70432-0

70432-0

No. 70432-0-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

KING COUNTY,

Respondent/Cross-Appellant,

v.

VINCI CONSTRUCTION GRANDS PROJETS/PARSONS RCI/ FRONTIER-KEMPER, JV, a Washington joint venture; and 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,

Appellants/Cross-Respondents.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
THE HONORABLE LAURA GENE MIDDAUGH

REPLY BRIEF OF APPELLANT 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

OLES MORRISON RINKER & BAKER, LLP

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

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

SMITH GOODFRIEND, P.S.

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

1619 8th Avenue North
Seattle, WA 98109
(206) 624-0974

Attorneys for 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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES AND REGULATIONS

OTHER AUTHORITIES

I. INTRODUCTION

The legislature has enacted a comprehensive statutory scheme that governs attorney fee awards in actions arising out of a public works contract in which a public agency is a party. This action arises out of a public works contract. The County failed to qualify for a fee award under the governing statutory scheme, which cannot be waived. The County cannot circumvent the statutory scheme by recovering fees under an equitable rule that is inconsistent with public works fee statutes and that has never been applied in an action arising out of a public works contract.

Unlike the insured in *Olympic Steamship, Inc. v. Centennial Insurance Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991), or the obligee in *Colorado Structures, Inc. v. Insurance Company of the West*, 161 Wn.2d 577, 167 P.3d 1125 (2007), the County here was the contractually advantaged party. It was able to—and did—dictate the terms and conditions of both VPFK's construction contract and the Sureties' statutorily required performance bond, both of which the County alone drafted. The County chose not to include a fee provision in either the contract or the bond. Absent a fee provision, the fee award to the County is contrary to the statutory scheme allowing a party in an action arising out of a public works contract

to recover fees only if it makes a timely pretrial settlement offer and then betters that offer at trial. The equitable doctrines intended to protect insureds in *Olympic Steamship* and obligees in *Colorado Structures* do not allow an award of fees to the County in derogation of that statutory scheme, particularly when VPFK and the Sureties had no notice the County would seek fees as an element of its recovery when it commenced this action.

Even if the public works fee statutes did not preempt a claim for *Colorado Structures* fees in this case, the trial court erred by ordering the Sureties to pay $14.7 million – *all* the fees the County incurred prosecuting and defending claims on its construction contract with VPFK. Fees are available under *Olympic/Colorado* only for litigating coverage disputes, not for litigating disputes over a contractor's performance under a construction contract. Here, before the Sureties had an opportunity to investigate the County's claim that VPFK was in default, the County arranged to complete the disputed portion of the contract work and withdrew its demand that the Sureties "perform." Accordingly, the County's operative complaint did not allege any coverage dispute with the Sureties.

The County's argument that the entire action was a coverage dispute because the Sureties "adopted" VPFK's defenses to contract

liability would make every public works contract action a coverage dispute, in which only the public agency could recover fees and segregation would never be necessary. To the contrary, the burden to segregate fees was indisputably on the County, and segregation of fees incurred to litigate the Sureties' independent defenses (e.g., time to investigate/exoneration) would have been easy in this case.

This Court should reverse the Judgment against the Sureties for the County's attorney fees and costs.

II. REPLY ARGUMENT

A. The public works fee statutes govern fees in this action arising out of a public works contract.

The public works fee statutes, RCW 39.04.240 and 4.84.250-.280, "shall apply to an action arising out of a public works contract in which the state or a municipality, or other public body that contracts for public works, is a party[.]" RCW 39.04.240(1). The provisions of the public works fee statutes "may not be waived by the parties to a public works contract." RCW 39.04.240(2).

