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BY SUSAN L. CARLSON  
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No. 99158-8

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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SCARSELLA BROTHERS, INC.,

Appellant

v.

FLATIRON CONSTRUCTORS, INC., et al.

Respondents.

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FLATIRON CONSTRUCTORS, INC.'S ANSWER TO SCARSELLA  
BROTHERS, INC.'S PETITION FOR REVIEW

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## **I. INTRODUCTION**

Appellant and Petitioner Scarsella Brothers, Inc. (“Scarsella”) asks this Court to review whether the Court of Appeals erred in affirming the trial court’s denial of attorney fees and prejudgment interest after both courts determined that Scarsella was not the prevailing party and had not recovered on liquidated claims, despite entry of an affirmative monetary judgment. The lower courts’ decisions were based on the application of settled law to the somewhat unusual facts of this case. Because Scarsella’s petition does not show any conflict between the Court of Appeals’ unpublished, fact-bound decision and any prior decisions of this Court or the Court of Appeals, and because the petition does not present issues of substantial public interest, this Court should decline review.

## **II. RESTATEMENT OF ISSUES PRESENTED BY PETITION**

1. Did the Court of Appeals correctly affirm the trial court’s denial of attorney fees to Scarsella, and correctly deny attorney fees on appeal, when Scarsella did not prevail at trial or in its appeal?

2. Did the Court of Appeals correctly affirm the trial court’s denial of prejudgment interest when Scarsella failed to prove any violation of RCW 39.04.250 or RCW 39.76.011 and the judgment amount could not be calculated with exactness from Scarsella’s evidence?

## **III. RESTATEMENT OF THE CASE**

Scarsella’s petition attempts to present the case as one involving an unjustified withholding of undisputed payment. But as the record shows, this case actually arose from Scarsella’s inability to properly document

and substantiate its payment applications as required by the parties' contract, and from a justified withholding of payment for project delays that Flatiron believed in good faith Scarsella had caused. *See Op.* at 3.

The case involved various claims and counterclaims between Scarsella and Respondent Flatiron Constructors, Inc. ("Flatiron") and their respective sureties. Scarsella sought more than \$12 million on a variety of grounds, including breach of contract, quantum meruit, and violation of RCW 39.04.250 and Chapter 39.76 RCW. CP at 85. Much of Scarsella's claim involved a dispute regarding payment for "force account" work—work for which payment is determined not by any lump sum or agreed-upon formula, but by documented costs incurred for time and materials. *See CP* at 1283. Scarsella failed to provide documentation to Flatiron substantiating claimed force account work and generally failed to follow contractual documentation requirements, leading to disputes regarding whether claimed work was performed and what payment, if any, Scarsella had earned. CP at 1293, 1298-1300. Ultimately, the trial court found that Scarsella's documentation was "inconsistent and unreliable." CP at 1300.

Under the parties' contract, Scarsella was required to follow specified notice and claim procedures before resorting to litigation. CP at 1315-17. It did not do so, and instead chose to make a claim against Flatiron's payment bond for unsubstantiated amounts. CP at 1873-74. Flatiron's sureties attempted to investigate the claim and requested supporting documentation, but Scarsella initiated litigation before the sureties could reasonably complete their investigation. *Id.* at 1874.

During the project and throughout the litigation, Flatiron attempted in good faith to determine what work Scarsella had performed and what amounts it had earned for the work, but could not do so with any certainty due to the documentation problems. CP at 2330-31. Flatiron asserted a claim against Scarsella seeking compensation under the contract for delays it believed in good faith Scarsella had caused. *See* CP at 1308. Pursuant to a contractual right, Flatiron withheld payment to Scarsella for work it recognized as performed, providing all necessary notice to Scarsella. CP at 1296-98, 1327. At the time of trial, Flatiron had determined in good faith that Scarsella had earned \$2,731,437.97. CP at 1296, 2330-31.

Following a lengthy bench trial at which Scarsella was still unable to produce the necessary evidence to support its claims, the trial court denied all claims and counterclaims except Scarsella's breach of contract and bond claims, which it granted only in the amount of \$2,731,437.97. CP at 1330-31. The trial court made it clear that it granted the contract and bond claims based not on Scarsella's proof or any amounts claimed, but on Flatiron's own attempt to determine the amount Scarsella had earned. RP at 3942-43; *see also* CP 2330-31. It stated that "[a]lthough Flatiron conceded at trial that Scarsella had earned \$2,731,437.97, the evidence presented at trial made it obvious that Flatiron was unable to calculate that sum with any certainty." CP at 2330. The court determined that Scarsella had waived its right to seek any additional compensation by failing to follow the contractual notice and claims processes, CP at 1315-

17, and that Flatiron had withheld payment in good faith, and had not violated RCW 39.04.250 or RCW 39.76.011, CP at 1296-97, 1325-28.

