

63949-8

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No. 63949-8-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

NPRO, INC.,
Appellant,

v.

CENTRAL PUGET SOUND REGIONAL TRANSIT AUTHORITY,
Respondent.

BRIEF OF RESPONDENT

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2009 DEC -4 PM 3:52

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I. INTRODUCTION

The underlying lawsuit filed by nPro, Inc. (“nPro”) against the Central Puget Sound Regional Transit Authority (“Sound Transit”) was dismissed by the trial court on summary judgment because the three-year statute of limitations applicable to nPro’s claim for tortious interference with a business expectancy expired in October 2005, nearly three years before the lawsuit was initiated by service upon Sound Transit.

In October 2002, less than a month after nPro’s contract with a third party was terminated, nPro sent the following email to a federal civil rights official:

I wanted to let you know that I did speak with an attorney and he said *that there is clear and sufficient evidence showing that [Sound Transit] interfered with my ability to operate my business* which is what I have attempted to convey all along. *I just did not know the legal term for it.*

Clerk’s Papers (“CP”) 47 (Oct. 31, 2002 Email (emphases added)).

Less than two weeks later, nPro’s president sent a memorandum stating that “*Sound Transit staff, namely [the Diversity Manager] actively participated in the intimidation, threatening, and coercion tactics* employed by KJM.” She further stated: “*His behavior toward my firm and me ultimately led to my contract being terminated.*” CP 116 (Nov. 11, 2002 Memo (emphases added)).

In October 2008, approximately six years after the third party terminated nPro's contract, nPro filed the underlying tort action, alleging that Sound Transit tortiously interfered with nPro's contractual relationship. However, the statute of limitations had expired on nPro's claim in October 2005, three years after the allegedly tortious acts that purportedly caused nPro's contract termination in October 2002.

Because the statute of limitations had run, nPro tries to argue that the discovery rule should apply. As the trial court concluded, however, there is no basis to extend the statute of limitations. nPro failed to establish that the facts could not have been discovered within the limitations period, and the evidence in the record plainly establishes that nPro either knew or should have known of the essential facts of its claim in October 2002. The trial court, therefore, dismissed nPro's case on summary judgment, finding nPro's arguments—that the discovery rule should apply because it was not aware that Sound Transit acted “intentionally” until at least October 2005, and that the doctrine of equitable tolling should apply because the parties engaged in a two-year mediation starting in 2006, well after the statute of limitations had run—to be without merit. These are the same arguments that nPro makes here on appeal, and they still lack merit.

II. COUNTER STATEMENT OF ISSUES ON APPEAL

A. Assignment of Error.

On July 2, 2009, the trial court entered an order granting Sound Transit summary judgment on the statute of limitation. *See* CP 543-546 (Order). nPro asserts that the trial court entered this order in error and appeals from this ruling.

B. Issues on Appeal.

(1) Whether the discovery rule applies when: (a) the evidence shows that nPro knew or should have known of the essential facts of its claim in October 2002 or, at a minimum, was on notice that a legal action must be taken; and (b) nPro failed to meet its evidentiary burden of establishing that the necessary facts could not be discovered within the three-year statute of limitations period.

(2) Whether the mediation process in which the parties engaged in 2006, after the statute of limitations on nPro's tort claim ran in October 2005, equitably tolled the statute of limitations on nPro's tort claim.

III. COUNTER STATEMENT OF THE CASE

A. Statement of Procedure.

The underlying lawsuit began on October 1, 2008, when nPro served Sound Transit with its Complaint. *See* CP 52-53 (Summons). Sound Transit filed a Motion for Summary Judgment on May 26, 2009, *see* CP 11-163 (S.J. Motion; Armstrong Decl.), arguing that the lawsuit should be dismissed because the applicable three-year statute of limitations had expired in October 2005. *See* CP 11-27 (S.J. Motion). The trial court granted Sound Transit's motion on July 2, 2009. *See* CP 543-546 (Order).

B. Statement of Facts.

This lawsuit arises out of a contract that Sound Transit entered into more than 11 years ago. In May 1998, Sound Transit contracted with KJM to provide various consulting services. In July 1998, KJM subcontracted with nPro to provide a portion of those services. *See* CP 49 (Complaint, ¶ 1 (verifying that nPro is the successor to CpMe Inc.)); CP 55-80 (KJM/CpMe subcontract). Although nPro's subcontract with KJM contained a not-to-exceed amount of \$305,545, nPro was ultimately paid more than \$775,000. *See* CP 34 (Order Dismissing nPro's Federal Lawsuit, lines 17-18).

Over the next four years, nPro made numerous claims against Sound Transit for what nPro characterized as interference with its business. For example, Benita Thomas, nPro's president, submitted a claim to Sound Transit when an employee named Stacy Henderson chose to leave nPro and work for Sound Transit. *See* CP 84 (Thomas Dep., lines 16-22). And when another employee chose to leave in 2000, Ms. Thomas sent another claim letter to Sound Transit "to discuss the damage caused by Sound Transit to my company" and to demand more than \$88,000 in damages. *See* CP 85-86 (Thomas Dep., lines 9-25, 1-11); CP 88 (Nov. 30, 2000 Letter).

