# CASE NOTE:

# *GUNNELL V. ARIZONA PUBLIC SERVICE COMPANY*: THE ANTI-ABROGATION CLAUSE AS A SAFEGUARD AGAINST LEGISLATIVE SHIELDING FROM COMPARATIVE FAULT LIABILITY

J. Blake Mayes

## I. FACTS

In July of 1995, Stanley Gunnell ("Gunnell") contracted to excavate for the installation of a sewer line in Cottonwood, Arizona.[1] Before beginning excavation, Gunnell contacted the local Blue Stake Center, one of a system of centers allowing excavators to make a single call to have underground utilities in the excavation area marked by their owners.[2] The Blue Stake Center contacted the local utilities, which are required to respond to a request within two working days by marking any underground facilities they may have in the area.[3] Arizona Public Service Company ("APS") failed to respond within the prescribed time period, and Gunnell was forced to call the Blue Stake Center three additional times before APS marked its facilities several days later.[4]

After all facilities had apparently been marked, Gunnell began excavation.[5] Shortly thereafter, he encountered an unmarked galvanized steel pipe.[6] Gunnell believed the pipe was part of the local water system, since in his twenty years of experience he had yet to come across an electrical line so encased.[7]

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1. Gunnell v. Ariz. Pub. Serv. Co., 46 P.3d 399, 400 (Ariz. 2002) (en banc).
2. *Id.*
3. *Id.* Underground utility lines are called facilities in the Underground Facilities Act. *See* ARIZ. REV. STAT. § 40-360.21(10) (2004).
4. *Gunnell*, 46 P.3d at 400.
5. *Id.*
6. *Id.*
7. *Id.*

Gunnell contacted the two local water companies, but did not contact APS nor re-contact the Blue Stake Center.[8] Upon the apparent advice of a local water company[9] and his own experience, Gunnell concluded the pipe was an abandoned water line and proceeded to have James Knox ("Knox") cut through the pipe in order to remove it from the trench.[10] Gunnell and Knox were severely and permanently injured after an explosion resulted from Knox cutting into what was actually a live, high-voltage APS wire.[11] APS initially denied ownership of the line.[12] It was only after APS employees visited the site that APS admitted ownership as well as its employee's failure to identify the line during the pre-excavation identification process.[13]

Gunnell and Knox brought separate negligence claims against APS.[14] In Gunnell's suit, APS counterclaimed for damages to its line and indemnification for Knox's damages action.[15] The trial judge granted summary judgment for APS on the complaint and counterclaim, holding, based on the Underground Facilities Act ("UFA"),[16] that Gunnell's negligence was a superseding cause of the event.[17] A divided court of appeals affirmed.[18] The Arizona Supreme Court reversed and remanded in part, mandating that, with regards to Gunnell's claim for his own injuries, the trial court examine the fault of both Gunnell and APS using comparative negligence principles.[19]

## II. THE UNDERGROUND FACILITIES ACT

The Underground Facilities Act sets out the proper procedures for beginning and conducting excavation, and imposes liability for non-compliance with those procedures.[20] An excavator must begin by determining the existence of any underground facilities in the area he or she is prepared to excavate.[21] The

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8. *Id.*

9. There is some evidence that an employee of one of the water companies advised Gunnell that the line was probably an abandoned water line. *Id.*

10. *Id.* It is unclear whether Knox was acting as Gunnell's employee or subcontractor. *Id.*

11. *Id.*

12. *Id.* at 400–01.

13. *Id.*

14. *Id.* at 401.

15. *Id.*

16. ARIZ. REV. STAT. §§ 40-360.21 to 40-360.32 (2004).

17. *Id.* In Arizona, a superseding cause is an unforeseeable and extraordinary intervening act by another party, which renders the first party non-liable for any resulting injury. Herzberg v. White, 66 P.2d 253, 257 (Ariz. 1937). UFA does not mandate that any action by an excavator or facility owner is a superseding cause. *See* ARIZ. REV. STAT. §§ 40-360.22, 40-360.23.

