

No. 66777-7-I

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

NORTHWEST INFRASTRUCTURE, INC., a Washington corporation,

Plaintiff/Appellant,

v.

PCL CONSTRUCTION SERVICES, INC. a Washington corporation;
FIDELITY AND DEPOSIT COMPANY OF MARYLAND,

Defendants/Third-Party Plaintiffs/Respondents

v.

CENTRAL PUGET SOUND REGIONAL TRANSIT AUTHORITY, a
Washington regional transit authority,

Third-Party Defendant/Respondent.

ON APPEAL FROM KING COUNTY SUPERIOR COURT
(Hon. Timothy Bradshaw and Dean S. Lum)

BRIEF OF RESPONDENT SOUND TRANSIT

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I. INTRODUCTION

Appellant Northwest Infrastructure, Inc. (“NWI”) was awarded a subcontract by Respondent PCL Construction Services, Inc. (“PCL”) to perform earthwork services on a public works contract between PCL and Respondent Central Puget Sound Regional Transit Authority (“Sound Transit”). The subcontract between NWI and PCL and the prime contract between PCL and Sound Transit, which was incorporated by reference into the subcontract, both contained unambiguous notice provisions that required NWI to submit written claims within a specified time period if NWI believed it was entitled to additional compensation for work beyond the scope of the original subcontract. Under well-established Washington law, failure to comply with these contractual notice requirements bars a subcontractor like NWI from later recovering additional compensation. *Mike M. Johnson, Inc. v. Spokane*, 150 Wn.2d 375, 78 P.3d 161 (2003).

During its work on the project, NWI came to believe it was entitled to additional compensation for two different reasons: (1) so-called “liquefaction” of the soil and (2) earthwork excavation beyond the scope of the project drawings. NWI submitted claims to Sound Transit, through PCL, for additional compensation as to each. Unbeknownst to Sound Transit at the time, however, NWI became aware of the alleged grounds for both claims months before it actually submitted them—well beyond

the notice period specified in the subcontract and prime contract. Sound Transit rejected the liquefaction claim as unfounded, but—without knowing when NWI discovered its claim—agreed to issue a change order in excess of \$500,000 for the purported additional earthwork.

NWI wanted more, and when Sound Transit refused to pay NWI the additional \$2,000,000 it demanded, NWI sued on both the liquefaction and additional earthwork claims. NWI's greed was its undoing. During discovery, Sound Transit learned that NWI failed to immediately provide PCL or Sound Transit written notice of its purported claims when it first became aware of them, as it was required to do. Pointing to the contractual notice requirements, Sound Transit (and PCL) moved for summary judgment. NWI was so confident in its theory of the case that it cross-moved on the notice issue, filing a single attorney declaration with attached documents in support. NWI's strategy backfired. The trial court granted Sound Transit's motion for summary judgment and subsequently awarded it attorneys' fees under the public works statute, RCW 39.04.240.

Undaunted, NWI tried to take a second and then a third bite at the apple based on new theories and not-so-new evidence. NWI first moved for reconsideration, relying on a declaration prepared by NWI's president that contained no new facts, but that squarely contradicted his own prior deposition testimony. When the motion for reconsideration was denied,

NWI filed a “motion to vacate” several weeks later, this time relying on the deposition testimony of a PCL representative that NWI chose not to depose during the summary judgment proceedings. The trial court rejected that motion too. Like its motion for reconsideration, NWI’s motion to vacate was simply too late and, even if it had been considered, it would not create any genuine issues of material fact for trial.

NWI appeals the trial court’s summary judgment and attorneys’ fee rulings, as well the denials of NWI’s motion for reconsideration and motion to vacate. This Court should affirm the judgment below. The trial court correctly concluded as a matter of law that NWI failed to comply with its contractual notice requirements and that Sound Transit did not waive those requirements by words or conduct. The trial court also properly exercised its discretion when it denied NWI’s repeated efforts to relitigate the summary judgment ruling with arguments and evidence that could have been submitted earlier. Because Sound Transit was the prevailing party, the trial court properly awarded Sound Transit its attorneys’ fees under RCW 39.04.240, and this Court should award Sound Transit its attorneys’ fees on appeal as well.

II. COUNTERSTATEMENT OF THE ISSUES

1. Did the trial court properly enter summary judgment for Sound Transit where the undisputed facts show that NWI failed to submit

a written request for change order or claim to PCL or Sound Transit within the applicable time periods set forth in the subcontract's and incorporated prime contract's notice and claim provisions? **Yes.**

2. Did the trial court properly reject NWI's argument that Sound Transit waived its contractual notice defenses as a matter of law where the undisputed facts do not show an express waiver or unequivocal acts of conduct that evidence an intent to waive those defenses? **Yes.**

3. Did the trial court properly exercise its discretion when it denied NWI's motion for reconsideration and motion to vacate where both motions were based on evidence NWI could have obtained, but did not, prior to summary judgment, and where that evidence, even if considered, would not create a genuine issue of material fact? **Yes.**

4. Did the trial court properly conclude that Sound Transit was entitled to an award of attorneys' fees pursuant to RCW 39.04.240 because it was undisputed that Sound Transit was the prevailing party on NWI's pass-through public works contract claim? **Yes.**

5. Is Sound Transit entitled to attorneys' fees on appeal? **Yes.**

III. COUNTERSTATEMENT OF THE CASE

A. Statement of Undisputed Facts.

In its overly argumentative statement of the case, NWI does not distinguish between the evidence it submitted in opposition to Sound

Transit's motion for summary judgment and the evidence it subsequently submitted in connection with its motion for reconsideration and motion to vacate. For the reasons explained below, the trial court properly rejected NWI's post-summary judgment motions and, thus, the evidence NWI submitted with those motions is not part of the summary judgment record and not part of this Court's *de novo* review. Pursuant to RAP 9.12, the following statement of facts cites only to the materials and evidence considered by the trial court prior to entry of summary judgment. NWI's post-summary judgment evidence is addressed in the argument section relating to the motion for reconsideration and motion to vacate.

1. Contractual Notice Requirements.

This lawsuit arises out of NWI's claim for additional compensation for subcontract work performed during construction of the Sound Transit Federal Way Transit Center (the "Project"). The Project consisted of a parking garage, storm water detention vault, bus platform and pedestrian walkway connecting the garage to the platform. CP 155 (Dahl Decl., ¶ 2). Sound Transit put the Project out for bid in March 2004, and ultimately awarded the contract to PCL on June 25, 2004. *Id.* (¶ 4). As is typical in public works contracts, the prime contract incorporated general provisions that contain notice requirements that govern different types of claims that

PCL and its subcontractors might bring during the course of the Project. *Id.* (¶¶ 5-6). These notice requirements are central to this appeal.

PCL awarded a subcontract to NWI to perform earthwork on the Project. CP 99 (Hornland Decl., ¶ 2); CP 101-123. NWI's subcontract expressly incorporated the prime contract by reference and, thus, NWI had to comply with the prime contract's notice requirements. CP 112 (§§ 1.1 & 1.2); CP 118 ("When Subcontractor prosecutes or defends any [pass-through] claim ..., Subcontractor shall follow all claim procedures in the Prime Contract."). NWI would ultimately make claims for compensation related to alleged (1) "liquefaction" of soil at the Project site, and (2) additional earthwork excavation. CP 6-9 (Complaint, ¶¶ 2.3-2.7).¹ The notice provisions relevant to these claims are discussed in turn.

Notice of a Differing Site Condition. NWI conceded below that its claim regarding additional work due to allegedly saturated soils was a "differing site condition" within the meaning of Article 4.11 of the prime contract. *See* CP 435 (NWI's cross-motion: "[t]here is no factual dispute that the soil liquefaction claim proceeded under the Request for Change

¹ NWI's claim for additional compensation due to allegedly unforeseen saturation of the soil does not constitute "liquefaction" as a technical matter. Liquefaction is a phenomenon whereby saturated soil loses strength in response to an applied stress, usually an earthquake, causing it to behave like a liquid. Nevertheless, and for ease of simplicity, Sound Transit will utilize NWI's incorrect terminology in this brief.

(RFC) provisions of Article 4”). Article 4.11(A) required NWI to notify Sound Transit of a differing site condition “*immediately upon discovery*, and before the conditions are further disturbed, ... *in writing*[.]” CP 164 (emphasis added). Article 4.11(F) then provides that, “[n]o request ... for an equitable adjustment to the Contract for a Differing Site Condition shall be allowed unless the Contractor has given the required written notice.” CP 165. As discussed below, NWI did not submit such a notice.

