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No. 92744-8  
SUPREME COURT  
OF THE STATE OF WASHINGTON

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KING COUNTY,

Respondent,

v.

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.

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SURETIES' ANSWER TO AMICUS CURIAE BRIEFS

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OLES MORRISON RINKER  
& BAKER, LLP

SMITH GOODFRIEND, P.S.

By: Peter N. Ralston  
WSBA No. 8545  
Thomas R. Krider  
WSBA No. 29490

By: Catherine W. Smith  
WSBA No. 9542  
Howard M. Goodfriend  
WSBA No. 14355

701 Pike Street, Suite 1700  
Seattle, WA 98101  
(206) 623-3427

1619 8<sup>th</sup> Avenue North  
Seattle, WA 98109  
(206) 624-0974

Attorneys for Petitioners 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

**ORIGINAL**

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## I. INTRODUCTION

Amici Washington State Association of Municipal Attorneys (WSAMA) and Washington State Association for Justice Foundation (WSAJF) offer no sound public policy reasons for extending *Olympic Steamship* fees – an equitable doctrine meant to protect disadvantaged insureds – to governmental entities that by statute control the drafting of public works contracts and performance bonds. To the contrary, as argued by amici The Surety & Fidelity Association of America (SFAA) and Associated General Contractors of Washington (AGCW), the Court of Appeals' extension of *Olympic Steamship* fees in this case improperly conflates the roles and responsibilities of sureties and insurers and will make public works more expensive. This Court should reject WSAMA's and WSAJF's technical arguments for extending *Colorado Structures* to this case, and hold that RCW 39.04.240 provides the exclusive authority for an award of fees to the government in a dispute arising out of a public works contract and performance bond.

## II. ARGUMENT IN RESPONSE TO AMICI

### A. **RCW 39.04.240 precludes an equitable award of attorney fees under *Colorado Structures* in a dispute arising out of a public works contract.**

The starting point for the discussion of any award of attorney fees in Washington is, as WSAJF concedes, the “American Rule,” which prohibits an award of attorney fees unless specifically authorized by a contract, statute, or recognized equitable ground. (WSAJF Br. 6, citing *McGreevy v. Oregon Mutual Insurance Co.*, 128 Wn.2d 26, 35 n.8, 904 P.2d 731 (1995).) RCW 39.04.240, which governs fee awards in public works contract disputes, was enacted in 1992, and amended in 1999, years before this Court’s fractured 4-1-4 decision in *Colorado Structures, Inc. v. Ins. Co. of the West*, 161 Wn.2d 577, 167 P.3d 1125 (2007), the purported authority for an award of *Olympic Steamship* fees in this case. WSAMA and WSAJF thus have the analysis backwards in asserting that the issue is whether RCW 39.04.240 “preempts” the common law. (WSAMA Br. 12-13; WSAJF Br. 10-11)

The question is not whether the Legislature abrogated the common law but whether *Colorado Structures* can be construed to override the statutory scheme governing the award of attorney fees in disputes arising from public works contracts that was already in place

when *Colorado Structures* was decided. The answer to that question is “no.” *Longview Fibre Co. v. Cowlitz County*, 114 Wn.2d 691, 699, 790 P.2d 149 (1990) (courts “will not give relief on equitable grounds in contravention of a statutory requirement”); RCW 4.04.010 (“The common law . . . shall be the rule of decision in all the courts of this state” only “so far as it is not inconsistent with the . . . laws of . . . the state of Washington . . .”); see also *Potter v. Washington State Patrol*, 165 Wn.2d 67, 77, ¶ 11, 196 P.3d 691 (2008) (discussing when statute abrogates “prior common law”) (emphasis added; quoted case omitted) (cited at WSAMA Br. 13, WSAJF Br. 11, 12). Because *Colorado Structures* had not been decided when the Legislature enacted RCW 39.04.240, it is no wonder the statute does not “mention . . . disputes arising out of a surety bond” or state an “intent to deviate from” a purported “common law” rule that did not exist when the statutory scheme was enacted. (WSAMA Br. 13)

