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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.

BRIEF OF APPELLANT CITY OF BOTHELL

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

Rules

Acts

Municipal Code Provisions

A. INTRODUCTION

This tax-refund case arises from the advent of the so-called "smart phone." Respondent New Cingular Wireless PCS LLC ("New Cingular"), a Delaware corporation, alleges that when its affiliate, AT&T Mobility LLC ("AT&T"), started marketing wireless devices with internet capabilities, it failed to recognize that it had become an internet-access provider. As such, it continued—for years, across the country—paying local utility taxes on internet services that it now claims are exempt from taxation under federal law.

When class-action lawsuits by its subscribers finally prompted AT&T to address this issue, it submitted refund claims to taxing jurisdictions around the nation in November 2010. One of the many Washington cities to receive such a claim was appellant City of Bothell (the "City"). AT&T chose not to follow the administrative procedures set out in the Bothell Municipal Code ("BMC"). Instead, after the City denied the refund request, New Cingular brought this original action in superior court in April 2012. Although New Cingular raised multiple causes of action, the complaint's allegations made clear that this lawsuit was a straightforward tax-refund claim.

The City moved for partial summary judgment, to establish that the standard three-year limitations period for tax-refund claims applied, such that New Cingular could seek a refund of taxes paid only from April 25, 2009 to April 25, 2012, i.e. the three years immediately preceding the filing of the judicial action. In opposition, New Cingular argued that the statute of limitations should be "equitably tolled" as of the date AT&T filed its administrative claim, in November 2010. New Cingular failed, however, to present any evidence to satisfy the longstanding prerequisites to the equitable tolling doctrine: (1) deception, bad faith, or false assurances by the defendant; and (2) reasonable diligence by the plaintiff.

Despite the total lack of evidence to support these predicates, the trial court denied the City's motion and *sua sponte* granted partial summary judgment in New Cingular's favor. Acknowledging that it was extending Washington law, the trial court decided that equitable tolling could apply to tax-refund claims without proof of the predicates. This decision flew in the face of our Supreme Court's mandate that the equitable tolling doctrine, as an encroachment on the legislative power, should be used only in exceptional situations. The trial court erred when it expanded the doctrine here. The partial summary judgment in New

Cingular's favor should therefore be reversed with instructions to enter a partial summary judgment in the City's favor.

B. ASSIGNMENTS OF ERROR

Assignments of Error

1) The trial court erred in denying the City's motion for partial summary judgment regarding the statute of limitations.

2) The trial court erred in deciding that the doctrine of equitable tolling applies in tax-refund actions where the predicate showings of deception, bad faith, or false assurances by the defendant and reasonable diligence by the plaintiff have not been made.

3) The trial court erred in *sua sponte* granting partial summary judgment on the statute of limitations issue in New Cingular's favor.

Issue Pertaining to Assignments of Error

Washington law has long required predicate findings of deception, bad faith, or false assurances by the defendant and reasonable diligence by the plaintiff before a plaintiff can invoke the doctrine of equitable tolling. The trial court effectively decided that these requirements do not apply to tax-refund actions. Did the trial court err by extending a doctrine that, according to our Supreme Court, should be used sparingly and only under narrow circumstances?

C. STATEMENT OF THE CASE

1. Background

The City is a non-charter, optional municipal code city situated in North King County and South Snohomish County, Washington. CP 275. New Cingular is a telephone business that sells telecommunication services. CP 11. New Cingular also sells wireless data plans that provide internet access via "smart phone" devices, such as the iPhone and the Blackberry. *Id.*

This lawsuit involves utility taxes that New Cingular allegedly paid to the City on revenues from the provision of this type of internet service. According to New Cingular, the federal government has prohibited taxation of such services since November 1, 2003, under the Internet Tax Freedom Act ("ITFA"), 47 U.S.C. § 151. CP 13. New Cingular also asserts that the State of Washington has prohibited such taxes since 1997, under RCW 35.21.717. *Id.*

Notwithstanding its current position that these services were not taxable, New Cingular represents that until November 1, 2010, it included revenues from such services when it reported its taxable income for purposes of local utility taxes. CP 12-13. New Cingular passed the costs of such taxes, including the taxes allegedly paid on internet service, onto

its customers in the form of a surcharge. *Id.* New Cingular assessed this surcharge to customers not only in Bothell, but also in taxing jurisdictions across the United States, including at least 128 other cities in this State. CP 7-11, 13-14. New Cingular attributes this alleged overcharge to what it calls a "coding error." CP 13.

2. **The class-action lawsuits**

New Cingular claims that it first learned about the "coding error" when its customers across the country began bringing lawsuits against AT&T. CP 184. Customers in Washington, for example, sued AT&T in *Vickery v. AT&T Mobility LLC*, Cause No. 2:10-cv-00257, in the U.S. District Court for the Western District of Washington. CP 14. The *Vickery* complaint alleged that AT&T improperly and illegally charged its Washington customers for state and local taxes on internet service. CP 75. The U.S. Judicial Panel on Multidistrict Litigation centralized 28 actions against AT&T, including *Vickery*, in the U.S. District Court for the Northern District of Illinois. CP 14.

AT&T settled these lawsuits without paying a dime. Under the settlement, AT&T agreed to cease billing its customers for internet taxes. CP 85. It also agreed to pursue refunds from taxing jurisdictions in which

it had standing. CP 14. The refunds obtained would be assigned to the settlement class. *Id.*

Although New Cingular claims now that it paid internet taxes mistakenly due to a "coding error," in the settlement agreement it reserved the right to continue charging its customers for such taxes if the settlement agreement was not approved by the court. CP 85. AT&T also represented that if the case were litigated further, it would assert defenses to customer claims, including "that neither ITFA nor state law forbids the challenged taxes." CP 93. AT&T further advised that its defenses would include "invoking the voluntary payment doctrine to bar plaintiffs' right to recover charges." *Id.*

Although the district court approved the settlement, its decision was heavily influenced by the weakness of the customers' claim. For example, the court emphasized the testimony of Robert Klonoff, class-action expert and Dean of Lewis & Clark Law School, who stated that the customers' case had "enormous complications" and that the voluntary payment doctrine was a "huge problem." CP 99. Dean Klonoff estimated the customers' probability of success, in recovering this money from AT&T, as less than fifty percent. *Id.*

3. **New Cingular's administrative refund claim**

On November 12, 2010, the City received from AT&T a form letter containing a refund claim for $416,802.28 in utility tax payments. CP 280. The amount requested included nearly five years of taxes, paid from November 1, 2005 through September 30, 2010. *Id.* AT&T offered the following explanation for the request:

> Reason: Tax was inappropriately collected from customers of the Taxpayer and remitted to your jurisdiction's tax administration during the above time period as explained in the attached statement. Supporting detailed billing and tax remittance schedules are also enclosed on the DVD.

Id.

