

NO. 639498-I

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

NPRO, INC., Appellant

v.

CENTRAL PUGET SOUND REGIONAL TRANSIT AUTHORITY,
Respondent

REPLY BRIEF OF APPELLANT

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ORIGINAL

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A. INTRODUCTION

This appeal is about a summary judgment that was granted on statute of limitations grounds notwithstanding the existence of a legitimate question about when the respondent knew or at least had reasonable cause to know of proof of a *concededly* necessary element of a cognizable cause of action, i.e., the intentional nature of Sound Transit's interference with nPro's contractual relationship with Sound Transit prime contractor KJM.

Sound Transit's opposition, at least as to the issues which are material to this appeal,¹ argues that (1) nPro was

¹ Sound Transit refers, repeatedly, in its brief to a decision made by Judge Martinez in another case. See, e.g., BR 7; CP 33-45. That argument is a sideshow and should be ignored. That case was not dealt with on summary judgment regarding the statute of limitations; Sound Transit did not argue in the motion presently under appeal that Judge Martinez' opinion was somehow *res judicata*, collateral estoppel or issue preclusion. Sound Transit cites to no legal authority on *res judicata*, collateral estoppel or issue preclusion in its appeal. Arguments unsupported by any authority will not be considered on appeal. *Tran v. State Farm Fire & Cas. Co.*, 136 Wn. 2d 214, 961 P.2d 358 (1998). Sound Transit's argument seems to be that it is somehow not a tort to interfere with a "bad" contract involving a "bad contractor." Sound Transit cites no authority in its Brief to

obligated to have included in the summary judgment certain helpful findings of fact to the effect that nPro *could not have known earlier* of its cognizable cause of action; (2) nPro simply is prohibited from contradicting inferences Sound Transit derives from evidence to the effect that nPro earlier knew of Sound Transit's deliberate interference with nPro's contract; (3) the date upon which voluminous records were produced is the date upon which receiving party is deemed to know their contents; (4) equitable tolling, such that would stop the running of a limitations period during a long-running mediation process established by Sound Transit, cannot depend nPro's reasonable inference but, rather, only Sound Transit's express agreement to waive the limitations period. Sound Transit's arguments are specious, there are still open and unaddressed issues of fact, and the summary judgment

demonstrate the logic of its argument even if it were properly before the Court. nPro, when given the opportunity, will debunk it. Issue preclusion is too important to be treated by innuendo.

should be reversed.

B. ARGUMENT

1. Equitable tolling, by definition, may result from reasonable inference.

Sound Transit states that it did not waive explicitly its limitations defense when establishing its ADR process. Brief of Respondent (“BR”) 31. nPro’s position on equitable tolling, however, was not dependent upon the existence of an explicit waiver (and a later change of heart on that subject, misleading the opponent). nPro, rather, showed that the availability of equitable tolling depends on normal equitable principles including the reasonableness of the plaintiff’s view of the particular ADR process as one expected to toll the judicial limitations period. *Douchette v. Bethel School District No. 403*, 117 Wn. 2d 805, 811-812; 818 P.2d 1362 (1991) (Brief of Appellant (“BA”) 20-22). Bad faith is another possible factor, but it is not the only one. *Id.*

Sound Transit’s rejoinder (*citing Trotzer v. Vig*, 149

Wn. App. 594, 607, 203 P.3d 1056 (2009)) that it did not expressly waive its limitations defense is, thus, not responsive.

2. There is sufficient proof that nPro did not know of Sound Transit's intent to interfere with nPro's contract.

2.1 In a summary judgment setting, the respondent most definitely is *not* required to have entered supporting findings of fact.

Sound Transit mixes up the normal burden of proof in summary judgment (especially with regard to affirmative defenses) by insisting that "nPro bears the evidentiary burden of establishing that the necessary facts *could not be discovered within the three-year statute of limitations period.*" BR 21. (Emphasis added.) It cites *Burns v. McClinton*, 135 Wn. App. 285, 300, 143 P.3d 630 (2008) for this, but *Burns* is inapplicable.

The *Burns* case dealt with an appeal of a trial decision. The *Burns* decision does pivot on the absence of findings of

fact to the effect that the plaintiff could not have discovered its cognizable cause of action within the statutory time period, but that can have no effect on summary judgment motions as there are, by definition, *no findings of fact in summary judgment decisions*. Rather, the moving party in summary judgment motions needs itself to demonstrate that there are no such questions of fact to prevail on summary judgment.

2.2 nPro can rely upon the declaration of its principal to contradict inferences drawn by Sound Transit from prior evidence as to when nPro was aware that Sound Transit tortiously interfered with nPro's contract.

