Supreme Court No. 927448

Court of Appeals No. 70432-0-I

SUPREME COURT
OF THE STATE OF WASHINGTON

KING COUNTY,

Respondent,

v.

VINCI CONSTRUCTION GRANDS PROJETS/PARSONS RCI/FRONTIER-KEMPER, JV, a Washington joint venture; TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA, a Connecticut corporation; LIBERTY MUTUAL INSURANCE COMPANY, a Massachusetts corporation; FEDERAL INSURANCE COMPANY, an Indiana corporation; FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a Maryland corporation; and ZURICH AMERICAN INSURANCE COMPANY, a New York corporation,

Petitioners.

RESPONDENT KING COUNTY'S ANSWER THE SURETY & FIDELITY ASSOCIATION OF AMERICA'S AMICUS CURIAE MEMORANDUM IN SUPPORT OF PETITIONS FOR REVIEW

David R. Goodnight
(WSBA No. 20286)
Karl F. Oles
(WSBA No. 16401)
Hunter Ferguson
(WSBA No. 41485)
STOEL RIVES LLP
600 University Street, Suite 3600
Seattle, WA 98101
Telephone: (206) 624-0900
Facsimile: (206) 386-7500

Leonard J. Feldman
(WSBA No. 20961)
PETERSON | WAMPOLD | ROSATO | LUNA | KNOPP
1501 Fourth Avenue, Suite 2800
Seattle, WA 98101
Telephone: (206) 624-6800
Facsimile: (206) 682-1415

Attorneys for Respondent King County

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

GLOSSARY

Bond	Performance and Payment Bond issued by Sureties, Trial Exhibit 6
Brightwater Project	The King County regional wastewater treatment
JDC	Tunneling contractor working on the West Contract (BT-4)
King County Br.	Brief of Respondent King County In Response To Brief Of Appellants Travelers Casualty And Surety Company Of America, Liberty Mutual Insurance Company, Federal Insurance Company, Fidelity And Deposit Company Of Maryland, And Zurich American Insurance Company filed in the Court of Appeals
Op.	*King County v. Vinci Const. Grands Projets*, 191 Wn. App. 142, 364 P.3d 784 (2015)
RP	Report of Proceedings for trial
SFAA	Surety & Fidelity Association of America
SFAA Mem.	The Surety & Fidelity Association of America's Amicus Curiae Memorandum In Support of Petitions for Review
STBM	Slurry tunnel boring machine
Sureties	Travelers Casualty and Surety Company of America, Liberty Mutual Insurance Company, Federal Insurance Company, Fidelity and Deposit Company of Maryland, and Zurich American Insurance Company
Surety Pet.	Petition for Review filed by the Sureties in the Washington Supreme Court
VPFK	Vinci Construction Grands Projets/Parsons RCI/Frontier-Kemper, JV

I. INTRODUCTION

The Surety & Fidelity Association of America (SFAA) asks this Court to grant discretionary review so that it can reconsider *Colorado Structures v. Insurance Co. of the West*, 161 Wn.2d 577, 167 P.3d 1125 (2007). In the nine years since the Court decided *Colorado Structures*, neither this Court nor any other court has criticized or sought to limit the Court's holding regarding attorney fees. The Washington legislature also has not enacted or amended any statute to abrogate or limit that holding. Nor has SFAA shown that *Colorado Structures* is both incorrect and harmful – as required to abandon an existing rule of law under this Court's precedent.[1] For these reasons, as well as the reasons set forth below and in King County's previous briefing, discretionary review is not warranted.

II. ARGUMENT

A. SFAA Rehashes Arguments That The Court Rejected In *Colorado Structures* And Does Not Show – As It Must – That *Colorado Structures* Is Both Incorrect And Harmful.

Although SFAA asks the Court to reconsider *Colorado Structures*, it does not discuss or even mention the doctrine of stare decisis, which governs such a request. As the Court explained in *City of Fed. Way v. Koenig*, 167 Wn.2d 341, 217 P.3d 1172 (2009), "[t]he principle of stare decisis requires a clear showing that an established rule is incorrect and

[1] As with King County's previous briefing, a glossary of relevant abbreviations can be found after the Table of Authorities.

harmful before it is abandoned." *Id.* at 346 (internal quotation marks omitted). The Court further noted that "[t]his respect for precedent promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Id.* at 347 (internal quotation marks omitted).

Also significant here, the Court in *Koenig* added that "[m]aking the same arguments that the original court thoroughly considered and decided does not constitute a showing of 'incorrect and harmful.'" *Id.* In refusing to overturn its prior decision, the Court also relied on "legislative acquiescence" in the 23 years since it issued its prior decision. *Id.* at 348. The Court explained:

> By not modifying the [Public Record Act's] definition of agency to include the judiciary, the legislature has implicitly assented to our holding in *Nast* that the PRA does not apply to the judiciary and judicial records.