Scarsella complains that it was somehow forced to litigate this case in order to be paid.<sup>1</sup> *E.g.*, Pet. at 3. In fact, the record shows that Scarsella disregarded required contractual dispute resolution processes, pursued improper litigation of waived claims, and was never able to prove its claims. Scarsella *chose* to litigate rather than abide by the requirements of the contract. CP at 2317-18, 1315-20. For this reason, the trial court determined that Scarsella waived most of its claims and did not prevail, despite receiving a monetary judgment. CP at 2321-26.

#### **IV. ARGUMENT WHY REVIEW SHOULD BE DENIED**

Scarsella's petition does not raise any issues that should prompt this Court to accept review of the Court of Appeals' unpublished decision. Scarsella mischaracterizes the record and presents factual arguments rejected below, but presents no sound basis for accepting review. With respect to the issues identified by Scarsella, the Court of Appeals correctly affirmed the trial court by applying settled case law and the unambiguous plain language of statutes. Scarsella may not be pleased with the outcome, but the issues it identifies do not warrant Supreme Court review.

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<sup>1</sup> Scarsella states that "Flatiron *admitted* it refused to pay without a lawsuit." Pet. at 10 (emphasis in original). This is incorrect, and Scarsella cites to no support for the statement.



Under RAP 13.4(b),

A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Scarsella does not argue that there are any constitutional issues presented by this case. Rather, it argues broadly that review is warranted under RAP 13.4(b)(1), (2), and (4) because, in its view, the Court of Appeals erred in its application of the law by affirming the trial court's denial of Scarsella's claims for (A) attorney fees and (B) prejudgment interest. For the reasons described below, this Court should deny Scarsella's petition.

**A. Given the Facts of this Case, the Court of Appeals Correctly Affirmed the Trial Court's Denial of Attorney Fees to Scarsella**

Scarsella argues that the Court of Appeals erred in affirming the trial court's denial of attorney fees on grounds that Scarsella did not prevail. It asks this Court to review the issue on grounds that it should have been awarded attorney fees (1) under RCW 39.08.030 even though it did not prevail in the litigation; (2) under RCW 39.04.250 and RCW 39.76.040, even though it did not seek fees under those statutes and did not prevail in its statutory withholding claims; and (3) under *Olympic Steamship Co., Inc. v. Centennial Ins. Co.*, 117 Wn.2d 37, 811 P.2d 673

(1991), even though it did not prevail in any coverage dispute. None of these arguments provide suitable grounds for review.

Washington follows the American Rule with respect to attorney fees awards, “which provides that attorney fees are not recoverable by the prevailing party as costs of litigation unless the recovery is permitted by contract, statute, or some recognized ground of equity.” *Leingang v. Pierce Cty. Med. Bureau, Inc.*, 131 Wn.2d 133, 143, 930 P.2d 288 (1997). Scarsella continues to assert that it prevailed simply because it received a monetary judgment. But both the trial court and the Court of Appeals determined that Scarsella did not prevail, despite the judgment, because it failed to prove its claims and only received a judgment to unwind Flatiron’s proper withholding of payment following resolution of Flatiron’s delay claim against Scarsella. *See* CP at 2324. Because the Court of Appeals correctly affirmed the trial court’s denial of attorney fees to Scarsella, this Court should decline review.

**1. The Court of Appeals Correctly Affirmed the Trial Court’s Denial of Attorney Fees under RCW 39.08.030 Because Scarsella Did Not Prevail**

Scarsella argues that the trial court and Court of Appeals erred in denying attorney fees under RCW 39.08.030(1)(b) because the statute “nowhere requires a party to formally ‘prevail’ to recover from sureties.” Pet at 4 (emphasis removed). However, it is axiomatic that a party who does not prevail is not entitled to attorney fees. *See, e.g., McGreevy v. Oregon Mut. Ins. Co.*, 128 Wn.2d 26, 35 n.8, 904 P.2d 731 (1995); *Mt. Hawley Ins. Co. v. Zurich Am. Ins. Co.*, 8 Wn. App. 2d 1018, 2019 WL

1487726 at \*9 (2019) (unpublished). Although RCW 39.08.030 does not expressly invoke a prevailing party standard, it is clear that the common law rule establishes it. *See id.*; *Leingang*, 131 Wn.2d at 143.