Attached to the request was an eight-page "Statement in Support of Claim." CP 281-88. More than four pages of this statement consisted of AT&T's newly adopted argument that data services are internet access. CP 281-85. The remaining pages outlined the arrangement between AT&T and the class-action plaintiffs. CP 285-88.

New Cingular made no further efforts to communicate with the City until more than a year later. Its attorneys wrote to the City in January 2012, inquiring as to the status of the claim. CP 290. The City denied the refund claim by letter dated April 16, 2012. CP 103.

4. **New Cingular's multiple revisions to the amount and time period claimed**

Since the City denied the claim, New Cingular has admitted that the amount it originally claimed was erroneous. On June 15, 2012, AT&T notified the City that it was reducing the amount of its refund request. CP 293. It had made two errors in calculating the amount:

- First, it had included taxes paid on charges for services that were *not* data services and therefore were properly taxable. This error had inflated the original request by $11,144.70.
- Second, it had failed to account for credits taken against tax remittances on amounts that had been written off as "bad debts." AT&T acknowledged that it would need to reduce its refund claim by 1.5% to account for this oversight.

CP 293-94. Thus, AT&T had overstated its request by roughly $17,000.[1]

Moreover, New Cingular and AT&T have tacitly acknowledged that the time period claimed in the administrative request was excessive. In November 2010, AT&T represented that it had paid the taxes in question "through September 30, 2010." CP 280. However, during the course of this lawsuit, New Cingular has represented that AT&T re-coded

[1] The letter does not state the total reduction amount. The original claim was for $416,802. CP 280. Reducing this amount by $11,144 and then subtracting 1.5% yields approximately $399,572.

its charges for internet-access services as "nontaxable" in August 2010. CP 243, 177-78.

5. **New Cingular's failure to comply with the Bothell Municipal Code's procedural requirements**

The City levies a utility tax on companies engaged in the telephone business under the BMC, Chapter 5.08. *See* CP 192 *et seq.* It exempts, however, income derived from "transactions in interstate or foreign commerce or from any business which the City is prohibited from taxing under the constitutions of the United States or the state." BMC 5.08.040.

The BMC also provides a detailed refund procedure. A taxpayer that believes it has overpaid may apply to the city treasurer for a correction of the amount paid and a conference for examination and review of the tax liability. BMC 5.08.210. If the taxpayer is unsatisfied with the treasurer's decision, it may appeal to the City Council within ten days. BMC 5.08.220. The taxpayer then has a further right of appeal to superior court. BMC 5.08.230.

In its complaint, New Cingular represented that to the extent any city's municipal code contained specific refund requirements, "New Cingular substantially complied with those requirements." CP 16. But New Cingular did not comply with the foregoing procedure in soliciting the refund at issue here from the City of Bothell. New Cingular did not,

for example, apply for a conference with the city treasurer. CP 276. Nor did it appeal the denial to the City Council or the superior court. *Id.*

6. **New Cingular's original action in superior court**

After its administrative claim was denied, rather than follow the City's claim procedures, New Cingular filed this action on April 25, 2012. CP 106-24. New Cingular alleged that the superior court had "original jurisdiction under Article IV Section Six of the Washington Constitution and RCW 2.08.010 because this case involves the legality and applicability of a tax." CP 6. New Cingular later argued that it was not required to exhaust administrative remedies, based on the concept of concurrent original jurisdiction mentioned in *Qwest Corp. v. City of Bellevue*, 161 Wn.2d 353, 371, 166 P.3d 667 (2007). CP 234.[2]

Although the complaint attempts to repackage the claim under four different causes of action, all four merely seek a tax refund. For example, the first cause of action, for "declaratory judgment," seeks a "judicial determination of [New Cingular's] right to a refund under municipal, state, and federal law." CP 17. The second cause of action, for unjust

[2] The Washington Supreme Court subsequently held that this interpretation of *Qwest*—as obviating the need to exhaust remedies—was erroneous. *See Cost Mgmt. Servs., Inc. v. City of Lakewood*, 178 Wn.2d 635, 310 P.3d 804, 812 (2013). Although the *Cost Management* holding calls into question the viability of New Cingular's entire cause of action, the question of whether the case should be dismissed due to New Cingular's failure to exhaust administrative remedies is not currently before the Court.

enrichment, alleges that "Defendants received a benefit from receipt of taxes erroneously collected from New Cingular customers and remitted to the Defendants." *Id.* New Cingular also asserted constitutional violations, but based these on the allegation that "due process requires Defendants to provide a remedy in the form of a tax refund to New Cingular." CP 18. That this is a straightforward tax-refund claim is confirmed in New Cingular's prayer for relief, where the only substantive relief requested was "a declaration that Defendants have an obligation to refund the erroneously collected tax on Internet access." CP 019.

7. New Cingular's failure to produce any evidence on the predicates for equitable tolling in response to the City's discovery requests

By the time discovery began in the trial court, New Cingular had advised that it would rely on the equitable tolling doctrine to argue that the claim should be equitably tolled as of the date it filed its administrative refund claim. CP 55. The City propounded discovery requests to New Cingular directed at this argument. Specifically, the City asked New Cingular to identify "all actions, representations, or other similar conduct" by the City that would satisfy the predicate showing of bad faith, deception, or false assurances by the defendant. CP 186.

New Cingular's response did not identify any specific conduct by the City. Instead, it offered generalized allegations about the conduct of multiple defendants:[3]

> Defendant cities have acted in bad faith in a variety of ways, including but not limited to by requesting unnecessary and unduly burdensome additional information; delaying responding to the refund request, and in some instances, completely failing to respond to the tax refund request; asserting boilerplate objections and defenses without reasonable basis; and denying the refund request without reasonable justification.

CP 186.

The City further asked New Cingular to identify the date of any such action or representation, any City personnel who performed the action or made the representation, and any New Cingular personnel who witnessed the action or to whom the representation was made. CP 187. The City also asked New Cingular to identify and produce any documents that reflect or relate to the actions or representations. *Id.* New Cingular responded to these requests only with objections and did not identify any persons or documents. *Id.*

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[3] New Cingular initially sued more than 100 cities in the same action. CP 1-5. Most defendants were eventually dismissed without prejudice as misjoined. This ruling was not applied to the City as the first-named defendant.

8. **The City's motion for partial summary judgment**

Based on this lack of evidence, the City moved for partial summary judgment. Specifically, it asked the trial court to limit the claim period to the three years immediately preceding April 25, 2012, the date New Cingular filed its original complaint. The City established that New Cingular could not show either of the two predicates for equitable tolling: (1) reasonable diligence by the plaintiff and (2) deception, bad faith, or false assurances by the defendant. CP 49-67.

In response, New Cingular argued that the requirement of deception, bad faith, or false assurances by the City was met by the fact that the City had taken seventeen months to deny the claim. CP 233. Regarding reasonable diligence, New Cingular cited the Declaration of Linda Fisher, AT&T's Assistant Secretary and Director of Transaction Tax Operations. *Id.* Ms. Fisher stated that due to "the volume and complexity of the data, the process of taxing jurisdictions' evaluation of the refund claims has been lengthy." CP 244.