Sound Transit does not challenge the necessity of intent for a cognizable cause of action for tortious interference.

nPro showed that a defendant's intent is a necessary element in a case of tortious interference; negligence is not enough. Brief of Appellant at 11-13, *citing* Restatement (2d) Torts §766 (2009), *see particularly* § 766C, Comment a.

Sound Transit says nothing to disagree (with either the need to show intent nor with the evident fact that it had it), but rather insists that here there is no legitimate possibility that nPro was unaware (at various early dates) that Sound Transit deliberately was abusing nPro.

Sound Transit also suggests that it is not necessary for a plaintiff to know or suspect the existence of all necessary elements before the limitation period starts, but that argument also is based on distinguishable authority. First, it says that *Reichelt v. Johns-Manville Corp.*, 107 Wn.2d 761, 769-70, 733 P.3d 530 (1987) stands for the proposition that “[a]n action accrues when the plaintiff knows or should know the relevant facts, whether or not the plaintiff also knows that these facts are enough to establish a legal cause of action.” (BR 15.) That quotation, however, shows that *Reichelt* involved facts contrary to ours; nPro had no evidence (but only Sound Transit denials) of the obviously material element

of intent.² nPro originally believed that losing its KJM contract may have been an unintentional consequence of Sound Transit's passivity. It only later learned that it was Sound Transit's intent to reduce and eventually end nPro's participation in the project. Brief of Appellant, passim; CP 168-170. Second, Sound Transit notes (correctly) that *Beard v. King County*, 76 Wn. App. 863, 889 P.2d 501 (1995) does not require that a plaintiff have particularly good evidence of all necessary elements before being held to have sufficient knowledge of a cause of action. That does not mean, obviously, that plaintiffs are to be encouraged or (perhaps worse) required to file cases without any evidence of some necessary elements. *Beard* acknowledges the distinction:

² In its brief at 29, Sound Transit accuses nPro of making "disingenuous[]" claims and "grossly misleading" the Court regarding the evidence. The evidence that Sound Transit put into the record is its own evidence. It was not put in by nPro. It cannot be "grossly misleading" to catalog a simple fact of who put the evidence into the record. And that evidence, as shown at BA 14 - 15 shows Benita Thomas' understanding of the role taken by Sound Transit at the time its actions were being carried out.

the limitation period begins to run when the factual elements of a cause of action exist and the injured party knows or should know they exist...

Id. at 868. Unless it is to be interpreted as encouraging litigation without a grasp of the presence of some necessary element(s), *Beard* must be viewed as requiring some evidence of all elements.

The *Marshall* exclusionary rule is inapplicable.

Sound Transit seeks protection of an exclusionary rule so as to ignore nPro's evidence. It cites *Marshall v. AC&S Inc.*, 56 Wn. App. 191, 782 P.2d 1107 (1989) for the proposition that "[respondent's s]elf-serving affidavits . . . that merely contradict previous testimony and evidence, without explanation, do not raise genuine issues of material fact sufficient to defeat SJ." (BR, 23.) *Marshall* is inapposite.

Marshall is based on federal authority, which in turn addresses only attempted diversions from prior sworn testimony. It, of course, does not hold that a declaration

cannot rebut the opponent's view of the facts (or interpretation of documents). *Marshall* rests on *Van T. Junkins & Assocs., Inc. v. United States Indus., Inc.*, 736 F.2d 656, 657 (11th Cir.1984) and *Radobenko v. Automated Equipment Corp.*, 520 F.2d 540 (9th Cir.1975) to say that “[w]hen a party has given clear answers to unambiguous [deposition] questions which negate the existence of any genuine issue of material fact, that party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony.” *Marshall*, 56 Wn. App. 191 at 185. This Court, applying the *Marshall* rule, requires that a clear contradiction of prior sworn testimony is necessary to invoke it. See *Berry v. Crown Cork & Seal Co.*, 103 Wn. App. 312, 322, 14 P.3d 789, 794 (2000).³

³ This lack of contradictory prior testimony also dispenses with Sound Transit's parallel authority of *Selvig v. Caryl*, 97 Wn. App. 220, 225, 983 P.2d 1141 (1999) (*Id.* at 14). As with the other cases discussed in this section, *Selvig* is useless to Sound Transit as there was no prior contradictory sworn testimony.

Sound Transit points to no sworn testimony that is contradicted by nPro's opposition to the summary judgment motion.