In September 2002, a month before KJM terminated its contract with nPro, nPro filed a complaint with the Federal Transit Administration ("FTA") that clearly and unequivocally alleged numerous complaints against Sound Transit related to nPro's contract with KJM. *See* CP 90-94 (Sept. 19, 2002 Complaint Letter). Excerpts from that complaint include the following:

- "I am writing to file a formal complaint with your office against Sound Transit and KJM." CP 90.
- "I am seeking your assistance [because] I cannot keep my company viable as long as KJM, aided and abetted by Sound Transit, persists in its pattern of unethical, predatory, discriminatory and illegal behavior." *Id.*

- “Discriminatory and Intimidating Behavior by KJM, Inc. and Sound Transit’s Diversity Program Manager.” CP 91.
- “It is a sad and tragic fact that [Sound Transit’s Diversity Manager], by his own behavior has created an atmosphere that has emboldened KJM in its attacks on nPro, Inc. and its staff. Far from offering unbiased advice, problem-solving assistance and fair advocacy, [Sound Transit’s Diversity Manager] quickly sided with KJM every time an issue was brought to his attention.” *Id.*
- “nPro, Inc. and its staff have been subjected to a pattern of racist oppression by KJM. KJM has been aided and abetted by Sound Transit in these acts and practices.” CP 92.
- “Sound Transit has consistently raided these businesses for their key personnel.” *Id.*
- “nPro had come disastrously close to having its credit rating ruined because Sound Transit continually refused to abide by its legal obligation to make sure prompt payment commitments are adhered to....” CP 93.
- “It is mind boggling how Sound Transit administrators continue to ‘look the other way’ while [Sound Transit’s Diversity Manager] is allowed to run amok damaging the very persons and businesses for whom he is supposed to be an advocate.” *Id.*
- “All of this is known and condoned by Sound Transit’s Administration and it is allowed to continue unchecked.” *Id.*

KJM terminated its subcontract with nPro for convenience on October 2, 2002. *See* CP 34 (Order Dismissing nPro’s Federal Lawsuit, lines 16-17). nPro, in turn, filed a lawsuit against KJM in connection with the termination, but, presumably for tactical reasons, nPro chose not to sue Sound Transit at that time. *See* CP 33-45 (Order Dismissing nPro’s

Federal Lawsuit). The lawsuit was removed to federal district court on August 10, 2004. CP 34 (Order Dismissing nPro's Federal Lawsuit, lines 1-2) and dismissed on summary judgment on October 14, 2005. CP 33-34 (Order Dismissing nPro's Federal Lawsuit). In his summary judgment order dismissing nPro's lawsuit against KJM, Judge Martinez found nothing unlawful or inappropriate about the termination. *See* CP 33-45 (Order Dismissing nPro's Federal Lawsuit).

Factually, Judge Martinez found that nPro and KJM had a poor working relationship that deteriorated over time and culminated in nPro's employee refusing to speak with or take direction from KJM, and that the termination was a result of, among other things, nPro's employee's subordination. *See* CP 34 (Order Dismissing nPro's Federal Lawsuit, lines 10-15). Judge Martinez also found that the record was "filled with evidence that [nPro's] sole employee...was performing well below expectations." CP 36 (Order Dismissing nPro's Federal Lawsuit, lines 1-3).

Within 20 days after KJM terminated the contract, nPro filed a complaint with the U.S. Department of Justice Civil Rights Division, reiterating previous allegations against Sound Transit. *See* CP 97-109 (Federal Civil Rights Complaint). On October 29, 2002, nPro filed yet

another complaint with the King County FTA Civil Rights Division in which it again stated its belief that “the person who was assigned to monitor all of these activities, [Sound Transit’s Diversity Manager], **was also a participant in instigating or performing the illegal acts himself.**” CP 113 (FTA Complaint).

Especially important is an email sent on October 31, 2002, by Ms. Thomas to an FTA civil rights officer making clear that she had consulted with an attorney and believed that she had a valid claim against Sound Transit for interfering with nPro’s contract with KJM:

Mr. Payton: I wanted to let you know that I did speak with an attorney and **he said that there is clear and sufficient evidence showing that [Sound Transit] interfered with my ability to operate my business** which is what I have attempted to convey all along. **I just did not know the legal term for it.**

CP 47 (Oct. 31, 2002 Email (emphases added)).

A few days later, on November 11, 2002, nPro sent a memorandum to Sound Transit’s chief administrative officer, reiterating previous allegations already made against Sound Transit. *See* CP 115-117 (Nov. 11, 2002 Memo). nPro asserted that “KJM was able to violate every guideline established and it appears that it was with the blessing of Sound Transit.” CP 115 (Nov. 11, 2002 Memo). It also contained two separate

and independent allegations (first, a failure to monitor KJM, and second, active interference by Sound Transit) that are dispositive:

[1] I believe that Sound Transit has failed to perform due diligence in monitoring and enforcing KJM's compliance to the commitments. [2] In addition, ***Sound Transit staff, namely [Diversity Manager] actively participated in the intimidation, threatening, and coercion tactics*** employed by KJM.

