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SUPREME COURT NO. 99158-8
COURT OF APPEALS NO. 785435

SUPREME COURT
OF THE STATE OF WASHINGTON

SCARSELLA BROTHERS, INC., a Washington corporation,

Appellant,

v.

FLATIRON CONSTRUCTORS, INC., et al.,

Respondents.

RESPONDENTS THE CO-SURETIES'
ANSWER TO PETITION FOR REVIEW

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No. 929539824) and XL Specialty
Insurance Company (Bond No.
SUR7401972)

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I. INTRODUCTION AND RELIEF REQUESTED

Petitioner Scarsella Brothers, Inc.’s (“Scarsella”) fails to establish any of the conditions necessary to justify the extraordinary grant of acceptance of review by the Washington State Supreme Court of the unpublished appellate decision at issue. Thus, Respondents, the Co-Sureties¹, file this Answer to Scarsella’s Petition for Review (“Petition”) to request that the Court deny Scarsella’s request and not accept review.

Scarsella’s Petition is limited to seeking review of the Division I, Court of Appeals’ September 28, 2020, unpublished decision (“Opinion”), affirming the trial court’s decision to deny Scarsella’s request to recover its attorneys’ fees, costs, and prejudgment interest. Division One properly affirmed the trial court’s decision to deny Scarsella’s request for attorneys’ fees, costs, and interest based on the facts before it and as required under Washington law.

Scarsella’s Petition is simply another attempt to belatedly cure its own failure to substantiate and document its claims against Flatiron.

¹ Respondents are the sureties that co-issued payment and performance bonds on behalf of their principal, Respondent Flatiron Constructors, Inc. (“Flatiron”). The sureties, and their respective bond numbers, are as follows: (1) Liberty Mutual Insurance Company, Bond No. 015035206; (2) Travelers Casualty and Surety Company of America, Bond No. 105688202; (3) Fidelity and Deposit Company of Maryland/Zurich American Insurance Company, Bond No. 9070286; (4) Federal Insurance Company, Bond No. 82292503; (5) The Continental Insurance Company, Bond No. 929539824; and (6) XL Specialty Insurance Company, Bond No. SUR7401972 (collectively, “Co-Sureties”). CP 2-3, 34-35. Each of the above-identified bond numbers will be collectively referred to as the “Bonds” throughout this Answer.

Scarsella could not substantiate or otherwise prove its claimed work to Flatiron in 2014-2015; Scarsella could not substantiate or validate its claim of over \$5,000,000.00 to the Sureties in 2015; and Scarsella could not establish, substantiate or prove its claim during a lengthy bench trial with voluminous exhibits and many witnesses. Scarsella could not cure its failure when it brought this appeal to Division One and, now, it seeks review by the Supreme Court for one last attempt to undo its own failures.

Scarsella's Petition sets forth conclusory and unsupported arguments which fail to justify review under RAP 13.4(b)(1),(2), and (4). Scarsella fails to establish that the Opinion is in conflict with any Supreme Court decision, that the Opinion is in conflict with a published decision by the Court of Appeals, or that petition involves any issue of substantial public interest. Both the trial court and Division One properly applied the specific facts of this case to Washington statutory and common law. Scarsella's arguments to the contrary are nothing more than its continued disregard of the salient facts and its misconstruction and wrongful interpretation of Washington law. Scarsella's arguments not only are unsupported under Washington law, but, would require a broad departure from existing law addressing the availability of a party to recover its attorneys' fees, costs, and prejudgment interest that cannot be supported.

II. CLARIFICATION OF THE ISSUE

Whether review is warranted of the decisions to deny Scarsella's request to recover attorneys' fees, costs, and prejudgment interest when Scarsella fails to identify conflicting published authority and fails to identify an issue of substantial public interest and where the trial court's and Division One's decisions are consistent with long-established Washington statutory and common law?

III. RESTATEMENT OF THE CASE

This matter commenced as a contractual dispute between Flatiron, the general contractor, and Scarsella, its subcontractor, relating to Scarsella's work on a project referred to as the I-405 NE 6th Street to I-5 Widening and Express Toll Lanes, CN 0143-12 (the "Project"). However, Scarsella's petition is limited solely to decisions made by the trial court following a bench trial. The following facts are relevant to the Court's consideration of Scarsella's request.