Requests for Changes and Notices of Claim. NWI’s claim for additional earthwork implicates two different notice provisions. To the extent NWI believed that it was required to perform additional earthwork outside the original scope of the Project, Article 4.02 governed the process for seeking a request for change (“RFC”), and it provided in part:

- A. After the Contractor becomes aware of the need for or desirability of a requested change, an RFC may be submitted to Sound Transit *in writing* ... and must specify the reasons for such a change, including relevant circumstances and impacts on the schedule.
- B. The Contractor may request additional compensation and/or time through an RFC, ***but not for instances that occurred more than twenty (20) days prior to the request.***

CP 455 (emphasis added). As discussed below, NWI did not submit a written RFC (or any RFC) within 20 days of it first becoming aware of its purported claim for compensation or delays due to additional earthwork.

To the extent NWI's claim did not fall within Article 4's 20-day notice provision, then Article 10 catch-all provision for notice of claims applied. Article 10.01(A) stated in pertinent part:

1. In order to receive any recovery for relief under or in connection with the Contract, the Contractor must submit a *written Notice of Intent to Claim* to Sound Transit through the Resident Engineer in accordance with the provisions of this Article.
- ...
3. The Notice shall be submitted within ten (10) days after the event or occurrence giving rise to the potential claim, or ... *if the event or occurrence is claimed to be an act or omission of Sound Transit, a Notice of Intent to Claim shall be given by the Contractor within ten (10) days after the Contractor discovers the act or omission* and prior to the time for performance of that portion of the Work to which such alleged act or omission relates.

CP 166 (emphasis added). Article 10.01 further specified that “[f]ailure to comply with these requirements shall constitute a waiver by the Contractor on any right, equitable or otherwise, to bring any such claim against Sound Transit.” *Id.* Here too, NWI did not submit a written notice within 10 days of discovering the alleged reasons giving rise to its claim.

Subcontract Notice Requirements. In addition to the prime contract's notice provisions, NWI's subcontract with PCL had additional notice requirements for pass-through claims, like those at issue here. Regarding differing site conditions, “Subcontractor shall give Contractor written notice of any condition it discovers which may or will adversely

impact upon Subcontractor's performance of the Subcontract Work, such notice to be provided within forty-eight (48) hours after discovery and prior to any disturbance of the condition." CP 113 (§ 3.2). For claims based on delay, the subcontract stated, "Subcontract shall have notified Contractor in writing of the cause of the Delay no later than seventy (72) hours after the occurrence or event causing the Delay." *Id.* (§ 12.2).

2. NWI's Discovery of its Liquefaction Claim.

NWI's "liquefaction" claim is based on NWI's alleged encounter of unanticipated water in the soil around the storm water detention vault. The NWI employee in charge of excavating the detention vault testified that NWI encountered saturated soil no later than October 14, 2004:

Q. So when we are looking at a photo dated October 14, 2004, we are looking at the consequences of the liquefied soils?

A. Yes.

Q. Which is that you can't put your excavator down in the hole of the detention tank?

A. Correct.

Q. So you have already at this point of October 14, 2004 encountered the liquefied soils?

A. Yes.

CP 153 (Johnson Dep. at 203:10-18); *see also* CP 149 (*id.* at 107:19-21).

Even though NWI had discovered an allegedly differing site condition no

later than October 14, 2004, it did not “immediately” provide notice to PCL or Sound Transit “in writing” as required by Article 4.11, or within 48 hours as required by the terms of its subcontract with PCL.

Rather, more than ten weeks after its discovery, on December 31, 2004, PCL received an RFC from NWI complaining about liquefied soil and requesting additional compensation. CP 170; CP 252 (Pittman Decl., ¶ 2). PCL passed NWI’s request on to Sound Transit on January 4, 2005. CP 169. Sound Transit denied the RFC on January 10, 2005. CP 171-172. Sound Transit denied an updated RFC again on March 3, 2005. CP 189-190. Thereafter, PCL issued a Notice of Intent to Claim on behalf of NWI, which Sound Transit likewise rejected. CP 192-194. Although Sound Transit would issue a unilateral change order in connection with NWI’s additional earthwork claim, see below, it never did so with respect to its purported “liquefaction” claim. CP 210-212.

3. NWI’s Discovery of Its Additional Earthwork Claim.

NWI’s additional earthwork claim arises from an allegation that NWI excavated and exported more soil than was specified in a Project drawing that it purportedly relied upon when making its bid. NWI began mass excavation in late July 2004 and, by at least the sixth or seventh week on the job, NWI had discovered that it had excavated more soil than what was allegedly reflected on the Project drawings:

Q. When did you realize you were going to be excavating more than 24,000 cubic yards?

A. When the stockpiles started to become unmanageable. Harold asked the question -- or expressed the concern that something was wrong. And every day I would hear that something's wrong. And what date that was, I don't know. It was early on. It was about the sixth week of the job actually, sixth, seventh week of the job.

* * *

Q. So in 2004, you knew that there were more quantities than indicated on drawing C304 for excavation?

A. Yes.

Q. And at that point did you submit a claim to PCL?

A. No. PCL instructed us what would have to happen and worked with us. Jim Pitman was telling us what to do. At the time, you know, we thought, well, we discovered something here. Let's just take care of it. And a claim was developed based on that information.

CP 135-136 (NWI Dep. at 113:16-23; 119:8-16). Indeed, in its March 2006 claim letter, NWI stated that it had discovered the purported error in the Project drawings “[w]ithin the first month of excavating.” CP 217. NWI’s CR 30(b)(6) designee testified that, when NWI informed PCL of the issue, “PCL instructed us per the contract to develop a claim and how to do that ...” CP 136 (*id.* at 119:17-22). Yet, NWI did not submit an RFC, a claim any kind of written notice to PCL or Sound Transit within 10 days or even 20 days of the alleged discovery of additional earthwork.

Sound Transit did not receive written notice until June 2005—some nine months later. On June 28, 2005, PCL sent a letter to Sound Transit on NWI’s behalf requesting \$821,101 for additional earthwork. CP 195. Prior to that, NWI had never communicated directly with Sound Transit about the issue. CP 824 (*id.* at 128:8-15). Without knowledge of when NWI discovered the basis of its claim (or knowledge that NWI’s request was fraudulent—the subject of Sound Transit’s appeal in Case No. 66870-6), Sound Transit initially agreed to pay NWI \$230,031 for the purported additional earthwork by letter dated August 24, 2005. CP 196-208. On October 19, 2005, PCL responded by submitting a revised claim on behalf of NWI in the amount of \$1,190,218. CP 209. Sound Transit conducted its own analysis and, on December 16, 2005, agreed to issue a change order in the amount of \$534,602.75. CP 210-213.

NWI refused to accept the change order, so Sound Transit—still without knowledge that NWI’s request was untimely—unilaterally issued Change Order 12 for \$534,602.75 on January 19, 2006, most of which PCL passed on to NWI. CP 157-158 (Dahl Decl., ¶¶ 18-19); CP 253 (Pittman Decl., ¶ 8); CP 550-551. On January 27, 2006, PCL submitted a Notice of Intent to Claim (CP 553) and, on March 27, 2006, a claim to Sound Transit on behalf of NWI based on the additional earthwork claim—this time for \$2,703,723. CP 214-221. The claim included the

liquefaction claim and, for the first time, an additional request that Sound Transit compensate NWI for delay costs allegedly incurred by NWI for having to work on the Project longer than planned. *Id.*; also CP 222-228. Sound Transit denied the claim in its entirety. CP 229-234.

B. Statement of the Proceedings Below.

Pleadings. NWI sued PCL, alleging that PCL breached the subcontract when it failed to pay NWI additional compensation. CP 1-13. PCL denied liability, and filed a third-party complaint against Sound Transit; PCL did not assert any direct claims against Sound Transit, but simply passed NWI's claims through to Sound Transit. CP 15-22. Sound Transit answered the third-party complaint and asserted cross-claims against NWI and "pass-through" counterclaims against PCL. CP 23-34. PCL and NWI also asserted various derivative counterclaims and cross-claims against each other and Sound Transit. CP 35-47; CP 57-62.²

Summary Judgment. Sound Transit filed a motion for summary judgment seeking to dismiss NWI's claims for additional compensation based on NWI's failure to provide contractually required notice. Sound Transit's motion carefully distinguished between NWI's separate claims

² The derivative claims remain pending with the exception of Sound Transit's cross-claims against NWI for fraud and violation of the Consumer Protection Act, which were dismissed. That ruling is the subject of Sound Transit's separate appeal in Case No. 66870-6-I.

based on differing site conditions and increased earthwork, and argued that both claims must be dismissed. CP 72-97. In support of its motion, Sound Transit filed several declarations. CP 98-123 (Hornland); CP 124-153 (Gabel); CP 154-234 (Dahl); CP 806-810 (Supp. Dahl.); CP 811-840 (Supp. Gabel). PCL joined Sound Transit's motion and filed its own motion for partial summary judgment against NWI, asserting the same contractual notice defense. CP 235-250. PCL likewise filed declarations in support of its motion. CP 251-263 (Pittman); CP 264-289 (Groff).

