70810-4

70810-4

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON

2014 MAR 24 PM 3:00

No. 70810-4-I

COURT OF APPEALS,
DIVISION I,
OF THE STATE OF WASHINGTON

---

NEW CINGULAR WIRELESS PCS LLC, a Delaware limited liability company,

Respondent,

v.

CITY OF BOTHELL, WASHINGTON,

Appellant.

---

# REPLY BRIEF OF APPELLANT CITY OF BOTHELL

---

Wayne D. Tanaka
WSBA #6303
Aaron P. Riensche
WSBA #37202
Ogden Murphy Wallace PLLC
901 Fifth Avenue, Suite 3500
Seattle, Washington 98164-2008
206.447.7000

Philip A. Talmadge
WSBA #6973
Talmadge/Fitzpatrick
18010 Southcenter Parkway
Tukwila, WA 98188-4630
206.574.6661

Attorneys for Appellant City of Bothell

ORIGINAL

TABLE OF CONTENTS

*Page*


A. INTRODUCTION ..... 1

B. ARGUMENT ..... 2

1. As the beneficiary of a summary judgment, New Cingular is not entitled to have the facts and inferences viewed in its favor. ..... 2
2. The trial court does not have "broad discretion" to disregard legislative policy decisions. ..... 3
3. New Cingular fails to identify any evidence to support the mandatory predicates for equitable tolling. ..... 6
   - a. Speculation and conclusory assertions are insufficient to show deception, bad faith, or false assurances. ..... 7
   - b. New Cingular cannot show that it acted diligently when it deliberately pursued a course of action that created the statute of limitations problem. ..... 11
4. New Cingular failed to show that justice requires equitable tolling. ..... 15
   - a. New Cingular's attempts to distinguish recent Washington Supreme Court authority are unavailing. ..... 16
   - b. The trial court was required to take New Cingular's sophistication into account. ..... 18
   - c. If equitable tolling is applied, the City will be prejudiced due to New Cingular's failure to give notice of a state law claim. ..... 19
5. The out-of-state cases proffered by New Cingular remain unhelpful. ..... 20
   - a. The cited Ninth Circuit authority is irrelevant because the clarification of the law alleged here did not affect the timeliness of this action. ..... 20
   - b. The cited cases from other states have no application under Washington law. ..... 22

C. CONCLUSION ..... 23

## TABLE OF AUTHORITIES

*Page*

**Cases**

American Marine Corp. v. Sholin, 295 P.3d 924, 927 (Alaska 2013) ... 22

Anfinson v. FedEx Ground Package System, Inc., 174 Wn.2d 851, 861, 281 P.3d 289 (2012) ... 10

Arkison v. Ethan Allen, Inc., 160 Wn.2d 535, 538, 160 P.3d 13 (2007) ... 10

Benyaminov v. City of Bellevue, 144 Wn. App. 755, 767, 183 P.3d 1127 (2008) ... 6

Capital Tracing v. United States, 63 F.3d 859 (9th Cir. 1995) ... 21

City of Seattle v. Montana, 129 Wn.2d 583, 592, 919 P.2d 1218 (1996) ... 4

Cost Management Services, Inc. v. City of Lakewood, 178 Wn.2d 635, 651, 310 P.3d 804 (2013) ... 5, 13, 16, 17, 18, 21

Enron Oil & Gas Co. v. Freudenthal, 861 P.2d 1090, 1094 (Wyo. 1993) ... 23

Finkelstein v. Security Properties, Inc., 76 Wn. App. 733, 739-40, 888 P.2d 161 (1995) ... 6, 18, 19

Graham Neighborhood Ass'n v. F.G. Associates, 162 Wn. App. 98, 120, 252 P.3d 898 (2011) ... 16

Hart v. Clark County, 52 Wn. App. 113, 117, 758 P.2d 515 (1988) ... 19

Holland v. Florida, 560 U.S. 631, 130 S. Ct. 2549, 2562, 177 L.Ed.2d 130 (2010) ... 21

In re Bonds, 165 Wn.2d 135, 141, 196 P.3d 672 (2008) ... 15

In re Haghighi, 178 Wn.2d 435, 309 P.3d 459 (2013) ... 16, 17

J.M. Arthur & Co. v. Burke, 83 Wash. 690, 693, 145 P. 974 (1915) ... 5

Kingery v. Dep't of Labor & Indus., 132 Wn.2d 162, 178, 937 P.2d 565 (1997) ........ 11, 12, 13

