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Supreme Court No. 927448

Court of Appeals No. 70432-0-1

SUPREME COURT
OF THE STATE OF WASHINGTON

by
/

KING COUNTY,

Respondent,

v.

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

Petitioners.

SUPPLEMENTAL BRIEF OF RESPONDENT KING COUNTY

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GLOSSARY

Bond	Performance and Payment Bond issued by Sureties, Trial Exhibit 6
County	King County
Ex.	Trial Exhibit
Op.	<i>King County v. Vinci Const. Grands Projets</i> , 191 Wn. App. 142, 364 P.3d 784 (2015)
RP	Report of Proceedings
September 7 Order	September 10, 2016 Order of the Washington Supreme Court denying VPFK's Petition for Review and granting the Sureties' Petition for Review in this matter
SFAA	Surety & Fidelity Association of America
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 filed by the Sureties in the Court of Appeals
Surety Pet.	Petition for Review filed by the Sureties in the Washington Supreme Court
VPFK	Vinci Construction Grands Projets/Parsons RCI/Frontier-Kemper, JV

I. INTRODUCTION

The overarching issue in this appeal is whether King County can recover attorney fees from a group of insurance companies that refused to perform their contractual obligations under the performance bond they issued on a public project.¹ That issue is important not only to the County (which paid those fees), but also to other governmental entities and taxpayers in Washington. If a governmental plaintiff forced to sue to obtain coverage is not made whole in these circumstances, as dictated by *Olympic Steamship Co. v. Centennial Insurance Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991), and its progeny, then insurance companies that issue performance bonds on public projects will have little if any incentive to perform their contractual obligations when their performance is most needed, and public projects will suffer accordingly.

Attempting to avoid liability for the County's attorney fees, the Sureties have asserted two arguments. First, the Sureties assert that governmental plaintiffs, unlike private plaintiffs, should not be permitted to recover *Olympic Steamship* fees in disputes regarding performance bonds because public works statutes provide an alternative avenue to recover such fees. Surety Pet. at 5-11. Second, the Sureties claim that any such recovery (if permitted) should be limited to fees incurred in litigating

¹ For the Court's convenience, a glossary of abbreviations can be found immediately following the Table of Authorities.

whether a performance bond provides coverage and should exclude fees incurred in litigating other claims and defenses. *Id.* at 11-16. As set forth in Section II.A below, neither argument has merit. If anything, there should be *greater* protection when public projects and public funds are involved. And there is no requirement to segregate attorney fees where, as here, a surety denies liability on the bond it issued by adopting all of the claims and defenses of its principal. The Court of Appeals correctly decided these issues, and this Court should affirm those rulings.

Additionally, SFAA filed an amicus brief urging this Court to grant review so that it can reconsider *Colorado Structures v. Insurance Co. of the West*, 161 Wn.2d 577, 167 P.3d 1125 (2007), which holds that *Olympic Steamship* applies to performance bonds. The Court need not reach this issue because it was not presented by the Sureties in their Petition for Review and was raised only by amici. If the Court reaches the issue, it should conclude that *Colorado Structures* was correctly decided. Indeed, in the nine-plus years since the Court issued *Colorado Structures*, the opinion has not been questioned, abrogated, limited, or legislatively overruled. For these reasons, discussed further in Section II.B below, the trial court correctly awarded attorney fees and the Court of Appeals correctly affirmed that decision.

II. ARGUMENT

A. The Court Should Reject The Sureties' Attempts To Avoid Or Limit Its Liability For The County's Attorney Fees.

1. The Court Of Appeals Correctly Concluded That "The Trial Court Did Not Abuse Its Discretion When It Determined That The Attorney Fees Could Not Be Segregated." Op. ¶ 119.

In its September 7 Order in this matter, the Court unanimously denied the Petition for Review filed by VPFK, the contractor whose performance was previously at issue in this matter and the principal on the Bond that the Sureties issued. The Court added that "King County's request for attorney fees for answering this petition is also denied." Because that ruling could imply that the Court has decided the segregation issue adverse to the County, this supplemental brief addresses that issue first. As set forth below, while segregation is required by Washington law *where feasible*, the Court of Appeals correctly concluded, based on the unique facts and circumstances at issue here, that "[t]he trial court did not abuse its discretion when it determined that the attorney fees could not be segregated." Op. ¶ 119.

