

668,70-6

668 10-

No. 66870-6-I

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

NORTHWEST INFRASTRUCTURE, INC., a Washington corporation,

Plaintiff/Respondent

v.

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

Defendants/Third-Party Plaintiffs

v.

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

Third-Party Defendant/Appellant

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

REPLY BRIEF OF APPELLANT SOUND TRANSIT

Stanton Phillip Beck, WSBA No. 16212
Ryan P. McBride, WSBA No. 33280
Andrew J. Gabel, WSBA No. 39310
Attorneys for Appellant Sound Transit

LANE POWELL PC
1420 Fifth Avenue, Suite 4100
Seattle, Washington 98101-2338
Telephone: 206.223.7000
Facsimile: 206.223.7107

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2011 SEP 20 AM 9:16

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. ARGUMENT	2
A. Sound Transit Established All The Elements Of Fraud	2
1. NWI’s Representations That It Exclusively Relied On Project Drawings When Preparing Its Bid Were False.....	2
2. Sound Transit Reasonably Relied On NWI’s False Representations When It Issued Change Order 12, And That Reliance Caused Its Damages.....	7
B. Sound Transit’s Fraud Claim Is Not Time Barred	14
C. Sound Transit Established Sufficient Facts To Prove A Violation Of The CPA	17
D. Sound Transit’s Appeal Is Not Frivolous	18
III. CONCLUSION.....	19

TABLE OF AUTHORITIES

CASES

	<u>Page</u>
<i>Bennett v. Dalton</i> , 120 Wn. App. 74, 84 P.3d 265 (2004)	16, 17
<i>Blake v. Federal Way Cycle Ctr.</i> , 40 Wn. App. 302, 698 P.2d 578 (1985)	17
<i>Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.</i> , 105 Wn.2d 778, 719 P.2d 531 (1986)	17, 18
<i>J. R. Simplot Co. v. Vogt</i> , 93 Wn.2d 122, 605 P.2d 1267 (1980)	15
<i>Schnall v. AT & T Wireless Servs., Inc.</i> , 171 Wn.2d 260, --- P.3d --- (2011)	18
<i>Schoeman v. New York Life Ins. Co.</i> , 106 Wn.2d 855, 726 P.2d 1 (1986)	16
<i>Tallman v. Durussel</i> , 44 Wn. App. 181, 721 P.2d 985 (1986)	15
<i>Tiffany Family Trust Corp. v. City of Kent</i> , 155 Wn.2d 225, 119 P.3d 325 (2005)	19

STATUTES, REGULATIONS AND COURT RULES

RCW 39.04.040	5
CR 13(a)	16
CR 19(a)	15

I. INTRODUCTION

Sound Transit's fraud and CPA claims are straightforward. In mid to late 2005, NWI represented to Sound Transit, orally and in writing, that when it prepared its subcontract bid for earthwork on the Project, it solely relied on the soil quantities noted on Drawing C3.04 of the construction documents to determine the total amount of soil to be cut, filled and exported, but that the actual quantities involved had been far greater. As a result of NWI's representations, Sound Transit issued Change Order 12 in the amount of \$534,000. When NWI later filed a claim for an additional \$2,000,000 for the same work, Sound Transit obtained a copy of NWI's internal bid documents. Those documents showed that NWI did not rely on the quantities noted on Drawing C3.04. Contrary to its representations to Sound Transit, at the time it prepared its bid, NWI knew that the Project involved far more work than what was noted on the drawing. Had Sound Transit known the truth, it never would have issued Change Order 12.

NWI's approach on appeal is to both ignore and confuse these facts. NWI devotes the majority of its brief to events that are irrelevant, badly mischaracterized or disputed. The only material facts, however, are those that relate to whether NWI lied when it told Sound Transit that it exclusively relied on Drawing C3.04 when preparing its bid. Sound Transit believes those facts unequivocally prove fraud but, at the very

minimum, and especially when viewed in the light most favorable to Sound Transit, they certainly raise a disputed issue for the jury to resolve. The trial court's summary judgment order must be reversed and Sound Transit's fraud and CPA claims remanded for trial.

