70432-0

70432-0

No. 70432-0-I

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

KING COUNTY,

Plaintiff/Respondent/Cross-Appellant,

v.

VINCI CONSTRUCTION GRANDS PROJETS/PARSONS RCI/FRONTIER-KEMPER, JV, a Washington joint venture, et al.,

Defendants/Appellants/Cross-Respondents.

ON APPEAL FROM KING COUNTY SUPERIOR COURT
(Hon. Laura Gene Middaugh)

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

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GLOSSARY

Bond	Performance and Payment Bond issued by Sureties, Trial Exhibit 6
Brightwater Project	The King County regional wastewater treatment system at issue in this appeal
BT-1	Brightwater tunnel segment 1
BT-2	Brightwater tunnel segment 2
BT-3	Brightwater tunnel segment 3
BT-4	Brightwater tunnel segment 4
Central Contract	Contract documents governing VPFK's work on BT-2 and BT-3, Trial Exhibit 6
Central Tunnel	BT-2 and BT-3
Contract	Central Contract
Corrective Action Plan	Trial Exhibit 145
CP	Clerk's Papers
East Contract	Contract documents governing work on BT-1
East Tunnel	BT-1
EPB TBM	Earth pressure balance tunnel boring machine
GBR	Geotechnical Baseline Report, Trial Exhibit 7
GDR	Geotechnical Data Report, Trial Exhibit 8
JDC	Tunneling contractor working on the West Contract (BT-4)
RP	Report of Proceedings for trial
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 Br.	Opening brief submitted by the Sureties
Vinci	Vinci Construction Grands Projets
VPFK	Vinci Construction Grands Projets/Parsons RCI/Frontier-Kemper, JV
VPFK Br.	Opening brief submitted by VPFK
West Contract	Contract documents governing work on BT-4
West Tunnel	BT-4

I. INTRODUCTION

Under Washington law, a surety that compels an obligee to assume the burden of legal action to obtain the benefit of a performance bond is liable for the obligee's attorney fees and costs. The Sureties, appellants herein, issued such a bond for work to be performed by VPFK (a joint venture that included one of the largest construction companies in the world) on a portion of the Brightwater Project governed by the Central Contract.[1] But when VPFK breached the Central Contract by failing to timely complete its work, the Sureties did nothing to remedy the default. Instead, the Sureties denied liability on the County's claim against the Bond they issued by adopting the defenses VPFK had asserted. The Sureties then hired teams of lawyers to defend that decision through more than two years of litigation, including a three-month trial, to the substantial detriment of the County and the public fisc. At the conclusion of that trial, the jury overwhelmingly rejected VPFK's defenses and found that VPFK breached the Central Contract by failing to timely complete its work. It thereby rejected the Sureties' primary reason for denying King County's claim against the Bond.

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[1] This answering brief uses the same abbreviations as King County's answering brief in response to VPFK's opening brief, filed concurrently herewith. In addition, "Surety Br." refers to the Sureties' opening brief. For the Court's convenience, a glossary of abbreviations can be found immediately following the Table of Authorities.

As with any wrongful denial of a claim, the Sureties' decision has consequences. Consistent with the plain language of the Bond and the Central Contract, the trial court entered judgment on the jury's verdict jointly and severally against VPFK and the Sureties. The trial court also awarded attorney fees and costs totaling $14,720,387.19 in favor of King County and against the Sureties as required by two controlling Washington Supreme Court opinions: *Olympic Steamship Co. v. Centennial Insurance Co.*, 117 Wn.2d 37, 53, 811 P.2d 673 (1991), which holds that "[a]n 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"; and *Colorado Structures v. Insurance Co. of the West*, 161 Wn.2d 577, 608, 167 P.3d 1125 (2007), which holds that this same rule of law applies to performance bonds.

The Sureties ask this Court to set aside the trial court's award of attorney fees and costs on two principal grounds, each of which fails. First, the Sureties claim that *Colorado Structures* and *Olympic Steamship* do not apply to cases that arise out of public projects, but they repeatedly misstate or ignore controlling case law. *See* Section IV.B below. Second, the Sureties claim that the trial court abused its discretion when it held that King County was not required to segregate fees incurred in litigating its breach of contract claim against VPFK. This argument fails because King

County could not obtain the benefit of the Bond unless it refuted both VPFK's and the Sureties' arguments regarding VPFK's default. *See* Section IV.C below. Because the trial court properly applied controlling case law to the specific facts of this case, its award of attorney fees and costs should be affirmed. In addition, upon affirmance of the trial court's judgment, King County should also be awarded its attorney fees on appeal, including fees incurred in responding to VPFK's arguments.

II. ISSUES PRESENTED

A. Whether the Sureties have shown that the trial court erred in awarding attorney fees and costs in favor of King County when the County, like the obligee in *Colorado Structures* and the insured in *Olympic Steamship*, was compelled to assume the burden of legal action to obtain the benefit of the Bond the Sureties issued.

B. Whether the Sureties have shown that the trial court abused its discretion in finding that King County was not required to segregate attorney fees incurred in litigating its breach of contract claim against VPFK when the Sureties have consistently adopted and litigated VPFK's defenses and King County could recover damages from the Sureties only if it refuted those defenses.

C. Whether the Sureties should be permitted to litigate any so-called "surety defenses" on remand (if there is such a remand) when the

contract documents preclude the asserted defenses and there is in any event insufficient evidence to support the Sureties' proposed jury instruction regarding such defenses.

D. Whether King County should be awarded attorney fees on appeal under *Olympic Steamship*, *Colorado Structures*, and RAP 18.1, including fees incurred in responding to VPFK's arguments.

III. STATEMENT OF THE CASE

King County incorporates by reference the Statement of the Case in its brief of respondent/cross-appellant in response to VPFK's opening brief. The following additional facts also bear on the issues that the Sureties raise in this appeal:

A. Rather Than Promptly Remedy VPFK's Default, The Sureties Denied King County's Claim Against The Bond.

As fully described in King County's brief of respondent/cross-appellant in response to VPFK's opening brief, VPFK started tunneling later than planned and its progress on tunneling never met its planned production rate because of serious mismanagement and equipment failures. Accordingly, on October 28, 2009, the County provided notice of default to VPFK. Ex. 142. As of that date, VPFK was months behind schedule, both STBMs were inoperable, and VPFK had not even started to repair either STBM. RP 4545-46. The Sureties were notified of the asserted default the next day. CP 6988-94.

Nearly five months later, King County and VPFK entered into an agreement, called the "Interim Agreement," that would allow the County to delete the remaining BT-3 tunneling work from VPFK's contract and hire JDC (the tunneling contractor working on the portion of the tunnel west of BT-3) to finish that work. Ex. 152. The County also subsequently agreed to provide VPFK with a new schedule to complete BT-2 (the remaining portion of VPFK's work) and to pay up to $5 million in incentives if VPFK finished that tunnel by the new deadline. Ex. 155.

The Sureties did not object to the Interim Agreement (which also preserved the County's claim against the Sureties and their defenses to that claim), nor did they object to King County's arrangements for completing the BT-2 tunnel. Instead, they consented to King County's decision to hire JDC while continuing to deny liability on the County's claim against the Bond by adopting the defenses VPFK had asserted. Ex. 161 at 2; Ex. 162 at 20-21.

