STATE OF CONNECTICUT *v.* LOMBARDO BROTHERS MASON CONTRACTORS, INC., ET AL.
(SC 18462)
(SC 18463)

Palmer, Zarella, Harper, Vertefeuille and Lavine, Js.*

Argued January 10—officially released November 13, 2012

Gregory T. D'Auria, solicitor general, with whom were *Robert J. Deichert*, assistant attorney general, *Timothy Fisher* and, on the brief, *George Jepsen*, attorney general, and *Richard Blumenthal*, former attorney general, for the appellant (state).

John P. Graceffa, with whom, on the brief, were *Anita C. Di Gioia* and *Cristin E. Sheehan*, for the appellee (named defendant).

Robert M. Barrack, with whom were *Brian J. Donnell* and, on the brief, *Stephen P. Brown*, *Karen K. Clark*, *John Cvejanovich*, *Rebecca Hartley*, *Donna Jenner*, *Richard J. Kenny*, *James D. Kuthe*, *Russell Boon Rhea* and *John S. Rosania*, for the appellees (defendant Apogee Wausau Group, Inc., et al.).

David E. Rosengren with whom were *Daniel J. Klau* and *Frank A. Sherer III*, for the appellee (defendant Gilbane, Inc.).

Kenneth B. Walton, with whom were *Patricia B. Gary* and, on the brief, *David J. Hatem*, *Leslie P. King*, *Marisa Lanza*, *Deborah Monteith Neubert* and *Mark E. Stopa*, for the appellees (defendant S/L/A/M Collaborative, Inc., et al.).

Jack G. Steigelfest and *Elizabeth S. Tanaka* filed a brief for the appellee (defendant Arborio Corporation).

Michael T. Ryan filed a brief for the appellee (defendant F.B. Mattson Company, Inc.).

Jeffrey R. Babbin, *Charles E. Vermette, Jr.*, *Kathleen F. Adams*, *Dirk D. Bender*, *Neyah Kane Bennett*, *Michael A. Dowling*, *Ralph G. Eddy*, *J. Kevin Golger*, *Kenneth H. Naide*, *Richard A. Roberts*, *Ryan W. Scully*, *James F. Shields* and *Kevin P. Walsh* filed a brief for the appellees (defendant Johnson Controls, Inc., et al.).

Matthew M. Horowitz and *Michelle Himes-Wiederschall* filed a brief for the appellee (defendant Peerless Insurance Company).

Contantine G. Antipas filed a brief for the appellee (defendant Special Testing Laboratories, Inc.).

William M. Mack filed a brief for the American Institute of Architects, Connecticut Chapter, as amicus curiae.

Michael J. Donnelly, *Christopher R. Drake* and *Derek T. Werner* filed a brief for the Connecticut Construction Industries Association, Inc., et al., as amici curiae.

Opinion

PALMER, J. This appeal requires us to consider the viability and scope of the doctrine of nullum tempus occurrit regi (no time runs against the king),[1] a common-law rule that exempts the state from the operation of statutes of limitation and statutes of repose[2] and from the consequences of its laches[3] in a manner similar to the closely related doctrine of sovereign immunity.[4] The plaintiff, the state of Connecticut, commenced this action against the named defendant, Lombardo Brothers Mason Contractors, Inc., and twenty-seven other defendants,[5] to recover, inter alia, damages for the allegedly defective design and construction of the library at the University of Connecticut School of Law. Each of the defendants raised time based defenses to the state's claims by way of motions to strike or motions for summary judgment, with nearly all of them relying on applicable statutes of limitation and repose. The defendant Gilbane, Inc. (Gilbane), also raised a contractual limitation on suit defense, claiming that the chief deputy commissioner of public works (commissioner) had waived nullum tempus in the state's contract with Gilbane[6] by agreeing to be bound by the seven year period of repose set forth in General Statutes § 52-584a.[7] The trial court concluded that the rule of nullum tempus never was adopted as the common law of this state, and, consequently, the state's claims against the defendants are barred by the periods of repose contained in General Statutes §§ 52-577,[8] 52-577a,[9] 52-584[10] and 52-584a, and the limitation period set forth in General Statutes § 52-576.[11] The trial court also agreed with Gilbane that its contract with the state expressly waives any claim that the state may have had under the rule of nullum tempus. Accordingly, the trial court granted the defendants' motions to strike and motions for summary judgment and rendered judgment for the defendants.[12]

The state challenges these rulings on appeal,[13] claiming that the trial court had no justification for declining to follow long-standing precedent of this court recognizing the doctrine of nullum tempus. 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 §§ 52-576, 52-577, 52-577a, 52-584 and 52-584a. We also agree that, to the extent that the limitation on suit provision in Gilbane's contract purports to waive the state's immunity from the operation of the repose period of § 52-584a, the provision is invalid because the commissioner lacked authority to waive the state's immunity. Accordingly, we reverse the judgment of the trial court and remand the case to that court for further proceedings on the merits of the state's claims.

The following facts and procedural history are relevant to our resolution of this appeal. The state acquired

the Hartford campus of the University of Connecticut School of Law in the 1980s as part of a program to enhance the quality of education at the school as well as the standing of the university as a state institution. After acquiring the campus, the state began plans for the construction of a library to be built on land located at the center of the campus. The new library was intended to be a focal point of the campus and of such high quality that it would last for 100 years or more. The state retained Gilbane, a construction management firm, to work with the architect during the later stages of design to ensure construction input into the design process.

The project was designed beginning in 1992, and construction commenced in 1994. The project was completed in 1996. The state began occupying the library in January, 1996. Soon thereafter, the state experienced problems with water intrusion into the library. The defendant contractors were notified of the water problems and frequently visited the library to ascertain the nature and extent of the problems. Over the years, the water intrusion proved to be continuing and progressive. Beginning in or about 2000, and continuing for several years thereafter, the state retained forensic engineers to investigate the full extent and likely causes of the problem. The forensic investigation uncovered numerous defects in the building including, but not limited to, (1) improper design and installation of the wall anchoring system, the flashing, the windows, and the roof parapets, (2) improper design and construction of the exterior cavity wall, (3) inadequate waterproofing of the structural steel and the outside face of the building's structural wall, (4) inadequate relieving angles to support the exterior stone facade, and (5) inadequate design of the heating, ventilation and air conditioning system. These defects required the state to complete corrective work costing more than $15 million. The state commenced this action in March, 2008, seeking reimbursement for those costs.

All of the defendants raised time based defenses to the state's claims via motions to strike or motions for summary judgment, nearly all of which relied on applicable statutes of limitation and repose. In addition, Gilbane asserted that the state's claims against it were barred by the repose provision of Gilbane's contract with the state, which provided that "[t]he services performed pursuant to [the] contract shall be considered professional work to which any statutory period of repose then otherwise applicable to professional design work shall apply."[14] In support of this defense, Gilbane argued that the commissioner, who negotiated the contract on behalf of the state, contractually waived nullum tempus by agreeing to be bound by the seven year limitation period applicable to professional design work. Gilbane also contended that the contract's limitation of remedies provision precluded the state from

pursuing tort claims against Gilbane. In response to the defendants' motions, the state argued that it was immune from statutes of limitation and repose by operation of the doctrine of nullum tempus. The state further argued that, to the extent that any provision of its contract with Gilbane purported to waive that immunity, the provision is not binding on the state because General Statutes (Rev. to 1993) § 4b-99,[15] which permits the department of public works to enter into contracts, does not expressly or by necessary implication authorize a waiver of the state's immunity, and it is well established that, in the absence of such authorization, no purported waiver is enforceable against the state.

The trial court disagreed with the state's contentions, concluding, first, that the doctrine of nullum tempus does not shield the state from operation of the repose provisions of §§ 52-577, 52-577a, 52-584 and 52-584a or the limitation period of § 52-576. The trial court expressly acknowledged that that the doctrine of nullum tempus "was well entrenched in English common law"; *State* v. *Lombardo Bros. Mason Contractors, Inc.*, 51 Conn. Sup. 265, 296, 980 A.2d 983 (2009); that the rule was "imparted to our American justice system as one of the incidents of sovereignty," with each of the colonies taking the prerogative of nullum tempus as its own; id., 276; that "Connecticut common law adheres" to the principle that "statutes limiting rights and interests" are not to be construed to apply to the state "unless a clear intention to that effect on the part of the legislature is disclosed, by the use of express terms or by force of a necessary implication"; (internal quotation marks omitted) id., 296–97; and, more specifically, that "[a] long established common-law principle in Connecticut holds that ordinary statutes of limitation do not apply to government claims."[16] Id., 296. The trial court nevertheless concluded that nullum tempus "is not a part of the Connecticut common law."[17] Id. The trial court also concluded that Gilbane was entitled to enforce the seven year repose provision in its contract with the state, albeit without addressing the state's argument that the commissioner lacked the necessary statutory authorization to enter into that provision of the contract.

On appeal, the state renews its claims that it is immune from statutes of limitation and repose pursuant to the doctrine of nullum tempus and that the commissioner lacked authority to contractually waive that immunity because General Statutes (Rev. to 1993) § 4b-99 does not explicitly or by necessary implication authorize such a waiver. The state contends that the trial court, in reaching a contrary conclusion, ignored centuries old precedent recognizing and applying nullum tempus as the law of this state, as well as the fundamental principle that statutes limiting rights are not to be interpreted as applicable to the state in the absence of a clear expression of legislative intent to the contrary.

See, e.g., *State* v. *Goldfarb*, 160 Conn. 320, 323, 278 A.2d 818 (1971); *State* v. *Shelton*, 47 Conn. 400, 404–405 (1879).

The defendants counter with a variety of arguments. Some defendants contend that the rule of nullum tempus never was adopted in Connecticut and that the state always has been subject to statutes of limitation and repose. Others contend that Connecticut adheres to a more limited rule of sovereign immunity with respect to statutory limitation periods, one that exempts the state from statutes of limitation but not from statutes of repose, which, they argue, apply to the state by necessary implication. The defendants further maintain that the expiration of the repose periods contained in §§ 52-577, 52-577a, 52-584 and 52-584a vested in them a right to be free from liability afforded by the due process clause of article first, § 10, of the Connecticut constitution. Several defendants also contend that General Statutes § 4-61 (a),[18] which authorizes an action against the state for disputes arising out of certain public works contracts, waives nullum tempus by necessary implication. All of the defendants urge this court to abolish nullum tempus, to the extent that the doctrine has been recognized in this state, on the ground that it is a harsh and antiquated rule that serves no just or useful purpose in a modern legal system. Gilbane argues that there is no merit to the state's claim that the commissioner lacked authority to bind the state to a contractual limitations period. Gilbane also asserts, as an alternative ground for affirmance, that the state's tort claims against it are barred by the limitation of remedies provision in its contract with the state.

We agree with the state that the trial court had no basis for rejecting the rule of nullum tempus, which this and other courts of this state expressly have recognized as part of this state's common law since the second half of the nineteenth century. Because the rule defeats all of the defendants' time based defenses, the trial court improperly granted the defendants' motions to strike and motions for summary judgment.

I

We first address the state's contention that the trial court incorrectly concluded that the rule of nullum tempus never has been recognized as part of the common law of this state. The trial court reached that determination on the ground that "no reported Connecticut case has ever used" the term "nullum tempus"; *State* v. *Lombardo Bros. Mason Contractors, Inc.*, supra, 51 Conn. Sup. 296; and because the rule is incompatible with the legislative policies underlying statutes of limitation and repose. See id., 297–301. The state contends that the rule has long been a part of our common law, and, in fact, the doctrine is so fundamental and important a feature of the state's sovereignty that only the legislature can abrogate it. The state further maintains that,

in rejecting the doctrine, the trial court ignored binding precedent of this court and substituted its policy judgment for that of the legislature. We agree with the state.

As early as 1879, this court recognized a general principle, traceable to English common law, pursuant to which a statutory provision limiting rights is not to be construed as applying to the state unless the statutory language expressly or by necessary implication provides otherwise. *State* v. *Shelton*, supra, 47 Conn. 404–405. By its terms, this general principle applied to statutes restricting the time period within which an action may be brought. Then, in 1888, this court declared it "elementary law that a statute of limitations does not run against the state, the sovereign power." *Clinton* v. *Bacon*, 56 Conn. 508, 517, 16 A. 548 (1888); see also id., 517–18 (rejecting claim that rule of nullum tempus did not apply to action brought by town to recover public lands).[19] This view was then shared by virtually every court in the country;[20] e.g., *State* v. *School District*, 34 Kan. 237, 242, 8 P. 208 (1885) ("[I]t is universally held by courts that no statute of limitations will run against the state or the sovereign authority unless the statute itself expressly so provides, or unless the implications of the statute to that effect are so strong as to be utterly unavoidable. It requires no citation of authorities to sustain this proposition."); and, to this day, the doctrine remains in effect in a large majority of jurisdictions.[21] See, e.g., *United States* v. *Peoples Household Furnishings, Inc.*, 75 F.3d 252, 254 (6th Cir.) ("[t]he ancient rule quod nullum tempus occurit regi—that the sovereign is exempt from the consequences of its laches, and from the operation of statutes of limitations—has enjoyed continuing vitality for centuries" [internal quotation marks omitted]), cert. denied sub nom. *Holland* v. *United States*, 519 U.S. 964, 117 S. Ct. 386, 136 L. Ed. 2d 302 (1996); *District of Columbia Water & Sewer Authority* v. *Delon Hampton & Associates*, 851 A.2d 410, 413 (D.C. 2004) ("[t]he prevailing modern view in the United States is that a state government is entitled to the nullum tempus exemption as a matter of common law"); *Baltimore County* v. *RTKL Associates, Inc.*, 380 Md. 670, 685, 846 A.2d 433 (2004) ("[m]ost [s]tates continue to recognize the doctrine").