RCW 39.08.030 provides in relevant part that

in any suit or action brought against such surety or sureties by any such person or corporation to recover for any of the items specified in this section, the claimant is entitled to recover in addition to all other costs, attorneys' fees in such sum as the court adjudges reasonable.

RCW 39.08.030(1)(b). The statute has been interpreted and applied as providing for an attorney fees award only where the bond claimant prevails. *See, e.g., 3A Indus., Inc. v. Turner Const. Co.*, 71 Wn. App. 407, 419 n.3, 869 P.2d 65, 71 (1993); *Lakeside Pump & Equip., Inc. v. Austin Const. Co.*, 89 Wn.2d 839, 846, 576 P.2d 392 (1978). Scarsella cites to no authority supporting the idea that a claimant who does not prevail is entitled to attorney fees under the statute.

Scarsella asserted a claim against Flatiron's payment bond for \$5,680,598.94. CP at 1902. It was not able to prove the validity of that claim. In fact, the trial court found that Scarsella had *waived the right to litigate* its claim for payment of any amounts not recognized by Flatiron as earned. CP at 1317. The court entered judgment for Scarsella only in the amount Flatiron had properly withheld—an amount far less than Scarsella's bond claim. CP at 1304-05. Scarsella did not prove entitlement to the payment that it claimed and did not overcome Flatiron's defenses. Accordingly, it did not prevail. CP at 2324.

Scarsella focuses on the policy undergirding RCW 39.08.030's attorney fees provision, noting that "the purpose of the fee provision in RCW 39.08.030(1)(b) is to prevent sureties from using their superior financial position to litigate and thereby frustrate payment to contractors." Pet at 5. But Scarsella ignores the record, which shows that in fact *Scarsella* chose to rush to the courthouse to litigate an unsubstantiated claim before Flatiron's sureties could properly investigate that claim. CP at 1872-74. After it failed to prove that it was entitled to the payment it sought, it requested attorney fees under RCW 39.08.030 in an attempt to increase its take. Scarsella cites no support for the notion that this is the sort of "protection" RCW 39.08.030 was intended to provide.

The Court of Appeals recognized that in unusual cases like this one where a party receives a monetary judgment despite not prevailing as to the major issues in the case, a prevailing party analysis is appropriate to determine whether attorney fees are available under RCW 39.08.030. Op. at 19-20. To hold otherwise would frustrate, rather than further, the policy underlying RCW 39.08.030's attorney fees provision. This is not a case where a surety forced a bond claimant to litigate a justified bond claim—it is a case where the claimant forced litigation of an unjustified, unsupported bond claim before the sureties could even finish their investigation. Because Scarsella did not prevail in its litigation, the mere fact that it received a monetary judgment against Flatiron and its sureties does not entitle it to attorney fees for its failed effort. Because the Court

of Appeals correctly affirmed the trial court, and its unpublished decision does not conflict with existing precedent, this Court should decline review.

**2. Scarsella Neither Prevailed under RCW 39.04.250 or Chapter 39.76 RCW, Nor Requested Attorney Fees under Those Statutes**

Scarsella's argument that it is entitled to attorney fees under RCW 39.04.250 and RCW 39.76.040 is similarly, but even more obviously, flawed. Scarsella not only failed to prevail in its litigation overall, it failed to prevail specifically as to its statutory payment withholding claims under RCW 39.04.259 and Chapter 39.76 RCW. Moreover, Scarsella did not even request attorney fees under those statutes. CP at 1623-24. Flatiron, in contrast, requested attorney fees under the statutes because it prevailed in its defense against the statutory actions. CP at 2355, 2359, 2360-62. Thus, even if the Court believes review of this issue is warranted, it is Flatiron rather than Scarsella that is entitled to an attorney fees award.