II. ARGUMENT

A. Sound Transit Established All The Elements Of Fraud.

1. NWI's Representations That It Exclusively Relied On Project Drawings When Preparing Its Bid Were False.

The most telling aspect of NWI's brief is its failure to address, much less explain, the critical facts that support Sound Transit's fraud claim. The facts show that, when making its request for Change Order 12, NWI told Sound Transit, in writing and orally, that it believed the numbers listed in Drawing C3.04 represented the total quantity of soil that would have to be cut, filled and exported on the Project, and that it relied on that total when it prepared its bid. Sound Transit's Br. at 13-14 (*citing* CP 1464-65 (Dahl Decl., ¶¶ 6, 7); CP 1477; CP 1479; CP 1481; CP 1509). NWI does not dispute that it made these representations, nor can it.

NWI wholly ignores the key facts that evidence the falsity of those representations. NWI's internal bid documents show that NWI knew that the Project involved far more earthwork than what was reflected on Drawing C3.04; it knew that it would have to export at least *double* the amount of soil noted on the drawing and that the drawing did not include

other significant earthwork involved on the Project, including excavation of the detention vault. Sound Transit's Br. at 7-8 (*citing* CP 1411; CP 1609-12). NWI dismisses the massive discrepancy in export totals as "fluff" (NWI's Br. at 5) and fails to mention the detention vault work at all. "Fluff" or otherwise, however, NWI sought compensation for all earthwork that exceeded the totals listed in Drawing C3.04, saying it had been misled by the drawing, even though it knew from its own estimates that actual work on the Project required far more work. Given the inconsistency between NWI's representations that it solely relied on Drawing C3.04, and its own non-disclosed bid estimates which show otherwise, a jury could reasonably find NWI's representations were false.

NWI's response to these facts is to assert a variety of straw-man arguments that it tries to knock down. NWI's misdirection fails. NWI points to Sound Transit's written discovery responses, and argues that the representations cited therein were true. NWI's Br. at 37-38. That is simply wishful thinking. The responses accurately identify the same two written misrepresentations that Sound Transit has asserted below and on appeal. In the first statement, NWI's June 2005 request for a change order, NWI requested compensation for all "additional earthwork above and beyond the quantities shown on drawing C3.04," and appended a chart purporting to show those quantities. CP 1479-90. As Sound Transit stated

in its discovery response, “NWI claimed that when it compiled its bid, it planned for the quantities of earthwork as set forth on Drawing C3.04.” CP 1004. As discussed above, that claim was false because, in fact, NWI planned for earthwork far in excess of what was listed in the drawing.

In the second statement, NWI’s October 2005 revised RFC, NWI stated that the “earthwork quantities were specified on the published bid plans. *The competitive nature of the proposal dictated that NWI use those numbers.*” CP 1509 (emphasis added). Here too, Sound Transit’s discovery response correctly noted that “NWI stated in its claim that it relied upon the quantities listed on Drawing C3.04.” CP 1005. Like the first representation, that statement was false because NWI had not relied upon the quantities listed on Drawing C3.04; its internal documents show that it relied on its own, far greater, estimate of the earthwork involved. As Sound Transit stated in its discovery response: “Both statements ... contain the same factual misrepresentation. NWI did not rely at the time of bidding upon the stated quantities on Drawing C3.04.” *Id.*

In addition to these two written statements, Sound Transit’s Gerald Dahl testified that NWI’s Hal Johnson told him at June 15, 2005 meeting that NWI planned to make a request for additional compensation because it had solely relied on the quantities in Drawing C3.04. CP 1464-65 (Dahl Decl., ¶¶ 6, 7). Meeting minutes confirm Dahl’s testimony. CP 1477.

NWI's response to this evidence is to challenge it, claiming that the list of attendees for the meeting does not include Johnson. NWI's Br. at 30-31. Critically, however, although Johnson disputes that he attended the June 15 meeting, he concedes he made the representations to Dahl: "NWI had repeated discussions with both PCL and Sound Transit representatives, including Jerry Dahl, that there appeared to be far more site earthwork depicted on Drawing C3.04 than the quantities stated." CP 1737-38 (Johnson Decl., ¶ 8). Thus, while there may be a dispute as to *when* Johnson made the statements at issue, it is undisputed that Johnson did in fact make them. A jury gets to decide whether they were false.