This action "arising out of a public works contract"[1] is governed by RCW 39.04.240(1). As the County recognized in

[1] "The phrase 'arising out of' is unambiguous, . . . has a broader meaning . . . ordinarily means 'originating from,' 'having its origin in,' 'growing out of,' or 'flowing from.' *Australia Unlimited, Inc. v. Hartford Casualty Ins. Co.*, 147 Wn. App. 758, 774 ¶ 34, 198 P.3d 514 (2008).

drafting the Performance and Payment Bond (Sureties' Br. App. A), the bond was issued "pursuant to RCW 39.08," which requires in all public works contracts that the bond cover *performance* of the contract for the benefit of the public agency, and *payment* for the benefit of laborers, mechanics, subcontractors, and material suppliers. RCW 39.08.010(1). The bond became part of the Brightwater public works contract, to which the Sureties agreed to be bound as parties. (*See* Sureties' Br. 22)

Under the public works fee statutes governing this action, a party is not "prevailing"— and cannot recover fees—unless it makes a settlement offer "not less than thirty days and not more than one hundred twenty days" after service and filing the complaint, and then recovers an amount at trial that equals or exceeds the offer. RCW 39.04.240(1)(b); RCW 4.84.260. As it concedes (County Br. 22 n.9), the County never made, much less bettered, a settlement offer to VPFK or to the Sureties that would have satisfied the conditions for an "offer-of-settlement" fee award under the public works fee statutes.

The County thus relies exclusively on *Colorado Structures* as an equitable basis for the fee award. (County Br. 14) But *Colorado Structures* was an action on a non-statutory bond, drafted by the

surety and issued on a private construction project on which a subcontractor indisputably had defaulted. 161 Wn.2d at 584-85.[2] The County faults the Sureties for failing to explain why, despite these differences, it is not entitled to "even *greater* protection," because "the public fisc is involved." (County Br. 17-18, emphasis in original) But the statute itself, and its legislative history, demonstrate why the legislature chose to limit fee awards in an action arising out of a public works contract to a party who betters a timely settlement offer at trial.

First, the time limitations placed on settlement offers that will bring a party within the public works fee statute are clearly intended to encourage *early* resolution of public works contract disputes. To support an award of fees, the offer must be made between 30 and 120 days after filing and service of the complaint. RCW 39.04.240(1)(b). This provision protects "the public fisc" from protracted litigation, encouraging reasonable settlement offers

---

[2] This analysis presumes that *Colorado Structures* should create a claim for fees on a performance bond at all – which the Sureties do not concede. As the Supreme Court noted in *Matsyuk v. State Farm Fire & Cas. Co.*, 173 Wn.2d 643, 660 n.5, 272 P.3d 802 (2012): "We recognize that *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." (*See* Sureties' Br. 19-21)

and fair dealing among the parties. The legislature eliminated any monetary restriction on the "offer-of-settlement" fee provision in 1999 because RCW 39.04.240 "works very well to save both sides time and money. It . . . is a two-edged sword that will force both sides to act reasonably." House Bill Report, H.B. 1671, 1999 Reg. Sess.

Second, unlike a private surety bond obligee, the County as a public agency enjoys sole and absolute power to dictate the terms of both a public works construction contract, on which it invites competitive bids, and of the statutorily required bond. (Sureties' Br. 22) Public works contracts are contracts of adhesion; neither the contractor nor the surety can change any terms of the contract or the bond. Indeed, the legislature enacted RCW 39.04.240 and extended the "offer-of-settlement" fee provision to all public works contracts precisely because "[t]hese contracts are very one-sided, and . . . the public agency has little incentive to compromise or settle now." House Bill Report, H.B. 1671. The balance of bargaining power is the converse of that in *Colorado Structures,* where the surety dictated the terms of the bond and the obligee's lack of bargaining power created an equitable basis for an award of fees when the obligee was forced to sue on the bond.

