

No. 66777-7

COURT OF APPEALS DIVISION I  
OF THE STATE OF WASHINGTON

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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.

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**AMENDED REPLY BRIEF OF APPELLANT**

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Bryan P. Coluccio, WSBA 12609  
CABLE LANGENBACH KINERK &  
BAUER, LLP  
*Attorneys for Plaintiff/Appellant*  
1000 Second Avenue, Suite 3500  
Seattle, WA 98104  
Telephone: (206) 292-8800  
Facsimile: (206) 292-0494

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COURT OF APPEALS  
DIVISION I  
CLERK OF COURT  
JENNIFER L. BROWN  
1000 SECOND AVENUE  
SUITE 3500  
SEATTLE, WA 98104

**TABLE OF CONTENTS**

I. REPLY TO SOUND TRANSIT’S ARUGMENTS CONCERNING THE SUMMARY JUDGMENT RULING DISMISSING NWI’S CLAIM AND DENYING NWI’S CROSS-MOTION .....1

A. Review Of The Contract Claim Notice Requirements In Article 10, And The Sound Transit Team Of Experts Processing The January 2006 Article 10 Claim.....3

1. The Section 10.01.A Claim Notice Requirements. .... 3

2. The Team Of Sound Transit Representatives Processing And Ruling Upon The January 2006 Article 10 Claim..... 4

B. Reply To Sound Transit Argument 1: The January 20, 2006 Article 10 Claim Was A Timely Claim Arising From Sound Transit’s Issuance Of Unilateral Change Order 12 – It Was Not A “New Delay Claim”. ....4

1. The January 27, 2006 Notice Of Intent To Claim. .... 5

2. The Claim Package Letter Dated March 27, 2006..... 6

3. Sound Transit’s Audit Request And Demand For PCL And NWI Project Records: ..... 7

4. Sound Transit’s December 7, 2006 Claim Denial. .... 7

C. Reply To Sound Transit Argument 1, Continued: Sound Transit’s Characterization Of The January 2006 Article 10 Claim As A New And Independent “Delay Claim” Is Utterly Implausible; And Even If It Could Be Characterized As A “New Claim,” All Contract Defenses Were Waived By Sound Transit.....8

1.	Based On The Plain Language Of Section 10.01.A And The Record, Sound Transit’s Response To The “New Delay Claim” Is Implausible And Unsupportable On Summary Judgment; Sound Transit Would Have Denied The “New Delay Claim” Upon Receipt.....	9
2.	At The Very Least, Waiver Is Established By The Implausibility Of Sound Transit’s “New Delay Claim,” Coupled With Its Actual Conduct Following Receipt Of The January 2006 Article 10 Claim.....	12
D.	Reply To Sound Transit Argument 2: Sound Transit’s Attempt To Apply A Belated Contract Notice Defense To The June 2005 RFC As A Defense To The January 2006 Article 10 Claim Fails.....	16
II.	THE TRIAL COURT IMPROPERLY AWARDED ATTORNEYS’ FEES TO SOUND TRANSIT AND DIRECTLY AGAINST NWI UNDER RCW 39.04.240; THE LEGAL AUTHORITY CITED BY SOUND TRANSIT AND PCL DOES NOT SUPPORT THE FEE AWARD.....	20
A.	Division I’s Ruling In <i>Frank Coluccio Construction Company, Inc. v. King County</i> , 136 Wn. App. 751, 150 P.3d 1147 (2007) Does Not Support The Fee Award Or Sound Transit’s Interpretation Of RCW 39.04.240.....	20
B.	Cases Cited By Sound Transit Support NWI’s Argument – Sound Transit And PCL Were Required To Provide Prior Written Notice That Attorneys’ Fees Were Sought Under RCW 39.04.240 As A Condition Precedent To Recovery.....	23
C.	Sound Transit Misinterprets <i>Absher Construction Co. v. Kent School District</i> . ....	24

III. THE TRIAL COURT IMPROPERLY DENIED NWI’S MOTION FOR RECONSIDERATION AND MOTION TO VACATE; THE RECORD ON <i>DE NOVO</i> REVIEW INCLUDES THE RECORD SUBMITTED ON THESE MOTIONS.....	25
A. The Trial Court’s Supplemental Orders Subject To RAP 9.12.....	25
1.    NWI’s Motion For Reconsideration Following The Trial Court’s May 20, 2010 Order On Partial Summary Judgment. ....	25
2.    NWI’s Subsequent Motion To Vacate.....	26
B. The Materials Included In The Two Later Motions Are Properly Part Of The Record On Review. ....	28

## TABLE OF AUTHORITIES

### Cases

<i>Absher Construction Co. v. Kent School District, No. 415</i> , 79 Wn. App. 841, 917 P.2d 1086 (1995) .....	24
<i>Allen v. State</i> , 118 Wn.2d 753, 826 P.2d 200 (1992).....	12
<i>Beckmann v. Spokane Transit Authority</i> , 107 Wn.2d 785, 733 P.2d 960 (1987).....	23
<i>Blair v. Washington State University</i> , 108 Wn.2d 558, 740 P.2d 1379 (1987).....	22
<i>Bowers v. Transamerica Title Ins.</i> , 100 Wn.2d 581, 675 P.2d 193 (1983).....	24
<i>Central Washington Bank v. Mendelson-Zeller</i> , 113 Wn.2d 346, 779 P.2d 697 (1989).....	12
<i>Chesapeake and Patomac Tele. Co. of Virginia v. Sisson and Ryan, Inc.</i> , 362 SE2d 723 (Va. 1987) .....	15
<i>Frank Coluccio Construction Company, Inc. v. King County</i> , 136 Wn. App. 751, 150 P.3d 1147 (2007) .....	20, 21
<i>Jacob’s Meadow Owner’s Association v. Plateau, 44 II, LLC</i> , 139 Wn. App. 743, 162 P.3d 1153 (2007).....	29
<i>Lay v. Hass</i> , 112 Wn. App. 818, 51 P.3d 130 (2002) .....	23, 24
<i>Mike M. Johnson, Inc. v. Spokane County</i> , 150 Wn.2d 375, 78 P.3d 161 (2003).....	2, 15
<i>Rodriguez v. City of Moses Lake</i> , 158 Wn. App. 724, 243 P.3d 552 (2010).....	29
<i>Tanner Electric Cooperative v. Puget Sound Power and Light Company</i> , 128 Wn.2d 656, 911 P.2d 1301 (1996) .....	29