NWI next argues that its representations were true or, at most, they amounted to a non-actionable misstatement of the law because NWI believed Washington law *required* it to rely on Drawing C3.04. NWI's Br. at 3, 37. This argument misses the point entirely. NWI's fraud was a statement of fact (that it relied on the quantities noted on Drawing C3.04 to prepare its bid), not a statement of law, and the issue is not whether NWI was *entitled* to rely on Drawing C3.04, but whether it *actually* did so, as it represented to Sound Transit. It did not. Regardless, RCW 39.04.040, the statute cited by NWI, says nothing about what contractors can or cannot rely upon when preparing a bid (nor has any court construed it as such). And, even if Washington law somehow required NWI to rely

on Drawing C3.04, it simply begs the question of what the quantities on Drawing C3.04 were intended to represent. As discussed below, they did not represent all the earthwork involved on the Project and, as NWI's own internal bid documents show, NWI did not construe or rely on it as such.

Finally, NWI suggests that its misrepresentations are not actionable because everyone (NWI, Sound Transit, KPFF, etc.) agreed that the soil quantities noted on Drawing C3.04 were wrong. Again, NWI's argument either misses the point or is a deliberate attempt to confuse the issues. Whether the quantities on Drawing C3.04 were right or wrong is irrelevant. The only thing that matters is whether NWI lied when it told Sound Transit that it relied exclusively on those quantities. Even if it mattered, the accuracy of the drawing is disputed. The Project's lead engineer testified that the quantities noted on Drawing C3.04 were intended to estimate mass grading at the site, not the earthwork associated with foundations, footings, auger cast piles, and the detention vault. CP 1590 (Mathews Decl., ¶¶ 4, 5). On that basis, the drawing is accurate. *Id.* Even though it was not required to do so, Sound Transit issued Change Order 12 because it took NWI's at its word and believed it was reasonable for it to have been misled by the intended scope of the drawing.

But NWI had not been misled by Drawing C3.04. When preparing its bid, NWI understood that the drawing addressed mass grading only.

NWI's bid documents show that NWI knew the Project required it to cut, fill and export more than the quantities noted on Drawing C3.04; in addition to mass grading, NWI estimated work for clearing and grubbing, footing excavation and "Excavate & Fill Detention Vault." CP 1598 (Congleton Decl., ¶ 7); CP 1411; CP 1609-12. NWI also knew it would export at least 15,386 CY—nearly double the 8000 CY noted on the drawing. *Id.* Those two items alone would each fill a 14 x 12 ft. room to the height of the Empire State Building.¹ Yet when NWI made its claim, it represented that it relied on the quantities noted on Drawing C3.04 to estimate *all* earthwork on the Project. CP 1479-90; CP 1506-1534. A jury could certainly and reasonably conclude that this Empire State Building-sized discrepancy rendered NWI's representations false.

2. Sound Transit Reasonably Relied On NWI's False Representations When It Issued Change Order 12, And That Reliance Caused Its Damages.

As Sound Transit explained in its opening brief, ample facts show that Sound Transit reasonably relied on NWI's false representations when it issued Change Order 12, which resulted in Sound Transit paying NWI

¹ A 14 x 12 ft. room to the height of the Empire State Building (1250 ft.) equals 210,000 cubic feet. NWI's estimate of 7,836 cubic yards of additional export came to 211,572 cubic feet. Estimates showed that the soil associated with the detention vault to be somewhere between 8,972 CY (Sound Transit's estimate) and 12,871 CY (NWI's estimate). CP 1496. Even at the more conservative estimate of 8972 cubic yards, work for the detention vault came to 242,244 cubic feet.

money to which it was not entitled. Sound Transit did not receive NWI's internal bid documents until June 2006 and, thus, when it agreed to issue Change Order 12 in December 2005, Sound Transit could not have known that NWI's representations were false. Sound Transit's Br. at 16 (*citing* CP 1465-66 (Dahl Decl., ¶¶ 9-12); CP 1492-1505 (Aug. 24, 2005 letter); CP 1536-1543 (Dec. 16, 2005)). Had Sound Transit known, it would not have issued Change Order 12; after Sound Transit learned the truth, it denied NWI's request for even more compensation, in part, based on its fraud. CP 1550 ("at the time of the bid, NWI anticipated earthwork quantities greater than the quantities noted on Drawing C3.04.").