Finally, another indication of the inapplicability of the *Marshall* rule to our case is the fact that the Thomas declaration was not excluded by the trial court—as is the case when the rule applies. See *Berry*, 103 Wn. App. at 322 and *Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262, 266–67 (9th Cir. 1991) (“We conclude that the ...*Radobenko* rule does not automatically dispose of every case in which a contradictory affidavit is introduced to explain portions of earlier deposition testimony. Rather, the *Radobenko* court was concerned with “sham” testimony that flatly contradicts earlier testimony in an attempt to “create” an issue of fact and avoid summary judgment. Therefore, before applying the *Radobenko* sanction, the district court must make a factual determination that the contradiction was actually a ‘sham.’”)

nPro's proof was otherwise sufficient to create a genuine question of obviously material fact. Sound Transit also minimizes Ms. Thomas' declaration as something full of superficial statements and vague generalizations, *citing Thompson v. Everett Clinic*, 71 Wn. App. 548, 860 P.2d 1054 (1993) (*Id.* at 555, BR, 13-14) and *Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986) (*Id.* at BA 21-22). It, however, fails to demonstrate how that criticism possibly could apply to, as here, a declaration which both traces nPro's changing (over time) appreciation of Sound Transit's involvement in nPro's difficulties and displays what caused nPro's appreciation to change—including Sound Transit's early denials of involvement and later-discovered documents.

Sound Transit argues here and below that nPro's prior statements unquestionably establish that nPro knew, or should have known, that Sound Transit deliberately was interfering with nPro's contract. Sound Transit refers

principally to its hiring away nPro's employees (BR 17, 28) and to nPro's prior complaints that Sound Transit somehow aided and abetted KJM (BR, 18, 19); discriminated against and intimidated nPro or participated in similar behavior by KJM (BR, 18-19); emboldened KJM in its attacks on nPro (BR, 18); failed to ensure that KJM made prompt payments (BR, 19); looked the other way when KJM damaged nPro (BR, 19); otherwise failed to monitor and enforce contract compliance by KJM (BR, 19).⁴

⁴ At BR 17, Sound Transit insists that nPro's email of October 31, 2002 (wherein Ms. Thomas refers to advice by an attorney that Sound Transit's management "interfered with my ability to operate my business") simply disposes of the chance that Thomas was not aware that she had a cognizable cause of action for tortious interference. That claim, however, is no less distinguishable as a claim of negligent management than any of the others. As noted by us earlier, the Restatement does refer to the tort of negligent interference with contractual relations; it also says that jurisdictions have not recognized it. That Ms. Thomas intended her complaints only to refer to Sound Transit negligence is indicated, after all, by the procedural history of our case: until nPro was in possession of documents disclosing Sound Transit's involvement in and encouragement of KJM behavior, nPro did not sue Sound Transit.

All of these facts reasonably may be interpreted as evidence of tone deaf, bureaucratic, and negligent mishandling. nPro's explanation that such was its interpretation until being disabused of it by later disclosures is both understandable and credible. In her Declaration in Support of Plaintiff's Response and Objection to Defendant's Motion for Summary Judgment, nPro principal Thomas explained that she always understood that a "a legal claim for interference with [her] subcontract required evidence of intent" (CP 168, ¶2) and that her prior complaints were written by her about what she understood was Sound Transit's mere "failure...to monitor, intervene, and correct" KJM's hostile behavior.

2.3 nPro was not bound to know earlier of Sound Transit's intentional interference.

Sound Transit's case on public records is irrelevant. At BR 21, Sound Transit cites *Douglass v. Stanger*, 101 Wn. App. 243, 256, 2 P.3d 998 (2000).

Douglass is a due diligence case about fraud which imputes to the victim knowledge of certain public records (viz., recorded deeds and articles of incorporation). Sound Transit suggests no counterpart public records here. *Douglass* certainly does not suggest that parties involved somehow in commercial transactions with public entities are presumed to know the contents of the agencies' business records.

The argument that nPro instantly was bound to know the contents of all documents upon their being produced in discovery is imaginary. At BR 25, Sound Transit refers to the date of its production to nPro's *KJM* matter attorney of 20 boxes of documents as the date of nPro's presumptive knowledge of all contents, *citing Hill v. Dep't of Labor & Indus.*, 90 Wn. 2d 276, 279, 580 P.2d 636 (1978). *Hill* easily is distinguishable.

Hill is about the imputation to a party of its attorney's admitted knowledge of a fact. There is no counterpart for such an admission here and certainly there is no reason to

think that it naturally follows that the recipient of such a large volume of documents is presumed immediately to know their contents.

D. CONCLUSION

The lower Court granted a summary judgment notwithstanding an obviously genuine question of an equally obvious material element. It should be reversed.

DATED this 4th day of January, 2010.

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