CP 116 (Nov. 11, 2002 Memo (emphasis added)). Further, this memorandum clearly and unequivocally alleges fault for the contract termination to Sound Transit: "***His behavior toward my firm and me ultimately led to my contract being terminated.***" *Id.* (emphasis added).

In accordance with the statutory requirement that an injured party must first file an administrative claim before suing a government agency, nPro then filed a \$2.5 million administrative claim against Sound Transit on January 16, 2003 that mirrors the cause of action presented in the underlying case. *See* CP 119-121 (Jan. 16, 2003 Claim). Sixty days after filing this administrative claim and not obtaining the relief it sought, nPro could have sued Sound Transit for all of the reasons articulated in its various complaints. But instead, nPro waited over a year and then filed a lawsuit solely against KJM, in July 2004. Judge Martinez dismissed that

lawsuit on summary judgment on October 14, 2005. CP 33-45 (Order Dismissing nPro's Federal Lawsuit).

In April 2006, with Judge Michael Spearman (ret.) serving as a mediator/neutral, Sound Transit initiated a multi-party claims process with a group named the Community Coalition for Contracts and Jobs ("CCCJ"). See CP 30 (Armstrong Decl., ¶ 17). Undeterred by Judge Martinez's ruling that there was nothing unlawful about nPro's termination, nPro submitted its tortious interference claim, which by that time had ballooned to more than \$27 million, as part of that process. *Id.* No settlement was reached with nPro, primarily because Sound Transit consistently believed and stated to nPro that there was no legal or factual basis for liability, and any claim would be barred by the statute of limitations. *Id.*

Although nPro was represented by various attorneys since 2002, no tolling agreement was ever executed between Sound Transit and nPro because Sound Transit never intended to waive the statute of limitation defense. CP 28 (Armstrong Decl., ¶ 3). Further, nPro's attorney produced a letter in discovery and attached it as an exhibit to its opposition to the summary judgment motion that plainly states, in a section entitled

“Limitation Period”: “I understand that Sound Transit’s position also is that it is too late for Thomas to sue.” CP 208.

The summons and complaint in the underlying action here were finally served on Sound Transit on October 1, 2008, nearly *six years* after KJM terminated its subcontract with nPro. *See* CP 52-53 (Summons).

A summary timeline of the above facts follows:

Date	Action
May 1998	Sound Transit / KJM enter contract
July 1998	KJM / nPro enter subcontract
Nov. / Dec. 2000	nPro submits claims against Sound Transit based on employees that left to work for Sound Transit, including \$88,000 claim
Sept. 19, 2002	nPro files a complaint against Sound Transit with the FTA
Oct. 2, 2002	KJM terminates subcontract with nPro
Oct. 22, 2002	nPro files complaint against Sound Transit with the U.S. Dept. of Justice Civil Rights Division
Oct. 29, 2002	nPro files complaint against Sound Transit with the King County FTA Civil Rights Division
Oct. 31, 2002	nPro sends email to FTA civil rights official stating that it met with lawyer and believes there is clear and sufficient evidence that Sound Transit interfered with its contract
Nov. 11, 2002	nPro sends a memorandum to Sound Transit outlining Sound Transit’s alleged wrongful acts, including a failure to monitor KJM and active interference, and alleging that Sound Transit’s Diversity Manager’s “behavior toward my firm and me ultimately led to my contract being terminated”
Jan. 16, 2003	nPro files \$2.5 million administrative claim against Sound Transit

July 2004	nPro files lawsuit against KJM and does not include Sound Transit
Oct. 2, 2005	Three-year statute of limitations expires on Plaintiff's tort claims
Oct. 14, 2005	Federal court dismisses all of Plaintiff's claims
April 2006	Broader CCCJ mediation process initiated
Oct. 1, 2008	Summons and complaint served on Sound Transit in this action

nPro does not deny any of the above facts, nor could it. Each factual assertion is well documented. Rather, nPro's opposition to Sound Transit's summary judgment motion, as with its appeal here, was based upon the argument that, notwithstanding all of the above facts, "there was [still] a genuine issue of fact as to when nPro knew of *active and intentional* participation in the interference by Sound Transit." Opening Brief of Appellant at 5 (underline added, italics in original). This argument lacks merit.

IV. POINTS AND AUTHORITIES

A. **Standard of Review.**

In a summary judgment proceeding, the reviewing court makes the same inquiry as the trial court. *Marshall v. AC&S Inc.*, 56 Wn. App. 181, 184, 782 P.2d 1107 (Div. 1 1989). If the pleadings, depositions, admissions on file and affidavits submitted demonstrate that no genuine issue of material fact exists and that the moving party is entitled to

judgment as a matter of law, then summary judgment is proper. *Id.*; CR 56(c). Summary judgment involving statutes of limitations should be granted when there is no genuine issue of material fact as to when the relevant limitations period commenced. *Marshall*, 56 Wn. App. at 184.