"Nullum tempus . . . is typically viewed as a privilege imparted to the federal and state governments as incidents of . . . sovereignty." (Internal quotation marks omitted.) *State* v. *Lake Winnipesaukee Resort, LLC*, 159 N.H. 42, 45, 977 A.2d 472 (2009); see also *District of Columbia* v. *Owens-Corning Fiberglas Corp.*, 572 A.2d 394, 401 (D.C. 1989) ("[l]ike immunity from suit, the sovereign exemption from the running of time originated as a royal privilege"), cert. denied, 498 U.S. 880, 111 S. Ct. 213, 112 L. Ed. 2d 173 (1990). "[S]overeign immunity from liability and governmental immunity from statutes of limitation [share] a philosophical origin and have the similar effect of creating

a preference for the sovereign over the ordinary citizen . . . .'' *Shelbyville* v. *Shelbyville Restorium, Inc.*, 96 Ill. 2d 457, 460, 451 N.E.2d 874 (1983). ''The . . . distinction between [the] two doctrines lies in the manner in which they are employed in litigation. Sovereign immunity is invoked as a shield by the sovereign defendant against suits from parties allegedly injured by its wrongful conduct or that of its agents. . . . Conversely, nullum tempus is invoked by the sovereign plaintiff . . . as a sword to strike down the statute of limitation defense raised by the defendant whose conduct is alleged to have injured the sovereign in some manner.'' (Citation omitted.) *Indiana* v. *Acquisitions & Mergers, Inc.*, 770 A.2d 364, 372 (Pa. Commw. 2001). Thus, nullum tempus and sovereign immunity may be viewed as opposite sides of the same coin.

As to the historical origins of the rule, it has been observed that ''[t]he rule of nullum tempus . . . has existed as an element of the English law from a very early period. It is discussed in Bracton,[22] and has come down to the present time.'' *United States* v. *Thompson*, 98 U.S. 486, 489, 25 L. Ed. 194 (1879). ''From the presumption that the [k]ing [was] daily employed in the weighty and public affairs of government, it [was] an established rule of common law . . . that no laches [should] be imputed to him, nor [was] he in any way to suffer in his interests, which are certain and permanent. Vigilantibus sed non dormientibus jura subveniunt [literally, the law assists those who are vigilant, not those who sleep on their rights] is a rule for the subject, but nullum tempus . . . is the [k]ing's plea. For there is no reason that he should suffer by the negligence of his officers, or by their contracts or combinations with the adverse party. . . . Therefore the [k]ing is not bound by any statute of [l]imitations, unless it is made by express words to extend to him.'' (Citation omitted.) *Armstrong* v. *Dalton*, 15 N.C. (4 Dev.) 568, 569 (1834). ''When the colonies achieved their independence, each one took these prerogatives, which had belonged to the crown; and when the national [c]onstitution was adopted, they were imparted to the new government as incidents of the sovereignty thus created. It is an exception equally applicable to all governments.'' *United States* v. *Thompson*, supra, 489–90.

''Although . . . nullum tempus may have had its roots in the prerogative of the crown, 'the source of its continuing vitality where the royal privilege no longer exists is to be found in the public policy underlying the rule.' . . . That public policy was expressed by Justice [Joseph] Story in 1821 as the 'great public policy of preserving the public rights, revenues, and property from injury and loss, by the negligence of public officers.' [*United States* v. *Hoar*, 26 F. Cas. 329, 330 (C.C.D. Mass. 1821) (No. 15,373)].'' *Shootman* v. *Dept. of Transportation*, 926 P.2d 1200, 1203 (Colo. 1996). ''And though this is sometimes called a prerogative right, it

is in fact nothing more than a reservation, or exception, introduced for the public benefit, and [is] equally applicable to all governments." *United States* v. *Hoar*, supra, 330. "This is the policy basis that courts have relied [on] to apply the rule in more modern times." *Shootman* v. *Dept. of Transportation*, supra, 1203; see also *Rowan County Board of Education* v. *United States Gypsum Co.*, 332 N.C. 1, 14, 418 S.E.2d 648 (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").

Presumably because the rule of nullum tempus is both well established and clear-cut, there appears to have been little controversy over its application in this state, with the result that our courts have not often been called on to consider it. On those occasions when the rule has been the subject of litigation, however, this court, the Appellate Court and the Superior Court all have recognized the doctrine in concluding, without exception, that an action by the state, or a subdivision of the state, was not barred by an otherwise applicable statutory limitation period or by laches.[23] See, e.g., *State* v. *Goldfarb*, supra, 160 Conn. 326 ("[t]his court has recognized the principle that a subdivision of the state, acting within its delegated governmental capacity, is not impliedly bound by the ordinary statute of limitations"); *New Haven* v. *Torrington*, 132 Conn. 194, 204, 43 A.2d 455 (1945) (municipalities not bound by statute of limitations when acting in governmental capacity), overruled in part on other grounds by *Anderson* v. *Bridgeport*, 134 Conn. 260, 56 A.2d 560 (1947); *Bridgeport* v. *Schwarz Bros. Co.*, 131 Conn. 50, 54, 37 A.2d 693 (1944) (same); *In re Title & Guaranty Co.*, 109 Conn. 45, 55, 145 A. 151 (1929) ("a sovereign [s]tate cannot be barred of a right of action or a defense by the laches of its officials" [internal quotation marks omitted]); *Fair* v. *Hartford Rubber Works Co.*, 95 Conn. 350, 356, 111 A. 193 (1920) ("[laches] the rule which denies a rehearing to a non-diligent litigant is not applied in cases [in which] the [s]tate is interested for reasons of public policy"); *Towbin* v. *Board of Examiners of Psychologists*, 71 Conn. App. 153, 177, 801 A.2d 851 ("[a] state agency [is] not subject to [a] statute of limitations unless declared by [the] legislature," and "laches may not be invoked against [a] governmental agency"), cert. denied, 262 Conn. 908, 810 A.2d 277 (2002); *Joyell* v. *Commissioner of Education*, 45 Conn. App. 476, 486, 696 A.2d 1039 ("the [state] board [of education] as an agency of the state is not subject to a statute of limitations unless it is expressly declared by the legislature"), cert. denied, 243 Conn. 910, 701 A.2d 330 (1997); *Aronson* v. *Foohey*, 42 Conn. Sup. 348, 354, 620 A.2d 843 (1992) ("[t]he statute of limitations [in § 52-576] does not apply to bar a state agency from filing an action after the statutory period for bringing

suit has expired"); *Dept. of Transportation* v. *Canevari*, 37 Conn. Sup. 899, 900, 442 A.2d 1358 (1982) ("[t]he Connecticut Supreme Court has repeatedly stated that, as respects public rights, 'a subdivision of the state, acting within its delegated governmental capacity, is not impliedly bound by the ordinary statute of limitations,' " and, therefore, § 52-584 did not bar action brought by state); *State* v. *Regnier*, 33 Conn. Sup. 14, 15, 356 A.2d 912 (1975) (state not subject to statutes of limitation); *Westport* v. *Kellems Co.*, 15 Conn. Sup. 485, 491 (1948) ("[l]aches does not bar the state or a municipality from enforcing governmental rights").[24] In fact, to our knowledge, the decision of the trial court in the present case marks the first time that a court of this state *ever* has declined to recognize the rule of nulum tempus as the law of this state.[25]

In light of the foregoing, we find no merit in the defendants' contention that the rule of nullum tempus never was adopted in Connecticut. On the contrary, a review of our case law dating back more than one century makes it crystal clear that the rule has been and continues to be a part of the common law of this state.

The defendants nevertheless advance two primary arguments in support of their claim that the trial court's rejection of nullum tempus should be upheld. First, they argue that the rule never has been adopted in this state because it never has been applied as a holding in any Connecticut appellate case. The defendants attempt to substantiate this argument by parsing several of the cases in which this court or the Appellate Court has stated that statutes of limitation do not apply to the state, asserting that, although nullum tempus may have informed the analysis in those cases, it was not essential to the holdings. This contention is meritless. Even if we were to presume, for the sake of argument, that no appellate decision of this state has been decided on the basis of nullum tempus—a presumption with which we disagree[26]—we nevertheless would conclude that the doctrine is part of this state's common law. We previously have stated that the common law of this state includes universally accepted usages and customs as well as the adjudications of courts and the rules of practice. *State* v. *Courchesne*, 296 Conn. 622, 680–81 n.39, 998 A.2d 1 (2010); *Blumenthal* v. *Barnes*, 261 Conn. 434, 456, 804 A.2d 152 (2002); see also *Western Union Telegraph Co.* v. *Call Publishing Co.*, 181 U.S. 92, 102, 21 S. Ct. 561, 45 L. Ed. 765 (1901) ("the common law comprises the body of those principles and rules of action relating to the government and security of persons and property, which derive their authority solely from usages and customs of immemorial antiquity, or from the judgments and decrees of the courts recognizing, affirming and enforcing such usages and customs; and, in this sense, particularly the ancient unwritten law of England" [internal quotation marks omitted]). That a particular doctrine or principle pre-

viously did not constitute a holding of this court or the Appellate Court is by no means determinative of whether that doctrine or principle is a part of the state's common law. This court, the Appellate Court and the Superior Court repeatedly have spoken of nullum tempus as an established legal principle that represents the law of this state, without any suggestion that the rule lacks vitality or otherwise should be reconsidered. These pronouncements, along with the historical underpinnings of the rule, leave no room for doubt that nullum tempus has long been recognized as a component of our common law.[27]

Alternatively, the defendants urge us to abolish nullum tempus pursuant to our authority to adapt the common law to the changing needs of society. Arguing that the doctrine is unfair and incompatible with the state's strong policy favoring repose, they ask us "to engage in a balancing test to determine which policy, limitations or nullum tempus, prevails." We reject the defendants' invitation for the same reasons that we consistently have rejected similar requests to abrogate the doctrine of sovereign immunity.

We long have held that our authority over the common law does not extend to the doctrine of sovereign immunity in the same way or to the same extent that it extends to other common-law principles. This is so because the doctrine derives from the very sovereignty of the state. Although originally recognized by the English common law, sovereign immunity "has . . . been modified and adapted to the American concept of constitutional government where the source of governmental power and authority . . . rests in the people themselves who have adopted constitutions creating governments with defined and limited powers and courts to interpret these basic laws. The source of the sovereign power of the state is now the constitution which created it, and it is now recognized that, as . . . Justice [Oliver Wendell Holmes, Jr.] wrote: 'A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.' " *Horton* v. *Meskill*, 172 Conn. 615, 623, 376 A.2d 359 (1977).

In light of the derivation of sovereign immunity as a prerogative of the state arising directly out of the state's sovereign power, "we have continually expressed our reluctance to abolish [the doctrine] by judicial fiat . . . . The question [of] whether the principles of governmental immunity from suit and liability can best serve this and succeeding generations has become, by force of the long and firm establishment of these principles as precedent, a matter for legislative, not judicial determination." (Internal quotation marks omitted.) *Rogan* v. *Board of Trustees for the State Colleges*, 178

Conn. 579, 582, 424 A.2d 274 (1979), quoting *Bergner* v. *State*, 144 Conn. 282, 286–87, 130 A.2d 293 (1957); see also *White* v. *Burns*, 213 Conn. 307, 312, 567 A.2d 1195 (1990) (recognizing that "[t]he state legislature . . . possesses the authority to abrogate any governmental immunity . . . that the common law gives to the state and municipalities"); *Struckman* v. *Burns*, 205 Conn. 542, 558, 534 A.2d 888 (1987) ("[i]t is a matter for the legislature, not this court, to determine when our state's sovereign immunity should be waived"). Accordingly, "[t]his court continually has reaffirmed the viability of the doctrine of sovereign immunity." *Martinez* v. *Dept. of Public Safety*, 263 Conn. 74, 79, 818 A.2d 758 (2003). Because nullum tempus and sovereign immunity share the same historical and doctrinal underpinnings, we have no reason to treat the two doctrines differently for purposes of the defendants' claim that nullum tempus should be abolished judicially.