The Court's analysis of this issue should begin with the plain language of the Bond, which states that when the contractor is "in default under the Contract," the Sureties "shall promptly remedy the default in a manner acceptable to the Owner." Ex. 3001 at 1. As the language of the

Bond confirms, the coverage issue is expressly controlled by whether VPFK was in default. So in order to establish coverage under the Bond, the County had to establish its claim against VPFK and refute VPFK's defenses to that claim. Under the terms of the Bond, the coverage and default issues are wholly inseparable.

But contrary to the Sureties' argument that the Court of Appeals' analysis "would make *Olympic Steamship* fees available in every case" (Surety Pet. 15), Washington law provided a clear path for the Sureties to avoid or at least limit their liability for the County's fees. First, the Sureties could have expressly acknowledged coverage. Had the Sureties done so, they could have argued that the matter involved, at most, a "claims dispute" for which attorney fees are not recoverable. *See, e.g., Dayton v. Farmers Ins. Grp.*, 124 Wn.2d 277, 279, 876 P.2d 896 (1994) (attorney fees not recoverable under *Olympic Steamship* because insurer "did not dispute liability").² Second, the Sureties could have asserted certain *discrete* defenses and allowed VPFK – *and VPFK alone* – to assert other defenses. Had the Sureties done so, they could have argued that the

² *See also Colo. Structures*, 161 Wn.2d at 606 ("[t]his case *would be* in the nature of a claims dispute if West [the surety] had *agreed to pay* under the bond") (first emphasis in original, second emphasis added); *Nordstrom, Inc. v. Chubb & Son, Inc.*, 54 F.3d 1424, 1437 (9th Cir. 1995) ("no fees are awarded [under *Olympic Steamship*] when the insurer does not dispute coverage"). Conversely, where an insurer or surety disputes coverage, it is liable for *Olympic Steamship* fees. *See, e.g., Matsyuk v. State Farm Fire & Cas. Co. of Ill.*, 173 Wn.2d 643, 661, 272 P.3d 802 (2012) (plaintiff entitled to recover *Olympic Steamship* fees because "coverage was disputed" and the plaintiff filed suit "to obtain the benefit of the insurance contract").

issues were separable and that the County could not properly recover attorney fees for work performed in litigation solely with VPFK. *See* discussion of segregation principles on pages 9-11 below. The Sureties are *large and sophisticated insurance companies* and they are presumed to know this. *See Maynard Inv. Co. v. McCann*, 77 Wn.2d 616, 624, 465 P.2d 657 (1970) (“every person is presumed to know the law”).

But instead, the Sureties flatly denied coverage under the Bond *by adopting all of VPFK’s defenses*. The Sureties first did so in their initial response to King County’s request that the Sureties promptly remedy VPFK’s default pursuant to the Bond they issued. Rather than acknowledge coverage or litigate certain discrete issues, the Sureties “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 (emphasis added). Having reserved all of VPFK’s rights, defenses, and claims, the Sureties insisted that they needed to conduct an extended investigation (Ex. 158 at 5) and then – months later – again asserted that “VPFK is not in default of its contract obligations and the County has not performed its obligations thereunder. Accordingly, the County’s claim [against the Bond] is respectfully denied.” Ex. 162 at 20-21.

The Sureties then 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). The Sureties also filed their own summary judgment motion in which they argued, specifically on this point, that “the obligations of the surety under the bond become[] *coextensive with those of the principal.*” CP 4953 (emphasis added). And in their trial brief, the Sureties again asserted all of the same defenses as VPFK. CP 9295-323.

The defendants’ alignment continued in trial. In their proposed jury instructions, the Sureties asserted that they “are entitled to assert the defenses of VPFK in defense of the County’s claim that VPFK breached the contract.” CP 7855. 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 in their opening brief on appeal, the Sureties expressly adopted VPFK’s assignments of error, issues presented, and substantive arguments. Surety Br. 8, 39, 43. As the Sureties repeatedly stated, King County could obtain the benefit of the Bond if and only if it established its claim against VPFK and likewise established that VPFK’s defenses lacked merit.