Ladzinski v. MEBA Pension Trust, 951 F. Supp. 570 (D. Md. 1997) ........ 17, 18

Leschner v. Dep't of Labor & Indus., 27 Wn.2d 911, 926, 185 P.2d 113 (1947) ........ 5

McDonald v. Antelope Valley Community College District, 45 Cal.4th 88, 96, 84 Cal.Rptr.3d 734, 194 P.3d 1026 (2008) ........ 23

Millay v. Cam, 135 Wn.2d 193, 206, 955 P.2d 791 (1998) ........ 6, 15

Nickum v. City of Bainbridge Island, 153 Wn. App. 366, 379, 223 P.3d 1172 (2009) ........ 6

Pace v. DiGuglielmo, 544 U.S. 408, 418, 125 S. Ct. 1807, 161 L.Ed.2d 669 (2005) ........ 21

Qwest Corp. v. City of Bellevue, 161 Wn.2d 353, 166 P.3d 667 (2007) ........ 21

Rupert v. Gunter, 31 Wn. App. 27, 30, 640 P.2d 36 (1982) ........ 4

State ex rel. Heavey v. Murphy, 138 Wn.2d 800, 815, 982 P.2d 611 (1999) ........ 4

State v. Evans, 130 Wis. 381, 110 N.W. 241, 242 (1907) ........ 4

State v. Ralph Williams' NW Chrysler, 82 Wn.2d 265, 277-78, 10 P.2d 233 (1973) ........ 4

Structural Steel Fabricators, Inc. v. City of Orange, 40 Cal.App.4th 459, 464-65, 46 Cal.Rptr.2d 867 (1995) ........ 23

Teeter v. Brown, 130 Wash. 506, 510, 228 P. 291 (1924) ........ 12, 14

Town of Sumner v. Ward, 126 Wash. 75, 78, 217 P. 502 (1923) ........ 4

Trotzer v. Vig, 194 Wn. App. 594, 607, 203 P.3d 1056 (2009) ........ 2

Valley View Indus. Park v. City of Redmond, 107 Wn.2d 621, 625-28, 733 P.2d 182 (1987) ........ 5, 6

Weidow v. Uninsured Employers' Fund, 259 Mont. 77, 82, 246 P.3d 704 (2010) ........ 22

## Statutes

RCW 68.08.105 .......... 12
RCW 7.16.040 .......... 14

## Rules

CR 56 .......... 3
CR 56(c) .......... 3

## Municipal Code Provisions

BMC 5.05.220 .......... 11
BMC 5.05.230 .......... 11
BMC 5.08.110 .......... 8, 19
BMC 5.08.210 .......... 7, 9, 13
BMC 5.08.220 .......... 8
BMC 5.08.230 .......... 14
Bothell Municipal Code .......... 7, 8, 11, 13

## A. INTRODUCTION

A sophisticated corporation made tactical decisions to forgo available remedies and chose a litigation path that triggered the three-year statute of limitations. It then asked equity to deliver it from the consequences of those decisions. The trial court's extension of Washington law, to accommodate that request, was unwarranted.

The Legislature has plenary power to set time limits for presenting claims, and Washington law on equitable exceptions fully disposes of the issue presented here. New Cingular cannot satisfy the strict requirements that our Supreme Court has established for the equitable tolling doctrine. It offers nothing more than speculation to support its theory that the City engaged in deception, bad faith, or false assurances. And it cannot show that it acted with reasonable diligence when it created the statute of limitations problem with its own strategic decisions. Nor can it show that justice requires tolling in this situation.

New Cingular does not dispute that the standard limitations period is the three years immediately preceding the filing of the complaint. Because New Cingular failed to meet the prerequisites for equitable tolling, the trial court erred in allowing it to maintain a claim for taxes paid before that timeframe. This decision should be reversed.

## B. ARGUMENT

### 1. As the beneficiary of a summary judgment, New Cingular is not entitled to have the facts and inferences viewed in its favor.

There is no dispute that this Court reviews a trial court's decision on equitable tolling *de novo*. *See Trotzer v. Vig*, 194 Wn. App. 594, 607, 203 P.3d 1056 (2009) (equitable tolling decision following a bench trial reviewed *de novo*). As the City explained in its opening brief, the Court must view facts and reasonable inferences in the light most favorable to New Cingular in reviewing the trial court's denial of the City's motion for summary judgment. But the facts and reasonable inferences must be viewed in the light most favorable to the City upon review of the summary judgment that was granted *sua sponte* to New Cingular.