**Statutes**

RCW 39.04.240 ..... passim  
RCW 4.84.250 ..... 20, 21, 23, 24  
RCW 4.84.260 ..... 20, 24  
RCW 4.84.270 ..... 20, 21, 24  
RCW 4.84.280 ..... 20, 21, 23, 24

**Rules**

Rule of Appellate Procedure 9.12..... 28

**Appendices**

Appendix 1: Rules and Statutes ..... vi

I. **REPLY TO SOUND TRANSIT'S ARUGMENTS CONCERNING THE SUMMARY JUDGMENT RULING DISMISSING NWI'S CLAIM AND DENYING NWI'S CROSS-MOTION**

The only contract claim at issue in this proceeding is PCL's Notice of Intent to Claim dated January 27, 2006 (CP 553), followed by the complete claim package submitted by PCL to Sound Transit on March 27, 2006 (CP 555) (collectively, "the January 2006 Article 10 Claim"). The January 2006 Article 10 Claim challenged the dollar amount approved by Sound Transit by its unilateral Change Order 12. As a claim arising from a unilateral change order, the January 2006 Article 10 Claim was submitted in accordance with Section 10.01.A of the Project Contract. CP 465. Change Order 12 was issued by Sound Transit on January 19, 2006, and received by PCL on January 27, 2006. CP 550, 553. The genesis of the change order was PCL's Request for Change dated June 28, 2005 ("the June 2005 RFC"). That RFC was made in accordance with Project Contract Section 4.01 and 4.02. CP 454-455.

In Sound Transit's brief, it makes two alternative arguments supporting the trial court's dismissal of NWI's January 2006 Article 10 Claim on summary judgment:

**Argument 1:** Sound Transit argues the Article 10 Claim was a new and independent "delay claim" unrelated to Change Order 12, and was untimely under requirements found in Section 10.01.A.3 or Section

4.02.B of the Project Contract. Sound Transit argues it did not waive these requirements, either in writing or by unequivocal conduct. Brief of Respondent Sound Transit (“ST Br.”) at 23-25.

**Argument 2:** Sound Transit’s alternative argument is that even if the Article 10 Claim was based on unilateral Change Order 12, it was still untimely under Section 10.01.A.3 because the “original” June 2005 RFC was untimely under Section 10.01.A.3. According to Sound Transit, it only first discovered the untimeliness of the June 2005 RFC during depositions in this lawsuit taken in February 2010. ST Br. at 29-30.

As to this second argument, Sound Transit does concede in its brief that it is too late now to challenge Change Order 12 itself even if the June 2005 RFC was allegedly untimely. ST Br. at 30 and n. 5. Sound Transit acknowledges that once Change Order 12 modified the Project Contract, any contract claim procedure defenses to the June 2005 RFC became moot. *See Mike M. Johnson, Inc. v. Spokane County*, 150 Wn.2d 375, 387, 78 P.3d 161 (2003). To get around the contract modification, Sound Transit argues that although it is unable to recover the amount paid by Change Order 12 (\$534,602.75), its notice defense to the June 2005 RFC still applies to the amount claimed in the January 2006 Article 10 Claim. ST Br. at 30.

All of Sound Transit's arguments fail, and none justify affirmance of the trial court's summary judgment ruling and denial of NWI's cross-motion. To the contrary, the trial court should be reversed, and summary judgment granted in favor of NWI on its cross-motion.

A. **Review Of The Contract Claim Notice Requirements In Article 10, And The Sound Transit Team Of Experts Processing The January 2006 Article 10 Claim.**

Since Sound Transit's arguments center on Section 10.01.A, it merits reviewing those contract requirements first. It is also important to keep in mind the persons comprising the team of Sound Transit representatives responsible for processing and ruling on the January 2006 Article 10 Claim.

1. **The Section 10.01.A Claim Notice Requirements.**

Section 10.01.A of the Project General Conditions defines three types of claims available to the general contractor, PCL:

- *An event or occurrence* giving rise to the potential claim, including an act or omission of Sound Transit; or
- The denial of a Request for Change by Sound Transit; or
- The *issuance of a unilateral Change Order by Sound Transit.*

CP 465 (Section 10.01A.3). (Emphasis added.) Any Notice of Intent to Claim had to be submitted by PCL to Sound Transit *within ten days* after (1) the issuance of a unilateral Change Order by Sound Transit, (2) the denial of the Request for Change by Sound Transit, or (3) after the event

or occurrence giving rise to a potential claim. CP 465. If the event or occurrence giving rise to a potential claim was due to an act or omission of Sound Transit, then there are two conditions to timely notice:

- The Notice of Intent to Claim was due within ten days after the Contractor discovered Sound Transit's act or omission; *and*
- Notice was required *prior to the time for performance* of that portion of the Work to which the alleged act or omission relates. CP 465.

2. **The Team Of Sound Transit Representatives Processing And Ruling Upon The January 2006 Article 10 Claim.**

At all times during the processing of the January 2006 Article 10 Claim, Sound Transit was represented by a skilled, experienced, and sophisticated team of professionals, all knowledgeable as to how contract claim procedures work and the rights afforded Sound Transit under the Project Contract. That team included Sound Transit's project manager, Jerry Dahl; Sound Transit's on-site resident engineer, Scott Perry; Sound Transit's in-house counsel; Sound Transit's outside counsel at Lane Powell; construction claim consultants with Hainline & Associates; and construction claim auditors with Navigant Consulting.

B. **Reply To Sound Transit Argument 1: The January 20, 2006 Article 10 Claim Was A Timely Claim Arising From Sound Transit's Issuance Of Unilateral Change Order 12 – It Was Not A “New Delay Claim”.**

Sound Transit calls the January 2006 Article 10 Claim a “new delay claim.” ST Br. at 23-25. Yet, nowhere does Sound Transit find

support in the record for this characterization. PCL likewise joins in on the mislabeling of the Article 10 claim, calling it a “claim for additional compensation based on schedule delay.” Brief of Respondents PCL Construction Services, Inc. And Fidelity And Deposit Company of Maryland (“PCL Br.”) at 11. PCL cites the Pittman Declaration (CP 251-253) for its contention. *Id.* PCL misrepresents this record: Nowhere in Pittman’s Declaration does he describe or call the claim one for additional compensation based on schedule delay.