B. The Sureties Have Consistently Adopted VPFK's Arguments, And They Continue To Do So On Appeal.

Throughout the parties' dispute – both before and after King County filed its lawsuit – the Sureties have adopted VPFK's defenses. In their initial response to King County's request that the Sureties promptly remedy VPFK's default pursuant to the Bond they issued, the Sureties

expressly "reserve[d] all of VPFK's rights, defenses and claims of any nature or description, under the bonded contract, at law or equity." Ex. 3015 at 2. Several months later, the Sureties' position was the same: "VPFK is not in default of its contract obligations and the County has not performed its obligations thereunder. Accordingly, the County's claim is respectfully denied." Ex. 162 at 20-21.

The Sureties continued to assert VPFK's defenses after King County filed this lawsuit. In their answers, the Sureties specifically denied that VPFK "was responsible for the damages claimed by the County." CP 95 ¶ 1, 139 ¶ 1. The Sureties also retained their own experts to testify in support of VPFK's defenses (CP 1435 ¶ 7) and joined each of VPFK's motions for summary judgment against King County. CP 671-74, 5140-47. In their own summary judgment motion, the Sureties likewise argued that "the obligations of the surety under the bond become[] coextensive with those of the principal." CP 4953. And in their trial brief, the Sureties again asserted all of the same defenses as VPFK. CP 9295-323.

This alignment continued through trial. In their proposed jury instructions, the Sureties emphasized that they "are entitled to assert the defenses of VPFK in defense of the County's claim that VPFK breached the contract." CP 7855. The Sureties and VPFK were also represented by *the same attorneys* at trial. CP 1435 ¶ 7. Then, in closing argument,

defense counsel emphasized that the Sureties' consultants had "confirmed what VPFK had been saying all along, that there was no default." RP 7022. Indeed, even now, in their opening brief on appeal, the Sureties expressly adopt VPFK's assignments of error, issues presented, and substantive arguments. Surety Br. 8, 39, 43.

C. The Sureties Are Jointly And Severally Liable For The Amount Of The Jury Verdict And Separately Liable For King County's Attorney Fees And Costs.

After the Sureties denied liability on the County's claim against the Bond by adopting VPFK's defenses, King County sued VPFK and one of the Sureties to recover the additional amounts that the County was required to pay to complete VPFK's work and consequential damages resulting from VPFK's breach. CP 1-14. The other Sureties then intervened as defendants. CP 1433 ¶ 2. Because the Sureties denied liability by expressly adopting VPFK's defenses, King County could obtain the benefit of the Bond only if it established that VPFK's defenses lacked merit. King County established that point at the trial in this matter: after three months of trial proceedings and two weeks of deliberations, the jury overwhelmingly rejected VPFK's defenses and awarded King County a net verdict totaling $129,578,522. CP 1316-29.

Under the Bond and the Central Contract, the Sureties are jointly and severally liable with VPFK for the amount of the jury verdict. By

executing the Bond, the Sureties agreed to be "held and firmly bound and obligated unto . . . King County . . . for the faithful performance of the Agreement." Ex. 3001 at 1. The Bond also incorporated by reference "all of the Contract Documents" between VPFK and King County relating to the project. *Id.* One such document, the General Terms and Conditions for the Central Contract that governed VPFK's work, stated that the Sureties, along with VPFK, "shall be liable for all damages and costs" incurred by the County as a result of VPFK's breach. Ex. 6 at 492 (Art. 8.0 ¶ A.4). In accordance with this contractual language, the trial court instructed the jury that "if it found VPFK liable for damages, the Sureties would be jointly and severally liable for those damages" and entered judgment on the jury's verdict jointly and severally against VPFK and the Sureties. CP 4487 ¶ 11, 4536-39.

Because King County was compelled to assume the burden of legal action to obtain the benefit of the Bond the Sureties issued, it filed a post-trial motion for attorney fees and costs. For the reasons set forth in the argument below, the trial court concluded that King County was entitled to recover its fees and costs. CP 4485-91. Although the amount of the trial court's award ($14,720,387.19 (CP 4490 ¶ 26)) is substantial, the trial court correctly noted that "[D]efendants do not dispute the reasonableness

of the amounts requested." CP 4487 ¶ 9. Nor do the Sureties do so on appeal.

IV. ARGUMENT

A. Standard Of Review

"A party's entitlement to attorney fees is an issue of law" and is therefore "reviewed de novo." *Colo. Structures*, 161 Wn.2d at 586. Conversely, the Court reviews for abuse of discretion the trial court's ruling that King County was not required to segregate fees incurred in litigating its breach of contract claim against VPFK. *See MP Med. Inc. v. Wegman*, 151 Wn. App. 409, 426-27, 213 P.3d 931 (2009). In addition, "Washington Courts universally agree" that the reasonableness of an attorney fee award is also reviewed "for an abuse of discretion" *Gander v. Yeager*, 167 Wn. App. 638, 645, 282 P.3d 1100 (2012).

Because the trial court issued detailed findings of fact and conclusions of law regarding King County's motion for attorney fees (CP 4485-91), the standard of review is especially deferential. Where, as here, "a party challenges a trial court's findings of fact and conclusions of law, we limit our review to determining whether substantial evidence supports the findings and whether those findings, in turn, support its legal conclusions." *Scott's Excavating, LLC v. Winlock Props., LLC*, 176 Wn. App. 335, 341, 308 P.3d 791 (2013). The *Scott's* court added: "This is a

deferential standard, which views reasonable inferences in the light most favorable to the prevailing party." *Id.* at 342.

B. The Trial Court Did Not Err In Awarding Attorney Fees And Costs In Favor Of King County.

1. King County Was Entitled To Recover Its Attorney Fees And Costs Under *Colorado Structures* and *Olympic Steamship* Because It Was Compelled To Assume The Burden Of Legal Action To Obtain The Benefit Of The Bond The Sureties Issued.

Addressing the issue of King County's entitlement to attorney fees and costs, the trial court found that "King County proved its default claim and responded to Defendants' wide-ranging claims and defenses," that "the jury returned a verdict in favor of King County, awarding $155,831,371 in damages," and that the jury had been instructed that "if it found VPFK liable for damages, the Sureties would be jointly and severally liable for those damages." CP 4487 ¶¶ 9-11. Turning to the legal issue presented by King County's request for attorney fees and costs, the trial court held: "As a matter of law, King County is entitled to *Olympic Steamship* fees from the Sureties." *Id.* ¶ 13.

The trial court's analysis is both factually and legally sound. Factually, King County successfully established that the Sureties wrongfully denied liability on the County's claim against the Bond by adopting the defenses VPFK had asserted: the jury rejected those defenses, and the trial court entered judgment on the jury's verdict jointly

and severally against VPFK and the Sureties. CP 4485-91, 4536-39. Legally, the trial court cited two opinions in support of its holding: *Olympic Steamship* and *Colorado Structures*. CP 4487 ¶ 13. As set forth below, the trial court correctly applied those opinions to King County's claim against the Sureties and correctly concluded that King County was entitled to recover its attorney fees and costs under Washington law.

In *Olympic Steamship*, the Supreme 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 and has been cited repeatedly as the basis for an award of attorney fees in cases involving insurance disputes.[2]

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[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.*

In *Colorado Structures*, the Supreme Court squarely held that this same rule of law applies to performance bonds. Rejecting the defendant's argument that performance bonds are somehow different from a traditional insurance policy with regard to legal remedies and enforcement, the court explained: "given the underlying principles of *Olympic Steamship* and the nature of a performance bond, which guarantees the performance of the principal, we fail to find a material distinction. Indeed, all surety bonds are regarded as 'in the nature' of insurance contracts and controlled by the rules of interpretation of such contracts." 161 Wn.2d at 598.