There were of course benefits to the Sureties in adopting such a scorched earth approach. At the very least, the Sureties were able to substantially delay any payment to the County and hold on to their money longer. On top of that, the Sureties presumably believed that adopting and supporting VPFK's claims and defenses would increase the likelihood that they might avoid any obligation to perform or pay under the Bond they issued. But while the Sureties' approach had these potential benefits, the approach also made it impossible for the County or the trial court to distinguish between fees incurred in litigation with the Sureties and fees incurred in litigation with VPFK. No such distinction was possible because, *as the Sureties repeatedly argued and the plain language of the Bond confirmed*, the County could recover damages from the Sureties only if it refuted VPFK's claims and defenses.

The trial court recognized this complete overlap in its ruling granting the County's motion for attorney fees. Addressing the parties' arguments regarding segregation of fees, the trial court found that "[t]hroughout the litigation, the Sureties adopted VPFK's defenses." CP 4487 ¶ 12. It then cited several Washington opinions regarding segregation of attorney fees 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 proved 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. The trial court also recognized that "no segregation of attorney fees is required" where "the claims are so related that no reasonable segregation" can be made. CP 4489 ¶ 21 (internal quotation marks omitted). Based on this analysis, the trial court rejected the Sureties' segregation argument and awarded attorney fees and costs in favor of King County. CP 4490 ¶ 26.

The Court of Appeals, in turn, correctly recognized that "a trial court's decision regarding the segregation of attorney fees" is reviewed "for abuse of discretion." Op. ¶ 113. The court then quoted the above findings and agreed with the trial court's analysis because, as discussed above, the Sureties "denied liability" by "adopt[ing] VPFK's defenses," such that "the County could only obtain the benefit of the Bond by defeating VPFK's defenses." *Id.* As a result of that approach, the claims against VPFK and the Sureties "arose out of the same facts and were based on related legal theories and defied segregation." *Id.* The Court of

Appeals therefore concluded (correctly) that “[t]he trial court did not abuse its discretion when it determined that the attorney fees could not be segregated.” Op. ¶ 119.

This Court upheld a similar ruling in *Mayer v. Sto Industries, Inc.*, 156 Wn.2d 677, 132 P.3d 115 (2006), and its holding in that case is directly on point. The trial court in *Mayer* expressly found that “[t]he [Mayers’] requested [Consumer Protection Act (CPA)] fees could not realistically be separated from time spent pursuing their [Washington Product Liability Act (WPLA)] claims” because “[p]roof of the CPA claims required the Mayers to establish the elements of a failure to warn claim...” *Id.* at 692. This Court upheld that analysis as follows:

The better authority on the segregation issue is found in *Hume v. American Disposal Co.*, 124 Wash.2d 656, 880 P.2d 988 (1994). There, this court stated that, where “the trial court finds the claims to be so related that no reasonable segregation of successful and unsuccessful claims can be made, there need be no segregation of attorney fees.” *Id.* at 673, 880 P.2d 988. We adhere to our holding in *Hume* and here conclude that, given the trial court’s clear explanation that the CPA work could not be segregated from the WPLA work, the trial court’s award of attorney fees under the CPA was not an abuse of discretion.

Id. at 693. Given the trial court’s clear explanation regarding segregation of attorney fees and the corresponding standard of review, the Court *unanimously* upheld the trial court’s analysis. *Id.* at 695.

This case presents an even stronger basis to reject the Sureties' segregation argument. In *Mayer*, the segregation issue was controlled by the relevant statutes: the attorney fees at issue were not segregable because the plaintiffs could not establish their CPA claim without also establishing elements of their WPLA claim. *Id.* at 693. Here, in contrast, the segregation issue was controlled by the Sureties themselves: they expressly and repeatedly denied coverage based on the claims and defenses of their principal, thereby equating their legal position with VPFK's. As a result, King County could not prevail on its claim against the Sureties without establishing its claim against VPFK. And consistent with *Mayer*, the trial court provided a clear explanation as to why the County's claims against the Sureties and VPFK could not reasonably be segregated. *See supra* at 7-8 (discussing trial court's explanation and findings). Applying *Mayer*, *Hume*, and *numerous* other similar cases,³ the

