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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

LANCE MICHAEL BERSCH; DAVID JOHN WANZEK and LINDA
WANZEK, husband and wife, *Plaintiffs/Appellants*,

v.

THE STATE OF ARIZONA; THE ARIZONA CORPORATION
COMMISSION, an agency of the State of Arizona; MATTHEW J.
NEUBERT, in his official capacity as Director of the Securities Division of
the Arizona Corporation Commission; MARK PRENY, in his official
capacity as Administrative Law Judge of the Arizona Corporation
Commission, *Defendants/Appellees*.

No. 1 CA-CV 15-0340
FILED 6-2-2016

Appeal from the Superior Court in Maricopa County
No. LC2014-000415-001
The Honorable J. Richard Gama, Judge

AFFIRMED

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MEMORANDUM DECISION

Judge Donn Kessler delivered the decision of the Court, in which Presiding Judge Margaret H. Downie and Judge Kent E. Cattani joined.

K E S S L E R, Judge:

¶1 Appellants Lance Michael Bersch (“Bersch”), David Wanzek (“Wanzek”),¹ and Linda Wanzek appeal the superior court’s decision to dismiss their petition for special action. For the reasons stated below, we affirm the superior court.

FACTUAL AND PROCEDURAL HISTORY

¶2 In 2014, the Arizona Corporation Commission (“ACC”) brought an administrative enforcement action against Appellants pursuant to Arizona Revised Statute (“A.R.S.”) sections 44-2032 (Supp. 2015), -2036 (2013), -1961 (2013), -1962 (2013), and 25-215 (2007).² The ACC alleged

¹ ACC filed administrative charges against Linda Wanzek solely for determining the liability of the marital community. See A.R.S. § 44-2031(C) (2013) (“The commission may join the spouse in any action authorized by this chapter to determine the liability of the marital community.”) Accordingly, we use “Wanzek” to refer to David Wanzek for the balance of this decision.

² We cite the current version of applicable statutes when no revisions material to this decision have since occurred.

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Wanzek and Bersch had violated the Arizona Securities Act's ("ASA")³ registration and anti-fraud provisions in transactions that took place between 1998 and 2009. Specifically, the ACC alleged Wanzek and Bersch had: (1) sold unregistered securities in violation of A.R.S. § 44-1841 (2013); (2) offered or sold securities within or from Arizona while not registered as dealers or salesmen in violation of A.R.S. § 44-1842 (2013); and (3) committed fraud in the sale of securities in violation of A.R.S. § 44-1991(A) (2013). Appellants moved to dismiss the enforcement action, arguing in part that: (1) the action was barred by the statute of limitations found in A.R.S. § 44-2004(A), (B) (2013)⁴; and (2) proceeding with stale claims would violate due process. The Administrative Law Judge ("ALJ") denied the motion.

¶3 Appellants then filed a special action in the superior court as an interlocutory appeal from the ALJ's ruling. The ACC moved to dismiss Appellants' complaint. The court dismissed the special action, stating in part that *Trimble v. American Savings Life Insurance Company*, 152 Ariz. 548 (App. 1986), "had specifically addressed and rejected the application of § 44-2004 to the [ACC's] enforcement action." The court did not expressly address Appellants' due process argument but held that: no extraordinary circumstances warranted acceptance of special action jurisdiction; Appellants had an equally plain, speedy, and adequate remedy on appeal; and the petition did not raise issues that were novel, new, or of statewide importance.

¶4 Appellants timely appealed, and this Court stayed the ACC enforcement action pending this appeal. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(1) (2016).

DISCUSSION

¶5 We conduct a bifurcated review of a special action initiated in the superior court. *Bilagody v. Thorneycroft*, 125 Ariz. 88, 92 (App. 1979).

³ A.R.S. §§ 44-1801 to -2126 (2013).

⁴ A.R.S. § 44-2004(A) provides that "[n]o civil action shall be maintained under this article to enforce any liability based on a violation of § 44-1841 or 44-1842 unless brought within one year after the violation occurs." Section 44-2004(B) provides that subject to exceptions inapplicable here, "no civil action shall be brought under this article to enforce any liability based on a violation of article 13 of this chapter unless brought within two years after discovery of the fraudulent practice . . . or after the discovery should have been made by the exercise of reasonable diligence."