The plain language of RCW 39.04.240 confirms that it provides the exclusive remedy for “action[s] arising out of a public works contract” to which any governmental entity is a party. The statute incorporates the offer-of-settlement provisions of RCW 4.84.250-4.84.280, requiring that they “shall apply” to all covered actions. RCW 39.04.240(1). The word “shall” is mandatory. *Philadelphia II*

*v. Gregoire*, 128 Wn.2d 707, 713, 911 P.2d 389 (“The statutory term ‘shall’ is presumptively imperative unless a contrary legislative intent is apparent.”), *cert. denied*, 519 U.S. 862 (1996). By contrast, the Legislature uses “may” – not “shall” – when it does “not intend the statute to provide the exclusive procedures and remedies.” *Wilson v. City of Monroe*, 88 Wn. App. 113, 125, 943 P.2d 1134 (1997), *rev. denied*, 134 Wn.2d 1028 (1998). Indeed, WSAMA concedes the Legislature intended the statute would “reach to *all* ‘action[s] arising out of a public works contract.’” (WSAMA Br. 11, quoting Laws of 1999, ch. 107, § 1) (brackets in original; emphasis added)

That the statute does not contain an express exclusivity provision is not dispositive, contrary to amici’s arguments. (WSAJF Br. 11-12; WSAMA Br. 13) “The absence of [an express preemption] clause does not defeat the case for preemption . . . . Clear statutory language and corroborative legislative history leave no doubt about the . . . preemptive purpose.” *Washington Water Power Co. v. Graybar Elec. Co.*, 112 Wn.2d 847, 853, 855, 774 P.2d 1199, *amended sub nom.* 779 P.2d 697 (1989) (holding WPLA preempted common law and equitable remedies; the statute “would accomplish little if it were a measure plaintiffs could choose or refuse to abide at their pleasure.”).

Amici's arguments ignore the Legislature's express mandate that the statute's provisions "may not be waived," and that "a provision in [a public works contract] that provides for waiver of these rights is void as against public policy." RCW 39.04.240(2). If the statute does not provide the exclusive means for obtaining fees in a dispute arising from a public works contract, then this prohibition against waiver is meaningless. As AGCW explains, the contractor will in most instances ultimately pay any fees recovered "against" the surety because, the contractor is bound to indemnify the surety. (See AGCW Br. 13-14). By drafting a construction contract and statutory bond without a fee provision, a governmental entity can force both the surety and the contractor to waive their rights under the statute simply by always suing the surety as well as the contractor. Because the courts must interpret statutes "so that all the language used is given effect, with no portion rendered meaningless or superfluous," *Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996), the public works fee statutes must be considered the exclusive means of obtaining fees.

RCW 39.04.240 created a remedy where none previously existed – the award of attorney fees in public works disputes – further evidence that the Legislature intended the statute to be an exclusive

remedy. *In re Custody of A.F.J.*, 179 Wn.2d 179, 185, ¶ 8, 314 P.3d 373 (2013) (“whether a statutory gap exists is relevant to whether the court is prompted to apply an equitable remedy or whether the parties are limited to statutory avenues.”); *see also Hinck v. United States*, 550 U.S. 501, 506, 127 S. Ct. 2011, 2015, 167 L. Ed. 2d 888 (2007) (“when Congress enacts a specific remedy when no remedy was previously recognized ... the remedy provided is generally regarded as exclusive.”).

WSAMA erroneously contends that “either *both* RCW 39.04.240 and RCW 4.84.250-.280 statutorily supersede the common law or neither one does.” (WSAMA Br. 12) (emphasis in original) But “the context of the statute” matters. *Washington Water Power Co.*, 112 Wn.2d at 855; *Whatcom County*, 128 Wn.2d at 548. There is nothing “absurd” (WSAMA Br. 16) in holding that RCW 39.04.240 – a statute aimed at encouraging governmental entities to promptly settle public work contract disputes by requiring that its offer-of-settlement provisions “shall apply” to all public works contract disputes – creates an exclusive remedy and that RCW 4.84.250-.280 – broadly aimed at all civil litigation, and subject to waiver – does not. *Cf. Beckmann v. Spokane Transit Authority*, 107 Wn.2d 785, 790, 733 P.2d 960 (1987) (recognizing that right to fees under RCW 4.84.250 can be waived);

*Hinck*, 550 U.S. at 506, 127 S. Ct. at 2015 (“a precisely drawn, detailed statute pre-empts more general remedies”) (quotation omitted).

