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STATE OF WASHINGTON  
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NO. 639498-I

COURT OF APPEALS, DIVISION I  
STATE OF WASHINGTON

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NPRO, INC., Appellant

v.

CENTRAL PUGET SOUND REGIONAL TRANSIT AUTHORITY,  
Respondent

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CORRECTED OPENING BRIEF OF APPELLANT

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ORIGINAL

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## **A. ASSIGNMENTS OF ERROR AND ISSUES ON APPEAL**

### 1. Assignments of Error:

- (a) The trial court erred in entering its order of summary judgment on July 6, 2009. CP 543-46.

### 2. Issues Pertaining to Assignments of Error:

- (a) Is there a genuine issue of material fact, or a question of law, as to when Appellant nPro knew of the intentional nature of Sound Transit's involvement in interference with its contract leading to its termination in 2002? (Assignment a.)
- (b) Is there a genuine issue of material fact, or a question of law, as to whether the mediation process the parties engaged in tolled the statute of limitations? (Assignment a.)

## **B. STATEMENT OF THE CASE**

### 1. Procedural Facts

On October 1, 2008, Appellant served its Complaint for Tortious Interference with Contract and Business Expectancy against Respondent Central Puget Sound Regional Transit Authority ("Sound Transit") in King County Superior Court.

CP 1-3, 18 (lines 4-5). Sound Transit filed a Motion for Summary Judgment on May 26, 2009. CP 11-27. On July 2, 2009, the trial court granted Sound Transit's motion for summary judgment and dismissed Appellant's claims with prejudice. CP 543-46.

## 2. Substantive Facts

This appeal is brought by nPro, Incorporated,<sup>1</sup> a company closely held by Benita Thomas ("Thomas"), to address violations by Sound Transit of certified disadvantaged business obligations imposed on it as conditions to federal financing. Those requirements mandate that grantees of federal money require that the grantee's prime contractors take steps to encourage independent, real and substantive participation in federally financed projects by women and minority-owned sub-contractors. CP 487-88. In this case, nPro asserts that it was entitled to have Sound

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<sup>1</sup> The company changed names during the underlying project. For simplicity, we will refer to the company as "nPro, Inc."

Transit enforce those federal requirements, that Sound Transit did not do so, and that its failure was intentional. CP 488.

Sound Transit's motion for summary judgment alleged that nPro knew of Sound Transit's affirmative misdeeds more than three years before filing suit. CP 12. NPro argued below that Sound Transit, more than merely failing to enforce, actually flouted federal requirements by actively joining in and encouraging the micro-management and eventual abolishment of nPro's role as a subcontractor and that it did not (and could not) know until much later of Sound Transit's encouragement of and collusion with the prime contractor's unfair management. Specifically, Thomas testified that she unearthed the records of Sound Transit's active involvement shortly after October 14, 2005 from documents exchanged in discovery in her suit against the Prime Contractor. Up until that time, she knew only that Sound Transit was not enforcing the federal regulations

related to disadvantage businesses. October 14, 2005 was less than 3 years before nPro's suit here. CP 169.

Documents that nPro did *not* have prior access to, which were turned over in the 2005 case discovery in that prior action (*Thomas, et. al. v. KJM & Associates, LTD.*), included the prime contractor's internal notes on the complaint in that case saying that Sound Transit refused to permit the Prime Contractor to ameliorate nPro's problems. See interlineations to prior complaint ¶ 11 (e) (CP 410) & ¶ 18 (413-14) (to the effect that Sound Transit refused to permit KJM to allocate more work to nPro). They also included e-mails by Sound Transit's Deputy Executive Director Vernon Stoner congratulating KJM for showing nPro the door for complaining about poor treatment by KJM.<sup>2</sup> CP

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<sup>2</sup> Stoner's comment was: "Just think of all the personnel issues one must work with when you are at the top! I like the way you are handling these matters and appreciate your STYLE" [emphasis in original]. (CP 401.) That was his response to KJM's September 15, 2002 letter to Thomas which rejected Thomas' September 10, 2002 concerns about evidence of KJM's filing of a security report falsely alleging Thomas' involvement in

490.