18. Gunnell v. Ariz. Pub. Serv. Co., 18 P.3d 176 (Ariz. Ct. App. 2001).

19. *Gunnell*, 46 P.3d at 407–08.

20. ARIZ. REV. STAT. §§ 40-360.21 to 40-360.22.

21. ARIZ. REV. STAT. § 40-360.22(A) states in part: "A person shall not make or begin any excavation in any public street . . . without first determining whether underground facilities will be encountered, and if so where they are located from each and every public utility, municipal corporation or other person having the right to bury such underground facilities." *Id.*

normal procedure is to notify the local Blue Stake Center, which in turn notifies potential owners of underground facilities in the area.[22] The owners must promptly mark their lines (within two days) in the customary manner, and the excavator cannot commence until all owners have marked their lines.[23] Even after lines have been marked, the excavator must proceed with reasonable care.[24] If an excavator encounters an unmarked line, he or she must notify either the actual owner of the facility or the Blue Stake Center.[25] The excavator may not treat the unidentified line as abandoned until after taking the appropriate steps and obtaining confirmation that the line is no longer in use.[26]

Violation of a statutory standard of care is usually held to be negligence *per se*.[27] Arizona Public Service Company apparently violated A.R.S. § 40-360.22(B) and (I) by failing to identify and mark its own lines and by failing to warn Gunnell of the existence and location of a hazardous high-voltage line.[28] Gunnell apparently violated A.R.S. §§ 40-360.23(B) and 40-360.22(I) by failing to contact the actual owner of the unidentified line and by treating it as abandoned before receiving confirmation.[29] Based on Gunnell's negligence and the provisions of UFA, the trial court and court of appeals concluded that Gunnell's actions were a superseding cause of the incident. Therefore, the lower courts held that, despite APS's own negligence, Gunnell was liable for damage to APS's property and for indemnification for Knox's claim, as well as barred from continuing a claim for his own injuries.[30] Gunnell argued the proper approach was to apply comparative

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22. *Gunnell*, 46 P.3d at 400.

23. ARIZ. REV. STAT. § 40-360.22(B) (2004) states in part:

> Upon receipt of inquiry or notice from the excavator, the owner of the facility shall respond as promptly as practical, but in no event later than two working days, by marking such facility with stakes, paint or in some customary manner. No person shall begin excavating before the location and marking are complete or the excavator is notified that marking is unnecessary.

*Id.*

24. ARIZ. REV. STAT. § 40-360.23(A) (2004) provides: "Obtaining information as required by this article does not excuse any person making any excavation from doing so in a careful and prudent manner, nor shall it excuse such persons from liability for any damage or injury resulting from his negligence." *Id.*

25. ARIZ. REV. STAT. § 40-360.23(B) states: "After markings have been made pursuant to § 40-360.22, an excavator shall notify either the owner of an underground facility or an organization designated by the owner if the excavator encounters an underground facility that has not been located and marked or has been marked in the wrong location." *Id.*

26. ARIZ. REV. STAT. § 40-360.22(I) provides that: "The owner of an underground facility shall notify the excavator whether the facility is active or abandoned . . . . For all purposes under this article, a facility owner, [or] excavator . . . may not . . . treat an underground facility as abandoned, unless the facility has been verified as abandoned pursuant to this subsection." *Id.*

27. Brannigan v. Raybuck, 667 P.2d 213, 217 (Ariz. 1983) (citing Orlando v. Northcutt, 441 P.2d 58, 60 (Ariz. 1968)).

28. Gunnell v. Ariz. Pub. Serv. Co., 46 P.3d 399, 403 (Ariz. 2002).

29. *Id.*

30. Gunnell v. Ariz. Pub. Serv. Co., 18 P.3d 176, 182 (Ariz. Ct. App. 2001).

negligence and permit a jury to allocate fault between Gunnell and APS.[31] The Arizona Supreme Court granted review to determine the operation of comparative negligence within the strictures of UFA where a negligent excavator brings claims for his own injuries against a negligent facility owner.[32]