Our conclusion in this regard is buttressed by the fact that the primary modern rationale for both doctrines is the same: the fiscal well-being of the state. As we have stated with respect to sovereign immunity, that doctrine "is supported by a strong policy reason; that is, to prevent the imposition of enormous fiscal burdens on states." *Fetterman* v. *University of Connecticut*, 192 Conn. 539, 551–52, 473 A.2d 1176 (1984); see also *Pamela B.* v. *Ment*, 244 Conn. 296, 328, 709 A.2d 1089 (1998) ("[s]overeign immunity rests on the principle and on the hazard that the subjection of the state and federal governments to private litigation might constitute a serious interference with the performance of their functions and with their control over their respective instrumentalities, funds and property" [internal quotation marks omitted]). The doctrine of nullum tempus rests on similar principles, namely, those related to protecting the public fisc by allowing the government to pursue wrongdoers in vindication of public rights and property without regard to the time limitations applicable to other parties. Accordingly, the decision whether to abrogate the doctrine of nullum tempus, like the decision whether to abrogate the doctrine of sovereign immunity, is one for the legislature, not this court, to make.

II

We next consider the defendants' contention that the repose periods contained in §§ 52-577, 52-577a, 52-584 and 52-584a apply to the state by necessary implication. The defendants concede, and we agree, that none of them applies to the state by their express terms. The defendants maintain, however, that the policies effectuated by such statutes, together with the language of the statutes, compel the conclusion that they were intended to apply to the state.[28] We disagree.

It is well settled that, "in order for statutory language to give rise to a necessary implication that the state

has waived its sovereign immunity, [t]he probability . . . must be apparent, and not a mere matter of conjecture; but . . . necessarily such that from the words employed an intention to the contrary cannot be supposed. . . . In other words, in order for a court to conclude that a statute waives sovereign immunity by force of necessary implication, it is not sufficient that the claimed waiver reasonably may be implied from the statutory language. It must, by logical necessity, be the only possible interpretation of the language. Therefore, although a conclusion that statutory language is ambiguous ordinarily allows a court, pursuant to [General Statutes] § 1-2z, to consult extratextual sources in interpreting a statute, that avenue is unavailable when a court, in examining statutory language to determine whether a statute waives sovereign immunity by necessary implication, concludes that the language is ambiguous as to waiver. Ambiguous language, by definition, is susceptible to more than one reasonable interpretation." (Citation omitted; internal quotation marks omitted.) *Envirotest Systems Corp.* v. *Commissioner of Motor Vehicles*, 293 Conn. 382, 388–90, 978 A.2d 49 (2009) (*Envirotest*); see also *Rivers* v. *New Britain*, 288 Conn. 1, 13–14, 950 A.2d 1247 (2008) ("this court long has stated that, in the absence of express language indicating that a statutorily created duty applies to the state, the statutory provision will not be construed as constituting a waiver of sovereign immunity"). Because, as we have explained, sovereign immunity and nullum tempus share a common history and purpose, there is no reason why the foregoing principles should not apply equally to both doctrines.

The only textual argument that the defendants offer in support of their claim that §§ 52-577, 52-577a, 52-584 and 52-584a apply to the state by necessary implication is that all of them use unequivocal language such as "no action . . . shall be brought," "no such action" and "in no event," terms that, according to the defendants, are so "comprehensive" as to necessarily encompass *all actions*, including those brought by the state. This court has held, however, that statutory language generally purporting to affect rights and liabilities of all persons *will not be deemed to apply to the state in the absence of an express statutory reference to the state.* *Rivers* v. *New Britain*, supra, 288 Conn. 14; see *State* v. *Kilburn*, 81 Conn. 9, 11, 69 A. 1028 (1908); see also *State* v. *Chapman*, 176 Conn. 362, 365, 407 A.2d 987 (1978) ("[a] statute giving a right to costs in general terms will not be construed to include an award against the [s]tate"); *State* v. *Shelton*, supra, 47 Conn. 405 ("[t]he most general words that can be devised, as any person or persons, bodies politic and corporate, affect not [the state] in the least, if they may tend to restrain or diminish any of [its] rights or interests" [internal quotation marks omitted]). We can perceive of no reason, and the defendants have offered none, why this reasoning

should not apply with equal force to the statutory language of the repose provisions at issue in the present case.

Our determination that §§ 52-577, 52-577a, 52-584 and 52-584a do not apply to the state is reinforced by the principle of statutory interpretation that requires us to presume that the legislature is cognizant of our interpretation of a statute, and that its subsequent failure to enact corrective legislation is evidence of its agreement with that interpretation. See, e.g., *White* v. *Burns*, supra, 213 Conn. 333. "Time and again, we have characterized the failure of the legislature to take corrective action as manifesting the legislature's acquiescence in our construction of a statute. . . . Once an appropriate interval to permit legislative reconsideration has passed without corrective legislative action, the inference of legislative acquiescence places a significant jurisprudential limitation on our own authority to reconsider the merits of our earlier decision." (Internal quotation marks omitted.) *Hummel* v. *Marten Transport, Ltd.*, 282 Conn. 477, 494–95, 923 A.2d 657 (2007); see also *State* v. *Courchesne*, supra, 296 Conn. 743 (inference of legislative acquiescence may apply to published opinions of Superior Court).

As we noted previously in this opinion, in numerous cases spanning more than one century, the courts of this state uniformly and without exception—until the trial court in the present case—have held that statutes of limitation and repose, including many of the statutes at issue in this appeal, *do not apply to the state*. We may assume that if the legislature had disagreed with these cases, it likely would have amended §§ 52-577, 52-577a, 52-584 and 52-584a to make them expressly applicable to the state, just as legislatures in other states have done with respect to statutory limitation periods. See, e.g., *State* v. *Seventh Regiment Fund, Inc.*, 98 N.Y.2d 249, 254, 774 N.E.2d 702, 746 N.Y.S.2d 637 (2002) (declining to apply rule of nullum tempus when statute of limitations expressly applied to state); *State ex rel. Condon* v. *Columbia*, 339 S.C. 8, 16, 592 S.E.2d 408 (2000) (declining to apply rule of nullum tempus when "the [l]egislature abandoned the nullum tempus doctrine long ago by making the various statutes of limitation [in South Carolina expressly] applicable to the [s]tate"). That the legislature has failed to do this strongly suggests that it agrees with our interpretation of these provisions.

Finally, the defendants contend that a necessary implication of waiver can be inferred from the policies underlying statutes of repose. In support of this assertion, the defendants rely on "decisions of courts in other jurisdictions that have held statutes of repose to be substantive [per se] because, in their view, unlike statutes of limitation, statutes of repose operate as a grant of immunity serving primarily to relieve potential defen-

dants from anxiety over liability for acts committed long ago . . . .” (Citations omitted; internal quotation marks omitted.) *Baxter* v. *Sturm, Ruger & Co.*, 230 Conn. 335, 343, 644 A.2d 1297 (1994). Courts that adhere to this view have concluded that, because “statutes of repose reflect legislative decisions that as a matter of policy there should be a specific time beyond which a defendant should no longer be subjected to protracted liability . . . [such] a statute . . . is intended as a substantive definition of rights as distinguished from a procedural limitation on the remedy used to enforce rights.” (Internal quotation marks omitted.) *School Board* v. *United States Gypsum Co.*, 234 Va. 32, 37, 360 S.E.2d 325 (1987); see also *Daidone* v. *Buterick Bulkheading*, 191 N.J. 557, 564–65, 924 A.2d 1193 (2007) (“Unlike a statute of limitations, the [s]tatute of [r]epose does not bar a cause of action; its effect, rather, is to prevent what might otherwise be a cause of [action] from ever arising. . . . For that reason, injury occurring [after the expiration of the applicable repose period] forms no basis for recovery. . . . The starkness of its application is intended: The injured party literally has no cause of action. The harm that has been done is damnum absque injuria—a wrong for which the law affords no redress. The function of the statute [of repose] is thus rather to define substantive rights than to alter or modify a remedy.” [Citations omitted; internal quotation marks omitted.]).

The defendants note, moreover, that at least two courts have concluded that statutes of repose apply to the state by necessary implication. See *Shasta View Irrigation District* v. *Amoco Chemicals Corp.*, 329 Or. 151, 164, 986 P.2d 536 (1999) (“The public policy for exempting governments from statutes of limitations . . . does not apply to statutes of ultimate repose. That is so . . . because the expiration of ultimate repose periods extinguishes all claims irrespective of whether the injured plaintiff was negligent in failing to assert claims in a timely manner.”); *Commonwealth* v. *Owens-Corning Fiberglas Corp.*, 238 Va. 595, 598, 385 S.E.2d 865 (1989) (concluding that legislature intended to exempt state from statutes of limitation but not statutes of repose because “[t]he exemption from suit accorded those named in [those] statute[s] is a substantive right protected by the due process clause of the [Virginia constitution]”).

As many of the defendants concede, however, this court never has recognized a substantive distinction between statutes of limitation and statutes of repose. Indeed, we explicitly have rejected that distinction. *Baxter* v. *Sturm, Ruger & Co.*, supra, 230 Conn. 345 (“Connecticut law makes no distinction . . . between statutes of limitation and statutes of repose”); see also id., 344–45 (“the fact that a statute of repose may bar a claim before the cause of action has accrued does not form a basis to distinguish it from a statute of

limitation"). As we have explained, "[w]hether seen as a sanction imposed on plaintiffs who sleep on their rights or as a benefit conferred [on] defendants to reduce the risk and uncertainty of liability, statutes of limitation and statutes of repose serve the same public policy of avoiding the litigation of stale claims." Id., 344; see also *Barrett* v. *Montesano*, 269 Conn. 787, 795–96, 849 A.2d 839 (2004) (noting "the legislature's repeated apparent use of the phrase 'statute of limitations' as also encompassing a statute of repose").

Thus, in this state, "the characterization of a statute of repose as procedural or as substantive is governed by the same test that applies to statutes of limitation." *Baxter* v. *Sturm, Ruger & Co.*, supra, 230 Conn. 342. Under that test, "statutes of repose, like statutes of limitation, are neither substantive nor procedural per se . . . . In any given case, the characterization of the applicable statute of repose depends on the nature of the underlying right that forms the basis of the lawsuit. If the right existed at common law, then the statute of repose is properly characterized as procedural because it functions only as a qualification on the remedy to enforce the preexisting right. If, however, the right is newly created by the statute, then the statute of repose is properly characterized as substantive because the period of repose is so integral a part of the cause of action as to warrant saying that it qualifie[s] the right." (Internal quotation marks omitted.) Id., 346–47.

"[When] . . . a specific time limitation is contained within a statute that creates a right of action that did not exist at common law, then the remedy exists only during the prescribed period and not thereafter. . . . In such cases, the time limitation is not to be treated as an ordinary statute of limitation . . . but rather is a limitation on the liability itself, and not of the remedy alone. . . . [U]nder such circumstances, the time limitation is a substantive and jurisdictional prerequisite, which may be raised [by the court] at any time . . . and may not be waived." (Citations omitted.) *Ecker* v. *West Hartford*, 205 Conn. 219, 232, 530 A.2d 1056 (1987); cf. *Moore* v. *McNamara*, 201 Conn. 16, 22, 513 A.2d 660 (1986) ("[when] a statute of [repose] is procedural, it is subject to waiver; unless specifically pleaded it is deemed waived and the remedy continues beyond the prescribed period").

In *State* v. *Goldfarb*, supra, 160 Conn. 326–27, we applied these principles in concluding that the time limitation for filing a claim against a decedent's estate, as provided in General Statutes (Cum. Sup. 1967) § 45-205,[29] our nonclaim statute,[30] imposed a condition precedent to legal recovery that applied to the state by necessary implication. This is the *only case* in which this court ever has held that a statutory limitations period for bringing an action applied to the state. Our analysis in that case is instructive and bears directly on our

resolution of the defendants' claim in the present case.

In *Goldfarb*, we concluded that the state's claim against the decedent's estate was barred by General Statutes (Cum. Sup. 1967) § 45-205 because the limitation period contained in the statute, unlike that of an ordinary or typical statute of limitations, imposed a condition precedent to the enforcement of the right of action, the nonfulfillment of which extinguished the right of action. See id., 325–27. In reaching that determination, we framed the issue presented as follows: "The single claim made in this appeal is that the statute does not bar the state from pursuing [its] claim . . . even though the claim was not presented . . . within . . . three months . . . . The purport of the special defense is that the state's failure to present its claim within the time limited by the [statute] is a complete bar to the cause of action stated in the complaint. The state attacks the defense on the ground that it is not, without its consent, subject to the '[s]tatute of [l]imitations' . . . . It would avoid [General Statutes (Cum. Sup. 1967)] § 45-205, which [is] assert[ed] to be a statute of limitation[s], on the ground of sovereign immunity." Id., 323.