Id. Based on these considerations, the Court refused to "violate the doctrine of stare decisis." *Id.* As set forth below, the same reasoning and result are applicable here.

Colorado Structures is, by any measure, an established rule in Washington. In *Olympic Steamship Co. v. Centennial Insurance Co.*, 117 Wn.2d 37, 53, 811 P.2d 673 (1991), which preceded *Colorado Structures*,

the Court held that "an award of fees is required in any legal action where the insurer compels the insured to assume the burden of legal action, to obtain the full benefit of his insurance contract ...." 117 Wn.2d at 53. In support of that holding, the Court noted that "[w]hen an insured purchases a contract of insurance, it seeks protection from expenses arising from litigation, not vexatious, time-consuming, expensive litigation with his insurer." *Id.* at 52 (internal quotation marks and citation omitted). The Court also explained that "allowing an award of attorney fees will encourage the prompt payment of claims." *Id.* at 53. The Court's holding in *Olympic Steamship* is now firmly ingrained in Washington law.[2]

In *Colorado Structures*, the Court held that "*Olympic Steamship* attorney fees apply to performance bonds." 161 Wn.2d at 608. It did so for the same reasons identified in *Olympic Steamship*, including disparity in enforcement power, ensuring that the obligee is "made whole," and the importance of providing an economic incentive for sureties to promptly complete the principal's work or pay the obligee. 161 Wn.2d at 607. In addition to relying on *Olympic Steamship*, the Court relied on *Estate of Jordan v. Hartford Accident & Indem. Co.*, 120 Wn.2d 490, 492, 844 P.2d

[2] *See, e.g., Matsyuk v. State Farm Fire & Cas. Co. of Ill.*, 173 Wn.2d 643, 661, 272 P.3d 802 (2012); *Mut. of Enumclaw Ins. Co. v. T&G Constr., Inc.*, 165 Wn.2d 255, 273-74, 199 P.3d 376 (2008); *Wash. Greensview Apartment Assocs. v. Travelers Prop. Cas. Co. of Am.*, 173 Wn. App. 663, 680, 295 P.3d 284 (2013); *Unigard Ins. Co. v. Mut. of Enumclaw Ins. Co.*, 160 Wn. App. 912, 928, 250 P.3d 121 (2011); *S&K Motors, Inc. v. Harco Nat'l Ins. Co.*, 151 Wn. App. 633, 645, 213 P.3d 630 (2009).

403 (1993), which applied *Olympic Steamship* to fiduciary bond obligations, and *National Bank of Washington v. Equity Investors*, 86 Wn.2d 545, 553, 546 P.2d 440 (1976), which recognized that surety bonds are "in the nature" of insurance contracts and controlled by the same rules of interpretation. *Colorado Structures*, 161 Wn.2d at 598. In the many years since the Court announced these legal principles, they have not been questioned, abrogated, limited, or legislatively overruled.[3]

Despite this Court's holding that "[m]aking the same arguments that the original court thoroughly considered and decided does not constitute a showing of 'incorrect and harmful'" as required to overturn established precedent (*Koenig*, 167 Wn.2d at 347) , SFAA merely rehashes arguments that the Court rejected in *Colorado Structures*. SFAA complains, for example, that in cases involving performance bonds "any attorney fees awarded will ultimately be owed by the bond principal." SFAA Mem. at 4. The Court in *Colorado Structures* found this asserted difference between insurance contracts and performance bonds

[3] Contrary to the Sureties' assertion that there is no majority opinion on the attorney fees issue in *Colorado Structures* (Surety Pet. 5, 10), SFAA correctly acknowledges that there was a "majority opinion" (SFAA Mem. at 2). But like the Sureties, SFAA ignores the many other cases (cited above) that address the legal issue on which the Sureties seek review. The Court of Appeals has similarly ruled that "[t]he *Olympic Steamship* rule extends to an action to recover on a surety bond." *Axess Int'l Ltd. v. Intercargo Ins. Co.*, 107 Wn. App. 713, 720-21, 30 P.3d 1 (2001). This longstanding body of case law is all the more reason to apply the doctrine of stare decisis. *See, e.g., State v. Frawley*, 181 Wn.2d 452, 465, 334 P.3d 1022 (2014) ("we decline to overrule the long-standing rule that public trial rights violations may be asserted for the first time on appeal").

"immaterial" and added that "the risk of a wrongful decision falls on the surety, not the principal." *Colo. Structures*, 161 Wn.2d at 605 n.15. Consistent with that analysis, no court has ever held – and SFAA cites no case law holding – that a surety can avoid liability simply because its principal is ultimately responsible for the financial consequences of its breach. Indeed, such a rule would eviscerate surety law.

