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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

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

BRIEF OF APPELLANT SOUND TRANSIT

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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. ASSIGNMENT OF ERROR AND STATEMENT OF ISSUES	2
III. STATEMENT OF THE CASE	3
A. Statement Of The Facts	3
B. Proceedings Below	9
IV. ARGUMENT	12
A. Genuine Issues Of Material Fact Exist To Support Sound Transit’s Fraud Claim Against NWI.....	12
1. Elements (1) Through (4): NWI Knowingly Made False And Material Representations Of Existing Fact	13
2. Elements (5) Through (9): Sound Transit Relied On NWI’s Misrepresentations To Its Detriment	16
B. Genuine Issues of Material Fact Exist To Support Sound Transit’s CPA Claim Against NWI.....	18
C. Sound Transit’s Fraud Claim Against NWI Is Not Barred By The Statute Of Limitations.....	21
VI. CONCLUSION	24

TABLE OF AUTHORITIES

CASES

PAGE

<i>Bennett v. Dalton</i> , 120 Wn. App. 74, 84 P.3d 265 (2004).....	23
<i>Blake v. Federal Way Cycle Ctr.</i> , 40 Wn. App. 302, 698 P.2d 578 (1985).....	19
<i>Central Puget Sound Reg. Tran. Auth. v. Miller</i> , 156 Wn.2d 403, 128 P.3d 588 (2006).....	20
<i>Eastlake Constr. Co., Inc. v. Hess</i> , 102 Wn.2d 30, 686 P.2d 465 (1984).....	19
<i>Equitable Shipyards, Inc. v. Dep't of Transp.</i> , 93 Wn.2d 465, 611 P.2d 396 (1980).....	19
<i>Hearst Commc'ns, Inc. v. Seattle Times Co.</i> , 154 Wn.2d 493, 115 P.3d 262 (2005).....	1
<i>Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.</i> , 105 Wn.2d 778, 719 P.2d 531 (1986).....	18, 20, 21
<i>Holiday Resort Cmty. Ass'n v. Echo Lake Assoc., LLC</i> , 134 Wn. App. 210, 135 P.3d 499 (2006).....	20
<i>In re C.B.</i> , 61 Wn. App. 280, 810 P.2d 518 (1991).....	13
<i>Seattle First Nat'l Bank v. Siebol</i> , 64 Wn. App. 401, 824 P.2d 1252 (1992).....	23
<i>J. R. Simplot Co. v. Vogt</i> , 93 Wn.2d 122, 605 P.2d 1267 (1980).....	22, 24
<i>State v. Armstrong</i> , 109 Wn. App. 458, 35 P.3d 397 (2001).....	23

CASES – CONTINUED

	<u>PAGE</u>
<i>Stiley v. Block</i> , 130 Wn.2d 486, 925 P.2d 194 (1996).....	13
<i>Tallman v. Durussel</i> , 44 Wn. App. 181, 721 P.2d 985 (1986).....	22
<i>Turner v. Enders</i> , 15 Wn. App. 875, 552 P.2d 694 (1976).....	17
<i>Wilson v. Steinbach</i> , 98 Wn.2d 434, 656 P.2d 1030 (1982).....	12

STATUTES, REGULATIONS AND COURT RULES

RCW 4.16.080(4)	21
RCW 19.86.093(3)(a).....	21
RCW 81.112, <i>et. seq.</i>	20
CR 13(h)	23
CR 19(a)	23
CR 56(c)	12

I. INTRODUCTION

Appellant Central Puget Sound Regional Transit Authority (“Sound Transit”) awarded a public works contract to PCL Construction Services, Inc. (“PCL”) who, in turn, awarded a subcontract to Respondent Northwest Infrastructure, Inc. (“NWI”) to do earthwork on the project. During the course of the project, NWI complained that it was being asked to excavate more soil than what was listed in a published project drawing. NWI repeatedly represented that it had relied on this purported error in the drawing when preparing its subcontract bid. PCL passed NWI’s request for a change order on to Sound Transit. Sound Transit, on the good faith belief that NWI had been misled by the drawing, agreed to pay NWI more than \$500,000 in additional compensation.

It turns out that it was Sound Transit who had been misled. When NWI demanded even more money, Sound Transit requested information from NWI, including its original subcontract bid documents. To Sound Transit’s surprise, those documents showed that NWI had not exclusively relied on the quantity of soil listed in the project drawing. In fact, and contrary to its later representations to Sound Transit, NWI had internally estimated that it would have to excavate double the amount shown on the drawing. Sound Transit refused to pay NWI any more money and, after NWI filed suit, Sound Transit filed cross-claims against NWI for fraud

and violation of the CPA to get its money back. The trial court, however, dismissed Sound Transit's claims on summary judgment.