Sound Transit’s effort to label the January 2006 Article 10 Claim as a “new delay claim” is utterly specious. The record makes clear that under Section 10.01.A.3, the January 2006 Article 10 claim was based solely upon Sound Transit’s issuance of Unilateral Change Order No. 12; that all parties, Sound Transit, PCL, and NWI, knew and understood the Article 10 claim was based on Sound Transit’s unilateral Change Order 12; and that PCL timely submitted the claim within the Section 10.01.A.3 ten day notice requirement following issuance of the unilateral change order. This is the record:

**1. The January 27, 2006 Notice Of Intent To Claim.**

The Notice of Intent to Claim required by Section 10.01A.1 is found in the January 27, 2006 letter from PCL to Sound Transit, and states:

Please accept this letter as PCL's written "Notice of to Intent to Claim" (sic) with respect to additional earthwork compensation. *Specifically, specification section 00200 10.01 A.3 requires the submission of this intent within 10 days of the issuance of a unilateral change order. Change Order #12 dated September 16<sup>th</sup> and received on January 27<sup>th</sup> is a unilateral change order that required the issuance of this notice.*

CP 553.

**2. The Claim Package Letter Dated March 27, 2006.**

PCL submitted the claim package within 60 days of the Notice of Intent to Claim as required by Section 10.01B.2.a. In the March 27, 2006 cover letter accompanying the claim package, PCL states:

Pursuant to our SL (Serial Letter) 261 dated and Faxed to Sound Transit on January 27, 2006 enclosed, *please accept this letter as PCL's claim in the amount of \$2,703,723 for the additional earthwork not included in unilateral Change Order #12.* This claim is made per the requirements of specification section 0020 10.01.B.1.a.

CP 555. (Emphasis added.) In the claims summary accompanying the March 27, 2006 cover letter, it was again reaffirmed that the January 2006 Article 10 claim was based upon Sound Transit's unilateral Change Order 12 and underpayment of the actual costs directly caused by the additional earthwork omitted in Sound Transit's project plans (Drawing C3.04):

*Northwest Infrastructure, Inc. ("NWI") submits this claim for additional compensation following Sound Transit's unilateral change order in the sum of \$509,145.18 for additional earthwork required on ("the Project").*

CP 557.

**3. Sound Transit's Audit Request And Demand For PCL And NWI Project Records:**

In its project audit and document production request to PCL dated April 25, 2006, Sound Transit describes its understanding that the January 2006 Article 10 Claim was a continuation of the Additional Earthwork Claim underlying unilateral Change Order 12:

In accordance with Article 10.01-B.2, please provide the following additional documentation *regarding your Additional Earthwork Claim, received March 27<sup>th</sup> 2006:*

...

CP 571.

**4. Sound Transit's December 7, 2006 Claim Denial.**

Sound Transit's December 7, 2006 denial of the January 2006 Article 10 Claim does not characterize it as a new and independent delay claim arising from the defective Drawing C3.04 and additional earthwork underlying unilateral Change Order 12:

We represent Sound Transit in connection with the "Additional Earthwork Claim" submitted by PCL Services, Inc. "PCL," dated March 27, 2006 (the "Claim"). PCL's subcontractor, Northwest Infrastructure, Inc. ("NWI") claims that it originally bid cut and fill quantities as listed in Drawing FW-C3.04, but that the actual earthwork quantities were significantly higher than the quantities noted on the drawing. PCL and NWI seek compensation from Sound Transit for the alleged additional quantities in the amount of \$2,221,154.33.

CP 597.

C. **Reply To Sound Transit Argument 1, Continued: Sound Transit's Characterization Of The January 2006 Article 10 Claim As A New And Independent "Delay Claim" Is Utterly Implausible; And Even If It Could Be Characterized As A "New Claim," All Contract Defenses Were Waived By Sound Transit.**

As will be addressed in more detail below, the gist of Sound Transit's entire defense in this case is summed up by the allegations at pages 29-30 of its brief – it never waived any defenses to the Article 10 Claim because it did not know it had any defenses at the time:

...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. *As far as Sound Transit knew, the RFC complied with all contractual notice requirements.* 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. 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. (Citations omitted.)

ST Br. at 29-30. The record does not support these contentions, but that does not matter here.

By characterizing the January 2006 Article 10 Claim as a "new delay claim," Sound Transit has actually outwitted itself, or perhaps a more apt metaphor, Sound Transit has shot itself in both feet. Even if

Sound Transit believed the January 2006 Article 10 Claim was a “new delay claim,” and even if Sound Transit “incorrectly” assumed the original June 25, 2005 RFC was timely, Sound Transit had full and actual knowledge of facts in January 2006 that would have led it to deny the “new delay claim” upon receipt.

Indeed Sound Transit’s failure to deny the January 2006 Article 10 Claim is what makes its “new delay claim” characterization utterly implausible. At the very least, Sound Transit affirmatively waived any contract defenses to the “new delay claim.”

1. **Based On The Plain Language Of Section 10.01.A And The Record, Sound Transit’s Response To The “New Delay Claim” Is Implausible And Unsupportable On Summary Judgment; Sound Transit Would Have Denied The “New Delay Claim” Upon Receipt.**

Sound Transit contends that its team of experts and representatives understood the Article 10 Claim to be a “new delay claim,” and not a claim arising from unilateral Change Order 12 (as the record fully supports). If Sound Transit actually did believe and understood the Article 10 Claim to be a “new delay claim,” that claim was “dead on arrival” under Section 10.01.A.3 and the Sound Transit team would have treated it as such for these reasons:

1) As a “new claim,” the delay claim would have fallen under the category of “an event or occurrence due to an act or omission of Sound

Transit” per Section 10.01.A.3. According to Sound Transit, the other claim category, “issuance of a unilateral change order by Sound Transit,” did not apply.

2) The “act or omission of Sound Transit” was the defects in Drawing C3.04, leading to the additional earthwork.

3) The Notice of Intent to Claim for the “new delay claim” (required by Section 10.01.A.1-2) was received by Sound Transit on January 27, 2006. CP 553.