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First, we determine whether the superior court assumed jurisdiction of the merits of the claim. *Id.* If we determine the court assumed jurisdiction, we review the superior court's determination of the merits. *Id.* If we determine the court declined to accept jurisdiction, the sole issue on appeal is whether the superior court abused its discretion when it declined to accept jurisdiction. *Id.*

I. The superior court ruled on the merits on the statute of limitations issue.

¶6 “[W]hen a special action is initiated by complaint in superior court the judge must first exercise his discretion and decide whether to consider the case on its merits.” *Id.* “Acceptance of special action jurisdiction is highly discretionary,” *State ex rel. Romley v. Fields*, 201 Ariz. 321, 323, ¶ 4 (App. 2001), and appropriate when addressing an issue that is a purely legal question, *Lear v. Fields*, 226 Ariz. 226, 229, ¶ 6 (App. 2011).

¶7 Appellants argue the superior court effectively reached the merits when it observed that “controlling precedent specifically addressed and rejected the application of § 44-2004 to the [ACC’s] enforcement action.” We agree with the Appellants that the court addressed the merits of the statute of limitations.

¶8 Although the superior court repeatedly stated it was declining special action jurisdiction, the court made several legal determinations in its ruling. In addition to addressing issues pertinent to the court’s declining special action jurisdiction,⁵ the court stated, in part, that (1) *Trimble* “specifically addressed and rejected the application of § 44-2004 to the Commission’s enforcement action,” and (2) Appellants’ “estoppel and laches claims will not lie against the state.” Because the court made these determinations, we presume the superior court implicitly exercised its discretion to accept jurisdiction on those issues but denied

⁵ See RPSA 1(a) (“[T]he special action shall not be available where there is an equally plain, speedy, and adequate remedy by appeal”); *Piner v. Superior Court In and For Cty. of Maricopa*, 192 Ariz. 182, 185-86, ¶ 8 (1998) (“We do not favor accepting special action jurisdiction to review the propriety of interlocutory orders and pretrial rulings . . . [t]his being said, we have recognized a few exceptional cases in which we will exercise our discretion to grant special action relief.”); *Vo v. Superior Court*, 172 Ariz. 195, 198 (App. 1992) (stating special action jurisdiction is appropriate to address an issue that is “a purely legal question, is of statewide importance, and is likely to arise again.”).

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relief. See *Compassionate Care Dispensary, Inc. v. Ariz. Dep't of Health Servs.*, 1 CA-CV 13-0133, 2015 WL 1395271 at *5, ¶ 19 (Ariz. App. March 24, 2015) (mem. decision) (“Here, the superior court did not expressly accept jurisdiction . . . [h]owever, because the court denied [the] special action for failure to plead a substantive right, we presume that the superior court implicitly exercised its discretion to accept jurisdiction but then denied relief.”). However, the court did not expressly address the due process argument, and we conclude based on the court’s language that the court declined jurisdiction on that issue.

II. The superior court did not err in denying relief regarding the statute of limitations issue.

¶9 We review the superior court’s decision on the merits of the statute of limitations issue⁶ to determine whether the court abused its discretion in granting or denying relief. *Cranmer v. State*, 204 Ariz. 299, 301, ¶ 7 (App. 2003). Because the superior court’s ruling addressed pure issues of law, we review its legal conclusions de novo. *Norgord v. State ex rel. Berning*, 201 Ariz. 228, ¶ 4 (App. 2001). We will uphold a denial of special action relief if the record discloses any valid reason for doing so. *State ex rel. Dean v. City Court of Tucson*, 123 Ariz. 189, 192 (App. 1979).

¶10 Appellants argue that the statute of limitations bars the ACC enforcement action, urging us to (1) “borrow” the most analogous statute of limitations, (2) construe *Trimble* narrowly, or, alternatively, (3) overturn *Trimble*.

¶11 It has long been the case that statutes of limitations do not run against the state “unless the Legislature has expressly and definitively declared that they do.” *City of Bisbee v. Cochise Cty*, 52 Ariz. 1, 10 (1938). This doctrine stems from the common law rule of *nullum tempus occurrit regi* (“time does not run against the king”), which “is, in fact, nothing more than an exception or reservation introduced for the public benefit, and equally applicable to all governments.” *Id.* (internal citation omitted). Its role under modern law is “to prevent the public from suffering because of the negligence of its officers and agents in failing to assert causes of action

⁶ The superior court also appears to have addressed the merits of the estoppel and laches claims. However, Appellants do not address those issues in their opening brief. Accordingly, we do not address those issues, considering them waived on appeal. *Dawson v. Withycombe*, 216 Ariz. 84, 100 n. 11, ¶ 40 (App. 2007) (an issue preserved on appeal, but not argued in an appellant’s opening brief, is waived).