NWI opposed Sound Transit's and PCL's motions for summary judgment, and cross-moved. CP 418-443. It is cross-motion, NWI asked the trial court to determine, as a matter of law, that NWI complied with all the contract notice and claim requirements under both the primary contract and its subcontract with PCL. NWI did not request a continuance to conduct additional discovery pursuant CR 56(f). *Id.* NWI supported its opposition and cross-motion with a attorney declaration and, later, a supplemental pleading, both of which attached various documents but no testimony. CP 444-711 (Coluccio); CP 868-893 (Supp. Coluccio).

The trial court heard argument on April 23, 2010. In an order entered on May 21, 2010, the trial court granted Sound Transit's and PCL's motions for summary judgment. CP 928-933. Citing *Mike M. Johnson, Inc. v. Spokane*, 150 Wn.2d 375, 78 P.3d 161 (2003), and similar

cases, the court concluded that Sound Transit was entitled to judgment as a matter of law because:

NWI's failure to comply with the contract documents and mandated notice-claim procedures was not excused by the unequivocal conduct of Sound Transit; Sound Transit expressly asserted that it was not waiving or surrendering its established contractual rights or defenses.

CP 933. The court's order expressly listed the materials it had considered in connection with its ruling. CP 929-931.

Motion for Reconsideration. On June 1, 2010, NWI filed a motion for reconsideration of the May 21 summary judgment order, citing CR 59(a)(7) and (a)(9). CP 934-945.³ NWI supported its motion with new evidence—specifically, another attorney declaration (CP 946-995 (Coluccio)) and, for the first time, a declaration from NWI's president Hal Johnson. CP 996-1027 (Johnson). Johnson claimed that NWI was not aware of its additional earthwork claim until June 2005, when it hired a firm named Earthwork Services to survey the quantity of soil excavated. Johnson also claimed that Sound Transit was aware of NWI's concerns before NWI submitted its June 28 RFC. *Id.*

Sound Transit asked the court to reject NWI's motion because, among other reasons, it was based on Johnson's new declaration but did

³ NWI's motion also asked for clarification of the trial court's summary judgment order. CP 935-937. NWI has not assigned error or otherwise challenged the trial court's denial of its motion to clarify.

not comply with CR 59(a)(4)'s "newly discovered evidence" requirement. CP 3373-3407. PCL likewise filed a response. CP 3408-3417. On July 21, 2010, without oral argument, the trial court denied NWI's motion. CP 2060-2062. The court specifically found that "NWI failed to meet its burden pursuant to CR 59(a)(4), (7), and (9)." *Id.*

Motion to Vacate. On August 10, 2010, NWI filed a so-called "motion to vacate" pursuant to CR 54(b). CP 2416-2539. This time, NWI asked the trial court to reverse its prior summary judgment ruling "in the interest of justice" based primarily upon the post-summary judgment deposition testimony of PCL's CR 30(b)(6) designee. *Id.*; CP 2376-2415 (Coluccio). Both Sound Transit and PCL opposed NWI's motion. CP 2569-2578 (Sound Transit); CP 2615-2628 (PCL). On November 12, 2010, without oral argument, the trial court entered an order denying NWI's motion to vacate. CP 2728-2730.

Attorneys' Fees. Meanwhile, Sound Transit moved the trial court for an award of attorneys' fees pursuant to RCW 39.04.240. CP 2063-2071. NWI opposed the motion, arguing, among other things, that RCW 39.04.240 did not apply because there was no contractual privity between Sound Transit and NWI. CP 2196-2206. For its part, PCL argued that if Sound Transit were entitled to fees under the statute, the award should be

assessed directly against NWI. CP 2207-2212; CP 2213-2217. The trial court agreed. In a November 12, 2010 order, the court found:

Sound Transit is the prevailing party under RCW 39.04.240. NWI's claims were pass-through claims against Sound Transit. Sound Transit successfully defended against NWI's pass-through claims. As a result, Sound Transit is entitled to recover its reasonable attorney's fees and costs from NWI directly.

CP 2726-2727. The trial court has deferred ruling on the amount of the award pending the outcome of this appeal. CP 2936.

Partial Final Judgment. Pursuant to CR 54(b), the trial court entered partial final judgment on the summary judgment order, the orders denying the motion for reconsideration and motion to vacate, and the order awarding Sound Transit attorneys' fees, and stayed further proceedings pending appeal. CP 2931-2941. CP 2951-2959. NWI timely appealed.

IV. ARGUMENT

A. The Trial Court Properly Granted Sound Transit Summary Judgment On NWI's Additional Compensation Claim.

This Court reviews an order granting summary judgment *de novo*, engaging in the same analysis and considering the same record as the trial court. *Wash. Fed'n of State Employees v. Office of Fin. Mgtm.* 121 Wn.2d 152, 163, 849 P.2d 1201 (1993); RAP 9.12. Summary judgment is proper when, after viewing all facts and reasonable inferences in the light most favorable to the nonmoving party, there are no genuine issues of material

fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Wilson v. Steinbach*, 98 Wn.2d 434, 656 P.2d 1030 (1982). This Court should affirm the trial court's May 21, 2010 summary judgment order because the undisputed facts show that (1) NWI failed to comply with its contractual notice requirements, and (2) Sound Transit did not waive those requirements by words or conduct.⁴

1. It Is Undisputed That NWI Failed To Comply With Applicable Contractual Notice Requirements.

Washington courts strictly enforce contractual notice and claim provisions and, unless waived or modified by agreement, failure to comply with any such provision will bar a contractor from recovery on its claims. *Mike M. Johnson, Inc. v. County of Spokane*, 150 Wn.2d 375, 78 P.3d 161 (2003); *Absher Constr. Co. v. Kent Sch. Dist. No. 415*, 77 Wn. App. 137, 890 P.2d 1071 (1995); *Sime Constr. Co. v. Wash. Pub. Power Supply Sys.*, 28 Wn. App. 10, 621 P.2d 1299 (1980). If the provision requires written

⁴ Pursuant RAP 9.12, Sound Transit's basis its argument solely on the evidence considered by the trial court prior to entry of the summary judgment order and identified in that order. *See Wash. Fed'n of State Employees v. Office of Fin. Mgtm.*, 121 Wn.2d 152, 157, 849 P.2d 1201 (1993) ("purpose of this limitation is to effectuate the rule that the appellate court engages in the same inquiry as the trial court."). This Court may consider the evidence subsequently filed by NWI with its motion for reconsideration and motion to vacate only in connection with its review of the separate orders denying those motions, which Sound Transit addresses below. *See Jacob's Meadow Owners Ass'n v. Plateau 44II, LLC*, 139 Wn. App. 743, 162 P.3d 1153 (2007) (when reviewing denial of a motion for reconsideration, court should consider materials filed with motion)

notice, as it does here, even a party's "actual notice" of an event or claim will not suffice to excuse the other's compliance. *Mike M. Johnson*, 150 Wn.2d at 391. The party may enforce a notice provision without showing prejudice. *Absher*, 77 Wn. App. at 145. For the reasons explained below, none of NWI's claims complied with its contractual notice requirements.

The "Liquefaction" Claim. NWI made a distinct (albeit untimely) claim to Sound Transit for additional compensation due to unanticipated soil saturation (CP 169-170); it asserted that claim in its complaint (CP 6-7 (¶ 2.3)); and it addressed the issue separately in its summary judgment brief (CP 435-438). NWI ignores the issue completely on appeal. Its brief is devoted solely to resurrecting the additional earthwork claim; its so-called "liquefaction" claim is never mentioned. Because NWI does not challenge this aspect of the summary judgment ruling on appeal, NWI has abandoned it. *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 689 n. 4, 974 P.2d 836 (1999); RAP 10.3(a)(6). The dismissal of NWI's claim for additional compensation due to saturated soils may be affirmed on this basis alone.

Appeal on this issue would be futile in any event. It is undisputed that NWI's purported "liquefaction" claim qualifies as a "Differing Site Condition" under the prime contract. CP 164 (§ 4.11(A)). The relevant notice requirement, incorporated into NWI's subcontract, provides that:

The Contractor shall *immediately* upon discovery, and *before the conditions are further disturbed*, notify the Resident engineer *in writing*

Id. (emphasis added). This notice requirement is mandatory and absolute: “No request ... for an equitable adjustment to the Contract for a Differing Site Condition shall be allowed unless the Contractor has given the required written notice.” *Id.* (§ 4.11(F)). In addition, or at a minimum, NWI’s subcontract required NWI to provide PCL written notice of the condition within 48 hours of discovery. CP 113 (§ 3.2).