If a public agency wants to recover attorney fees (to protect the "public fisc") in the event of a public works contract dispute, it can include an attorney fee provision in the contract or the bond, and the winning bidder and its surety will be obliged to accept it. There is a risk to such a contracting strategy, however, which the County was unwilling to take here. Just as the public works fee statutes allow fees to any party (not just the public agency) that makes an early settlement offer and then betters it at trial, a contractual fee provision entitles any prevailing party (not just the public agency) to fees:

> In any action on a contract . . . [that] specifically provides that attorney's fees and costs, which are incurred to enforce the provisions of such contract. . ., shall be awarded to one of the parties, the prevailing party, whether he or she is the party specified in the contract . . . or not, shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements.
>
> Attorney's fees provided for by this section shall not be subject to waiver by the parties.

RCW 4.84.330.

Cognizant of the provisions of RCW 4.84.330, the County did not include a fee provision in either the Brightwater contract or the statutorily required bond, each of which it alone drafted. The County was free to make that choice. But having made it, the County must live with the consequences: the public works fee

statutes govern its right to recover attorney fees in this action arising out of a public works contract.

B. The public works fee statutes preempt a unilateral fee award under *Colorado Structures*.

Where, as here, the public agency chooses not to include a fee provision in either the public works contract or the statutorily required bond, the statutory scheme controls fee awards for at least two reasons:

First, when the legislature has established a condition precedent to particular relief, the courts will not "give relief on equitable grounds in contravention of [the] statutory requirement." *Longview Fibre Co. v. Cowlitz County*, 114 Wn.2d 691, 699, 790 P.2d 149 (1990); *see* cases cited at Sureties' Br. 23. The legislature created a comprehensive statutory scheme for recovering fees in an "action arising out of a public works contract." RCW 39.04.240 governs a public agency's right to recover on the sureties' promise in the statutorily required performance bond to "faithfully perform" the public works contract. Absent from the legislative scheme is any right of a public agency to recover attorneys' fees on the

statutorily required performance bond *except* under the "offer-of-settlement" fee provisions of RCW 39.08.240.[3]

Second, if the statutory scheme did not control, a public agency suing for breach of a public works contract could always circumvent the public works fee statutes by naming the statutory bond surety as a co-defendant. The legislature certainly would not have imposed a specific condition on the right to recover fees, which "*shall apply* to an action arising out of a public works contract" to which *any* public agency is a party, RCW 39.04.240(1) (emphasis added), nor prohibited waiver of the condition, RCW 39.04.240(2), unless it intended the condition to apply in all cases, and to all parties – including the public agency.

A performance bond obligee had no right to attorney fees under the common law when the legislature enacted RCW 39.04.240 in 1992. The County's claim that the public works fee statutes should not be construed to preempt the common law or the

---

[3] RCW 39.08.030 also creates a mechanism for laborers, mechanics, subcontractors and material suppliers to obtain attorney's fees on the payment bond. As with RCW 39.04.240, this provision is also intended "to attempt to equalize the ability and willingness to litigate when one party may have much stronger motives and greater financial ability to litigate than the other parties to the action." *Brear v. Washington State Highway Comm'n*, 67 Wn.2d 308, 316, 407 P.2d 423 (1965).

court's equitable powers (County Br. 19) gets the analysis backwards. "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 . . .*" RCW 4.04.010 (emphasis added). RCW 39.04.240(2) expressly provides that the provisions of the public works fee statutes "cannot be waived." The issue is not whether the public works fee statutes abrogate the common law, but whether the common law rule announced in *Colorado Structures* in 2007 could abrogate the public works fee statutes.

The absence of an express preemption clause ""does not defeat the case for preemption." *Washington Water Power Co. v. Graybar Elec. Co.*, 112 Wn.2d 847, 853, 774 P.2d 1199, 779 P.2d 697 (1989). In holding that the Washington Product Liability Act displaced all common law product liability remedies, the *Graybar* Court refused to "discover among the many canons of statutory construction an arsenal of technical rules that could be deployed to defeat the cause of preemption":

> Overriding all technical rules of statutory construction must be the rule of reason upholding the obvious purpose that the legislature was attempting to achieve.