A. Scarsella's Bond Claim and the Commencement of the Lawsuit

Approximately nine months after the dispute between Scarsella and Flatiron commenced, the Co-Sureties first learned of the claim upon receipt of Scarsella's "Notice of Claim of Lien," on August 14, 2015.² Scarsella claimed it was owed \$5,680,598.94, exclusive of its claimed attorney fees

² Opinion, Appendix to Scarsella's Petition ("Appx."), A-3 3-4.

and costs, for Scarsella's labor and supplied materials on the Project.³ Scarsella did not include any documentation to support its claim in its August 14 notice.⁴

In a letter dated August 25, 2015, the Co-Sureties acknowledged Scarsella's claim and requested documentation and further information from Scarsella necessary to perform an independent investigation.⁵ Receiving no response, the Co-Sureties sent a second letter to Scarsella on November 6, 2015, seeking documentation and further information to substantiate the claim.⁶ The Co-Sureties also informed Scarsella that Flatiron, the Co-Sureties' principal, was disputing its claim under the Bonds.⁷

Finally, on December 7, 2015, Scarsella partially responded to the Co-Sureties' August 25 request and provided certain documentation and additional information relating to its claim.⁸ A week later, on December 14, Scarsella sent the Co-Sureties further documentation relating to its claim, although that documentation was not complete.⁹

³ Opinion, Appx. A-4; CP 1902-1904. It is notable that the amount claimed by Scarsella in its Notice of Claim is more than double the amount that Scarsella recovered at trial.

⁴ CP 1902-1904.

⁵ CP 1892-1893, 1906-1912.

⁶ CP 1893, 1914-1915.

⁷ *Id.* The Co-Sureties did not take a position on the validity of Scarsella's claim in the November 6, 2015 letter.

⁸ CP 1893, 1925-2119.

⁹ CP 1893, 1917-1920.

However, prior to sending the additional documentation and only four days after providing a partial response to the Co-Sureties, Scarsella commenced its lawsuit against Flatiron and the Co-Sureties in King County Superior Court on December 11, 2015.¹⁰ The Co-Sureties were thrust into litigation before they had a meaningful opportunity to evaluate Scarsella's claim on the Bonds.

B. Scarsella Cannot Prove its Claim at Trial

Following a lengthy bench trial where Scarsella presented the testimony of numerous witnesses and voluminous documents, Scarsella sought a total award of \$12,135,173.00 for all of its causes of action.¹¹ Scarsella sought over \$6,000,000.00 in damages for its alleged breach of contract claim against Flatiron, which included the \$2,731,427.97 amount that Flatiron had acknowledged during trial that Scarsella had earned, but was withheld by Flatiron based on its good faith dispute that Scarsella was owed such funds.¹²

On November 2, 2017, the trial court issued its Findings of Fact and Conclusions of Law and awarded Scarsella \$2,731,437.97, the amount that

¹⁰ CP 1, 14, 1893.

¹¹ CP 108, 350.

¹² CP 1296.

Flatiron acknowledged had been earned.¹³ In an oral ruling, the trial court stated the following with respect to the amount awarded to Scarsella:

With respect to Scarsella's claims, I think Scarsella was handicapped by the poor records, as well as other things that happened along the way, in some ways Scarsella was in control of. I have concluded that for Scarsella's claim, it can be granted, and its been proved only insofar as Flatiron has agreed that amounts are owing, and that amount is \$2,731,437.97. And the only reason I could agree to that is that Flatiron agrees. I would not have been able to conclude beyond a preponderance of the evidence as to how much was owed, based upon literally reams of data that the parties have had to work with here.¹⁴

The trial court consistently found that Scarsella failed to document and substantiate its work and its claims, including Scarsella's continued failure to properly prepare and maintain contractually required project documentation and its failure or inability to produce documents substantiating its claimed work on the Project.¹⁵ The trial court also concluded that Scarsella failed to comply with the contractually required claim procedures and, thus, waived its rights to claim any compensation beyond the amounts acknowledged by Flatiron.¹⁶ The trial court also concluded that Flatiron's withholding of payment to Scarsella complied with Washington law because it arose from "a good faith dispute with

¹³ CP 1317, 1331.