New Cingular acknowledges that it was granted a summary judgment. And yet, it makes the remarkable argument that this Court should give it the benefit of inferences when reviewing that decision.[1] This argument is based entirely on the fact that, in the traditional boilerplate statement of the standard of review, the courts say that the inferences are viewed favorably to the "nonmoving party."

If New Cingular's theory were correct, then a party would be penalized for using summary judgment procedure to refine the issues early

[1] Brief of Respondent at 13-14.

in litigation. Each party, knowing an issue is ripe for summary judgment, would delay, hoping for the opposition to move first. The nonmoving party already receives a substantial benefit when it is awarded a summary judgment without having to file a motion. Under New Cingular's interpretation, this advantage would be transformed into a windfall.

Moreover, the plain language of CR 56 undermines New Cingular's position. The rule recognizes summary judgment only for the "moving party." CR 56(c) (allowing summary judgment if submissions show "that the moving party is entitled to a judgment as a matter of law"). This language is compatible with the concept of a *sua sponte* summary judgment for the nonmoving party only if "moving party" is viewed as a term of art referring to the party in whose favor the judgment is rendered. The adverse party must then be considered the "nonmoving party" for purposes of review. Any other interpretation would subvert the well-established standards for reviewing a summary judgment.

### 2. **The trial court does not have "broad discretion" to disregard legislative policy decisions.**

New Cingular further misstates the applicable legal standards when it discusses the courts' discretion in applying equitable remedies. For the propositions that equitable powers are "broad and flexible" and that the courts have "considerable inherent discretion," New Cingular cites two

Washington cases.[2] The equitable action in each of these cases was the issuance of an injunction. *See State v. Ralph Williams' NW Chrysler*, 82 Wn.2d 265, 277-78, 10 P.2d 233 (1973); *Rupert v. Gunter*, 31 Wn. App. 27, 30, 640 P.2d 36 (1982). Neither involved the use of equity in derogation of a legislative enactment.

Rather than discretion, the courts must exercise deference to the Legislature's policy decisions when applying exceptions to statutes. *See State ex rel. Heavey v. Murphy*, 138 Wn.2d 800, 815, 982 P.2d 611 (1999) (citing *City of Seattle v. Montana,* 129 Wn.2d 583, 592, 919 P.2d 1218 (1996)) ("In the absence of an unconstitutional act, under our constitutional system of separation of powers, we must defer to the Legislature's policy judgment, even in the circumstances where we think the policy judgment is unwise."); *Town of Sumner v. Ward*, 126 Wash. 75, 78, 217 P. 502 (1923) (quoting *State v. Evans*, 130 Wis. 381, 110 N.W. 241, 242 (1907)) (noting that courts must exercise "the utmost deference" toward the Legislature in matters of public policy).

"The statute of limitations is 'a legislative declaration of public policy which the courts can do no less than respect.'" *Cost Management Services, Inc. v. City of Lakewood*, 178 Wn.2d 635, 651, 310 P.3d 804

[2] Brief of Respondent at 15.

(2013) (quoting *J.M. Arthur & Co. v. Burke,* 83 Wash. 690, 693, 145 P. 974 (1915)). Our Supreme Court has specifically rejected a rule that would allow the courts broad discretion to equitably toll statutory limitations periods. *See Leschner v. Dep't of Labor & Indus.*, 27 Wn.2d 911, 926, 185 P.2d 113 (1947). The court opined that such a rule "would be a dangerous path to follow," "could only be in disregard of the universal maxim that ignorance of the law excuses no one," and "would substitute for a positive rule established by the legislature a variable rule of decision based upon individual ideas of justice conceived by administrative officers as well as by the courts." *Id.*

New Cingular adds nothing to this analysis by citing to *Valley View Indus. Park v. City of Redmond*, 107 Wn.2d 621, 625-28, 733 P.2d 182 (1987).[3] *Valley View* involved a city's administrative filing deadlines, ***not*** a statute of limitations for judicial action. More importantly, the claimant in *Valley View* actually relied on false assurances by the city in pursuing its permit application. The city informed the plaintiff that the application was deemed abandoned, but assured the plaintiff that it could proceed under the applications and continued to work with the plaintiff toward issuance of a permit. *Id.* at 632. The plaintiff did not challenge the

[3] Brief of Respondent at 16-17.

zoning change within the city's thirty-day time limit "because it had a good faith belief, based on discussions with City officials, that it had a vested right to develop its industrial park." *Id.*

Thus, *Valley View* does not support the broad discretion that New Cingular advocates here. Rather, it illustrates the overt interference that would justify a finding of deception, bad faith, or false assurances under our Supreme Court's framework for equitable tolling. Because New Cingular failed to present any evidence of such conduct by the City in this case, the trial court had no discretion to invoke equitable tolling.