SFAA also claims that awarding *Olympic Steamship* fees in disputes involving performance bonds is somehow unfair because "[a]nyone who provided a bond will be exposed to paying the opposing party's attorney fees." SFAA Mem. at 4. Far from being a reason to revisit *Colorado Structures*, that is why the Court *correctly* ruled as it did. The Court explained that "sureties, like insurance companies, face minimal incentive to perform on their contracts if the maximum loss they may incur is the amount of the bond." *Colo. Structures*, 161 Wn.2d at 601. The Court read "*Olympic Steamship* as including performance bonds" to offset a surety's "financial interest to withhold payment," a situation that the Court found "untenable." *Id.* at 602.

This case illustrates the need for such liability. While SFAA claims that "the sureties stood by prepared to pay if VPFK failed to do so" (SFAA Mem. at 6), nothing could be further from the truth. Rather than promptly hire a contractor to complete VPFK's work or pay King County

as required by the Bond that they issued, the Sureties insisted that they needed to conduct an extended investigation (Ex. 158 at 5) and then – months later – denied the County's claim by adopting the defenses VPFK had asserted (Ex. 162 at 20-2). At trial, the Sureties hired their own experts, joined VPFK's summary judgment motions, filed their own summary judgment motions, proposed their own jury instructions, and argued in closing (represented by the same lawyers as VPFK) that their consultants had "confirmed what VPFK had been saying all along, that there was no default." King County Br. at 5-7; RP 7022. Conversely, there is *no evidence* that the Sureties ever informed the County that they were standing by "prepared to pay" if VPFK failed to do so.

Finally, SFAA does not show – nor can it – that *Colorado Structures* is "harmful," as is also required to overturn established precedent. *Koenig*, 167 Wn.2d at 346. SFAA claims that if the Court of Appeals' decision is allowed to stand, construction contractors and prospective sureties "will have to account for the risk that, in the event of a dispute, the contractor and surety may have to pay the public entity's attorney fees." SFAA Mem. at 9. As to contractors, there is no evidence – or reason to believe – that contractors will stop bidding on public works contracts or increase the amount of their bids on this basis. As to sureties, the Court of Appeals expressly recognized that the Sureties were liable for

attorney fees under *Olympic Steamship* and *Colorado Structures* because "[t]he County had to take legal action to obtain the benefit of the performance bond." Op. ¶ 103. *Colorado Structures* similarly explains that a surety is not liable for attorney fees if it "*agreed to pay* under the bond, but had a factual dispute with [the obligee] as to the amount of the payment." 161 Wn.2d at 606 (emphasis added). A *responsible* surety can therefore avoid *Olympic Steamship* fees by agreeing to pay under a bond while disputing *solely* the amount of the claim. Far from being "harmful," that result substantially benefits obligees without undermining the surety's legitimate financial interests.

B. *Colorado Structures* Applies To Disputes Over A Performance Bond In A Case Arising Out Of A Public Project.

SFAA also claims that, even if *Colorado Structures* was correctly decided as to private construction disputes, it should not be applied to "a statutory public works performance bond." SFAA Mem. at 6. In support of this argument, SFAA claims that the County had substantial "bargaining power" and "dictated the terms of ... the bonds." SFAA Mem. at 6. First, there is no evidence that King County provided to bidders anything other than an industry standard and surety-approved form document. *See Colorado Structures*, 161 Wn.2d at 600 (recognizing "use of form contracts"). Second, as SFAA notes, sureties are not without

recourse: like contractors, sureties can "either bid or not bid." SFAA Mem. at 2. Third, the Sureties are *five large and sophisticated insurance companies*; they can hardly claim to be powerless to protect their financial interests.

In addition, the Court addressed and rejected a similar argument in *Colorado Structures*. Recognizing that construction project owners typically have more bargaining power than an insured, the Court held that "[t]he disparity of bargaining power is relevant, but *more important is the disparity of enforcement power*." 161 Wn.2d at 603 (emphasis added). When the Sureties were notified of King County's notice of default, VPFK was months behind schedule, both STBMs were inoperable, and VPFK had not even started to repair either STBM. RP 4545-46. At that critical juncture, King County had no leverage to enforce the Bond that the Sureties issued, short of litigation.