To be sure, the burden of presenting evidence is typically on the moving party and all reasonable inferences typically should be considered in the light most favorable to the non-moving party. *Id.* But even so, a summary judgment motion should be granted when, from all the evidence, reasonable persons could reach but one conclusion. *Id.* In other words, a summary judgment motion should not be denied on the basis of an unreasonable inference. *Id.*

What is more, a party cannot create an issue of fact and prevent summary judgment simply by offering two different versions of a story by the same person. *See id.* at 185 (self-serving affidavits from non-moving parties that merely contradict previous testimony and evidence, without explanation, do not raise genuine issues of material fact sufficient to defeat summary judgment); *see also Selvig v. Caryl*, 97 Wn. App. 220, 225, 983 P.2d 1141 (Div. 1 1999) (genuine issues of material fact cannot be created by declarant who submits contradictory testimony). Broad generalizations and vague conclusions are also insufficient to resist a motion for summary

judgment. *Thompson v. Everett Clinic*, 71 Wn. App. 548, 860 P.2d 1054 (Div. 1 1993).

This is particularly true here because the burden of proof rests with nPro. To defeat summary judgment under a discovery rule defense, the law is clear that nPro bears the evidentiary burden of establishing that the necessary facts could not be discovered within the three-year statute of limitations period. *Burns v. McClinton*, 135 Wn. App. 285, 300, 143 P.3d 630 (Div. 1 2006), *as amended* (Feb. 13, 2008) (affirming on summary judgment because “[t]he [trial] court did not . . . make a finding that Burns could not have discovered the overcharges earlier through the exercise of due diligence. The lack of this finding is fatal.”).

B. The Discovery Rule Does Not Apply in This Case Because the Evidence Establishes That nPro Knew or Should Have Known of the Necessary Facts of Its Claim in October/November 2002 or, at a Minimum, Was on Notice That Legal Action Must Be Taken Within the Three-Year Statute of Limitations.

The discovery rule applies to two categories of cases: (1) cases of fraudulent concealment; and (2) cases where the nature of the plaintiff’s injury makes it extremely difficult, if not impossible, for the plaintiff to learn the factual elements giving rise to the cause of action within the limitation period. *Crisman v. Crisman*, 85 Wn. App. 15, 20-21, 931 P.2d 163 (Div. 2), *review denied*, 132 Wn.2d 1008, 940 P.2d 653 (1997). It prevents the commencement of the running of an applicable limitations

period until the time a plaintiff knew, or should have known, of the facts giving rise to his or her claim. *See, e.g., Reichelt v. Johns-Manville Corp.*, 107 Wn.2d 761, 769-70, 733 P.2d 530 (1987).¹ In making this determination, it does not matter whether the plaintiff understood the legal basis for the claim. An 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. *Id.*; *Retired Pub. Employees Council of Wash. v. State, Dep't of Retirement Sys.*, 104 Wn. App. 147, 151-52, 16 P.3d 65 (Div. 2 2001) (discovery rule does not toll statute of limitations merely because plaintiff was ignorant of law on which to base cause of action; "ignorance of the law is no excuse").

The discovery rule requires a plaintiff to use due diligence in discovering the basis for the cause of action; it will postpone the running of a statute of limitation only until the time when a plaintiff, through the exercise of due diligence, should have discovered the basis for the cause of action. *Reichelt*, 107 Wn.2d at 761, 772-773. In other words, when a plaintiff reasonably suspects that a specific wrongful act has occurred, that

¹ Referring to Sound Transit's summary judgment motion, CP 21, nPro misleadingly asserts that "Sound Transit candidly admits that a plaintiff's claim accrues only at the time that all essential elements are known by the plaintiff." Opening Brief at 9. There is no reasonable way to interpret CP 21 in this manner. Sound Transit correctly stated the standard in its summary judgment motion, as it does so above.

plaintiff is deemed to be on notice that legal action must be taken and must from that point exercise due diligence to learn of any further facts necessary to initiate a lawsuit. *1000 Va. Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 581, 146 P.3d 423 (2006).

Importantly, the discovery rule does not require “smoking gun” proof of the essential facts and “[a]n injured claimant who reasonably suspects that a specific wrongful act has occurred is on notice that legal action must be taken.” *Beard v. King County*, 76 Wn. App. 863, 868, 889 P.2d 501 (Div. 1 1995). Once on notice, a plaintiff must then “file suit within the limitation period and use the civil discovery rules within that action to determine whether the evidence necessary to prove the cause of action is obtainable.” *Id.* at 868.

Here, nPro does not deny that the evidence plainly shows that (1) nPro’s subcontract with KJM was terminated by KJM on October 2, 2002; and (2) nPro did not initiate its lawsuit against Sound Transit until October 1, 2008. nPro’s appeal is chiefly based on the argument that the discovery rule tolled the statute of limitations until at least October 14, 2005. *See* Opening Brief of Appellant at 3-4.

But given nPro’s admissions in its October 31, 2002 email to the FTA—specifically, that nPro had consulted an attorney; that nPro was

aware that there is “clear and sufficient evidence” showing that Sound Transit interfered with its ability to operate its business; and that this interference with business expectancies was what nPro had previously attempted to convey, but simply did not know the legal term for it—no reasonable mind could conclude that nPro was not aware of the facts giving rise to its claim in October 2002, the same month that its contract with KJM was terminated. *See Marshall*, 56 Wn. App. at 184 (summary judgment should be granted when, from all evidence, reasonable persons could reach but one conclusion); *Meissner v. Simpson Timber Co.*, 69 Wn.2d 949, 951, 421 P.2d 674 (1966) (same). At a minimum, the evidence clearly shows that nPro should have known of the facts giving rise to its claim.