That ruling was wrong. Sound Transit presented sufficient evidence to support each element of fraud, including the falsity of NWI's representations. That evidence, including both lay and expert testimony, shows that NWI's stated reliance on the quantities listed in the project drawing cannot be reconciled with its own internal bid documents. That same evidence equally supports Sound Transit's CPA claim. A reasonable jury could find that NWI's fraud on a government agency in a public works contract, which cost the taxpayers a half a million dollars, was an unfair and deceptive act that substantially impacted the public interest. For these and the other reasons set forth below, the trial court's order must be reversed, and Sound Transit's fraud and CPA claims remanded for trial.

II. ASSIGNMENT OF ERROR AND STATEMENT OF ISSUES

The trial court erred when it granted NWI's motion for summary judgment, dismissing Sound Transit's cross-claims against NWI for fraud and violation of the CPA. CP 1801-1802; CP 1815-1822. The issues relating to this assignment of error are as follows:

1. Was it error for the trial court to enter summary judgment against Sound Transit on its fraud claim when there were genuine issues of material fact on every element of fraud, including facts showing that (a)

NWI knowingly represented that it relied on a purportedly erroneous project drawing in its bid for an earthwork excavation subcontract when, in fact, it did not, and (b) Sound Transit relied on that false representation when it agreed to pay NWI for the allegedly additional earthwork? Yes.

2. Was it error for the trial court to enter summary judgment against Sound Transit on its CPA claim when there were genuine issues of material fact on every element of a CPA violation, including facts showing that NWI committed an unfair and deceptive act in connection with a public works contract that adversely affected the public interest? Yes.

3. Was the statute of limitations on Sound Transit's fraud claim tolled when (a) NWI's complaint and PCL's third-party complaint were both filed within the three-year limitations period, and (b) Sound Transit's fraud claim relates to and arises from NWI's and PCL's claims and, thus, was a compulsory counterclaim, cross-claim and affirmative defense to those underlying and timely claims? Yes.

III. STATEMENT OF THE CASE

A. Statement of the Facts.

PCL Subcontracts with NWI for Earthwork on the Project. This lawsuit involves the construction of the Sound Transit Federal Way Transit Center (the "Project"). The Project consists of a parking garage, storm water detention vault, bus platform and pedestrian walkway

connecting the garage to the platform. CP 1464 (Dahl Decl., ¶ 2). Sound Transit put the Project out for bid, and bidding opened on May 13, 2004. *Id.* (¶ 4). Specifications and drawings were made available to all bidders, including a page numbered FW-C3.04 (“Drawing C3.04”). *Id.* (¶ 5); CP 1472. Drawing C3.04 includes a note in the margin for “Site Earthwork Quantities” that identifies two estimated quantities in cubic yards (“CY”): “Cut = 24,000 CY” and “Fill = 16,000 CY.” CP 1472.

PCL was the lowest bidder for the Project. Sound Transit awarded the prime contract for the Project’s construction to PCL on July 7, 2004, and issued a Notice to Proceed on July 12, 2004. *Id.* (Dahl Decl., ¶ 4); CP 1470 & CP 1101-22 (excerpts of prime contract). PCL, in turn, entered into a subcontract with NWI for the earthwork component of the Project. NWI submitted a \$1,213,000.00 bid to PCL on May 13, 2004. CP 1400-1401 (Johnson Dep. at 29:7-30:14); CP 1411-1412. PCL ultimately entered into a subcontract with NWI on June 24, 2004 for \$1,093,332.00. CP 1407 (Johnson Dep. at 129:8-20); CP 355-377 (subcontract). NWI began excavating shortly after Sound Transit issued the Notice to Proceed

NWI’s Additional Earthwork Claim. During a weekly onsite meeting, NWI’s president and owner, Hal Johnson, stated that NWI intended to make a claim for additional compensation based upon a purported error on Drawing C3.04. CP 1464-1465 (Dahl Decl., ¶ 6).

Johnson pointed to the “Site Earthwork Quantities” listed on the drawing and stated that NWI had relied solely on those quantities when it bid on the total amount of earthwork required by the Project. *Id.* Johnson stated that, based on those quantities, NWI had anticipated exporting only 8,000 CY of soil; *i.e.*, the difference between the 24,000 CY of cut and 16,000 CY of fill identified on Drawing C3.04. CP 1465 (¶ 7); CP 1477 (meeting minutes: “NWI is reviewing the earthwork quantity. There may be a conflict in the plans (pg 20). NWI is compiling information for possible additional costs.”).