Amici also utterly ignore that the Legislature created this remedy to encourage quick settlement of public works disputes, because “the public agency has little incentive to compromise or settle now.” House Bill Report, H.B. 1671, 1999 Reg. Sess. Yet under the interpretation advocated by WSAJF and WSAMA, the threat of a fee award will, once again, do nothing to encourage a governmental entity to settle, because it can still recover fees after failing to comply with the statute’s offer-of-settlement requirement – directly contrary to the Legislature’s intent. *See Benson v. Roberts*, 35 Wn. App. 362, 364, 666 P.2d 947 (1983) (“the primary role of the appellate court in interpreting statutes is to determine the intent of the Legislature and to give effect to that intent”; examining legislative history and purpose of RCW 28A.88.010 and concluding it provided exclusive remedy and barred teacher’s breach of contract claims).

Public works contracts “are very one-sided” in favor of governmental entities, House Bill Report, H.B. 1671, 1999 Reg. Sess, refuting WSAMA’s contention that governmental entities do not enjoy a “disparity of *enforcement power*.” (WSAMA Br. 16) (emphasis in original) Although WSAMA, the County, and the Court of Appeals all

have made much of this supposed distinction between disparity in bargaining and enforcement power, no reasoned support is cited for the proposition such a difference exists, and the Legislature clearly thinks otherwise – for good reason.<sup>1</sup>

As the Legislature recognized in expanding the offer-of-settlement fee provisions to all actions arising out of public works contracts in 1999, “enforcement power” arises from the ability to control the drafting of the documents governing the parties’ relationship. House Bill Report, H.B. 1671, 1999 Reg. Sess. (“These contracts are very one-sided, and in cases near the \$250,000 limit, the public agency has little incentive to compromise or settle now.”). The government by statute dictates the terms of both the construction

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<sup>1</sup> In particular, the Legislature clearly did not share the concerns of WSAMA that smaller public agencies, and smaller public works projects, need to be exempted from RCW 39.04.240 and its bilateral offer-of-settlement fee provisions. (WSAMA Br. 16-18) The statute as enacted in 1992 originally applied only to public works disputes of less than \$250,000; its fee provisions were extended to all actions arising out of public works contracts in 1999 because “[t]he offer-of-settlement statute works very well to save both sides time and money. It should be extended to all public works contract disputes. . . . This bill is a two-edged sword that will force both sides to act reasonably.” House Bill Report, H.B. 1671, 1999 Reg. Sess. WSAMA’s professed concerns over the consequences of application of the statutory provisions governing fee awards to smaller governmental entities or smaller public works contracts is doubly misplaced because of the relaxed contractual and bonding requirements for public works contracts of less than \$100,000. RCW 39.08.010 (now codified in subsections (3),(4)).

contract and statutory bond,<sup>2</sup> and alone establishes the means of ensuring compliance with, and the consequences of breaching, contractual obligations. The government enjoys disparity of power in both bargaining and enforcement of public works contracts and statutory bonds.

Further, even if there were some “disparity of enforcement power” in a true coverage dispute between a private property owner and a surety,<sup>3</sup> here the dispute was between the government and the contractor over enforcement of a public works construction contract, not the statutory bond.<sup>4</sup> As a consequence, any claim that “disparity

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<sup>2</sup> For instance, the government can include a contractual provision for fees to the prevailing party in any construction dispute – subject to the statutory requirement of RCW 4.84.330 that, just as with the offer-of-settlement fee provisions of RCW 39.04.240, the contractual provision must be bilateral. (See Sureties’ Supp. Br. 4-5) All governmental entities, regardless of the size of the public agency or the public works, enjoy this drafting power and the ability to obtain fees by making a timely reasonable offer of settlement.