Like its holding in *Olympic Steamship*, the court's holding in *Colorado Structures* is premised on several complementary considerations. First, the court relied on the disparity of power at the point in time when an event occurs that arguably triggers the surety's obligation to make payments. *Id.* at 602. The court noted that this disparity "is compelling" and that the "obligee has no leverage over the surety to compel payment, except litigation." *Id.* The court added: "If the transaction costs of litigation are too high relative to the bond, obligees will simply cut their losses." *Id.*

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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).

Second, the court emphasized the importance of providing an economic incentive for sureties to either promptly complete the principal's work or pay the obligee. The court explained that "[i]f the maximum risk to the surety is the penal amount of its bond, a surety has nothing to lose." *Id.* The court added: "Without the application of *Olympic Steamship* and awarding attorney fees in addition to the policy limits of a surety bond when appropriate, an insurer would have absolutely no incentive to refrain from litigation over even the most clear coverage provisions." *Id.* at 607.

Lastly, the court also held that "when an insurer unsuccessfully contests coverage, it has placed its interests above the insured. Our decision in *Olympic Steamship* remedies this inequity by requiring that the insured be made whole." *Id.* (internal quotation marks and citation omitted). The court applied this consideration to the parties before it and concluded that the obligee, like the policyholder in *Olympic Steamship*, should be awarded attorney fees so as to "be made whole." *Id.* For this reason too, the court concluded: "*Olympic Steamship* attorney fees apply to performance bonds." *Id.* at 608.[3]

[3] This holding echoes prior case law applying *Olympic Steamship* to fiduciary bond obligations. *See Estate of Jordan v. Hartford Accident & Indem. Co.*, 120 Wn.2d 490, 413-14, 844 P.2d 403 (1993); *Axess Int'l Ltd. v. Intercargo Ins. Co.*, 107 Wn. App. 713, 720-21, 30 P.3d 1 (2001).

The Washington Supreme Court has also extended the *Olympic Steamship* rule to litigation expenses, including expert witness fees. In *Panorama Village Condominium Owners Ass'n Board of Directors v. Allstate Insurance Co.*, 144 Wn.2d 130, 144, 26 P.3d 910 (2001), the court explained that failure to reimburse such expenses would "eat up whatever benefits the litigation might produce" and would thereby undermine a central purpose of *Olympic Steamship*. That holding, too, is now firmly ingrained in Washington law,[4] and the Sureties do not argue otherwise.

The Washington Supreme Court's holding in *Colorado Structures* requires that King County recover its attorney fees against the Sureties. Likewise, under *Panorama Village*, King County is also entitled to recover its litigation expenses. Any other result, as the Washington Supreme Court noted, would "eat up" the benefits of the litigation and undermine a central purpose of awarding attorney fees where, as here, a surety compels an obligee to assume the burden of legal action to obtain the benefit of a performance bond. *Id.* The trial court did not err in so holding. CP 4487-88 ¶¶ 13, 14.

Because the Washington Supreme Court's holding in *Colorado Structures* is directly on point, the Court need not consider this issue any

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[4] *See Port of Seattle v. Int'l Union of Operating Eng'rs, Local 286*, 164 Wn. App. 307, 325, 264 P.3d 268 (2011); *Ellis Ct. Apartments Ltd. P'ship v. State Farm Fire & Cas. Co.*, 117 Wn. App. 807, 819, 72 P.3d 1086 (2003).

further. If the Court also examines the *reasoning* in *Colorado Structures* and *Olympic Steamship*, the result is the same. When King County sent a letter of default to VPFK, the situation was dire. VPFK was months behind schedule, both STBMs were inoperable, and VPFK had not even started to repair either STBM. RP 4545-46. VPFK subsequently estimated that it would substantially complete its work more than three years late (in February 2014) and that it was uncertain it could complete the mining at all. Ex. 153 at 3. What King County needed from the Sureties was prompt performance or payment, not vexatious, time-consuming, and expensive litigation.

It is equally clear that the Sureties placed their own interests above those of King County. Rather than promptly hire a contractor to complete VPFK's work or pay King County, the Sureties insisted that they needed to conduct an extended and time-consuming investigation. Ex. 158 at 5. When the Sureties substantially completed that investigation – *over four months later* – they still did not offer any assistance; instead, they simply denied the County's claim by adopting the defenses VPFK had asserted. Ex. 162 at 20-21. Then, as the trial court noted, the Sureties continued to assert VPFK's defenses "[t]hroughout the litigation." CP 4487 ¶ 12. Throughout the project, the Sureties have consistently put their own interests ahead of King County's.

Finally, as in *Colorado Structures* and *Olympic Steamship*, King County should be awarded attorney fees to "be made whole." *Colo. Structures*, 161 Wn.2d at 607. As the trial court found, King County provided "detailed documentation" in support of its fee request, and the amount requested for fact discovery, expert discovery, and trial was "reasonable and necessary," particularly given the magnitude of the case, "Defendants' vast demands for production of documents," and "the wide-ranging claims asserted by Defendants." CP 4486-87 ¶¶ 3, 6-7, 9. For all these reasons, the trial court did not err in awarding attorney fees and costs in favor of King County in accordance with *Colorado Structures*, *Olympic Steamship*, and *Panorama Village*.

2. Contrary To The Sureties' Arguments, There Is No Equitable Or Statutory Basis To Depart From The Washington Supreme Court's Holding In *Colorado Structures*.

The Sureties do not dispute – nor could they – that King County was compelled to assume the burden of legal action to obtain the benefit of the Bond the Sureties issued and that King County did so successfully. Instead, they assert that "*Colorado Structures* does not apply to cases arising out of public works contracts, in which fee awards are governed by statute." Surety Br. 19. As set forth below, the Sureties misstate the law.

As an initial matter, the Sureties emphasize that "[i]n *Colorado Structures*, a bare majority of the Supreme Court extended the *Olympic Steamship* exception to a general contractor's action against a subcontractor's surety for payment under a performance bond ...." Surety Br. 20. A "bare majority" is still controlling. *See, e.g., MP Med.*, 151 Wn. App. at 417 ("We are bound by the decisions of our state Supreme Court and err when we fail to follow them."); *1000 Va. Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 578, 146 P.3d 423 (2006) (reversing Court of Appeals decision that attempted to limit Supreme Court decision on claim accrual).[5]

The Sureties' attempt to distinguish or narrow *Colorado Structures* is similarly without merit. The Sureties claim that *Colorado Structures* involved a private construction contract whereas the Bond here was "to secure performance of a *public works* contract for the benefit of a public agency as project owner." Surety Br. 21 (emphasis in original). The Sureties do not explain, nor can they, why a private obligee should be entitled to recover attorney fees under *Colorado Structures* and *Olympic Steamship* while a governmental obligee – city, county, or state – cannot.