On June 28, 2005, NWI submitted a request to Sound Transit (through PCL) for a change order in the amount of \$821,101.00. The request specifically demanded compensation for all quantities cut, filled and exported above the 24K/16K/8K quantities identified in Drawing C3.04. CP 1479-1490. Based on NWI’s representations that it had relied on the quantities identified in Drawing C3.04 when making its original bid to PCL, in a letter dated August 24, 2005, Sound Transit agreed that NWI may be entitled to compensation for earthwork above the quantities identified in Drawing C3.04. CP 1465 (Dahl Decl., ¶ 9); CP 1492-1504.

NWI responded by letter (from PCL) dated October 19, 2005. This time, NWI requested \$1,190,218 for the purportedly additional

earthwork. CP 1506-1534. In the letter, NWI continued to represent that it had relied solely on the quantities listed in Drawing C3.04:

The earthwork quantities were specified on the published bid plans. The competitive nature of the proposal dictated that NWI use those numbers. Had quantities not been included as part of the grading document, NWI would have, as normal practice, digitized the grading plans and used the resulting quantities for their proposals. ***Not knowing the correct earthwork quantities, NWI initially only exported what the plans specified 8,000 cy, leaving an excessive amount of export material throughout the project site.*** ... The impact of the faulty quantities affected the entire construction process.

CP 1509 (emphasis added). In a letter dated December 16, 2005, Sound Transit questioned whether NWI had a “right to rely” on the quantities listed in Drawing C3.04, but—based on NWI’s representation that it had relied on the drawing—Sound Transit agreed to provide additional compensation to NWI. CP 1536-1543. An internal Sound Transit memo dated December 5, 2005 confirmed that Sound Transit agreed to pay NWI because of NWI’s representation that it was “misled” in its original bid by the quantities listed in Drawing C3.04. CP 1545-1547.

Sound Transit Discovers NWI’s Subcontract Bid. NWI did not agree to the compensation Sound Transit proposed and, ultimately, Sound Transit issued a unilateral Modification of Contract No. 12 (“Change

Order 12”) in the amount of \$534,602.75. CP 1466 (Dahl Decl., ¶ 12).¹ PCL substantially completed the Project on February 9, 2006. Shortly thereafter, in March 2006, NWI (through PCL) submitted a claim for even more compensation in the amount of \$2,703,723. *Id.* (¶ 13); CP 420-724. As part of that claim, Sound Transit requested an audit of NWI’s project documents, including its subcontract bid. *Id.* (¶ 14). NWI provided its bid documents to Sound Transit on or around June 21, 2006. *Id.*; CP 1159.

Those bid documents contradicted NWI’s representations that it relied solely on the quantities listed in Drawing C3.04. CP 1466 (Dahl Decl., ¶ 14); CP 1360 (Kippen Decl., ¶ 3). The documents showed that, rather than relying on Drawing C3.04 to anticipate exporting 8,000 CY of soil, NWI actually anticipated exporting nearly double that: 15,386 CY. NWI’s bid also contained a separate line item for excavation related to the storm water detention vault, reflecting NWI’s understanding that the quantities listed in Drawing C3.04 did not include all the excavation work necessary to compete the Project:

Grading	Clear & Grub	1	ls
	Excavation	24,000	cy
	Embankment	16,000	cy
	Export	15,386	cy
	Excavate & Fill Detention Vault	1	ls
	Fine Grade	292,288	sf

¹ Sound Transit issued Change Order 12 to PCL in the amount of \$534,602.75; PCL passed on \$509,145.48 of that amount to NWI. CP 426.

CP 1411 (ls = lump sum). Additional internal NWI bid documents likewise reflected that NWI had estimated excavation in quantities that exceeded those listed in Drawing C3.04. CP 1597-1598 (Congleton Decl., ¶¶ 5-9); CP 1609-1612. In short, NWI knew from the beginning that it would be required to export far more than 8,000 CY of soil.

NWI's bid documents were entirely consistent with Drawing C3.04, which was not intended to quantify all the soil that would have to be excavated on the Project. Sound Transit's civil engineer, who prepared Drawing C3.04, testified that the quantities listed on Drawing C3.04 were rough estimates of the difference between the existing grade and finished grade, or "mass grading." Mass grading does not include fine grading or structural earthwork excavation for foundations, utility trenches and vaults, and the quantities for that earthwork excavation were not included on Drawing C3.04. CP 1590-1591 (Mathews Decl., ¶¶ 4-7). NWI's bid documents—particularly the separate line item for "Excavate & Fill Detention Vault"—show that NWI understood that distinction when it originally bid on the earthwork subcontract for the Project.

