No. 91978-0

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

NEW CINGULAR WIRELESS PCS, LLC,

Appellant

v.

THE CITY OF CLYDE HILL, WASHINGTON,

Respondent

ON PETITION FOR REVIEW FROM
COURT OF APPEALS, DIVISION I
(Court of Appeals No. 71626-3-I)

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

New Cingular Wireless PCS, LLC collects local utility taxes from its customers, and then pays those taxes to the various municipalities where the customers reside. Several years ago, New Cingular was sued on the theory that some of those local taxes were preempted by federal law and should not have been collected. To settle that class action suit, New Cingular entered into a court-approved settlement in which it agreed to seek refunds of the challenged taxes from over a thousand states and local municipalities around the country for the benefit of the class. One of those municipalities was the City of Clyde Hill and, in 2010, New Cingular filed a refund claim with the city for approximately $22,000.

Clyde Hill refused to act on the refund claim. So, after nearly a year and a half, New Cingular filed a lawsuit to compel Clyde Hill to process its refund claim. Clyde Hill still didn't take any action on New Cingular's refund claim (and is currently fighting the refund suit in federal court), and instead sent New Cingular a "Notice of Violation," in which the city assessed New Cingular a fine on the grounds that the original overstated returns were "false or fraudulent." The Notice of Violation demanded New Cingular pay a civil penalty of more than $293,000.

New Cingular appealed the fine to the city's mayor, who rejected it after a five minute informal telephonic hearing. New Cingular then filed

this declaratory judgment action, invoking the superior court's original trial jurisdiction to decide cases involving the "legality of any ... municipal fine." But the superior court dismissed the case, agreeing with Clyde Hill that New Cingular could only invoke the court's appellate jurisdiction by writ of review—which New Cingular did not do. To add insult to injury, the court entered judgment for the city in the amount of the fine, plus interest and attorneys' fees. In short, as a result of its request for a $22,000 refund, New Cingular was liable for over $400,000 in fines and fees.

The Court of Appeals reversed and remanded, so that Clyde Hill now has to justify its fine on the merits. There is no error, and no grounds for review. The Court of Appeals correctly held that the Washington Constitution gives superior courts original jurisdiction over cases involving the legality of any "municipal fine," and the legislature has never limited that jurisdiction to appellate review. After exhausting the city's limited administrative process, New Cingular had a choice of either invoking the superior court's original trial jurisdiction by filing a complaint or its appellate jurisdiction by seeking a writ of review. It chose the former. Clyde Hill's Petition for Review (the "Petition") should be denied.

II. COUNTERSTATEMENT OF THE ISSUES

1. Did the Court of Appeals properly hold that Article IV, § 6 of the Washington Constitution conferred the superior court with original

trial jurisdiction over New Cingular's challenge to the legality of Clyde Hill's municipal fine? **Yes.**

2. Did the Court of Appeals properly hold, given New Cingular's election to invoke the superior court's original trial jurisdiction by filing a complaint, that it would be improper to apply a 30-day time limit to New Cingular's declaratory judgment action? **Yes.**

III. COUNTERSTATEMENT OF THE CASE

The Opinion contains a concise and accurate statement of the facts and proceedings below, which New Cingular incorporates by reference. Op. at 1-4. Clyde Hill claims that the Court of Appeals ignored the record in stating that the "city administrator offered New Cingular the choice of an 'informal hearing' or a decision based on its written protest alone"—suggesting that New Cingular cavalierly chose to forego a formal hearing. Pet. at 2-3 & n. 2. The Court of Appeals got it right; there was never an opportunity for a formal hearing. The record ambiguously shows that the city gave New Cingular the opportunity for an "informal hearing" only, which New Cingular took. CP 594. The result, as the Opinion also correctly notes, was a five minute telephone call with the mayor. Op. at 3.

IV. ARGUMENT AGAINST REVIEW

The Opinion does not raise an issue of substantial public interest, nor does it conflict with prior case law. RAP 13.4(b). The Washington

Constitution gives superior courts original jurisdiction over cases involving the "legality of any ... municipal fine." Clyde Hill argues that this mandate is limited to the superior court's *appellate* jurisdiction and can be invoked only by writ of review. Wrong. Unlike the APA or LUPA, the legislature has not created procedural limits for judicial review of a municipal fine, nor does the writ of review statute itself create an exclusive means for review. The Opinion is entirely consistent with the prior decisions of this Court and the court of appeals in municipal tax cases, which hold that a party may invoke the superior court's original trial jurisdiction by filing a complaint.