<sup>3</sup> The dispute in *Colorado Structures, Inc. v. Ins. Co. of the West*, 161 Wn.2d 577, 167 P.3d 1125 (2007), for instance, was a coverage dispute between the surety and the contractor over interpretation of the language of the private performance bond drafted by the surety. The subcontractor’s breach and subsequent cessation of business was undisputed by the parties, and the subcontractor was not a party to the suit. *Colorado Structures*, 161 Wn.2d at 584-85, ¶¶ 7-8.

<sup>4</sup> Contrary to WSAJF’s claims that “King County sued VPFK and the Sureties, alleging . . . the Sureties breached the bond by failing to remedy VPFK’s default,” (WSAJF Br. 2), the County never raised such a claim against the Sureties. (CP 1, 43-45; see Sureties’ Opening Br. 14) Nor did the County ever plead for attorney fees from VPFK or the Sureties. (CP 45) There was no assertion, finding, or verdict that the Sureties failed to fulfill any obligation to the County in this case.

of enforcement power” justifies an award of fees merely highlights the unfairness of allowing the government to obtain an award against the statutory surety for fees incurred in litigating the underlying construction dispute with the contractor. (See Sureties’ Supp. Br. 18-20; see also Sureties’ Petition 11-16, Sureties’ Reply Br. 17-24)

Governments can – as the County did here – declare a contractor in default, negotiate a contract modification with the contractor, and only then demand the surety pay for the contract modification, giving the surety no opportunity to perform the bonded obligation, let alone adequate time to investigate the alleged default. Amici urge that the surety must then choose between paying on the bond without any investigation, or conduct an investigation on penalty of having *Olympic Steamship* fees imposed on it for taking the time to investigate.

*McGreevy v. Oregon Mutual Insurance Co.*, 128 Wn.2d 26, 904 P.2d 731 (1995) (WSAJF Br. 11) does not support amici’s arguments. The Court in *McGreevy* considered whether the Consumer Protection Act’s fee provision preempted *Olympic Steamship* fees against an insurer that had denied its insured UIM benefits under an “anti-stacking” provision in the policy the insurer had drafted, does not support amici’s arguments. The CPA differs in

critical respects from RCW 39.04. 240. The CPA is a remedial statute designed to protect consumers that expressly provides for unilateral fee awards only to injured persons. RCW 19.86.090; *McGreevy*, 128 Wn.2d at 37-38; *Sato v. Century 21 Ocean Shores Real Estate*, 101 Wn.2d 599, 603, 681 P.2d 242 (1984). Because the public works fee statute, unlike the CPA, applies to all parties in any “action arising out of a public works contract,” any equitable or common law rules that might allow a fee recovery for success on a particular claim within the action must yield as inconsistent with the statutory scheme.

Moreover, unlike the CPA and *Olympic Steamship*, the public works fee statutes provide for bilateral fee awards. Any party (not just the government) may recover fees if it satisfies the statutory conditions by bettering a timely settlement offer. Statutes providing for bilateral fee awards are plainly incompatible with any equitable or common law rule that limits fee awards to plaintiffs. The Legislature intended that RCW 39.04.240 would provide the exclusive means of recovering attorney fees in actions arising out of a public works contract, and this Court should reject amici’s arguments to the contrary.

**B. *Colorado Structures'* plurality decision is not binding precedent on the application of *Olympic Steamship* to performance bonds.**

The Sureties argued in their petition for review that *Colorado Structures* lacked precedential value in this case, and asked the Court to consider the issue of its application to actions arising out of public works contracts. (Sureties' Petition 10-11, *see also* Sureties' Reply Br. 5) WSAMA's contention that this Court should ignore the very argument on which review was granted (WSAMA Br. 4) is without merit.<sup>5</sup> WSAMA confuses fundamental precepts of judicial decision-