Sound Transit would not have issued Change Order 12 had Sound Transit known that NWI did not, in fact, rely solely on the quantities listed in Drawing C3.04. CP 1466-1467 (Dahl Decl., ¶ 14). Not surprisingly given the revelation in NWI's bid documentation, Sound Transit denied

NWI's request for even more compensation. *Id.* In its denial letter dated December 7, 2007, Sound Transit's attorneys wrote:

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. ... NWI contends that actual earthwork exceeded these quantities, causing delay and increased cost to NWI. ...

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

CP 1549-1554 (emphasis added). As a result, Sound Transit denied NWI's claim for additional compensation and demanded partial repayment of Change Order 12 from NWI. *Id.* NWI refused.

B. Proceedings Below.

On March 18, 2009, NWI sued PCL for, among other things, allegedly failing to pursue NWI's "pass-through" claims against Sound Transit for additional earthwork compensation. CP 1-13. On April 30, 2009, PCL answered and asserted a third-party complaint against Sound Transit. CP 15-22. In the third-party complaint, PCL disputed NWI's claim for additional compensation, but alleged that "[t]o the extent that NWI is able to prove its claim for additional costs and obtains a judgment

against PCL, Sound Transit is liable to PCL for the payment of NWI's proven costs and judgment amount." CP 20.

On August 6, 2009, Sound Transit answered PCL's third-party complaint and asserted counterclaims against PCL and cross-claims against NWI. CP 23-34. Sound Transit alleged that it issued Change Order 12 in reliance on NWI's false representation that it had solely relied on the quantity amounts listed in Drawing C3.04 when preparing its earthwork bid. *Id.*² Sound Transit prayed for rescission of Change Order 12 and/or damages. *Id.* Sound Transit also alleged that NWI's unfair and deceptive conduct in the course of a public works contract violated the CPA. *Id.* Based on Sound Transit's allegations, PCL asserted identical claims against NWI for rescission and/or damages. CP 48-53.

NWI answered Sound Transit's cross-claims. CP 35-47. The trial court subsequently granted NWI leave to amend its answer to include a statute of limitations defense. CP 232-245. Thereafter, NWI moved for summary judgment on the grounds that there were no genuine issues of material fact to support either the fraud or CPA claim and, additionally, that Sound Transit's fraud claim was barred by the statute of limitations. CP 1257-1282. Sound Transit opposed NWI's motion and filed six

² Sound Transit, NWI and PCL asserted various other direct and derivative and cross-claims and counterclaims against each other that were not resolved on summary judgment, and are not relevant to this appeal.

declarations. CP 1555-1580 (opposition); CP 1361-1386 (Kippen); CP 1387-1462 (Gabel); CP 1463-1554 (Dahl); CP 1581-1588 (Williams); CP 1589-1592 (Mathews); CP 1596-1614 (Congleton).³ PCL also filed a response and declaration to clarify factual inaccuracies contained in NWI's motion. CP 1350-1358 (response); CP 1355-1358 (Loubser).

The trial court heard argument on August 12, 2010. On November 10, 2010, the court granted NWI's motion for summary judgment. CP 1801-1802. The trial court entered a formal order on March 1, 2011. CP 1815-1822. The order did not specify the basis of the court's decision. *Id.* Thereafter, the parties stipulated to entry of the summary judgment order as a final partial judgment pursuant to CR 54(b), and to stay further proceedings. CP 1803-1814. The trial court entered a CR 54(b) judgment on the summary judgment order, with requisite findings. CP 1823-1831.⁴ Sound Transit timely appealed. CP 1832-1851.

³ Sound Transit moved to strike portions of declarations and exhibits submitted by NWI in connection with its. CP 1283-1349. The trial court did not rule on Sound Transit's motion, but indicated that it was "keeping all evidence that's challenged in context and ... under advisement." RP (8/12/2010) at 11. On the day before the hearing, NWI also filed untimely motions to strike two of Sound Transit's declarations. The trial court expressly denied both motions. CP 1797-1800.

⁴ The trial court entered partial final judgment on several interlocutory orders, including its May 21, 2010 order granting Sound Transit summary judgment on NWI's claim for additional earthwork compensation. CP 1830. That ruling is subject to NWI's separate (but linked) appeal in Case No. 66777-7-I.

IV. ARGUMENT

This Court reviews a summary judgment *de novo*, engaging in the same inquiry as the trial court and viewing all facts and reasonable inferences in the light most favorable to the nonmoving party. *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 501, 115 P.3d 262 (2005). Summary judgment is proper only if the pleadings, depositions, answers to interrogatories, admissions, and affidavits show there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Id.*; CR 56(c). A genuine issue exists where reasonable minds could differ regarding facts that control the outcome of the litigation. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). For the reasons that follow, this Court must reverse the judgment below and remand Sound Transit's fraud and CPA claims for trial.