In considering the state's claim, we set forth the following general principles. "It may be stated . . . as a universal rule in the construction of statutes limiting rights, that they are not to be construed to embrace the government or sovereignty unless by express terms or necessary implication such appears to have been the clear intention of the legislature, and the rights of the government are not to be impaired by a statute unless its terms are clear and explicit, and admit of no other construction. . . . The [s]tate holds the immunities in this respect belonging by the English common law to the [k]ing." (Citations omitted; internal quotation marks omitted.) Id., 323–24. Applying these principles, we then concluded: "It is settled law that [General Statutes (Cum. Sup. 1967)] § 45-205 is not a statute of limitation[s] but, instead, imposes a condition precedent to a legal recovery against a solvent estate. . . . The purpose of the statute is to enable the [estate's] administrator to perform his duties by [ensuring] that he is informed as to what claims . . . must be paid out of the estate and [by] allowing him the opportunity to pass on them. . . . Its meaning is that if a creditor fails to present his claim within the time limited, and no extension of time is granted, that omission is an effectual bar to any further demand against the estate. . . . Thus, the statute imposes a condition precedent to the enforcement of a right of action, the nonfulfilment of which extinguishes the right of action, in contrast to a statute of limitation[s] which merely bars the remedy and is to be pleaded as a special defense. . . .

"The distinction between a nonclaim statute and a statute of limitation[s] is made clear in *Robbins* v. *Cof-*

fing, 52 Conn. 118, 141 [1884], [in which] this court [stated], in construing the predecessor of . . . [General Statutes (Cum. Sup. 1967)] § 45-210 relating to suits brought on disallowed claims, that the statute contains a special limitation—not to prevent the litigation of stale claims, but to facilitate the speedy settlement of estates. Each statute has its own sphere of operation and is independent of the other.

"The sphere of operation of the nonclaim statute is to expedite the orderly and exact settlement of estates. [General Statutes (Cum. Sup. 1967) §] 45-205 empowers the [Probate Court] to order executors and administrators to cite the creditors of the deceased . . . to bring in their claims against such estate within the time ordered. If any creditor fails to do so he is barred of his demand against the estate. The clear purpose is one for the general good, to avoid the indefinite postponement of the settlement of estates to the detriment of the rightful beneficiaries, a purpose to which government as well as any other creditor should be required to adhere.

"This court has recognized the principle that a subdivision of the state, acting within its delegated governmental capacity, is not impliedly bound by the ordinary statute of limitations. . . . With respect to the nonclaim statute, however, this court has held that a demand by a subdivision of the state which came within the definition of a claim against an estate was governed by this statute and, when not presented within the time limited by the [Probate Court], was barred." (Citations omitted; internal quotation marks omitted.) *State* v. *Goldfarb*, supra, 160 Conn. 325–26.

In contrast to the nonclaim statute in *Goldfarb*, none of the statutes of repose at issue in the present case creates a condition precedent to bringing an action.[31] All of them, rather, apply to claims that existed at common law and, therefore, are ordinary limitation periods, as that term has been defined in our case law.[32] As such, they are subject to waiver and, unless specifically pleaded, are deemed waived. Accordingly, there is no merit to the defendants' contention that the policies effectuated by statutes of repose give rise to a necessary implication that the legislature intended the statutes to apply to the state.[33] In the absence of language in the repose statutes that compels the conclusion that those limitation periods apply to the state, the defendants' claim must fail.[34]

III

The defendants also claim that the legislature waived nullum tempus by necessary implication through its enactment of § 4-61, "which waives the state's sovereign immunity with respect to certain claims arising under public works contracts . . . ." *Dept. of Transportation* v. *White Oak Corp.*, 287 Conn. 1, 2–3, 946 A.2d 1219

(2008). In support of this contention, the defendants rely primarily on *Lacasse* v. *Burns*, 214 Conn. 464, 572 A.2d 357 (1990), in which we held that the legislature, in waiving the state's sovereign immunity from suit under General Statutes § 13a-144, the highway defect statute, "intended that procedural statutes and rules of court [including the accidental failure of suit statute, General Statutes § 52-592][35] be applied to the state, just as they would be applied to any other litigant." Id., 468. The defendants argue that the statutory limitation periods at issue in this appeal constitute the kind of procedural statutes contemplated in *Lacasse* and, furthermore, that *Lacasse* supports the view that the state, in waiving sovereign immunity from suit with respect to certain public works contracts, waived nullum tempus with respect to any action that the state might bring related to those contracts.[36] The defendants also rely on cases from other jurisdictions holding that, when the doctrine of sovereign immunity previously has been abolished, then, by necessary implication, the doctrine of nullum tempus goes with it.

The state counters that nothing in the text or legislative history of § 4-61 supports the defendants' assertion that the statute's limited waiver of defensive sovereign immunity was intended to encompass the offensive use of nullum tempus. The state maintains that nullum tempus and sovereign immunity from suit serve very different roles in litigation and that most sister state courts that have considered the issue have concluded that a waiver of one does not encompass a waiver of the other. We agree with the state.

"[T]his court has recognized the well established principle that statutes in derogation of sovereign immunity should be strictly construed. . . . [When] there is any doubt about their meaning or intent they are given the effect which makes the least rather than the most change in sovereign immunity." (Internal quotation marks omitted.) *Envirotest Systems Corp.* v. *Commissioner of Motor Vehicles*, supra, 293 Conn. 388. "The scope of [an] exception [to sovereign immunity] is not to be extended, modified, repealed or enlarged in its scope by the mechanics of [statutory] construction"; (internal quotation marks omitted) *Dept. of Transportation* v. *White Oak Corp.*, supra, 287 Conn. 13; but "must be confined strictly to the extent the statute provides." (Internal quotation marks omitted.) *First Union National Bank* v. *Hi Ho Mall Shopping Ventures, Inc.*, 273 Conn. 287, 294, 869 A.2d 1193 (2005).

By its express terms, § 4-61 "grants the right to sue the state . . . to contractors who have 'entered into a contract with the state' and who have a dispute 'under such contract.' " *Federal Deposit Ins. Corp.* v. *Peabody, N.E., Inc.*, 239 Conn. 93, 104, 680 A.2d 1321 (1996). "[W]e repeatedly have observed . . . [that] § 4-61 was intended to carve out *a narrow and limited exception*

to sovereign immunity. [Id., 103] (legislative history of § 4-61 reflects the narrow and limited purpose for the exception to sovereign immunity contained in § 4-61 [a], and indicates that impleaders . . . were not contemplated); *DeFonce Construction Corp*. v. *State*, [198 Conn. 185, 189, 501 A.2d 745 (1985)] ([t]he legislative history [of § 4-61] makes no mention of contracts involving nonstate facilities . . . [and] [i]n the absence of evidence of legislative intent to waive its immunity . . . we presume that the legislature meant to exclude such contracts from the operation of the statute) . . . *Berger*, *Lehman Associates*, *Inc*. v. *State*, 178 Conn. 352, 357, 422 A.2d 268 (1979) (construing term design in § 4-61 narrowly and noting that . . . [t]here is no expression of legislative intent to the contrary)." (Citation omitted; emphasis added; internal quotation marks omitted.) *Dept. of Transportation* v. *White Oak Corp*., supra, 287 Conn. 13; see also id., 9, 13–14 (statutory language authorizing " 'an action' " strictly construed to preclude more than one action against state arising out of single contract).

"[The legislative] history [of § 4-61 likewise] reflects the narrow and limited purpose for the exception to sovereign immunity contained in [the statute] . . . . [Before] § 4-61 (a) was enacted, [actions] against the state by contractors were not countenanced because of sovereign immunity. Individualized legislative authorization to sue was required to be sought by petition before an action could be brought against the state. The legislature enacted § 4-61 in 1957 because of the mounting prevalence of these petitions for permission to sue the state. 7 S. Proc., Pt. 3, 1957 Sess., p. 1636. The legislature wanted to reduce the number of petitions for permission to sue the state that it received involving [actions] over state construction contracts. 7 H.R. Proc., Pt. 4, 1957 Sess., p. 1937. . . . Another reason for allowing parties who had contracted with the state to sue the state directly without seeking legislative authorization was the hope that affording contractors the right to sue would reduce the costs of construction projects to the state by eliminating the cost of the lengthy legislative authorization process that was often built into state construction contracts. Conn. Joint Standing Committee Hearings, General Law, Pt. 2, 1957 Sess., p. 436, remarks of Representative Merrill S. Dreyfus." (Citation omitted; internal quotation marks omitted.) *Federal Deposit Ins. Corp*. v. *Peabody, N.E., Inc*., supra, 239 Conn. 103–104.

The defendants have identified nothing in the text or legislative history of § 4-61 to support their assertion that the statute's limited waiver of government immunity from suit was intended to abrogate the doctrine of nullum tempus. This is not surprising in view of the fact that the state's immunity from statutory limitation periods arises only when the state *commences* an action. Section 4-61 is concerned solely with actions

against the state. It does not address actions *by the state*, much less does it purport to restrict the state's right to bring such an action. See *Ohio Dept. of Transportation* v. *Sullivan*, 38 Ohio St. 3d 137, 140, 527 N.E.2d 798 (1988) ("[Statute waiving sovereign immunity from suit] governs only suits against the state. It has no application to suits initiated by the sovereign against its citizens in courts of general jurisdiction [and, therefore, cannot be construed as waiving nullum tempus]."). To read such a restriction into § 4-61, therefore, would violate the cardinal rule of statutory construction that the scope of an exception to sovereign immunity "must be confined strictly to the extent the statute provides." (Internal quotation marks omitted.) *First Union National Bank* v. *Hi Ho Mall Shopping Ventures, Inc.*, supra, 273 Conn. 294. Because sovereign immunity from suit and sovereign immunity from statutory limitation periods serve very different purposes in litigation, it does not logically follow that a waiver of one requires a waiver of the other.

We are far from alone in this view. Most courts that have considered the question have concluded that the abrogation of sovereign immunity from suit does not mandate the abolition of the state's exemption from statutes of limitation. See, e.g., *Shelbyville* v. *Shelbyville Restorium, Inc.*, supra, 96 Ill. 2d 460 ("[w]hile sovereign immunity from liability and governmental immunity from statutes of limitation shared a philosophical origin and have the similar effect of creating a preference for the sovereign over the ordinary citizen, we do not believe that the abolition of the first of these doctrines requires abandonment of the second"); *Fennelly* v. *A-1 Machine & Tool Co.*, 728 N.W.2d 163, 169 n.3 (Iowa 2006) (rejecting view that abrogation of sovereign immunity effectuated waiver of nullum tempus because "[n]ullum tempus is an independent doctrine from sovereign immunity, with independent supporting policy considerations"); *State* v. *Lake Winnipesaukee Resort, LLC*, supra, 159 N.H. 48 (rejecting claim "that legislative waivers of sovereign immunity [have] the ancillary effect of abrogating nullum tempus"); *Rowan County Board of Education* v. *United States Gypsum Co.*, supra, 332 N.C. 14 ("[w]hile limiting sovereign immunity diminishes the government's escape of its misdeeds, the same 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"); *Ohio Dept. of Transportation* v. *Sullivan*, supra, 38 Ohio St. 3d 138 (rejecting claim that rule of nullum tempus "is no longer viable in light of . . . [the] long line of cases abrogating the common-law doctrine of sovereign immunity . . . [because] the policy reasons supporting [nullum tempus] . . . are separate from the issues concerning sovereign immunity"); *Commonwealth* v. *J. W. Bishop & Co.*, 497 Pa. 58, 64, 439 A.2d 101 (1981) (concluding that

rule of nullum tempus survived abrogation of sovereign immunity because, "[d]espite their common origin, the doctrines [of sovereign immunity and nullum tempus] have been consistently recognized as distinct," "[w]henever the [state] invokes the doctrine of nullum tempus, it is seeking as a plaintiff to vindicate public rights and protect public property," and "since its adoption in this country, the rationale for the doctrine of nullum tempus has been the great public policy of preserving public rights, revenues and property from injury and loss" [internal quotation marks omitted]). We agree with the reasoning of these cases.[37]

The defendants nevertheless contend that *Lacasse* v. *Burns*, supra, 214 Conn. 464, stands for the proposition that, "when the state subjects itself to the jurisdiction of the court by bringing an affirmative claim, it waives the prerogatives it ordinarily enjoys as the sovereign, and must be treated [as] any other litigant." The defendants misapprehend the holding of *Lacasse*. In that case, we simply concluded that the legislature, in waiving the state's sovereign immunity from suit pursuant to the highway defect statute, "intended that procedural statutes and rules of court be applied to the state, just as they would be applied to any other litigant." *Lacasse* v. *Burns*, supra, 468. In reaching that determination, we noted, among other things, that "our decisions have consistently treated the state with respect to procedural matters, once its immunity has been waived, in a manner identical to any other litigant . . . ." Id., 468–69. We also stated that, "[b]y bringing an action, the [s]tate subjects itself to the procedure established for its final and complete disposition in the courts, by way of appeal or otherwise." (Internal quotation marks omitted.) Id., 470. Finally, we observed that, "once involved in an action, the state enjoys the same status as any other litigant." Id., 469. It is this language—taken out of context—that the defendants rely on in arguing that, by submitting to the jurisdiction of the court, the state forfeited its sovereign exemption from statutes of limitation.