4) Per Section 10.01.A.3, because it was based on an act or omission of Sound Transit, the Notice of Intent to Claim dated January 27, 2006 had to be received by Sound Transit within ten days after discovery of the defects in Drawing C3.04, **and before** PCL/NWI performed the additional earthwork (i.e. “prior to the time for performance of that portion of the work to which such alleged act or omission relates.”)

5) Even though Sound Transit calls it an “erroneous assumption,” Sound Transit cannot dispute that it knew of PCL/NWI’s discovery of the Drawing C3.04 defects at least by June 28, 2005, when the original RFC (CP 252, 954-965; 2380-2386) was received.

6) Knowing that PCL/NWI had discovered Sound Transit’s acts and omissions (the Drawing C3.04 defects) at least by June 2005, on its face it was obvious the January 2006 Article 10 Claim received on

January 27, 2006 had not been submitted within ten days of discovery. Based on the “new delay claim” contention, the January 2006 Article 10 Claim was more than 200 days late (July 2005-January 2006) based on what Sound Transit actually knew and “assumed” as of January 2006.

7) If the Article 10 Claim was also a “new delay claim,” not only was it over 200 days late; it was not received by Sound Transit before PCL/NWI had performed the additional earthwork related to Sound Transit’s act or omission (the defective Drawing C3.04), as required by Section 10.01.A.3.

Nor does Sound Transit help itself by offering an additional argument that the “new delay claim” was also barred under Section 4.02.B, governing change order requests. ST Br. at 24. This argument is similarly baseless, for two reasons. First, Section 4.02.B, like the entirety of Section 4.02, applied only to “Requests for Change.” The January 2006 Article 10 claim was not a “request for change” under Article 4, but rather a claim arising from a unilateral change order issued by Sound Transit governed by Section 10.01.A.3 (or as Sound Transit claims, an event arising from an act or omission of Sound Transit). Second, even if Section 4.02.B did apply as Sound Transit now claims, Sound Transit equally had to know the January 2006 Article 10 Claim on its face was untimely under Section 4.02.B based on the exact same facts described above. The only

difference between Section 4.02.B and Section 10.01.A.3: the former has a 20 day notice requirement, the latter a ten day notice requirement. Under Section 4.02.B, the “new delay claim” would have also been nearly 200 days too late.

Based on the contract language and the record, Sound Transit’s “new delay claim” arguments are not credible on summary judgment, and should be rejected outright. *See Allen v. State*, 118 Wn.2d 753, 760, 826 P.2d 200 (1992); *Central Washington Bank v. Mendelson-Zeller*, 113 Wn.2d 346, 353, 779 P.2d 697 (1989).

2. **At The Very Least, Waiver Is Established By The Implausibility Of Sound Transit’s “New Delay Claim,” Coupled With Its Actual Conduct Following Receipt Of The January 2006 Article 10 Claim.**

Sound Transit’s implausible characterization of the Article 10 claim as a “new delay claim,” and its conduct following receipt, at the very least waived any contract claim defense. Waiver was both in writing and by unequivocal conduct.

a) **Written Waiver.**

Sound Transit made at least two written waivers. *See* NWI’s Amended Brief at 40-41.<sup>1</sup>

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<sup>1</sup> Contrary to ST Br. at 2, NWI did assert the written waiver defense in its cross-motion. *See* CP 430, 441 (NWI Cross-Motion at 13, 24).

**b) Unequivocal Waiver By Conduct.**

Waiver by unequivocal conduct is established by the following undisputed facts:

1) As explained above, Sound Transit's team of experts possessed knowledge of facts allowing immediate denial of the "new delay claim" as untimely under Section 10.01.A.3 (and Section 4.02.B had that provision also applied).

2) Rather than denying the claim, Sound Transit demanded PCL and NWI produce all of their respective project documents. Sound Transit also initiated an audit of NWI in order to evaluate the merits of the Article 10 Claim. CP 571. The audit and review of the PCL and NWI project records would have been pointless and unnecessary, since Sound Transit possessed all facts necessary to deny the Article 10 Claim immediately upon receipt as untimely under either Section 10.01.A.3 (ten days' notice required) or Section 4.02.B (20 days' notice required). Certainly, absent an intent to waive, Sound Transit would not have otherwise needlessly and recklessly spent taxpayer money (Sound Transit is a public agency) for the substantial expense to hire auditors, construction consultants, and outside legal counsel for a claim that was purportedly untimely under Section 10.01.A.3 and Section 4.02.B.

3) Sound Transit commissioned and received a detailed audit report (and supplemental report from Navigant Consulting), analyzing the amount of additional compensation claimed in the January 2006 Article 10 claim. The audit reports were completed in September, 2006. CP 655, 659. If waiver was not intended, then Sound Transit would not have spent taxpayer money on a needless audit.

4) By letter dated December 7, 2006, Sound Transit denied the January 2006 Article 10 Claim. CP 597-602. If Sound Transit had not intended to waive any defenses to the “new delay claim,” the denial letter would have been issued far earlier, and made reference to the lack of timeliness of the “new delay claim” under Sections 10.1.A.3 and 4.02.B. The claim denial makes no reference to any contract claim procedures that were not followed by either PCL or NWI, or that the Article 10 claim was untimely. Rather, the claim was denied for the following singular reason:

Once NWI entered into its subcontract with PCL, it was contractually bound to perform the subcontracted scope of work. As the subcontract made no reference to specific earthwork quantities, NWI lost any entitlement it might have had to claim the scope of its work was limited to the quantities noted on Drawing C3.04.

CP 600-601.

Sound Transit's brief attempts to skirt its unequivocal waiver by conduct in two ways, both of which fail. First, Sound Transit asserts that such waiver is precluded by a non-waiver clause contained in the Project Contract. A single case is cited in support of this proposition, *Chesapeake and Potomac Tele. Co. of Virginia v. Sisson and Ryan, Inc.*, 362 SE2d 723 (Va. 1987). ST Br. at 28-29. No reported Washington decision has ever concurred with the ruling in *Sisson and Ryan*, which directly conflicts with the actual waiver rule recognized in *Mike M. Johnson* and *American Safety*. ***In fact, there is not a single published decision in any jurisdiction (including Virginia) that either adopts or cites with approval the ruling in Sisson and Ryan.***

Second, Sound Transit asserts that it somehow avoids waiver by conduct because all contract defenses were expressly "preserved" in its December 7, 2006 claim denial letter (CP 233). ST Br. at 30. Sound Transit's letter cannot be reasonably interpreted that way. Even if it could, Sound Transit could not "preserve" any of the defenses that it had already waived, forfeited, or lost before December 7, 2006. NWI Amended Brief at 37-44. The defenses lost included:

- Any defenses made moot by the previous contract modifications by Change Order 12;
- Any defenses previously waived in writing;

- Any defenses previously waived by Sound Transit’s unequivocal conduct.