All of the following, individually and especially in combination, also support the conclusion that nPro knew or should have known the facts of its claim long before October 14, 2005:

- the \$88,000 claim it submitted in 2000 related to employees that left nPro (CP 85-86 (Thomas Dep., lines 9-25, 1-11); CP 88 (Nov. 30, 2000 Letter));
- nPro’s September 19, 2002 letter to the FTA (CP 90-94 (Sept. 19, 2002 Complaint Letter));
- the October 22 and October 29, 2002 complaints nPro sent to various civil rights groups (CP 97-109 (Federal Civil Rights Complaint); CP 111-113 (FTA Complaint));

- nPro’s November 11, 2002 memorandum to Sound Transit outlining Sound Transit’s alleged wrongful acts, including a failure to monitor KJM and active interference with nPro’s contract, and alleging that Sound Transit’s Diversity Manager’s “behavior toward my firm and me ultimately led to my contract being terminated” (CP 115-116 (Nov. 11, 2002 Memo)); and
- the \$2.5 million claim that nPro asserted against Sound Transit in January 2003 (CP 119-121 (Jan. 11, 2003 Claim)).

In short, no reasonable person could conclude that nPro should not have known of the facts of its claim during the fall of 2002. *See Marshall*, 56 Wn. App. at 184 (summary judgment should be granted when, from all evidence, reasonable persons could reach but one conclusion); *Meissner*, 69 Wn.2d at 951 (same). The discovery rule does not apply in this case.

Even if the discovery rule did apply in this case, nPro’s allegations against Sound Transit in 2002 plainly establish that it believed Sound Transit interfered with nPro’s contract with KJM. Specifically, nPro alleged that Sound Transit did all of the following:

- “aid[ed] and abet[ted] [KJM] . . . in its pattern of unethical, predatory, discriminatory and illegal behavior.” CP 90.
- “Discriminatory and Intimidating Behavior by . . . Sound Transit’s Diversity Program Manager.” CP 91.
- “[Sound Transit’s Diversity Manager], by his own behavior has created an atmosphere that has emboldened KJM in its attacks on nPro, Inc. and its staff. Far from offering unbiased advice, problem-solving assistance and fair advocacy, [Sound Transit’s Diversity Manager] quickly sided with KJM every time an issue was brought to his attention.” *Id.*

- “KJM has been aided and abetted by Sound Transit in its [pattern of racist oppression.]” CP 92.
- “Sound Transit has consistently raided these businesses for their key personnel.” *Id.*
- “nPro has come disastrously close to having its credit rating ruined because Sound Transit continually refused to abide by its legal obligation to make sure prompt payment commitments are adhered to...” CP 93.
- “Sound Transit administrators continue to ‘look the other way’ while [Sound Transit’s Diversity Manager] is allowed to run amok damaging the very persons and businesses for whom he is supposed to be an advocate.” *Id.*
- “KJM was able to violate every guideline established and it appears that it was with the blessing of Sound Transit.” CP 115.
- “I believe that Sound Transit has failed to perform due diligence in monitoring and enforcing KJM’s compliance to the commitments. In addition, ***Sound Transit staff namely, [Diversity Manager] actively participated in the intimidation, threatening, and coercion tactics*** employed by KJM. ***His behavior toward my firm and me ultimately led to my contract being terminated.***” CP 116 (emphases added).

Even more important, for all facts nPro alleged were subject to the discovery rule, Sound Transit requested identification in discovery of the manner in which each fact was first discovered or first became known and the exact date on which each fact was first discovered or otherwise first became known. *See* CP 143-145 (Interrogatories 8, 9, 10). nPro’s discovery responses were misleading at best, but once decoded and

compared to plaintiff's prior allegations, they revealed that virtually all of nPro's primary allegations against Sound Transit were first made in 2002. *See* CP 22-24 (S.J. Motion).

Based on this uncontroverted documentary evidence, even if the discovery rule applies, nPro knew or should have known of its alleged tortious interference claim against Sound Transit by at least October 31, 2002, the date of its unequivocal email admission to the FTA. *See Beard*, 76 Wn. App. at 868 (discovery rule does not require "smoking gun" proof of essential facts and "[a]n injured claimant who reasonably suspects that a specific wrongful act has occurred is on notice that legal action must be taken").

nPro certainly cannot wait nearly six years to bring its lawsuit, during which time it brought and lost a federal lawsuit against KJM based on similar facts—and during which extensive document and deposition discovery from Sound Transit personnel was conducted. *Id.* (once on notice, plaintiff must "file suit within the limitation period and use the civil discovery rules within that action to determine whether the evidence necessary to prove the cause of action is obtainable"). Accordingly, if the discovery rule applies at all, the statute of limitation would have expired on October 31, 2005. However, the summons and complaint in this action

were not served on Sound Transit until October 1, 2008, well after the statute of limitations expired.