112 Wn.2d at 855 (citation and internal quotation omitted). *See also Chelan Cnty. v. Nykreim,* 146 Wn.2d 904, 931, 52 P.3d 1 (2002) ("where . . . a statute is plain and unambiguous, it must be construed in conformity to its obvious meaning without regard to the previous state of the common law") (citation and internal quotation omitted); *State v. Bravo Ortega*, 177 Wn.2d 116, 124 ¶ 14, 297 P.3d 57 (2013).

RCW 39.04.240 was enacted in 1992.[4] By the time *Colorado Structures* was decided in 2007, the public works fee statutes had been in force for 15 years. The Court did not purport to dispense with the requirements of the public works fee statutes in *Colorado Structures*, because the issue in that case was whether the equitable rule of *Olympic Steamship* should apply to actions against a non-statutory bond surety on a private construction contract. The Court in *Colorado Structures* had no reason to discuss the statutory scheme governing fee awards in actions arising out of public works contracts.

---

[4] The statute originally applied only to public works contracts for less than $250,000. Laws 1992, ch. 171, § 1. The legislature extended its "offer-of-settlement" fee provisions to all public works contracts in 1999 for the reasons described *supra* at 5-6. Laws 1999, ch. 107, § 1.

Olympic Steamship was decided in 1991, a year before RCW 39.04.240 was enacted. But because the statute and the case addressed totally different subjects, the legislature had no reason to include language in RCW 39.04.240 abrogating *Olympic Steamship,* contrary to the County's argument. (County Br. 19-20) *Olympic Steamship* addressed an insured's right to recover fees in a coverage action on *an insurance contract*; RCW 39.04.240 addresses the right to recover attorney fees in an action arising out of *a public works contract.* Insurance policies and public works contracts serve different purposes. No court – including *Colorado Structures* – has held that a public works contract should be treated like an insurance policy for purposes of *Olympic Steamship.*

McGreevy v. Oregon Mutual Insurance Co., 128 Wn.2d 26, 904 P.2d 731 (1995) did not consider the public works fee statutes, contrary to the County's contention. (County Br. 21) The issue there was whether *Olympic Steamship* should be overruled, in part on the grounds of the fee provisions in the Consumer Protection Act (CPA). *McGreevy*, 128 Wn.2d at 31, 38. The Court held in *McGreevy* that nothing suggested the legislature intended the CPA to afford "the exclusive means to recover attorney fees in a case

involving a dispute over the coverage of an insurance policy." 128 Wn.2d at 38.[5]

The CPA, however, differs in critical respects from the public works fee statutes. The CPA is a remedial statute, designed to protect consumers from unfair and deceptive acts in "the conduct of any trade or commerce." RCW 19.86.020; *see Berryman v. Metcalf*, 177 Wn. App. 644, 674 ¶ 72, 312 P.3d 745 (2013), *rev. denied*, 179 Wn.2d 1026 (2014). Among its remedies, the CPA provides for unilateral fee awards; only injured persons may qualify for a fee award, by prevailing on a claim under the CPA. 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). Likewise, under *Olympic Steamship*, only an insured may

---

[5] The County also cites the Court of Appeals' decision in *Gossett v. Farmers Ins. Co. of Washington*, 82 Wn. App. 375, 917 P.2d 1124 (1996) (County Br. 21), which was reversed in part at 133 Wn.2d 954, 948 P.2d 1264 (1997). The Court of Appeals in *Gossett* simply followed *McGreevy* in rejecting an argument that the fee provisions of the CPA "preempted" *Olympic Steamship,* 82 Wn. App. at 389, a holding that is inapposite here.