The one and only “preserved” defense asserted by Sound Transit is its notice defense discovered during the February 2010 depositions. ST Br. at 29-30. But as previously explained, that “defense” does not save Sound Transit here. Sound Transit had ample and accurate knowledge to still have denied the so-called “new delay claim” as untimely under either Section 10.01.A.3 or Section 4.02.B.

**D. Reply To Sound Transit Argument 2: Sound Transit’s Attempt To Apply A Belated Contract Notice Defense To The June 2005 RFC As A Defense To The January 2006 Article 10 Claim Fails.**

Sound Transit’s alternative defense to the January 2006 Article 10 Claim seems to go like this: the “original” June 2005 RFC that led to issuance of Change Order 12 was actually untimely under Section 10.01.A.3. Even though the Project Contract was modified by Change Order 12, any contract notice defenses now foreclosed from challenging Change Order 12 still exist and remain applicable to the Article 10 Claim. In other words, any notice defense to the June 2005 RFC discovered by Sound Transit in February 2010 depositions can be applied to the January 2006 Article 10 Claim. ST Br. at 29-31. Sound Transit at least concedes it does not get a do-over and can undo Change Order 12. That is a done deal. ST Br. at 30.

It is worth again restating this quote from Sound Transit's brief:

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. ***As far as Sound Transit knew, the RFC complied with all contractual notice requirements.*** (Citations omitted; emphasis added).

ST Brief at 29.

In claiming the June 2005 RFC was untimely under the Project Contract, the only contractual notice requirement relied upon by ST in its summary judgment motion was Section 10.01.A.3. CP 72-96. Sound Transit asserted that the June 2005 RFC was governed entirely by Section 10.01.A.3. CP 76, 91-95.<sup>2</sup> On this point, Sound Transit similarly relies upon Section 10.01.A.3 in its appeal brief. ST Br. at 22-23.

So now let's take Sound Transit's factual allegations and examine them specifically in the context of Section 10.01.A.3:

- When it agreed to issue Change Order 12, Sound Transit did not know then that the June 2005 RFC was untimely under Section 10.01.A.3.

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<sup>2</sup> In fact, Sections 4.01 and 4.02 of the Project Contract governing change order requests were nowhere cited in Sound Transit's motion (CP 72-96), nor were those contract provisions included in Sound Transit's supporting materials. CP 161-168. The likely reason Sound Transit avoided the Article 4 provisions: it knew, and the record makes clear, PCL/NWI complied with Sections 4.01 and 4.02 in submitting the June 2005 RFC.

- As far as Sound Transit knew, the June 2005 RFC complied with all contractual requirements under Section 10.01.A.3.

According to Sound Transit, under Section 10.01.A.3, the June 2005 RFC was based upon acts and omissions of Sound Transit, i.e. the defects in Drawing C3.04. Section 10.01.A.3 therefore required PCL/NWI to deliver the June 2005 RFC no later than ten days after discovery of the defects in Drawing C3.04.

It is implausible that Sound Transit actually viewed the June 2005 RFC as an Article 10 Claim, rather than the Request for Change under Article 4 that it truly was and actually understood to be. Otherwise, Sound Transit has yet again outwitted itself in treating the RFC as an Article 10 claim. *If Sound Transit really did process the June 2005 RFC under Section 10.01.A.3, then unfortunately its statement that “it did not know the original RFC was untimely” is utterly false. Sound Transit’s own records does it in.*

*Sound Transit’s Weekly Progress Meeting Minutes for its June 15, 2005 meeting confirms Sound Transit knew at least by that date NWI and PCL had discovered the Drawing C3.04 defects:*

NWI is reviewing the earthwork quantity. There may be a conflict in the plans (pg #20).<sup>3</sup> NWI is compiling information for possible additional costs.

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<sup>3</sup> Drawing C3.04 is found on Page 20 of the plan drawings. CP 476.

CP 493, 496. Based on Sound Transit's own records, PCL had ten days from June 15, 2005, i.e. until June 25, 2005, to submit a claim that complied with the ten day notice requirement of Section 10.01.A.3. Any notice received after that date would have been untimely under the express provisions of Article 10. Sound Transit did not receive the June 2005 RFC until June 28, 2005. CP 195. That receipt was three days late if the RFC was based on Section 10.01.A.3.<sup>4</sup> If Sound Transit truly believed Article 10 did apply to the June 2005 RFC, it too would have been dead on arrival and immediately denied by Sound Transit as untimely. Even if only three days late, PCL's or NWI's failure to comply with Sound Transit's ten day contract claim notice procedures would have resulted in the same consequence when missing a statute of limitations by only three days – the preclusion of the party's claim.

There can really be only two explanations why Sound Transit did not deny the June 2005 RFC upon receipt (or any time before issuing Change Order 12): (1) Sound Transit really did process the RFC as governed by Article 4 and not Article 10; or (2) Sound Transit waived any defense (even under Article 10) to the RFC for any untimely notice.

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<sup>4</sup> It wasn't; Article 4 applied.

**II. THE TRIAL COURT IMPROPERLY AWARDED ATTORNEYS' FEES TO SOUND TRANSIT AND DIRECTLY AGAINST NWI UNDER RCW 39.04.240; THE LEGAL AUTHORITY CITED BY SOUND TRANSIT AND PCL DOES NOT SUPPORT THE FEE AWARD**

A. **Division I's Ruling In *Frank Coluccio Construction Company, Inc. v. King County*, 136 Wn. App. 751, 150 P.3d 1147 (2007) Does Not Support The Fee Award Or Sound Transit's Interpretation Of RCW 39.04.240.**

Sound Transit asserts that its right to a direct award of attorneys' fees against NWI is premised upon RCW 4.84.270 (which is referenced within RCW 39.04.240). What Sound Transit ignores is that in order to properly read RCW 4.84.270, you must first refer to RCW 4.84.260 (also referenced in RCW 39.04.240), which states:

The plaintiff, or *party seeking relief*, shall be deemed the prevailing party within the meaning of RCW 4.84.250 when the recovery, exclusive of costs, is as much as or more than the amount offered in settlement by the plaintiff, or the party seeking relief, as set forth in RCW 4.84.280. (Emphasis added.)