A. Genuine Issues Of Material Fact Exist To Support Sound Transit's Fraud Claim Against NWI.

Sound Transit's fraud claim is straightforward: when NWI requested payment for additional earthwork excavation, NWI represented that it had exclusively relied on the soil quantities listed in Drawing C3.04; unbeknownst to Sound Transit, NWI's representations were false; NWI had estimated doing far more earthwork than what was listed in Drawing C3.04; without knowledge of the truth, Sound Transit reasonably relied on NWI's misrepresentations when it agreed to pay NWI an

additional \$534,602—to which NWI was not otherwise entitled; had NWI told Sound Transit the truth, Sound Transit would not have paid NWI.

The elements of fraud are: (1) a representation of existing fact; (2) materiality; (3) falsity; (4) the speaker’s knowledge of its falsity; (5) intent of the speaker that it should be acted on by the plaintiff; (6) plaintiff’s ignorance of its falsity; (7) plaintiff’s reliance on the truth of the representation; (8) plaintiff’s right to rely on it; and (9) damages. *Stiley v. Block*, 130 Wn.2d 486, 505, 925 P.2d 194 (1996). Summary judgment is improper if a rational trier of fact—viewing the evidence in the light most favorable to Sound Transit—could find clear, cogent, and convincing evidence on each element. *In re C.B.*, 61 Wn. App. 280, 285, 810 P.2d 518 (1991). Sound Transit’s evidence easily meets that burden here.

1. Elements (1) Through (4): NWI Knowingly Made False And Material Representations Of Existing Fact.

Sound Transit presented evidence that NWI repeatedly represented to Sound Transit that it had solely relied on the quantities listed in Drawing C3.04 as the total amount of soil requiring excavation when bidding on its subcontract for the Project:

- Sound Transit’s project manager testified that NWI’s president, Hal Johnson, made such a representation at an on-site construction meeting in June 2005, CP 1464-1465 (Dahl Decl., ¶¶ 6, 7), which is reflected by the minutes of the meeting. CP 1477.
- Just weeks later, PCL passed on NWI’s request for a change order which likewise requested payment for “earthwork above and

beyond the quantities shown on drawing C3.04.” CP 1479. In support of the claim, NWI submitted a chart that purported to show the quantities NWI relied upon (which tracked those listed in Drawing C3.04) and the quantities it claimed to have actually excavated. CP 1481.

- In October 2005, PCL once again passed on NWI’s request for additional compensation to Sound Transit, including a letter from NWI’s civil engineer which 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.

In a declaration filed in *support* of NWI’s motion for summary judgment, Hal Johnson confirmed that, “in preparing the “Grading” portion of NWI’s bid, I relied specifically upon the Site Earthwork Volumes specified in Drawing C3.04.” CP 1168 (Johnson Decl., ¶ 4).⁵

Sound Transit presented significant evidence to show that those representations were material and knowingly false. They certainly were material. NWI was not entitled to additional compensation unless there was a change in the scope of the Project; it was not entitled to a change order for additional costs caused by its own “error in judgment or mistake in designing, estimating, contracting, constructing or otherwise performing the Work.” CP 1102-1103 (Article 4.01). It was therefore critical and

⁵ In a supplemental declaration, filed with NWI’s reply brief, Hal Johnson retreated from this earlier, unequivocal, statement, claiming instead that, “[a]t no time did we ever represent that NWI relied solely on Drawing C3.04 for all of the earthwork covered by our subcontract with PCL. CP 1738 (Johnson Decl., ¶ 8). Of course, Johnson’s own shifting explanation only highlights the need for resolution by a trier of fact.

necessary for NWI to attribute the additional earthwork to alleged errors in Sound Transit's plans—not a faulty bid, poor planning or inefficient work. That is what NWI did, and based on NWI's representations, which Sound Transit accepted in good faith, Sound Transit paid \$534,602 that it was not required to pay otherwise. CP 1465 (Dahl Decl., ¶¶ 9-11).

NWI knew its representations regarding purported reliance on the quantities listed in Drawing C3.04 were false. Sound Transit submitted first-person and expert testimony showing that NWI's bid documents, which were not available to Sound Transit when it issued Change Order 12, contradicted NWI's representations. CP 1360 (Kippen Decl., ¶ 3) & CP 1366-1368; CP 1466 (Dahl Decl., ¶ 14); CP 1597-1598 (Congleton Decl., ¶¶ 5-9). On their face, NWI's bid documents show that NWI did not, in fact, rely on the 8000 CY export quantity listed in Drawing C3.04; its own bid estimated nearly 16,000 CY and separately itemized excavation for the detention vault without listing any particular quantity. CP 1411; CP 1609-1612. Given the high stakes, and the fact that Hal Johnson was responsible for NWI's bid and its request for a change order, a jury could reasonably infer that NWI knowingly misrepresented the facts when it demanded additional compensation from Sound Transit.