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[5] Additionally, the Washington Supreme Court has recognized that a plurality decision is controlling when the concurring justices state that they agree with the holding. *See In re Francis*, 170 Wn.2d 517, 532 n.7, 242 P.3d 866 (2010). In that circumstance, "the holding is the narrowest ground upon which a majority agreed." *Id.*

If anything, there should be *greater* protection when the public fisc is involved.[6]

Nor is there any proper basis to preclude King County from recovering its attorney fees and costs under *Colorado Structures* and *Olympic Steamship* simply because, as the Sureties claim (Surety Br. 21), a governmental entity can in some cases *also* recover attorney fees under RCW 4.84.250-.280 as modified by RCW 39.04.240. This argument improperly attempts to limit the role of courts in crafting equitable remedies. Addressing that issue, the Washington Supreme Court recently recognized "the long standing history of Washington courts exercising equity powers in spite of legislative enactments that may have spoken to an area of law, but did so incompletely." *In re Custody of B.M.H.*, 179 Wn.2d 224, 242, 315 P.3d 470 (2013) (internal quotation marks, citation, and brackets omitted). The court in *B.M.H.* also recognized that "[i]t is a well-established principle of statutory construction that the common law . . . ought not to be deemed repealed, unless the language of a statute be clear and explicit for this purpose." *Id.* at 241-42 (internal quotation marks, citation, and brackets omitted).

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[6] *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.").

In *Potter v. Washington State Patrol*, 165 Wn.2d 67, 196 P.3d 691 (2008), the court likewise held that "[a] statute in derogation of the common law must be strictly construed and no intent to change that law will be found, unless it appears with clarity." 165 Wn.2d at 77 (internal quotation marks and footnote omitted).[7] Accordingly, when the legislature has intended to abrogate the common law, it has done so explicitly. *See, e.g., State v. Ortega*, 177 Wn.2d 116, 125, 297 P.3d 57 (2013) ("unambiguous language" of RCW 10.31.100 abrogated common law rules allowing teams of officers to make misdemeanor arrests on shared information); *State v. Pub. Util. Dist. No. 1 of Douglas Cnty.*, 83 Wn.2d 219, 222, 517 P.2d 585 (1973) ("plain and unambiguous" language of RCW 54.16.220 abrogated common law rules regarding grant of easement by public utility district).

The Sureties do not even attempt to satisfy these legal requirements. Nor can they, because there is nothing in RCW 39.04.240 indicating that the legislature intended to abrogate the equitable power of courts to award attorney fees under common law principles such as those set forth in *Olympic Steamship*, *Colorado Structures*, and the scores of

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[7] *See also State v. Kurtz*, 178 Wn.2d 466, 477, 309 P.3d 472 (2013) ("When a question arises as to whether a statute abrogates the common law, there is likely to be overlap. But under our holdings, the relevant question is whether the common law and statute are inconsistent or the legislature clearly intended to deviate from the common law." (citation omitted)).

cases following and applying those opinions. Likewise, there is nothing in RCW 39.04.240 establishing that this statutory modification of RCW 4.84.250-.280 is the *exclusive means* for a governmental entity to recover attorney fees in a dispute over a performance bond in a case arising out of a public project. For this reason alone, the Sureties' reliance on RCW 39.04.240 is entirely misplaced.[8]

The Sureties' argument is also contrary to controlling case law, including *Colorado Structures* and *Olympic Steamship*. In both cases, the plaintiff also had a *contractual* right to recover attorney fees. *Colo. Structures*, 161 Wn.2d at 597 (trial court awarded fees "under the contract"); *Olympic Steamship*, 117 Wn.2d at 52 (fees recoverable "pursuant to Supplementary Payments para. D of [Olympic's] policy"). Likewise, the plaintiff in both cases also could have recovered statutory attorney fees under RCW 4.84.080. Despite the contractual and statutory entitlement to attorney fees in both cases, the Washington Supreme Court awarded *Olympic Steamship* fees. *Olympic Steamship*, 117 Wn.2d at 53; *Colo. Structures*, 161 Wn.2d at 608. This case is no different.

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[8] Further, even if the legislature had intended to limit *Olympic Steamship* or *Colorado Structures*, such an intrusion into judicial power over procedural remedies would likely be invalid. *See Sackett v. Santilli*, 146 Wn.2d 498, 504, 47 P.3d 948 (2002) ("It is a well-established principle that the Supreme Court has implied authority to dictate its own rules, even if they contradict rules established by the Legislature." (internal quotation marks and citation omitted)).

The Washington Supreme Court's opinion in *McGreevy v. Oregon Mutual Insurance Co.*, 128 Wn.2d 26, 904 P.2d 731 (1995), also addresses this issue. The insurer there, much like the Sureties here, argued that the Washington legislature had "preempted the field of determining when attorney fees may be awarded in controversies over insurance coverage" by "specifically provid[ing] for attorney fees in cases where a Consumer Protection Act violation is found to have been committed by an insurance company." 128 Wn.2d at 38 (citing RCW 19.86.170). The court rejected that argument as follows:

> Significantly, there is nothing in the language of the Consumer Protection Act, and we know of no other authority, for the proposition that the Legislature intended to make that Act the exclusive means to recover attorney fees in a case involving a dispute over the coverage of an insurance policy. Consequently, we are satisfied that the Legislature intended the Consumer Protection Act to be only one avenue to obtain fees, and not the exclusive means for an aggrieved party to obtain fees in actions involving insurance coverage.

Id. at 38-39. The insurer asserted a similar argument in *Gossett v. Farmers Insurance*, 82 Wn. App. 375, 917 P.2d 1124 (1996). The court responded: "This argument is resolved by *McGreevy*, which held that the Legislature has not preempted the field . . . by specifically providing for attorney fees in the Consumer Protection Act." 82 Wn. App. at 389.

This Court applied the same legal principles and reached the same result in *Axess International Ltd. v. Intercargo Insurance Co.*, 107 Wn.

App. 713, 30 P.3d 1 (2001). The defendant there argued that the *Olympic Steamship* rule was preempted by federal maritime law, which generally limits fee awards "to a bad faith context." 107 Wn. App. at 722, 726. Similar to the analysis in *McGreevy* and *Gossett*, this Court disagreed, in part, because "nothing in the [federal] statute or regulations prohibits a state fee award." *Id.* at 724. As discussed above, the same reasoning and result apply because there is nothing in RCW 39.04.240, nor is there anything in RCW 4.84.250-.280, establishing that this statutory scheme is the "exclusive means" to recover attorney fees in a dispute over a performance bond. Instead, that is "one avenue," but not the only avenue, for an obligee such as King County to recover its fees.[9]

In contrast, there is no case law – and the Sureties have not cited any – holding that *Colorado Structures* and *Olympic Steamship* do not apply to cases that arise out of public projects. The cases cited by the Sureties (Surety Br. 23) do not support such an argument because each case involved a clear statutory conflict.[10] Here, in contrast, as the above

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[9] Moreover, as the Sureties note, the statute only applies if a governmental entity recovers more in litigation than an amount offered in settlement. Surety Br. 21-23. Because King County never made such an offer (as the Sureties also admit), this entire statutory scheme is inapplicable.

[10] In *Longview Fibre Co. v. Cowlitz County*, 114 Wn.2d 691, 698-99, 790 P.2d 149 (1990), the court refused to grant equitable relief that was expressly barred by a Washington statute requiring written notice of any alleged over-taxation. Similarly, in *Williams v. Duke*, 125 Wash. 250, 253-54, 215 P. 372 (1923), the court refused to grant equitable relief that was precluded by a statute barring note makers from bringing offset

discussion confirms, there is no such conflict. Given the absence of any statutory conflict, as well as the limited scope and effect of RCW 39.04.240, the Court should squarely reject the Sureties' argument that governmental obligees, unlike private obligees, cannot recover attorney fees and costs under *Colorado Structures* and *Olympic Steamship*.