Both RCW 39.04.250 and RCW 39.76.040 are part of a statutory scheme governing payment withholding on public works construction projects.<sup>1</sup> *See generally* RCW 39.04.250; RCW 39.76.011-040. Both statutes provide for an attorney fees award to the party that prevails in an action brought under that statutory scheme. Notably, the scheme also includes "safe harbor" provisions that allow a contractor to withhold

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<sup>1</sup> Throughout this litigation, Scarsella has consistently referred to these statutes as the "Prompt Payment Act." It does so again in its Petition. *E.g.*, Pet. at 13 ("As befits its name, the Prompt Payment Act . . ."). The Act now codified at RCW 39.04.250 and Chapter 39.76 RCW had no such title or short title. *See* S.H.B. 1736, 52nd Leg., Reg. Sess. (1992).

payment in the event of a good faith dispute without violating the statutes. RCW 39.04.250(2); RCW 39.76.020(4).

RCW 39.04.250(3) provides that “[i]n any action for the collection of funds *wrongfully withheld*, the prevailing party shall be entitled to costs of suit and reasonable attorneys’ fees.” (Emphasis added.) The statute also contextually defines “wrongfully withholding the funds” as “with[olding] *in violation of this section*.” RCW 39.04.250(3). Where a defendant proves it has not violated RCW 39.04.250—for example, because it withheld payment pursuant to a good faith dispute, RCW 39.04.250(2)—it is the prevailing party as to that action.

Chapter 39.76 RCW provides for the assessment of statutory interest penalties for untimely payment on public works projects under certain circumstances. *See* RCW 39.76.011-020. RCW 39.76.040 provides that “[i]n any action brought *to collect interest due under this chapter*, the prevailing party is entitled to an award of reasonable attorney fees.” (Emphasis added.) This language mandates an award of attorney fees only to a party that prevails as to a claim for statutory interest penalties under Chapter 39.76 RCW. *See, e.g., Elcon Construction, Inc. v. Eastern Washington University*, 174 Wn.2d 157, 171, 273 P.3d 965 (2012) (“Because Elcon does not prevail on its statutory interest claim, we deny its request [for attorney fees under RCW 39.76.040].”). Where a defendant establishes that no interest may be collected under Chapter 39.76 RCW, the defendant has prevailed as to that claim.

Scarsella's argument for review is based on the fanciful assertion that "Scarsella was, in fact, the prevailing party below" even though the trial court denied its claims under RCW 39.04.250 and Chapter 39.76 RCW. Pet. at 6. The trial court clearly found and concluded that Flatiron had withheld payment of the judgment amount pursuant to a good faith dispute, had properly complied with all procedural requirements of the safe harbor provisions, and therefore had not violated the payment withholding statutes. CP at 1326-28. Scarsella suggests that this is somehow inconsistent with the legislative intent behind the statutes, ignoring that the Legislature included and enacted the safe harbor provisions to protect contractors disputing payment in good faith.

The trial court unambiguously denied Scarsella's claims for wrongful withholding of payment under RCW 39.04.250 and interest penalties under RCW 39.76.011. CP at 1328, 1331, 2791. As discussed *supra*, the trial court also determined that Scarsella did not prevail in the litigation overall. CP at 2324. Therefore, under the plain language of the statutes, Scarsella had no basis whatsoever for seeking attorney fees under either RCW 39.04.250(3) or RCW 39.76.040. Presumably, this is why it declined to do so below. *See* CP at 1623-24; Br. of Appellant at 58. Only now, after both lower courts have rejected its claims for attorney fees on other grounds, does it belatedly attempt to seek fees under these statutes.

If the Court believes interpretation of the attorney fees provisions of RCW 39.04.250 and RCW 39.76.040 warrants review, it should grant review only as to the Court of Appeals' denial of *Flatiron's* cross-appeal

of the trial court's denial of attorney fees under those statutes. Unlike Scarsella, Flatiron properly moved for fees on this basis and assigned error on appeal. CP at 2354-72; Br. of Resp't at 5. The Court of Appeals denied Flatiron's cross-appeal as to this issue because it determined that Flatiron, like Scarsella, did not prevail overall. Op. at 21. But Flatiron did prevail as to the specific statutory actions Scarsella brought under RCW 39.04.250 for wrongful withholding and under RCW 39.76.011 for interest penalties. CP at 1331. Flatiron prefers finality to continued litigation, but if this Court wishes to review and clarify entitlement to attorney fees under these statutes, it should consider whether the Court of Appeals erred in denying Flatiron's cross-appeal.