### 3. **New Cingular fails to identify any evidence to support the mandatory predicates for equitable tolling.**

"The party asserting that equitable tolling should apply bears the burden of proof." *Nickum v. City of Bainbridge Island*, 153 Wn. App. 366, 379, 223 P.3d 1172 (2009) (citing *Benyaminov v. City of Bellevue*, 144 Wn. App. 755, 767, 183 P.3d 1127 (2008)). This burden requires New Cingular to show two predicates: (1) "bad faith, deception, or false assurances by the defendant"; and (2) "the exercise of diligence by the plaintiff." *Millay v. Cam*, 135 Wn.2d 193, 206, 955 P.2d 791 (1998) (citing *Finkelstein v. Security Properties, Inc.*, 76 Wn. App. 733, 739-40, 888 P.2d 161 (1995)). New Cingular has not made this showing.

a. Speculation and conclusory assertions are insufficient to show deception, bad faith, or false assurances.

New Cingular has not identified any evidence of deception, bad faith, or false assurances by the City. Instead, it offers a speculative theory: that the seventeen-month processing time was motivated by bad faith. Notably, New Cingular admits that this time period "could be a reasonable amount of time,"[4] provided the City processed the claim the way New Cingular wanted it to. It then, without any evidentiary support, hypothesizes that the City used this time to "stonewall." New Cingular complains about several aspects of the City's denial and argues that these somehow belie a bad faith motive. But these complaints amount to nothing more than argument, with no actual evidence.

First, New Cingular misrepresents the Bothell Municipal Code ("BMC") by claiming that it requires the City to "'promptly' process the claim."[5] The cited provision does not say that the City will promptly "process" the claim, but rather that the City "shall promptly consider" it. BMC 5.08.210. New Cingular fails to identify any evidence that the City did not promptly consider this claim.

---

[4] Brief of Respondent at 23.

[5] Brief of Respondent at 22 (quoting BMC 5.08.210).

More fundamentally, New Cingular offers no evidence that any New Cingular personnel actually relied on this provision. Conspicuously absent is any declaration from a single New Cingular representative who claims to have even read this provision before it made the strategic decisions in this case. Indeed, New Cingular complains elsewhere that the City's denial letter did not identify the administrative deadline for appealing its decision.[6] But the appeal procedure is outlined in the section that immediately follows the "promptly consider" provision. *See* BMC 5.08.220; CP 207. New Cingular's claims that it needed the City to advise it of one provision, while pretending to have relied on another that appears right next to it, are disingenuous at best.

Similarly, New Cingular claims to have relied on the "shall be refunded" language in BMC 5.08.110.[7] This provision also limits the administrative claim period to two years. BMC 5.08.110. And yet, New Cingular demanded a refund of five years' worth of taxes. CP 280.

Moreover, New Cingular did not mention the BMC, much less any reliance on it, in its response to discovery requests. CP 186-87. The City asked New Cingular to identify all conduct that constituted deception, bad faith, or false assurances. CP 186. New Cingular's failure to mention

[6] Brief of Respondent at 10.

[7] Brief of Respondent at 24.

BMC 5.08.210 in its answer exposes this argument as an after-the-fact rationalization.

Second, New Cingular complains that the City's denial letter did not detail the deficiencies in New Cingular's refund claim and that the City did not request additional information.[8] New Cingular offers no authority whatsoever for the notion that a taxing jurisdiction is somehow required to request information to supplement a deficient claim or provide a detailed explanation for its decisions.

New Cingular is not being candid when it extolls the completeness of its refund claim and represents that the refund amount is not in dispute.[9] New Cingular ***admitted*** that the amount claimed was ***wrong***. CP 293. Two months after the denial that New Cingular now claims was in bad faith, New Cingular advised the City of corrections to the denied claim. CP 293-95. New Cingular cannot legitimately argue that the denial of an undisputedly erroneous claim is, in and of itself, evidence of bad faith.

Finally, New Cingular makes a vague reference to the City's reliance on other defenses, but never discusses their merits.[10] The City raised, for example, the voluntary payment doctrine. CP 104. This is the

---

[8] Brief of Respondent at 19-20.

[9] Brief of Respondent at 22-23.