NPro also demonstrated that the evidence provided to the trial court by *both* sides illustrates the distinction between (1) Sound Transit's failure to monitor or stop the prime contractor's bad management; and (2) Sound Transit's active participation in and encouragement of bad management. NPro argued that there was a genuine issue of fact as to when nPro knew of *active and intentional* participation in the interference by Sound Transit. CP 488-90.

During much of the period after nPro's discovery of the *intentional* nature of Sound Transit's involvement in reducing the scope and impeding the performance of its contract, the parties were engaged in a mediation process formally established by Sound Transit itself. CP 490, 495. The mediation process began on April 17, 2006 and was ongoing

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harassing telephone calls. CP 371. KJM invited Thomas to withdraw as a subcontractor. CP 371. These documents are part of nPro's response to Respondent's Second Set of Interrogatories and Requests for Production. See Thomas Declaration, Ex. D, Tabs B & C, CP 345-451.

at least in May, 2008. CP 30, CP 206-210.

### **C. ARGUMENT**

#### 1. Standard of Review

The standard of review on summary judgment is the *de novo* standard, with the court engaging in the same inquiry as the trial court. *Hartley v. State*, 103 Wn.2d 768, 698 P.2d 77 (1985).

CR 56(c) provides that before a summary judgment may be granted, the evidence submitted to the trial court must disclose that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The moving party has the burden of proving that no genuine issues of material fact exist in the case. *Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 721 P.2d 1 (1986); *Bankhead v. City of Tacoma*, 23 Wn. App. 631, 639, 597 P.2d 920 (1979).

In ruling on a motion for summary judgment, the trial

court must consider the material evidence and all reasonable inferences from the evidence in favor of the nonmoving party. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 226, 770 P.2d 182 (1989). There must be no genuine issue as to *material facts, i.e.*, facts upon which the outcome of the litigation depends. *Jacobsen v. State*, 89 Wn.2d 104, 569 P.2d 1152 (1977) (*overruled on other grounds, Peeples v. Port of Bellingham*, 93 Wn.2d 766, 771, 613 P.2d 1128 (1980); *Wojcik v. Chrysler Corp.*, 50 Wn. App. 849, 751 P.2d 854 (1988)).

Where reasonable minds might reach a different conclusion on the facts, summary judgment is inappropriate. *Hartley v. State*, 103 Wn.2d 768, 698 P.2d 77 (1985). If reasonable persons could reach more than one conclusion from the evidence and the reasonable inferences therefrom, summary judgment is not proper. *Turngren v. King County*, 104 Wn.2d 293, 705 P.2d 258 (1985); *Busenius v. Horan*, 53 Wn. App. 662, 769 P.2d 869 (1989).

Summary judgments are generally not favored under Washington law. A trial must occur if there is a genuine issue as to any material fact. *Balise v. Underwood*, 62 Wn.2d 195, 381 P.2d 966 (1963); the trial court must deny a motion if there is any reasonable hypothesis in the record that would entitle the nonmoving party to relief. *Mostrom v. Pettibon*, 25 Wn. App. 158, 162, 607 P.2d 864 (1980). Summary judgment should be permitted only with caution for fear that worthwhile claims will be lost without a determination on the merits. *Smith v. Acme Paving Co.*, 16 Wn. App. 389, 392, 558 P.2d 811 (1976).

2. A question of fact remains as to when nPro knew of the intentional nature of Sound Transit's involvement.
  - a. *Thomas' lack of knowledge of the intentional nature of Sound Transit's interference tolled the statute of limitations.*

Sound Transit admits that the limitation period for a

claim of cognizable tortious interference is 3 years<sup>3</sup>. Sound Transit candidly admits that a plaintiff's claim accrues only at the time that all essential elements are known by the plaintiff. CP 21.

Sound Transit also admits that it was obligated to follow the federal requirements for the propagation and health of disadvantaged business enterprises in federally financed construction projects. Answer ¶ 7, CP 5. Parties, even without the mandates of specific federal regulations, have a duty not to interfere gratuitously in contract interests. DeWolf, *supra*, at § 22.2.