The County's reliance on *Axess Int'l Ltd. v. Intercargo Ins. Co.*, 107 Wn. App. 713, 30 P.3d 1 (2001) (County Br. 21-22) is similarly misplaced. No federal statute, regulation or principle of admiralty jurisprudence precluded a fee award because federal admiralty law, unlike this state's public works fee statutes, did not condition a fee award on a parties' timely pretrial settlement offer. *See* discussion *supra* 5-7.

qualify for a fee award, by prevailing on a claim for coverage under an insurance policy.

Further, the CPA neither authorizes nor precludes an award of fees incurred to litigate non-CPA claims in the same action. *Schmidt v. Cornerstone Investments, Inc.*, 115 Wn.2d 148, 170-71, 795 P.2d 1143 (1990) (denying award based on failure to segregate fees incurred on CPA claim); *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 743-44, 733 P.2d 208 (1987) (cautioning courts to limit fees to those reasonably incurred on CPA claims). Like the CPA, *Olympic Steamship* neither authorizes nor precludes an award of fees incurred to litigate non-coverage claims in the same action.

The unilateral fee provision of the CPA and the unilateral fee rule of *Olympic Steamship* thus are compatible. Each can apply without interfering with the other, and an award under one is consistent with an award under the other. That is why the CPA does not "preempt" *Olympic Steamship*.

In contrast, the right to recover fees under the public works fee statutes does not depend on the party's success on a particular claim but on the outcome in the action as a whole, and on a party's efforts to timely resolve the action by a reasonable settlement offer. These requirements of the public works fee statutes "may not be

waived." RCW 39.04.240(2). Because the public works fee statutes, unlike the CPA's fee provision, apply to the entire "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 public agency) may recover fees if it satisfies the statutory conditions by bettering a timely pretrial offer. Statutes providing for bilateral fee awards are plainly incompatible with any equitable or common law rule that limits fee awards to plaintiffs.

The County should not be permitted to avoid the statutory restrictions by claiming fees under an equitable rule that has never been applied to cases arising out of public works contracts. The Supreme Court has described the *Olympic Steamship* rule as "a narrow exception" to the American Rule, applicable only "where the specific facts and circumstances warrant." *Dayton v. Farmers Ins. Group.*, 124 Wn.2d 277, 280, 876 P.2d 896 (1994). This action arises out of a public works contract, and is governed by RCW 39.04.240 and RCW 4.84.250-.280, not by *Olympic Steamship* or

Colorado Structures. The Court should not stretch the narrow equitable exception created by *Olympic Steamship* so far that it nullifies the legislative enactment of the public works fee statutes directly applicable to this action.

C. The equitable rule of *Colorado Structures* should not apply where, as here, a fee award would be inequitable.

Even if the public works fee statutes do not control here, equitable considerations preclude a *Colorado Structures* fee award to the County. (Sureties' Br. 25-28) Because the American Rule requires each side to bear its own attorney fees, a litigant must be given adequate notice when it may be subject to a fee award. *See In re 1992 Honda Accord*, 117 Wn. App. 510, 524, 71 P.3d 226 (2003) ("[s]ome type of notice is required so the parties can settle the claim before they incur the risk of paying the prevailing party's attorney fees.) (quotations and alterations omitted). Typically, notice is provided by a fee provision in the parties' contract. Here, however, the County chose not to include a fee provision in either the construction contract or the bond. And the County concedes it made no pretrial offer in this case that would allow it to recover fees under RCW 39.04.240. (County Br. 22 n.9.)

The County claims that *Colorado Structures* itself placed VPFK and the Sureties on notice that they faced a fee award. (County Br. 25) But *Colorado Structures* was an action on a private project's non-statutory bond in which the owner was not even a party and the surety admitted the principal's default. The Sureties were justified in assuming that the County's action for breach of a public works contract would be governed by the statutes applicable to public works contracts, not by a court opinion that did not even garner a majority for the proposition that *Olympic Steamship* should be extended to a non-statutory performance bond on a private construction project.