RCW 4.84.260 plainly means this: a "party seeking relief" is a party making an affirmative claim against an opponent, i.e. a defendant or third party defendant with an affirmative counterclaim or cross-claim against an opponent. If you so qualify as a "party seeking relief," then there may be entitlement to attorneys' fees under RCW 4.84.250-280 if other statutory requirements are otherwise met. RCW 4.84.270 then says this:

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 in an action for damages where the amount pleaded, exclusive of costs, is equal to or less than the maximum amount allowed under RCW 4.84.250, 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. (Emphasis added.)

RCW 4.84.270 means only that if you are a party defending an affirmative claim, i.e. a complaint, cross-claim, counterclaim, or as here, a third-party complaint, you qualify as a “party resisting relief.”

Accordingly, if a party is successful in either defending or “resisting relief” against an affirmative claim, it may be deemed a prevailing party under RCW 4.84.250-.280.

These statutory rules do not change for an award of attorneys’ fees under RCW 39.04.240. NWI never asserted any claims against Sound Transit arising from the project, nor could NWI otherwise be deemed a “party seeking relief” against Sound Transit. As to any claims impacting Sound Transit arising out of a public works contract, i.e. the Federal Way Transit Center Project, the only party seeking relief against Sound Transit was PCL. As to its status as a “party resisting relief,” the only party against whom Sound Transit was resisting any relief was PCL.

Sound Transit argues that *Frank Coluccio Construction Co. v. King County*, 136 Wn. App. 751, 150 P.3d 1147 (2007) supports the

argument that strict privity rules do not constrain fee awards under RCW 39.04.240. Sound Transit misreads that case. The only parties in that action were plaintiff Frank Coluccio Construction Company (“FCCC”) and defendant King County. FCCC’s claims against King County included a subcontractor’s pass-through claim. As noted by the Court of Appeals, FCCC was awarded fees under RCW 39.04.240 because it was “...the only named plaintiff and was the prevailing party at trial.” FCCC had prosecuted the subcontractor’s pass-through claims under a separate contractual agreement. The Court found irrelevant that FCCC had itself not directly incurred all of the attorneys’ fees and costs ultimately awarded against King County:

Whether FCCC incurred expenses itself is irrelevant to our resolution of this issue, as evidenced by cases which recognize that attorneys’ fees may be awarded to a party who received the assistance of pro bono counsel. *Blair v. Washington State University*, 108 Wn.2d 558, 570-71, 740 P.2d 1379 (1987). Thus, the fact that FCCC litigated the instant action pursuant to contractual agreement with DBM did not compel the trial court to reach a different result. The work performed by the attorneys was performed in order to assist FCCC in prevailing at trial. The fact that, by contract, DBM was primarily responsible for the payment of some of the fees does not render the work performed non-compensable.

136 Wn. App. at 780. These factors are absent here.

**B. Cases Cited By Sound Transit Support NWI's Argument – Sound Transit And PCL Were Required To Provide Prior Written Notice That Attorneys' Fees Were Sought Under RCW 39.04.240 As A Condition Precedent To Recovery.**

Sound Transit asserts that there is no requirement imposed by RCW 39.04.240 that it provide prior written notice to either PCL or NWI that it intended to seek attorneys' fees pursuant to RCW 39.04.240. However, the primary cases cited by Sound Transit hold that prior notice is required: *Beckmann v. Spokane Transit Authority*, 107 Wn.2d 785, 733 P.2d 960 (1987) and *Lay v. Hass*, 112 Wn. App. 818, 51 P.3d 130 (2002). In *Beckmann*, the plaintiff made an offer of settlement in which it expressly stated was made pursuant to RCW 4.84.280. 107 Wn.2d at 787. The case only holds that notice does not require it be pled in an affirmative pleading. 107 Wn.2d at 788-789.

*Lay v. Hass* similarly fails to support Sound Transit's argument. There, plaintiff had filed a summary judgment motion that encompassed all of its claims against the defendant, including damages and attorneys' fees and costs. Before the trial court ruled on the summary judgment motion, plaintiff filed a second motion for additional damages and attorneys' fees, in which plaintiff specifically pleaded attorneys' fees under RCW 4.84.250. In support of that motion, the plaintiff's attorney also filed a declaration setting forth the specific dollar amount of

attorneys' fees and costs sought in recovery. 112 Wash. App. at 822. Approving the trial court's award of attorneys' fees, the *Lay* court affirmed the rule that prior written notice of a party's intent to seek attorneys' fees under RCW 4.84.250 is required, but does not need to be pled. 112 Wn. App. at 824.

Here, Sound Transit afforded no notice to PCL (or to NWI for that matter) of any intent to seek attorneys' fees under RCW 39.04.240, which requires compliance with the requirements applicable to fee awards under RCW 4.84.250-.280. Based on established precedent, the fee award was improper.

C. **Sound Transit Misinterprets *Absher Construction Co. v. Kent School District*.**

Sound Transit miscites *Absher Construction Co. v. Kent School District*, No. 415, 79 Wn. App. 841, 846, 917 P.2d 1086 (1995). ST Br. at 48-49. What the *Absher* court actually states is that RCW 4.84.250-.280 provides "little guidance" in terms of calculating how much to award in attorneys' fees once entitlement is established. 79 Wn. App. at 846. The *Absher* court goes on to hold that in calculating the amount of attorneys' fees to be awarded under RCW 39.04.240 once entitlement is established, the lodestar method is used under *Bowers v. Transamerica Title Ins.*, 100 Wn.2d 581, 675 P.2d 193 (1983). 79 Wn. App. at 846.

**III. THE TRIAL COURT IMPROPERLY DENIED NWI'S MOTION FOR RECONSIDERATION AND MOTION TO VACATE; THE RECORD ON *DE NOVO* REVIEW INCLUDES THE RECORD SUBMITTED ON THESE MOTIONS**

NWI stands by the arguments made at pages 50-54 of its Amended Opening Brief addressing the trial court's denial of its motion for reconsideration (CP 934-945; 946-995; 996-1027), and later motion to vacate (CP 2416-2539; 2376-2415). The trial court's rulings on these motions are effectively moot; the record on *de novo* review of the trial court's summary judgment ruling and denial of NWI's cross-motion includes the record on these motions.