**3. The Court of Appeals Correctly Determined that Scarsella Was Not Entitled to Attorney Fees under *Olympic Steamship* Because It Did Not Prevail in a Coverage Dispute**

Scarsella argued below that it is entitled to attorney fees under *Olympic Steamship*. The Court of Appeals correctly held that the trial court did not err in denying fees under this theory because Scarsella did not prevail in a coverage dispute. Op. at 24-25. Scarsella now asks this Court to review the issue on grounds that even substantially unsuccessful litigation in which bond coverage is not at issue should be rewarded as long as the claimant makes a bond claim and receives a judgment. This does not comport with the law. Review is not warranted under *Olympic Steamship* because Scarsella did not prevail in any coverage dispute.



*Olympic Steamship* provides an equitable exception to the American Rule. *King Cty. v. Vinci Constr. Grands Projets/Parsons RCI/Frontier-Kemper, JV*, 188 Wn.2d 618, 625, 398 P.3d 1093 (2017). The policy rationale underlying the *Olympic Steamship* rule is the same as that underlying RCW 39.08.030: an insured should not be forced to litigate a “justified action or claim” for which an insurer denies coverage, and thereby incur legal fees to receive the benefit of an insurance policy. *Olympic Steamship*, 117 Wn.2d at 53 (1991). This Court has extended the *Olympic Steamship* rule to allow attorney fees awards to prevailing plaintiffs asserting meritorious *performance bond* coverage claims. *Vinci*, 188 Wn.2d at 626.

Regardless of whether the rule in *Olympic Steamship* applies to *payment bond* sureties, it would not entitle Scarsella to attorney fees when it failed to prevail in any coverage dispute. “*Olympic Steamship* attorney fees are not awarded merely because an insurer challenges liability or damages.” *Colorado Structures, Inc. v. Ins. Co. of the West*, 161 Wn.2d 577, 597–98, 167 P.3d 1125 (2007); accord *Solnicka v. Safeco Ins. Co. of Illinois*, 93 Wn. App. 531, 533, 969 P.2d 124 (1999). Rather, “[a]n award of attorney fees under *Olympic Steamship* is restricted to disputes where the insurer forces the insured to litigate coverage and then loses.” *Vinci*, 188 Wn.2d at 630. The issues in this case did not involve issues of coverage under the payment bond, they involved whether Flatiron was liable to pay Scarsella and the amount of damages, if any. Scarsella states, without citation to any authority, that a coverage dispute exists any time “a

surety adopts the entirety of the contractor's defenses against breach as here, making the breach claim and the bond claim essentially indistinguishable." Pet. at 12. But where, as here, the contractor's defenses pertain not to issues of bond coverage but to underlying liability and damages, *Olympic Steamship* does not apply. To the extent Scarsella's waiver of its claims could be considered a coverage dispute, Flatiron and the sureties prevailed as to that issue. CP at 1317.

As with RCW 39.08.030, the equitable rationale underpinning *Olympic Steamship* does not apply on the facts of this case. Because Scarsella did not succeed in any coverage dispute, *Olympic Steamship* is inapplicable. As noted above, Flatiron's sureties did not force Scarsella to litigate this case—Scarsella chose to do so, and even hastily initiated its lawsuit before the sureties could properly investigate and respond to its bond claims. CP at 1873-74. Scarsella failed to overcome any of Flatiron's defenses, and its monetary judgment resulted solely from the unwinding of Flatiron's proper withholding of payment. The Court of Appeals' unpublished decision does not conflict with existing precedent, and review of this issue is unwarranted.

**B. Under Existing Law, the Court of Appeals Correctly Affirmed the Trial Court's Decision to Deny Prejudgment Interest**

Scarsella asks this Court to review the Court of Appeals' decision affirming the trial court's denial of prejudgment interest on the judgment amount of \$2,731,437.97. It argues that the Court of Appeals erred because (1) Scarsella somehow prevailed as to the statutory payment

withholding claims the trial court expressly denied, and (2) its claim was liquidated, despite its ever-changing amount and Flatiron's inability to determine the proper amount with any certainty. Neither of these arguments has merit, and the Court should decline to review this issue.