On August 2, 2013, the trial court denied the City's motion and *sua sponte* granted summary judgment to New Cingular on this issue. CP 326. The order states not only that the City's motion is denied, but also that the "doctrine of equitable tolling applies under the circumstances of this case,

commencing upon the filing of the tax refund claim with the City of Bothell in November 2010." CP 327.

The trial court issued this ruling without finding that the prerequisites for equitable tolling were met. Indeed, it highlighted the lack of evidence of deception, bad faith, or false assurances as a source of concern:

> The only concern I have is whether or not I'm bound to have to find either bad faith, deception, or false assurances on the part of the City of Bothell before I can embrace the notion of equitable tolling.

RP 44. With respect to the City's processing time, the trial court stated that it was "not criticizing the length of time, necessarily." RP 14.

The trial court recognized that its ruling extended the equitable tolling doctrine:

> So even though ***this is an extension, I believe, of the equitable tolling rule in Washington***, I think it's appropriate under the circumstances.

RP 45 (emphasis added). Likewise, in its written order, the trial court acknowledged "***that its decision is an extension of the current Washington case law on equitable tolling***." CP 327 (emphasis added).

The trial court further advised that its decision was based not on Washington law, but on law from other jurisdictions:

> Well, I would have to be candid with both of you gentlemen and say I think it is an extension. ***It's pushing the envelope further than it's been pushed before***. And frankly, ***that's partly due to the case law that you provided to me from elsewhere that allows that to happen***. So I think, in all candor, that's a fair statement, that ***it is an extension of the equitable tolling rule in Washington***. And somebody else might see it differently than I do.

RP 49-50 (emphasis added).

The trial court later certified the order under RAP 2.3(b)(4). CP 350-51. The City timely sought discretionary review. CP 352. This Court granted review on October 18, 2013.

D. SUMMARY OF ARGUMENT

The trial court impermissibly substituted its own judgment for that of the Legislature. The statute of limitations is a declaration of public policy to which the courts must defer. While the doctrine of equitable tolling is a recognized exception to the statute of limitations, it must be applied sparingly and only under narrow circumstances.

Our Supreme Court has instituted a framework that constrains this doctrine. First, a plaintiff must prove two required predicates: (1) deception, bad faith, or false assurances by the defendant; and

(2) reasonable diligence by the plaintiff. Second, the plaintiff must then establish that justice requires equitable intervention.

The trial court erred by equitably tolling the statute of limitations without evidence to prove either predicate. Absent these prerequisites, New Cingular's argument that equitable tolling was the fair result was irrelevant. Essentially, it asked the court to skip the first part of the framework and go straight to the second part.

Moreover, New Cingular's arguments utterly failed to show that justice required tolling because New Cingular could have preserved its tolling date by simply exhausting its administrative remedies. All tolling did in this case was insulate a corporation from the consequences of a tactical decision to ignore the City's administrative procedures. Washington courts apply an even stricter standard to equitable tolling where a party has other means of preserving its claim. As such, equitable tolling does not apply here as a matter of law, and the partial summary judgment in New Cingular's favor must be reversed, with instructions to enter a partial summary judgment for the City.

E. ARGUMENT

1. Standard of review.

The Court reviews an order granting or denying summary judgment *de novo*. *Young v. Savidge*, 155 Wn. App. 806, 814, 230 P.3d 222 (2010). The moving party "bears the initial burden of showing the absence of an issue of material fact." *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989) (citing *LaPlante v. State*, 85 Wn.2d 154, 158, 531 P.2d 299 (1975)). The moving party may meet this burden by pointing out "that there is an absence of evidence to support the nonmoving party's case." *Id.* at 158 n. 1 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 81 L.Ed.2d 265 (1986)). If the moving party is the defendant and makes this initial showing, the burden shifts to the plaintiff. *Id.*

"If, at this point, the plaintiff 'fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial,' then the trial court should grant the motion." *Id.* (quoting *Celotex*, 477 U.S. at 322). "In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id.*

(quoting *Celotex*, 477 U.S. at 322–23). The nonmoving party "may not rely on speculation, argumentative assertions that unresolved factual issues remain, or in having its affidavits considered at face value," but rather "must set forth specific facts." *Seven Gables v. MGM/UA Entertainment,* 106 Wn.2d 1, 13, 721 P.2d 1 (1986). While facts must be viewed in the light most favorable to the nonmoving party, the nonmoving party must still come forward with "actual evidence." *Trimball v. Washington State University*, 140 Wn.2d 88, 93, 993 P.2d 259 (2000).

The order appealed from here has two components: (1) a denial of the City's motion for partial summary judgment; and (2) a *sua sponte* partial summary judgment granted to New Cingular. Before granting summary judgment to the nonmoving party, the Court must exercise "great care" to assure that the original movant had an adequate opportunity to make the showings necessary to defeat summary judgment. *Kassbaum v. Steppenwolf Prods., Inc.*, 236 F.3d 487, 494 (9th Cir. 2000) (quoting *Ramsey v. Coughlin,* 94 F.3d 71, 74 (2d Cir.1996)). Where both parties seek summary judgment, the Court must consider each motion separately. *Burris v. General Ins. Co. of America*, 16 Wn. App. 73, 75-76, 553 P.2d 125 (1976). If the party to whom summary judgment is granted bears the burden of proof, factual assumptions cannot sustain the

judgment. *Jacobsen v. State*, 89 Wn.2d 104, 109, 569 P.2d 1152 (1977). Here, New Cingular bore the burden of proving that equitable tolling should apply. *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)). Thus, in reviewing the summary judgment granted in New Cingular's favor, the Court must hold New Cingular to an even more rigorous standard.

2. **The limitations period for this tax-refund action is the three years preceding the date the complaint was filed.**

The statute of limitations permits New Cingular to seek a refund only of taxes paid in the three years immediately preceding the filing of its complaint. Washington courts apply the three-year statute of limitations, in RCW 4.16.080(3), to tax-refund claims. *See Cost Mgmt. Servs., Inc. v. City of Lakewood*, 178 Wn.2d 635, 310 P.3d 804, 813 (2013); *Hart v. Clark County*, 52 Wn. App. 113, 117, 758 P.2d 515 (1988). "The limitation period commences when a cause of action accrues and tolls when a complaint is filed or a summons is served." *U.S. Oil & Ref. Co. v. Department of Ecology*, 96 Wn.2d 85, 91, 633 P.2d 1329 (1981). An action for a tax refund accrues when the challenged taxes are paid. *Hart*, 52 Wn. App. at 117. No discovery rule applies in tax-refund cases. *See id.*

This limitations period applies to all of New Cingular's causes of action. Notwithstanding New Cingular's efforts to give creative names to various counts, what it seeks is a tax refund, and all of its causes of action request the same relief. CP 19. This is a refund claim, pure and simple.