[10] Brief of Respondent at 23.

same defense that New Cingular (through its affiliate, AT&T Mobility) asserted against its customers' refund claims in the underlying class-action litigation. CP 93. New Cingular touted the strength of this defense in convincing the federal court to approve a settlement in which New Cingular avoided all financial responsibility for compensating the customers that it now claims to have overcharged. CP 99. It is thus judicially estopped from asserting that this defense lacks merit. *See Anfinson v. FedEx Ground Package System, Inc.*, 174 Wn.2d 851, 861, 281 P.3d 289 (2012) (quoting *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538, 160 P.3d 13 (2007)) (judicial estoppel "precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position").

In short, the City denied a concededly erroneous refund claim after seventeen months. New Cingular argues that this is too long, but cannot escape the fact that it took New Cingular nineteen months to discover the errors. Its argument that the time period and fact of denial are evidence of deception, bad faith, or false assurances is thus wholly without merit.

b. New Cingular cannot show that it acted diligently when it deliberately pursued a course of action that created the statute of limitations problem.

New Cingular also failed to act with reasonable diligence. It evinced this lack of diligence not only by failing to use the procedural mechanisms at its disposal to secure relief, but also by actually creating the problem at issue through its own tactical decisions.

New Cingular filed an administrative refund claim in November 2010. Once its claim was denied, it could have appealed this decision to the city council and eventually to the King County Superior Court. BMC 5.05.220, BMC 5.05.230.[11] Instead, it abandoned the administrative process in favor of an original action in Superior Court. It was this purely strategic decision that brought the three-year statute of limitations into play.

The diligence predicate is not met when a party fails "to timely utilize existing regular mechanisms." *Kingery v. Dep't of Labor & Indus.*, 132 Wn.2d 162, 178, 937 P.2d 565 (1997). As our Supreme Court explained long ago, "[o]rdinarily, equity puts out its assisting arm only to

[11] New Cingular's argument that the administrative appeal was somehow not available because the denial was expressed in a letter from the City's attorney has no merit. *See* Brief of Respondent at 42. The decision was made by the treasurer. CP 276. Nothing in the BMC prohibits the City's attorney from communicating the treasurer's decisions to the claimant.

those who have shown a disposition to help themselves." *Teeter v. Brown*, 130 Wash. 506, 510, 228 P. 291 (1924).

New Cingular attempts to distinguish *Kingery* based on the time periods involved.[12] But the *Kingery* court emphasized the plaintiff's failure to utilize existing regular mechanisms within the limitations period. The Department denied her claim for benefits in October 1983. *Kingery*, 132 Wn.2d at 166. She later disputed the autopsy findings on which the denial was based. *Id.* at 167. The court stressed that she "could have secured another expert ***in 1983***" to contest the autopsy findings and that she failed "to avail herself of the provisions of RCW 68.08.105, as it existed ***in 1983***, to schedule a meeting with the coroner on the autopsy findings." *Id.* at 176 (emphasis added).

New Cingular also argues extensively about whether the available mechanisms to preserve its claim were required.[13] This argument misses the mark. The "existing regular mechanisms" in *Kingery* were also optional. The point is that these mechanisms were available to New Cingular, as a means of preserving a claim based on the November 2010 filing date, and its failure to utilize them precludes a finding of reasonable diligence.

[12] Brief of Respondent at 25.

[13] Brief of Respondent at 27-29.

For example, New Cingular stresses that under the BMC the taxpayer "may" apply for a conference with the treasurer for examination and review of its tax liability. BMC 5.08.210. Whether optional or not, this process was an available means by which New Cingular could have prompted action on its claim, but which it chose to forgo. Indeed, the optional conference with the City treasurer is analogous to the optional meeting with the coroner that the plaintiff failed to schedule in *Kingery*.

Similarly, New Cingular's lengthy discussion about whether exhaustion of administrative remedies was required is a red herring.[14] Regardless of whether exhaustion was necessary, the administrative process was available and would have preserved the November 2010 filing date. When New Cingular chose instead to pursue recovery through the courts, it should have known that the statute of limitations "necessarily applies as a result of that choice." *Cost Management*, 178 Wn.2d at 652.

Indeed, as New Cingular acknowledges, the City advised New Cingular in the denial letter that the statute of limitations was not tolled. CP 266. This informed New Cingular that it would face a limitations issue

---

[14] *See* Brief of Respondent at 37-44. It is the City's position that exhaustion was required in this case, under the clear holding in *Cost Management*, 178 Wn.2d at 645-48, and that New Cingular's entire claim is subject to dismissal. As stated in the City's opening brief, however, this issue is not before the Court. The City submits that supplemental briefing would be appropriate if the Court finds it necessary to decide this issue.

if it pursued direct court action over the administrative appeal. Despite being forewarned, New Cingular chose precisely that path.