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which belong to the public.” *Trimble*, 152 Ariz. at 555 (internal citation and quotation omitted).

¶12 *Trimble’s* application of this doctrine to public enforcement actions falls well within this framework. As this Court noted in *Trimble*, “the public interest is served by the cessation of illegal and fraudulent acts.” *Id.* at 556; *see also Grand v. Nacchio*, 225 Ariz. 171, 174, ¶ 12 (2010) (“The legislature intended the ASA ‘as a remedial measure’ for the ‘protection of the public’”) (quoting 1951 Ariz. Sess. Laws, ch. 18, § 20 (1st Reg. Sess.)). Appellants acknowledge the lack of express or definitive time limits in A.R.S. § 44-2032 by urging us to “borrow” the most analogous statute of limitations, suggesting A.R.S. § 44-2004 or, alternatively, A.R.S. § 13-107 (Supp. 2015). However, because statutes of limitations do not apply to the state “unless the Legislature has expressly and definitively declared that they do,” *Bisbee*, 52 Ariz. at 10, we will not “borrow” an analogous statute of limitations unless we can say the legislature expressly intended that the statute apply. The legislature has not done so here.

¶13 As an initial matter, and as the ALJ and superior court correctly noted, this Court already thoroughly discussed the application of A.R.S. § 44-2004 to ASA enforcement actions in *Trimble*. 152 Ariz. at 554-56. We do not find *Trimble* sufficiently distinguishable from this case, and we will not disagree with *Trimble* absent compelling reasons. *See Wiley v. Indus. Comm’n of Ariz.*, 174 Ariz. 94, 103 (1993) (stating the supreme court will only overrule precedent for compelling reasons); *see also State v. Hickman*, 205 Ariz. 192, 200, ¶ 37 (2003) (clarifying that departure from precedent “require[s] more than that a prior case was wrongly decided”).

¶14 Additionally, these statutes are inapplicable by their own language. A.R.S. § 44-2004(A) clearly states it applies only to actions “maintained *under this article*,” and § 44-2032 is located in a different article than § 44-2004.⁷ (Emphasis added.) Similarly, A.R.S. § 44-2004(B) applies only to actions “*brought under this article* to enforce any liability based on a violation of article 13” of Title 44. (Emphasis added.) Although one of the provisions the ACC alleged Appellants violated, A.R.S. § 44-1991(A), falls within Article 13, the ACC brought the enforcement action pursuant to A.R.S. § 44-2032, which is located in Article 16. Because § 44-2004(B) only applies to actions “*brought under this article*,” and § 44-2032 is located in a

⁷ A.R.S. § 44-2004 is in Article 14 of Title 44, and A.R.S. § 44-2032 is in Article 16.

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different article than § 44-2004(B), § 44-2004(B) is inapplicable to the ACC's enforcement action.⁸

¶15 The emphasized language in § 44-2004 also distinguishes it from Appellant's cited federal case, *Gabelli v. SEC*, 133 S. Ct. 1216, 1219 (2013). *Gabelli* held that the five-year general civil statute of limitations, 28 U.S.C. § 2462, applies to SEC proceedings. *Id.* However, 28 U.S.C. § 2462 does not contain the same limiting language as A.R.S. § 44-2004, therefore we depart from that authority. *See Sell v. Gama*, 231 Ariz. 323, 327, ¶ 18 (2013) (stating federal law is persuasive in interpretation of Arizona securities laws only where the provisions and underlying policies are similar).

¶16 Section 13-107 is similarly inapplicable; section 13-107 is a criminal statute that specifically lists the offenses to which it applies.⁹ By their own language, §§ 44-2004 and 13-107 are inapplicable to § 44-2032, and we will not apply them to A.R.S. § 44-2032 absent clear legislative intent. *See Matter of Estate of O'Connor*, 139 Ariz. 450, 453 (App. 1984) ("The legislature is perfectly capable of expressing a statutory bar when it so

⁸ The actions in Article 14 to which § 44-2004(B) refers are those brought by purchasers of the securities, not actions brought by the ACC pursuant to § 44-2032. *See, e.g.*, A.R.S. § 44-2001(A) (2013) (allowing a purchaser to void a securities sale that violates §§ 44-1841, -1842, or Article 13 and to bring an action to recover consideration paid for the securities, taxable costs, and attorneys' fees). Indeed, Article 14's only mention of A.R.S. § 44-2032 is in A.R.S. § 44-2003(A) (2013), which states that actions brought under §§ 44-2001, -2002 (2013), or -2032, may be brought against any person who participated or induced the unlawful securities sale, and provides for joint and several liability to the person who is entitled to maintain such action. That is insufficient to bring administrative actions pursuant to A.R.S. § 44-2032 within the statute of limitations in A.R.S. § 44-2004(B).