Again, NWI does not dispute these facts. Instead, it claims that Sound Transit did not rely on its misrepresentations because, NWI says, "Sound Transit independently evaluated" NWI's claim and determined that it was entitled to Change Order 12. NWI's Br. at 38-39.² Here too, NWI ignores the facts. Before it learned of NWI's fraud, Sound Transit

² NWI also suggests, in passing, that Sound Transit did not rely on its misrepresentations because it "rejected any request for extra earthwork on the detention vault." NWI's Br. at 39. That assertion is bogus and a deliberate effort to confuse the record. Sound Transit rejected *unrelated requests* for compensation made in 2004 and early 2005 for work that involved the detention vault, but *had nothing to do with excavation*. See CP 1545. This appeal involves NWI's requests in June and October 2005 for compensation related to mass excavation, including excavation on the detention vault. CP 1487; CP 1509. Far from rejecting that request, because of NWI's fraud, Sound Transit issued Change Order 12, which specifically included mass excavation at the detention vault. CP 1542-43.

could only evaluate the *amount* of additional compensation to which NWI claimed it was entitled, but not whether NWI truly relied on the quantities listed in Drawing C3.04, as it represented. In its December 2005 internal assessment of NWI's request, which NWI ironically points to as proof of non-reliance, Sound Transit expressly noted that it had accepted, at face value, NWI's false representation that it had calculated its bid based on the quantities listed in Drawing C3.04. CP 744 ("It would seem reasonable for a bidder to rely on this quantity instead of performing an independent take-off. ... [T]he note on the drawing misled the bidders ...").³

In reliance on that false premise—for, as discussed above, NWI had not been misled—Sound Transit, along with its design firm KPFF, independently analyzed the total amount of earthwork above the mass grading amounts noted on Drawing C3.04 and issued Change Order 12. CP 1492-1504; CP 1536-1543. That exercise was devoted entirely to calculating the *quantity* of soil involved. *Id.*; CP 1591 (Mathews Decl.,

³ Sound Transit's attorneys said the same thing in their September 2006 correspondence with KPFF's insurer—a document that NWI also ironically points to as proof of non-reliance. NWI's Br. at 26, 39. Again, the letter confirms that Sound Transit *relied* on NWI's representations that it based its bid solely on the quantities listed in Drawing C3.04. *See* CP 1709 ("When PCL first raised the claim for additional earthwork on behalf of [NWI], *Sound Transit and KPFF reviewed the facts and concluded that it could have been reasonable for [NWI] to assume...that the cut and fill quantities noted on drawing C3.04 were meant to include all excavation on the project.*") (emphasis added).

¶ 8) (“Sound Transit asked KPFF to analyze ... earthwork quantities for the entire Project.”) Neither Sound Transit nor KPFF could or did evaluate whether NWI had actually relied on the quantities noted on Drawing C3.04 when preparing its bid. *Id.* Indeed, in the midst of Sound Transit’s analysis, NWI continued to represent that the “competitive nature of the proposal dictated that NWI use those numbers.” CP 1509.

The same is true with respect to the analysis performed by Sound Transit’s consultants after June 21, 2006—the date when NWI produced its internal bid documents. NWI suggests that Navigant found that NWI was entitled to additional compensation, even after NWI produced its previously undisclosed bid estimates, and that this somehow refutes reliance. NWI’s Br. at 24, 27-28. Not so. While the June 21 date may be relevant for statute of limitations purposes because it marks the date when Sound Transit *could have discovered* NWI’s fraud, it is irrelevant to reliance because neither Sound Transit nor Navigant actually considered NWI’s internal bid documents when initially analyzing NWI’s March 2006 claim. Indeed, Navigant’s associate director expressly testified that she did not consider the documents as part of her analysis. CP 1584-85 (Williams Decl., ¶ 8) (“Although original bid and original estimate documentation may have been made available for review ..., I did not review any original bid and original estimate documentation in detail ...”).