A. The Court Of Appeals Correctly Held That The Superior Court Could Exercise Original Jurisdiction Over New Cingular's Declaratory Judgment Action.

1. The Washington Constitution Gives The Superior Court Original Jurisdiction Over Cases Involving Municipal Fines, Which The Legislature Has Never Limited.

Clyde Hill argues that the Opinion somehow runs afoul of the Washington Constitution. Pet. at 5. It doesn't. There's no dispute that the Constitution vests our state's superior courts with "original jurisdiction" in all cases involving the "legality" of any "municipal tax," WASH. CONST. Art. IV, § 6, and that the legislature implemented this grant by statute. RCW 2.08.010. Nor is there any dispute that Article IV, § 6 "pertains to both original trial jurisdiction and original appellate jurisdiction." *James v. County of Kitsap*, 154 Wn.2d 574, 588, 115 P.3d 286 (2005). Thus, as the

Court of Appeals properly recognized, the issue is whether there is some source of law that limits Article IV, § 6 such that the superior court can only exercise its appellate jurisdiction over challenges to a municipal fine.

The Opinion correctly holds that there is not. To be sure, the Clyde Hill Municipal Code, which states that a mayor's decision is final absent a "judicial appeal," cannot limit the superior court's original trial jurisdiction. As the Court of Appeals noted, this Court has held that " a municipality cannot limit the jurisdiction of the superior courts or prescribe the manner in which they operate." Op. at 5 (citing *City of Spokane v. J-R Distribs., Inc.*, 90 Wn.2d 722, 729, 585 P.2d 784 (1978) (the "jurisdiction and duties of the superior court ... must be conferred by the constitution and by legislative authority")). The lower courts have uniformly recognized this too. *See City of Tacoma v. Mary Kay, Inc.*, 117 Wn. App. 111, 115, 70 P.3d 144 (2003) (city code could not prescribe means of invoking superior court's original jurisdiction to the filing of a "notice of appeal").

As the Court of Appeals also properly recognized, only the state legislature can impose "procedural requirements" that effectively limit the superior court's jurisdiction over certain disputes to appellate review. Op. at 5-6 (quoting *James v. Kitsap County*, 154 Wn.2d 574, 588-89, 115 P.3d 286 (2005) ("state courts have required substantial compliance [with] ... the procedural requirements before they will exercise jurisdiction over the

matter")). The legislature did this, for example, when it enacted the Industrial Insurance Act. *Dougherty v. Dep't of Labor & Indus.*, 150 Wn.2d 310, 314-15, 76 P.3d 1183 (2003). It did it again with the APA. *Wells Fargo Bank, N.A. v. Dep't of Revenue*, 166 Wn. App. 342, 359-60, 271 P.3d 268 (2012). And with LUPA, too. *James*, 154 Wn.2d at 588-89.

Unlike these acts, "[n]o statute articulates specific procedures for getting into superior court with a challenge to the legality of a municipal fine." Op. at 6. Thus, after it exhausted its administrative remedies, New Cingular could invoke *either* type of superior court jurisdiction: original *trial* jurisdiction by filing a complaint, or *appellate* jurisdiction by seeking a writ of review.[1] New Cingular understandably chose the former. Clyde Hill's administrative process was perfunctory; there was no opportunity for discovery or evidentiary hearing. Appellate review of the agency "record" would amount to no review at all. New Cingular timely filed a complaint for a declaratory judgment to test the legality of city's fine *de novo*.

[1] Clyde Hill's suggestion that the Opinion allows litigants to bypass the APA or LUPA by filing a declaratory judgment actions is a red-herring. Pet. at 9. The Court of Appeals noted just the opposite: the APA and LUPA are comprehensive schemes imposing procedural requisites to superior court jurisdiction—making appellate jurisdiction the exclusive means of review. Op. at 6. Although the legislature could impose similar requisites to superior court jurisdiction over disputes regarding municipal taxes or fines, it never has. Indeed, that is the whole point of the Opinion.