³ *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 fees without segregation where "the evidence presented and attorney fees incurred for the successful and unsuccessful claims were inseparable"); *Fiore v. PPG Indus., Inc.*, 169 Wn. App. 325, 352-53, 279 P.3d 972 (2012) (plaintiff could recover fees incurred in an arbitration before prevailing in court because defendant had "moved to arbitrate the case" and it was "necessary for [Fiore's attorneys] to engage in that process"); *Broyles v. Thurston Cty.*, 147 Wn. App. 409, 451, 195 P.3d 985 (2008) (trial court awarded fees incurred in previously dismissed lawsuit; "it was appropriate to treat the case for what it was, one continuous process of reaching judgment"); *Bloor v. Fritz*, 143 Wn. App. 718, 747, 180 P.3d 805 (2008) (plaintiff could recover fees incurred in litigating an "unsuccessful claim" against another defendant because "[t]he claims arose out of the same set of facts and involved interactions between the defendants"); *Ives v. Ramsden*, 142 Wn. App. 369, 397 n.14, 174 P.3d 1231 (2008) (affirming award of unsegregated attorney fees where legal issues presented by all claims "were the same"); *Ethridge v. Hwang*, 105 Wn. App. 447, 461, 20

Court of Appeals correctly concluded that there was no abuse of discretion in these circumstances. Op. ¶ 119.

The trial court's fee award is not only legally and factually sound, it is also consistent with applicable public policy considerations. Over 25 years ago, in *Olympic Steamship*, this 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). Critical here, the Court also explained that "allowing an award of attorney fees will encourage the prompt payment of claims." *Id.* at 53. The ability to recover "*Olympic Steamship* fees" is now a central tenet of Washington insurance law.

Although the Sureties issued a "Performance and Payment Bond" (Ex. 6) rather than a traditional insurance policy, the Court recognized in *Colorado Structures* that there is no material difference between these

P.3d 958 (2001) ("[b]ecause nearly every fact in this case related in some way to all three claims, segregation of the fee request was not necessary"); *Abels v. Snohomish Cty. 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.").

contracts in terms of liability to an obligee or insured: “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...” 161 Wn.2d at 598. And although a principal on a bond sometimes provides security and funds the surety’s obligations, the Court in *Colorado Structures* concluded that “this difference is immaterial.” *Id.* at 605 n.15. Likewise, although in this case they issued a performance bond, the Sureties are insurance companies, and they have the same incentives to deny, delay, and defend as other insurance companies.

Moreover, the same policy considerations that apply to insurance contracts apply to performance bonds. When a covered event occurs (an insured’s home is destroyed by fire or a contractor refuses to perform), policyholders and project owners alike “rely on prompt and certain payment” from their insurers and sureties. *Id.* at 605. But “[w]ithout the application of *Olympic Steamship* and awarding attorney fees,” these companies “have absolutely no incentive to refrain from litigation.” *Id.* at 607. Instead, they can engage in protracted litigation – just like the Sureties did in this case – knowing that their maximum risk in litigation is the amount that they would otherwise be required to pay under the

contract. Awarding *Olympic Steamship* fees in cases like this one is necessary to give sureties a financial incentive to acknowledge coverage or adopt a measured approach to litigation.

Lastly, just like insurance companies, sureties know that “the transaction costs of litigation are likely to dissuade contractors who would otherwise assert their right to full payment in court.” *Id.* at 601. That provides another reason to deny, delay, and defend. Here, for example, the County incurred attorney fees and costs totaling over \$14 million litigating the issues that the Sureties identified in their correspondence and pleadings (as discussed above). CP 4490 ¶ 26. *Olympic Steamship* fees remedy “this inequity by requiring that the insured be made whole.” 161 Wn.2d at 607 (internal quotation marks and citation omitted). Both the trial court’s attorney fee award and the Court of Appeals’ opinion affirming that award are consistent with this important public policy consideration. The Sureties’ segregation argument, in contrast, seeks to undermine this policy consideration to the substantial detriment of any obligee that must engage in protracted litigation to obtain the benefits of a performance bond issued by a litigious insurer. For all these reasons, the Sureties’ segregation argument should be rejected.⁴

⁴ For the same reasons, the Court should reconsider its ruling that “King County’s request for attorney fees for answering [VPFK’s] petition is also denied.” September 7 Order at 1.

2. The Court Of Appeals Correctly Rejected The Sureties' Argument That RCW 39.04.240 Is The "Exclusive Method" To Recover Attorney Fees In Disputes Over Performance Bonds For Public Projects. Op. ¶ 110.