That is not surprising. Like the scope of the calculations preceding Change Order 12, the evidence is undisputed that Navigant was not tasked with determining the entitlement issue, or whether NWI had been misled by Drawing C3.04. CP 1582-83 (Williams Decl., ¶¶ 3, 7). Sound Transit asked Navigant to conduct a cost analysis of NWI's records to determine how much additional compensation NWI may be due, assuming (but not determining) that NWI was in fact entitled to compensation. *Id.*; also CP 1552 (Sound Transit's Dec. 7, 2006 claim denial letter) ("Navigant's work did not address entitlement, and assumed full entitlement on the part of NWI."). Indeed, Navigant's final report, issued in September 2006 says this specifically: "There is no assessment relating to the accuracy of the reported costs, the reasonableness of the estimate presented, or the party responsible for any cost overruns." CP 1432-33.⁴

For this reason too, NWI's quote from a June 21, 2006 email from Navigant's Ronald Maus is particularly misleading. NWI asserts that "[a]fter having in hand the PCL and NWI bid documents," Maus somehow "affirmed" that NWI was misled by the quantities on Drawing C3.04 and

⁴ Nor did Navigant find, as NWI asserts, that "NWI needed to be paid \$701,126 over and above the amount already paid by Change Order 12." NWI's Br. at 27-28. Navigant's task was to compare NWI's actual costs on the Project to NWI's claim for additional compensation, and it found—again, assuming entitlement—that NWI was attempting to overcharge Sound Transit by nearly \$1.5 million. CP 1072.

was entitled to compensation. NWI's Br. at 24-25. Putting aside the fact that Maus's email was sent the same day NWI first produced the bid documents and the email does not reference the documents or remotely suggest that Maus reviewed them, Maus made no conclusions; he merely reported what *he'd heard from NWI* while reviewing records at its offices: "*In a variety of discussions, it was represented to us that ...*" CP 1159 (emphasis added). Notably, and indicative of its strategy to play fast and loose with the facts, NWI omits this telling phrase in favor of an ellipse when quoting the email in its brief. *See* NWI's Br. at 24.

Contrary to NWI's suggestion that Sound Transit acquiesced to NWI's fraud, when Sound Transit recognized that NWI's bid documents revealed the falsity of NWI's statements, it immediately said so.⁵ NWI badly distorts the facts on this issue as well. Sound Transit's counsel

⁵ NWI similarly suggests that PCL affirmed the truth or validity of NWI's representations when it passed NWI's June 2005 request for additional compensation on to Sound Transit. NWI's Br. at 11-12. But like Sound Transit, PCL originally believed NWI's request was reasonable because it had no knowledge of NWI's fraud at the time. After NWI's fraud became apparent, even though PCL would be contractually entitled to a markup on any amounts awarded to NWI from Sound Transit, PCL's third-party complaint stated: "PCL disputes NWI's entitlement to additional compensation and/or disputes the amount of compensation sought by NWI. In accordance with its subcontract obligations to NWI ..., PCL forwarded NWI's claim to Sound Transit as a pass-through claim, *but PCL was unable to, and did not, certify NWI's claim as valid or as compliant under the Federal False Claims Act.*" CP 20 (PCL's Third Party Complaint, at ¶ 3.4) (emphasis added).

denied NWI's claim in a December 7, 2006 letter. NWI only partially quotes the letter and writes "there is nothing in the letter even hinting to any false representations." *Id.* at 28-29. Not even close. In a portion of the letter not quoted by NWI, Sound Transit plainly exposed NWI's fraud:

The Claim is based on NWI's argument that, at the time NWI prepared its bid, it relied on the earthwork quantities noted on Drawing C3.04, which were allegedly incorrect.

* * *

In fact, however, NWI's bid estimate for excavation and backfill includes net export that is almost double the 8,000 CY NWI now claims was planned for export, and includes a separate line item for excavation and backfill of the detention vault. ***Thus, at the time of bid, NWI anticipated earthwork quantities greater than the quantities noted on Drawing C3.04.***

CP 1550 (emphasis added). Later in the letter, Sound Transit similarly states that it "disputes" NWI's assertion that it "reasonably relied upon the quantities noted in Drawing 3.04." CP 1552.⁶ Thus, contrary to NWI's contention, its claim was rejected based on fraud, among other reasons, and it is that same fraud which is the basis of Sound Transit claim here.