SFAA nevertheless doubles down on this argument and asserts that public entities, unlike private project owners, have "a procurement department well able to complete the work if necessary." SFAA Mem. at 7. Contrary to SFAA's suggestion, public entities like the County do not have unlimited resources. Here, for example, King County agreed to pay JDC over $68 million to complete VPFK's work, which it funded with public bonds. Ex. 3022. It then "had to take legal action to obtain the

benefit of the performance bond," which generated fees and costs in excess of $14 million. Op. ¶¶, 43 103. No less so than for private project owners, courts must award attorney fees under *Colorado Structures* to protect public entities from harm and ensure that they are ultimately "made whole." 161 Wn.2d at 607. Indeed, if anything, there should be *greater* protection when the public fisc is involved.[4]

Lastly, SFAA also claims that this issue should be left to the legislature, which "could weigh the competing costs and interests and amend RCW 39.08.010 to require the bond to cover the public entity's attorney fees if it thought that the balance favored doing so." SFAA Mem. at 9-10. There is no reason for the legislature to do so if it believes that *Olympic Steamship* and *Colorado Structures* already strike an appropriate balance. As noted above, the legislature has not questioned, abrogated, or sought to limit this well-established line of cases. This "legislative acquiescence" is significant (*see Koenig*, 167 Wn.2d at 348, quoted on page 2 above) and is another reason why this Court should deny the Sureties' petition for review.

[4] *See, e.g., Heckler v. Cmty. Health Servs. of Crawford Cnty., Inc.*, 467 U.S. 51, 63, 104 S. Ct. 2218, 81 L.Ed.2d 42 (1984) ("Protection of the public fisc requires that those who seek public funds act with scrupulous regard for the requirements of law.").

C. Because The Case Involves A Coverage Dispute, King County Was Entitled To Recover Attorney Fees And Costs Under *Colorado Structures* And *Olympic Steamship*.

Finally, stepping beyond its role as a friend of the court to advocate for the Sureties, SFAA argues that "the case did not involve coverage of the bond and so the lower courts erred in awarding *Olympic Steamship* attorney fees." SFAA Mem. at 7. The County refutes this argument at pages 29-31 of its answer to the pending petitions for review. SFAA's argument regarding this issue is both inappropriate and incorrect.

III. CONCLUSION

For the foregoing reasons, the issues addressed by SFAA do not merit discretionary review.

DATED: May 26, 2016

PETERSON | WAMPOLD | ROSATO | LUNA | KNOPP

Leonard J. Feldman
STOEL RIVES LLP
David R. Goodnight
Karl F. Oles
Hunter Ferguson

CERTIFICATE OF SERVICE

I certify that on the date shown below a copy of this document was sent as stated below.

Howard M. Goodfriend Catherine W. Smith Smith Goodfriend PS 1619 8th Avenue N. Seattle, WA 98109-3007 howard@washingtonappeals.com cate@washingtonappeals.com	☒ via efiling/email ☒ via messenger ☐ via US Mail ☐ via fax
Peter N. Ralston Thomas R. Krider Oles Morrison Rinker & Baker LLP 701 Pike Street, Suite 1700 Seattle, WA 98101 ralston@oles.com krider@oles.com	☒ via efiling/email ☒ via messenger ☐ via US Mail ☐ via fax
Frederic D. Cohen Mitchell C. Tilner Horvitz & Levy 15760 Ventura Blvd., 18th Floor Encino, CA 91436 fcohen@horvitzlevy.com mtilner@horvitz.levy.com	☒ via efiling/email ☐ via messenger ☒ via US Mail ☐ via fax

SIGNED in Seattle, Washington this 26th day of May, 2016.

Mary Monschein

OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
Sent: Thursday, May 26, 2016 4:47 PM
To: 'Mary Monschein'
Cc: Leonard Feldman; howard@washingtonappeals.com; cate@washingtonappeals.com; ralston@oles.com; krider@oles.com; fcohen@horvitzlevy.com; mtilner@horvitz.levy.com
Subject: RE: No. 927448 - King County v. Vinci Construction Grands Projets et al.

Received 5/26/2016.

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Mary Monschein [mailto:mary@pwrlk.com]
Sent: Thursday, May 26, 2016 4:07 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Leonard Feldman <feldman@pwrlk.com>; howard@washingtonappeals.com; cate@washingtonappeals.com; ralston@oles.com; krider@oles.com; fcohen@horvitzlevy.com; mtilner@horvitz.levy.com; Mary Monschein <mary@pwrlk.com>
Subject: No. 927448 - King County v. Vinci Construction Grands Projets et al.

Enclosed for filing in the above-referenced matter are the following:

1. Respondent King County's Answer to the Surety & Fidelity Assn. of America's Amicus Curiae Memorandum in Support of Petitions for Review
2. Respondent King County's Answer to the Amicus Curiae Brief of Construction Industry Trade Assns. in Support of Petitions for Review

The following information is provided pursuant to the Court's rule regarding e-filing:

Case name: King County v. Vinci Construction Grands Projets et al.

Case number: 927448

Name, phone number, bar number, and e-mail address of the person filing the document: Leonard Feldman, 206-624-6800, WSBA No. 20961, email: feldman@pwrlk.com.

Thank you for your attention to this matter.

Mary

Mary Monschein, Paralegal
Peterson | Wampold | Rosato | Luna | Knopp
1501 4th Avenue, Suite 2800
Seattle, WA 98101
206.624.6800