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<sup>5</sup> Equally meritless is WSAJF's claim that *Olympic Steamship* was applied "to actions arising out of surety bonds" in *Estate of Jordan by Jordan v. Hartford Acc. & Indem. Co.*, 120 Wn.2d 490, 844 P.2d 403 (1993) and *Axess Int'l Ltd. v. Intercargo Ins. Co.*, 107 Wn. App. 713, 30 P.3d 1, 2001 A.M.C. 2460 (2001) (WSAJF Br. 7). *Jordan* considered a fidelity bond, a form of insurance that protects against losses caused by the dishonest acts of an employee. 120 Wn.2d at 497 ("The fidelity bond *insured against loss . . .*") (emphasis added). In contrast, a surety bond is a promise by the surety to perform an obligation to the obligee if the principal fails to do so. Philip L. Bruner & Patrick J. O'Connor, Jr., *4A Bruner & O'Connor Construction Law* § 12:7 (2009) ("The surety bond is a financial credit product, not an insurance indemnity product.") (*See generally* Sureties' Supp. Br. 13-15). *Axess* did not involve a surety bond either, but instead addressed the right to fees for litigating coverage under a federal maritime bond required "to pay any judgment for damages against a non-vessel-operating carrier." 107 Wn. App. at 722. *Axess* cited *Jordan* for the proposition that "[t]he *Olympic Steamship* rule extends to an action to recover on a surety bond," 107 Wn. App. at 720, n.14, but neither this Court nor any other Washington court would be bound by its passing statement "when the court did not address or consider the issue directly." *Kish v. Ins. Co. of N. America*, 125 Wn.2d 164, 172, 883 P.2d 308 (1994). In any event, the court in *Axess* recognized that *Olympic Steamship* fees were limited to coverage disputes. 107 Wn. App. at 721.

making in asserting that *Colorado Structures* has “full precedential value” entitled to deference (or, in this case, expansion) under the doctrine of *stare decisis*. (WSAMA Br. 1 n.1, 6-8)

Five justices – four in concurrences and one in dissent – voted *against* awarding *Olympic Steamship* fees to a contractor in a coverage dispute with the surety on a private bond<sup>6</sup> in *Colorado Structures, Inc. v. Ins. Co. of the West*, 161 Wn.2d 577, 167 P.3d 1125 (2007). As this Court itself later recognized, “*Colorado Structures* does not have a majority rule on its main proposition regarding attorney fees, whether *Olympic Steamship* fees are available in the context of a performance bond as opposed to an insurance contract.” *Matsyuk v. State Farm Fire & Cas. Co.*, 173 Wn.2d 643, 660 n.5, ¶ 30, 272 P.3d 802 (2012).

WSAMA mistakenly asserts *Colorado Structures* is “binding precedent” that this Court should not revisit because five justices

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<sup>6</sup> The primary issue in *Colorado Structures* was whether the surety was liable under the private surety bond it had drafted; eight justices agreed that the plaintiff was not required to have formally declared the subcontractor in default under the contract before substantial completion in order to recover against the bond. *Colorado Structures, Inc. v. Ins. Co. of the West*, 161 Wn.2d 577, 581, ¶ 2, 608, ¶ 29, 611, ¶ 35, 167 P.3d 1125 (2007) (lead opinion by Chambers, J.; Alexander, J. and Madsen, J. concurring in holding). The contract at issue there contained a fee provision; the secondary question in *Colorado Structures* was whether any fee award against the surety, when combined with the amounts due as a result of a subcontractor’s admitted breach, could exceed the penal amount of the bond. See 161 Wn.2d at 597, ¶ 11.

“agreed” on the issue whether *Olympic Steamship* fees should be extended to sureties on a performance bond. (WSAMA Br. 4) WSAMA ignores that one of the “agreeing” justices, Justice Sanders, *dissented* from the judgment that the surety bore any liability on the bond. Because he dissented from the Court’s liability decision, Justice Sanders thus did not believe *Olympic Steamship* fees should be awarded against the surety in *Colorado Structures*. His dissenting opinion said as much, stating not that he would award fees to the contractor in *Colorado Structures*, but that in some future case he “would award attorney fees to a prevailing contractor.” 161 Wn.2d at 638 (Sanders, J., dissenting).

