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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 305244-III

**COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON**

IGI Resources, Inc.

Respondent,

v.

City of Pasco,

Appellant.

Supplemental Brief of Respondent

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I. Introduction

On October 2, 2012, IGI Resources, Inc., (“IGI”) filed a statement of additional authorities advising this Court of the Court of Appeals, Division II’s publication in part of its opinion in *Cost Management Services, Inc. v. City of Lakewood and Choi Halladay*, Dckt. No. 41509-7-II *consolidated with* Dckt. No. 41744-8-II. That opinion was offered as additional authority on the issue of exhaustion of administrative remedies.

As the publication of *Cost Management Services, Inc. v. City of Lakewood* was subsequent to the preparation and filing of the Brief of Respondent, Respondent had no opportunity to brief the decision. At oral argument of this matter, significant attention was directed to the *Cost Management Services, Inc. v. City of Lakewood* matter, and the panel directed that the proceedings in this matter be stayed pending the decision and mandate by the Washington Supreme Court in the *Cost Management Services, Inc. v. City of Lakewood* case.

The Washington Supreme Court decided *Cost Management Services, Inc. v. City of Lakewood* on October 10, 2013, and its mandate was issued on November 6, 2013. *Cost Management Services, v. City of Lakewood*, Cause No. 87964-8 (slip op., Oct. 10, 2013) (hereinafter cited as Slip Op.).

This brief demonstrates that *Cost Management Services, Inc. v. City of Lakewood* establishes independent, additional grounds for sustaining the trial court decision in this matter. IGI had no obligation to exhaust administrative remedies under the facts of this case.

II. Summary of Argument

The trial court held that the city ordinances providing administrative procedures for refund of voluntary payments of any utility bill, fee, tax or other consideration for a service provided by the City were inapplicable to IGI because the moneys received from IGI were not for services provided by the City or taxes. RP 3-5 (Appended to Brief of Appellant).¹ *See also*, Brief of Respondent at 3, 4, and 9.

Even if it is assumed that the moneys received from IGI were for services provided by the City or taxes, the trial court decision that exhaustion was not required is still correct under the reasoning of *Cost Management Services, Inc. v. City of Lakewood* because:

- (i) IGI's claim for money had and received is a different claim than the one for which an administrative remedy is provided by the City code and

¹ Denying the City's motion for reconsideration, Judge Mitchell concluded "that the City of Pasco lacked the authority to assess a tax for activities conducted outside the city limits and that PMC 1.17.020 cannot properly be applied to the plaintiff's activities and/or the overpayment in this case." CP 11-12.

- (ii) The relief sought by IGI (refund of amounts paid over the preceding three years with prejudgment interest) was unattainable under City administrative proceedings.

III. Argument

A. *Cost Management Services, Inc. v. City of Lakewood*

Clarifies The Exhaustion Doctrine.

Cost Management Services, Inc. v. City of Lakewood clarifies that a superior court's original jurisdiction over a claim does not vitiate an exhaustion requirement. Slip Op. at 16. Focusing on matters where an administrative body and the superior court have concurrent original jurisdiction, the Supreme Court wrote: "[a] superior court's original jurisdiction over a claim does not relieve it of its responsibility to consider whether exhaustion should apply to the particular claim before the court." *Id. See also*, Slip. Op. at 14-16 (emphasis added).²

But, the conclusion that original jurisdiction does not vitiate an exhaustion requirement does not mean that exhaustion is required in all cases. In *Cost Management Services, Inc. v. City of Lakewood*, the Court

² The Supreme Court reasoned that exhaustion was a doctrine of judicial administration and that courts applying the exhaustion doctrine consider whether an adequate administrative remedy exists and whether the judiciary should give proper deference to a body possessing expertise outside the conventional expertise of judges. While IGI would argue before the Supreme Court that the constitutional grant of original jurisdiction is for the benefit of plaintiffs and therefore not amendable to delegation or deference to inferior tribunals, for the reasons explained in text, the reasoning of *Cost Management Services, Inc. v. City of Lakewood* compels the conclusion that IGI had no need to exhaust Pasco's administrative remedy.

held that exhaustion was not required because “the administrative process available to CMS could not have provided an adequate remedy ...” Slip Op. at 11.