What the defendants ignore, however, is the portion of *Lacasse* in which we made clear that our holding *did not apply* to procedural statutes or rules of court that deprive the state of immunity beyond the scope of the explicit waiver giving rise to the action. See id. (emphasizing that *Lacasse* does not involve whether the "state's monetary liability can be expanded beyond that provided by a statute permitting the state to be sued . . . but, rather, whether the state, having consented to being sued, is subject to procedural statutes applicable to all other litigants"). Statutory limitation periods are not procedural in the sense contemplated by *Lacasse* because their application *would* deprive the state of immunity. Indeed, under the defendants' view, the state automatically would waive nullum tempus in the only context in which it ever applies, that is, when the state

brings an action. Notably, the defendants do not explain how their interpretation of *Lacasse* is reconcilable with our long-standing precedent exempting the state from the operation of statutory limitation periods. We take the defendants' silence on this issue as tacit acknowledgment that it cannot be reconciled.

IV

We next address the state's claim that the trial court incorrectly concluded that the commissioner contractually waived nullum tempus in the contract with Gilbane by agreeing to be bound by the seven year repose provision then applicable to architects, professional engineers and land surveyors. See General Statutes § 52-584a (a). The state contends that the provision, when read in the broader context of the entire contract, merely reflects the parties' intent that Gilbane shall have the benefit of that repose period for claims against it by third parties, not the state. The state further maintains that, even if the provision can be construed as applying to the state, it is unenforceable under *Envirotest Systems Corp.* v. *Commissioner of Motor Vehicles*, supra, 293 Conn. 382, because the statute authorizing the commissioner to enter into contracts; see General Statute (Rev. to 1993) § 4b-99; does not expressly or by force of necessary implication authorize him to waive the state's immunity from the operation of § 52-584a. In Gilbane's view, *Envirotest* is distinguishable from the present case because it involved an unauthorized waiver of the state's sovereign immunity from suit, whereas the present case involves an unauthorized waiver of nullum tempus, a doctrine which, according to Gilbane, does not merit the same protection by the court. We conclude that the provision, even if applicable to the state, is not enforceable.

The contract between Gilbane and the state contains a provision, entitled "Period of Repose," which provides: "The services performed pursuant to this contract shall be considered professional work to which any statutory period of repose then otherwise applicable to professional design work under Connecticut law shall apply." The trial court determined that this provision refers to § 52-584a and constitutes a waiver of any immunity that the state otherwise had with respect to the operation of that repose period. The state maintains, contrary to the determination of the trial court, that the provision does not apply to the state but, rather, to third parties. The state identifies several interpretative considerations which, it claims, support that conclusion; in particular, the state notes that the provision follows a paragraph in the contract that discusses Gilbane's liability to third parties only, and that the provision contains no mention of § 52-584a, referring instead to some future statutory repose period "then otherwise applicable . . . ." We need not resolve the parties' dispute concerning the proper construction of the contrac-

tual language at issue because, even if we assume, arguendo, that the commissioner entered into the contract with Gilbane intending to waive the repose period of § 52-584a, it is clear under *Envirotest* that the commissioner had no authority to do so, and, accordingly, the provision is not enforceable.[38]

The facts of *Envirotest*, which involved a purported waiver of sovereign immunity, closely mirror those of the present case, and our legal analysis in *Envirotest* is no less applicable to the present case in light of the marked similarities between sovereign immunity and nullum tempus. In *Envirotest*, we were required to determine whether General Statutes § 14-164c (e),[39] which authorizes the defendant, the commissioner of motor vehicles, to enter into contracts for the establishment of motor vehicle emissions inspection stations, permitted the commissioner of motor vehicles to waive sovereign immunity with respect to those contracts. See *Envirotest Systems Corp.* v. *Commissioner of Motor Vehicles*, supra, 293 Conn. 383–84, 392–93. The commissioner of motor vehicles had entered into such a contract with the plaintiff, Envirotest Systems Corporation (Envirotest). See id., 385. Pursuant to § 12 of the contract, which dealt with dispute resolution, the parties agreed "to consult and work together to resolve any disputes arising under the contract. If the parties [were] unable to resolve a dispute through consultation, § 12 [required] . . . the commissioner [of motor vehicles to] submit a written decision on the issue, which [was] final unless [Envirotest sought] review of the decision by the American Arbitration Association. Section 12 also provide[d] that '[a]ll disputes and differences between [Envirotest] and the [s]tate arising out of or under the [c]ontract and not so resolved through consultation, shall, at the option of either party, be settled and finally determined by arbitration in accordance with the applicable rules of the American Arbitration Association.' The last sentence of § 12 provide[d]: 'Except as provided in . . . [§] 14-164c et seq. pursuant to which [the] [c]ontract is executed, the [s]tate has not waived its right of sovereign immunity.' " Id., 385–86.

Envirotest subsequently claimed that the commissioner of motor vehicles had breached the contract "by virtue of the . . . failure [of the department of motor vehicles] to use its best efforts to enforce emissions testing compliance by creating and maintaining a registration suspension program, and that, as a consequence of that alleged failure, [Envirotest] ha[d] suffered approximately $9 million in damages. After attempting to resolve the dispute . . . [Envirotest] demanded that the commissioner [of motor vehicles] issue a decision pursuant to § 12 of the contract. The commissioner [of motor vehicles] responded by letter, indicating that it was the state's position that § 12 did not apply to [Envirotest's] claims for monetary damages." Id., 386. Envirotest then filed an application to proceed with

arbitration, which the commissioner of motor vehicles moved to dismiss on the ground that Envirotest's action "was barred by the doctrine of sovereign immunity." Id. "The trial court denied the motion to dismiss, concluding that, by necessary implication, § 14-164c (e) vested the commissioner [of motor vehicles] with authority to waive sovereign immunity. In so concluding, the court relied on the fact that § 14-164c (e) authorizes the commissioner [of motor vehicles] to enter into 'negotiated' agreements in a project of considerable magnitude." Id.

On appeal to this court, we framed the issue presented as one that required a determination of whether § 14-164c (e) expressly or by force of necessary implication authorized the commissioner of motor vehicles to agree to binding arbitration. See id., 386, 388. In concluding that the statute did not confer such authority, we stated: "The plain language of the statute illustrates that the legislature's objectives in providing the commissioner [of motor vehicles] with authority to negotiate and enter into inspection agreements pursuant to § 14-164c (e) were to identify the areas of negotiation, to establish the general scope and limitations of any agreement, to delineate the types of administrative provisions to which any agreement would be subject, and to vest the commissioner [of motor vehicles] with discretion to fill in the details as necessary. None of the language in the statute alludes to liability, lawsuits or dispute resolution. A close examination of the statutory language reveals that the trial court's conclusion that § 14-164c (e) waives the state's sovereign immunity from suit by force of necessary implication is not supported. . . . [T]he trial court relied primarily on the fact that § 14-164c (e) authorizes the commissioner [of motor vehicles] to enter into a negotiated inspection agreement or agreements . . . with an independent contractor or contractors . . . . [Envirotest] contends that the fact that this grant of negotiation authority confers exceptionally broad authority on the commissioner [of motor vehicles] suggests that it includes by necessary implication the authority to incorporate into the agreement a dispute resolution procedure that effectively waives the state's sovereign immunity. . . . It simply does not follow, from a grant of authority to the commissioner [of motor vehicles] to negotiate the terms of an agreement, however large the project covered by the agreement may be, that the grant includes by necessary implication the power to waive the state's sovereign immunity. Otherwise, every provision of the General Statutes that grants to an administrative agency the power to negotiate a contract would have to be construed as a delegation of the legislature's power to waive sovereign immunity despite the absence of an express delegation in the statute, or language from which an intent to delegate necessarily could be implied. . . . That type of inference simply is inconsis-

tent with our definition of necessary implication, which occurs when a particular meaning of the statutory language is the only reasonable interpretation of that language and is one that flows by logical necessity from the words of the statute." (Citations omitted; internal quotation marks omitted.) Id., 394–96.

Our holding in *Envirotest* is consistent with a long line of cases recognizing that government officials cannot waive sovereign immunity, contractually or otherwise, in the absence of explicit legislation authorizing them to do so. See, e.g., *Bacon Construction Co.* v. *Dept. of Public Works*, 294 Conn. 695, 711 n.14, 987 A.2d 348 (2010) ("[w]e are mindful that only the legislature, and not the attorney representing the state in a particular dispute, may waive the state's sovereign immunity"); *Berger, Lehman Associates, Inc.* v. *State*, supra, 178 Conn. 357 ("The plaintiff has also suggested that the contractual provision for service of process on the secretary of the state as agent acts as a nonlegislative waiver of sovereign immunity. The provision is in no way an explicit waiver, and, even if it were, the executive is not the appropriate authority to waive the state's immunity. Legislative action is necessary for the state to consent to suit."); *Lambert* v. *New Haven*, 129 Conn. 647, 649, 30 A.2d 923 (1943) ("[c]ertainly none of [the] officers [of the city] would have power to waive the right of a municipality to any immunity from liability which the law gives it, in the absence of special authority given them by the city"); *Hoyle* v. *Putnam*, 46 Conn. 56, 62 (1878) ("The fact that the selectman happened to be ex-officio the agent of the town . . . does not affect the case. As such agent he would doubtless have power to appear and prosecute or defend suits, and transact much of the formal and ordinary business of the town; but the statute making him agent was not intended to authorize him to waive the legal rights of the town in an important matter like this."). *Envirotest* is merely an extension of this principle applied to the facts of that case.

Envirotest also accords with the universal principle that "only those with specific authority can bind the government contractually; even those persons may do so *only to the extent that their authority permits*. [Thus], a party who seeks to contract with the government *bears the burden of making sure that the person who purportedly represents the government actually has that authority* . . . ." (Emphasis added.) *Gardiner* v. *Virgin Islands Water & Power Authority*, 145 F.3d 635, 644 (3d Cir. 1998). As the United States Supreme Court stated long ago: "It is too late in the day to urge that the [g]overnment is just another private litigant . . . for purposes of charging it with liability . . . . The [g]overnment may carry on its operations through conventional executive agencies or through corporate forms especially created for defined ends. . . . Whatever the form in which the [g]overnment

functions [however], anyone entering into an arrangement with the [g]overnment takes the risk of having accurately ascertained that he who purports to act for the [g]overnment stays within the bounds of his authority. The scope of this authority may be explicitly defined by Congress or be limited by delegated legislation, properly exercised through the rule-making power. And this is so even though . . . the agent himself may have been unaware of the limitations [on] his authority." (Citation omitted.) *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380, 383–84, 68 S. Ct. 1, 92 L. Ed. 10 (1947); cf. id., 385 ("The oft-quoted observation . . . that '[m]en must turn square corners when they deal with the [g]overnment,' does not reflect a callous outlook. It merely expresses the duty of all courts to observe the conditions defined by Congress for charging the public treasury." [Citation omitted.]).

Thus, in order for Gilbane to prevail on its contractual claim, it "must prove . . . that there is a precise fit between the narrowly drawn reach of the relevant statute, [General Statutes (Rev. to 1993) § 4b-99], and the contractual language [on] which [it] depends." *Berger, Lehman Associates, Inc.* v. *State*, supra, 178 Conn. 356. This it cannot do. Indeed, Gilbane concedes that General Statutes (Rev. to 1993) § 4b-99 does not expressly or by force of necessary implication delegate to the commissioner the authority to waive sovereign immunity. That statute simply provides a procedure for selecting construction management firms to assist the department of public works with its projects, and authorizes the commissioner "[to] negotiate a contract for . . . services with the most qualified firm from among the list of firms submitted by [a] panel, at compensation which he determines in writing to be fair and reasonable to the state." General Statutes (Rev. to 1993) § 4b-99 (c). "None of the language in the statute alludes to liability, lawsuits or dispute resolution." *Envirotest Systems Corp.* v. *Commissioner of Motor Vehicles*, supra, 293 Conn. 394. Accordingly, we conclude that the commissioner was not authorized by General Statutes (Rev. to 1993) § 4b-99 to waive nullum tempus in the contract with Gilbane.

Gilbane nevertheless argues that we should not extend the holding in *Envirotest* to unauthorized waivers of nullum tempus because the public policy underlying that doctrine is not as "compelling" as that which supports the enforcement of contractual repose provisions, namely, "fairness, contractual certainty and sound economic policy." Gilbane contends that, in fairness, the state should not be permitted to avoid its contractual obligations, and that to conclude otherwise thwarts the ability of the parties to rationally allocate and rely on the risks and costs of their bargain. Gilbane further asserts that failure to enforce the repose provision in the present case "would fundamentally alter the consideration underlying the contract by unraveling the

contractual certainty for which [it] bargained" and that, if it "had . . . realized [that] the state could . . . wait a potentially infinite amount of time after completion of construction to bring [an action], Gilbane would have incorporated additional consideration into its price for the contract."