NWI failed to give immediate notice of the alleged liquefied soils. NWI admitted that it discovered liquefied soils no later than October 14, 2004. CP 149 (Johnson Dep. at 107:19-21). Despite that discovery, NWI did not give written notice to PCL until December 31, 2004—more than ten weeks too late. CP 169-170. During that period, also contrary to the requirement that the site not be “further disturbed,” NWI continued its excavations, thereby defeating the purpose of the provision; *i.e.*, giving Sound Transit a chance to take immediate steps to resolve the issue and reduce unnecessary costs. *Sime Contr.*, 28 Wn. App. at 17 (if contractor “was obligated to bring its claim prior to completion of its work,” failure to require notice “would defeat the purpose of the ... provision”). The trial court properly dismissed NWI’s “liquefaction” claim on this basis.

The Additional Earthwork Claim. NWI’s additional earthwork claim suffers from the same defect. A request for additional compensation for work allegedly outside the scope of project specifications—the basis of NWI’s additional earthwork claim—is governed by the prime contract’s RFC procedure. Article 4.02(A) requires an RFC to be made “in writing,” and it must “specify the reasons for such a change ...” CP 455. Critically, however, Article 4.02(B)—which NWI conspicuously fails to quote anywhere in its brief—governs the timing of an RFC:

The Contractor may request additional compensation and/or time through an RFC, ***but not for instances that occurred more than twenty (20) days prior to the request.***

CP 455 (emphasis added). Thus, NWI had 20 days from discovering that the scope of its earthwork was greater than originally specified to submit a written RFC to PCL and/or Sound Transit.

There can be no dispute that NWI failed to do so. NWI admitted that it discovered the alleged error in project drawings no later than September 2004, and likely earlier than that. CP 135 (NWI Dep. at 113:16-23); CP 136 (*id.* at 119:8-10); CP 217. NWI mentioned it to PCL, and was told to prepare a written claim as required by the contract; NWI never raised the issue directly with Sound Transit. CP 136 (*id.* at 119:11-22); CP 824 (*id.* at 128:8-15). More than nine months passed. It wasn’t until June 28, 2005 that PCL first submitted a written RFC for additional

compensation to Sound Transit on NWI's behalf. CP 195. Because this plainly exceeded the 20-day notice requirement set forth in Article 4.02(B), NWI had no right to additional compensation. *See Absher*, 77 Wn. App. at 142-143 (subcontractor claim properly dismissed for failure to comply with notice provision).

In an effort to avoid Article 4.02(B)'s 20-day notice requirement, NWI suggests that Article 10's claim provisions somehow superseded Article 4's notice provisions. NWI Br. at 9, 24-25. Not so. Article 4.02 specifically refers to Article 10; immediately following Article 4.02(B)'s notice provision, Article 4.02(C) states:

If the request is denied, but the Contractor believes that it does have merit, the Contractor may submit a Notice of Intent to Claim in accordance with Paragraph 10.01A, Notice of Intent to Claim.

CP 455. Just as important, Article 10 itself says: "The notice requirements of this Article are in addition to any other notice requirements set forth in the Contract." CP 166 (§ 10.01(A)(4)). Thus, where an Article 10 claim challenges the outcome of an RFC, as was the case here, compliance with Article 4.02 is a prerequisite. That makes sense. To hold otherwise would render Article 4's notice provisions illusory whenever a subcontractor files a *timely* claim based on the owner's denial of an *untimely* RFC.

Even if NWI could somehow skip over Article 4.02, and go directly to Article 10, it is still out of luck. Article 10.01(A)(3) provides:

The Notice [of Intent to Claim] shall be submitted within ten (10) days after the event or occurrence giving rise to the potential claim, or the denial of a Request for Change or the issuance of a unilateral Change Order by Sound Transit. However, *if the event or occurrence is claimed to be an act or omission of Sound Transit, a Notice of Intent to Claim shall be given by the contractor within ten (10) days after the Contractor discovers the act or omission and prior to the time for performance of that portion of the Work to which such alleged act or omission relates.*

CP 166 (emphasis added). NWI focuses on the first sentence, but it is the second sentence that applies here. It is undisputed that the event or occurrence giving rise to NWI's claim was an alleged "act or omission of Sound Transit"—*i.e.*, Sound Transit's allegedly erroneous drawings. CP 7; CP 421. Under the plain language of Article 10, NWI had 10 days to give notice, and had to stop further work pending the outcome of the claim. NWI did neither; it continued to do earthwork for another 9 months before filing its RFC. NWI's claim was untimely for this reason too.

The Delay Claim. Even if there were a genuine issue of material fact regarding the timeliness NWI's additional earthwork claim, it would not include the claim for delay-related costs. When NWI filed its RFC on June 28, 2005, there was no reference to delay; NWI sought only to recoup costs associated with excavation, measured on a cubic yard basis. CP 195. When NWI issued a revised RFC on October 19, 2005, it too was based on excavation costs. CP 209. Finally, NWI's January 27, 2006 Notice of Intent to Claim, sent after Sound Transit issued unilateral

Change Order 12, which also sought to compensate NWI on a cubic yard basis, did not include or mention delay-related costs. CP 553.

It wasn't until March 26, 2006 that NWI first raised the issue of delay costs. In its claim, NWI wrote that additional compensation "cannot be priced nor calculated on a unit price basis," but must be based on "actual costs" for its work, which NWI claimed took months longer than estimated. CP 555-569. This notice was too late under any scenario. Without question, the March 2006 letter was well beyond the 20-day RFC notice period set forth in Article 4.02(B)—even if, as NWI would claim in its motion for reconsideration, it didn't "discover" Sound Transit's alleged error until Earthwork Services performed its soil quantity analysis in June 2005. Indeed, NWI had finished its work by late 2005, and the Project itself was complete by February 2006. CP 158 (Dahl Decl., ¶ 23).

For the same reason, the notice was untimely under Article 10.01's 10-day notice requirement. Under Article 10.02(G), NWI was entitled to compensation for project-related delays only if it "strictly compl[ied] with the notice and other claims procedures set forth in Section 10.01, Claims." CP 471. To be sure, NWI did not submit a written notice, nor identify the "nature of the costs involved," within 10 days "after [it] discover[ed] the act or omission and prior to the time for performance of that portion of the Work to which such alleged act or omission relates," as required by

Article 10.01. CP 465 (§ 10.01(A)(2) & (3)). Indeed, even if unilateral Change Order 12 re-started the notice clock, as NWI suggests, NWI's notice did not state that NWI sought delay-related costs (CP 553) and, as noted, up to that point NWI sought compensation on a per CY basis only. CP 195; CP 209. NWI's delay-related claim fails for this reason too.

Finally, the PCL/NWI subcontract imposed an additional notice requirement on NWI for delay-based claims that NWI failed to satisfy.

Article 12.2 of the subcontract provides in relevant part:

If such Delay claims are based on Owner's action or inaction, Subcontractor's sole remedies against Contractor shall be: ... [describing remedies]. ***Subcontractor shall only be entitled to remedies specified herein if Subcontractor shall have notified Contractor in writing of the cause of Delay no later than seventy-two (72) hours after the occurrence of the event causing the Delay.***

CP 118 (emphasis added). In short, the subcontract required NWI to provide notice within 72 hours after discovery of the claim. NWI's March 2006 letter—sent a year and a half after it discovered the allegedly erroneous drawing and nine months after it submitted its RFC—doesn't even come close. NWI's delay-related claim was properly dismissed.

2. It Is Undisputed That Sound Transit Did Not Waive NWI's Contractual Notice Requirements.

NWI's waiver theory fails no better. "Waiver" is an intentional and voluntary relinquishment of a known right. *Birkeland v. Corbett*, 51 Wn.2d 554, 565, 320 P.2d 635 (1958). A party may expressly waive a

contractual notice provision, and may imply waiver through its conduct. *Mike M. Johnson*, 150 Wn.2d at 386. NWI argues that Sound Transit intentionally waived its contractual defenses in writing and, separately, by its conduct. Neither argument has any merit.