There also is no proper basis to preclude King County from recovering its attorney fees under *Colorado Structures* and *Olympic Steamship* simply because a governmental entity can, *in some cases*, recover attorney fees under RCW 4.84.250-.280 as modified by RCW 39.04.240. Despite multiple opportunities to do so, the Sureties have not pointed to – nor can they point to – anything in these statutes indicating that the Legislature intended to abrogate or limit 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 cases following 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 for a public project.

In these circumstances, where there is no indication that a statutory remedy precludes or preempts other available remedies, courts have repeatedly recognized that *both* remedies are potentially applicable. Indeed, in both *Colorado Structures* and *Olympic Steamship*, the plaintiff recovered *Olympic Steamship* fees even though it also had a *contractual*

right to recover attorney fees. *See 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 ¶ D of [Olympic’s] policy”).

The Court’s opinion in *McGreevy v. Oregon Mutual Insurance Co.*, 128 Wn.2d 26, 904 P.2d 731 (1995), squarely addresses this issue and reaches the same result. The insurer there, 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). This 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. Here too, the statutory modification in RCW 39.04.240 is “one avenue to obtain fees, and not the exclusive means” to do so. *Id.* The Court of Appeals has followed *McGreevy* to the same effect.⁵

The Court’s opinion in *Potter v. Washington State Patrol*, 165 Wn.2d 67, 196 P.3d 691 (2008), also speaks to this issue. The issue in *Potter* was whether the plaintiff could pursue a tort claim of conversion for unlawful impoundment of his vehicles even though the Washington Legislature had enacted RCW 46.55.120 to provide a specific remedy for unlawful impoundments. *Id.* at 77. The Court rejected the defendant’s argument that RCW 46.55.120 provided the exclusive remedy for unlawful impoundments because the statute did not contain an exclusivity provision and there was no indication that the Legislature intended the statute to provide an exclusive remedy. *Id.* at 79-88.

The Court of Appeals correctly identified these legal principles and correctly applied them to RCW 4.84.250-.280 and RCW 39.04.240.

Citing *Potter* and other similar cases, the Court of Appeals recognized that the Legislature has the authority to supersede, abrogate, or modify the

⁵ Addressing a similar preemption argument in *Gossett v. Farmers Insurance*, 82 Wn. App. 375, 389, 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.” Likewise, in *Axess International Ltd. v. Intercargo Insurance Co.*, 107 Wn. App. 713, 722, 726, 30 P.3d 1 (2001), the defendant argued that an award of *Olympic Steamship* fees was preempted by federal maritime law, which generally limits fee awards “to a bad faith context.” The court disagreed, in part, because “nothing in the [federal] statute or regulations prohibits a state fee award.” *Id.* at 724.

common law principles set forth in *Olympic Steamship* and *Colorado Structures*. Op. ¶ 108. But similar to this Court in *Potter*, the Court of Appeals found 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 for a public project. Op. ¶ 110. Despite multiple opportunities, the Sureties have not pointed to any such manifestation of legislative intent. Nor can they.

Finally, the same public policy considerations that led this Court to hold that prevailing policyholders can recover *Olympic Steamship* fees also require that governmental entities can do the same:

1. Governmental entities, no less than private entities, want protection from expenses arising from litigation, not vexatious, time-consuming, and expensive litigation with a surety;
2. Governmental entities, no less than private entities, deserve to be made whole when they are compelled to assume the burden of legal action to obtain the benefit of a performance bond;
3. Sureties for governmental entities, no less than for private entities, must be incentivized to refrain from protracted and unwarranted litigation;
4. Even when governmental entities have bargaining power relative to large and sophisticated insurance companies (many will not), most construction projects utilize a *surety-approved* form document;
5. Even if a public entity had bargaining power in contract negotiations, there is a clear and overwhelming disparity of *enforcement power* between the public entity and the surety when, as occurred here, a major public project is behind schedule and a contractor refuses to perform; and

6. Taxpayers, no less so than shareholders, also deserve protection when contractors fail to timely perform their contractual obligations on a public project.

For all these reasons, as well as the additional reasons set forth in the County's previous briefing, the Court of Appeals correctly rejected the Sureties' attempt to carve out an unwarranted exception to *Colorado Structures* in disputes over performance bonds for public projects.

