

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

NORTHWEST INFRASTRUCTURE, )  
INC., a Washington corporation, )  
 )  
Appellant, )

v. )

PCL CONSTRUCTION SERVICES, )  
INC., a Washington corporation; )  
FIDELITY AND DEPOSIT COMPANY )  
OF MARYLAND Bond No. )  
6318278/400SL4177, )

Respondents. )

PCL CONSTRUCTION SERVICES, )  
INC., a Washington corporation, )  
 )  
Respondent, )

v. )

CENTRAL PUGET SOUND REGIONAL )  
TRANSIT AUTHORITY, a Washington )  
Regional Transit Authority, )

Appellant. )

No. 66777-7-I

No. 66870-6-I

UNPUBLISHED OPINION

FILED: December 10, 2012

Ellington, J.P.T. — These two appeals arise out of a public works contract for construction of the Federal Way Transit Center. We consolidate them for purposes of

this opinion.

PCL Construction Services, Inc. (PCL) was the general contractor. Northwest Infrastructure, Inc. (NWI) subcontracted for the site excavation work. NWI sought additional compensation for earthwork allegedly not described in the bidding process. At issue is whether NWI complied with the contract claim deadlines, and whether questions of fact existed as to counterclaims for fraud and violation of the Consumer Protection Act, chapter 19.86 RCW. The trial court answered both questions in the negative.

We reverse and remand.

#### BACKGROUND

In June 2004, Central Puget Sound Regional Transit Authority (Sound Transit) hired PCL as the general contractor on the Federal Way project, which involved considerable excavation. PCL subcontracted the earthwork to NWI.

The subcontract incorporated the prime contract between PCL and Sound Transit, and also provided that should NWI wish to make a claim against Sound Transit, PCL would present the claim as a “pass-through” claim.<sup>1</sup> Both the prime contract and the subcontract imposed deadlines for written notice of such claims.

In preparing its bid, NWI allegedly relied on Sound Transit’s Drawing C3.04, which included estimates of cubic yardage to be excavated and then used as backfill or exported from the site. NWI began work in July 2004. NWI contends that in mid-September, it allegedly became aware for the first time that Drawing C3.04 significantly underestimated

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<sup>1</sup> Clerk’s Papers (No. 66777-7) at 118.

the excavation. NWI completed the work later that fall.

In June 2005, NWI retained a consultant, Earthwork Services. Based on its report, NWI sought compensation for the additional earthwork by submitting to PCL a request for change (in the contract) under contract Article 4.<sup>2</sup> NWI alleged that more than four times the yardage estimated in the drawing had to be excavated and exported from the site. PCL passed the request for change through to Sound Transit on June 28, 2005.

Sound Transit agreed that additional compensation was appropriate due to errors in Drawing C3.04. In a letter captioned “Entitlement,” Sound Transit agreed to pay “full reimbursement” for NWI’s costs incurred for additional earthwork.<sup>3</sup>

But the parties could not agree as to the reimbursement amount. On January 19, 2006, Sound Transit issued a unilateral change order granting additional compensation of \$534,602.75, which it then paid.

Dissatisfied with this compensation, NWI submitted a notice of intent to claim under contract Article 10. PCL passed the claim through to Sound Transit. Sound Transit obtained NWI’s original bid documents, and denied the claim on two grounds: that the PCL-NWI subcontract did not specify earthwork quantities, and that the bid documents revealed NWI had not in fact relied on Drawing C3.04 in submitting its bid. Sound Transit demanded return of some of the funds (\$186,933.23) paid under the change order.

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<sup>2</sup> Unless otherwise specified, references are to the prime contract. Contract details are discussed *infra*.

<sup>3</sup> Clerk’s Papers (No. 66777-7) at 534-35.