In sum, none of NWI's arguments have merit and, if anything, the 35 pages of briefing that it devotes to (largely mischaracterized) "facts" only confirm that there are disputed issues of material fact that must be

⁶ For this reason, NWI's complaint that Gerald Dahl's declaration is inconsistent with the facts is baseless. NWI's Br. at 29. Dahl accurately testified, pointing to the December 7, 2006 letter, that NWI's claim was denied based on its misrepresentations. CP 1466-67.

resolved by the jury. The trial court's summary judgment order on Sound Transit's fraud claim must be reversed, and the claim remanded for trial.

B. Sound Transit's Fraud Claim Is Not Time Barred.

NWI's argument that contractual privity somehow controls the statute of limitation analysis is without merit, and ignores the pass-through nature of the proceedings below. Although privity principles dictated a two-step process, this lawsuit is really between NWI and Sound Transit, and the timeliness of Sound Transit's fraud claim must reflect that reality. NWI sued PCL to recover from Sound Transit. PCL duly passed NWI's claim through to Sound Transit by way of a third-party complaint. Sound Transit, in turn, asserted a pass-through counterclaim against PCL based on NWI's fraud and, at the same time, made the allegation directly against NWI via a cross-claim. Both NWI's original action and PCL's third-party complaint were filed *before* the expiration of the three-year limitations period on Sound Transit's fraud counterclaim/cross-claim.

NWI does not dispute that Sound Transit's fraud counterclaim was compulsory under CR 13(a), nor could it. The claim arises out of the same transaction and occurrence as NWI's complaint and PCL's third-party complaint; *i.e.*, NWI's claim for additional compensation on the Project. Nor does NWI dispute that, under Washington law, this compulsory counterclaim was timely because it relates back to the date of complaint

and/or third party complaint. *J. R. Simplot Co. v. Vogt*, 93 Wn.2d 122, 126, 605 P.2d 1267 (1980); *Tallman v. Durussel*, 44 Wn. App. 181, 187 n. 3, 721 P.2d 985 (1986). If nothing else, the timeliness of Sound Transit's counterclaim against PCL, which PCL has passed-through to NWI, means that Sound Transit's fraud claim must be tried and, if Sound Transit prevails, NWI will ultimately be liable for damages or rescission.

Given that reality, NWI cannot explain why Sound Transit's fraud cross-claim is any less compulsory or timely than its identical counterclaim against PCL. After all, as Sound Transit pointed out (and NWI does not dispute), NWI is a necessary party to Sound Transit's counterclaim because it was NWI's fraud, not PCL's, that is the subject of claim and it is NWI from whom Sound Transit seeks its relief. CR 19(a). Just as important, as this Court recognized in *Bennett v. Dalton*, 120 Wn. App. 74, 81, 84 P.3d 265 (2004), a cross-claim relates back to the date of the original complaint for limitations purposes unless it seeks relief that is "separate and independent" from the plaintiff's claim. Sound Transit's fraud claim is not "separate and independent" from NWI's contract claim.

On the contrary, the two claims are inexorably intertwined. Both arise out of Change Order 12: NWI claims that Change Order 12 was inadequate to compensate it for additional earthwork it says it did on the Project. Sound Transit, on the other hand, claims that it never would have

issued Change Order 12 in the first place had it known that NWI's representations were false. The two claims are based on the same subject matter, and overlapping facts and evidence. And, if Sound Transit prevails on its fraud claim (which it also asserted as an affirmative defense), then NWI's contract claim will necessarily fail. Contrary to NWI's argument, for which it provides no authority, the fact that one claim sounds in tort, and the other in contract, does not make the two "separate and independent." *See, e.g., Schoeman v. New York Life Ins. Co.*, 106 Wn.2d 855, 865-66, 726 P.2d 1 (1986) (test for "transaction and occurrence" under CR 13(a) is whether claims are "logically related").

In sum, NWI initiated this action, and insisted that PCL interplead Sound Transit as a third party defendant. After that occurred, Sound Transit was *required* to assert its compulsory counterclaims against PCL, and the timeliness of that claim relates back to the filing of the original complaint and third-party complaint. For the same reason that Sound Transit's fraud counterclaim *was* compulsory under CR 13(a), its fraud cross-claim against NWI *was not* "separate and independent" and, thus, it too relates back. *Bennett, supra*. Neither Sound Transit's fraud counterclaim nor fraud cross-claim is barred by the statute of limitations.