2. Elements (5) Through (9): Sound Transit Relied On NWI's Misrepresentations To Its Detriment.

There is no real dispute regarding the detrimental reliance aspects of Sound Transit's fraud claim. NWI made its false representations in the course of requesting a change order, and intended Sound Transit to rely on those representations because, as explained above, NWI would not be entitled to additional compensation otherwise. It worked. When it agreed to Change Order 12, Sound Transit did not have NWI's bid documents, and did not know that NWI's representations were false. CP 1465-1466 (Dahl Decl., ¶¶ 9-12); CP 1492-1505 (Aug. 24, 2005 letter); CP 1536-1543 (Dec. 16, 2005 letter).⁶ It wasn't until June 2006, after NWI gave Sound Transit its bid documents, that Sound Transit first learned that NWI had not, in fact, relied on the quantities listed in Drawing C3.04 when estimating the total excavation on the Project. CP 1466 (Dahl Decl., ¶ 14).

Nor is there any dispute that, without knowledge of the truth revealed in those bid documents, Sound Transit relied on NWI's false representations when it issued Change Order 12. In its December 16, 2005 letter to PCL regarding NWI's request, Sound Transit wrote:

⁶ Nor did Sound Transit know that NWI's request for a change order was also improper because it failed to comply with certain notice and claim requirements set forth in the parties' contracts. The trial court dismissed NWI's claim for additional compensation (above and beyond the \$534,602 actually paid) on this basis. As noted, NWI has separately appealed that ruling in Case No. 66777-7-I.

[NWI] has requested compensation “for additional earthwork above and beyond the quantities shown on drawing C3.04.” Drawing C3.04 (Sheet 20) of the contract plans lists “Site Earthwork Volumes” as Cut = 24,000 CY” and “Fill = 16,000 CY”. We question [NWI’s] right to rely upon this note. Nonetheless, Sound Transit is willing to pay the difference between the C3.04 earthwork quantities and a reasonable theoretical earthwork quantity (TEQ), based on the project documents at the time of the bid.

CP 1536. An internal Sound Transit memo from December 2005 likewise summarized NWI’s request for a change order: “the note on the drawing misled the bidders into assuming that the indicated quantities were the actual earthwork amounts.” CP 1546. It was only after Sound Transit learned the truth that it could, and did, dispute NWI’s purported reliance on the quantities listed in Drawing C3.04. CP 1549-1554.

That Sound Transit suffered damages as a result of its reliance on NWI’s misrepresentations is equally beyond dispute. By the time Sound Transit obtained NWI’s bid documents, Sound Transit had already issued unilateral Change Order 12 for \$534,602.75. Had it known the truth, it would not have done so. CP 1466 (Dahl Decl., ¶ 14). If the jury agrees, Sound Transit will be entitled to rescission of Change Order 12 and/or damages in that amount. *Turner v. Enders*, 15 Wn. App. 875, 880, 552 P.2d 694 (1976) (measure of damages for fraud is all losses proximately caused by the misrepresentation). For this and all the reasons set forth above, Sound Transit presented more than sufficient evidence upon which

a reasonable jury could find in its favor. The trial court's summary judgment dismissal of Sound Transit's fraud claim must be reversed.

B. Genuine Issues Of Material Fact Exist To Support Sound Transit's CPA Claim Against NWI.

The same is true with respect to Sound Transit's CPA claim. NWI devoted a sum total of three sentences in its motion for summary judgment to the issue, and none in its reply brief.⁷ The CPA claim was likewise ignored at the summary judgment hearing, and disparaged by NWI's counsel as not "worth the Court's time at all." RP (8/12/2010) at 34. The court apparently agreed and, despite Sound Transit's significant briefing, it summarily dismissed the CPA claim. CP 1801-1802; CP 1819. But like its fraud claim, Sound Transit presented more than sufficient evidence of a CPA violation upon which a reasonable jury could find in its favor.