New Cingular will argue that the statute of limitations does not apply to its first cause of action, under the Uniform Declaratory Judgments Act, because claims for declaratory judgment must be brought within a reasonable time. Washington law is clear, however, that filing an action for declaratory judgment, rather than one for direct relief, does not avoid the statute of limitations. *Reid v. Dalton*, 124 Wn. App. 113, 122, 100 P.3d 349 (2004). "What constitutes a reasonable time is determined by analogy to the time allowed for ... a similar [action] as prescribed by statute, rule of court, or other provision." *Schreiner Farms, Inc. v. Am. Tower, Inc.*, 173 Wn. App. 154, 159, 293 P.3d 407 (2013) (quoting *Cary v. Mason County*, 132 Wn. App. 495, 501, 132 P.3d 157 (2006)) (alterations in original). "The 'right to declaratory relief should be barred when [the] right to coercive relief is barred.'" *Id.* (quoting *Federal Way v. King County*, 62 Wn. App. 530, 537, 815 P.2d 790 (1991)) (alteration in original).

Accordingly, whether denominated as declaratory relief, unjust enrichment, or a due process right, all of New Cingular's claims for a tax refund are subject to the three-year statute. New Cingular commenced this action on April 25, 2012. The limitations period reaches back only to April 25, 2009. As explained in detail below, the trial court erred in permitting New Cingular to seek a refund of taxes paid before that date.

3. Equitable tolling may be applied only when the plaintiff shows both that justice requires it and that the predicates are met.

"The statute of limitations is 'a legislative declaration of public policy which the courts can do no less than respect.'" *Cost Management*, 310 P.3d at 813 (quoting *J.M. Arthur & Co. v. Burke,* 83 Wash. 690, 693, 145 P. 974 (1915)). The courts are "reluctant to apply exceptions to legislative time limits." *In re Bonds*, 165 Wn.2d 135, 143, 196 P.3d 672 (2008). One rare exception is the doctrine of equitable tolling, which "should be used ***sparingly*** and does not extend broadly to allow claims to be raised except under ***narrow circumstances***." *Id.* at 141 (emphasis added). This exception exists because the "general policy of our laws is ***to protect those who are unable to protect themselves*** and equitable doctrines grew naturally out of the humane desire to relieve ***under special circumstances*** from the harshness of strict legal rules." *Ames v. Dep't of*

Labor & Indus., 176 Wash. 509, 513, 30 P.2d 239 (1934) (emphasis added).

The exceptional circumstances that warrant equitable tolling are illustrated by a line of earlier Washington cases decided in the industrial insurance context. In *Ames*, the claimant was "violently insane" and committed to Western State Hospital. *Id.* at 510. The Department of Labor and Industries had actual knowledge that the claimant was confined to the hospital, but nonetheless mailed its rejection notice to his home address. *Id.* The Department rejected his later petition for rehearing as untimely. *Id.* at 512. The Supreme Court held that the claimant's incapacity, along with the Department's knowingly sending the denial to an address at which he would not receive it, created "a sufficient showing to warrant relief on equitable grounds." *Id.* at 514.

The Supreme Court refused, however, to recognize a general rule allowing the courts to toll legislative time limits whenever equity justifies it. *See Leschner v. Dep't of Labor & Indus.*, 27 Wn.2d 911, 926, 185 P.2d 113 (1947). In *Leschner*, the worker's doctor falsely represented that he had filed the worker's claim. The worker argued that the court should extend the *Ames* principle to permit the Department to consider untimely but meritorious claims whenever for equitable reasons the Department

should be estopped to assert the time limits. *Id.* The court held that such a rule "would be a dangerous path to follow." *Id.*

> Such a rule could only be in disregard of the universal maxim that ***ignorance of the law excuses no one***. What is more important, it ***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. (emphasis added).

Our Supreme Court considered equitable tolling of the Department's deadlines again in *Rodriguez v. Dep't of Labor & Indus.*, 85 Wn.2d 949, 540 P.2d 1359 (1975) and *Kingery v. Dep't of Labor & Indus.*, 132 Wn.2d 162, 937 P.2d 565 (1997). In *Rodriguez*, the court held that "extreme illiteracy" could satisfy the requirement of mental incompetence established in *Ames*. *Rodriguez*, 85 Wn.2d at 954. In *Kingery*, the court rejected a plea for equitable tolling because the claimant had not shown that she acted with reasonable diligence. *Kingery*, 132 Wn.2d at 178.

The foregoing cases involved administrative deadlines. The Washington courts did not recognize equitable tolling of statutory limitations for the filing of civil lawsuits until 1991. *See Douchette v. Bethel School Dist. No. 403*, 117 Wn.2d 805, 810-11, 818 P.2d 1362

(1991). In *Douchette*, the Supreme Court declined to rule out the possibility that such a limitation could be equitably tolled, but refused to do so under the facts of that case. The plaintiff had not acted diligently and had not been misled as to her rights. *Id.* at 812. "In the absence of bad faith on the part of the defendant and reasonable diligence on the part of the plaintiff, equity cannot be invoked." *Id.*

From these principles, our Supreme Court has adopted a framework for equitable tolling of statutory limits on judicial action. *Bonds*, 165 Wn.2d at 141. Equitable tolling is permitted only "when justice requires and when the predicates for equitable tolling are met." *Id.* (citing *Millay v. Cam*, 135 Wn.2d 193, 206, 955 P.2d 791 (1998)). Thus, the framework requires a plaintiff to first show the predicates, and then show that justice requires tolling. *See Millay*, 135 Wn.2d at 206.

The required predicates are: (1) "bad faith, deception, or false assurances by the defendant"; and (2) "the exercise of diligence by the plaintiff." *Id.* (citing *Finkelstein v. Security Properties, Inc.*, 76 Wn. App. 733, 739-40, 888 P.2d 161 (1995)). The doctrine does not extend "to a garden variety claim of excusable neglect." *State v. Duvall*, 86 Wn. App. 871, 875, 940 P.2d 671 (1997) (quoting *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 (1990)). "The party asserting that equitable

tolling should apply bears the burden of proof." *Nickum*, 153 Wn. App. at 379 (citing *Benyaminov*, 144 Wn. App. at 767). New Cingular did not carry its burden of showing that equitable tolling should apply here.

4. **New Cingular failed to produce any evidence on the predicates for equitable tolling.**

Because New Cingular failed to produce any evidence to support either of the two prerequisites for equitable tolling, the trial court erred in applying the doctrine. New Cingular bears the burden of showing both predicates, and its failure to show either one, on its own, precludes equitable tolling. *Bonds*, 165 Wn.2d at 141.