C. Sound Transit’s Established Sufficient Facts To Prove A Violation Of The CPA.

Sound Transit’s CPA claim is predicated on the very same false representations that form the basis of its fraud claim.⁷ As Sound Transit explained in its opening brief, NWI’s false representations were both “unfair” and “deceptive” because they resulted in NWI receiving more than \$500,000 in taxpayer dollars than it deserved. *See* Sound Transit’s Br. at 19-21 (*citing Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 719 P.2d 531 (1986) and *Blake v. Federal Way Cycle Ctr.*, 40 Wn. App. 302, 698 P.2d 578 (1985)). If this Court reverses the trial court’s ruling on Sound Transit’s fraud claim, it must do so on the CPA claim as well. NWI apparently concedes the point, and does not argue that there are any separate or independent grounds to affirm the trial court’s dismissal of Sound Transit’s fraud-based CPA claim.⁸

⁷ NWI’s confusing discussion of Sound Transit’s “intentional underbidding” theory misses the point. NWI’s Br. at 45-46. Sound Transit did present alternative theories in the trial court, but its primary claim—and the *only* claim Sound Transit raises on appeal—was that NWI misrepresented the fact that it relied on Drawing C3.04 when preparing its bid. NWI’s fraud was the “unfair and deceptive” act. NWI’s brief ignores that CPA claim entirely, even though it is the only claim that matters here.

⁸ The same is true with respect to NWI’s argument on causation, which likewise relies entirely on the merits of Sound Transit’s fraud claim. NWI’s Br. at 47. As discussed above, because Sound Transit would not have issued Change Order 12 “but for” NWI’s fraud, Sound Transit easily satisfied the CPA’s causation requirement. *Schnall v. AT & T Wireless Servs., Inc.*, 171 Wn.2d 260, --- P.3d --- (2011).

NWI's argument that there was no evidence "to establish impact upon the public interest" likewise defies reality and common sense. This was not a "private contract affecting no one but the parties to the contract" (NWI's Br. at 46-47), nor is this Court required to pigeon-hole its public interest analysis into the traditional "private dispute" factors. *Hangman Ridge*, 105 Wn.2d at 791 (factors are not dispositive or exclusive). Sound Transit is a public agency. The Project was a public works contract. NWI's fraud resulted in the loss of public money. NWI simply ignores these facts, but they plainly pull this controversy into the sphere of the public interest. Like its fraud claim, Sound Transit presented more than enough evidence to prove a violation of the CPA. The trial court's summary judgment order must be reversed on this basis as well.

D. Sound Transit's Appeal Is Not Frivolous.

NWI's frivolousness argument is itself frivolous. Far from being "devoid of merit" with "no reasonable possibility of reversal," for the reasons explained above and in its opening brief, Sound Transit's appeal should result in reversal. *See Tiffany Family Trust Corp. v. City of Kent*, 155 Wn.2d 225, 241, 119 P.3d 325 (2005) (appeal is frivolous only if it "is so devoid of merit that there is no possibility of reversal"). NWI's unfounded grab for an award of attorneys' fees must be rejected.

III. CONCLUSION

This Court should reverse the trial court's summary judgment order and remand Sound Transit's fraud and CPA claims for trial.

RESPECTFULLY SUBMITTED this 20th day of September, 2011.

LANE POWELL PC

By 

Ryan P. McBride

WSBA No. 33280

Attorneys for Third-Party

Defendant/Appellant Sound Transit

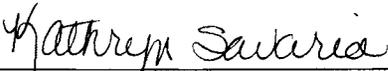
CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2011, I caused to be served a copy of the foregoing REPLY BRIEF on the following person(s) in the manner indicated below at the following address(es):

Bryan P. Coluccio, Esq.
Cable, Langenbach, Kinerk & Bauer, LLP
1000 Second Avenue, Suite 3500
Seattle, WA 98104-1063

David C. Groff, Esq.
Groff Murphy PLLC
300 East Pine
Seattle, WA 98122

- by **CM/ECF**
- by **Electronic Mail**
- by **Facsimile Transmission**
- by **First Class Mail**
- by **Hand Delivery**
- by **Overnight Delivery**



Kathryn Savaria