Under New Cingular's reasoning, its lack of diligence was even more profound. According to New Cingular, it believed the City's administrative procedures were entirely optional, and it thus could have filed this lawsuit in November 2010. By this logic, New Cingular had at least two roads to court that would have borne a November 2010 filing date: (1) file the lawsuit directly in Superior Court in November 2010; or (2) pursue the administrative process through to Superior Court, either by appeal under BMC 5.08.230 or by a writ of review under RCW 7.16.040.

Indeed, New Cingular's theory implies that there were other available options. For example, New Cingular could have filed both the administrative claim and the lawsuit and then moved the trial court for a stay pending the outcome of the administrative action.[15] It also could have filed the administrative action alone and asked the City to enter into a tolling agreement. By failing to take any steps to protect its claim and instead choosing the one course that engendered the limitations issue, New Cingular failed to display the diligent effort that equity requires. *See Teeter*, 130 Wash. at 510.

[15] Again, it is the City's position that exhaustion was required before New Cingular could file a lawsuit. The option of filing both actions arises only under New Cingular's theory.

New Cingular argues that in *Millay*, our Supreme Court found that a declaratory action could be a diligent approach.[16] But *Millay* merely illustrates why New Cingular's conduct cannot be considered diligent. In *Millay*, confusion caused by the defendant's misrepresentations made it impossible for the plaintiff to "with due diligence" obtain the information necessary to timely proceed with the procedures for redeeming foreclosed real property. *Millay*, 135 Wn.2d at 206. The plaintiff filed a declaratory judgment action to seek the needed information. *Id.* at 207.

New Cingular was not, like the plaintiff in *Millay*, left with a declaratory action as its only option for proceeding with its claim. New Cingular had the means to reach the court system with a November 2010 filing date. It was not diligent when it chose instead to file an original action in April 2012.

4. **New Cingular failed to show that justice requires equitable tolling.**

New Cingular does not dispute that our Supreme Court's framework for equitable tolling requires the plaintiff first to establish the predicates and then to show that justice requires equitable intervention. *See In re Bonds*, 165 Wn.2d 135, 141, 196 P.3d 672 (2008). Because New Cingular failed to show the predicates, the courts lack equitable authority.

[16] Brief of Respondent at 26-27.

*See Graham Neighborhood Ass'n v. F.G. Associates*, 162 Wn. App. 98, 120, 252 P.3d 898 (2011). At any rate, New Cingular has also failed to show the "justice requires" portion of the framework.

a. New Cingular's attempts to distinguish recent Washington Supreme Court authority are unavailing.

When the trial court ruled in this case, it did not have the guidance of our Supreme Court's recent opinions in *Cost Management* and *In re Haghighi*, 178 Wn.2d 435, 309 P.3d 459 (2013). As an initial matter, New Cingular is incorrect when it claims the City omitted that *Haghighi* "was decided in the Personal Restraint Petition ('PRP') context."[17] The City used the term "PRP" five times in discussing *Haghighi*.[18]

In any event, the fact that *Haghighi* was a criminal case is a completely arbitrary distinction. The crux of the *Haghighi* holding is that the defendant had other means to preserve his rights, and thus the equitable tolling doctrine had a "a more limited role . . . which makes it necessary to adhere to a stricter standard." *Haghighi*, 178 Wn.2d at 448.

The same limited role and stricter standard apply here. New Cingular had options to maintain a claim with a November 2010 filing date. It was thus "both unwise and unnecessary to expand the doctrine

[17] Brief of Respondent at 35.

[18] Brief of Appellant at 37-38.

beyond the traditional standard." *Id.* at 448. This is thus not what *Haghighi* described as the "normal" situation in which equitable tolling is the only means to avoid depriving a party of its remedy. *Id.* To the extent New Cingular argues that it has no other means now, this is purely a result of its own making.

As for *Cost Management*, this case plainly states that use of the administrative process to recover a stale portion of a tax-refund claim is improper. New Cingular tries to distinguish this holding on the ground that the trial court in *Cost Management* had already ruled on timeliness, and the plaintiff used the administrative process to evade that ruling.[19] But the court mentioned this fact merely as evidence that the taxpayer's motive was to avoid the statute of limitations. *See Cost Management*, 178 Wn.2d at 651. No such evidence is necessary here because New Cingular's motive for invoking equitable tolling is not in question.