**A. The Trial Court's Supplemental Orders Subject To RAP 9.12.**

**1. NWI's Motion For Reconsideration Following The Trial Court's May 20, 2010 Order On Partial Summary Judgment.**

The trial court entered its Order on Motions for Partial Summary Judgment on May 20, 2010. CP 928-933. On June 1, 2010, NWI filed a Motion for Specification and Clarification of Facts and Claims No Longer in Controversy Pursuant to CR 56(d) and Reconsideration Pursuant to CR 59. CP 934-945; 946-995; 996-1027. PCL and Sound Transit responded to the motion with briefing filed on June 7, 2010. CP 1028-1031 (Sound Transit); 1032-1034 (PCL). Following Respondent's submissions, the trial court issued an Order dated June 23, 2010, stating, "This matter came before the undersigned on NW Infrastructure's motion for reconsideration

of the Court's May 20, 2010 Order. The trial court has reviewed the motion submissions and is granting NWI's request for reconsideration." CP 3337-3338. The trial court set a briefing schedule, affording Sound Transit and PCL an opportunity to submit additional briefing, with NWI allowed opportunity to file a reply brief. *Id.*

By Order dated July 21, 2010, the trial court denied NWI's motion for reconsideration. CP 2060-2062. In its July 21, 2010 Order, the trial court identified the materials it had considered, including NWI's motion for reconsideration; the Declarations of Bryan P. Coluccio and Hal Johnson; and NWI's Reply. *Id.* In denying NWI's motion, the trial court made a finding that "NWI failed to meet its burden pursuant to CR 59(a)(4), (7), and (9)." *Id.* No finding or ruling was made concerning NWI's request for CR 56(d) relief. *Id.*

**2. NWI's Subsequent Motion To Vacate.**

On August 5, 2010, NWI filed a motion to vacate the trial court's Partial Summary Judgment Order Pursuant to Civil Rule 54(d). CP 2416-2539; 2376-2415. NWI's motion was based in part upon newly discovered evidence obtained following the Court's May 2010 Partial Summary Judgment Order, including (a) deposition testimony of PCL 30(b)(6) representative Garth Hornland deposed on July 13, 2010, and (b)

what was then a recently revealed release agreement between Sound Transit and PCL dated June 29, 2010. *Id.*

In response, both Sound Transit and PCL addressed the substantive merits of NWI's motion. CP 2569-2578 (Sound Transit); 2615-2628 (PCL). In its opposition, PCL also made part of the record new evidence in the form of (1) the five page Declaration of Garth Hornland, and also (2) the entire 113 page deposition transcript of Mr. Hornland. CP 2579-2614.

The trial court denied NWI's motion by order dated November 10, 2010. CP 2728-2730. That order identified the specific materials relied upon by the trial court in making its ruling, including NWI's motion, supporting declaration of Bryan P. Coluccio, and NWI's reply. *Id.* In the November 10, 2010 Order, the trial court not only denied NWI's motion to vacate, it also *amended* its earlier May 20, 2010 Partial Summary Judgment Order:

**THE COURT FURTHER FINDS AS FOLLOWS:**

- 1) The Court's May 20, 2010 Order (Dkt No. 110) dismissing the claims of NWI and PCL adjudicated all of the direct claims that NWI had against PCL except for contractual retainage *(consistent with Sound Transit's release agreement)*
- 2) The Court's May 20, 2010 Order dismissing the claims of PCL against Sound Transit adjudicated all of the claims that PCL had against Sound Transit.

CP 2729.

Of particular significance is the trial court's ruling that "(T)he Court's May 20, 2010 Order (Dkt No. 110) dismissing the claims of NWI and PCL adjudicated all of the direct claims that NWI had against PCL except for contractual retainage (*consistent with Sound Transit's release agreement*)." CP 2729. "Sound Transit's release agreement" refers to the June 29, 2010 agreement between Sound Transit and PCL, which was new evidence first made part of the record by NWI's motion to vacate. CP 2377, 2391-92, 2425.

**B. The Materials Included In The Two Later Motions Are Properly Part Of The Record On Review.**

Sound Transit's argument concerning the record on review is resigned to a single footnote in its brief. ST Br. at 18, n. 4. Contrary to Sound Transit's argument, RAP 9.12 does not preclude the Court's *de novo* consideration of the record on NWI's motions for reconsideration and to vacate. It is established precedent that the record subject to an appellate court's *de novo* review of a summary judgment ruling includes materials submitted in support of subsequent requests for reconsideration. Further, the orders on these later motions are "supplemental orders" under RAP 9.12.

As stated at pages 36-37 of NWI's opening brief, for purposes of the appellate court's *de novo* review, the record on appeal includes any

materials considered by the trial court on the initial summary judgment motion, and any additional materials considered in subsequent motions for reconsideration. *Tanner Electric Cooperative v. Puget Sound Power and Light Company*, 128 Wn.2d 656, 675, n. 6, 911 P.2d 1301 (1996); *Rodriguez v. City of Moses Lake*, 158 Wn. App. 724, 728, 243 P.3d 552 (2010); *Jacob's Meadow Owner's Association v. Plateau, 44 II, LLC*, 139 Wn. App. 743, 754-756, 162 P.3d 1153 (2007). Where a trial court grants summary judgment and then denies a motion for reconsideration, evidenced offered in support of the motion for reconsideration is properly part of the appellate court's *de novo* review. *Rodriguez*, 158 Wn. App. at 728 (citing *Tanner*, 128 Wn.2d at 675, n.6).

Instructive here is Division I's ruling in *Jacob's Meadow*. That case involved a general contractor's claims against a subcontractor for breach of contract and enforcement of contractual indemnity rights arising from construction defects in a condominium project. The trial court granted partial summary judgment in favor of the subcontractor on the general contractor's breach of contract claim. The general contractor filed two motions for reconsideration, both of which were denied. The reconsideration motions included submission of new expert witness declarations, along with additional exhibits. The general contractor, SSB, later appealed the summary judgment ruling.