Clarifying the doctrine further the Supreme Court wrote “[t]he primary question in exhaustion cases is whether the relief sought can be obtained through an administrative remedy;” Slip Op. at 7, and held “[e]xhaustion is required *only* if an administrative remedy can provide the relief sought.” *Id.* at 11 (emphasis added).

The Supreme Court’s analysis also focused on the claim being brought. “A superior court’s original jurisdiction over a claim does not relieve it of its responsibility to consider whether exhaustion should apply to *the particular claim* before the court.” Slip Op. at 16 (emphasis added). In *Cost Management Services, Inc. v. City of Lakewood*, the Supreme Court rejected the city’s argument that exhaustion of the city’s administrative remedies concerning a notice and order was required because the notice and order was not a response to the CMS claim for a refund. As the proffered administrative remedy was not applicable to CMS’s state law refund claim, it need not be exhausted.³ *See*, Slip Op. 8-11.

³ The Supreme Court’s analysis that exhaustion might be required in cases of concurrent jurisdiction throws doubt on the continued vitality of *State v. Tacoma Pierce County Multiple Listing Service*, 95 Wn.2d 280, 284, 622 P.2d 1190 (1980) (Exhaustion is

**B. IGI's State Law Claim Could Not Be Granted or Heard
Before Any City Administrative Body.**

Here, Pasco's administrative remedy permits "voluntary payment of any utility bill, fee, tax or other consideration for a service provided by the City or any of its employees" to be corrected only within one year of payment. PMC 1.17.020. The City ordinances further define "voluntary payment" as a payment without a contemporaneous written protest setting forth the reasons for the protest," PMC 1.17.101, and provide that any "person seeking correction, adjustment, refund or reimbursement for any payment of any utility bill, fee, tax, assessment or other consideration for a service provided by the City, shall, prior to judicial action, present to the City Manager, or his designee, a written protest stating the basis upon which such correction, adjustment or refund is requested." PMC 1.17.030.

Pasco provides no remedy for involuntary payments.⁴ It similarly provides no remedy for payments of other than a utility bill, fee, tax or

required only "when a claim is cognizable in the first instance by an agency alone." Nevertheless, it certainly remains true that exhaustion can never be required where the claim is not cognizable by the agency.

⁴ Here, IGI's payments were, as a matter of constitutional law and the law of money had and received, involuntary. IGI had no ability to contest its liability for the amounts paid prior to payment, PMC 5.32.095, and the City imposes penalties on any late payment. PMC 5.32.090. Courts long ago decided that when, as here, amounts are remitted under a code which requires payment prior to contest and which imposes penalties for nonpayment, the amounts paid are not considered to be paid voluntarily but rather as a matter of law under duress. *Great Northern R. Co. v. State*, 200 Wash. 392, 93 P.2d 694 (1939). *Accord, Ward v. Love County*, 253 U.S. 17, 64 L. Ed. 751, 40 S. Ct. 419 (1920); *See also, Puget Sound Alumni Kappa Sig. v. Seattle*, 70 Wn.2d 222, 228-29, 422 P.2d 799

other consideration for a service provided by the City or any of its employees.⁵ Pasco's administrative remedy does not provide for any interest on the payments it permits recovered. It does not permit any payments more than a year prior to be corrected.

IGI brought an action to recover amounts paid to Pasco over a three year span prior to suit. The action sought recovery of the amounts paid and interest on the amounts. While the relief sought by IGI was not obtainable through Pasco's administrative remedy, IGI could and did seek such relief under a state law claim for money had and received. CP 93-97. That claim permits recovery of involuntary payments such as IGI's.⁶ That claim permits recovery of payments made three years prior.⁷ That claim

(1969), *Davenport v. Wash. Educ. Ass'n.*, 147 Wn. App. 704, 197 P.3d 686 (2008) and *Carpenter v. Shaw*, 280 U. S. 363, 74 L. Ed. 478, 50 S. Ct. 121 (1930). Pasco's code, which defines payments without contemporaneous protest voluntary, conflicts with this principle of law.

American Steel & Wire Co. v. State, 49 Wn.2d 419, 302 P.2d 207 (1956) is not in conflict with the cited decisions. That case failed to find payments under duress because American Steel could have brought suit prior to payment. On that basis, it was distinguished from *Carpenter*. In *Carpenter*, an Oklahoma statute allowed a suit to challenge a tax only if the tax had been paid. *Carpenter*, as IGI here, was without a remedy unless the tax was first paid. The inability to file suit prior to payment and the possible penalty for nonpayment makes the payment involuntary.