B. The Court Should Not Address The Argument That *Colorado Structures* Should Be Abrogated Because The Sureties Did Not Present That Issue In Their Petition For Review.

In their Petition for Review, the Sureties presented two issues that, they argued, warrant this Court's review. The first issue is whether a governmental entity can recover attorney fees under *Olympic Steamship* and *Colorado Structures* when it cannot recover fees under RCW 39.04.240. Surety Pet. 1. The second issue is whether fees incurred in litigating a dispute over a performance bond must be segregated from fees incurred in litigating the underlying dispute with the contractor. Surety Pet. 2. Critical here, the Sureties did not ask the Court to abrogate *Colorado Structures*. Instead, that argument was asserted solely by amici. As a result, the Court need not – and should not – reach the issue. See *State v. Barker*, 143 Wn.2d 915, 919, 25 P.3d 423 (2001) (“[t]his court ordinarily will not review issues not presented in the petition for review or the answer,” citing RAP 13.7(b)); *State v. Hirschfelder*, 170 Wn.2d 536,

552, 242 P.3d 876 (2010) (“We need not address issues raised only by amici, and decline to do so here.”).

If the Court nevertheless considers this issue, it should not abrogate or otherwise limit *Colorado Structures* for all the reasons set forth in the County’s response to SFAA’s amicus brief in support of the Sureties’ Petition for Review. One such reason is stare decisis, which requires “a clear showing that an established rule is incorrect and harmful before it is abandoned.” *City of Fed. Way v. Koenig*, 167 Wn.2d 341, 346, 217 P.3d 1172 (2009) (internal quotation marks omitted). Neither SFAA nor the Sureties have made such a showing. To the contrary, the facts in this case amply demonstrate the wisdom and necessity of providing a financial incentive for sureties to promptly perform their contractual obligations under a performance bond on a public project. Without such a rule, public construction projects will suffer along with the public fisc.

Moreover, the controlling legal principles are well established in Washington,⁶ and neither *Olympic Steamship* nor *Colorado Structures* has been questioned, abrogated, limited, or legislatively overruled. That is all

⁶ The Court’s holding in *Colorado Structures* is based largely on its 1991 opinion in *Olympic Steamship*. See *Colo. Structures*, 161 Wn.2d at 607-08. The Court also relied on *Estate of Jordan v. Hartford Accident & Indem. Co.*, 120 Wn.2d 490, 492, 844 P.2d 403 (1993), which applied *Olympic Steamship* to fiduciary bond obligations, and *National Bank of Washington v. Equity Investors*, 86 Wn.2d 545, 553, 546 P.2d 440 (1976), which recognized that surety bonds are “in the nature” of insurance contracts and controlled by the same rules of interpretation. *Colo. Structures*, 161 Wn.2d at 598. The Court of Appeals, too, has ruled that “[t]he *Olympic Steamship* rule extends to an action to recover on a surety bond.” *Axess Int’l*, 107 Wn. App. at 720-21.

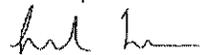
the more reason to decline to reconsider this long-standing precedent. *See, e.g., State v. Frawley*, 181 Wn.2d 452, 465, 334 P.3d 1022 (2014) (“we decline to overrule the long-standing rule that public trial rights violations may be asserted for the first time on appeal”); *City of Fed. Way*, 167 Wn.2d at 348 (“By not modifying the [Public Record Act’s] definition of agency to include the judiciary, the legislature has implicitly assented to our holding in *Nast...*”). The County will address this issue further if additional briefing is submitted on this point. In short, just as the Court concluded in *City of Federal Way*, there is “no reason to violate the doctrine of stare decisis here.” 167 Wn.2d at 348.

III. CONCLUSION

For the foregoing reasons, this Court should affirm the Court of Appeals’ rulings that the trial court correctly awarded King County attorney fees under *Olympic Steamship* and *Colorado Structures* without requiring King County to segregate fees incurred in litigating the defenses that the Sureties adopted when they denied coverage under the Bond.

DATED: October 7, 2016.

PETERSON | WAMPOLD | ROSATO |
LUNA | KNOPP



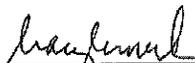
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CERTIFICATE OF SERVICE

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

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Enclosed for filing in the above-referenced matter is the Supplemental Brief of King County.

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

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