¹⁴ Report of Proceedings ("RP") at 3942-3942 (emphasis added).

¹⁵ CP 1292-1293, 1298, 1300.

¹⁶ CP 1316-1317.

Scarsella regarding the impact of Scarsella's delays to the Project and its failure to meet scheduling and documentation obligations."¹⁷

C. The Trial Court Properly Denied Scarsella's Requests for Attorneys' Fees, Costs, and Interest

On a post-trial motion, Scarsella sought, in relevant part, an award of attorneys' fees, costs, and prejudgment interest.¹⁸ The trial court denied Scarsella's motion other than to grant Scarsella its requested judgment of \$2,731,437.97.¹⁹ In doing so, the trial court reiterated that Scarsella's documentation, particularly of its force account claim, was "inconsistent and unreliable."²⁰ The trial court also again noted that it only awarded Scarsella \$2,731,437.97 as a result of "*Flatiron's witnesses trial testimony* conceding that amount to be payable but for the parties' dispute, and *Flatiron's analysis* of a sampling of project documents, the results of which were adjusted as late as just prior to the trial."²¹ Scarsella could not recover its claimed attorneys' fees, costs, or prejudgment interest under the payment withholding statutes²² "because Flatiron had withheld payments from Scarsella in good faith."²³

¹⁷ CP 1296.

¹⁸ CP 1620-1643.

¹⁹ CP 2311-2333.

²⁰ CP 2317.

²¹ CP 2317-2318 (emphasis added).

²² The payment withholding statutes refers to RCW 39.04.250 and RCW 39.76.040, also referred to as the Prompt Payment Act.

²³ CP 2318.

Thus, RCW 39.08.030 was the only remaining statutory basis under which Scarsella could claim entitlement to recovery its attorneys' fees.²⁴ In order to recover under the statute, Scarsella had to establish that it was the prevailing party.²⁵ This Scarsella could not do because both Scarsella and Flatiron had "prevailed" on major issues in the litigation when each successfully defended against the other's claims.²⁶ Importantly, the trial court concluded that Scarsella failed to prevail on its own respective claims against Flatiron, including its breach of contract claim – "Scarsella waived its contract claim against Flatiron, and Scarsella failed to prove other claims against Flatiron."²⁷ Because Scarsella was not a prevailing party, it could not recover its attorneys' fees and costs under RCW 39.08.030(1)(b).²⁸

In discussing Scarsella's statutory claim against the Sureties under RCW 39.08.030, the trial court noted that it "would be particularly inequitable to require the [Co-]Sureties to pay Scarsella's attorneys' fees and costs" when Scarsella failed to prove and recover on its own affirmative claims.²⁹ Further, the trial court recognized that allowing a claimant to

²⁴ CP 2319-2320.

²⁵ CP 2320.

²⁶ CP 2321-2327.

²⁷ CP 2324.

²⁸ CP 2327.

²⁹ *Id.*

recovery its attorneys' fees and costs in such a situation would create inequitable and problematic policy.³⁰

The trial court also denied Scarsella's equitable claim to recover its attorneys' fees and costs under *Olympic Steamship Co. Inc. v. Centennial Insurance Co.*³¹ because Scarsella had not prevailed on its claim against the Bonds. Division One appropriately affirmed the trial court's decisions.³²

IV. GROUNDS FOR DENYING REVIEW

In order for review to be accepted, Scarsella must to satisfy one of the following considerations: (1) that the Opinion "is in conflict with a decision of the Supreme Court"; (2) that the Opinion "is in conflict with a published decision of the Court of Appeals"; (3) that "a significant question of law under the Constitution of the State of Washington or of the United States is involved; or" (4) that "the petition involves an issue of substantial public interest that should be determined by the Supreme Court."³³

Scarsella cannot establish any one of the necessary considerations to justify the acceptance of review. Contrary to Scarsella's conclusory and unsupported assertions, the Opinion does not conflict with any decision by the Supreme Court, nor does it conflict with any published Court of Appeals

³⁰ CP 2327-2328.