The elements of a CPA claim are: (1) an unfair or deceptive act; (2) in trade or commerce; (3) that affected the public interest; (4) an injury to Sound Transit in its business; and (5) a causal link between the unfair or deceptive act and the injury. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 719 P.2d 531 (1986). For the

⁷ After reciting the *Hangman Ridge* elements, the entirety of NWI's argument was: "Sound Transit is unable to present admissible evidence demonstrating an issue of material fact on all five elements required to establish a CPA claim. Sound Transit has no proof of a CPA violation whatsoever. NWI is entitled to summary judgment dismissing Sound Transit's second cross-claim." CP 1281.

reasons discussed above, elements (4) and (5) are satisfied; Sound Transit relied on NWI's representations and suffered injury to its business as a result. Nor can there be any dispute regarding element (3)'s "trade and commerce" criteria. *Eastlake Constr. Co., Inc. v. Hess*, 102 Wn.2d 30, 50, 686 P.2d 465 (1984) (construction projects occur in trade and commerce). The only issue, therefore, is whether NWI's representations constituted "unfair or deceptive acts" that "affected the public interest." They did.

To be sure, NWI's conduct was "unfair." The CPA does not define "unfair," but courts find unfairness where conduct "offends public policy," is "immoral, unethical, oppressive, or unscrupulous," or "causes substantial injury to consumers." *Blake v. Federal Way Cycle Ctr.*, 40 Wn. App. 302, 310, 698 P.2d 578 (1985). NWI's conduct offended public policy and caused substantial injury to consumers. "The primary purpose of public bidding is to benefit the taxpayers by procuring the best work or material at the lowest price practicable." *Equitable Shipyards, Inc. v. Dep't of Transp.*, 93 Wn.2d 465, 473, 611 P.2d 396 (1980). That policy was frustrated, and the public injured, when NWI submitted a false request for a change order that caused Sound Transit to pay more than \$500,000 of taxpayer money than originally agreed upon. A reasonable jury could easily find NWI's conduct to be "unfair" within the meaning of the CPA.

NWI's conduct was also "deceptive." A plaintiff need not show intent to deceive, only the "capacity to deceive a substantial portion of the public." *Hangman Ridge*, 105 Wn.2d at 785. "Implicit in the definition of 'deceptive' under the CPA is the understanding that the practice misleads or misrepresents something of material importance." *Holiday Resort Cmty. Ass'n v. Echo Lake Assoc., LLC*, 134 Wn. App. 210, 226, 135 P.3d 499 (2006). Given what NWI knew when it bid the Project but failed to disclose, NWI was never entitled to a change order, and Sound Transit would not have issued Change Order 12 but for NWI's fraud. NWI fraud therefore cost Sound Transit more than \$500,000, and resulted in NWI receiving 50% more than it was originally awarded on the subcontract. NWI's misrepresentations were plainly "of material importance."

Further, when NWI deceived Sound Transit, it effectively deceived a substantial portion of the public. Sound Transit is a public agency created by approval of the voters in the Puget Sound area. *Central Puget Sound Reg. Tran. Auth. v. Miller*, 156 Wn.2d 403, 128 P.3d 588 (2006); RCW 81.112 *et seq.* One of its primary functions is to plan and build mass transportation projects for the benefit of the public with taxpayer dollars. *Id.* Unlike a private party, it was the public at large that stood to benefit from NWI's work on the Project, whose taxpayer dollars paid for

it, and who ultimately were injured when NWI's fraud caused Sound Transit to pay more than what was bid or owing under the contract.

For the same reasons, NWI's acts "affected the public interest." "[W]hether the public has an interest ... is to be determined by the trier of fact from several factors, depending upon the context in which the alleged acts were committed." *Hangman Ridge*, 105 Wn.2d at 789. The public interest element is automatically satisfied when the unfair or deceptive act "[i]njured other persons." RCW 19.86.093(3)(a). Without question, a jury could reasonably find that NWI's misrepresentations to a government agency in the course of a public works project adversely impacted the public interest, especially where, as here, the fraud directly caused an unwarranted expenditure of taxpayer money. For this reason too, CPA claim must be reinstated and remanded for trial on the merits.

C. Sound Transit's Fraud Claim Against NWI Is Not Barred By The Statute Of Limitations.

Although unclear whether the trial court reached the issue, NWI also argued that Sound Transit's fraud claim was barred by the three-year statute of limitations. RCW 4.16.080(4).⁸ This argument is without merit. The relevant dates are undisputed. Sound Transit discovered the basis for

⁸ The trial court's order stated only: "there are no issues of material fact on the matters presented in NWI's motion, and as a matter of law NWI is entitled to entry of summary judgment dismissing Sound Transit's cross-claims in their entirety." CP 1819.

its fraud claims no earlier than June 21, 2006. CP 1466 (Dahl Decl., ¶ 14); CP 1159. NWI filed suit against PCL on March 18, 2009, and PCL filed a third-party complaint against Sound Transit on April 30, 2009. CP 1-13; CP 15-22. Sound Transit filed counterclaims against PCL and cross-claims against NWI fraud on August 6, 2009. CP 23-34. The issue, therefore, is whether the filing of NWI's complaint or PCL's third-party complaint, both of which occurred within the limitations period, tolled the statute of limitations on Sound Transit's fraud claims. They did.