NWI then filed this action against PCL for breach of contract, asserting that PCL breached the subcontract by failing to manage NWI's pass-through claims as required by the subcontract and by failing to pay NWI the additional compensation to which it was entitled.<sup>4</sup> NWI demanded that its claims be passed through to Sound Transit, which PCL did by third party complaint. The parties filed various cross and counterclaims, including Sound Transit's claims for fraud and violation of the Consumer Protection Act.

Sound Transit moved for summary judgment against PCL, contending that neither the request for change nor the notice of intent to claim was timely under contract Articles 4 and 10, and relief was therefore barred. PCL in turn made the same motion against NWI.

NWI responded that its timely compliance with notice requirements was either plainly established or plainly waived, and filed its own motion seeking a determination to that effect.

The trial court granted the motions to dismiss, ruling that NWI's suit was barred because it failed to comply with contract notice requirements and that those requirements had not been waived. NWI moved for reconsideration and to vacate. Both motions were denied. The court ordered NWI to pay Sound Transit's attorney fees directly. The court also dismissed Sound Transit's claims against NWI for fraud and violation of the Consumer Protection Act. The court then certified these rulings for immediate appeal under CR 54(b) and stayed further proceedings.

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<sup>4</sup> This appeal does not involve any claims by NWI against PCL.

Both parties appealed.

RECORD ON REVIEW

As a preliminary matter, we must address what record is before us. Throughout its briefing, NWI relies upon evidence submitted for the first time in its motions to reconsider and to vacate. Sound Transit asks us to strike these references.

NWI contends the materials should be considered because review of a summary judgment is de novo.<sup>5</sup> But our review is confined to the evidence that was or should have been before the trial court.<sup>6</sup> Evidence submitted later is relevant on appeal only as to the rulings on the postjudgment motions unless those motions were error. This distinction was not made in the briefing. The references as submitted were thus improper. Sound Transit's motion to strike is granted.

ADDITIONAL COMPENSATION CLAIM

*Contract Claim Notice Requirements*

The question on this issue is whether NWI preserved its claim for additional compensation by complying with the contract's notice requirements. Notice requirements are enforced; absent waiver, failure to comply bars relief.<sup>7</sup>

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<sup>5</sup> This court reviews summary judgment de novo. Vallandigham v. Clover Park Sch. Dist. No. 400, 154 Wn.2d 16, 26, 109 P.3d 805 (2005). Summary judgment is affirmed when 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). All facts and reasonable inferences are considered in the light most favorable to the nonmoving party, and summary judgment is appropriate only if, from all the evidence, reasonable persons could reach but one conclusion. Id.

<sup>6</sup> RAP 9.12; Wash. Fed'n of State Employees, Council 28, AFL-CIO v. Office of Fin. Mgmt., 121 Wn.2d 152, 157, 849 P.2d 1201 (1993).

<sup>7</sup> Mike M. Johnson, Inc. v. Spokane County, 150 Wn.2d 375, 386, 78 P.3d 161 (2003).

The first deadline at issue applies to requests for change orders. Contract Article 4.02.B governs such requests and provides that “[t]he Contractor may request additional compensation and/or time through [a request for change], *but not for instances that occurred more than twenty (20) days prior to the request.*”<sup>8</sup> NWI completed the earthwork in fall of 2004. It did not submit its request for additional compensation for that work until June 2005.

The parties engage in extensive argument as to exactly when the 20-day deadline was triggered and whether it was waived by Sound Transit’s issuance of the unilateral change order. But this skirmish is irrelevant. Sound Transit acknowledges that the change order cannot be withdrawn and that its effects cannot be avoided. One of those effects is that under Article 4.04.D, issuance of a change order triggers a new process with a new deadline.<sup>9</sup> Whether or not the change order waived the notice requirement for change order requests, the fact remains that it triggered Article 10, which governs claims.