2. The Opinion Follows The Decisions Of This Court And The Court Of Appeals, Which Recognize Superior Court Original Trial Jurisdiction In Cases Like This One.

There is no merit to Clyde Hill's claim that the Court of Appeals' holding is "unprecedented." Pet. at 8 & n. 9. In the analogous context of municipal tax disputes, over which Article IV, § 6 likewise confers original jurisdiction in the superior courts, this Court has recognized that a taxpayer has a choice of invoking the superior court's original trial jurisdiction or its appellate jurisdiction. *See Cost Mgmt. Servs., Inc. v. City of Lakewood*, 178 Wn.2d 635, 651, 310 P.3d 804 (2013) ("CMS chose to [file] suit in superior court. CMS could also have chosen (although it was not required to do so) to seek [a writ of] mandamus from the superior court"); *Qwest Corp. v. City of Bellevue*, 161 Wn.2d 353, 371, 166 P.3d 667 (2007) (Qwest "did not invoke the Superior Court's appellate jurisdiction .... Instead, ... it invoked the Superior Court's *original* jurisdiction").[2]

There's no conflict with any prior decision of the court of appeals, either. On the contrary, the Opinion is wholly consistent with, and follows, the holding in *City of Tacoma v. Mary Kay, Inc.*, 117 Wn. App. 111, 70

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[2] *Cost Management* clarified dicta in *Qwest* improperly conflating jurisdiction and exhaustion, holding that the "superior court's original jurisdiction over a claim does not relieve it of its responsibility to consider whether exhaustion should apply ...." 178 Wn.2d at 648. Importantly, *Cost Management* did not reject, much less overrule, *Qwest*'s recognition that the superior court had original trial jurisdiction in a municipal tax case; on the contrary, it reaffirmed and followed that principle itself.

P.3d 144 (2003)—which Clyde Hill tellingly tries (and fails) to dismiss in a footnote. Pet. at 8 n. 9. In *Mary Kay*, after the city's hearing examiner ruled that the city's tax was invalid, and all other administrative remedies were exhausted, the city sought to invoke the superior court's original *trial* jurisdiction so that it could obtain discovery and a trial *de novo*. *Id.* at 113. The court of appeals held that the superior court *could have* exercised original jurisdiction over the issue because the city's claim involved the "legality of any tax" under Article IV, § 6 and RCW 2.08.010. *Id.* at 115.

The problem, however, was that the city failed to properly invoke the court's jurisdiction when it filed a "notice of appeal." *Mary Kay* states clearly what the city should have done: "Tacoma could invoke the superior court's original jurisdiction ... by filing a complaint, CR 3 ..." *Id.* at 115. Or, alternatively, the city could have filed a writ of review, "[b]ut even if it had ... the superior court still would have been limited to a review on the record[.]" *Id.* at 115-116 & n. 6. The import of *Mary Kay* is plain: to challenge the legality of a municipal tax or fine in a *de novo* proceeding, a party should invoke the superior court's original *trial* jurisdiction "by filing a complaint." That is precisely what New Cingular did.

3. The Writ Of Review Statute Does Not Establish An Exclusive Means Of Seeking Judicial Review Of Quasi-Judicial Decisions Involving Municipal Fines.

Clyde Hill next argues that, just like the APA and LUPA, the legislature intended the writ of review statute to limit a superior court's original jurisdiction over *all* quasi-judicial municipal decisions to appellate review. Pet. at 10 ("RCW 7.16.040 clearly contains the Legislature's required procedures for securing judicial review of all types of quasi-judicial administrative decisions that have not otherwise been addressed by separate statutes."). The Opinion correctly rejected this argument as well. Op. at 6-7. Not only is it contrary to cases like *Cost Management* and *Mary Kay*, which recognize the superior court's original *trial* jurisdiction over analogous quasi-judicial municipal administrative tax decisions, it ignores the plain meaning and purpose of the writ statute itself.

The writ of review statute sets forth a procedure for invoking the superior court's *appellate* jurisdiction, but—as the Court of Appeals held—the statute does not curtail the superior court's original *trial* jurisdiction. Op. at 7. Unlike the APA, LUPA or other statutory schemes, RCW 7.16 does not expressly or implicitly establish an exclusive means of judicial review. *Compare* RCW 34.05.510 (APA "establishes the exclusive means of judicial review of agency action ..."); RCW 36.70C.030(1) (LUPA "shall be the exclusive means of judicial review of land use decisions.").