No Written Waiver. NWI's claim that Sound Transit expressly waived its right to enforce contractual notice provisions can be rejected out-of-hand. In support of this claim, NWI points to (1) a December 29, 2006 letter from Sound Transit's counsel to NWI's counsel, and (2) a January 5, 2007 letter from Sound Transit's counsel to PCL's counsel. As an initial matter, NWI did not argue written waiver in the trial court (*see* CP 441 (NWI's cross-motion)) and, thus, this issue is waived on appeal. *Sourakli v. Kyriakos, Inc.*, 144 Wn. App. 501, 510, 182 P.3d 985 (2008); RAP 2.5(a)(3); RAP 9.12. The argument is baseless in any event. Neither letter has anything to do with the timeliness of NWI's notice of a differing site condition or additional earthwork (including delay) claim.

The December 29, 2006 letter does not discuss, let alone waive, NWI's failure to give timely notice of its claims following its discovery of its alleged claims in summer and fall of 2004. For the reasons explained below, Sound Transit did not yet know that NWI's claims were untimely. The December 2006 letter concerned only what Sound Transit did know at

the time: that NWI had been unwilling or unable to supply accurate and consistent information regarding its additional earthwork claim:

Sound Transit would be within its contractual rights if it rejected the Claim as untimely because the amount of the Claim fluctuated wildly for months ... Sound Transit has not done so, despite the fact that Navigant has been forced to expend significant effort reviewing and analyzing cost and claim information that was superseded by NWI.

CP 891-893. Sound Transit's willingness to forgive NWI's failure to provide information cannot be construed as an express waiver of NWI's failure to comply with its separate obligation to provide timely notice. The prime contract specifically states that, "[n]o waiver of one provision by Sound Transit shall act as a waiver of any other provision or as a subsequent waiver of the same provision." CP 809-810 (§ 7.02). Besides, Sound Transit could not waive a right it did not yet know existed.

NWI's argument regarding the January 5, 2007 letter is even more off-base, if possible. That letter was sent by Sound Transit's counsel to PCL's counsel regarding *PCL's* delinquent conduct. Specifically, Sound Transit sent its letter denying NWI's additional earthwork claim to PCL on December 7, 2006, but PCL waited until January 3, 2007 to forward it on to NWI. In its January 5, 2007 letter, for PCL's benefit, Sound Transit agreed to regard the latter date as the operative one:

Although it is clear that Sound Transit's response to PCL's claim was properly delivered on December 7, 2006, Sound

Transit has no objection to permitting the period for any response to begin running as of January 3, 2007.

CP 591. Thus, even if construed as an express waiver, it was directed to PCL, not NWI. More importantly, like the December 29, 2006 letter, the January 5, 2007 does not address, much less waive, NWI's contractual duty to give notice upon discovery of grounds for a change order or claim; it relates to deadlines that arise only *after* timely notice is submitted. NWI failed to present any facts demonstrating an express written waiver.

No Waiver By Conduct. The same is true with respect to NWI's other waiver argument. An implied waiver "requires unequivocal acts of conduct evidencing an intent to waive." *Mike M. Johnson*, 150 Wn.2d at 386 (*quoting Absher*, 77 Wn. App. at 143). Thus, evidence of equivocal or ambiguous conduct is not sufficient to survive summary judgment. *Am. Safety Cas. Ins. Co. v. City of Olympia*, 162 Wn.2d 762, 771, 174 P.3d 54 (2007) ("ambiguity ... means that the conduct by definition was *not* unequivocal, as is required for waiver"). The undisputed facts do not reveal any conduct that demonstrates an unequivocal intent to waive.

NWI's waiver theory is based on the fact that, after NWI submitted its RFC, Sound Transit agreed to pay NWI for the additional earthwork, issued Change Order 12, and then considered NWI's claim without raising a contractual notice defense. NWI Br. at 41-42. Those acts, however, do not establish a waiver as a matter of law. The prime contract states:

No act or failure to act on the part of Sound Transit with respect to the exercise or enforcement of any provision of this Contract (including but not limited to rights or remedies conferred upon Sound Transit under this Contract, performance, or construction standards) shall be deemed to be a waiver on the part of Sound Transit of any provision of this Contract. ... No waiver shall be effective against Sound Transit except an express waiver in writing.

CP 809-810 (§ 7.02). The parties' unambiguous intent to preclude claims of waiver based on conduct should be enforced. Although no Washington court has considered the effect of a "no-waiver" clause in this context, courts from other jurisdictions have enforced nearly identical clauses. *See e.g., Chesapeake and Potomac Tele. Co. of Virg. v. Sisson and Ryan, Inc.*, 362 S.E.2d 723, 730 (Va. 1987) ("No action or failure to act by the Owner ... shall constitute a waiver of any right or duty afforded any of them under the Contract ..., except as may be specifically agreed in writing.").

Further, even if Sound Transit's conduct mattered, that conduct does not show unequivocal waiver. Put simply, Sound Transit could not intentionally waive a right it did not yet know existed. When it agreed to issue Change Order 12 and in its later dealings with NWI, Sound Transit did not know NWI's original RFC was untimely. NWI submitted its RFC through PCL on June 28, 2005, when NWI was still on-site. CP 195. As far as Sound Transit knew, the RFC complied with all contractual notice requirements. CP 157 (Dahl Decl., ¶¶ 15, 18). It wasn't until NWI's March 2006 claim letter, which mentioned the timing of its discoveries,

that Sound Transit first became aware of a potential notice defense. Not coincidentally, Sound Transit's response to NWI expressly preserved all contract defenses. CP 233. Sound Transit was finally able to confirm the dates of NWI's discoveries, and the dispositive nature of the notice defense, during NWI's February 2010 depositions. CP 153 (Johnson Dep. at 203:10-18); CP 135-136 (NWI Dep. at 113:16-23; 119:8-16).

For largely the same reasons, Change Order 12 did not modify the prime contract so as to make Sound Transit's contractual notice defense "moot and irrelevant," as NWI argues. NWI Br. at 40. Had Sound Transit known that NWI failed to give proper notice in the first place, it would not have issued a change order. Thus, to the extent Change Order 12 modified the prime contract, it did so only in the amount paid (\$534,602.75), not by the additional amount NWI *wanted* to be paid (\$2,221,154.33) and that Sound Transit *refused* to pay. CP 229-234. To be sure, Sound Transit's good faith but ultimately unnecessary payment of Change Order 12 does not show an unequivocal intent to irrevocably modify the contract's notice and claim provisions for any and all claims NWI might thereafter make.⁵

⁵ NWI makes the related argument that Sound Transit waived its contractual notice defense to NWI's additional compensation claim because it did not seek to invalidate Change Order 12 based on the same defense. NWI Br. at 44. Sound Transit would like very much to have Change Order 12 back, but it knows of no theory that would allow it to convert its contractual notice defense into an affirmative cause of action.

Nor did Sound Transit somehow waive its rights by issuing Change Order 12 and subsequently considering NWI's demand for more compensation without expressly reserving its rights. As noted, Sound Transit did not know it had any rights based on untimely notice to reserve and, regardless, a blind invocation of rights was superfluous and unnecessary given the contract's express "no-waiver" clause. Further, in *American Safety*, the Supreme Court held that discussions between the parties regarding a potential claim is not unequivocal evidence of waiver, even where, as here, the owner does not continuously assert its rights. 162 Wn.2d at 770-772. In any event, in its December 7, 2006 letter, Sound Transit denied NWI's claim "without waiver of Sound Transit's position and all defenses it may have to PCL/NWI's Claim" CP 233.

Finally, even if NWI's waiver theory had merit, it would not reach NWI's "liquefaction" claim or its claim for delay costs. It is undisputed that Change Order 12 did not compensate NWI for either item; on the contrary, Sound Transit immediately denied both claims as soon as they were raised. NWI gave notice of its liquefaction claim on January 4, 2005, and it was denied by Sound Transit on January 10, 2005, and again on March 3 and March 30, 2005. CP 169-172, 189-190, 193-194. The liquefaction claim was not part of NWI's June 28, 2005 RFC, which resulted in Change Order 12. CP 195-213. Similarly, the delay claim was

first raised NWI's its March 27, 2006 claim letter (CP 214-221), months *after* Change Order 12 was issued, and it too was denied outright. CP 229-234. In short, Sound Transit's unequivocal *denial* of both claims cannot at the same time show an unequivocal *waiver* of its defenses to those claims. Summary judgment was proper on this basis as well.

B. The Trial Court Did Not Abuse Its Discretion When It Denied NWI's Motion For Reconsideration And Motion To Vacate.

After the trial court granted summary judgment in Sound Transit's favor, NWI scrambled to convince the trial court to change its mind. NWI filed a motion for reconsideration, which was denied. NWI then filed a motion to vacate, which was denied as well. With each motion, NWI relied on additional (but ultimately immaterial) evidence that NWI strategically chose not to submit during the original summary judgment proceedings. For the reasons explained below, the trial court properly rejected NWI's repeated attempts at a do-over.