If we were writing on a clean slate, these arguments, which are no less applicable to sovereign immunity than they are to nullum tempus, might have some persuasive force. But whatever appeal the arguments might have, they are unavailing in light of our analysis and conclusion in *Envirotest*. As we have explained throughout this opinion, it is not for this court to decide whether nullum tempus is sound policy generally or whether the interests it serves are more important than those served by the enforcement of contractual repose provisions. That decision rests solely and exclusively in the hands of the legislature,[40] and, to date, the legislature has not seen fit to abrogate the doctrine of nullum tempus. To the extent that the commissioner purported to contractually waive the state's immunity from the repose period of § 52-584a, he lacked the authority to do so, and, consequently, the provision is a nullity.

V

Finally, we consider Gilbane's contention that the trial court's decision to strike the state's tort claims against Gilbane can be upheld on the alternative ground that they are barred by the limitation of remedies provision in the parties' contract. We also reject this claim.

The state's complaint contains five causes of action against Gilbane: negligence; breach of contract; negligent misrepresentation; intentional misrepresentation; and breach of fiduciary duty. Gilbane claims that all of the claims sounding in tort are barred by the limitation of remedies provision in the parties' contract. That provision, entitled "Construction Manager's Liability as to the [Department of Public Works]; Covenant Not to Sue," provides: "In recognition of the [consideration previously identified in the contract], the [c]onstruction [m]anager shall be liable to the [department of public works] for loss, damage or expense incurred by the [department of public works], including, without limitation, claims of construction contractors, subcontractors, and suppliers of the [department of public works] that are caused by the [c]onstruction [m]anager's negligent errors or omissions in its services, or negligent errors or omissions in the services of its consultants, agents or employees performed under this contract.

"Such liability shall not exceed, in the cumulative aggregate, an amount equal to the proceeds paid under all the insurance [purchased by the construction manager in accordance with the terms of the contract] plus [200 percent] of the [c]onstruction [m]anager's fee under this contract, and to the maximum extent permit-

ted by law. The [department of public works] releases the [c]onstruction [m]anager from, and agrees not to sue the [c]onstruction [m]anager for, any liability for such loss, damage or expense in excess thereof; provided, however, that the foregoing limitation, release and covenant not to sue shall not apply to the extent that any claim for loss, damage or expense is attributable to the willful misconduct, gross negligence (recognizing that gross negligence is substantially and appreciably higher in magnitude than ordinary negligence), fraud or active concealment of the [c]onstruction [m]anager. The remedies afforded the [department of public works] under this contract shall be the . . . sole and exclusive remedies [of the department of public works] with respect to the [c]onstruction [m]anager for liability, loss, damage or expense, irrespective of the nature of the cause of action, arising out of or in connection with this contract."

On appeal, Gilbane asserts that the last sentence of the limitation of remedies provision, which provides that the remedies afforded to the department of public works shall be its sole and exclusive remedies, "makes clear the legal insufficiency of the state's tort claims against Gilbane, as the contract clearly confines any attempted recovery against Gilbane to contractual remedies." We cannot discern how this language supports Gilbane's contention. Although the last sentence provides that the contractual remedies afforded the state shall be the state's sole and exclusive remedies, it does not identify what those remedies are. The two paragraphs directly preceding the last sentence, however, make clear that the state's remedies include tort remedies. Specifically, the first paragraph provides that Gilbane is liable to the department of public works for damage, loss or expense caused by Gilbane's "negligent errors or omissions . . . or [the] negligent errors or omissions . . . of its consultants, agents or employees . . . ." The second full paragraph further provides that the covenant not to sue Gilbane for loss, damage or expense in excess of the liability limits (insurance proceeds plus 200 percent of Gilbane's fee) "shall not apply to the extent that any claim for loss, damage or expense is attributable to the willful misconduct, gross negligence . . . fraud or active concealment of [Gilbane]." It is well settled that, "[when] the language of the contract is clear and unambiguous, the contract is to be given effect according to its terms. A court will not torture words to import ambiguity [when] the ordinary meaning leaves no room for ambiguity . . . . Similarly, any ambiguity in a contract must emanate from the language used in the contract rather than from one party's subjective perception of the terms." (Internal quotation marks omitted.) *Connecticut Light & Power Co.* v. *Lighthouse Landings, Inc.*, 279 Conn. 90, 110, 900 A.2d 1242 (2006). Furthermore, when, as in the present case, the contract language is definitive, the

determination of the parties' intent as expressed by that language is a question of law. E.g., *Mulligan* v. *Rioux*, 229 Conn. 716, 740, 643 A.2d 1226 (1994). The language of the parties' contract with respect to remedies clearly and unambiguously reserves to the state the right to pursue tort claims against Gilbane. Indeed, the *only* remedies expressly contemplated by the contract are tort remedies.[41] Accordingly, Gilbane's claim lacks merit.

The judgment is reversed and the case is remanded for further proceedings according to law.

In this opinion the other justices concurred.

* This appeal originally was argued before a panel of this court consisting of Justices Palmer, Zarella, McLachlan, Harper and Vertefeuille. Thereafter, Justice McLachlan recused himself and did not participate in the consideration of the case. Judge Lavine was added to the panel and has read the record and briefs, and listened to a recording of oral argument prior to participating in this decision.

[1] The maxim is sometimes referred to as nullum tempus occurrit reipublicae ("time does not run against the state"); Black's Law Dictionary (9th Ed. 2009); and is often shortened to "nullum tempus." Hereinafter, we refer to the rule as nullum tempus.

[2] As this court previously has observed, "[w]hile statutes of limitation are sometimes called statutes of repose, the former bars [a] right of action unless it is filed within a specified period of time after [an] injury occurs, [whereas] statute[s] of repose [terminate] any right of action after a specific time has elapsed, regardless of whether there has as yet been an injury." (Internal quotation marks omitted.) *Baxter* v. *Sturm, Ruger & Co.*, 230 Conn. 335, 341, 644 A.2d 1297 (1994).

[3] "Laches consists of two elements. First, there must have been a delay that was inexcusable, and, second, that delay must have prejudiced the defendant." *Kurzatkowski* v. *Kurzatkowski*, 142 Conn. 680, 684–85, 116 A.2d 906 (1955). "Laches is purely an equitable doctrine, is largely governed by the circumstances, and is not to be imputed to one who has brought an action at law within the statutory period." *A. Sangivanni & Sons* v. *F. M. Floryan & Co.*, 158 Conn. 467, 474, 262 A.2d 159 (1969).

[4] Under the doctrine of sovereign immunity, the state is not subject to liability or suit without its consent. See *Bergner* v. *State*, 144 Conn. 282, 284–85, 130 A.2d 293 (1957). Although conceptually distinct, the doctrines of nullum tempus and sovereign immunity are closely related insofar as they both shield the state from the consequences of its own neglect or malfeasance.

[5] The state's second amended complaint names twenty-eight defendants, which are divided into seven categories: (1) construction professionals (Gilbane, Inc., Arborio Corporation and Special Testing Laboratories, Inc.); (2) design professionals (S/L/A/M Collaborative, Inc., and Hartman-Cox Architects); (3) prime contractors (Lombardo Brothers Mason Contractors, Inc., and F.B. Mattson Company, Inc.); (4) subcontractors (Fox Steel Company, Daniel's Caulking, LLC, A & J Caulking Company, Inc., and ProTect of Connecticut, Inc.); (5) product suppliers (Apogee Wausau Group, Inc., and Hohmann & Barnard, Inc.); (6) sureties (American Casualty Company of Reading, Pennsylvania, and Peerless Insurance Company); and (7) apportionment defendants (Custom Metal Services, Inc., USA Contractors, Inc., Caribe Damproofing & Sealing, Inc., Premier Roofing Company, Inc., Titan Roofing Company, Inc., Andrew Peterson, Kamco Supply Corporation of New England, Walter D. Sullivan Company, Inc., Johnson Controls, Inc., Plascal Corporation, Karnak Corporation, The DiSalvo Ericson Group Structural Engineers, Inc., and VanZelm Heywood & Shadford, Inc.). Custom Metal Services, Inc., failed to appear, and the state subsequently withdrew its claims against it.

[6] Two other defendants, Arborio Corporation and Special Testing Laboratories, Inc., claimed that the state's purported waiver of nullum tempus in its contract with Gilbane also was applicable to them. See footnote 14 of this opinion.

[7] General Statutes § 52-584a provides in relevant part: "(a) No action or arbitration, whether in contract, in tort, or otherwise, (1) to recover damages (A) for any deficiency in the design, planning, contract administration, super-

vision, observation of construction or construction of, or land surveying in connection with, an improvement to real property; (B) for injury to property, real or personal, arising out of any such deficiency; (C) for injury to the person or for wrongful death arising out of any such deficiency, or (2) for contribution or indemnity which is brought as a result of any such claim for damages shall be brought against any architect, professional engineer or land surveyor performing or furnishing the design, planning, supervision, observation of construction or construction of, or land surveying in connection with, such improvement more than seven years after substantial completion of such improvement.

"(b) Notwithstanding the provisions of subsection (a) of this section, in the case of such an injury to property or the person or such an injury causing wrongful death, which injury occurred during the seventh year after such substantial completion, an action in tort to recover damages for such an injury or wrongful death may be brought within one year after the date on which such injury occurred, irrespective of the date of death, but in no event may such an action be brought more than eight years after the substantial completion of construction of such an improvement. . . ."

[8] General Statutes § 52-577 provides: "No action founded upon a tort shall be brought but within three years from the date of the act or omission complained of."

[9] General Statutes § 52-577a provides in relevant part: "(a) No product liability claim, as defined in section 52-572m, shall be brought but within three years from the date when the injury, death or property damage is first sustained or discovered or in the exercise of reasonable care should have been discovered, except that, subject to the provisions of subsections (c), (d) and (e) of this section, no such action may be brought against any party nor may any party be impleaded pursuant to subsection (b) of this section later than ten years from the date that the party last parted with possession or control of the product. . . ."

[10] General Statutes § 52-584 provides in relevant part: "No action to recover damages for injury to the person, or to real or personal property, caused by negligence, or by reckless or wanton misconduct . . . shall be brought but within two years from the date when the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered, and except that no such action may be brought more than three years from the date of the act or omission complained of . . . ."

[11] General Statutes § 52-576 provides in relevant part: "(a) No action for an account, or on any simple or implied contract, or on any contract in writing, shall be brought but within six years after the right of action accrues . . . ."

[12] Although statutes of limitation and statutes of repose ordinarily are raised by way of special defense; see, e.g., *Forbes* v. *Ballaro*, 31 Conn. App. 235, 239, 624 A.2d 389 (1993); the state does not dispute that its action was not brought within the statutory and contractual limitation periods on which the defendants rely. Consequently, in the interest of resolving the issues presented by those time based defenses as expeditiously as possible, and in the absence of any prejudice to or objection by the state, the trial court permitted the defendants to raise the defenses by way of motions to strike or motions for summary judgment. Therefore, for purposes of this appeal, we accept as true the facts alleged in the state's second amended complaint. See, e.g., *Southwick at Milford Condominium Assn., Inc.* v. *523 Wheelers Farm Road, Milford, LLC*, 294 Conn. 311, 318, 984 A.2d 676 (2009) (in ruling on motion for summary judgment, court views facts in light most favorable to nonmoving party); *State* v. *Marsh & McLennan Cos.*, 286 Conn. 454, 472 n.21, 944 A.2d 315 (2008) (in ruling on motion to strike, court takes facts to be those alleged in complaint).

[13] The state appealed to the Appellate Court from the judgment of the trial court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-2.

We note that the state filed two separate appeals, one from the trial court's judgment with respect to the granting of the defendants' motions to strike and motions for summary judgment (SC 18462), and a second from the judgment with respect to the dismissal of certain cross complaints and apportionment complaints (SC 18463). These appeals, which are identical in all material respects, were consolidated by the Appellate Court prior to our transfer of the appeals to this court. Because the first appeal was jurisdictionally proper, the second appeal is merely redundant. *Earlington* v. *Anastasi*, 293 Conn. 194, 196–97 n.3, 976 A.2d 689 (2009).

[14] Arborio Corporation (Arborio) and Special Testing Laboratories, Inc.

(STL), were hired by Gilbane as subcontractors. Although not signatories to Gilbane's contract with the state, Arborio and STL claimed that the repose provision of that contract nevertheless applies to them because they performed services pursuant to the contract and the repose provision is sufficiently broad to cover such services. The trial court did not address this claim but, instead, granted Arborio's and STL's motions to strike on the alternative ground that the state's claims against them were barred by certain statutes of repose. We hereinafter refer only to Gilbane when discussing the claim pertaining to the repose provision of its contract. We need not address separately the contention of Arborio and STL that they are covered under Gilbane's contract because, as we discuss more fully hereinafter, Gilbane cannot enforce that contract provision. Consequently, even if we assume that the provision inures to the benefit of Arborio and STL, they, like Gilbane, also cannot enforce the provision.