Once it was impleaded as a third-party defendant, Sound Transit had to assert all defenses and counterclaims it had against PCL. CR 14(a) (third-party defendant must assert defenses and counterclaims under CR 12 and CR 13 against third-party plaintiff). Since PCL's third-party claim was premised entirely on NWI's underlying claim, Sound Transit properly raised its fraud claim against PCL—as both an affirmative defense and a compulsory counterclaim. CP 26-29. Under well-established Washington law, Sound Transit's fraud counterclaim against PCL was tolled when PCL filed its third-party complaint and, thus, was not barred by the statute of limitations. *J. R. Simplot Co. v. Vogt*, 93 Wn.2d 122, 126, 605 P.2d 1267 (1980); *see also Tallman v. Durussel*, 44 Wn. App. 181, 187 n. 3, 721 P.2d 985 (1986) (“plaintiff's suit tolls or suspends the running of the statute of limitations governing a compulsory counterclaim”).

The same is true for NWI's fraud cross-claim against NWI. *First*, because Sound Transit's counterclaim against PCL was based on NWI's conduct, Sound Transit had to join NWI to that claim as well. CR 13(h) & CR 19(a). The tolling rule applicable to counterclaims must apply equally to Sound Transit's mandatory cross-claim against NWI. *Second*, when a cross-claim is defensive and relates to the plaintiff's underlying action, the limitations period is tolled by the filing of the plaintiff's complaint; it is only when a cross-claim seeks relief "separate and independent from the plaintiff's complaint" that tolling does not apply. *Bennett v. Dalton*, 120 Wn. App. 74, 81, 84 P.3d 265 (2004). Sound Transit's fraud claim is not "separate and independent" from NWI's claim. The two are not only based on the same facts, but one is dispositive of the other; if Sound Transit prevails on its cross-claim that Change Order 12 was procured by fraud, then NWI's claim for additional compensation necessarily fails.⁹

⁹ Sound Transit also pleaded fraud as an affirmative defense. CP 26. Even if Sound Transit's fraud claim were time-barred, that affirmative defense is not. "Statutes of limitation never run against defenses arising out of the transactions sued upon." *Seattle First Nat'l Bank v. Siebol*, 64 Wn. App. 401, 407, 824 P.2d 1252 (1992). If Sound Transit prevails on a fraud defense, the result will be the same as if it were to prevail on its fraud claim; either way, Sound Transit will be entitled to rescission *and return* of its \$534,02.75. "'Rescission' is available as 'a remedy or defense for a nondefaulting party and restores the parties to their precontractual positions.'" *State v. Armstrong*, 109 Wn. App. 458, 462 n. 4, 35 P.3d 397 (2001) (*quoting* Black's Law Dictionary 1308 (7th ed.1999)).

Finally, it makes no sense to dismiss Sound Transit's direct claim against NWI since the same fraud claim must be tried as a pass-through counterclaim in any event. As noted above, in addition to its direct claim against NWI, Sound Transit filed a counterclaim against PCL seeking rescission of Change Order 12. The basis of the counterclaim was NWI's fraud. CP 28-29. PCL, in turn, asserted an identical pass-through fraud counterclaim against NWI. CP 50. Not only are both counterclaims timely for the reasons explained above, *Simplot*, 93 Wn.2d at 126, they are both still pending; neither NWI nor PCL moved for judgment on the fraud counterclaims, and they were not included in the trial court's summary judgment order. CP 1819-22. In short, NWI's statute of limitations argument is pointless: Sound Transit's fraud allegations must be tried one way or the other and, if proven, NWI must return Sound Transit's money. Under these circumstances, Sound Transit's related (indeed, identical) direct claim against NWI should be deemed tolled and timely.

V. CONCLUSION

The trial court erred when it entered judgment in favor of NWI. Viewing the evidence and inferences in the light most favorable to Sound Transit, a reasonable jury could find for Sound Transit on its fraud and CPA claims. Nothing more is required to defeat summary judgment. The

summary judgment order must be reversed and Sound Transit's fraud and CPA claims remanded for trial on the merits.

RESPECTFULLY SUBMITTED this 21st day of June, 2011.

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By  _____

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CERTIFICATE OF SERVICE

I hereby certify that on June 21, 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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Kathryn Savaria

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