The material facts relevant to the predicates are not disputed. New Cingular will argue, however, that it is entitled to favorable inferences under the summary judgment standard. This is true only to the extent the Court reviews the denial of the City's motion for summary judgment. In reviewing the summary judgment that was *sua sponte* granted to New Cingular, however, the Court must view all inferences *in the City's favor*. *See Jacobsen*, 89 Wn.2d at 109; *Burris*, 16 Wn. App. at 75-76.

a. New Cingular failed to produce any evidence of deception, bad faith, or false assurances.

The Supreme Court recently reaffirmed that a plaintiff seeking to invoke equitable tolling must prove "bad faith, deception, or false

assurances" by the defendant. *In re Haghighi*, 178 Wn.2d 435, 466, 309 P.3d 459 (2013). In a vain effort to make this showing, New Cingular offered nothing more than a speculative theory: that the seventeen months from the time it filed its administrative claim to the time the City denied the claim was an unreasonable processing time and that this constituted bad faith. This theory suffers from at least three fatal flaws.

First, New Cingular did not offer ***any*** evidence to support its conclusory assertion that the processing time was unreasonable. When the City asked New Cingular to identify its evidence of deception, bad faith, or false assurances, New Cingular responded only with objections. CP 187. The trial court apparently recognized this absence of proof when it stated that it was "not criticizing the length of time." RP 14.

There was no evidence as to how long it should take a municipality to process a complex request for hundreds of thousands of dollars in tax refunds. The only evidence that even addressed processing time was the admission by AT&T's Director of Transaction Tax Operations that due to "the volume and complexity of the data, the process of taxing jurisdictions' evaluation of the refund claims has been lengthy." CP 244.

Nor did New Cingular explain how the City's processing time could possibly be unreasonable, given the considerably longer timeframes

involved in New Cingular's own processing. It allegedly took New Cingular at least *five years* to discover its alleged overpayments. CP 280. After New Cingular submitted its administrative refund request, it took *nineteen* months to identify a significant error in its own calculations. CP 293. And yet, New Cingular now speculates that the City acted in bad faith by taking seventeen months to process the claim.

Second, even assuming *arguendo* that the processing time was unreasonable, New Cingular could not cite to a single case in which delay alone constituted deception, bad faith, or false assurances. To the contrary, merely showing that an agency could have done something different or better does not establish the type of bad faith contemplated by this doctrine. *See, e.g., Graham Neighborhood Ass'n v. F.G. Associates*, 162 Wn. App. 98, 252 P.3d 898 (2011) (no equitable tolling of deadline to appeal cancellation of plat application, where county advised applicant of impending cancellation one year in advance but gave no notice once the application was canceled); *Benyaminov*, 144 Wn. App. at 763 (trial court erred in equitably tolling deadline to withdraw guilty plea, where only ground for tolling was that defendant was not advised of immigration consequences of his conviction). Thus, New Cingular cannot prove this requirement as it merely argues that the City should have acted faster.

Indeed, the notion of delay as bad faith defies common sense, because there was no advantage to the City in a longer processing time. If New Cingular had followed the administrative process to completion, it had the right, under both city and state law, to seek judicial review of the denial. *See* BMC 5.08.220, .230; RCW 7.16.040; *Kerr-Belmark Const. Co. v. City Council of City of Marysville*, 36 Wn. App. 370, 371-73, 674 P.2d 684 (1984). Thus, the administrative process gave New Cingular redress in court, regardless of the length of the City's processing time. The statute of limitations comes into play only because New Cingular failed to exhaust its administrative remedies and instead sought a refund directly from the court.

Finally, even if there had been some factual support for the claim that the processing time was unreasonable, and even if there had been some legal support for the argument that taking too long can equal deception, bad faith, or false assurances, there was still no evidence tying the alleged delay to the timeliness of this action. New Cingular merely argued that seventeen months was an unreasonable time. But it did not offer the testimony of a *single* New Cingular employee or other witness who could say that the lack of an earlier denial somehow confused it, misled it, or otherwise interfered with its ability to pursue this claim.

In response to the City's summary judgment motion, New Cingular cited only two Washington cases that applied equitable tolling: *Millay* and *Duvall*. In both of these cases, the courts articulated not only how the defendant engaged in deception, bad faith, or false assurances, but also exactly how this interfered with the ability to comply with deadlines.

Millay was a lien foreclosure case, in which the parties were lien creditors competing to redeem foreclosed real property. To redeem the property from the defendant, who was in possession of the property, the plaintiff was required to pay various sums, including the amount of any senior liens held by the defendant. *Millay*, 135 Wn.2d at 200 (citing RCW 6.23.040(3)). The defendant submitted a statement which grossly exaggerated the sum required. *Id.* at 197. The trial court noted a "strong aura of fraudulent manipulation" in the asserted interests. *Id.* at 198.

The defendant's misrepresentations imposed a dilemma for the plaintiff. He had to either: (1) pay the overstated amount; or (2) risk the possibility that one or more of the questionable interests was valid. *Id.* at 207. If he failed to pay any valid senior lien of which he had notice, he would lose the right to redeem. *Id.* (citing RCW 6.23.050). The Supreme Court held that these circumstances required a factual determination as to whether equitable tolling applied. *Id.* at 207.

Duvall arose from a criminal restitution order. Before the sentencing hearing, the defendant's attorney signed an agreed restitution order on the defendant's behalf. *Duvall*, 86 Wn. App. at 873. But at the hearing, the defendant explicitly refused to waive his right to be present at the restitution setting. *Id.* The trial court later entered the restitution order *ex parte*. *Id.* When the defendant learned of this order, he moved to vacate it because he had not waived his right to be present when restitution was set. *Id.* The trial court vacated the order, but then entered a new restitution order in the defendant's presence. *Id.*

The defendant argued that the new order was entered after the time limit for restitution orders. *Id.* at 874. Equitable tolling applied because defense counsel's signature on the first "agreed" restitution order was a "false assurance" that induced the trial court to believe a hearing in the defendant's presence was unnecessary. *Id.* at 875. The trial court's reliance on this purported consent was justifiable. *Id.* (citing *State v. Peeler*, 7 Wn. App. 274, 499 P.2d 90 (1972)). Here, in contrast, New Cingular failed to present any evidence as to how the processing time had any effect whatsoever on New Cingular's decision making.

b. New Cingular failed to show that it acted with reasonable diligence.

The other prerequisite to equitable tolling requires a plaintiff to show that it was reasonably diligent in pursuing its claim. *Bonds*, 165 Wn.2d at 141. The failure to prove this requirement is fatal to a claim for equitable tolling. *Id.* As a matter of law, New Cingular cannot show reasonable diligence where it *ignored* its claim for more than a year and then failed to pursue available remedies.

The policy behind the diligence requirement "is tersely expressed in an ancient maxim: Equity aids the vigilant, not those who slumber on their rights." *Leschner*, 27 Wn.2d at 927. Reasonable diligence is a question of law if reasonable minds could not differ. *Cawdrey v. Hanson Baker Ludlow Drumheller, P.S.*, 129 Wn. App. 810, 818, 120 P.3d 605 (2005) (citing *Goodman v. Goodman*, 128 Wn.2d 366, 373, 907 P.2d 290 (1995)). Where a party fails to avail itself of existing regular mechanisms, it has not exercised reasonable diligence. *Kingery*, 132 Wn.2d at 176.