In some instances, the statute of limitations on a tort claim may be tolled until the plaintiff discovers the claim. Where this "discovery rule" applies, it generally requires inquiry into when the plaintiff knew or reasonably should have known of the presence of all of the elements of the cause of

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<sup>3</sup> Respondent's Summary Judgment Brief at 10, citing *Seattle v. Blume*, 134 Wn.2d 243, 251, 947 P. 2d 223 (1997). CP 20.

action. *First Maryland v. Rothstein*, 72 Wn. App. 278, 285, 864 P.2d 17 (1993). In this case, the trial court erred by not ruling that the statute of limitations was tolled by the discovery rule until Thomas learned of the intentional nature of its interference with nPro's contract by Sound Transit.

Case law states that if any situation exists such that there is a material question of fact remaining, summary judgment should not be granted. On a motion for summary judgment, the trial court is required to view *all* evidence, to draw all reasonable inferences in favor of the nonmoving party, and to deny the motion if the evidence and inferences create any question of material fact. *DeYoung v. Providence Med. Ctr.*, 136 Wn.2d 136, 140, 960 P.2d 919 (1998); *Scott v. Pacific West Mountain Resort*, 119 Wn.2d 484, 487, 834 P.2d 6 (1992). In this case, the facts raised by nPro are not hypothetical or speculative. There is evidence showing a material dispute of facts as to when nPro knew of the intentional nature of Sound Transit's interference.

Many of the decisions which necessarily were made by the trial judge in granting summary judgment are factual, and thus were questions to be left for the jury. Whether, for example, Sound Transit's interference with an existing or prospective contract is intentional is a question of fact. Restatement (2d) Torts § 767 (2009), comment l. "Function of court and jury" ("Restatement"). Whether the interference caused damage to the contract or expectancy is also a question of fact. Restatement § 766, comment o., "Causation." Likewise, whether the plaintiff has exercised due diligence in discovering the injury (i.e. under the discovery rule) is also a question of fact. *Mayer v. City of Seattle*, 102 Wn. App. 66, 76, 10 P.3d 408 (2000). That question should be decided by a jury.

- b. *Intentional interference is a necessary element of a cognizable cause of action for tortious interference.*

The elements of a cognizable cause of action for tortious interference are: *intentional* and improper

interference with the performance of an existing or prospective contract between two other entities which causes damage to that economic relationship. Restatement § 766 (emphasis added). A defendant is legally liable only for deliberate interference, not “merely an incidental, indirect result of another act.” *Hairston v. Pacific-10 Conference*, 893 F. Supp. 1485, 1494 (W.D. Wa. 1994), *aff’d* 101 F.3d 1315 (1996) (applying Washington law).

While a victim (from a public policy perspective) legitimately could criticize inaction by another party which lead to damage (e.g., a municipality’s slow processing of a building permit), he/she would have no luck attempting to sue for *intentional* interference with a business expectancy without proof of intent.

Liability for interference with contracts and prospective contractual relations developed in the field of intentional torts. Sections 766, 766A and 766B all involve intentional torts. Thus far there has been no general recognition of any liability for a negligent interference, whether it is interference with a third person’s performance of

his contract with the plaintiff (cf. § 766), with the plaintiff's performance of his own contract (cf. § 766A) or with the plaintiff's acquisition of prospective contractual relations. (Cf. § 766B).

Restatement § 766C, Comment a. Thus, the fact that one makes claims about inaction cannot be evidence of knowledge of *intentional* interference.

There is ample evidence to raise a question of fact as to whether nPro knew of the intentional nature of Sound Transit's interference. For instance, Thomas described Sound Transit as a *victim* of KJM's actions in her 2004 lawsuit against KJM. CP 419, ¶ 38. This is one hundred eighty degrees from saying that Sound Transit was a perpetrator.

Thomas was aware of the bad conduct by one of Sound Transit's employees, see CP 516 (describing "Diversity Manager's" conduct), but she also testified at CP 169-170 that she did not understand that his efforts were those of *Sound Transit* to evade or eliminate her contract. She knew, for instance, that the Diversity Manager also was

rude to others, even including his Sound Transit superior, CP 169, and that he denied that he was involved in management of the nPro contract. CP 170. Sound Transit also explicitly distanced itself from his acts. *Id.*

Similarly, while Thomas was aware of Sound Transit's practice of poaching her employees, it told her that it would make it up to her in other ways. CP 169. Without more indication of bad faith by this public entity, nPro had no reason to know of Sound Transit's plan. *Id.*

Respondent's own evidence shows Thomas' ignorance of Sound Transit's intent. She originally perceived the rude behavior of Sound Transit's contract manager as indicative merely of his lack of personal commitment to the "mission of his office," for if it were otherwise he "would have long ago stepped in to change" KJM's damaging behavior.