Rather, a statutory writ gives the superior court discretion to exercise *appellate* jurisdiction over quasi-judicial administrative decisions where there is "no appeal." RCW 7.16.040. Not surprisingly, no court has construed RCW 7.16's *grant* of appellate jurisdiction as an implicit *limitation* on the superior court's trial jurisdiction over the same dispute.

4. The Opinion Does Not Conflict With *Reeder*.

By the same token, the Opinion does not conflict with this Court's decision in *Reeder v. King Co.*, 57 Wn.2d 563, 564, 358 P.2d 810 (1961). *Reeder* held that a party challenging a municipal land-use decision could not seek declaratory relief if a writ of review was an "adequate remedy." *Id.* As a threshold matter, *Reeder* reflects a pre-LUPA policy requiring prompt review in the land-use context. *Federal Way v. King Co.*, 62 Wn. App. 530, 538, 815 P.2d 790 (1991) ("The consistent policy in this state is to review decisions affecting use of land expeditiously so that legal uncertainties can be promptly resolved and land development not unnecessarily slowed or defeated by litigation-based delays."). The precise holding in *Reeder* is now reflected in and superseded by LUPA itself.

To the extent *Reeder* applied beyond land-use cases, its reasoning was abrogated by CR 57. The availability of a writ of review is no longer a bar to a declaratory judgment action. As this Court held, "[t]he rule ... that declaratory relief will not lie where any alternative remedy is available,

was changed by court rule in 1967." *Ronken v. Bd. of Co. Comm'rs of Snohomish Co.*, 89 Wn.2d 304, 310, 572 P.2d 1 (1977) ("*Reeder* ... no longer control[s]"). The lower courts agree. *See Donald v. City of Vancouver*, 43 Wn. App. 880, 883 n. 2, 719 P.2d 966 (1986) ("defendants' attempt to defend the conclusion that [plaintiff] was not entitled to seek declaratory relief because he could have sought equivalent relief through a writ of review is not well taken. Such doctrine was overruled long ago").

Under CR 57, "[t]he existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate." As the Court of Appeals recognized, and subsequent case law confirms, a declaratory judgment action is "appropriate" unless "it is sought as a means of avoiding the strict statutory procedural rules and short time limits" legislatively imposed in comprehensive and exclusive statutory schemes. Op. at 9-10; *Stafne v. Snohomish Co.*, 174 Wn.2d 24, 39, 271 P.3d 868 (2012) (declaratory relief not available when LUPA provides exclusive remedy). Indeed, the UDJA says so specifically. RCW 7.24.146 ("This chapter does not apply to state agency action reviewable under [the APA]."). As discussed above, unlike the APA or LUPA, there is no statutory scheme imposing limits on the superior court's Article IV, § 6 jurisdiction over cases involving the legality of a "municipal fine."

5. The Opinion Does Not Conflict With Cases Requiring The Exhaustion Of Administrative Remedies.

Finally, this Court can easily dismiss Clyde Hill's suggestion that the Opinion is inconsistent with the exhaustion of administrative remedies doctrine. Pet. at 15-17. Jurisdiction and exhaustion are distinct concepts. "The exhaustion doctrine has no bearing on the jurisdiction of the court in terms of the constitutional power of the court to hear a case." *Cost Mgmt.*, 178 Wn.2d at 648. Rather, when jurisdiction exists, a superior court should consider, as a matter of "judicial administration" and "deference," whether "an adequate administrative remedy exists that the claimant should try first[.]" *Id.* Thus, in *Cost Management*, this Court found exhaustion excused. *Id.* at 643-45. In *IGI Res., Inc. v. City of Pasco*, 180 Wn. App. 638, 325 P.3d 275 (2014), the court found that it was not. *Id.* at 642. Critically, in both cases, there was no dispute that the superior court had original *trial* jurisdiction over the taxpayer's claims under Article IV, § 6.