On appeal, Division I recognized that before addressing the merits of the summary judgment ruling, it had to first determine the content of the record on review:

It is our task to renew a ruling on a motion for summary judgment based on the precise record considered by the trial court. *Wash. Fed'n of State Employees, Council 28 v. Office of Fin. Mgmt.*, 121 Wash.2d 152, 163, 849 P.2d 1201 (1993); *Green v. Normandy Park Riviera Sec. Cmty. Club*, 137 Wash. App. 665, 678, 151 P.3d 1038 (2007). ***That record includes those documents designated in an order granting summary judgment and any supplemental order of the trial court. RAP 9.12. Accordingly, if a supplemental order of the trial court indicates that it considered certain evidentiary submissions in reaching its determination, those items designated in the trial court's order are part of the record upon which we base our review. See Noble Manor Co. v. Pierce County***, 133 Wash.2d 269, 284 n.9, 943 P.2d 1378 (1997); *Tanner Elec. Coop. v. Puget Sound Power & Lights*, 128 Wash. 2d 656, 675 n. 6, 911 P.2d 1301 (1996). In ruling on SSB's second motion for reconsideration, the trial court specifically noted that it had considered the evidence proffered by SSB in conjunction with its first motion for reconsideration. Accordingly, those evidentiary submissions constitute a part of the record upon which we now base our review. RAP 9.12; *Tanner Elec. Coop.*, 128 Wash. 2d at 675 n.6. (Emphasis added.)

139 Wn. App. at 754-755.

As explained by the *Jacob's Meadow* court, orders denying reconsideration motions that identify materials considered by the trial court are "supplemental orders" defined by RAP 9.12:

***...Documents or other evidence called to the attention of the trial court but not designated in the (initial summary***

*judgment) order shall be made a part of the record by supplemental order of the trial court....* (Emphasis added.)

RAP 9.12.

Here, the two supplemental orders at issue are the trial court's order denying NWI's motion for reconsideration, and the later order denying NWI's motion to vacate (which order also amended the earlier May 20, 2010 partial summary judgment order). CP 2060-62; 2728-30. ***Both supplemental orders delineate and make clear that the trial court did in fact consider the materials submitted by NWI, Sound Transit, and PCL on the motions. Id.*** The trial court's consideration of the record on both motions is further affirmed by the fact that the November 10, 2010 Order contains a handwritten interlineation by the trial court specifically referring to the "Sound Transit release agreement," new evidence that had only been made part of the trial court record by way of NWI's motion to vacate. CP 2377, 2391-92, 2425.

RESPECTFULLY SUBMITTED on October 11<sup>th</sup>, 2011.

CABLE LANGENBACH KINERK & BAUER, LLP

By



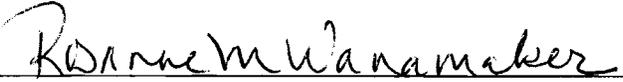
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Bryan P. Coluccio, WSBA 12609  
*Attorneys for Plaintiff/Appellant Northwest  
Infrastructure, Inc.*

**CERTIFICATE OF SERVICE**

I hereby certify that on October 11, 2011, I caused the foregoing document to be served on the following counsel of record, via U.S. mail:

Stanton Beck, Esq.  
Andrew J. Gabel, Esq.  
Ryan McBride, Esq.  
Lane Powell, PC  
1420 Fifth Avenue, Suite 4100  
Seattle, WA 98101-2338

David Groff, Esq.  
Shelley Tolman, Esq.  
Groff Murphy PLLC  
300 East Pine Street  
Seattle, WA 98122

  
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Rosanne M. Wanamaker, Legal Secretary

## APPENDIX 1

### **Rule of Appellate Procedure 9.12 Special Rule for Order on Summary Judgment**

On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court. The order granting or denying the motion for summary judgment shall designate the documents and other evidence called to the attention of the trial court before the order on summary judgment was entered. Documents or other evidence called to the attention of the trial court but not designated in the order shall be made a part of the record by supplemental order of the trial court or by stipulation of counsel.

### **RCW 39.04.240 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, except that: (a) The maximum dollar limitation in RCW 4.84.250 shall not apply; and (b) in applying RCW 4.84.280, the time period for serving offers of settlement on the adverse party shall be the period not less than thirty days and not more than one hundred twenty days after completion of the service and filing of the summons and complaint.

(2) The rights provided for under this section may not be waived by the parties to a public works contract that is entered into on or after June 11, 1992, and a provision in such a contract that provides for waiver of these rights is void as against public policy. However, this subsection shall not be construed as prohibiting the parties from mutually agreeing to a clause in a public works contract that requires submission of a dispute arising under the contract to arbitration.

### **RCW 4.84.250 Attorneys' fees as costs in damage actions of ten thousand dollars or less — Allowed to prevailing party.**

Notwithstanding any other provisions of chapter 4.84 RCW and RCW 12.20.060, in any action for damages where the amount pleaded by the

prevailing party as hereinafter defined, exclusive of costs, is seven thousand five hundred dollars or less, 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. After July 1, 1985, the maximum amount of the pleading under this section shall be ten thousand dollars.

**RCW 4.84.260**

**Attorneys' fees as costs in damage actions of ten thousand dollars or less — When plaintiff deemed prevailing party.**

The plaintiff, or party seeking relief, shall be deemed the prevailing party within the meaning of RCW 4.84.250 when the recovery, exclusive of costs, is as much as or more than the amount offered in settlement by the plaintiff, or party seeking relief, as set forth in RCW 4.84.280.

**RCW 4.84.270**

**Attorneys' fees as costs in damage actions of ten thousand dollars or less — When defendant deemed prevailing party.**

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 in an action for damages where the amount pleaded, exclusive of costs, is equal to or less than the maximum allowed under RCW 4.84.250, 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.

**RCW 4.84.280**

**Attorneys' fees as costs in damage actions of ten thousand dollars or less — Offers of settlement in determining.**

Offers of settlement shall be served on the adverse party in the manner prescribed by applicable court rules at least ten days prior to trial. Offers of settlement shall not be served until thirty days after the completion of the service and filing of the summons and complaint. Offers of settlement shall not be filed or communicated to the trier of the fact until after judgment, at which time a copy of said offer of settlement shall be filed for the purposes of determining attorneys' fees as set forth in RCW 4.84.250.