Article 4.04.D provides the process to be used when the parties do not agree on a change order:

Unilateral Change Order: In the event that the Contractor and Sound Transit are unable to agree on the terms and conditions, the amount of any change or adjustment to be made to the Total Contract Price or Contract Time, Sound Transit may execute a unilateral Change Order, *in which case the Contractor may file a claim in accordance with the requirements of Article 10, Delays and Claims*. If the Contractor fails to follow the claim procedures in Article 10, the Contractor shall not be

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<sup>8</sup> Clerk’s Papers (No. 66777-7) at 455 (emphasis added).

<sup>9</sup> Sound Transit contends that the unilateral change order modified the contract only in the amount it paid, which is true. But the change order also triggered a new process, which NWI timely used.

entitled to any claim for additional compensation or schedule extension arising out of or relating to the Change Order than that specified in the Change Order.<sup>[10]</sup>

Article 10.01.A.3 provides as follows:

*The Notice [of Intent to Claim] shall be submitted within ten (10) days after the event or occurrence giving rise to the potential claim, or the denial of a Request for Change or the Issuance of a unilateral Change Order by Sound Transit. However, if the event or occurrence is claimed to be an act or omission of Sound Transit, a Notice of Intent to Claim shall be given by the Contractor within ten (10) days after the Contractor discovers the act or omission and prior to the time for performance of that portion of the Work to which such alleged act or omission relates.*<sup>[11]</sup>

It is undisputed that NWI submitted its notice of intent to claim within 10 days of Sound Transit's unilateral change order.

Sound Transit contends, however, that NWI's claim derives from an "act or omission" of Sound Transit (to wit, Drawing C3.04), and should therefore have been submitted within 10 days of discovery of the error in the drawing and before performance of the work.

This is an unwieldy interpretation of the contract. NWI's discovery of the error in the drawing allegedly occurred as a result of its work, so NWI could not file a claim "prior to the time for performance." Further, the first sentence of the same paragraph describes the specific situation here: a claim after issuance of a unilateral change order. That is the controlling provision.<sup>12</sup>

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<sup>10</sup> Clerk's Papers (No. 66777-7) at 457-58 (emphasis added).

<sup>11</sup> Clerk's Papers (No. 66777-7) at 465 (emphasis added).

<sup>12</sup> Adler v. Fred Lind Manor, 153 Wn.2d 331, 354, 103 P.3d 773 (2004) (specific terms given more weight) (quoting 2 Restatement (Second) of Contracts § 203(c) (1981)).

In short, NWI complied with Article 10 in submitting its notice of intent to claim. The court erred by dismissing NWI's claim for additional compensation for earthwork as untimely. We reverse and remand for further proceedings consistent with this opinion.<sup>13</sup>

### *Statutory Attorney Fees*

The court awarded Sound Transit its fees directly against NWI. NWI contends the award is not authorized by the applicable statute because Sound Transit was not a party to NWI's action. Because this issue may arise again on remand, we address it briefly.<sup>14</sup>

RCW 39.04.240 governs attorney fees in public works cases where a public body is a party:

(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.<sup>[15]</sup>

RCW 4.84.250 provides,

[I]n any action for damages . . . 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.

Whether a statute applies to a particular set of facts is a question of law; review is de

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<sup>13</sup> Given this determination, we do not address issues pertaining to the motions for reconsideration and to vacate.

<sup>14</sup> We do not address NWI's argument that Sound Transit failed to comply with the statutory notice requirements that would have informed NWI of the intention to seek fees.

<sup>15</sup> RCW 4.84.250 to RCW 4.84.280 govern attorney fees in small claims actions (\$10,000 or less).



novo.<sup>16</sup> Where statutory interpretation is required, the usual rules apply.<sup>17</sup> We review an award of fees for an abuse of discretion.<sup>18</sup>

NWI contends that because its action was filed solely against PCL as required by the subcontract, PCL is the only party to which NWI can be ordered to pay fees. Sound Transit and PCL point to the statutory phrase “arising out of a public works contract” and argue that Sound Transit was a party within the meaning of the statute by way of PCL’s third party complaint.