⁹ Section 13-107(A) states it applies to prosecutions "for any homicide, any conspiracy to commit homicide that results in the death of a person, any offense that is listed in chapter 14 or 35.1 of this title and that is a class 2 felony, any violent sexual assault pursuant to § 13-1423, any violation of § 13-2308.01, any misuse of public monies or a felony involving falsification of public records or any attempt to commit an offense listed in this subsection" Section 13-107(B) provides limitations periods for class 2 through class 6 felonies, misdemeanors, and petty offenses.

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intends and we will not read such a result into a statute absent a clear expression.”).¹⁰

III. The trial court did not err in declining special action jurisdiction regarding the due process issue.

¶17 Finally, Appellants argue the “sheer passage of time since the actions the ACC seeks to prosecute violates due process.” Because the superior court declined jurisdiction on this issue, we review that decision for an abuse of discretion. See *Bilagody*, 125 Ariz. at 92. Courts have wide discretion to decline special action jurisdiction, *Romley*, 201 Ariz. at 323, ¶ 4, and Arizona disfavors special action petitions from unsuccessful interlocutory orders, *Piner*, 192 Ariz. at 185, ¶ 8. We will affirm if there is any basis to support the decision to decline jurisdiction.

¶18 We find no abuse of discretion. Appellants argue in a vacuum that the delay in bringing the enforcement action will cause them a hardship in defending themselves. The court correctly concluded that there was no basis for accepting jurisdiction. Clearly, the ACC was acting within its authority in bringing the action under A.R.S. § 44-2032, and Appellants have not shown its decision to do so was arbitrary, capricious, or an abuse of discretion. See RPSA 3 (“The only questions that may be raised in a special action are . . . [w]hether the defendant has proceeded or is threatening to proceed without or in excess of jurisdiction or legal authority; or . . . [w]hether a determination was arbitrary and capricious or an abuse of discretion.”).

¶19 Appellants cite *Zavala v. Arizona State Personnel Board*, 159 Ariz. 256, 264 (App. 1987), for the proposition that “[d]elay in and of itself may constitute a constitutional violation,” but *Zavala* is distinguishable from the case at hand. *Zavala* addressed the length of an administrative proceeding leading to dismissal of a state employee with a property interest

¹⁰ Appellants also argue that Arizona follows the general common law on statutes of limitations, and we can therefore “borrow” a statute of limitation if no other statute directly applies. We disagree. Neither of Appellants’ suggested statutes apply according to the statutes’ own terms and Arizona case law, and neither of Appellants’ cited cases address “borrowing” statutes applicable to private actions and applying them to public enforcement actions. *Coal River Energy, LLC v. Jewell*, 751 F.3d 659, 663 (D.C. Cir. 2014) (suit by a coal company against the Secretary of the Interior challenging a Reclamation Act regulation); *Blood Sys., Inc. v. Roesler*, 972 F. Supp. 2d 1150, 1154 (D. Ariz. 2013) (a personal injury case).

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in his employment. *Id.* at 260 (“Due process requires administrative proceedings *leading to dismissal* be completed within a meaningful time.”) (internal citation and quotation omitted) (emphasis added). Here, Appellants have not asserted a protected property or liberty interest. Additionally, *Zavala* was concerned with the length of the proceeding, not the amount of time the agency in question took to initiate the proceedings. *Zavala* is thus inapplicable to the case at hand.

CONCLUSION

¶20 For the foregoing reasons, we affirm the superior court and vacate our order staying the proceedings before the ACC pending the appeal. Appellants request attorneys’ fees and expenses pursuant to A.R.S. § 12-348(A)(4) (2016) and their reasonable costs pursuant to A.R.S. § 12-341 (2016). Because Appellants are not the prevailing party, we will not grant their requests for attorneys’ fees and expenses or costs.



Ruth A. Willingham · Clerk of the Court
FILED : AA