[15] General Statutes (Rev. to 1993) § 4b-99, which has since been repealed, provided in relevant part: "(a) Whenever construction management services are required by the commissioner of public works in fulfilling his responsibilities under section 4b-1, the commissioner shall invite responses from construction management firms by advertisements inserted at least once in one or more newspapers having a circulation in each county in the state.

"(b) The responses received shall be considered by the state construction services selection panel established under section 4b-56. The panel shall select from among those responding no fewer than three firms, which it determines in accordance with criteria established by the commissioner are most qualified to perform the required construction management services. . . .

"(c) The commissioner shall negotiate a contract for such services with the most qualified firm from among the list of firms submitted by the panel, at compensation which he determines in writing to be fair and reasonable to the state. If the commissioner is unable to conclude a contract with any of the firms recommended by the panel, he shall, after issuing written findings of fact documenting the reasons for such inability, negotiate with those firms which he determines to be most qualified, at fair and reasonable compensation, to render the particular construction management services under consideration. . . ."

[16] As we explain more fully hereinafter; see part II of this opinion; the term "ordinary" statute of limitations refers to a statutory limitation period the expiration of which bars any remedy but is not a jurisdictional prerequisite to the commencement of the action. See *Ecker* v. *West Hartford*, 205 Conn. 219, 232, 530 A.2d 1056 (1987).

[17] Despite this conclusion, which, if correct, would itself have constituted a sufficient basis for the trial court to have rejected the defendants' time based defenses, the court provided several additional reasons for doing so. We discuss those reasons hereinafter in connection with our analysis of the defendants' claims.

[18] General Statutes § 4-61 (a) provides in relevant part: "Any person, firm or corporation which has entered into a contract with the state, acting through any of its departments, commissions or other agencies, for the design, construction, construction management, repair or alteration of any highway, bridge, building or other public works of the state or any political subdivision of the state may, in the event of any disputed claims under such contract or claims arising out of the awarding of a contract by the Commissioner of Public Works, bring an action against the state to the superior court for the judicial district of Hartford for the purpose of having such claims determined, provided notice of each such claim under such contract and the factual bases for each such claim shall have been given in writing to the agency head of the department administering the contract within the period which commences with the execution of the contract or the authorized commencement of work on the contract project, whichever is earlier, and which ends two years after the acceptance of the work by the agency head evidenced by a certificate of acceptance issued to the contractor or two years after the termination of the contract, whichever is earlier. No action on a claim under such contract shall be brought except within the period which commences with the execution of the contract or the authorized commencement of work on the contract project, whichever is earlier, and which ends three years after the acceptance of the work by the agency head of the department administering the contract evidenced by a certificate of acceptance issued to the contractor or three years after the termination of the contract, whichever is earlier. Issuance of such certificate of acceptance shall not be a condition precedent to the commencement of any action. . . . All legal defenses except governmental immunity shall

be reserved to the state. . . .”

[19] Although *Clinton* does not contain the term “nullum tempus,” the syllabus of the defendant that appeared immediately before the court’s opinion—at that time, opinions of this court contained a syllabus for each party summarizing the party’s claims and supporting argument—does contain the term. *Clinton* v. *Bacon*, supra, 56 Conn. 511.

We note that the defendants are correct that no prior case of this court or the Appellate Court makes express reference to the term “nullum tempus.” As we explain more fully hereinafter, however, both courts have recognized and applied the rule, albeit without calling it nullum tempus. With respect to the trial court’s assertion that the rule has not been adopted in this state because our appellate courts previously have not used the term “nullum tempus,” that assertion is manifestly incorrect. It is wholly irrelevant that neither this court nor the Appellate Court has used the term, as both courts have adopted the principle of law on which the rule is based, and both courts have done so in terms identical to the terms of the rule itself. Consequently, there is no merit to the trial court’s assertion that the rule of nullum tempus is not a part of the common law of this state merely because our courts have not used that particular term in recognizing the doctrine that the right of the state to bring an action is not subject to any time based defense unless the legislature clearly and unmistakably has expressed a contrary intent.

[20] As the United States Supreme Court explained in *United States* v. *Nashville, Chattanooga & St. Louis Railway Co.*, 118 U.S. 120, 6 S. Ct. 1006, 30 L. Ed. 81 (1886): “It is settled beyond doubt or controversy—upon the foundation of the great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided—that the United States, asserting rights vested in them as a sovereign government, are not bound by any statute of limitations, unless Congress has clearly manifested its intention that they should be so bound.” Id., 125.

[21] In fact, we are aware of only four states in which nullum tempus has been abolished. In two of those states, South Carolina and West Virginia, the legislature abrogated the doctrine statutorily. See *State ex rel. Condon* v. *Columbia*, 339 S.C. 8, 16–17, 528 S.E.2d 408 (2000); *State ex rel. Smith* v. *Kermit Lumber & Pressure Treating Co.*, 200 W. Va. 221, 227–28, 488 S.E.2d 901 (1997). In two other states, Colorado and New Jersey, the doctrine was abolished judicially after the court previously had abrogated the doctrine of sovereign immunity. See *Shootman* v. *Dept. of Transportation*, 926 P.2d 1200, 1207 (Colo. 1996); *New Jersey Educational Facilities Authority* v. *Gruzen Partnership*, 125 N.J. 66, 69, 592 A.2d 559 (1991).

[22] A thirteenth century scholar, Henry de Bracton published one of the first English legal treatises.

[23] The principle “no time runs against the state” is also why, in Connecticut, as in other states, “[t]itle to realty held in fee by [the] state or any of its subdivisions for a public use cannot be acquired by adverse possession.” *Goldman* v. *Quadrato*, 142 Conn. 398, 402–403, 114 A.2d 687 (1955); see also *American Trading Real Estate Properties, Inc.* v. *Trumbull*, 215 Conn. 68, 77, 574 A.2d 796 (1990) (“[a] public entity may claim immunity from adverse possession”); *Devins* v. *Bogota*, 124 N.J. 570, 575, 592 A.2d 199 (1991) (“[t]he restriction on the application of adverse possession to public property is rooted in the ancient doctrine that time does not run against the king”).

[24] See also *Dept. of Labor* v. *Lawrence Brunoli, Inc.*, Superior Court, judicial district of Hartford, Docket No. CV-03-0829600 (August 17, 2005) (39 Conn. L. Rptr. 810) (state not bound by limitation period of General Statutes § 52-596); *Rocque* v. *Xtra Lease, Inc.*, Superior Court, judicial district of Hartford, Docket No. CV-00-0598293-S (June 8, 2001) (state not bound by limitation period of General Statutes § 52-577c); *Commissioner* v. *Kapadwala*, Superior Court, judicial district of Hartford, Docket No. CV-99-0590472-S (February 13, 2001) (29 Conn. L. Rptr. 210) (state not bound by limitation period of § 52-577c, § 52-577 or § 52-584); *King* v. *State*, Superior Court, judicial district of Fairfield, Docket Nos. CV-91-0287324-S and CV-91-0287123-S (January 26, 1995) (state not bound by limitation period of § 52-584).

[25] Consequently, the trial court was unable to identify a single case from this state to support its rejection of the rule of nullum tempus. On the contrary, the Connecticut cases that the court cited on the issue of nullum tempus speak of the rule as a settled part of our common law.

[26] For example, the doctrine was integral to the outcome of the appeal in

Clinton v. *Bacon*, supra, 56 Conn. 508, a case involving a dispute over certain property that had been used for the planting of oysters. In *Clinton*, the defendant, Henry Bacon, claimed that he had acquired title to certain property located in the town of Clinton by virtue of his adverse possession of the property. See id., 516–17. The plaintiff town maintained that it held the land at issue on behalf of the state and that a claim of adverse possession does not lie against the state. See id., 517. Bacon did not dispute the town's contention that one cannot acquire property from the state by adverse possession, asserting, instead, that "the rule of nullum tempus . . . applies [only] to claims in which the state is the *real* party, and has no application in cases [in which] it has no real interest in the litigation, but its name is used to enforce a right which inures solely to the benefit of an individual or a corporation . . . ." (Emphasis in original.) Id., 511–12 (arguments of parties). Upon concluding that the state *was* the real party in interest, this court rejected the defendant's claim on the ground that the limitation period for adverse possession does not run against the state. Id., 517.

[27] In support of their contention to the contrary, the defendants also rely on an assortment of articles, treatises and cases that indicate that Connecticut, in contrast to other former colonies, did not adopt the English common law in toto but only so much "as . . . seemed applicable to our social conditions . . . ." (Internal quotation marks omitted.) *State* v. *Courchesne*, supra, 296 Conn. 680; see also *Graham* v. *Walker*, 78 Conn. 130, 133, 61 A. 98 (1905) ("the common law of England . . . was brought here by the first settlers, and became the common law of Connecticut so far as it was not unadapted to the local circumstances of this country" [citations omitted]). They also cite three cases, *Drake* v. *Watson*, 4 Day (Conn.) 37 (1809), *Dickinson* v. *Kingsbury*, 2 Day (Conn.) 1 (1805), and *State* v. *Enos*, 1 Kirby (Conn.) 21 (1786), and a 1786 legislative act that created Connecticut's first criminal and civil statutes of limitation, as evidence that such statutes originally were binding on the state and for the proposition that our founding fathers "clearly rejected" the rule of nullum tempus prior to 1818. The defendants rely on this authority to argue that, because Connecticut had not adopted the rule of nullum tempus prior to the adoption of the Connecticut constitution in 1818, they have a constitutionally protected right to rely on a statute of limitations defense under article first, § 10, of the Connecticut constitution. See *Ecker* v. *West Hartford*, 205 Conn. 219, 234, 530 A.2d 1056 (1987) ("[a]rticle first, § 10, has been viewed as a limitation [on] the legislature's ability to abolish common law and statutory rights that existed in 1818, when article first, § 10, was adopted" [internal quotation marks omitted]).

The cases on which the defendants rely, however, do not support their contention that nullum tempus was rejected by our founders, either because the issue was not directly addressed; see *Drake* v. *Watson*, supra, 4 Day (Conn.) 41–42; *Dickinson* v. *Kingsbury*, supra, 2 Day (Conn.) 11; or because the case involved a *criminal* statute of limitations. See *State* v. *Enos*, supra, 1 Kirby (Conn.) 22. It is axiomatic that a criminal statute of limitations would have applied to the state, if not expressly, then by necessary implication, because only the state can prosecute crimes. Nor do we agree that the 1786 enactment, entitled "An Act for the Limitation of Prosecutions in [Several] Cases, [C]ivil and [C]riminal"; see Acts and Laws of the State of Connecticut in America (1786) pp. 127–28. supports a different view. The defendants appear to argue that, because the legislature codified the first criminal and civil statutes of limitation in a single statute, both limitation provisions, by necessary implication, must have applied to the state. Suffice it to say that this argument falls short of the exacting standard for finding an implied waiver of sovereign immunity. See, e.g., *Envirotest Systems Corp.* v. *Commissioner of Motor Vehicles*, 293 Conn. 382, 389–90, 978 A.2d 49 (2009) ("[I]n order for a court to conclude that a statute waives sovereign immunity by force of necessary implication, it is not sufficient that the claimed waiver reasonably may be implied from the statutory language. It must, by logical necessity, be the only possible interpretation of the language."). That the legislature chose to enact the first criminal and civil statutes of limitation together was as likely a matter of expediency as anything else. In short, although it is true that we "have never given to [the English common law] a slavish adherence"; *State* v. *Muolo*, 118 Conn. 373, 377, 172 A. 875 (1934); the defendants have failed to persuade us that our adherence to nullum tempus has ever waivered.

[28] The trial court agreed with this claim. See footnote 33 of this opinion.

[29] General Statutes (Cum. Sup. 1967) § 45-205 provides in relevant part: "The court of probate may order executors and administrators to cite the creditors of the deceased whose estate is in settlement before it to bring in their claims against such estate within such time, not more than twelve months nor less than three months, as it limits . . . . If any creditor fails

to exhibit his claim within the time limited by such order, he shall be barred of his demand against such estate . . . ."

This statute is now codified as amended at General Statutes § 45a-395.

[30] "[A] nonclaim statute . . . grants to every person having a claim of any kind or character against a decedent's estate, the right to file the same in the court having jurisdiction thereof and have the same adjudicated, provided such claim is filed within the time specified in the statute. Unless such claim is filed within the time so allowed by the statute, it is forever barred. The time element is a built-in condition of the . . . statute and is of the essence of the right of action. Unless the claim is filed within the prescribed time set out in the statute, no enforceable right of action is created.

"While such statutes limit the time in which a claim may be filed or an action brought, they have nothing in common with and are not to be confused with general statutes of limitation. The former creates a right of action if commenced within the time prescribed by the statute, whereas the latter creates a defense to an action brought after the expiration of the time allowed by law for the bringing of such an action." (Internal quotation marks omitted.) *Bell* v. *Schell*, 101 P.3d 465, 473–74 (Wyo. 2004).