1. The Motion For Reconsideration Was Properly Denied.

"Motions for reconsideration are addressed to the sound discretion of the trial court and a reviewing court will not reverse a trial court's ruling absent a showing of manifest abuse of discretion." *Wilcox v. Lexington Eye Institute*, 130 Wn. App. 234, 241, 122 P.3d 729 (2005). A trial court abuses its discretion only if its decision is manifestly unreasonable or rests on untenable grounds or reasons. *In re Littlefield*,

133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997). There was no abuse of discretion here. The trial court properly rejected NWI's motion because it was based on evidence that could have and should have been submitted prior to entry of summary judgment and, even if that evidence were considered, it would not create a genuine issue of material fact.

No Newly Discovered Evidence. Although NWI styled its motion under CR 59(a)(7) and (a)(9), the trial court saw it for what it was—a second bite at the apple based on previously unsubmitted evidence—and it denied the motion under CR 59(a)(4). CP 2060-2062. Under CR 59(a)(4), reconsideration is warranted only if the moving party presents new and material evidence that could not have been discovered with reasonable diligence prior to the court's ruling. *Wagner Dev., Inc. v. Fidelity & Deposit Co. of Maryland*, 95 Wn. App. 896, 906, 977 P.2d 639 (1999). If the evidence was available but not offered, the party is not entitled to submit the evidence on reconsideration. *Id.* at 907; *also Wilcox*, 130 Wn. App. at 241 (“CR 59 does not permit a plaintiff to propose new theories of the case that could have been raised before entry of an adverse decision.”). NWI's motion for reconsideration plainly fails this test.

When Sound Transit moved for summary judgment, NWI made a strategic decision to cross-move on the same contractual notice issue. CP 418-443. Apparently believing that a limited record would increase the

chance that its motion would be granted, NWI did not offer any testimony to support its theory, nor did it seek additional discovery. It was only after that gambit backfired, and the trial court granted Sound Transit's motion, that NWI came forward with a declaration from NWI's president. CP 996-1027. That declaration, however, is not "newly discovered evidence" because every fact and allegation contained in it was admittedly known to NWI long before either party moved for summary judgment. The trial court did not abuse its discretion in rejecting NWI's motion on this basis alone. *Adams v. Western Host, Inc.*, 55 Wn. App. 601, 608, 779 P.2d 281 (1989) (trial court properly denied motion for reconsideration where new declaration contained facts available prior to summary judgment).

It follows that the trial court also properly refused to reconsider its decision under CR 59(a)(7) or (a)(9). CR 59(a)(7) permits reconsideration where there is "no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law." CR 59(a)(9) is a catch-all provision for "substantial justice." In deciding a motion for reconsideration under 59(a)(7) or (a)(9), however, the trial court must base its decision on the evidence it already considered in reaching its original decision. *Holaday v. Merceri*, 49 Wn. App. 321, 330, 742 P.2d 127 (1987) (citing *Jet Boats, Inc. v. Puget Sound Nat'l Bank*, 44 Wn. App. 32, 42, 721 P.2d 18 (1986)). For the reasons explained above,

the existing summary judgment record amply supported the trial court's decision as a matter of law, and there was no basis under CR 59(a)(4) to expand that record with NWI's tardy declaration. The trial court did not abuse its discretion when it denied NWI's motion for reconsideration.

NWI's New Evidence Did Not Create An Issue Of Fact. Even had the trial court considered NWI's new declaration, it would have made no difference. First, in an effort to bring its June 28, 2005 RFC within Article 4's 20-day notice window, NWI's president, Hal Johnson, claimed that NWI was not aware of its additional earthwork claim until June 2005, when it received Earthwork Services' analysis. CP 996-999; NWI Br. at 42-43. That assertion, however, flatly contradicted his own deposition testimony, which the trial court considered when granting Sound Transit's motion for summary judgment. Testifying as NWI's designee, Johnson admitted that NWI was aware of the alleged errors in Sound Transit's drawings within the first six or seven weeks of the Project:

Q. So in 2004, you knew that there were more quantities than indicated on drawing C304 for excavation?

A. Yes.

Q. And at that point did you submit a claim to PCL?

A. No. ... At the time, you know, we thought, well, we discovered something here. Let's just take care of it. And a claim was developed based on that information.

CP 136 (NWI Dep. at 119:8-16). Indeed, NWI conceded this point in own claim letter (CP 217), as well as its complaint (CP 8). Johnson's inconsistent and self-serving declaration cannot create a genuine issue of fact. *See Ramos v. Arnold*, 141 Wn. App. 11, 19, 169 P.3d 482 (2007) ("When a party has given clear answers to unambiguous 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.").

Moreover, Johnson's assertion, even if accepted, purposely ignores the low standard which triggered NWI's obligation to give notice. Article 4.02 required NWI to give notice when it became aware of the "reasons" why additional compensation may be due; NWI was not required to quantify its claim at the outset. CP 455. As discussed above, by the fall of 2004, NWI knew it was excavating more soil than was listed in the Project drawing and, thus, was aware of the reason for claim, *i.e.*, the drawing purportedly contained an error that it had relied on when bidding the project. CP 135-136 (NWI Dep. at 113:16-23; 119:8-16); CP 217. If it had a claim, it should have made it then; nothing that happened after that shed any more light on the basis of the claim, only the scope. Put simply, NWI hired Earthwork Services to quantify the claim, not to discover it.

Second, Johnson implies that Sound Transit was aware of NWI's brewing claim all along, and waived its notice defense by not raising the issue in response to NWI's June 2005 RFC. CP 997-998; NWI Br. at 43. Even if Sound Transit had "actual notice" of NWI's claim, it would not excuse NWI's obligation to provide timely written notice. *Mike M. Johnson*, 150 Wn.2d at 391. But, in any event, Johnson's vague statement that "Sound Transit was aware of NWI's concerns regarding additional earthwork" (CP 997) does not come close to showing that Sound Transit knew before June 2005 that NWI had a basis for an RFC. Indeed, the summary judgment record showed that NWI did not raise the alleged error in Project drawings with Sound Transit until shortly before it filed its RFC. CP 479-80 (June 10, 2005 email re discussion with NWI); CP 496 (June 15, 2005 meeting minutes: "NWI is reviewing earthwork quantity. There may be a conflict with the plans. NWI is compiling information for possible additional costs.").⁶ In short, nothing in Johnson's *post hoc* declaration, even if considered, raises an inference that Sound Transit knowingly and unequivocally waived its contract defenses.

⁶ NWI claims that Sound Transit should have known its RFC was untimely by the very fact that site mass excavation had been completed by the fall of 2004, thereby rendering its June 2005 RFC obviously untimely. NWI Br. at 10, 43. But NWI was still on-site performing earthwork. Indeed, its own claim letter states unequivocally that "NWI exported this material continuously from January 2005 to November 2005." CP 219.

2. The Motion To Vacate Was Properly Denied.

Just weeks after its motion for reconsideration was denied, NWI took a third bite at the apple when it filed a “motion to vacate” based on the deposition of Garth Hornland, PCL’s CR 30(b)(6) designee, which was taken after entry of the May 21 summary judgment order. CP 2416-2428. NWI brought the motion under CR 54(b), arguing—as it does on appeal—that such a motion is subject to a less stringent standard of review than a motion for reconsideration. *Id.*; NWI Br. at 51-52. Not so. Like a motion for reconsideration, a motion to vacate an interlocutory order under CR 54(b) is subject to the same deferential abuse of discretion standard. *Zimzores v. Veterans Admin.*, 778 F.2d 264, 267 (5th Cir.1985) (cited with approval by *Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 301, 840 P.2d 860 (1992)).⁷ The trial court did not abuse its discretion.

Washington courts have not considered the issue, but federal courts recognize that “law of the case” doctrine, as well as public policy, weigh strongly against relitigation of interlocutory orders. *Gallagher v. San Diego Unified Port Dist.*, 2009 WL 943860, *1 (S.D.Cal. April 07, 2009)

⁷ That makes sense. NWI’s motion was too late under CR 59 and too early under CR 60. *See* CR 59(b) (motion for reconsideration “shall be filed not later than 10 days after the entry of the ...order”); CR 60(b) (pertaining to “*final* judgment, order, or proceeding” (italics added)). Where a party uses CR 54(b) as a procedural hook to seek precisely the same relief, it should be subject to the same stringent standards.