Thus, in fact, five justices voted *against* awarding fees in *Colorado Structures*; it was not an “issue on which at least five justices agree[d].” (WSAMA Br. 4) WSAMA erroneously relies on dicta in a dissent as the basis for its claim that *Colorado Structures* is irrefutable precedent compelling a fee award in this case. (See also WSAJF Br. 3 n.1, asserting the “four justice lead opinion and a dissenting opinion” created a “holding.”)

Dissents are – by definition – dicta, because they are not necessary to the result of the case and are untethered to the Court’s judgment. *City of Seattle v. Holifield*, 170 Wn.2d 230, 244 n. 13, ¶ 27,

240 P.3d 1162 (2010) (discussion “immaterial to the outcome . . . is dicta”); *In re Recall of West*, 156 Wn.2d 244, 250-51, ¶ 14, 126 P.3d 798 (2006) (noting the “distinct difference” between an “opinion” and “decision;” “a judicial ‘decision’ is the judgment or conclusion itself rendered by the court and constitutes the instrument through which the court acts.”) (quoted case omitted). *See also State v. Meredith*, 178 Wn.2d 180, 184, ¶ 12, 306 P.3d 942 (2013) (explaining that a concurring opinion in an earlier case expressing “support for adoption of [the] bright-line rule” advocated by the dissent “in a future case” did not create precedent because “it does not relate to the disposition of” the case “and is merely dicta.”), *cert. denied*, 134 S.Ct. 1329 (2014).

It is for this reason that the U.S. Supreme Court directs that “[w]hen a fragmented Court decides a case . . . the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.” *Marks v. United States*, 430 U.S. 188, 193, 97 S. Ct. 990, 993, 51 L. Ed. 2d 260 (1977) (emphasis added; citation omitted); *see also King v. Palmer*, 950 F.2d 771, 783 (D.C.Cir.1991) (en banc) (“[W]e do not think we are free to combine a dissent with a concurrence to form a *Marks* majority.”), *cert. denied*, 505 U.S. 1229 (1992); *U.S. v. Robison*, 505 F.3d 1208, 1221 (11th Cir. 2007) (“*Marks* does not direct lower courts

interpreting fractured Supreme Court decisions to consider the positions of those who dissented.”); *Newmy v. Johnson*, 758 F.3d 1008, 1010–11 (8th Cir.) (“the combination of concurring and dissenting opinions . . . [does] not amount to a holding that binds this court.”), *cert. denied*, 135 S. Ct. 774 (2014).

This Court’s established practice is to follow the U.S. Supreme Court in *Marks*. “As we recently held in *Davidson v. Hensen*, 135 Wn.2d 112, 128, 954 P.2d 1327 (1998), ‘[w]here there is no majority agreement as to the rationale for a decision, the holding of the court is the position taken by those concurring on the narrowest grounds.’ While expressing different reasoning for their conclusions, five members of this Court, in *the lead and concurring opinions*, indicated *Tyler Pipe* applies retroactively.” *W.R. Grace & Co. v. State Dep’t of Revenue*, 137 Wn.2d 580, 593, 973 P.2d 1011 (brackets in original; emphasis added), *cert. denied*, 528 U.S. 950 (1999).

*Wright v. Terrell*, 162 Wn.2d 192, 170 P.3d 570 (2007) (WSAMA Br. 4-5) is consistent with *Marks* and this Court’s practice. In *Wright*, this Court discussed the precedential weight of *Bosteder v. City of Renton*, 155 Wn.2d 18, 56, 117 P.3d 316 (2005). In *Bosteder*, four justices believed that the claim filing statute, RCW 4.96.010–.020, applied to suits against individual employees of local

governments, and five believed it did not apply, and that a trespass claim against individual employees should not have been dismissed. Thus, unlike *Colorado Structures*, the agreement of five justices on an issue was reflected in this Court's judgment to allow the claims to proceed to trial, and "[o]n this point, *Bosteder* is not a plurality decision." *Wright*, 162 Wn.2d at 195, ¶ 5.