In *Kingery*, for example, our Supreme Court held that a widow's failure to invoke her rights under the autopsy statutes evinced a lack of diligence that precluded equitable tolling. Her husband died in the course of his employment while operating a road grader. *Id.* at 165. The Department denied the widow's claim for benefits because an autopsy

found that the husband had died of natural causes. *Id.* at 165-66. The widow, whose attorney withdrew after the denial, claimed that in the ensuing years the coroner's office refused her repeated requests for a copy of the autopsy report, until her congressman intervened. *Id.* at 166. The coroner eventually reopened the investigation and determined that the husband had died of an industrial injury. *Id.* at 167. The Department then denied the widow's renewed claim as untimely. *Id.*

The Supreme Court held that the widow had not "established a basis in equity for relief" because she had not acted diligently. *Id.* at 176. The Court explained that the widow could have retained her own expert and that a statute gave her the right to schedule a meeting with the coroner on the autopsy findings. *Id.* Equitable relief was not appropriate because she "failed to timely utilize existing regular mechanisms" and "did not diligently pursue remedies available to her." *Id.* at 178.

Here, it is undisputed that New Cingular did not pursue available remedies, even though—unlike the widow in *Kingery*—it was at all times represented by able legal counsel. After submitting its claim in November 2010, New Cingular waited more than a year to have any further contact with the City. Throughout this time, it never requested the conference with the city treasurer for examination and review of its tax liability, as

explicitly permitted in BMC 5.08.210. CP 276. When the claim was denied, New Cingular failed to pursue its rights of appeal to the City Council and superior court. *See* BMC 5.08.220, .230; CP 276.

Because New Cingular failed to timely utilize these existing regular mechanisms, it did not diligently pursue the remedies available to it. *Kingery*, 132 Wn.2d at 178. *See also Graham Neighborhood*, 162 Wn. App. at 120 (holding that requisite diligence was "unequivocally absent" where claimant failed to properly appeal from administrative decision). Had it done so, it would have preserved its right to bring its November 2010 claim to the superior court. Equitable tolling is not available on these undisputed facts.

5. **New Cingular failed to show that justice requires tolling.**

Under the Washington framework, once a plaintiff establishes the requirements for the doctrine's application, it must then show that justice requires tolling of the given time limit. *Bonds*, 165 Wn.2d at 141. Because New Cingular failed to show that it met the required predicates, the question of whether it can make an argument under the "justice requires" portion of the framework is irrelevant. *See, e.g., Graham Neighborhood*, 162 Wn. App. at 120 (holding that because the claimant failed to establish the predicates, the court lacked equitable authority to

absolve the claimant of its failure to comply with a county ordinance). Nonetheless, the doctrine is inapplicable here for the additional reason that New Cingular failed to demonstrate that justice requires equitable tolling under the facts of this case.

The trial court and New Cingular offered four arguments as to why the statute should be tolled: (1) tolling as of the date the administrative refund claim is filed would save the parties the trouble of an immediate lawsuit; (2) any rule must be applied evenly, regardless of whether the claimant is a large, sophisticated corporation or an unrepresented individual; (3) there is supposedly no prejudice to the City; and (4) tolling is consistent with the policies stated in Washington's Taxpayer Bill of Rights. As explained below, none of these arguments has any merit.

a. Because the administrative process is a path to superior court, equitable tolling is unnecessary to preserve the earlier tolling date.

New Cingular's primary argument for equitable tolling was that the doctrine applied here would eliminate the need for a taxpayer to file an immediate lawsuit to preserve the tolling date. According to New Cingular, if the limitations period were not tolled by the filing of a refund application, "then taxpayers would be forced to commence litigation to ensure tolling of the statute of limitations." CP 187. Aside from the fact

that this argument could apply to virtually any cause of action, the additional flaw is that it relies on a false premise: that a separate lawsuit is the only relief available if a claimant is dissatisfied with a city's decision.

As explained above, New Cingular had the right, under the BMC, to appeal the denial of its claim to the City Council and eventually to the superior court. *See* BMC 5.08.220, .230. Even in cities with less explicit remedies, New Cingular would still have a right to file a writ of certiorari in the superior court, seeking judicial review of the denied claim. *See* RCW 7.16.040; *Kerr-Belmark*, 36 Wn. App. at 371-73. Thus, New Cingular could have preserved the tolling date from its original claim simply by following the administrative process to completion. New Cingular's tactical decision to abandon this process is not a ground for equitable intervention.

In fact, our Supreme Court recently clarified that even where a party is justified in abandoning the administrative process, the earlier administrative filing cannot be used to avoid the statutory limits on judicial action. *See Cost Management*, 310 P.3d at 813. When the City of Lakewood failed to respond to an administrative tax-refund claim, the claimant, CMS, filed an original action in superior court. *Id.* at 810. It

then requested, and the trial court granted, a writ of mandamus ordering Lakewood to respond to the original refund claim. *Id.* at 812.

The Court held that Lakewood's failure to respond to the claim absolved CMS of the duty to exhaust remedies. *Id.* at 810. But it reversed the order of mandamus, in a unanimous decision, stating that "the problem is that CMS might get any recovery for the stale, time-barred, portion of its claim." *Id.* at 813. "In essence, CMS seeks to use the administrative process to revive a claim otherwise barred by the three year statute of limitations." *Id.*

The administrative process cannot be used in this manner:

> Here, CMS seeks mandamus for the express purpose of reaching back beyond the legal statute of limitations. We do not think the statute of limitations can be overcome by such a use of the administrative process. Under the circumstances of this case, we hold that ***CMS cannot choose first to pursue recovery through the courts, and then attempt to bypass the statute of limitations that necessarily applies as a result of that choice by seeking relief through the administrative process***.

Id. (emphasis added).

What CMS attempted to do with the writ of mandamus is exactly what New Cingular attempts to do with its proposed expansion of the equitable tolling doctrine. New Cingular made a strategic choice to pursue

this claim in superior court. It then raised equitable tolling, by virtue of the administrative process, in an "attempt to bypass the statute of limitations that necessarily applies as a result of that choice." *Id.* In essence, New Cingular "seeks to use the administrative process to revive a claim otherwise barred by the three year statute of limitations." *Id. Cost Management* controls this case and mandates that the administrative process cannot revive the time-barred portion of New Cingular's claim.

The Supreme Court also recently clarified that equitable tolling is not appropriate when a claimant has other means to preserve its tolling date. *See Haghighi*, 178 Wn.2d at 448.[4] In *Haghighi*, the defendant filed a timely personal restraint petition ("PRP"). *Id.* at 440. After the PRP deadline, he filed an amended PRP, alleging that his prior counsel had rendered ineffective assistance by failing to preserve his challenge to the inevitable discovery doctrine, which was declared unconstitutional after his conviction. *Id.* at 440-41.