Respondent's Exhibit 7, CP 92. Respondent's evidence also echoes nPro's phrasing in its concerns about Sound Transit's handling of its responsibilities as "reckless," not as intentional.

CP 107. Evidence also shows nPro stated that “the result of these issues [about KJM’s behavior with regard to its subcontract with nPro] is ultimately contractual BUT Sound Transit still had the responsibility to monitor their contractors and enforce the rules....” (Emphasis in original.) CP 113. Sound Transit emphasized one of Thomas’ sentences (in one of her earlier statements to it) to the effect that the Prime Contractor’s behavior evidently was done with the “blessing of Sound Transit” without reference to the prior sentence which details her then understanding that Sound Transit’s involvement was simply “lack of monitoring of KJM’s contract as it related to their subcontractors and the MWDBE [Minority, Women and Disadvantaged Business Enterprise] program requirements.” CP 115. All of those references in nPro’s administrative complaints expressly were based on the theory that Sound Transit’s failure was in not intervening to prevent recurrence, rather than any affirmative and intentional involvement and they were obviously so interpreted by Sound

Transit itself.<sup>4</sup> In other words, nPro's mind set was that Sound Transit's wrongs were nonfeasance, not misfeasance.

During the time that nPro's contract was improperly impeded and reduced in scope, Thomas complained that the prime contractor was mismanaging that contract and that Sound Transit was failing to intervene, but *not* that Sound Transit was intentionally acting itself to shorten the contract.

- c. *Before seeing internal documents recounting otherwise, Thomas had no reasonable basis for believing Sound Transit was deliberately interfering with her contract.*

NPro was not aware of the *intentional* nature of Sound Transit's interference in her business contract and expectancy until around October 14, 2005, when she started review of documents produced by the prime contractor in the prior case. CP 169. These documents included the prime

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<sup>4</sup> Thomas' last (January 16, 2003) administrative claim referenced by the motion (see Ex. 11, CP 119-21) was rejected by Sound Transit attorney Betty Ngan on July 28, 2003 on the basis that Thomas' claims should be directed to KJM. See Thomas Declaration Ex. D, Tab E, CP 486.

contractor's own internal notes on Thomas' complaint, which, in reference to whether the contractor identified opportunities where minority subcontractors could participate in providing necessary services (which is something required by the above-referenced federal rules), KJM wrote "try to - *only can do what Sound Transit allowed.*" (Emphasis added.) See interlineations to 2004 complaint ¶ 11 (e) (CP 410) & ¶ 18. CP 413-414.

There was evidence before the trial court that nPro also received in discovery in that prior case a long list of email exchanges evidencing a mixture of evening social occasions and business favors between officials of the prime contractor and agency (thus indicating personal motives for lax enforcement of contract requirements as to affirmative action). See Thomas Declaration Ex. D, Tab D. CP 453-81 (special emphasis on: 459-60; 468; 473-74; 475; and an email written from Sound Transit's Deputy Director to the President of Prime Contractor KJM: "See how fast things

work when I get involved. Only for KJM :-)!” CP 478 (smiley face in original). *Compare to Sound Transit’s Ethical Rules.*<sup>5</sup>

NPro could be charged with sufficient knowledge of Sound Transit’s intentional acts interfering with the subcontract only by concluding that Sound Transit was both open to such personal influence and untruthful (as it specifically had denied to nPro its involvement with the subcontract). See Thomas Declaration, CP 170; Stoner email, CP 478, 459-475.

Sound Transit highlighted an email by Thomas dated October 11, 2004, saying that Sound Transit’s diversity manager “interfered with my ability to operate my business” (CP 47) as evidence of Thomas’ knowledge of all of the elements of a cognizable claim of tortious interference. That, however did not acknowledge that she knew of the *intentional* nature of the interference - and we already have shown that

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<sup>5</sup> See Sound Transit’s Ethical Rules, p. 4, ¶ 5:  
<http://www.soundtransit.org/documents/pdf/about/board/resolutions/2008/Reso81-2.pdf> (last visited October 15, 2009).

intent is a material element. Indeed, that nPro did not sue Sound Transit until it later found that Sound Transit deliberately interfered indicates Ms. Thomas' appreciation of the distinction between active interference and negligent failure to stop interference by another.