WSAMA's heavy reliance on *Colorado Structures* as binding precedent also conflicts with this Court's repeated admonition that plurality opinions have "limited precedential value and [are] not binding on the courts." *In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 302, 88 P.3d 390 (2004); *Lauer v. Pierce County*, 173 Wn.2d 242, 258, ¶ 25, 267 P.3d 988 (2011); see also *In re Pers. Restraint of Domingo*, 155 Wn.2d 356, 367, ¶ 30, 119 P.3d 816 (2005) ("Dissenting opinions are not binding upon this court.") (citing *Roberts v. Dudley*, 140 Wn.2d 58, 75 n.13, 993 P.2d 901 (2000)). Because *Colorado Structures* is not binding it is not surprising that the Legislature has not "overruled" the decision (WSAMA Br. 9) – there was nothing to overrule, particularly in the context of a statutory performance bond governed by the public works fee statutes.

In short, principles of *stare decisis* should not apply to *Colorado Structures* and this Court can and should freely consider

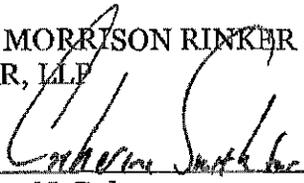
whether a surety that issues a performance bond on a public works contract may be held liable for *Olympic Steamship* fees. Regardless, this Court should still reconsider *Colorado Structures* because, as set forth in the Sureties' supplemental brief, its "rule" is both incorrect and harmful, and extends an equitable doctrine meant to protect disadvantaged insureds to governmental entities with superior contracting and enforcement power, in direct contravention of the statutory scheme governing the award of fees in disputes over public works contracts.

### III. CONCLUSION

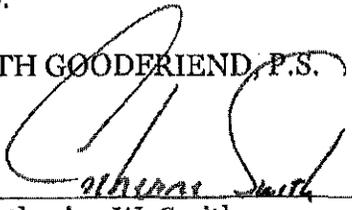
For the reasons set out in the Sureties' briefing and in the amicus curiae briefs of SFAA and AGCW, this Court should vacate the judgment for fees against the Sureties.

Dated this 28<sup>th</sup> of December, 2016.

OLES MORRISON RINKER &  
BAKER, LLP

By:   
Peter N. Ralston  
WSBA No. 8545  
Thomas R. Krider  
WSBA No. 29490

SMITH GOODRIEND, P.S.

By:   
Catherine W. Smith  
WSBA No. 9542  
Howard M. Goodfriend  
WSBA No. 14355

Attorneys for Petitioner Sureties

### DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on December 28, 2016, I arranged for service of the foregoing Sureties' Answer to Amicus Curiae Briefs, to the Court and to counsel for the parties to this action as follows:

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Thomas R. Krider Peter Ralston Oles Morrison Rinker & Baker LLP 701 Pike St., Ste 1700 Seattle, WA 98101-3930 <a href="mailto:Krider@oles.com">Krider@oles.com</a> <a href="mailto:ralston@oles.com">ralston@oles.com</a>	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Fredric D. Cohen Mitchell C. Tilner Horvitz & Levy LLP 15760 Ventura Blvd. 18 <sup>th</sup> Floor Encino, CA 91436 <a href="mailto:fcohen@horvitzlevy.com">fcohen@horvitzlevy.com</a>	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
David R. Goodnight Karl E. Oles Hunter Ferguson Stoel Rives LLP 600 University St., Ste 3600 Seattle, WA 98101-4109 <a href="mailto:kfoles@stoel.com">kfoles@stoel.com</a> <a href="mailto:drgoodnight@stoel.com">drgoodnight@stoel.com</a>	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Leonard Feldman Peterson Wampold Rosato Luna Knopp 1501 Fourth Avenue, Suite 2800 Seattle, WA 98101 <a href="mailto:feldman@pwrllk.com">feldman@pwrllk.com</a>	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail

<p>Mary DeVuono Englund  900 King County Administration Bldg.  500 Fourth Avenue  Seattle, WA 98104  <u>Mary.Englund@kingcounty.gov</u></p>	<p><input type="checkbox"/> Facsimile  <input type="checkbox"/> Messenger  <input type="checkbox"/> U.S. Mail  <input checked="" type="checkbox"/> E-Mail</p>
<p>R. Daniel Lindahl  Bullivant Houser Bailey PC  888 S.W. 5th Avenue, Suite 300  Portland, OR 97204  <u>(dan.lindahl@bullivant.com)</u></p>	<p><input type="checkbox"/> Facsimile  <input type="checkbox"/> Messenger  <input type="checkbox"/> U.S. Mail  <input checked="" type="checkbox"/> E-Mail</p>
<p>John P. Ahlers  Ahlers &amp; Cressman, PLLC  999 3rd Avenue, Suite 3900  Seattle, WA 98104  <u>E.jahlers@ac-lawyers.com</u></p>	<p><input type="checkbox"/> Facsimile  <input type="checkbox"/> Messenger  <input type="checkbox"/> U.S. Mail  <input checked="" type="checkbox"/> E-Mail</p>
<p>Michael P. Grace  Groff Murphy, PLLC  300 E Pine Street  Seattle, WA 98122-2029  <u>mgrace@groffmurphy.com</u></p>	<p><input type="checkbox"/> Facsimile  <input type="checkbox"/> Messenger  <input type="checkbox"/> U.S. Mail  <input checked="" type="checkbox"/> E-Mail</p>
<p>Eileen I. McKillop  Sedgwick, LLP  600 University Street, Suite 2900  Seattle, WA 98101  <u>eileen.mckillop@sedgwicklaw.com</u></p>	<p><input type="checkbox"/> Facsimile  <input type="checkbox"/> Messenger  <input type="checkbox"/> U.S. Mail  <input checked="" type="checkbox"/> E-Mail</p>
<p>Daniel E. Huntington  Richter-Wimberley PS  422 W. Riverside Ave., Suite 1300  Spokane, WA 99201  <u>danhuntington@richter-wimberley.com</u></p>	<p><input type="checkbox"/> Facsimile  <input type="checkbox"/> Messenger  <input type="checkbox"/> U.S. Mail  <input checked="" type="checkbox"/> E-Mail</p>
<p>Valerie D. McOmie  Attorney at Law  4549 NW Aspen St.  Camas, WA 98607-8302  <u>valeriemcomie@gmail.com</u></p>	<p><input type="checkbox"/> Facsimile  <input type="checkbox"/> Messenger  <input type="checkbox"/> U.S. Mail  <input checked="" type="checkbox"/> E-Mail</p>
<p>Josh Weiss  WA State Assn of Counties  206 10th Ave SE  Olympia, WA 98501-1311  <u>jweiss@wsac.org</u></p>	<p><input type="checkbox"/> Facsimile  <input type="checkbox"/> Messenger  <input type="checkbox"/> U.S. Mail  <input checked="" type="checkbox"/> E-Mail</p>

Daniel G. Lloyd Sara Baynard-Cooke Assistant City Attorneys City of Vancouver P.O. Box 1995 Vancouver, WA 98668-1995 <a href="mailto:dan.lloyd@cityofvancouver.us">dan.lloyd@cityofvancouver.us</a> <a href="mailto:sara.baynard-cooke@cityofvancouver.us">sara.baynard-cooke@cityofvancouver.us</a>	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
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**DATED** at Seattle, Washington this 28<sup>th</sup> day of December, 2016.

  
\_\_\_\_\_  
Patricia Miller

**SMITH GOODFRIEND, PS**

**December 28, 2016 - 4:08 PM**

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- cate@washingtonappeals.com
- krider@oles.com
- jahlers@ac-lawyers.com
- Sara.Baynard-Cooke@cityofvancouver.us
- dan.lloyd@cityofvancouver.us
- danhuntington@richter-wimberley.com
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- feldman@pwrlk.com
- dan.lindahl@bullivant.com
- howard@washingtonappeals.com
- cate@washingtonappeals.com
- patricia@washingtonappeals.com

**Comments:**

Sureties' Answer to Amicus Curiae Briefs

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Sender Name: Patricia Miller - Email: Patricia@washingtonappeals.com

**Filing on Behalf of:** Catherine Wright Smith - Email: cate@washingtonappeals.com (Alternate Email: )

Address:

1619 8th Avenue N

Seattle, WA, 98109

Phone: (206) 624-0974

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