Next, the Sureties argue that *Colorado Structures* and *Olympic Steamship* should not be applied to King County's claim because "[t]here was no disparity of bargaining power here." Surety Br. 24. The Washington Supreme Court acknowledged this argument in *Colorado Structures* and rejected it. 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 relevant is the disparity of enforcement power*." 161 Wn.2d at 603 (emphasis added). In other words, an obligee faced with a half-finished project has no leverage to force a surety to perform short of litigation unless courts award attorney fees in that circumstance. The Sureties ignore that critical consideration.

The Sureties also ignore the other considerations (in addition to disparity of enforcement power) that the Washington Supreme Court

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claims against holders in due course. Lastly, in *Kingery v. Department of Labor & Industries*, 80 Wn. App. 704, 710-11, 910 P.2d 1325 (1996), the Court of Appeals concluded that the express statutory limitation regarding appeals from decisions of the Board of Industrial Appeal conflicted with and therefore superseded CR 60(c).

identified in *Colorado Structures* and *Olympic Steamship*: (a) to encourage the prompt payment of claims, and (b) to ensure that obligees are "made whole." *See* discussion on page 13 above. Even if the Court were to accept the Sureties' argument that *Colorado Structures* and *Olympic Steamship* should be limited to governmental entities that somehow lack bargaining power, these additional considerations, discussed and applied above, provide ample grounds to award attorney fees and costs to King County.

Lastly, the Sureties also claim that allowing a fee award here would be "inequitable" for two reasons, the first of which is that "[t]o allow the County to recover under these circumstances would be tantamount to enforcing a unilateral fee provision," which the Sureties claim is "fundamentally unfair." Surety Br. 26. The Washington Supreme Court rejected that same argument in *McGreevy*, where an amicus, like the Sureties here, criticized *Olympic Steamship* as "fundamentally unfair, suggesting that it is 'one-sided' in that it authorizes an award of attorney fees exclusively to insureds." 128 Wn.2d at 37. The court responded: "This criticism is unwarranted because there is precedent for such 'one-sided' attorney fee provisions in statutes." *Id.* at 37-38. The court added that because such one-sided fee provisions have "not been invalidated as being fundamentally unfair, we are satisfied that an award of attorney fees

based on equitable principles to only one side should also be sustained." *Id.* at 38. The same reasoning applies here.

The second asserted reason that allowing a fee award here would be "inequitable," according to the Sureties, is that neither the Central Contract nor the Bond "afforded VPFK or the Sureties notice that they could be liable for the County's fees." Surety Br. 26-27. That argument, too, is contrary to law. In *Washington Greensview Apartment Associates v. Travelers Property Casualty Co. of America*, 173 Wn. App. 663, 295 P.3d 284 (2013), the court recognized: "It has long been held to be the universal law that the laws governing citizens in a state are presumed to be incorporated in contracts made by such citizens, because the presumption is that the contracting parties know the law." 173 Wn. App. at 680 (alterations and citations omitted). The Supreme Court decided *Olympic Steamship* in 1991 and *Colorado Structures* in 2007 – long before the Sureties denied liability on the County's claim. Ex. 162 at 20-21. Thus, to the extent notice of potential liability is required (a questionable assertion at best), the Sureties had ample notice that they could be liable for the County's attorney fees and costs if they improperly denied the County's claims against the Bond.[11]

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[11] The Sureties also argue that "the County did not make a claim for fees in its complaint." Surety Br. 27. To the extent relevant to the Court's analysis, the County's pleading expressly requested "such other relief the Court deems just and equitable" (CP

Nor does it matter that "[t]he burden of the fee award will ultimately fall on VPFK, which must reimburse the Sureties for payments to the County," as the Sureties also claim. Surety Br. 27. The Washington Supreme Court rejected a similar argument in *Colorado Structures*. Like the Sureties here, the dissent in *Colorado Structures* asserted that "[a]pplying *Olympic Steamship* fees to litigation arising from performance bond claims may be unjust to the principal, who must ultimately pay the attorney fees ...." 161 Wn.2d at 630 (Madsen, J., dissenting). The majority found this asserted difference between insurance contracts and performance bonds "immaterial" and added that "the risk of a wrongful decision falls on the surety, not the principal." *Id.* at 605 n.15. Consistent with that analysis, no court has ever held – and the Sureties cite 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.

In any event, VPFK – just like the Sureties – is presumed to know the law. It nevertheless adopted a scorched-earth litigation strategy, which included:

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14), which would necessarily include attorney fees and costs under *Colorado Structures* and *Olympic Steamship*. *See, e.g., Colo. Structures*, 161 Wn.2d at 603 (*Olympic Steamship* fees awarded based on "principles of equity").

- filing eight motions to delay, dismiss, or continue the case (CP 1089, 1419-20, 1445 ¶ 34, 7406-20);
- refusing to clearly articulate its claims and defenses, leading the trial court to remark "I have never had as much trouble figuring out what people's claims are and drafting jury instructions as I am having in this case" (RP 6432);
- requiring King County to take 15 depositions in Europe rather than making witnesses available for deposition in Seattle (CP 1446 ¶ 36); and
- failing to produce documents, answer interrogatories, and make witnesses available for deposition until ordered to do so – in *numerous* instances – by the special master, Judge Robert Alsdorf (ret.) (CP 1420-21, 1446 ¶¶ 37-38).[12]

The Sureties, for their part, joined in these delay tactics; indeed, both VPFK and the Sureties were represented at trial *by the same attorneys*. CP 1435 ¶ 7. On this record, applying *Colorado Structures* and *Olympic Steamship* is neither "harsh" nor "inequitable." Surety Br. 28. For that reason too, the trial court did not err in awarding attorney fees and costs in favor of King County.

[12] Like the trial court, the special master concluded the "VPFK's refusal to tie itself down, to identify and enumerate all [alleged differing site conditions] it currently believes support its counterclaim in this litigation, is unreasonable." CP 1443-44 ¶ 31.

C. The Trial Court Did Not Abuse Its Discretion In Finding That King County Was Not Required To Segregate Fees Incurred In Litigating Its Breach Of Contract Claim Against VPFK.

1. The Trial Court Correctly Held That King County Was Not Required To Segregate Fees Because The Sureties Consistently Adopted And Litigated VPFK's Defenses And King County Could Recover Damages From The Sureties Only If It Refuted Those Defenses.

Turning to the issue of segregation of attorney fees, the trial court found that "[t]hroughout the litigation, the Sureties adopted VPFK's defenses." CP 4487 ¶ 12. It then cited several controlling Washington opinions (discussed below) before concluding:

> 19. King County's claim of default against VPFK and the Sureties involved a common core of facts. Since the Sureties denied coverage and adopted all of VPFK's defenses, the claims could not and were not required to be segregated.
>
> 20. The Sureties adopted all of VPFK's defenses in this case, including claims for various differing site condition (DSC) claims, which, if provided in their entirety, would defeat King County's claim of default. The work King County did prosecuting its default claim against VPFK was also directly attributable to the Sureties, and the fee award cannot reasonably be segregated as between VPFK and the Sureties.

CP 4489 ¶¶ 19-20. Based on this analysis, the trial court rejected the Sureties' segregation argument and awarded attorney fees and costs totaling $14,720,387.19 in favor of King County and against the Sureties. CP 4490 ¶ 26.