The fact that *Cost Management*'s holding is not limited to cases with a prior timeliness ruling is reinforced by its reliance on *Ladzinski v. MEBA Pension Trust*, 951 F. Supp. 570 (D. Md. 1997). In *Ladzinski*, there was no prior ruling on timeliness. Rather, the court simply determined that the three-year statute of limitations had expired, even

---

[19] Brief of Respondent at 32-34.

though the plaintiff's administrative appeal was adjudicated just two years before. *Id.* at 573-74. Thus, *Cost Management* stands for a more general proposition, that the administrative process cannot be used to provide a way around the statute of limitations in a tax-refund action.

b. The trial court was required to take New Cingular's sophistication into account.

New Cingular mischaracterizes the City's argument when it says that "sophisticated plaintiffs are not categorically ineligible for equitable relief."[20] The City does not argue that a sophisticated party can never obtain equitable relief. However, the equitable tolling analysis necessarily differentiates among plaintiffs with varying levels of sophistication. *See Finkelstein v. Security Properties, Inc.*, 76 Wn. App. 733, 739-40, 888 P.2d 161 (1995).

For example, as explained in the City's opening brief, in *Finkelstein*, this Court rejected the notion that a confusing legal situation could justify equitable tolling where the plaintiff was an attorney. As a lawyer, "he should have known the effects of his bankruptcy on his business affairs." *Id.* at 740. Tellingly, New Cingular does not even mention *Finkelstein* in its brief.

[20] Brief of Respondent at 31.

*Finkelstein* cannot be reconciled with the relief granted to New Cingular here. When a multi-billion-dollar corporation fails to comprehend its own tax obligations, passes the excess costs onto its customers, and then pretends to be confused by the simple concept of a three-year statute of limitations, the courts are required to take into account that the corporation is sophisticated and represented by able legal counsel. New Cingular should have known, when it made its decisions in this case, that it was bringing the statute of limitations into play.

c. <u>If equitable tolling is applied, the City will be prejudiced due to New Cingular's failure to give notice of a state law claim</u>.

As the City explained in its opening brief, the trial court's ruling causes prejudice to the City by potentially allowing New Cingular to expand its claim period from two years to three. *See* BMC 5.08.110 (two-year limit on administrative claims); *cf. Hart v. Clark County*, 52 Wn. App. 113, 117, 758 P.2d 515 (1988) (three-year statute of limitations applies to court action for tax refund). New Cingular does not deny that it will argue for this expansion. Instead, it contends that this obvious prejudice is not the type that statutes of limitations protect against.

But New Cingular also acknowledges the importance of notice in the prejudice determination. It asserts, for example, that the City "has had

full notice of New Cingular's claims since the filing of the refund claim in November 2010."[21] New Cingular cannot seriously argue that notice of an administrative claim for two years of tax payments is "full notice" of a judicial action for three years of payments. Thus, whether the problem is viewed as one of prejudice or notice or both, the differences between the two types of claims undermine New Cingular's argument that equitable tolling is consistent with the purposes of the statute of limitations.

5. **The out-of-state cases proffered by New Cingular remain unhelpful.**

Washington law on equitable tolling is fully developed and complete. As such, New Cingular's foraging around the country, for scraps of case law that might support its position, is unnecessary. In any event, the handful of cases that New Cingular has managed to unearth cannot support the trial court's unnecessary extension of Washington law.

a. The cited Ninth Circuit authority is irrelevant because the clarification of the law alleged here did not affect the timeliness of this action.

As explained above, New Cingular devotes a substantial portion of its brief to a red herring argument about whether administrative exhaustion was required. New Cingular's purpose in conflating equitable tolling with exhaustion appears to be an attempt to bring this case within the realm of

[21] Brief of Respondent at 30; *see also id.* at 19.

*Capital Tracing v. United States*, 63 F.3d 859 (9th Cir. 1995).[22] In *Capital Tracing*, conflicting 9th Circuit authority recognized two paths for a wrongful levy action. Under one the plaintiff's action was timely, and under the other it was untimely. *Id.* at 862-63. Equitable tolling was appropriate where the clarifying opinion forced the plaintiff to choose the path for which its action was already untimely. *Id.* at 863. This decision has no application here, for two reasons.

First, *Capital Tracing* applied federal law, which does not require deception, bad faith, or false assurances as a prerequisite to equitable tolling. *See Holland v. Florida*, 560 U.S. 631, 130 S. Ct. 2549, 2562, 177 L.Ed.2d 130 (2010) (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418, 125 S. Ct. 1807, 161 L.Ed.2d 669 (2005)) (plaintiff must prove "'(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing").