C. nPro Failed to Meet Its Evidentiary Burden of Establishing That the Essential Facts Could Not Be Discovered Within the Three-Year Statute of Limitations Period.

Plaintiff's opening brief completely ignores (or intentionally omits) controlling, fundamental legal principles applicable to its discovery rule argument. To defeat summary judgment under a discovery rule defense, the law is clear that nPro bears the evidentiary burden of establishing that the necessary facts *could not be discovered within the three-year statute of limitations period*. *Burns*, 135 Wn. App. at 300 (affirming on summary judgment because “[t]he [trial] court did not . . . make a finding that Burns could not have discovered the overcharges earlier through the exercise of due diligence. The lack of this finding is fatal.”); *Douglass v. Stanger*, 101 Wn. App. 243, 256, 2 P.3d 998 (Div. 3 2000) (affirming summary judgment rejection of discovery rule because plaintiff failed to exercise due diligence once on notice of claim).

Moreover, nPro has to do so with actual evidence; unsupported assertions in a declaration do not satisfy nPro's burden. *See, e.g., Heath v. Uraga*, 106 Wn. App. 506, 513, 24 P.3d 413 (Div. 2 2001) (“After the moving party submits adequate affidavits, the nonmoving party must set out specific facts sufficiently rebutting the moving party's contentions and

disclosing the existence of a material issue of fact. The nonmoving party may not rely on speculation, argumentative assertions that unresolved factual issues remain, or having its affidavits accepted at face value.” (citing *Seven Gables Corp. v. MGM/UA Entm’t Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986)).

nPro did not satisfy its burden at the trial level and does not do so on appeal. Rather, nPro simply attempts to create genuine issues of material fact by arguing that nPro was not aware of Sound Transit’s “active and intentional participation in the interference [with its contract with KJM]” until shortly after October 14, 2005, when nPro “unearthed the records of Sound Transit’s active involvement.” Opening Brief of Appellant at 3-5.²

nPro asserts, for example, that Ms. Thomas “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 [sic] businesses.” See Opening Brief of Appellant at 3-4 (referring to CP 169, Thomas

² October 14, 2005, is conveniently the exact date on which the federal court dismissed nPro’s lawsuit against KJM. In other words, once that lawsuit was dismissed, nPro simply moved on to suing the next entity in its sights and conveniently asserts that that was when it first “unearthed” the records.

Decl.). But this assertion was made in a self-serving declaration filed by Ms. Thomas in opposition to Sound Transit's summary judgment motion. And it is contradicted by the numerous documents she sent in 2002, such as the November 11, 2002 memorandum (CP 115-117) that asserts that Sound Transit both failed to monitor KJM and "actively participated in the intimidation, threatening, and coercion tactics employed by KJM." *See, e.g., Heath*, 106 Wn. App. at 513 (unsupported assertions in declaration do not satisfy non-moving party's burden); *see also Marshall*, 56 Wn. App. at 185 (self-serving affidavits from non-moving parties that merely contradict previous testimony and evidence, without explanation, do not raise genuine issues of material fact sufficient to defeat summary judgment).

nPro also asserts that it did not have prior access to certain documents that were turned over in the 2005 case discovery, including KJM's internal notes and emails from Sound Transit's deputy executive director. *See* Opening Brief of Appellant at 4-5 (referring to CP 410, 413-414, 490). Assuming the Court accepts nPro's uncorroborated interpretation of these documents, the fact that these documents turned up in the 2005 discovery in no way contradicts the documented evidence set

forth above showing that nPro knew the essential facts of its claim in 2002. They simply expand on those facts.

And again, nPro had the burden of proving that the facts could not have been discovered within the three-year period of limitations. To meet this burden, one would have expected nPro's evidence to include the date the documents were produced in the prior litigation. But this is not the case, because the only evidence in the record shows that these were produced (and reviewed/used by Ms. Thomas's prior attorney) many months before the federal court issued its summary judgment opinion. In fact, every document in question was produced in connection with litigation prior to May 9, 2005, and nPro's attorney actually used some of the documents in question as deposition exhibits on May 9, 2005. *See* CP 518-519 (Sound Transit's Reply on S.J., esp. n.12); CP 528-533 (Index of Dep. Exhibits). Ms. Thomas may not have personally seen some of the documents, but she was represented by a team of attorneys and they reviewed and selected deposition exhibits from them long before the statute of limitation ran. The attorneys' knowledge is imputed to nPro.