(citing *Pyramid Lake Paiute Tribe of Indians v. Hodel*, 882 F.2d 364, 369 n. 5 (9th Cir. 1989)); 18B Wright & Miller, *Federal Practice & Procedure* § 4478 (2d ed. 2005) (reconsideration of interlocutory orders disfavored). “Most courts therefore apply a fairly narrow standard by which to reconsider their interlocutory opinions and orders. This standard requires that the moving party show: 1) an intervening change in the law; 2) additional evidence that was not previously available; or 3) that the prior decision was based on clear error or would work manifest injustice.” *Id.*

None of these factors was present here. There was no change in the law. There was no new evidence that was previously unavailable. Just like “newly discovered evidence” under CR 59, NWI had to show that Hornland’s testimony could not have been obtained before the trial court ruled on summary judgment. *Wagner*, 95 Wn. App. at 907; *Coulson v. Huntsman Packaging Prods. Inc.*, 121 Wn. App. 941, 947 n. 23, 92 P.3d 278 (2004) (new testimony presented with a motion for reconsideration, without showing that it was unavailable earlier, will not be considered). NWI did not make that showing; Hornland was available for deposition but NWI strategically chose to oppose (and cross-move for) summary judgment without his testimony, nor did it seek time to take his deposition under CR 56(f). Hornland’s testimony was not previously unavailable

simply because NWI decided to take his deposition *after* it lost summary judgment. This reason alone warranted denial of NWI’s motion to vacate.

Moreover, for the reasons explained above, the summary judgment ruling was not clearly erroneous. This is so even if Hornland’s testimony were considered—although there is no indication that the trial court did so. Hornland did not testify that the “June 2005 RFC fully complied with the contract claim notice and time requirements.” NWI Br. at 52. He was never asked that question.⁸ Rather, he testified that he believed *PCL* had acted in a timely manner when it passed on NWI’s claim. CP 2580-2581 (Hornland Decl., ¶¶ 5-6); CP 2600-2601 (Hornland Dep. at 60:19-62:16). Hornland worked in PCL’s Bellevue office and could not know when NWI first discovered its additional earthwork claim. CP 2581 (Hornland Decl. ¶ 6). Indeed, Hornland testified that he learned about NWI’s June 2005 RFC only two or three weeks before it was submitted. CP 2601 (Hornland Dep. at 62:21-63:19). In short, Hornland did not and could not know that NWI knew it had a valid basis for an RFC in the fall of 2004.⁹

⁸ Of course, even had he been asked that question, Hornland’s non-expert legal opinion could not alter what the undisputed evidence already showed—that NWI failed to comply with the contractual notice requirements. *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 359-60, 753 P.2d 517 (1988) (statements regarding ultimate facts or conclusions of law may not be considered on summary judgment).

⁹ Nor did Hornland testify that PCL management believed that “Sound Transit’s allegations in this litigation ... were without merit.”
(continued . . .)

Finally, NWI's argument that the June 2010 settlement between PCL and Sound Transit "effectively waived" the prime contract's notice requirements is baseless. NW Br. at 53-54. NWI did not argue in its motion to vacate that the settlement waived Sound Transit's contract rights against NWI; it referenced the settlement in its facts to purportedly show PCL's "Lack of Factual Candor," but its argument relied solely on "Mr. Hornland's testimony." CP 2424-2425. In any event, nothing in the June 2010 settlement suggests that Sound Transit intended to waive NWI's failure to comply with contract notice requirements five years earlier. On the contrary, Sound Transit refused to release retainage "attributable to NWI," and agreed to release PCL's portion "without prejudice to, or waiver of, any and all rights, positions, claims and defenses." CP 2392. Sound Transit's agreement with PCL regarding retainage unrelated to NWI's claims simply has nothing to do with this appeal.

3. Even If Reconsideration Were Warranted, It Would Be Confined To The Additional Earthwork Claim.

If this Court finds that the trial court abused its discretion when it denied NWI's motion for reconsideration or motion to vacate, it should

(. . . continued)

NWI Br. at 53. Hornland testified that he disagreed with Sound Transit's decision to seek rescission of Change Order 12 (which is not the subject of this appeal). CP 2602-2603 (68:21-71:05). He was never asked about the merits of contractual notice defense. CP 2581-2582 (Hornland Decl. ¶ 7).

only remand for trial that portion of the May 21, 2010 summary judgment order related to NWI's original additional earthwork claim. The trial court granted Sound Transit summary judgment with respect to NWI's liquefaction claim, its additional earthwork claim and NWI's claim for delay-related expenses. NWI's motion for reconsideration and motion to vacate focused exclusively on the additional earthwork claim; neither the liquefaction claim nor delay claim was mentioned. CP 934-945; CP 2416-2428. Under no circumstance, therefore, can those claims be revived.

C. The Trial Court Properly Awarded Attorneys' Fees To Sound Transit And Against NWI Under RCW 39.04.240.

This Court reviews an award of attorneys' fees under RCW 39.04.240 for abuse of discretion. *See Frank Coluccio Constr. Co., Inc. v. King County*, 136 Wn. App. 751, 780, 150 P.3d 1147 (2007). RCW 39.04.240, which creates a right to fees in public works cases, adopts the small claims attorneys' fee provisions set forth in RCW 4.84.250-.280. NWI does not argue, and therefore concedes, that Sound Transit was the prevailing party when the trial court dismissed NWI's claims. Rather, NWI argues that Sound Transit cannot recover fees under RCW 39.04.240 because (1) there was no direct contract claim between NWI and Sound Transit; (2) Sound Transit did not give NWI adequate notice of its intent to seek fees; and (3) Sound Transit's motion for fees was untimely under CR 54(d)(2). None of these arguments has any merit.

RCW 39.04.240 Permits Fee Awards On Pass-Through Claims.

NWI argues that RCW 39.04.240 only applies to direct claims between parties to a public works contract. NWI Br. at 45-46. NWI cites no authority to support its argument, and there is none. On the contrary, the text of the statutes, case law and common sense all show that where an owner prevails on a subcontractor's pass-through claim, the subcontractor must pay the owner's fees. RCW 39.04.240 provides in pertinent part:

Public works contracts - Awarding of attorneys' fees.

(1) The provisions of RCW 4.84.250 through 4.84.280 shall apply to ***an action arising out of a public works contract in which the state or a municipality, or other public body that contracts for public works, is a party, ...***

(Emphasis added.) On its face, RCW 39.04.240 does not limit an award of attorneys' fees to direct actions between parties to a public works contract, but makes such an award available in any action "arising out of a public works contract." There can be no dispute that NWI's claim against PCL for additional compensation for work on the Project, which PCL duly passed-through to Sound Transit, arose out of a public works contract.

As such, an award of attorneys' fees to the "prevailing party" was mandatory. RCW 4.84.250; *Absher*, 77 Wn. App. at 148 (award of fees under RCW 39.04.240 and RCW 4.84.250 is "mandatory"). It was well within the trial court's discretion to deem Sound Transit the prevailing party on NWI's pass-through claim. RCW 4.84.270 states:

The defendant, or party resisting relief, shall be deemed the prevailing party within the meaning of RCW 4.84.250, if the plaintiff, or party seeking relief ... recovers nothing, or if the recovery, exclusive of costs, is the same or less than the amount offered in settlement by the defendant, or the party resisting relief, as set forth in RCW 4.84.280.

Notably, RCW 4.84.270 defines “prevailing party,” not just by reference to the plaintiff and defendant, but also in terms of the “party seeking relief” and “party resisting relief.” *Id.* NWI focuses on the fact that it asserted a breach of contract claim only against the PCL, but as the trial court recognized, the practical reality of the litigation was different.

NWI’s claim was primarily premised on alleged errors in Sound Transit’s drawings and other plans. CP 6-9 (¶¶ 2.2-2.7). Although NWI had to bring its claim against PCL in the first instance, it did so knowing—and, indeed, insisting (CP 9 (¶ 2.9))—that PCL would pass it through to Sound Transit, which PCL did. CP 20. For all intents and purposes, NWI litigated its pass-through claim against Sound Transit, and it was Sound Transit’s defense that resulted in the claim’s dismissal.¹⁰ Sound Transit was the “party resisting relief,” and it became the prevailing party when NWI, the “party seeking relief ... recover[ed] nothing.” RCW 4.84.270.

¹⁰ Indeed, in joining Sound Transit’s motion, PCL wrote: “Although Sound Transit is contractually required to bring its summary judgment motion against PCL, it is based entirely on NWI’s alleged failure to provide contractually required written notice of its claim. In short, Sound Transit’s motion is essentially a motion for summary judgment against NWI PCL is caught in the middle, passing through each party’s claims and arguments against the other.” CP 235-236.

It was not an abuse of discretion to tax NWI directly for the significant fees Sound Transit incurred defeating NWI's pass-through claim.