³¹ 117 Wn.2d 52, 811 P.2d 673 (1991).

³² Opinion, Appx. A-1-30.

³³ RAP 13.4(b). Scarsella does not assert that this Petition involves "a significant question of law under the Constitution of the State of Washington or of the United States."

decision. Further, the petition does not involve an issue of substantial public interest because these issues are limited by the relevant facts of this matter. Because none of the considerations for accepting review have been established by the Petition, the Court should deny Scarsella's request.

Further, however, it must be noted that both the trial court and Division One reached appropriate and correct decisions which are consistent with Washington law. Scarsella's Petition seems to either misunderstand the current state of Washington law or to argue for a broad change in the law which would greatly expand the availability to recover a party's attorneys' fees, costs, and prejudgment interest. Scarsella's Petition not only fails to satisfy any of the necessary qualifications, it is unsupported under Washington law.³⁴

A. Review is Not Warranted of the Decisions Denying Scarsella's Request to Recover Statutory Attorneys' Fees

The trial court and Division One correctly concluded that Scarsella was not entitled to recover its attorneys' fees under any of its claimed statutory bases.³⁵ Scarsella argues that the prior decisions wrongfully

³⁴ Scarsella's unsupported arguments addressing its ability to recover attorneys' fees and costs is in direct conflict with Washington's long-standing approach to attorneys' fees under the American Rule which dictates that "attorneys' fees are not recoverable by the prevailing party as a cost of litigation absent a contract, statute, or recognized ground of equity." *Rettkowski v. Dept. of Ecology*, 128 Wn.2d 508, 514, 910 P.2d 462 (1996) (citing *Rorvig v. Douglas*, 123 Wn.2d 854, 861, 873 P.2d 492 (1941)).

³⁵ Scarsella seems to argue that it is entitled to attorney fees under RCW 39.04.250 and RCW 39.76.040, even though Scarsella's Prompt Payment Act claims failed at trial and Scarsella did not challenge the trial court's conclusion of law that Scarsella's claims failed,

denied its request for attorneys' fees and costs under RCW 39.08.030 and, to justify review, Scarsella asserts that it was not required to "prevail" to recover its attorneys' fees from the Co-Sureties. Scarsella fails to state which Supreme Court or published appellate decision conflicts with Scarsella's expansive statutory interpretation and also fails to identify the substantial public interest at issue.

Scarsella's argument reflects a fundamentally flawed understanding of the recovery of attorneys' fees under Washington law. First, attorneys' fees are generally not available unless allowed for under a contract, provided for in a statute, or allowed under grounds of equitable consideration.³⁶ Second, even if an exception applies, attorneys' fees are only recoverable by the prevailing party.³⁷ If a party does not prevail, it cannot recover its attorneys' fees and costs.

nor does Scarsella challenge the decision here. While Scarsella challenged Conclusion of Law No. 76, which concluded that Flatiron had established a good faith dispute as a basis to withhold payment, Scarsella did not challenge the other eight Conclusions of Law, Nos. 72-75, 77-80, holding that Scarsella's Prompt Payment Act claim failed. Rather, Scarsella argues that it is entitled to recover its attorneys' fees and costs under the Prompt Payment Act solely by alleging a cause of action thereunder and deeming itself the prevailing party. This is not the correct analysis of Washington law and should be ignored. Moreover, Scarsella's assertions as to the trial court's and Division One's analysis of whether it was a prevailing party are misplaced and belied by the factual and procedural record before this Court. Whether a party "prevails" in an action is necessarily based on the facts of each litigation before the Court addressing that specific question. There is nothing further for this Court to define, nor are any of the prior orders in conflict with Washington law. The Co-Sureties will focus on Scarsella's continued assertion to claims under RCW 39.08.030, but reserve their right to further address this issue if the Court agrees to accept review.

³⁶ *Rettkowski*, 128 Wn.2d at 514.