See, e.g., Hill v. Dep't of Labor & Indus., 90 Wn.2d 276, 279, 580 P.2d 636 (1978) (“Knowledge by the attorney is imputed to the client.”).³

Also regarding these documents, nPro argues in footnote 6 of its Opening Brief that “Sound Transit neither proved that the records were produced in chronological order nor explain[ed] why there [was] 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.” Opening Brief of Appellant at 19-20 n.6. “Possession of thousands of pages of documents[,]” nPro concludes, “does not inevitably lead to the conclusion that knowledge of all the content of all the documents automatically occurred.” *Id.* Again, nPro misses the point. The evidence clearly shows that nPro had knowledge of some of the documents in question by May 9, 2005, sufficient to allegedly show that Sound Transit intentionally interfered with Ms. Thomas’s contract with KJM. It is not necessary that nPro have reviewed every single possible document to make its claim, as it appears to be arguing. Even more important, it is not Sound Transit’s burden to defeat the discovery

³ Even assuming, *arguendo*, that the discovery rule somehow applies in this case, actual evidence in the record establishes that it could only possibly apply until May 9, 2005, the date on which the documents were used by nPro’s attorney in a deposition. Since nPro did not serve Sound Transit until October 1, 2008, nPro’s lawsuit is untimely even if the discovery rule applies.

rule by showing that nPro’s attorneys reviewed all “20 boxes” of documents prior to May 9, 2005. nPro bears the evidentiary burden of establishing that the necessary facts and documents *could not have been discovered* by October 1, 2005, which would be within three years of nPro’s contract termination. *See Burns*, 135 Wn. App. at 300 (affirming summary judgment because nonmoving party failed to establish that it could not have discovered essential facts earlier through exercise of due diligence). And nPro certainly has not met that burden because there is not a single fact in evidence establishing such.

D. nPro’s Further Attempts to Create Genuine Issues of Material Fact Fail as a Matter of Law.

In an effort to circumvent the fact that it failed to file its case in a timely manner, nPro makes several other attempts to create material issues of fact. Each attempt discussed below fails as a matter of law.

(1) nPro argues that there is a question of fact as to whether nPro knew of the intentional nature of Sound Transit’s actions because “[Ms.] Thomas described Sound Transit as a victim of KJM’s actions in her 2004 lawsuit against KJM.” Opening Brief of Appellant at 13 (referring to CP 419, ¶ 38; emphasis omitted). This certainly does not create a material issue of fact. *Zedrick v. Kosenski*, 62 Wn.2d 50, 54, 380 P.2d 870 (1963) (material facts are those facts upon which the outcome of the litigation

depends). CP 419 is only a copy of nPro's complaint in its lawsuit against KJM, and it simply alleges, with no proof, that KJM's use of nPro "constitutes a fraud on both Sound Transit and on plaintiffs." This statement does not contradict the evidence set forth above showing that nPro knew the essential facts of its claim in 2002, and more importantly, Judge Martinez' summary judgment dismissal essentially rejected this statement by dismissing all of nPro's claims in that lawsuit.

(2) nPro admits that it stated in November 2002 that

I believe that Sound Transit has failed to perform due diligence in monitoring and enforcing KJM's compliance to the commitments. In addition, Sound Transit staff namely [Diversity Manager] actively participated in the intimidation, threatening, and coercion tactics employed by KJM. *His behavior toward my firm and me ultimately led to my contract being terminated.*

Opening Brief of Appellant at 13 (referring to CP 516 (emphasis added; brackets in original)). But, in a self-serving declaration, nPro now claims that it "did not understand that [the Diversity Manager's] efforts were those of Sound Transit to evade or eliminate [nPro's] contract." Opening Brief of Appellant at 13 (referring to CP 169-170). Again, unsupported assertions in a declaration do not satisfy the non-moving party's burden. *See Heath*, 106 Wn. App. at 513; *Marshall*, 56 Wn. App. at 185 (self-serving affidavits from non-moving parties that merely contradict previous

testimony and evidence, without explanation, do not raise genuine issues of material fact sufficient to defeat summary judgment).

(3) In the same self-serving declaration, nPro also states that it “was aware of Sound Transit’s practice of poaching her employees, [but] it told her that it would make it up to her in other ways. Without more indication of bad faith by this public entity, nPro had no reason to know of Sound Transit’s plan.” Opening Brief of Appellant at 14 (referring to CP 169). As above, these simple assertions by Ms. Thomas in a declaration do not now satisfy nPro’s burden. *See Heath*, 106 Wn. App. at 513; *Marshall*, 56 Wn. App. at 185.

(4) In a conclusory assertion, without any factual support, nPro claims that “[a]ll 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[.]” Opening Brief at 15. A party may not successfully oppose summary judgment by nakedly asserting that there are unresolved factual issues. “The whole purpose of summary judgment procedure would be defeated if a case could be forced to trial by a mere assertion that an issue exists without any showing of evidence.” *Bates v. Grace United Methodist Church*, 12 Wn. App. 111, 115-16, 529 P.2d 466

(Div. 2 1974). Moreover, this assertion is plainly out of line with the various documents cited above containing allegations by nPro of affirmative interference and active involvement by Sound Transit. *See Heath*, 106 Wn. App. at 513; *Marshall*, 56 Wn. App. at 185.

(5) Lastly, nPro disingenuously claims that Sound Transit’s “own evidence shows [nPro’s] ignorance of Sound Transit’s intent[,]” *see* Opening Brief of Appellant at 14, and suggests that Sound Transit agrees with the following assertions:

- Sound Transit’s contract manager’s rude behavior was “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.” Opening Brief at 14 (*citing* CP 92).
- Sound Transit’s “evidence also echoes nPro’s phrasing in its co[n]cerns about Sound Transit’s handling of its responsibilities as ‘reckless,’ not as intentional.” Opening Brief at 14-15 (*citing* CP 107).

