are provided by the State Department of Public Safety as well as municipal police departments; roads are provided by the state, county, and municipal levels of government.

The opinion of this Court cites with approval the distinction between state and local governments based on a

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[2]A home rule city is equal to the General Assembly with respect to local matters, Denver Urban Renewal Authority v. Bryne, 618 P.2d 1374 (Colo. 1980), Article XX, Colorado Constitution. Counties and school districts lack standing to challenge a state statute as they are established to carry out the will of the state, Denver Urban Renewal Authority v. Bryne, supra.

[3]School districts were created to fulfill the constitutional obligations of the state to provide public education, Florman v. School District No. 11, 6 Colo. App. 319, 40 P. 469 (1895), Wilmore v. Annear, 100 Colo. 106, 65 P.2d 1433 (1937), Article IX, Colorado Constitution.

governmental/corporate distinction on page 9, but recognized on page 13 the invalidity of such a distinction of governmental functions because it "is fraught with inconsistencies in its application." Similarly neither the Colorado Constitution, the Colorado General Assembly, nor this Court, have previously made a distinction between state and local governments for the granting of sovereignty.

III. IF ON REHEARING, THE COURT UPHOLDS ITS DECISION AS CONSTITUTIONAL, THE DECISION OF THIS COURT SHOULD BE APPLIED PROSPECTIVELY

For the reasons stated in the Petition for Rehearing filed by Colorado Springs, the ruling in this case should be applied only prospectively. In effect, this Court is abolishing the nullum tempus doctrine upon which Colorado local governments have relied for over 100 years. The nullum tempus doctrine is not simply judicial in its creation until this decision, it was decided law that the general assembly could place statutes of limitation upon local governments, but has never chosen to do so. State v. Estate of Griffith, 130 Colo. 312, 275 P.2d 945 (1954); Berkeley Metro Dist. v. Poland, 705 P.2d 1004 (Colo. App. 1985). In fact, due to the proximity of the Berkeley decision and the legislative revision of limitations laws which occurred through the enactment of C.R.S. §13-80-101, et seq., it can only be concluded that the legislature, with full knowledge of the Berkeley precedent, did not choose to apply limitations to local governments. See, e.g., People v. Davis, 794 P.2d 159 (Colo. 1990), cert. denied, 112 L.Ed2d 656.

In arriving at its present decision, the Court relied heavily upon Evans v. Board of County Commissioners, 174 Colo. 97, 482 P.2d 968 (1971), and New Jersey Educ. Facilities Aut. v. Gruzen Partnership, 592 A.2d 559 (N.J. 1991); however, both courts applied the holdings prospectively[4]. The Court further emphasized the need for delay in the application of a change of a precedent in Marinez v. Industrial Commission, 746 P.2d 552 (Colo. 1987), by adopting a three part test to be considered before any change in law is applied retroactively. In determining whether the effect of this decision should be prospective, this Court should take further counsel from the Evans and New Jersey decisions, and apply the three part test set forth in Marinez. In Evans, the court noted the reliance other branches of government placed upon the doctrine of sovereign immunity as a means to protect the public fisk, and

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[4]In Evans, the Court vitiated the doctrine of sovereign immunity, indicating that it was "wrong when announced" in 1893. But in doing so, the Court displayed great deference to the needs of its sister branches of government and, in particular, the prerogatives of the legislative branch concluding that the effect of the Evans decision "is simply to undo what this court has done and leave the situation where it should have been at the beginning, or at least should be now: in the hands of the general assembly." 482 P.2d at 972.

In New Jersey Educ. Facilities Auth., the court ruled, "we must make this ruling prospective. Whatever may be the weaknesses of the doctrine, it has apparently never been abrogated by judicial decision in this State. . . . Yet that does not detract from the fact that retroactive abolition of nullum tempus would constitute a clean break with the past and would expose the government to unanticipated loss of claims in cases yet to be subject to the specific factual record this case has. . . . This decision shall not be effective or applicable to claims made by the State or its agencies prior to December 31, 1991 [five months after the decision was announced]." 592 A.2d at 564.

proceeded to delay the effect of its decision for 15 months, within which time the general assembly could act to reimpose the doctrine of sovereign immunity and during which time governments could act to protect themselves through procurement of insurance.

The same type of hiatus is necessary to effect justice in the current instance. Not only will prospective application allow the general assembly to affirmatively act concerning limitations periods for local governments'[5], but it will also allow local governments to continue with cases pending and to bring all claims which may exist but which have not been filed due to reliance upon the nullum tempus doctrine in effect in Colorado until this Court's decision on January 27, 1992[6], thereby effecting the requirements set forth in Marinez.

WHEREFORE, rehearing should be granted for this Court to consider the application of Article V, §38 of the Colorado Constitution which prohibits application of statutes of limitation against either the state or local governments, reconsider any arbitrary distinction between state and local governments, and have any decision changing existing law apply prospectively to exclude pending cases and potential claims and allow the general assembly to act in this area.

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[5]Until this decision, of course, the legislature had been deemed to have given direction concerning limitations against local governments by virtue of its inaction. State v. Estate of Griffith, supra; Berkeley Metro Dist. v. Poland, supra.

[6]The Motion of the City of Colorado Springs specifically cites in footnote 4 at least one case currently before the 10th Circuit that may be directly affected by the change in Colorado law announced by this Court.

Respectfully submitted this 18th day of February, 1992.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing MOTION TO PARTICIPATE AS AMICUS CURIAE was deposited in the United States mail, postage prepaid, this 18th day of February, 1992, addressed as follows:

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