³⁷ *Id.*

Scarsella’s argument for review skips the first hurdle entirely and instead makes a general allegation that the statute does not require “a party to formally ‘prevail,’” but such a requirement would be superfluous and unnecessary. Further, the authority cited by Scarsella recognizes that a party must prevail before an award of attorneys’ fees is considered. In *Brear v. Wash. State Highway Comm’n*³⁸, the Court noted that, if on remand the trial court found against the respondent and dismissed the action, then “no allowance for attorney fees can be made to respondent.” It was only if respondent received a judgment in its favor and, thus, prevailed, that the trial court should consider an award of attorneys’ fees in respondent’s favor.³⁹

Scarsella’s argument seems to be that, merely by naming a surety with adverse interests to it, that Scarsella is entitled to recover attorneys’ fees regardless of the outcome of the litigation. Taken to its logical conclusion, Scarsella argues that it could recover attorneys’ fees under RCW 39.08.030 even if there was a judgment in favor of Flatiron or the surety’s principal, which makes little sense and would undermine the purpose of the statute of “equaliz[ing] the ability and willingness to litigate.” Scarsella’s request for review is not based on the applicable

³⁸ 67 Wn.2d 308, 315, 407 P.2d 423 (1965).

³⁹ *Id.*

considerations, but, is instead based on an unsupported and conclusory assertions.

Furthermore, the prior denials of Scarsella's claimed entitlement to attorneys' fees under RCW 39.08.030 are consistent with Washington law. While RCW 39.08.030 does allow for a successful claimant to recover its attorneys' fees and costs, Washington courts do not guarantee entitlement solely because a claimant named a surety in the lawsuit.⁴⁰ Instead, the claimant must prevail on its claims and establish that the claimant and the surety's interests are adverse and that the claim was "undisputed" at the time the surety denied the claim.⁴¹ Scarsella has never been able to and cannot otherwise establish that its claim was undisputed or that Scarsella was able to substantiate and recover the amount it sought from the Co-Sureties on its claim. Thus, the trial court's decision, and the appellate court's affirmation of that decision, were proper under Washington law.

B. Review is Not Warranted of the Decisions Denying Scarsella's Request to Recover Attorneys' Fees in Equity

Scarsella argues that it is entitled to recover its attorneys' fees under the equitable exception provided in *Olympic Steamship*. Scarsella argues that the trial court and Division One added a requirement that the claimant "prevail" in order to recover its attorneys' fees pursuant to *Olympic*

⁴⁰ See, e.g., *U.S. Filter v. Katspan, Inc.*, 117 Wn. App. 744, 751 P.3d 1103 (2003).

⁴¹ *U.S. Filter*, 117 Wn. App. at 751.

Steamship. Scarsella’s argument again constitutes a fundamental misunderstanding of Washington law on the recovery of attorneys’ fees, including the Supreme Court’s decision in *Olympic Steamship*.⁴²

In *Olympic Steamship*, the Court held that “an award of attorney 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, regardless of whether the insurer’s duty to defend is at issue.”⁴³ It is important to note that *Olympic Steamship*, “extend[ed] the right of an insured to recoup attorney fees that it incurs **because an insurer refuses to defend or pay the justified action or claim of the insured**....”⁴⁴

Again, it bears repeating that the initial hurdle in seeking to recover attorneys’ fees under the exceptions to the American rule, is establishing that one has prevailed.⁴⁵ If the party has not prevailed, no further analysis

⁴² It is notable that Scarsella’s own argument seems to recognize that an insured or claimant must be successful in recovering against an insurance policy or surety bond. And yet, Scarsella still argues that this requirement of “success” is not a requirement that an insured or claimant prevail, which is nonsensical. If a party claiming entitlement to *Olympic Steamship* fees must be successful, it must also, necessarily prevail.

⁴³ 117 Wn.2d at 53. The Court extended the holding in *Olympic Steamship* to bond claimants forced to compel litigation against the surety when the surety “wrongfully denies coverage.” *Colorado Structures, Inc. v. Ins. Co. of the West*, 161 Wn.2d 577, 167 P.3d 1125 (2007). Notably, the Co-Sureties never had a chance to make a determination on Scarsella’s claim against the Bonds before Scarsella filed suit just days after finally providing the Co-Sureties with some of the initially requested documentation and information on its claim.