D. The clear distinction between coverage and claim defenses required segregation of recoverable fees.

Only fees incurred litigating coverage issues may be recovered under *Olympic Steamship* and *Colorado Structures.* (Sureties' Br. 30-31) The County's principal argument against segregating its recoverable fees, that the Sureties "adopt[ed] the defenses VPFK had asserted" (County Br. 1; *see* County Br. 5-7, 10, 15, 28-32, 37), in fact confirms that the vast majority of the fees claimed by the County are not recoverable because these fees were incurred in litigating contract, not coverage, claims and defenses.

The County argues that it could recover damages from the Sureties only if it proved VPFK had breached the Central Contract and was in default. (County Br. 3; 7: "King County could obtain the benefit of the Bond only if it established that VPFK's defense lacked merit."; 36: "King County's success on its breach of contract claim against VPFK was *critical* to its coverage claim against the Sureties.") (emphasis in original)) But the relevant inquiry is not whether the County had to overcome VPFK's contractual defenses before it could collect under the performance bond. The relevant inquiry is whether VPFK's defenses raised coverage issues. They did not. The defenses raised by VPFK (and "adopted" by the Sureties) were defenses to *VPFK's liability* under the construction contract. The County had to overcome VPFK's *contract* defenses and prove VPFK was in default before it could seek reimbursement under the bond. But it does not follow that the County's contract case against VPFK was a coverage dispute with the Sureties.

The County's burden to prove VPFK's contractual default was analytically no different from any injured party's burden to overcome an insured tortfeasor's defenses and prove the insured's liability before recovering from the defendant's insurer. "The [insurer's] duty to indemnify hinges on the insured's actual liability

to the claimant and actual coverage under the policy." *Hayden v. Mut. of Enumclaw Ins. Co.*, 141 Wn.2d 55, 64, 1 P.3d 1167 (2000). The insurer's duty to pay under the policy does not arise until the injured claimant establishes the insured's liability. *See Messer v. Estate of Shannon*, 65 Wn.2d 414, 415, 397 P.2d 846 (1964); *Rones v. Safeco Ins. Co.*, 60 Wn. App. 496, 501-03, 804 P.2d 649 (1991) (injured claimant has no right of action against insurer and cannot recover from insurer until tortfeasor's liability for a fixed amount of damages has been established), *aff'd*, 119 Wn.2d 650, 835 P.2d 1036 (1992).

That an injured claimant must establish the insured's liability as a condition to collecting on the insured's policy does not transform every tort claim into a coverage dispute for purposes of *Olympic Steamship*. *See* cases cited at Sureties' Br. 30-31; *Woo v. Fireman's Fund Ins. Co.*, 150 Wn. App. 158, 175-76 ¶ 47, 208 P.3d 557, *rev. denied*, 167 Wn.2d 1008 (2009); *Kroeger v. First Nat. Ins. Co.*, 80 Wn. App. 207, 210, 908 P.2d 371 (1995) ("A coverage dispute generally raises a question about who is insured, the type of risk insured against, or whether an insurance contract exists."), *rev. denied*, 129 Wn.2d 1002 (1996). The County's argument wrongly eliminates the distinction between claim and coverage disputes.

Although the County claims that *Olympic Steamship* supports an award of fees *unless* the insurer "*only* disputes the amount of the required payment" (County Br. 33) (emphasis in original), payment is *only* one example of a claim dispute for which fees cannot be recovered. Another example is a dispute over the insured's *liability*. *Olympic Steamship* does not apply to "controversies over liability." *Solnicka v. Safeco Ins. Co. of Illinois*, 93 Wn. App. 531, 533, 969 P.2d 124 (1999). The central dispute in this case—and the first question on the verdict form—concerned VPFK's liability.