As noted on pages 9-10 above, the applicable standard of review is highly deferential. *See Scott's*, 176 Wn. App. at 341-42; *MP Med.*, 151

Wn. App. at 426-27. That is especially true where, as here, a case is complex. In such cases, the Washington Supreme Court has observed: "[I]t is the trial judge who has watched the case unfold and who is in the best position to determine which hours should be included in the [fee award]. That is why the law requires us to defer to the trial court's judgment on these issues." *Chuong Van Pham v. Seattle City Light*, 159 Wn.2d 527, 540, 151 P.3d 976 (2007) (citation omitted). The trial court here rejected the Sureties' argument regarding segregation of attorney fees after watching the case unfold over two-plus years of pre-trial proceedings and three months of trial. As set forth below, it did not abuse its discretion or otherwise err in so ruling.

As an initial matter, the trial court correctly found that "[t]hroughout the litigation, the Sureties adopted VPFK's defenses." CP 4487 ¶ 12. The record amply supports that finding, as Section III.B above shows. Indeed, the Sureties concede that point by failing to assign error to the trial court's finding. *See* Surety Br. 4-7. As the trial court further noted, "[t]he defendants did not dispute the amount of fees requested." CP 4488 ¶ 17. The Sureties do not assign error to that pronouncement either. *See* Surety Br. 4-7.

The trial court also correctly identified and applied controlling case law. In *Fiore v. PPG Industries, Inc.*, 169 Wn. App. 325, 352, 279 P.3d

972 (2012), which the trial court cited in paragraph 20 of its ruling (quoted above), this Court decided whether Fiore could recover attorney fees incurred in an arbitration before prevailing in court on his claims under the Minimum Wage Act. The Court concluded that the fees at issue were recoverable because the defendant had "moved to arbitrate the case" and it was "necessary for [Fiore's attorneys] to engage in that process." *Id.* The Court therefore rejected the defendant's argument that such fees should be segregated. *Id.* at 352-53.

The Court also addressed whether Fiore could recover attorney fees incurred for "unsuccessful work" in litigating a protective order. *Id.* at 352. The Court held that "where the plaintiff's claims for relief involve a common core of facts or are based on related legal theories, a lawsuit cannot be viewed as a series of discrete claims and, thus, the claims should not be segregated in determining an award of fees." *Id.* (alterations and citations omitted). The Court applied that rule to Fiore – and allowed him to recover fees incurred in litigating the protective order – because he had successfully pursued a single claim for overtime wages under the Minimum Wage Act. *Id.* at 352-53.

The trial court here also cited *Bloor v. Fritz*, 143 Wn. App. 718, 180 P.3d 805 (2008) (CP 4489 ¶ 21), which provides further support for its analysis. The court in *Bloor* decided whether Bloor could recover from

two defendants (the Fritzes) fees incurred in litigating an "unsuccessful claim" against another defendant (LAM Management). 143 Wn. App. at 746-47. The court recognized that a trial court "may award the plaintiff all its fees" if the fees for recoverable and nonrecoverable claims are "inseparable" and held that the trial court did not abuse its discretion in not segregating the attorney fees at issue because "[t]he claims arose out of the same set of facts and involved interactions between the defendants." *Id.* at 747. Numerous other courts have similarly held.[13]

Applying these legal principles to King County's claims, it is clear that King County was not required to segregate fees incurred in litigating its breach of contract claim against VPFK. As in *Fiore* and other similar cases, because the Sureties adopted VPFK's claims and defenses, it was

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[13] *See, e.g., Blair v. Wash. State Univ.*, 108 Wn.2d 558, 572, 740 P.2d 1379 (1987) (trial court did not abuse its discretion in awarding attorney fees without segregation of fees for unsuccessful claims where "the evidence presented and attorney fees incurred for the successful and unsuccessful claims were inseparable"); *Broyles v. Thurston Cnty.*, 147 Wn. App. 409, 451, 195 P.3d 985 (2008) (trial court did not abuse its discretion in awarding fees incurred in previously dismissed lawsuit; "it was appropriate to treat the case for what it was, one continuous process of reaching judgment"); *Ives v. Ramsden*, 142 Wn. App. 369, 397 n.14, 174 P.3d 1231 (2008) (affirming award of unsegregated attorney fees where trial court orally ruled that legal issues presented by all claims "were the same"); *Ethridge v. Hwang*, 105 Wn. App. 447, 461, 20 P.3d 958 (2001) ("Because nearly every fact in this case related in some way to all three claims, segregation of the fee request was not necessary and the trial court did not abuse its discretion in awarding fees as it did."); *Abels v. Snohomish Cnty. Pub. Util. Dist. No. 1*, 69 Wn. App. 542, 557-58, 849 P.2d 1258 (1993) ("Our review of the record tells us there is no practical way of segregating some of the employees' claims for purposes of awarding attorney's fees because the case was presented as a single claim relating to accrued vacation time. Under these circumstances, we find the trial court did not abuse its discretion in awarding reasonable attorney's fees based on services rendered by counsel in presenting the entire case.").

"necessary" for King County's lawyers to litigate those claims and defenses in order to prevail against the Sureties. As in *Bloor* and other similar cases, King County's claim against the Sureties and its claim against VPFK arose out of the same set of facts, are based on related legal theories, involve interactions between these defendants, and are ultimately inseparable because the Sureties made them so. For all these reasons, the trial court did not abuse its discretion (or otherwise err) in finding that "the fee award cannot reasonably be segregated as between VPFK and the Sureties." CP 4489 ¶ 20.

2. The Sureties' Arguments Regarding Segregation Of Attorney Fees Are Both Legally And Factually Flawed.

The Sureties' lead argument regarding segregation of attorney fees is that this lawsuit involved a "noncoverage dispute" and that "[w]hen a single action combines both coverage and noncoverage disputes, the successful claimant may recover reasonable *Olympic Steamship* fees for litigating only the part of the action that resolved the coverage dispute." Surety Br. 31. This argument ignores the many cases, cited above, holding that segregation of attorney fees is *not required* where, as here, the underlying claims are related and/or the fees are inseparable. That body of law is controlling here, as the trial court correctly ruled. CP 4485-92.

In addition, the Sureties misread Washington law regarding the limited circumstances in which an insurer can avoid liability for attorney fees under *Olympic Steamship*. In *Colorado Structures*, the court explained:

> Generally, when an insured must bring suit against its own insurer to obtain a legal determination interpreting the meaning or application of an insurance policy, it is a coverage dispute. This case *would be* in the nature of a claims dispute if West [the surety] had *agreed to pay* under the bond but had a factual dispute with Structures [the obligee] as to the amount of the payment.

161 Wn.2d at 606 (second emphasis added). In *Axess International*, this Court likewise held: "Fees are awarded under *Olympic Steamship* where the insurer unsuccessfully denies coverage, not where the insurer *acknowledges coverage* but disputes the value of the claim." 107 Wn. App. at 721 (emphasis added).[14]

As the above cases show, the "claims dispute" exception to *Olympic Steamship* is a narrow one: it applies only if an insurer or a surety *acknowledges coverage* and *agrees to pay* under a policy or bond and *only* disputes the amount of the required payment. *Colo. Structures*, 161 Wn.2d at 606; *Axess Int'l*, 107 Wn. App. at 721. Here too, the

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[14] *See also Nordstrom, Inc. v. Chubb & Son, Inc.*, 54 F.3d 1424, 1437 (9th Cir. 1995) (*Olympic Steamship* "rule has been read broadly by Washington courts, even to include cases in which there is no contractual basis for the awarding of fees. *The only articulated limitation to this rule is that no fees are awarded when the insurer does not dispute coverage, but merely disputes the value of the claim.*" (emphasis added; citation omitted)).