The Court rejected his request to equitably toll the PRP deadline, explaining that it would be "both unwise and unnecessary to expand the doctrine beyond the traditional standard." *Id.* at 448. "Any lower

[4] Both *Cost Management* and *Haghighi* were decided after the summary judgment hearing in this case. The trial court thus did not have the benefit of our Supreme Court's most recent guidance on these issues.

standard would require the courts to constantly define the doctrine's boundaries and call into question the statutorily established finality." *Id.* The court also explained that "equitable tolling has a more limited role . . . which makes it necessary to adhere to a stricter standard" when a party has other means of preserving its claim. *Id.* The defendant knew all the facts relevant to ineffective assistance when he filed his initial appeal, and nothing prevented him from raising it in his timely PRP. *Id.* at 449.

Likewise, here, New Cingular indisputably had all the necessary facts by November 2010 at the latest. The administrative process adequately protected New Cingular's right to seek judicial review of its refund claim, with the November 2010 tolling date. It was thus "both unwise and unnecessary to expand the doctrine beyond the traditional standard." *Id.*

b. The equitable tolling doctrine differentiates among claimants with varying levels of sophistication.

Apparently recognizing that New Cingular should have been aware of the statute of limitations, the trial court expressed concern that its ruling should be one that can be applied equally to less sophisticated plaintiffs. The trial court stated that "if it wasn't New Cingular Wireless sitting over there and it was some individual, unrepresented party, who was in the same or similar circumstance, I'd have very little reticence to find

equitable tolling applied because it would be the fair thing to do." RP 45. The court went on to say "the fact that this is a huge corporation, and so forth, shouldn't change the analysis." RP 45.

What the court overlooked was that the claimant's circumstances and level of sophistication necessarily affect the analysis of equitable tolling. *See Rodriguez*, 85 Wn.2d at 955. In *Rodriguez*, for example, the Supreme Court stressed that the claimant was an extremely illiterate migrant farm worker who spoke only Spanish and could not read or write English or Spanish. His lack of sophistication, along with the fact that his interpreter was hospitalized and unavailable when he received an order closing his industrial insurance claim, was central to the decision to toll the administrative filing deadline.[5] *See id.*

On the other hand, when a plaintiff is sophisticated the courts will take that into account as well. *See Finkelstein*, 76 Wn. App. at 740. In *Finkelstein*, for example, the court held that the trial court erred in applying equitable tolling where the plaintiff was an attorney. The case involved the dissolutions of two partnership agreements. *Id.* at 734. The plaintiff filed bankruptcy in 1981. *Id.* Subsequent amendments to the

[5] *Rodriguez* arguably did not consider whether the predicates were met. However, it involved administrative deadlines and was decided sixteen years before the Supreme Court articulated these requirements for applying equitable tolling to statutory limits on judicial action. *See Douchette*, 117 Wn.2d at 810-12.

partnership agreements were ambiguous as to whether the plaintiff remained a partner. *Id.* at 739. By statute, however, a bankrupt individual cannot remain a partner. *Id.* (citing RCW 25.04.310(5)).

This Court held that equitable tolling could not apply because, notwithstanding the ambiguity in the documents, the plaintiff as an attorney should have known that he had been eliminated in 1981:

> Assuming, without deciding, that equitable tolling may be applied in this type of situation, it would not apply to the facts of this case. Finkelstein was a lawyer, and he should have known the effects of his bankruptcy on his business affairs.

Id. at 740.

Just as this Court took into account the fact that the plaintiff in *Finkelstein* was a lawyer, so the trial court should have taken into account that New Cingular is "a huge corporation." RP 45. The Washington equitable tolling doctrine specifically allows New Cingular to be treated differently than "some individual, unrepresented party." RP 45. New Cingular, a sophisticated corporation represented at all times by equally capable legal counsel, should have known how the statute of limitations works under Washington law.

c. Tolling is prejudicial to the City.

New Cingular also argued that there is no prejudice to the City in tolling the statute of limitations. Evidence on this issue was not developed because New Cingular never filed a motion for summary judgment. But equitable tolling would prejudice the City in a specific and tangible way, by increasing the preserved portion of New Cingular's claim.

The BMC allows a party to seek administrative refunds of taxes paid in the preceding two years. BMC 5.08.110. As such, when New Cingular filed its administrative refund claim in November 2010, it preserved a claim going back to November 2008. The limitations period for tax refunds under state law, however, is three years from the date of payment. *Hart*, 52 Wn. App. at 117. New Cingular will thus undoubtedly claim that the trial court's tolling order allows it to seek a refund of taxes paid as early as November 2007.

The Court may take notice that the City is a municipality which, like all government entities, must budget its expenses. When a corporation negligently overpays its taxes and then demands a refund of hundreds of thousands of dollars, it disrupts the budgeting process. This harm would be exacerbated if the filing of a new lawsuit, years later, could drastically increase the claim.

d. Under Washington law, New Cingular had a responsibility to know and understand the tax laws.

Finally, New Cingular cites to Washington's Taxpayer Bill of Rights for the argument that the State's public policy somehow favors equitable tolling. That statute is simply *inapplicable* here. New Cingular admits that the Taxpayer Bill of Rights is "not strictly applicable to cities." CP 237. And, the portions cited by New Cingular say nothing about the statute of limitations. *See* RCW 82.32A.005. Rather, they focus on the importance of accurate information, instructions, and procedures. RCW 82.32A.005(2). There is nothing unclear or inaccurate about the City's refund procedures.

Moreover, the Taxpayer Bill of Rights contains no requirement that the taxing authority explain the taxpayer's obligations. *Tracfone Wireless, Inc. v. Dept. of Revenue*, 170 Wn.2d 273, 291, 242 P.3d 810 (2010). Rather, the Legislature has found "that the Washington tax system is based largely on voluntary compliance and that taxpayers have a responsibility to inform themselves about applicable tax laws." RCW 82.32A.005(2). Thus, New Cingular must take responsibility for its own failure to familiarize itself with the BMC and the statute of limitations.

6. **New Cingular's out-of-state cases are not helpful.**

In support of its position, New Cingular offered a smattering of cases from other jurisdictions. CP 234-37. Reliance on out-of-state authority is unnecessary because Washington law fully disposes of New Cingular's arguments. To the extent there was ever any doubt about whether equitable tolling could apply under these circumstances, our Supreme Court recently dispelled it—and rejected New Cingular's arguments—in *Cost Management* and *Haghighi*.

In any event, New Cingular's proffered authority is unpersuasive. The cited federal cases did not apply New Cingular's proposed rule. In fact, New Cingular failed to cite any case applying this rule outside the State of California. Because California law conflicts with the Washington equitable tolling doctrine, reliance on these cases is not appropriate.

a. New Cingular's federal cases illustrate why equitable tolling was inappropriate under the facts of this case.