This Court has previously recognized that strict privity rules do not constrain fee awards under RCW 39.04.240. In *Frank Coluccio Constr.*, a contractor (FCCC) filed suit against King County to pursue the pass-through claims of its subcontractor (DBM), who had no contract with King County and was not a party to the litigation. After the contractor prevailed, the trial court awarded fees incurred by attorneys for the subcontractor. 136 Wn. App. at 780-81. This Court upheld the award:

King County argues that the trial court exceeded its statutory authority by awarding FCCC attorney fees and costs that were billed by attorneys to DBM, an entity that was not a party to the litigation. King County cites to no controlling cases in support of its argument. In any event, we disagree.

... RCW 4.84.250, made applicable to FCCC and King County through RCW 39.04.240, provides simply that "there shall be taxed and allowed to the prevailing party as a part of the costs of the action a reasonable amount to be fixed by the court as attorneys' fees." FCCC was the only named plaintiff, and was the prevailing party at trial. ... Furthermore, whether FCCC incurred the expenses itself is irrelevant to our resolution of this issue, The work performed by the attorneys was performed in order to assist FCCC in prevailing at trial.

Id. at 780. If RCW 39.04.240 allows a trial court to award fees incurred by a non-party subcontractor if its lawyers helped the contractor prevail on the subcontractor's pass-through claim, then certainly a court has

discretion to award fees against a subcontractor who loses an identical pass-through claim. That is precisely what the trial court did here.¹¹

Sound Transit Was Not Required To Give Notice That It Would Seek Attorneys' Fees Under RCW 39.04.240. It is equally clear that the trial court properly rejected NWI's argument that Sound Transit failed to give NWI adequate notice of its intent to seek attorneys' fees. Not only did NWI repeatedly pray for an award of attorneys' fees itself, both PCL and Sound Transit's pleadings requested an award of attorneys' fees. CP 13, CP 20; CP 33; CP 46. Thus, to the extent any kind of express notice was required at all, NWI knew from the pleadings that, if it lost its pass-through claim, it would be liable for fees. *See* Tegland, 14 Wash. Pract. § 12:16, p. 486-87 (2009) ("It is probably unnecessary to specify ... the precise basis for demanding attorney fees"); *State ex rel. A.N.C. v. Grenley*, 91 Wn. App. 919, 930, 959 P.2d 1130 (1998) (CR 54(c) permits a party to recover attorney's fees permitted by law even if not pleaded).

¹¹ Even if contractual privity were a prerequisite to recovery under RCW 39.04.240, NWI ultimately still would have been liable for Sound Transit's fees. In that event, the trial court would have had to tax Sound Transit's fees to PCL in the first instance, since Sound Transit prevailed on PCL's third-party claim to the same extent it did on NWI's pass-through claim. As it pointed out in a response to Sound Transit's motion for fees, PCL could then recover the same award from NWI—either by way of RCW 39.04.240 or contractual indemnity. CP 2209-2210.

RCW 39.04.240 requires nothing more. Neither RCW 39.04.240 nor RCW 4.84.250-.280 contains an express requirement that a party give notice that it intends to seek attorneys' fees under the statute or otherwise. Rather, courts have created a narrow *common law* notice rule under RCW 4.84.250 to encourage litigants to settle small claims cases:

The purpose of RCW 4.84.250 is to encourage out-of-court settlements and to penalize parties who unjustifiably bring or resist small claims Clearly, these purposes require some type of notice so that parties would realize the amount of the claim is small and that they should settle or else risk paying the prevailing party's attorney's fees.

Beckmann v. Spokane Transit Auth., 107 Wn.2d 785, 788-89, 733 P.2d 960 (1987); *Lay v. Hass*, 112 Wn. App. 818, 824, 51 P.3d 130 (2002) (noting that rule is a common law requirement). This judicially created rule has no application outside the small claims context, much less in million dollar public works contract disputes. Not surprisingly, no court has ever applied RCW 4.84.250's common law notice rule in a case decided under RCW 39.04.240. This Court should not be the first.

Even where RCW 4.84.250's notice rule applies, it does not require a party to give notice that it intends to seek attorneys' fees or to specifically refer to RCW 4.84.250 (or RCW 39.04.240) in its pleadings or otherwise. It requires only notice of the *amount* of the claim:

The settlement offer in *Beckmann* did not explicitly refer to either RCW 4.84.250 or attorney fees. The court nevertheless held that the settlement offer provided

sufficient notice that RCW 4.84.250 applied. Thus, *Beckmann* does not require explicit, advance notice of a fee request, but requires only notice of the size of the claim.

In re Estate of Tosh, 83 Wn. App. 158, 165, 920 P.2d 1230 (1996); *Schmerer v. Darcy*, 80 Wn. App. 499, 510, 910 P.2d 498 (1996) (RCW 4.84.250 applies “if there was actual notice ... that the claim was \$10,000 or less”). In small claims cases, the amount of the claim is important because it dictates whether RCW 4.84.250’s \$10,000 limit applies, thereby giving the parties notice that they “risk paying the prevailing party’s attorney’s fees.” *Beckmann*, 107 Wn.2d at 789. But here, RCW 39.04.240 adopts RCW 4.84.250 without a dollar limit and, thus, the amount of the claim has no significance. When NWI sued PCL on a public works contract, knowing its claim would be passed on to Sound Transit, NWI knew it could be liable for fees under RCW 39.04.240.

Indeed, this Court has previously recognized that the small claims attorneys’ fee provisions in RCW 4.84.250-.280 are particularly inapt and unhelpful when awarding attorneys’ fees under RCW 39.04.240:

We find little guidance here because of the way RCW 39.04.240 adopts the provisions of a seemingly inconsistent statute. The purpose of the attorney fee provisions of RCW Chapter 4.84 is to enable a party to pursue a meritorious small claim without seeing the award diminished in whole or part by legal fees. ... RCW Chapter 39.04 applies, however, to public works contracts There seems to be no principled way to reconcile the purpose ascribed to RCW Chapter 4.84 with the scope of RCW Chapter 39.04.

Absher Const. Co. v. Kent School Dist. No. 415, 79 Wn. App. 841, 846, 917 P.2d 1086 (1995). The same is true here. Absent an express duty to provide notice in the statute, and there is none here, there is “no principled way to reconcile the purpose” of the common law rule of notice in small claims cases with the unlimited right to attorneys’ fees in public works contract cases. Sound Transit was entitled to fees under RCW 39.04.240 as a matter of law, and was not required to specifically invoke the statute prior to entry of the order on summary judgment.

Sound Transit’s Motion Was Timely Under CR 54(d). This Court can easily reject NWI’s claim that Sound Transit’s motion for fees was untimely under CR 54(d)(2). NWI Br. at 49-50. CR 54(d)(2) states that a motion for fees must be filed “no later than 10 days after entry of judgment.” “Judgment” is a “final determination ... from which an appeal lies.” CR 54(a)(1). The May 21, 2010 order granting Sound Transit’s motion for summary judgment was not a final appealable order because it did not adjudicate all claims between all parties; it did not even adjudicate all the claims between Sound Transit and NWI. The trial court did not enter final judgment on the May 21, 2010 order until March 1, 2011 (CP 2951-2959)—more than seven months *after* Sound Transit filed its July 21, 2010 motion for fees. If anything, Sound Transit filed its motion for fees months earlier than necessary. Sound Transit’s motion was timely.

D. This Court Should Award Sound Transit Its Attorneys' Fees On Appeal Pursuant To RCW 39.04.240.

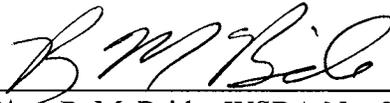
Sound Transit is entitled to attorneys' fees and expenses on appeal if permitted by applicable law. RAP 18.1. As discussed above, the trial court properly awarded Sound Transit fees pursuant to RCW 39.04.240. If Sound Transit prevails in this Court, it is likewise entitled to its fees on appeal. *American Safety*, 162 Wn.2d at 773 (RCW 39.04.240 applies on appeal); *Frank Coluccio Const.*, 136 Wn. App. at 780-81 (same).

V. CONCLUSION

For the reasons set forth above, (1) the trial court's May 21, 2010 order granting summary judgment to Sound Transit, (2) the denials of NWI's motion for reconsideration and motion to vacate, and (3) the November 12, 2010 order awarding Sound Transit attorneys' fees should be affirmed, and Sound Transit should be awarded its fees on appeal.

RESPECTFULLY SUBMITTED this 28th day of July, 2011.

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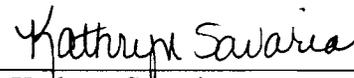
CERTIFICATE OF SERVICE

I hereby certify that on July 28, 2011, I caused to be served a copy of the foregoing document on the following person(s) in the manner indicated below at the following address(es):

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