**1. Scarsella Is Not Entitled to Prejudgment Interest under RCW 39.04.250 or RCW 39.76.011 Because the Trial Court Correctly Denied Its Claims under those Statutes**

Scarsella asks this Court to review the lower courts' decisions that Scarsella is not entitled to interest under RCW 39.04.250 and RCW 39.76.011. As noted *supra*, the trial court denied Scarsella's claim for interest under those statutes because Flatiron properly withheld payment pursuant to a good faith dispute, followed the statutory safe harbor procedures, and therefore was subject to the protections of the safe harbor provisions. CP at 1328. Scarsella simply rejects these findings and substitutes its own unsupported belief that Flatiron asserted a "spurious counterclaim" to avoid paying Scarsella. Pet. at 14. This attempt to rewrite the record does not present an issue for this Court to review.

RCW 39.04.250(3) provides:

In addition to all other remedies, any person from whom funds have been withheld *in violation of this section* shall be entitled to receive from the person wrongfully withholding the funds, for every month and portion thereof that payment including retainage is not made, interest at the highest rate allowed under RCW 19.52.025.

(Emphasis added.) Under the plain language of the statute, a claimant is entitled to interest only for a withholding *in violation of RCW 39.04.250*. Similarly, the interest penalty provisions of RCW 39.76.011 by express

language do not apply to a contractor withholding payment subject to a good faith dispute under the statutory safe harbor.<sup>1</sup> RCW 39.76.020(4).

Scarsella readily admits that “a general has the right to withhold funds if there is a *bona fide*, good faith dispute over payments due.” Pet. at 15. Scarsella ignores that the trial court here specifically determined that there was a *bona fide*, good faith dispute:

Because *the parties were engaged in a good faith dispute* on or before June 3, 2015, and because *Flatiron provided proper to notice of its good faith dispute to Scarsella* prior to June 25, 2015 (the due date with respect to Scarsella's Payment Application No. 28) RCW 39.76.020(4)(c) applies and exempts Flatiron from the interest and notice requirements of RCW 39.76.011, and the interest and attorney-fee requirements of RCW 39.04.250.

CP at 1328 (Conclusion 80) (emphases added). Scarsella tries to characterize Flatiron's withholding as “spurious,” but this is not what the trial court found and is not supported by the evidentiary record.

Scarsella also appears to ask the Court to read the safe harbor provisions out of the statutes entirely, interpreting them as providing for interest penalties *even in the event of a good faith dispute* if the contractor does not ultimately prevail in that dispute. *See* Pet. at 15. But this would render the safe harbor meaningless, as a contractor that prevails in the dispute and proves that no payment is owed would have no need of a safe

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<sup>1</sup> For this reason, Chapter 39.76 RCW should be read to abrogate any common law right to prejudgment interest on payment withholdings where the amount is subject to a good faith dispute and all required notice has provided under RCW 39.76.020. The Court of Appeals agreed, providing an additional basis for its decision, *see* Op. at 28-29, but Scarsella ignores this issue in its Petition.

harbor. It a well-established principle of statutory interpretation that a court should “render no portion meaningless or superfluous.” *Rivard v. State*, 168 Wn.2d 775, 783, 231 P.3d 186 (2010). Scarsella’s interpretive argument would do just that, making it impossible for a contractor to rely on the safe harbor to withhold payment as the Legislature intended.

Based on the clear language of RCW 39.04.250 and RCW 39.76.020 and trial court’s findings that Flatiron complied with the safe harbor requirements, the trial court correctly denied Scarsella’s claim that Flatiron violated the statutes and the Court of Appeals correctly affirmed. On the record of this case, Scarsella clearly was not entitled to interest under RCW 39.04.250 or RCW 39.76.011. Scarsella argues without support that the Court of Appeals somehow undermined the purpose of the statutes by applying the safe harbor provisions. Scarsella’s argument is contrary to the law and provides no grounds for review.

**2. The Court of Appeals Correctly Determined that Scarsella Is Not Entitled to Common Law Prejudgment Interest Because Its Claim Was Unliquidated**

Scarsella also argues that the Court of Appeals erred in affirming the trial court’s conclusion that Scarsella was not entitled to any common law prejudgment interest because its claim was unliquidated. However, Scarsella again ignores the actual facts. It is clear from the record that the evidence was insufficient to ever determine the amount of Scarsella’s claim with exactness. Under existing, well-settled law Scarsella’s claim was unliquidated. The Court of Appeals correctly affirmed the trial court on this point without departing from that settled law.