New Cingular fully exhausted Clyde Hill's administrative process *before* filing suit. And, although irrelevant to the jurisdictional issue, New Cingular's election to file an original action did not, as Clyde Hill claims, render the process meaningless. Pet. at 16-17. As the Opinion notes, New Cingular's protest served a key purpose of the exhaustion doctrine in that it gave the "mayor an opportunity to correct errors Clyde Hill may have made

in imposing the fine," before resort to the courts. Op. at 8. The mayor simply refused to do so. Nor did New Cingular's election squander agency expertise or findings of fact developed during an adversarial proceeding; the mayor's "informal hearing" involved neither thing. For this reason too, the Opinion does not undermine the exhaustion doctrine. If anything, the lack of administrative process explains why New Cingular chose a *de novo* declaratory judgment action over limited appellate review.

B. The Court Of Appeals Correctly Concluded That New Cingular's Declaratory Judgment Action Was Not Subject To A 30-Day Statute Of Limitations Period.

Clyde Hill argued in both the trial court and on appeal that—even if the superior court had original jurisdiction over New Cingular's declaratory judgment action—the action was untimely. The UDJA does not have a limitations period. Thus, a declaratory judgment action must be brought within a reasonable time, "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. American Tower, Inc.*, 173 Wn. App. 154, 163, 293 P.3d 407 (2013). The trial court never reached the issue, *see* VRP at 13:22-14:2, and the Court of Appeals refused to affirm on this alternative ground, leaving the issue to the trial court. Op. at 11. The Court of Appeals held, however, that on remand it would be "inappropriate to apply a 30-day time limit by analogy to an appellate proceeding." *Id.*

That holding was plainly correct, and likewise presents no issue for review.[3] The Court of Appeals rightly rejected Clyde Hill's claim that a declaratory judgment action should be governed by the "same 30-day time limit applicable to a writ." Pet. at 18. Clyde Hill ignores the difference between the superior court's original trial jurisdiction and its appellate jurisdiction. A writ of review requires the court to act only in an appellate capacity and, thus, it is analogous to an appeal; time limits are usually measured in days. A declaratory judgment action, on the other hand, is a *de novo* proceeding and, thus, it is analogous—indeed, identical—to an ordinary cause of action; time limits are usually measured in years. *See, e.g., Schreiner*, 173 Wn. App. at 160-64 (six-year breach of contract limitations period applied by analogy in UDJA action).

New Cingular argued, and the Court of Appeal apparently agreed, that the most analogous limitations period is three years—which is "the time limit for seeking a refund of an illegal tax or fee" assessed by a municipality. *Carrillo v. City of Ocean Shores*, 122 Wn. App. 592, 610, 94 P.3d 961 (2004); *Robinson v. City of Seattle*, 119 Wn.2d 34, 830 P.2d 318

[3] Clyde Hill argues that the relevant time period for seeking a writ of review is 30 days. Pet. at 17-18. Maybe so, and New Cingular has never argued otherwise. But that issue is irrelevant, and provides no grounds for review. Because New Cingular never sought a writ of review, neither the trial court nor the Court of Appeals considered the timeliness of a writ. The only relevant issue, as the Court of Appeals recognized, is whether New Cingular's declaratory judgment action was timely.

(1992). Clyde Hill cannot distinguish this authority on the grounds that "[t]his is not an action to 'recover' taxes or fees." Pet. at 19. The fact that New Cingular brought a declaratory judgment action to *invalidate* an illegal municipal fine *before* it was paid, instead of bringing a refund action to *recover* an illegal fine *after* it was paid, is a superficial distinction without a difference; the nature of the action is the same. For purposes of analogy, the applicable limitations period is the same too.

V. CONCLUSION

The Petition for Review should be denied, so that New Cingular can challenge Clyde Hill's overreaching fine on the merits. The Opinion is neither novel nor unprecedented. If follows well-established principles of superior court original jurisdiction over cases involving municipal taxes and fines, as well as prior decisions of this Court and the court of appeals.

RESPECTFULLY SUBMITTED this 15th day of July, 2015.

LANE POWELL PC

By _____
Ryan P. McBride, WSBA No. 33280
Attorneys for Appellant New Cingular Wireless PCS, LLC

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury of the laws of the State of Washington that on July 15, 2015, I caused to be served a copy of the foregoing document to the following person(s) in the manner indicated below at the following address(es):

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Executed on the 15th day of July, 2015, at Seattle, Washington.

Kathryn Savaria

Kathryn Savaria

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