[31] We note that § 52-584a, which contains a seven year repose provision for actions against architects, professional engineers and land surveyors for deficiencies in, inter alia, the design, planning, and construction of improvement to real property, applies to wrongful death actions as well as to tort and contract claims. See General Statutes § 52-584a (a). Because an action for wrongful death did not exist at common law; see *Ecker* v. *West Hartford*, supra, 205 Conn. 231; the time limitation for bringing that action is a jurisdictional prerequisite that must be met in order to maintain the action and cannot be waived. Id., 233. The present case, however, does not involve a claim for wrongful death. For purposes of this appeal, therefore, the limitation period of § 52-584a is properly treated as procedural.

[32] We note that the trial court attributed an altogether different meaning to the term "ordinary" statute of limitations. Specifically, the trial court looked to the dictionary definition of "ordinary" and then purported to use this definition to determine whether the state properly could raise the rule of nullum tempus to shield itself from operation of the six year limitation period of § 52-576 (a) for breach of contract. In concluding that the state could not invoke the rule of nullum tempus for that purpose under the facts of this case, the court reasoned as follows: "[I]t is undisputed that the state took occupancy of the law library on January 31, 1996, and that mere months after taking occupancy of the law library, became aware of the water intrusion that is the subject of this litigation. Yet the state chose not to initiate this action until some twelve years later. This length of time is unduly burdensome and unexplained.

"Citing *State* v. *Goldfarb*, supra, 160 Conn. 323, the state argues . . . that it is for the legislature, not the court, to waive the state's sovereign immunity. The court in *Goldfarb*, however, 'recognized the principle that a subdivision of the state, acting within its delegated governmental capacity, is not impliedly bound by the *ordinary* statute of limitations.' . . . Id., 326 . . . .

"Ordinary is defined in Black's Law Dictionary (4th Ed. 1951) as 'regular; usual; normal; common; reasonable.' In this case, the state is attempting to extend the principle of nullum tempus far past the 'ordinary' or usual statute of limitations. In fact, here, the 'ordinary' statute of limitations expired in 2002, six years after the construction was completed.

"To allow the state to bring [an action] so far past the 'ordinary' statute of limitations is not routine or usual.

"If the court adopts the state's argument that in the event there is no statute of limitations that specifically includes the state, the doctrine of nullum tempus allows the state to bring a claim for breach of contract after the statute of limitations has expired, and the question becomes when, if ever, will the state be prohibited from bringing a claim against a contractor for construction work on a state building? Will the state be able to bring a claim twenty-five years after the building was completed? Fifty years? One hundred years? . . . [T]he state's position [is] that the claim could be brought at any time. This slippery slope is . . . a major public policy concern. In the construction field, buildings do not last forever. If the state is not bound by any statutes of limitations, it will have an unlimited time period to commence [actions] against contractors and subcontractors.

"Therefore, the court concludes that under the circumstances of this action, the contract claims by the state are barred by the statute of limitations set [forth] in § 52-576." (Citations omitted; emphasis in original.) *State* v. *Lombardo Bros. Mason Contractors, Inc.*, supra, 51 Conn. Sup. 301–302.

The trial court's unprecedented explanation of the meaning of the term "ordinary" statute of limitations is wrong. As we noted previously, the term refers to the typical or usual statutory limitation period that operates not as a jurisdictional limitation on liability, but as a limitation on remedy only. The trial court's misunderstanding of the term caused it incorrectly

to conclude that the state was required to comply with the limitation period of § 52-576. None of the defendants seeks to defend the trial court's analysis on this issue.

[33] The trial court did not address the fact that the language of the statutes of repose at issue contains no indication that the provisions are applicable to the state. Nevertheless, the trial court reasoned that, in light of the important public policy embodied in those provisions, the legislature could not have intended to exempt the state from their operation. To support its conclusion, the trial court relied almost entirely on an article in Defense Counsel Journal; see J. Mack, "Nullum Tempus: Governmental Immunity to Statutes of Limitation, Laches, and Statutes of Repose," 73 Def. Couns. J. 180 (2006); a publication of the International Association of Defense Counsel and a forum for writings "from the viewpoint of the practitioner and litigator in the civil defense and insurance fields." International Association of Defense Counsel, Home Page, at http://www.iadclaw.org/publications/journal.aspx (last visited October 23, 2012). In that article, the author asserts that the policies underlying statutes of repose provide good reason to abolish the rule of nullum tempus; J. Mack, supra, 194–96; and, further, that courts should do so because, "[l]ike any common law doctrine . . . courts are free to evaluate the policies served by nullum tempus and arrive at their own conclusions about its continued validity." Id., 187.

On the basis of this reasoning, the trial court concluded: "The state legislature . . . possesses the authority to abrogate any governmental immunity by statute that the common law gives to the state and municipalities. . . . Excepting the state from adherence to statutes of repose as set forth in §§ 52-577, 52-577a, 52-584 and 52-584a would be an exception that could not have been intended by the legislature in its aim to alleviate the difficulties and implications of litigating stale claims. The purpose of the statutes of repose was to allow defendants at some point to become free from liability, absent some unclean or fraudulent conduct. The logical conclusion is that the legislature intended the state to abide by the statutes of repose." (Citation omitted; internal quotation marks omitted.) *State* v. *Lombardo Bros. Mason Contractors, Inc.*, supra, 51 Conn. Sup. 294–95. As we have explained, in this state, we adhere to the principle that a statute of repose applies to the state only if the legislature clearly so indicates. Because none of the repose provisions on which the defendants rely contains any evidence of such intent—let alone the clear expression of intent necessary to overcome the strong presumption against waiver—the trial court had no basis for concluding that the legislature abrogated the rule of nullum tempus when it enacted those provisions.

[34] Our determination that none of these statutes applies to the state is fatal to the defendants' contention that the expiration of the repose periods contained in §§ 52-577, 52-577a, 52-584 and 52-584a vested in them a constitutionally protected property right to be free from liability. Put simply, the defendants cannot be deprived of a right that they never possessed. Because statutory limitation periods do not apply to the state unless the statutory provisions in which they are contained clearly and unambiguously so provide, their expiration can never create a right of repose against the state.

[35] General Statutes § 52-592 (a) provides: "If any action, commenced within the time limited by law, has failed one or more times to be tried on its merits because of insufficient service or return of the writ due to unavoidable accident or the default or neglect of the officer to whom it was committed, or because the action has been dismissed for want of jurisdiction, or the action has been otherwise avoided or defeated by the death of a party or for any matter of form; or if, in any such action after a verdict for the plaintiff, the judgment has been set aside, or if a judgment of nonsuit has been rendered or a judgment for the plaintiff reversed, the plaintiff, or, if the plaintiff is dead and the action by law survives, his executor or administrator, may commence a new action, except as provided in subsection (b) of this section, for the same cause at any time within one year after the determination of the original action or after the reversal of the judgment."

[36] It bears emphasis that the majority of the defendants did not enter into a public works contract with the state, and, therefore, even if we were to conclude that § 4-61 serves to waive nullum tempus with respect to such contracts, it would have no bearing on those defendants. See, e.g., *Federal Deposit Ins. Corp.* v. *Peabody, N.E., Inc.*, 239 Conn. 93, 104, 680 A.2d 1321 (1996) ("Section 4-61 [a] expressly grants the right to sue the state only to contractors who have entered into a contract with the state and who have a dispute under such contract. Nowhere in § 4-61 or elsewhere in the General Statutes is there any provision that grants a subcontractor, who does not have a contract with the state, the right to sue the state." [Internal quotation marks omitted.]).

[37] The defendants do not cite a single case in which a limited waiver of

sovereign immunity, such as that found in § 4-61, was construed to have included a waiver of nullum tempus. Instead, they rely on *Shootman* v. *Dept. of Transportation*, supra, 926 P.2d 1200, *New Jersey Educational Facilities Authority* v. *Gruzen Partnership*, 125 N.J. 66, 592 A.2d 559 (1991), and *State ex rel. Condon* v. *Columbia*, supra, 339 S.C. 8. In each of those cases, however, the court concluded that nullum tempus no longer was viable in light of the complete abrogation of sovereign immunity. See, e.g., *Shootman* v. *Dept. of Transportation*, supra, 1207. Moreover, other courts have held that the rule of nullum tempus survives even the total abolition of sovereign immunity. See, e.g., *Fennelly* v. *A-1 Machine & Tool Co.*, supra, 728 N.W.2d 169 n.3 ("We reject the approach of some other courts . . . that have held the abrogation of sovereign immunity alone [is] the death knell of nullum tempus. Nullum tempus is an independent doctrine from sovereign immunity, with independent supporting policy considerations." [Citations omitted.]). Although we are dubious that the complete abrogation of sovereign immunity, without more, would cause us to conclude that the legislature necessarily also intended a waiver of nullum tempus, we need not decide that issue because, as we have explained, § 4-61 effectuates only a limited and narrow waiver of sovereign immunity.

[38] We note that *Envirotest* had not been decided at the time the trial court granted Gilbane's motion to strike on the ground that the state had waived nullum tempus in its contract with Gilbane.

[39] General Statutes § 14-164c (e) provides in relevant part: "In order to provide for emissions inspection facilities, the commissioner [of motor vehicles] may enter into a negotiated inspection agreement or agreements, notwithstanding chapters 50, 58, 59 and 60, with an independent contractor or contractors, to provide for the leasing, construction, equipping, maintenance or operation of a system of official emissions inspection stations in such numbers and locations as may be required to provide vehicle owners reasonably convenient access to inspection facilities. The commissioner [of motor vehicles] may employ such system and the services of such contractor or contractors to conduct safety inspections as provided by section 14-16a, subsection (g) of section 14-12 and section 14-103a. Such contractor or contractors, with the approval of the commissioner, may operate inspection stations at suitable locations owned or operated by other persons, firms or corporations, including retail business establishments with adequate facilities to accommodate and to perform inspections on motor vehicles. . . . The inspection agreement or agreements authorized by this section shall be subject to other provisions as follows: (A) Minimum requirements for staff, equipment, management and hours and place of operation of official emissions inspection stations including such additional testing facilities as may be established and operated in accordance with subsection (g) of this section; (B) reports and documentation concerning the operation of official emissions inspection stations and additional testing facilities as the commissioner [of motor vehicles] may require; (C) surveillance privileges for the commissioner [of motor vehicles] to ensure compliance with standards, procedures, rules, regulations and laws; and (D) any other provision deemed necessary by the commissioner [of motor vehicles] for the administration of the inspection agreement. . . ."

[40] We recognize that courts in some jurisdictions have concluded that the doctrine of nullum tempus does not apply to contractual repose provisions in government contracts. See, e.g., *United States* v. *Seaboard Air Line Railway Co.*, 22 F.2d 113, 115 (4th Cir. 1927) (nullum tempus inapplicable to contractual provisions); *Evergreen Park School District No. 124* v. *Federal Ins. Co.*, 276 Ill. App. 3d 766, 769, 658 N.E.2d 1235 (1995) ("[a] contract is a contract and a governmental entity must abide by its contractual obligations the same as an individual"); *State* v. *Evans*, 47 Tenn. App. 1, 18, 334 S.W.2d 337 (1959) ("we are not concerned with a statute of limitations . . . but with a contract which limits the time for bringing suit"). Gilbane relies heavily on these cases as support for its contention that the trial court correctly concluded that the repose provision at issue in the present case was binding on the state. As the state notes, however, in none of these cases did the government claim that the repose provision exceeded the signatory's statutory authority. These cases, therefore, are not persuasive authority because the courts were not required to consider the enforceability of the repose provision through the same lens that we must apply, which requires us to determine only whether the commissioner was statutorily authorized to waive the state's immunity. For the reasons previously set forth in this opinion, we conclude that he was not.

[41] In light of our determination that the contract between Gilbane and the

state imposes liability on Gilbane for loss, damage or expense attributable to Gilbane's negligence, gross negligence, wilful misconduct, fraud or active concealment, we need not address Gilbane's contention that the economic loss doctrine provides an independent, alternative ground on which to uphold the trial court's decision to strike the state's tort claims against Gilbane. The economic loss doctrine is "a [common-law] rule limiting a contracting party to contractual remedies for the recovery of economic losses unaccompanied by physical injury to persons or other property." *Flagstaff Affordable Housing Ltd. Partnership* v. *Design Alliance, Inc.*, 223 Ariz. 320, 323, 223 P.3d 664 (2010); see also C*alloway* v. *Reno*, 116 Nev. 250, 256, 993 P.2d 1259 (2000) ("[t]he economic loss doctrine marks the fundamental boundary between contract law, which is designed to enforce the expectancy interests of the parties, and tort law, which imposes a duty of reasonable care and thereby encourages citizens to avoid causing physical harm to others" [internal quotation marks omitted]). The doctrine is inapplicable, however, when, as in the present case, one party contractually agrees to be liable for loss, damage or expense attributable to that party's negligence, gross negligence or wilful misconduct.