⁵ The superior court ruled that exhaustion was not required because IGI's payments were not of a utility bill, fee, tax or other consideration for a service provided by the City or any of its employees.

⁶ The law of money had and received deems a payment under the mistaken belief that it is compelled by law to be involuntary and recoverable. *See e.g., Puget Sound Alumni v. Seattle*, 70 Wn.2d 222, 232, 422 P.2d 799 (1967) and cases cited therein. *See also, Davenport v. Wash. Educ. Ass'n.*, 147 Wn. App. 704, 197 P.3d 686 (2008). Thus, a payment may be involuntary and still not a tax.

⁷ The cause of action for money had and received is an action based on quasi contract or contract implied by law. *See generally, Puget Sound Alumni v. Seattle*, 70 Wn.2d 222, 232, 422 P.2d 799 (1967) and cases cited therein. Such an action is governed by the three

permits prejudgment interest on the amounts recovered.⁸ That claim is under state law.⁹ It is clearly a different claim than the Pasco administrative remedy. There is nothing in the Pasco code that permits IGI's claim for money had and received to be granted or heard by any administrative body of the City.

Just like *Cost Management Services, Inc. v. City of Lakewood* where exhaustion was not required because the proffered Lakewood administrative remedy was only applicable to a claim different from that brought by CMS, here too, exhaustion is not required because the Pasco proffered administrative remedy is only applicable to a claim different than that brought by IGI.

C. IGI Cannot Possibly Recover the Relief Sought Through Any Administrative Remedy.

In *Cost Management Services, Inc. v. City of Lakewood*, the Supreme Court wrote “[t]he primary question in exhaustion cases is whether the relief sought can be obtained through an administrative remedy;” Slip Op. at 7, and held “[e]xhaustion is required *only* if an

year statute of limitations. See, *id.* and *Giambattista v. Bank of Commerce*, 21 Wn. App. 723, 586 P.2d 1180 (1978).

⁸*Plywood Marketing v. Astoria Plywood*, 16 Wn. App. 566, 578, 558 P.2d 283 (1976) (Prejudgment interest is awarded when the claim is liquidated.), and see, McCormick on Damages 213, § 54 relied on by *Plywood Marketing v. Astoria Plywood*, 16 Wn. App. 566, 578, 558 P.2d 283 (1976) (“A claim is liquidated if the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness Examples are ... claims for money had and received”).

⁹ See e.g., *Byram v. Thurston Cty.*, 141 Wash. 28, 39, 251 P. 103 (1926).

administrative remedy can provide the relief sought.” *Id.* at 11 (emphasis added).

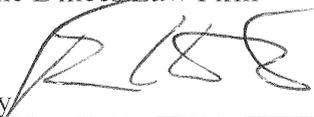
Here, the relief sought is recovery of payments made three years prior to suit and prejudgment interest on the payments. Such relief is not obtainable under the Pasco administrative remedy. Therefore, exhaustion is not required.¹⁰

IV. Conclusion

For the reasons stated above, the Superior Court Findings of Fact, Conclusions of Law and Judgment are correct and should be affirmed.

Respectfully submitted, this 6th day of November 2013.

The Dinces Law Firm

By 

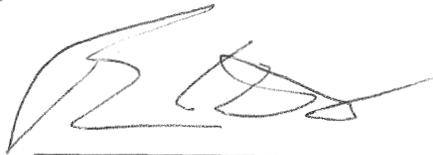
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¹⁰ Pasco argument in effect is that its remedy for voluntary payments made within the last year is the exclusive remedy for payments to the City. But, it is axiomatic that Pasco cannot change state law. State law provides IGI with a cause of action to recover three years of payments with prejudgment interest. IGI's has a right to seek that remedy and the only forum to seek such a remedy is the superior court.

Certificate of Service

I, Franklin G. Dinces, do hereby certify that on this the 7th day of November, 2013, I placed in the United States mail, postage prepaid, a copy of the Supplemental Brief of Respondent, addressed to:

Leland Kerr
Kerr Law Group
7025 West Grandridge Boulevard, Suite A
Kennewick, WA 99336-7724

A handwritten signature in black ink, appearing to read 'Franklin G. Dinces', written over a horizontal line.

Franklin G. Dinces