NWI had no privity of contract with Sound Transit and so filed its action against PCL. As required by the contracts and as demanded by NWI’s complaint, PCL passed NWI’s claims through to Sound Transit in a third party complaint. NWI and Sound Transit are the true parties in interest on this issue, and we see nothing in the statutes indicating an intent to prevent the court from exercising its discretion to tax fees directly between those parties.

### COUNTERCLAIMS/CROSS CLAIMS

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<sup>16</sup> Mackey v. America Fashion Inst. Corp., 60 Wn. App. 426, 429, 804 P.2d 642 (1991).

<sup>17</sup> Statutory interpretation is a question of law reviewed de novo. Millay v. Cam, 135 Wn.2d 193, 198, 955 P.2d 791 (1998). If the meaning is plain on the face of the statute, we follow that plain meaning. Dep’t of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). If the statute is ambiguous, we employ various rules of statutory interpretation to discern the legislature’s intent for the statute as a whole. Whatcom County v. Bellingham, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996). We construe a statute so as to effectuate that intent, avoiding a literal reading if it would result in unlikely, absurd, or strained consequences. Id. (purpose of enactment should prevail over express but inept wording).

<sup>18</sup> Frank Coluccio Constr. Co., Inc. v. King County, 136 Wn. App. 751, 780, 150 P.3d 1147 (2007).

*Background*

When Sound Transit performed its audit on NWI's Article 10 claim, it discovered bid documents allegedly indicating NWI had anticipated that excavation would exceed the amounts represented on Drawing C3.04 (24,000 cubic yards excavated and 16,000 cubic yards to be used for backfill, leaving 8,000 cubic yards to be exported).<sup>19</sup> One of NWI's bid documents listed grading quantities and export values nearly double those on Drawing C3.04 and acknowledged additional excavation and backfill work required for a detention vault, "clear & grub," and "fine grading."<sup>20</sup> Sound Transit concluded NWI had not in fact relied on Drawing C3.04 in producing its bid. Sound Transit therefore denied NWI's additional compensation request and demanded reimbursement of part of the compensation paid under the change order.

When this action resulted, Sound Transit filed a counterclaim against PCL (and a cross claim against NWI) alleging violation of the Consumer Protection Act and fraud, and seeking rescission of the change order. PCL asserted identical counterclaims against NWI.

NWI moved for summary judgment dismissing Sound Transit's cross claims as factually unsupported and (as to the fraud claim) barred by the statute of limitations. The court granted the motion.

*Fraud Claim: Statute of Limitations*

A fraud claim must be filed within three years of discovery of the facts

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<sup>19</sup> See Clerk's Papers (No. 66870-6) at 1360 (Kippen Decl.); id. at 1466 (Dahl Decl.); id. at 1597-98 (Congleton Decl.); id. at 1609-12 (bid document).

<sup>20</sup> Clerk's Papers (No. 66870-6) at 1411.

constituting the fraud.<sup>21</sup> It is undisputed that Sound Transit discovered the basis for its fraud claims by June 21, 2006. NWI argues that Sound Transit's August 6, 2009 fraud complaint came too late.

Sound Transit counters that its fraud claim constituted a compulsory counterclaim, and the statute of limitations was therefore tolled either by the filing of NWI's complaint on March 18, 2009, or by PCL's third party complaint against Sound Transit on April 30, 2009, either of which occurred within the statute of limitations. We agree with Sound Transit.

Failure to assert a compulsory defense or counterclaim generally bars later action on that claim.<sup>22</sup> Sound Transit's fraud claim was based on NWI's conduct in making claims under the contracts. Under CR 19(a), which requires joinder of a party in whose absence "complete relief cannot be accorded," Sound Transit had to join NWI by cross claim.

Sound Transit relies upon J.R. Simplot Co. v. Vogt,<sup>23</sup> which involved competing security interests in a potato crop. After one party was joined as a codefendant, that

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<sup>21</sup> RCW 4.16.080(4); see also Norris v. Church & Co., Inc., 115 Wn. App. 511, 517, 63 P.3d 153 (2002) (causes of action for fraud begin to accrue when the claimant discovers, or should have discovered, all the elements of the claim).