Sureties could have agreed that VPFK was in default and that King County was entitled to recover on the Bond. They chose not to do so and instead *denied* liability, thereby requiring King County to assume the burden of legal action to obtain the benefit of the Bond the Sureties issued. Under Washington law, including *Colorado Structures* and *Axess International*, this is a coverage dispute for which attorney fees are recoverable.

Far from supporting the Sureties' argument, the cases they cite on this point (Surety Br. 30-31) support King County's argument. In *Dayton v. Farmers Insurance Group*, 124 Wn.2d 277, 279, 876 P.2d 896 (1994), attorney fees were not recoverable under *Olympic Steamship* because the insurer "did not dispute liability." In *Solnicka v. Safeco Insurance Co. of Illinois*, 93 Wn. App. 531, 535, 969 P.2d 124 (1999), the insurer likewise "did not deny coverage." The Sureties' reliance on *Condon v. Condon*, 177 Wn.2d 150, 298 P.3d 86 (2013), is equally misguided. That case did not involve a coverage or a claims dispute; instead, the only issue was "a question as to the terms of the settlement." 177 Wn.2d at 167. None of these cases applies here because, as noted, the Sureties *did* dispute liability.

In *Matsyuk v. State Farm Fire & Casualty Co. of Illinois*, 173 Wn.2d 643, 661, 272 P.3d 802 (2012), in contrast, the court held that the

plaintiff *was entitled to recover Olympic Steamship* fees because "coverage was disputed" and the plaintiff had filed suit "to obtain the benefit of the insurance contract." The court reached the same conclusion in *Leingang v. Pierce County Medical Bureau*, 131 Wn.2d 133, 930 P.2d 288 (1977), where the insurer "argued throughout the case that Mr. Leingang did not have coverage for any medical bills which his own [underinsured motorist] carrier would ultimately pay." 131 Wn.2d at 144 (emphasis omitted). That denial of coverage, the court concluded, "comes under the rule of *Olympic Steamship*." *Id.* at 146. So too does the Sureties' denial of King County's claim against the Bond.

The only case cited by the Sureties that required segregation of attorney fees (*Leingang*) is clearly distinguishable. The plaintiff in *Leingang*, in addition to pursuing a coverage claim against its insurer, also pursued a consumer protection act cause of action. *Id.* at 136. The Washington Supreme Court granted summary judgment on that claim in favor of the insurer and therefore awarded fees solely for the declaratory judgment portion of the case, which, as noted above, involved a coverage dispute. *Id.* at 158.

In sharp contrast to the plaintiff in *Leingang*, King County did not pursue another claim against VPFK or the Sureties that was *unrelated* to its coverage claim against the Sureties. Nor did it pursue another claim

without success. Instead, King County *successfully* pursued its breach of contract claim against VPFK and *successfully* refuted VPFK's defenses to that claim (including VPFK's counterclaims). CP 1316-29. King County's success on its breach of contract claim against VPFK was *critical* to its coverage claim against the Sureties. As such, cases like *Fiore* and *Bloor* (discussed above) are controlling here, as the trial court found. CP 4489 ¶¶ 20-21. The Sureties' reliance on *Leingang*, in contrast, is entirely misplaced.[15]

For similar reasons, the Sureties' purported examples of "discrete activities unrelated to coverage" (Surety Br. 37-38) also do not support their argument:

- King County was required to work with its lawyers to respond to VPFK's pre-litigation change order requests and affirmative claims, engage in alternative dispute resolution, and depose witnesses concerning VPFK's claims because the Sureties

[15] The Sureties also cite two cases that *remanded* the issue of segregation of attorney fees to the trial court. Both cases provide further support for King County's arguments. In *Hume v. American Disposal Co.*, 124 Wn.2d 656, 880 P.2d 988 (1994) (Surety Br. 29), the court reiterated that recoverable fees include fees for "time spent on those theories *essential* to the cause of action for which attorney fees are properly awarded." 124 Wn.2d at 673 (alterations and citation omitted; emphasis added). Here, that would include King County's breach of contract claim against VPFK. In *Loeffelholz v. C.L.E.A.N.*, 119 Wn. App. 665, 691, 82 P.3d 1199 (2004) (Surety Br. 28-29, 36-37), the trial court failed to make the required findings regarding segregation of attorney fees. The Court of Appeals therefore remanded the issue to the trial court for further proceedings after noting – as the discussion in the text above confirms – that where "no reasonable segregation of successful and unsuccessful claims can be made, there need be no segregation of attorney fees." 119 Wn. App. at 691 (internal quotation marks and citation omitted). Here, in contrast, the trial court made the required findings and correctly found that "the fee award cannot reasonably be segregated as between VPFK and the Sureties." CP 4487 ¶ 12, 4489 ¶¶ 19-20.

refused to pay another contractor to complete VPFK's work or pay King County.

- King County likewise was required to work with its lawyers to negotiate with JDC to complete a portion of VPFK's work and seek the necessary authorization to do so (including preparing and passing an emergency ordinance) because the Sureties refused to pay another contractor to complete VPFK's work or pay King County.
- For the same reasons – because the Sureties improperly denied King County's claim against the Bond – King County paid various expert witnesses to prepare reports and testify regarding VPFK's and the County's claims. As noted previously, King County could not obtain the benefit of the Bond unless it established its claims and refuted VPFK's defenses (which the Sureties expressly adopted).
- As to work related to "construction problems on the BT-1 tunnel" (Surety Br. 37), the only evidence cited by the Sureties that references that work is the Sureties' *own* trial court briefing. CP 4334. Nonetheless, the BT-1 work was relevant to VPFK's concurrent delay argument. *See* King County's answering brief in response to VPFK's opening brief at 72-84. As noted, King County was required to refute that argument – along with *all* of VPFK's other defenses and counterclaims – to obtain the benefit of the Bond.

And of course, as the trial court noted, the Sureties did not sit idly by while VPFK and King County litigated these issues. To the contrary, it is *undisputed* that "[t]hroughout the litigation, the Sureties adopted VPFK's defenses." CP 4487 ¶ 12.

The Sureties nevertheless claim that "there is no evidence that the Sureties played any significant role in the lengthy trial." Surety Br. 32. That assertion is disingenuous at best. The same trial counsel represented

VPFK and the Sureties on every day of the trial. CP 1435 ¶ 7. In addition to adopting VPFK's defenses, 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 (still represented by the same lawyers as VPFK) that their consultants had "confirmed what VPFK had been saying all along, that there was no default." *See* discussion on pages 5-7 above; RP 7022.

Finally, the Sureties' argument regarding segregation of attorney fees also fails on policy grounds. If the Court were to accept the Sureties' argument, sureties would have little if any incentive to promptly perform or pay because they would only be liable for a small fraction of the obligee's attorney fees (the portion regarding interpretation of the surety bond and any related contract documents). Likewise, the obligee would not be made whole for those fees, which would then eat up the benefits of the litigation. Such a result is flatly inconsistent with controlling case law, including *Colorado Structures*, *Olympic Steamship*, and *Panorama Village*. For this reason as well, the trial court did not abuse its discretion (or otherwise err) in rejecting the Sureties' arguments regarding segregation of attorney fees.

D. The Trial Court Did Not Abuse Its Discretion In Rejecting The Sureties' So-Called "Surety Defenses," And No Such Defenses Should Be Permitted If The Matter Is Remanded.