## III. GUNNELL'S CLAIM AND ARTICLE XVIII

Article XVIII, § 5 of the Arizona Constitution mandates that contributory negligence "shall, in all cases whatsoever, be a question of fact and shall, at all times, be left to a jury." The Arizona Supreme Court has held that the same standard applies to comparative negligence.[33] In *Gunnell*, the trial court held, and a majority of the court of appeals agreed, that Gunnell's negligence was a superseding cause of the event, and thus he was liable without regard to the fault of APS.[34] However, the dissent argued, and the Arizona Supreme Court held en banc, that the lower courts' superseding cause rationale was flawed, and Gunnell's fault should be weighed against that of APS under comparative negligence principles.[35] The Arizona Supreme Court reasoned that if an excavator's negligence were a superseding cause of an event, the excavator could not indemnify a facility owner because the facility owner would have no liability to indemnify.[36] The justices held that the trial court and court of appeals had interpreted UFA so as to render it unconstitutional by holding as a matter of law that Gunnell's negligence, as *a* cause of the event, was the *sole* cause of the event.[37] The Arizona Supreme Court further reasoned that had the legislature statutorily mandated that contributory negligence on the part of a plaintiff barred his claim, such a law would be struck down as unconstitutional.[38] Such a statutory directive would take an obvious case of comparative negligence out of the hands of the jury, the sole arbiter of comparative negligence under the Arizona Constitution.[39]

Article XVIII, § 6 of the Arizona Constitution, the anti-abrogation clause, guarantees the right of an injured party to initiate a cause of action to recover damages. It permits the legislature to regulate access to a cause of action based on certain circumstances, but prohibits it from enacting, under the guise of regulation, any statute that effectively divests a claimant of his right to bring suit for

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31. *Gunnell*, 46 P.3d at 404.

32. *Id.* at 400. The court did not review the lower courts' holdings regarding APS's counterclaims for property damage and indemnification for Knox's claim based in part on analogy to a similar act, The Overhead Lines Act, which evinced a legislative intent to shift liability for property damage and damage to third parties from one negligent actor to another. *Id.*

33. *See* Williams v. Thude, 885 P.2d 1096 (Ariz. Ct. App. 1994).

34. *Gunnell*, 18 P.3d at 181.

35. *Gunnell*, 46 P.3d at 403–04.

36. *Id.* Interpreting the statute using the lower courts' superseding cause rationale would render superfluous the indemnification section of the statute. A superseding cause negates liability of an otherwise liable actor, and one wrongdoer can only indemnify another wrongdoer who is legally liable. *Id.*

37. *Id.* at 406.

38. *Id.* at 404–05.

39. *Id.* at 406.

damages.[40] As the Arizona Supreme Court intimates in *Gunnell*, the anti-abrogation clause not only protects a potential claimant from a legislative bar to a cause of action, it also precludes judicial interpretation of existing statutes to the same end.[41]

Arizona courts review a statute for compliance with the anti-abrogation clause using a two-part test.[42] First, the court determines whether the clause applies to the cause of action at issue.[43] Arizona courts have held that the anti-abrogation clause only protects actions in tort.[44] The anti-abrogation clause initially cast a very narrow net, encompassing only causes of action recognized by pre-statehood common law in Arizona.[45] Arizona courts have since interpreted the anti-abrogation clause to apply to any cause of action that has judicially evolved from actions recognized pre-constitution.[46]

The second arm of the two-part test is a determination whether the statute at issue permissibly regulates a cause of action, or impermissibly divests a would-be plaintiff of access to legal redress.[47] Arizona courts have endorsed a "reasonable election" test for such examination.[48] A statute is constitutional under the anti-abrogation clause if the claimant retains reasonable alternatives to bring his cause of action.[49] Examples of unconstitutional abrogation struck down by Arizona courts include a statute that limited dramshop liability to instances where alcohol was served to an obviously intoxicated person,[50] and one requiring the production of expert affidavits at the pleading stage in actions against contractors.[51] Both of these statutes effectively immunized a particular group from suit. The former set out a *per se* prohibition on allocating fault to one party that ran contrary to comparative negligence principles,[52] and the latter erected a barrier in front of the courthouse doors so insurmountable as to preclude most plaintiffs from having their day in court.[53] The Arizona Supreme Court, subsequent to *Gunnell*, has also held unconstitutional a statute barring a claim for battery against a licensed health care professional, stating that despite the fact that the plaintiff retained his right to bring a malpractice cause of action, a battery claim protected different interests