Second, the confusion and clarification alleged here did not affect the timeliness of the action. *Cost Management* recognized confusion about the exhaustion requirement, which stemmed from *Qwest Corp. v. City of Bellevue*, 161 Wn.2d 353, 166 P.3d 667 (2007). But nothing in *Qwest* suggested that a taxpayer could jump from an administrative action

[22] *See* Brief of Respondent at 48-49.

to a court action and retain the earlier tolling date or that the statute of limitations for a court action would not continue to run while an administrative claim was pending. When New Cingular made its tactical decisions, there was no confusion in Washington law about these principles.

b. The cited cases from other states have no application under Washington law.

Equally unavailing is New Cingular's reliance on cases from four other states, which it claims recognize the policy it advocates here.[23] There is simply no reason to delve into law from other jurisdictions on a matter of Washington law for which our Supreme Court has given clear guidance. Washington law imposes certain predicates on equitable tolling, and New Cingular has not made this essential showing. No further inquiry is needed.

It is noteworthy, however, that three of the four cases did not actually apply the rule advanced by New Cingular. *See American Marine Corp. v. Sholin*, 295 P.3d 924, 927 (Alaska 2013) (declining to apply equitable tolling); *Weidow v. Uninsured Employers' Fund*, 259 Mont. 77, 82, 246 P.3d 704 (2010) (applying equitable tolling based on an ambiguity

[23] Brief of Respondent at 44-47.

in the filing-deadline statute); *Enron Oil & Gas Co. v. Freudenthal*, 861 P.2d 1090, 1094 (Wyo. 1993) (declining to apply equitable tolling).

New Cingular is thus left with only one case that applied a rule similar to the one it proposes: *McDonald v. Antelope Valley Community College District*, 45 Cal.4th 88, 96, 84 Cal.Rptr.3d 734, 194 P.3d 1026 (2008). This case is inapposite because California does not require deception, bad faith, or false assurances as a predicate to equitable tolling. *See Structural Steel Fabricators, Inc. v. City of Orange*, 40 Cal.App.4th 459, 464-65, 46 Cal.Rptr.2d 867 (1995). New Cingular has not presented any evidence to meet this prerequisite under Washington law, and that failure of proof, on its own, precludes equitable tolling. The Court should decline New Cingular's invitation to apply California law in defiance of our Supreme Court's clear restrictions on the equitable tolling doctrine.

## C. <u>CONCLUSION</u>

New Cingular fails to meet any of our Supreme Court's requirements for equitable tolling. Rather than produce actual evidence of deception, bad faith, or false assurances by the City, New Cingular offers nothing more than a speculative theory that disintegrates under the slightest scrutiny. It cannot meet the reasonable diligence requirement where it deliberately rejected the various options available to secure relief.

And it cannot show that justice requires equitable intervention where a sophisticated corporation creates the statute of limitations problem and then asks equity to extend its hand to help it evade the consequences of its own tactical decisions. For these reasons, the decision below should be reversed, with instructions to enter partial summary judgment dismissing any claim for taxes paid before April 25, 2009.

DATED this 24th day of March, 2014.

Respectfully submitted,

Wayne D. Tanaka, WSBA #6303
Aaron P. Riensche, WSBA #37202
Ogden Murphy Wallace PLLC
901 Fifth Avenue, Suite 3500
Seattle, Washington 98164-2008
206.447.7000

Philip A. Talmadge, WSBA #6973
Talmadge/Fitzpatrick
18010 Southcenter Parkway
Tukwila, WA 98188-4630
206.574.6661

Attorneys for Appellant City of Bothell

{APR1154361.DOCX;5/00005.050015/}

## DECLARATION OF SERVICE

Carole Henry hereby makes the following declaration pursuant to RAP 18.5, CR 5(b)(B), and RCW 9A.72.085:

1. I am now and was at all times material hereto over the age of 18 years. I am not a party to the above-entitled action and am competent to be a witness herein.

2. I certify that I served via e-mail a copy of the Brief of Appellant City of Bothell on plaintiff's attorneys at Michael R. Scott, mrs@hcmp.com, Sarah E. Moum, sem@hcmp.com, and Holly D. Golden, hdg@hcmp.com, on the 24th day of March, 2014.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Mar. 24/14 Seattle WA

Date and Place

Carole Henry

Carole Henry