Finally, the Sureties argue that "[i]f this Court reverses the Judgment against VPFK, then the Sureties will also be entitled to reversal of the Judgment holding them jointly and severally liable with VPFK for the County's damages." Surety Br. 39. King County does not disagree with that assertion, though it obviously does not agree that there is any proper basis to vacate or reverse the underlying judgment.

Moving beyond that narrow point, the Sureties also assert that "[o]n any remand the Sureties are entitled to a resolution of their independent defenses to liability on the bond." *Id.* That argument fails because the Sureties have *no* independent defenses. The parties' agreement could not be more clear on that point. First, the Bond expressly "incorporat[es] herein by this reference all of the Contract Documents." Ex. 3001 at 1. Second, the General Terms and Conditions for the Central Contract – one of the contract documents that the Bond incorporates – states in relevant part:

> *The Contractor and its sureties shall be liable for all damages and costs*, including but not limited to: (1) compensation for architect and engineering services and expenses made necessary thereby; (2) any other costs or damages incurred by the County in completing and/or correcting the Work; and (3) any other special, incidental or consequential damages incurred by the County *which results or arises [sic] from the breach or termination for default.*

Ex. 6 at 492 (Art. 8.0 ¶ A.4) (emphases added). As the italicized text makes clear, the Sureties are liable for *all damages and costs*, including consequential damages, resulting from VPFK's "breach *or* termination for default." *Id.* (emphasis added). Applying this contractual mandate, the trial court *correctly* instructed the jury: "If you find that VPFK is liable for breach of contract, then you also must find the Sureties liable for breach of their obligations under the Bond." CP 9112.

The Sureties' contrary arguments lack merit. The Sureties argue, for example, that the Bond "contained no language committing the Sureties to compensate the County for all consequential damages flowing from VPFK's claimed breach of contract." Surety Br. 40. But while the Bond itself does not include such language, it incorporates by reference the Central Contract, and that agreement – as quoted above – *does* include such language. Ex. 6 at 492 (Art. 8.0 ¶ A.4).

The Sureties misrepresent the Central Contract. Citing Article 8, paragraphs A.2 and A.3.c, the Sureties claim that King County could require them to perform certain obligations under the Bond only "[u]pon termination." Surety Br. 42. But even if that is a correct interpretation of paragraphs A.2 and A.3.c, the relevant provision with regard to liability for damages is paragraph *A.4*, which is quoted above. That provision, as noted, expressly applies to "all damages and costs" – including

"consequential damages" (Surety Br. 41) – that result or arise from "breach *or* termination for default." Ex. 6 at 492 (Art. 8.0 ¶ A.4) (emphasis added). The Sureties ignore this clear contractual obligation to pay such damages arising from VPFK's breach of the parties' agreement.

Because the Central Contract clearly states that VPFK and the Sureties shall be liable for consequential damages (which the Sureties concede include damages for delay (Surety Br. 41)), the cases cited by the Sureties on this point are inapposite. In both of those cases – *Downingtown Area School District v. International Fidelity Insurance Co.*, 769 A.2d 560, 565 (Pa. Commw. Ct.), *appeal denied*, 786 A.2d 991 (Pa. 2001), and *Mycon Construction Corp. v. Board of Regents*, 755 So. 2d 154, 155 (Fla. Dist. Ct. App. 2000) – the court recognized that the bond did not make the surety liable for delay damages. Here, in contrast, as discussed above, the contract documents *do* make the Sureties liable for such damages.

The Sureties' argument that the Bond should be interpreted against King County as drafter is likewise misguided. There is no evidence that the County drafted the Bond as opposed to utilizing a surety-approved form document. But even if King County drafted the Bond, the Sureties' argument fails. The Sureties rely on *National Bank of Washington v. Equity Investors*, 86 Wn.2d 545, 555, 546 P.2d 440 (1976) (Surety Br. 40),

which ultimately rejected the surety's argument because the contractual language in that case was "clear and there is simply no rule of construction that can ascribe a different meaning to those words." Even under the Sureties' chosen authority, courts will not ignore the plain text of a bond or other written agreement.

Equally important, the Sureties' chosen authority is no longer good law. In *Colorado Structures*, decided over *30 years* after *National Bank of Washington*, the Washington Supreme Court squarely held that ambiguous bond provisions are "construed in favor of liability of the surety." 161 Wn.2d at 588 (internal quotation marks omitted). Accordingly, if the contractual undertaking of the Sureties is in any way unclear (as the Sureties suggest without establishing), it must be construed against the Sureties and not against King County. The Sureties have this issue backwards.

Finally, the Sureties' arguments regarding material changes to the underlying agreement and the supposed "right to perform an independent investigation" also fail. Although the trial court initially concluded that these issues should be submitted to the jury, it ultimately refused to give the Sureties' proposed jury instruction when it became clear that their argument was not premised on any legally relevant changes to the Central Contract. RP 6114-15, 6127-31. As a result, the trial court did not abuse

its discretion in refusing to give the Sureties' proposed instruction (CP 7858) because there was insufficient evidence to support the instruction. *See Thompson v. Berta Enters.*, 72 Wn. App. 531, 541, 864 P.2d 983 (1994) ("A trial court does not abuse its discretion in refusing to give an instruction where there is insufficient evidence to support it.").

The record amply supports the trial court's determination. As the Sureties' counsel explained during the jury instruction conference, its so-called "surety defenses" related specifically to King County's decision to hire another contractor to complete the BT-3 portion of VPFK's work while at the same time giving VPFK more time and more money to complete BT-2. RP 6114-15, 6127-31. Hiring another contractor was King County's *remedy* for VPFK's breach – akin to "cover" – not a change to its contract. Giving VPFK more time and money to complete its work merely left in place VPFK's *pre-existing* contractual obligation regarding BT-2. Neither circumstance "changes" the underlying agreement in a way that would give rise to any alleged surety defenses.

In short, the Court need not reach these issues because there is no proper basis to vacate the jury's verdict in King County's favor. But if there is to be a remand, the Sureties' liability on remand is and should be coextensive with VPFK's – just as the parties agreed in the Bond and the Central Contract.

E. King County Is Entitled To Recover Its Fees On Appeal.

Just as *Colorado Structures* and *Olympic Steamship* mandate an award of attorney fees in the trial court, they require an award of fees on appeal upon affirmance of the trial court's judgment. RAP 18.1; *Matsyuk*, 173 Wn.2d at 658; *Colo. Structures*, 161 Wn.2d at 607-08; *Olympic S.S.*, 117 Wn.2d at 53. And because the Sureties expressly adopted VPFK's assignments of error, issues presented, and substantive arguments (Surety Br. 8, 39, 43), King County should also recover from the Sureties attorney fees and costs incurred in responding to VPFK's arguments.

V. CONCLUSION

For the foregoing reasons, the trial court's judgment awarding attorney fees and costs totaling $14,720,387.19 in favor of King County and against the Sureties should be affirmed. The Court should likewise affirm the trial court's ruling and judgment that the Sureties are jointly and severally liable for the verdict in favor of King County. Lastly, upon affirmance of the trial court's judgment, King County should also be awarded its attorney fees on appeal.

DATED: April 7, 2014.

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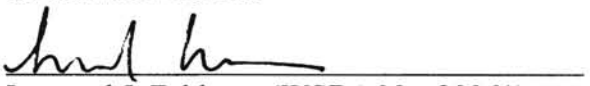

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