New Cingular's federal cases not only fail to apply New Cingular's proposed rule, but also actually undermine New Cingular's position. For example, New Cingular referred to a "rebuttable presumption" that federal statutes of limitations may be subject to equitable tolling. *Holland v. Florida*, 560 U.S. 631, 130 S. Ct. 2549, 2560-61, 177 L.Ed.2d 130 (2010).

This presumption refers only to whether the doctrine can ever apply to a given statute, not to whether it applies in a given case. *See id.* Once the federal courts decide that a statute can be subject to equitable tolling, the petitioner must still prove "'(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." *Id.* at 2562 (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)).

New Cingular also argued that equitable tolling in the tax-refund context is appropriate where the law is unclear and where there would be an absence of prejudice to the taxing authority, citing *Capital Tracing, Inc. v. U.S.*, 63 F.3d 859, 862 (9th Cir. 1995). *Capital Tracing* involved a special circumstance in which: (1) there was conflicting Ninth Circuit authority as to the method by which a wrongful levy action must be filed; (2) an intervening Ninth Circuit decision clarified the issue; and (3) the clarifying decision required the plaintiff to pursue the claim under a statute for which the limitations period had already expired when the decision was issued. *See id.* at 860-63. This was a "unique situation" in which the court "set forth new law." *Id.* at 863. Here, in contrast, there has never been any confusion as to whether the three-year statute of limitations applies to tax-refund actions in superior court.

Finally, New Cingular's citation of *Tenpenny v. U.S.*, 490 F.Supp.2d 852 (N.D. Ohio 2007), is unhelpful to its position. In *Tenpenny*, the trial court explained in detail the precise manner in which confusion created by the government and the trial court misled the *pro se* plaintiff as to her rights. The trial court had previously dismissed the plaintiff's action based on a failure to exhaust administrative remedies. *Id.* at 854.

When the plaintiff completed the administrative action and re-filed her complaint, the trial court found that the action was untimely. *Id.* at 859. However, the court acknowledged that its decision to dismiss the action earlier may have been incorrect and that its own language in the prior order was confusing and likely misled the plaintiff as to when she needed to re-file. *Id.* at 860. "*Under the unique circumstances of this case*," which included a *pro se* litigant and the court's complicity in confusing her as to filing requirements, equitable tolling was necessary to prevent injustice. *Id.*

In both *Tenpenny* and *Capital Tracing*, the court that eventually tolled the limitations period acknowledged that it had contributed to the plaintiff's confusion. These cases simply underscore New Cingular's complete lack of evidence. In discussing *Tenpenny*, New Cingular argued

that the City's actions caused it confusion, but it presented absolutely no evidence to support that assertion. CP 234. New Cingular, a sophisticated corporate litigant, could not present the testimony of a single employee who could claim that anything the City did confused it in any way.

b. California law conflicts with Washington law.

Ultimately, New Cingular's argument boiled down to a request to apply California law, which apparently allows courts to apply equitable tolling where a claimant voluntarily pursues an internal administrative remedy before filing a complaint. *See McDonald v. Antelope Valley Community College District*, 45 Cal.4th 88, 96, 84 Cal.Rptr.3d 734, 194 P.3d 1026 (2008). In *McDonald*, the California Supreme Court held that an employee's filing of a voluntary action with the California Department of Fair Employment and Housing could toll the statute of limitations for a lawsuit under the California Fair Employment and Housing Act. *Id.*

New Cingular's effort to draw parallels between this case and *McDonald* hinged on its misapprehension that the administrative remedy here was voluntary under *Qwest*, 161 Wn.2d at 371. Our Supreme Court, however, recently rejected this position. *Cost Management*, 310 P.3d at 812. This destroyed New Cingular's premises both that this is an issue of first impression and that *McDonald* is analogous. *See* CP 234-37.

In any event, California authority on equitable tolling is inapposite because California does not require bad faith, deception or false assurances as a predicate. *See Structural Steel Fabricators, Inc. v. City of Orange*, 40 Cal.App.4th 459, 464-65, 46 Cal.Rptr.2d 867 (1995) (quoting *Addison v. State*, 21 Cal.3d 313, 319, 146 Cal.Rptr. 224, 578 P.2d 941 (1978)) ("Equitable tolling has three elements: 'timely notice, and lack of prejudice to the defendant, and reasonable and good faith conduct on the part of the plaintiff.'"). Under Washington law, New Cingular's failure to show this predicate is fatal to its equitable tolling arguments. *Haghighi*, 178 Wn.2d at 466.

7. **Equity disfavors New Cingular under the facts of this case.**

Equity is simply not available to New Cingular here. Equity exists "to protect those who are unable to protect themselves." *Ames*, 176 Wash. at 513. Far from the "violently insane" claimant in *Ames* or the "extremely illiterate" farm worker in *Rodriguez*, New Cingular is a sophisticated corporate litigant which was at all times represented by able legal counsel. Its claims of ignorance of the law are unavailing. *Leschner*, 27 Wn.2d at 926.

Further, New Cingular *caused* all of the problems that have brought the parties before this Court. "The first maxim in equity is: 'He

who seeks equity must do equity.'" *People's Sav. Bank v. Bufford*, 90 Wash. 204, 208, 155 P. 1068 (1916). By its own allegations, New Cingular was at least negligent in calculating its tax liability. *See* CP 12-13. It then entered into a settlement agreement in which it avoided all of the responsibility for compensating the customers it had overcharged and instead placed the entire burden of this repayment on the taxing jurisdictions that received its tax payments in good faith. CP 14.

New Cingular represented to the trial court that it followed individual cities' claim procedures. CP 16. But it indisputably did not comply with the process set forth in the BMC. *See* CP 276. Once its claim was denied, it ignored the BMC's appeal process and filed a direct court action. *See* CP276. Had it simply followed the BMC, there would be no need for equitable tolling. New Cingular cannot invoke equity to escape the consequences of its tactical decision not to exhaust remedies.

F. CONCLUSION

The trial court erred in denying the City's motion and in *sua sponte* granting summary judgment to New Cingular. New Cingular presented no evidence whatsoever to satisfy Washington's requirements for equitable tolling, and the trial court's decision to extend Washington law and toll the

statute of limitations without such evidence infringed on the province of the legislature.

The trial court's decision must be reversed, with instructions to enter partial summary judgment for the City, limiting New Cingular's claim to a refund of taxes paid after April 25, 2009.

RESPECTFULLY SUBMITTED this 17th day of January, 2014.

OGDEN MURPHY WALLACE, P.L.L.C.

By _____
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DECLARATION OF SERVICE

Carole Henry hereby makes the following declaration:

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 foregoing Brief of Appellant City of Bothell as follows:

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on the 21st day of January, 2014.

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

Jan 21/14 Seattle WA
Date and Place

Carole Henry
Carole Henry