But nPro’s assertion is grossly misleading: CP 92 is nPro’s formal complaint to the FTA, and CP 107 is nPro’s formal complaint to the U.S. Department of Justice Civil Rights Division. Neither document even remotely suggests Sound Transit’s position.

nPro clearly has not met its burden of establishing that it could not have discovered the essential facts supporting its claim until after October 1, 2005, which was three years prior to the date it filed the underlying suit.

What is more, its attempt to create genuine issues of material fact fails because it cannot simply rely upon bald assertions in a self-serving declaration to defeat summary judgment. And, nPro has put forth no other evidence establishing that it did not know, and could not have known, the essential facts of its claim in October 2002, which the rest of the evidence in this case establishes.

E. The Doctrine of Equitable Tolling Does Not Apply in This Case.

nPro has no legal justification for filing this action nearly three years after the applicable period of limitations expired. Despite this, nPro now argues that the doctrine of equitable tolling should apply because Sound Transit agreed to consider nPro's claim as part of a broader claims process with the CCCJ. Opening Brief of Appellant at 20-22. nPro relies for its legal basis upon a single footnote in a single case stating that there "might exist" a "possibility [in] future [discrimination] cases" to toll a statute of limitations when the EEOC is actively pursuing non-judicial resolution of a complaint. *Id.* at 21 (*citing Douchette v. Bethel Sch. Dist. No. 403*, 117 Wn.2d 805, 812 n.6, 818 P.2d 1362 (1991)). This argument lacks merit.

It is certainly true that, when justice requires, a trial court may toll the statute of limitations. But the law in Washington is that courts should

permit equitable tolling only sparingly. *Trotzer v. Vig*, 149 Wn. App. 594, 607, 203 P.3d 1056 (Div. 2 2009). Furthermore, equitable tolling requires a showing of bad faith, deception or false assurances by the defendant and the exercise of diligence by the plaintiff. *Id.* And, the party asserting that equitable tolling should apply bears the burden of proof. *Id.*

Here, a finding of equitable tolling is inappropriate for numerous reasons:

- First, in April 2006 (approximately six months after the limitations period for nPro's tort claim expired), the CCCJ submitted claims to Sound Transit on behalf of seven different contractors, including nPro, related to Sound Transit's contracts dating from 1996. *See* CP 157-158 (Apr. 17, 2006 Letter from CCCJ). Sound Transit extensively investigated and ultimately mediated these claims in December 2007. Sound Transit's position with regard to nPro's alleged claim has always been that there was not a legal or factual basis for liability because any claim would be barred by the statute of limitations, and it never waived that defense during the entire CCCJ process. *See* CP 30 (Armstrong Decl., ¶ 17).
- Second, the CCCJ process did not commence until several months after the statute of limitations of nPro's tort claim had already run.

- Third, although nPro was represented by numerous sets of attorneys, at no time did nPro and Sound Transit execute a tolling agreement, because Sound Transit never intended to waive the defense. *See* CP 28 (Armstrong Decl., ¶ 3).

- Fourth, nPro has not put forth any facts that Sound Transit acted in bad faith, was in any way deceptive or made false assurances.

- Fifth, and most importantly, nPro did not act with due diligence. It consulted its attorney and admitted to numerous entities that it believed it had a valid claim against Sound Transit for tortious interference by October 31, 2002. Filing the claim nearly six years later cannot under any circumstance be considered acting with due diligence. *See, e.g., Gunnier v. Yakima Heart Ctr., Inc.*, 134 Wn.2d 854, 953 P.2d 1162 (1998) (plaintiff did not act with due diligence in pursuing her negligence claim against physician, and thus equitable tolling did not apply).

For all of these reasons, equitable tolling does not apply. And it certainly cannot serve as a basis for reviving a claim for which the statute of limitations had already expired.

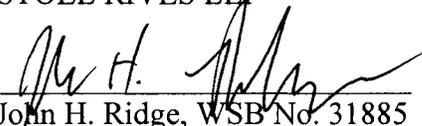
V. CONCLUSION

nPro chose to wait more than six years to file its tort claim—a claim it could have filed in 2002 when it clearly was aware of all the essential elements of its claim. nPro's conduct over the past six years, including filing numerous administrative claims and one federal lawsuit, demonstrates that it made a strategic decision not to pursue its claim against Sound Transit until now. Simply put, since nPro filed this lawsuit nearly three years after the statute of limitations on its tort claim expired in October 2005, the claim is time barred, as the trial court concluded.

There are no genuine issues of material fact, despite nPro's attempt to create such. Because Sound Transit is entitled to judgment as a matter of law, it respectfully requests that the Court uphold the trial court's order on summary judgment.

DATED: December 4, 2009.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the state of Washington that on the date indicated below the foregoing Brief of Respondent was caused to be served via Legal Messenger on the individuals and/or offices at the addresses listed below:

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I further certify that on December 4, 2009, I caused the original and one copy of Brief of Respondent to be filed with the appellate court via legal messenger:

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DATED: December 4, 2009.


Shelley Sasse, Legal Secretary

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