The County also repeatedly insists it "was compelled to assume the burden of legal action to obtain the benefit of the Bond[.]" (County Br. 3, 7-8, 10, 14, 23-34) But the record belies the County's attempt to portray itself as a victim of the Sureties' intransigence, with no option but to sue to enforce the bond. At about the time it filed this action, the County *terminated* its demand that the Sureties perform under the bond, and it never filed suit to compel performance by the Sureties. (Sureties' Br. 12-13) Instead, re-setting a course it had already charted for itself before making any demand on the Sureties, the County opted to arrange for completion of the work, without involving the Sureties. The County hired JDC to complete the excavation of the BT-3 tunnel,

issued a deductive change order to VPFK, and offered to pay VPFK incentives if it met certain milestones in completing the BT-2 tunneling – which it did. (VPFK Br. 30; Sureties' Br. 12-14)

Because the County terminated its demand on the Sureties, the County's complaint did not raise any coverage dispute, and did not allege the Sureties breached any obligations owed to the County under the bond. (CP 1-14) On the contrary, the sole dispute alleged was whether "VPFK is in default of the Central Contract." (CP 13) The County included the Sureties only on the grounds that they were "jointly and severally liable for all the County's damages and costs arising from VPFK's default[.]" (CP 13) In other words, the County sued the Sureties only because the County regarded them as a potential source from which the County might collect any contract damages awarded against VPFK.

The County also misstates the record in asserting that it "successfully established that the Sureties wrongfully denied liability on the County's claim against the Bond[.]" (County Br. 10) Having been (wrongly) instructed that a determination against VPFK would make the Sureties jointly and severally liable for any contract damages, the jury was not asked to decide, and did not decide, whether the Sureties wrongfully denied any claim under the

bond.[6] (*See* Sureties Br. 16-17) The judgment likewise does not resolve any coverage dispute and does not hold the Sureties independently liable for any "wrongdoing." (CP 4537; Sureties' Br. 17)

The Sureties no more "compelled" the County to file this action against VPFK than an automobile insurer "compels" an injured plaintiff to file suit against the insured tortfeasor driver when liability or damages are disputed. Just as the injured plaintiff must first establish the defendant driver's liability for damages before the plaintiff can claim benefits under the defendant's liability policy, the obligee (here, the County) must establish the principal's (VPFK's) default before claiming benefits under a performance bond. Both are disputes over *liability*; neither is a dispute over *coverage* within the rule of *Olympic Steamship*.

The distinction between liability and coverage disputes becomes clear when this case is compared with *Olympic Steamship* and *Colorado Structures*. *Olympic Steamship* was a dispute

---

[6] In their opening brief at 39-43, the Sureties identify several defenses they could pursue if this action is remanded for further proceedings. *See* RAP 2.5(c)(2). The County does not deny that the Sureties have adequately reserved these defenses for further litigation. Instead, the County undertakes to refute the defenses on their merits. (County Br. 39-43) Because the Sureties raised the defenses in their opening brief only for purposes of preserving them for further litigation, they are not currently before this Court, and need only be addressed in the event of remand, no reply on the merits is necessary.

between an insured and its own insurer. The litigation centered on the meaning of the policy's "sistership" exclusion. *See Olympic Steamship*, 117 Wn.2d at 42-51. Thus, *Olympic Steamship* involved a pure coverage dispute—the meaning of an insurance policy. It did not involve either the insured's liability or damages.

Similarly, in *Colorado Structures* the dispute was between the surety and the obligee claiming benefits under its bond; the project owner was not even a party. 161 Wn.2d at 584 ¶ 17. The parties *stipulated* that a subcontractor had materially breached the construction contract, so the principal's liability was never in dispute. *Colorado Structures*, 161 Wn.2d at 584 n.7. Instead, the litigation centered on whether the bond's terms required the obligee to formally declare a default before it could claim benefits under the bond. The Court resolved the issue in favor of the obligee and affirmed an award in the amount of the bond's penal sum. *Colorado Structures*, 161 Wn.2d at 585 ¶ 7, 608 ¶ 28. Thus, like *Olympic Steamship*, *Colorado Structures* involved a pure coverage dispute—the meaning of a performance bond.