⁴⁴ 117 Wn.2d at 52 (emphasis added).

⁴⁵ See, *Rettkowski*, 128 Wn.2d at 514.

is necessary. This is the hurdle that Scarsella cannot clear and nothing under *Olympic Steamship* or its progeny can alter that fact.

Further, the *Olympic Steamship* analysis necessarily requires that the insured or bond claimant be successful, or prevail, on its claim for coverage under the insurance policy or surety bond. *Olympic Steamship* further requires that the insured or claimant establish that its insurance or bond claim was justified.⁴⁶ These requirements effectuate the purpose of *Olympic Steamship* fees, which is to address the disparity of bargaining power between an insured and an insurer and to address the concern that an insurer or surety would seek to avoid its contractual obligations if the penalty is limited to the amount of the policy or bond, particularly where the time and cost of litigation may dissuade an insured or a bond claimant.⁴⁷ However, what Scarsella argues would expand this equitable exception such that it would swallow the rule. Under Scarsella's analysis, it only needed to sue the Co-Sureties to recover *Olympic Steamship* fees. Under this argument, an insured or bond claimant would not be required to prevail or

⁴⁶ Scarsella seems to improperly conflate part of the analysis under whether attorneys' fees are recoverable under RCW 39.08.030 in arguing that the insurer or surety must be "adverse" to the claimant. That is not a consideration for Washington courts in determining entitlement to recovery *Olympic Steamship* fees.

⁴⁷ *Colorado Structures, Inc.*, 161 Wn.2d at 602.

to successfully obtain coverage or to set forth a justified claim. Such an argument is completely inconsistent with Washington law.⁴⁸

C. Review is Not Warranted of the Decisions Denying Scarsella's Request for Prejudgment Interest.

Again, Scarsella seeks to recover prejudgment interest under the Prompt Payment Act, a cause of action under which Scarsella failed to recover under at the trial court. Such arguments should not be considered by this Court and do not present justification to accept review. Scarsella also argues that it is entitled to prejudgment interest under the common law, but again, Scarsella fails to establish how the Opinion, which is based on the specific facts of this matter, conflicts with any established Supreme Court or published appellate court precedent. While Scarsella points to certain decisions, it does so to attempt to analogize the facts of this matter with the facts of those decisions, but it does not and cannot point to how the Opinion conflicts with these decisions. The factual analysis of whether a sum is liquidated does not provide justification for this Court's review of the decision. This Court should deny the request to do so. Further, the trial court and Division One properly applied Washington law to the facts of this

⁴⁸ It is also notable that, under the facts before this Court, Scarsella cannot establish that the Co-Sureties "forced" Scarsella to bring this lawsuit. Instead, the underlying factual record establishes that Scarsella filed this lawsuit only days after providing the Co-Sureties with partial documentation relevant to its claim, thus, foreclosing the Co-Sureties ability to fully investigate the claim and to make a full determination on the claim under the Bond. The trial court appropriately denied, and Division One appropriately affirmed the denial, of Scarsella's requests for attorneys' fees under *Olympic Steamship*.

case in determining that Scarsella was not entitled to recover its prejudgment interest.

V. CONCLUSION

Scarsella's Petition is another effort in its continued attempts to cure its own failures. Thus, Scarsella fails to provide the justification necessary to require acceptance of review of the Opinion by this Court. Scarsella cannot clearly point to a conflict in Supreme Court precedent or a conflict in published appellate decisions presented by the Opinion. Scarsella also cannot establish a significant public interest justifying review. Moreover, the trial court and Division One entered their decisions denying Scarsella's attempts to recover its attorneys' fees, costs, and prejudgment interest in accordance with Washington law as applied to the facts of this matter. The Co-Sureties request that this Court deny Scarsella's petition and not accept review of this matter.

DATED this 30th day of November, 2020.

s/ Meredith E. Dishaw

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 30th day of November, 2020, I caused a true and correct copy of the foregoing document to be delivered in the manner indicated below to the following counsel of record:

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