- d. *Sound Transit's Argument below featured only an inference of Thomas' first learning of Sound Transit's cognizable wrong.*

Thomas testified that she was not aware of the active cooperation in and encouragement of KJM's objectionable practice's until shortly after October 14, 2005. CP 169. The complaint was served on Sound Transit on October 1, 2008. CP18. There is no dispute that the relevant statute of limitations is three years. Sound Transit presented no direct evidence that Thomas knew of its malfeasance before October 14, 2005.<sup>6</sup>

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<sup>6</sup> Sound Transit argued that documents used by Thomas' counsel in the KJM case before October 2005 bracketed the Bates numbers of the documents Thomas now relies on the prove intentional interference shows that her prior attorney (and, thus, Thomas too) then appreciated the documents on which she now

3. The trial court also erred by not finding that the mediation tolled the statute of limitations.

Not only should the court have ruled that the statute of limitations was tolled by the discovery rule until Thomas' discovery in 2005, but case law also dictates that equitable tolling should have applied as well. Equitable tolling of the limitation period can properly be applied during the pendency of administrative dispute processes if, under the particular facts, it was reasonable for the plaintiff to rely upon the process for the period upon which it did rely. The Washington Supreme Court has held that where a government agency engages in alternative dispute resolution, tolling of the statute of limitations may apply during the

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relies. CP 519. Sound Transit neither proved that the records were produced in chronological order nor explains why there is no question of fact or law that attorneys faced with over 20 boxes of documents in that prior case would review them to see what other malefactors they could find. CP 169. Possession of thousands of pages of documents does not inevitably lead to the conclusion that knowledge of all the content of all the documents automatically occurred especially where, as discussed at CP 170, Sound Transit had denied wrongdoing.

pendency of the ADR process:

If the EEOC had actively been pursuing some type of non-judicial resolution of the complaint, there might be a valid reason to toll the statute of limitations. Thus we do not rule out the possibility for future cases that equitable grounds might exist which justify a tolling of the statute of limitations in a discrimination case.

*See Douchette v. Bethel School Dist. No. 403*, 117 Wn.2d 805, 812, fn. 6, 818 P. 2d 1362 (1991).

After Thomas' suit against the prime contractor (and nPro's unearthing of records finally showing that Sound Transit actually was involved in KJM's interference) Sound Transit launched a formal mediation process to consider claims against it, including nPro's, on April 17, 2006. CP 30; Thomas Declaration Ex. C., CP 195-210. That process provided for a new deadline for filing claims and the mediation was still ongoing in May, 2008. CP 206-10. Thomas was reasonable to devote her attention to the formal mediation process which was adopted specifically to resolve Thomas' claims. At the very least, her reasonableness is a jury

question.

Even accepting Sound Transit's argument that Thomas knew of her claim against Sound Transit in May of 2005, (CP 519), equitable grounds did exist in this case to toll the statute of limitations from the beginning of the mediation process on April 17, 2006 until at least May, 2008. In other words, less than one year had run from the time that Sound Transit alleges "discovery" in 2005 until the beginning of the mediation. The discovery "clock" was then tolled to at least May 2008. When the "clock" started "ticking" again, there were still two years left on it and the present suit was timely.

#### **D. CONCLUSION**

Knowing of an interference with a business contract or expectancy and knowing of its intentional nature are two distinct things, and both are required to make a claim for interference with a contract and business expectancy. There is an existing question of material fact as to when nPro knew of the *intentional* nature of Sound Transit's interference.

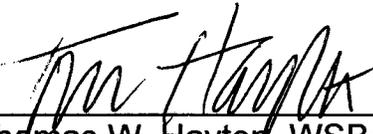
NPro has shown that such awareness started after October 14, 2005.

If nPro did not know of the *intentional* interference until May 2005, the mediation process, which lasted nearly two years, separately tolled the statute of limitations.

Whether nPro's October 1, 2008 filing was within the statute of limitations remains a question for the jury and therefore the trial court's granting of Sound Transit's motion for summary judgment should be reversed.

DATED this 6<sup>th</sup> day of November, 2009.

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