Here, on the other hand, the parties disputed whether VPFK was in default (liability), and the amounts claimed by both VPFK and the County (damages), not whether the bond applied in case of

a default (coverage). The fees the County incurred in litigating VPFK's liability and proving its damages – virtually all the fees claimed – were distinct from the County's limited efforts necessary to respond to the Sureties' summary judgment motion and to propose instructions that in the end wrongly left the Sureties with no defense at all. (*See* Sureties' Br. 36-39)

The County's only response to the Sureties' examples of discrete litigation activities that had no conceivable relation to coverage (Sureties' Br. 37-38) is to repeat its mantra that *all* litigation activities were related to coverage because all were undertaken to overcome VPFK's defenses to liability under the Central Contract. (County Br. 35-36) The County's "one big coverage dispute" argument is a tacit admission that it was litigating contract liability and damages, not coverage. It must fail because fees incurred in proving liability and damages are not recoverable under *Olympic Steamship*.

E. The County is not entitled to recover its attorney fees on appeal.

A party that was not entitled to recover *Olympic Steamship* fees in the trial court cannot recover fees on appeal. *Wellman & Zuck, Inc. v. Hartford Fire Ins. Co.*, 170 Wn. App. 666, 681 ¶ 32, 285 P.3d 892 (2012), *rev. denied,* 176 Wn.2d 1019 (2013); *Ledcor*

Indus. (USA), Inc. v. Mut. of Enumclaw Ins. Co., 150 Wn. App. 1, 16 ¶¶ 34-36, 206 P.3d 1255, *rev. denied*, 167 Wn.2d 1007 (2009). Because the County was not entitled to recover *Olympic Steamship* fees in the trial court, its fee request on appeal should be denied.

If this Court reverses the judgment against VPFK, the basis for the County's fee award will collapse; the County will not be the prevailing party in the action, let alone on appeal. *See Polygon Northwest Co. v. American Nat. Fire Ins. Co.*, 143 Wn. App. 753, 796 ¶ 75, 189 P.3d 777, *rev. denied*, 164 Wn.2d 1033 (2008). In any event, fees incurred in VPFK's appeal and the County's cross-appeal are clearly segregable and not recoverable from the Sureties in this separately briefed appeal.

III. CONCLUSION

The Court should reverse the Judgment against the Sureties for the County's attorney fees and costs.

DATED this 7th day of July, 2014.

OLES MORRISON RINKER & BAKER, LLP

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

SMITH GOODFRIEND, P.S.

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

Attorneys for Appellant 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 July 7, 2014, I arranged for service of the foregoing Reply Brief of Appellants Cross-Respondents Vinci Construction Grands Projets/Parsons RCI/Frontier-Kemper, JV, to the court and to counsel for the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	___ Facsimile _✓_ Messenger ___ U.S. Mail ___ E-Mail
Thomas R. Krider Peter Ralston Oles Morrison Rinker & Baker LLP 701 Pike St., Ste 1700 Seattle, WA 98101-3930	___ Facsimile ___ Messenger ___ U.S. Mail _✓_ E-Mail
Fredric D. Cohen Mitchell C. Tilner Horvitz & Levy LLP 15760 Ventura Blvd. 18th Floor Encino, CA 91436	___ Facsimile ___ Messenger ___ U.S. Mail _✓_ E-Mail
David R. Goodnight Karl E. Oles Leonard Feldman Hunter Ferguson Stoel Rives LLP 600 University St., Ste 3600 Seattle, WA 98101-4109	___ Facsimile ___ Messenger _✓_ U.S. Mail _✓_ E-Mail
Mary DeVuono Englund 900 King County Administration Bldg. 500 Fourth Avenue Seattle, WA 98104	___ Facsimile ___ Messenger _✓_ U.S. Mail _✓_ E-Mail

DATED at Seattle, Washington this 7th day of July, 2014.

Tara D. Friesen