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40. Barrio v. San Manuel Div. Hosp., 692 P.2d 280, 285 (Ariz. 1984).
41. *Gunnell*, 46 P.3d at 405.
42. *See* Cronin v. Sheldon, 991 P.2d 231, 238 (Ariz. 1999).
43. *Id.*
44. *See* Samaritan Health Sys. v. Superior Court, 981 P.2d 584 (Ariz. Ct. App. 1998).
45. *See* Hazine v. Montgomery Elevator Co., 861 P.2d 625 (Ariz. 1993).
46. *Id.*
47. *See Cronin*, 991 P.2d at 238.
48. Barrio v. San Manuel Div. Hosp., 692 P.2d 280, 285 (Ariz. 1984).
49. *Id.*
50. Young *ex rel.* Young v. DFW Corp., 908 P.2d 1 (Ariz. Ct. App. 1995).
51. Hunter Contracting Co., Inc. v. Superior Court, 947 P.2d 892 (Ariz. Ct. App. 1997).
52. *Young*, 908 P.2d 1. This is the same result achieved by the lower courts' interpretation of UFA in *Gunnell*. Gunnell v. Ariz. Pub. Serv. Co., 18 P.3d 176 (Ariz. Ct. App. 2001).
53. *Hunter*, 947 P.2d 892.

and could not be abrogated.[54] Regulation held to be valid under the anti-abrogation clause includes reducing the amount of recovery in a personal injury case,[55] and establishing a reasonable statute of limitations period.[56] Both were held constitutional because, while each *regulates* the cause of action, neither divests the claimant of his fundamental right to have his day in court.[57]

In *Gunnell*, the decision of the lower courts left the claimant with no reasonable legal alternatives, and without recourse against a negligent party for his injuries.[58] The trial court and court of appeals, in granting summary judgment for APS, interpreted a statute so as to impose all liability on one negligent actor, without regard to the negligence of the other, thereby insulating one despite its apparent *per se* negligence.[59] The Arizona Supreme Court had little trouble determining that such an interpretation of UFA was unconstitutional because it violated the anti-abrogation clause, completely barring Gunnell's access to judicial redress for his injuries.[60]

## IV. CONCLUSION

The decision in *Gunnell* resolved a question of first impression in Arizona and preserved an injured excavator's right to bring suit against a negligent facility owner despite the excavator's own negligence. While the holding in *Gunnell* only directly affects suits arising out of UFA, its implications are broader. Although the Arizona Supreme Court concluded that the legislature, in drafting UFA, intended to promote, rather than to bar, examination of fault under a comparative negligence regime, the Court also made it apparent that it will not tolerate legislation (nor judicial interpretation of state law by the lower courts) that apportions fault or immunizes certain classes of defendants by circumventing the constitutional guarantee of a fact-finding jury and the right of a claimant to bring suit for his or her injuries. The anti-abrogation clause, wielded properly, can be a powerful tool to prevent the legislature and the courts from insulating particular groups from liability by allocating fault to a party without examining the relative fault of all parties.

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54. Duncan v. Scottsdale Med. Imaging, Ltd., 70 P.3d 45 (Ariz. 2003).
55. Duarte v. State *ex rel.* Lewis, 971 P.2d 214, 218–19 (Ariz. Ct. App. 1998).
56. *See* Barrio v. San Manuel Div. Hosp., 692 P.2d 280, 283 (Ariz. 1984).
57. *See id.*; *Duarte*, 971 P.2d at 218–19.
58. Gunnell v. Ariz. Pub. Serv. Co., 46 P.3d 399, 405–06 (Ariz. 2002).
59. *Id.* at 405.
60. *Id.* at 405–06.