<sup>22</sup> See French v. Gabriel, 116 Wn.2d 584, 588-89, 806 P.2d 1234 (1991) (defense of insufficient service of process is waived unless the party asserts it either in a responsive pleading or in a motion); Chew v. Lord, 143 Wn. App. 807, 814, 181 P.3d 25 (2008) (failure to plead compulsory counterclaim will generally bar bringing separate action on that claim); Alexander v. Food Services of America, Inc., 76 Wn. App. 425, 428-29, 886 P.2d 231 (1994) (failure to raise defense of statute of limitations in answer or other appropriate pleading in timely manner waives that defense).

<sup>23</sup> 93 Wn.2d 122, 126, 605 P.2d 1267 (1980).

party asserted his lien. Time for enforcement of the lien had expired while the action was pending but before he was joined.<sup>24</sup> The court held the pendency of the action tolled the limitation period and the claim was not barred.<sup>25</sup>

NWI relies upon Bennett v. Dalton,<sup>26</sup> which involved a cross claim filed outside the statute of limitations by one defendant against the other. Because the cross claim was independent of the original action, we held the statute was not tolled and the claim was barred.<sup>27</sup>

Sound Transit's claim for fraud arises out of NWI's claim for additional compensation. It is not independent of the original action. Bennett is thus inapposite. Under Simplet, Sound Transit's counterclaim was not barred by the statute of limitations.

*Summary Judgment: Fraud*

Sound Transit challenges the trial court's summary dismissal of its fraudulent misrepresentation cross claim. A party seeking to avoid summary judgment on a claim of fraud must produce evidence to support each of nine elements: "(1) a representation of an 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."<sup>28</sup> Summary judgment is not warranted

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<sup>24</sup> Id. at 124.

<sup>25</sup> Id. at 126.

<sup>26</sup> 120 Wn. App. 74, 75-76, 84 P.3d 265 (2004).

<sup>27</sup> Id. at 81.

if a rational trier of fact, viewing the evidence in the light most favorable to the nonmoving party, could find clear, cogent, and convincing evidence on each element.<sup>29</sup>

A brief review of the evidence submitted to establish each element of the claim demonstrates that Sound Transit met its burden on summary judgment.

Under contract Article 4.01, NWI was entitled to additional compensation only if there was a change in the work, not if it erred in its bid.<sup>30</sup> According to Sound Transit's evidence, NWI represented in the claim process that it relied solely on the quantities represented in Drawing C3.04 in making its bid.<sup>31</sup> But NWI's internal bid documents included export values nearly double those represented on Drawing C3.04, as well as additional line items for clearing and grubbing and for excavation and fill of a detention vault (which were not represented on Drawing C3.40 at all).<sup>32</sup>

Sound Transit also offered evidence of its reliance on NWI's representations, including an internal memorandum concluding "it would seem reasonable for a bidder

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<sup>28</sup> Stiley v. Block, 130 Wn.2d 486, 505, 925 P.2d 194 (1996).

<sup>29</sup> In re Dependency of C.B., 61 Wn. App. 280, 285, 810 P.2d 518 (1991).

<sup>30</sup> See Clerk's Papers (No. 66777-7) at 454 (Art. 4.01.B.1); id. at 455 (Art. 4.01.F).

<sup>31</sup> See Clerk's Papers (No. 66870-6) at 1465-66 (Dahl Decl.); id. at 1168 (Johnson Decl.); id. at 1479-81 (PCL letter with supporting documents from NWI seeking compensation for "additional earthwork above and beyond the quantities shown on drawing C3.04"); id. at 1509 (NWI letter to PCL indicating, "The earthwork quantities were specified on the published bid plans. The competitive nature of the proposal dictated that NWI use those numbers. . . . 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. . . . Had NWI known the correct earthwork quantities initially, they would have exported all the material at the beginning of the project.").

<sup>32</sup> See Clerk's Papers (No. 66870-6) at 1141-42; id. at 1472 (Drawing C3.04).

to rely on” the drawing, its letter to PCL granting the request for change on that basis, and its reaction once it discovered NWI’s bid documents.<sup>33</sup>

The measure of damages for fraud is all losses proximately caused by the misrepresentation.<sup>34</sup> The change order cost Sound Transit \$534,602. NWI does not dispute that Sound Transit paid this amount. If there is a question of fact as to whether the change order was granted based upon a misrepresentation, there is a question of fact as to damages.

Sound Transit raised questions of fact as to the elements of fraudulent misrepresentation. Summary judgment was therefore improper.

*Consumer Protection Act Claim*

To establish a claim under the Consumer Protection Act, Sound Transit must show (1) an unfair and deceptive act or practice; (2) which occurred in the conduct of trade or commerce; (3) affected the public interest; (4) injured Sound Transit in its business; and (5) that NWI caused the injury.<sup>35</sup>

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<sup>33</sup> See Clerk’s Papers (No. 66870-6) at 1546 (“a note on the drawing misled the bidders into assuming that the indicated quantities were the actual earthwork amounts”); id. at 1536 (“We question [NWI’s] right to rely upon [Drawing C3.04]. Nonetheless, Sound Transit is willing to pay for the difference between the C3.04 earthwork quantities and a reasonable theoretical earthwork quantity . . . based on the project documents at the time of the bid.”); id. at 1131 (“In fact, however, NWI’s [internal] 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 bid, NWI anticipated earthwork quantities greater than the quantities noted on Drawing C3.04.”).

<sup>34</sup> Turner v. Enders, 15 Wn. App. 875, 880, 552 P.2d 694 (1976).

<sup>35</sup> Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 780, 719 P.2d 531 (1986).

Sound Transit asserted alternative theories for its counterclaim: that NWI presented a request for change premised upon a false representation of its bid; or that NWI unreasonably and intentionally underbid the project with the intent to make a claim for additional compensation. Under either theory, Sound Transit's evidence in support of its fraud claim is enough to raise questions of fact on the first, second, fourth, and fifth elements of its Consumer Protection Act claim.<sup>36</sup>

This leaves only the third element at issue: whether NWI's alleged act affected the public interest. Generally, whether the public interest is affected is a question for the trier of fact.<sup>37</sup>

An act or practice is injurious to the public interest if it “[i]njured other persons” or “had [or has] the capacity to injure other persons.”<sup>38</sup> Sound Transit is a public agency created by Puget Sound voters, and one of its primary functions is to plan and build mass transportation projects for the benefit of the public with taxpayer dollars.<sup>39</sup> It contends that public tax dollars paid for NWI's work, and the public stood to benefit

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<sup>36</sup> Courts have found “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) (quoting FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244 n.5, 92 S. Ct. 898, 31 L. Ed. 2d 170 (1973)). To show an act was “deceptive” under the Consumer Protection Act, 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. Construction projects occur in trade and commerce. Eastlake Constr. Co., Inc. v. Hess, 102 Wn.2d 30, 50, 686 P.2d 465 (1984).

<sup>37</sup> Hangman Ridge, 105 Wn.2d at 789.

<sup>38</sup> RCW 19.86.093(3).

<sup>39</sup> Central Puget Sound Reg'l Transp. Auth. v. Miller, 156 Wn.2d 403, 407, 128 P.3d 588 (2006) (citing RCW 81.112.010).

from that work or bear injury as a result of any unfair or deceptive act. These arguments could lead a reasonable trier of fact to find NWI's acts affected the public interest.

Sound Transit raised questions of fact on its Consumer Protection Act claim, and summary judgment was improper.

Reversed and remanded for further proceedings consistent with this opinion.

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WE CONCUR:

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A handwritten signature in black ink, appearing to read "Dwyer, J.", written over a horizontal line.