“A ‘liquidated’ claim is a claim ‘where the evidence furnishes data which, if believed, *makes it possible to compute the amount with exactness*, without reliance on opinion or discretion.’” *Hansen v. Rothaus*, 107 Wn.2d 468, 472, 730 P.2d 662 (1986) (quoting *Prier v. Refrigeration Eng’g Co.*, 74 Wn.2d 25, 32, 442 P.2d 621 (1968)) (emphasis added). A claim is not liquidated and not calculable if

the amount of the services, their character and value, can only be established by evidence in court, or by an accord between the parties, and are not susceptible of ascertainment, either by computation or by reference to market rates, or other known standard . . . .

*Wright v. City of Tacoma*, 87 Wash. 334, 354, 151 Pac. 837 (1915) (quoting *Cox v. McLaughlin*, 76 Cal. 60, 18 Pac. 100 (1881)).

The payment dispute in this case arose because Scarsella failed to keep records necessary to support its payment claims. The parties disputed what work Scarsella had performed and what payment it had earned. CP at 2330-31. Importantly, Scarsella’s claim consisted in large part of payment for alleged force account work for which there is no fixed formula or computation method. *See id.*; CP at 1283, 1298-1300. Given Scarsella’s incomplete and unreliable documentation, Scarsella’s claim could not be computed or otherwise ascertained with exactness.

Scarsella argues that because Flatiron conceded at trial that Scarsella had earned \$2,731,437.97, this somehow rendered Scarsella’s claim liquidated in that amount. Pet. at 16. Scarsella ignores that Scarsella itself never claimed it had earned that amount. Scarsella asserted

a payment bond claim for \$5,680,598.94 in August 2015. CP at 1902. It then pleaded payment claims of \$6,564,370.72, plus attorney fees and interest. CP at 13. At trial, it sought \$12,135,173, plus attorney fees and interest. Throughout the parties' dispute and litigation, Scarsella's claim was an ever-moving target. As the trial court noted, it was

impossible to calculate with any certainty how much Scarsella earned for its force account work – let alone how much Scarsella earned for any of its other work. . . . Flatiron presented \$2,731,437.97 as the total amount that it owes to Scarsella not because Flatiron believed that it is in fact a correct total, but rather because the sum was merely Flatiron's most recent attempt to compute a total . . . [I]f the parties had had more time to locate and examine more documents and revise their calculations, the \$2,731,437.97 figure very likely would have continued to change.

CP at 2331; *see also* CP at 1316 (“At trial Flatiron presented computations . . . calculated in different ways, at different times, with different results, based on incomplete and conflicting Project records.”).

The trial court exercised its discretion in using Flatiron's concession as the measure of Scarsella's earnings. *See Kiewit-Grice v. State*, 77 Wn. App. 867, 873, 895 P.2d 6 (1995). Scarsella's protean claim was not rendered liquidated by *Flatiron's* good faith efforts to determine the amount Scarsella had earned and to concede to that amount for purposes of trial. As the trial court found, it is “obvious that Flatiron was unable to calculate that sum with any certainty.” CP at 2330.

As both the trial court and the Court of Appeals recognized, this case is materially analogous to *Wright*, in which the underlying services

and quantities at issue could not be determined with exactness. The Court in *Wright* noted that the claim was unliquidated and did not bear interest because “the items which made up [the] amount were in dispute, *either as to the amount of work done, or the material furnished, or the price which was to be paid therefor.*” 87 Wash. at 354 (emphasis added). This must be distinguished from situations in which liability for a known amount is disputed. *See, e.g., Prier*, 74 Wn.2d at 35.

The trial court and Court of Appeals arrived at their decisions by applying long-settled law to the facts of this case. It is clear that Scarsella’s claim was unliquidated because it could not be calculated with exactness based on the evidence. Scarsella’s attempt to recast Flatiron’s good-faith attempts to determine and agree that Scarsella had earned certain amounts does not change the character of Scarsella’s claim from unliquidated to liquidated. The Court should deny review as to this issue.

## **V. CONCLUSION**

Scarsella’s unsuccessful attempts to push unsubstantiated payment claims should be put to rest at last. Flatiron long ago paid Scarsella the amount the trial court determined it was owed. CP at 2898-901. Scarsella did not prevail in the litigation and is not entitled to attorney fees or interest under any of the theories it has espoused. Because Scarsella fails to raise any conflict between the Court of Appeals’ unpublished decision and existing precedent, and because the facts of this case render it a poor candidate for clarifying any of the relevant law, the Court should deny review and allow the parties to achieve finality at long last.



RESPECTFULLY SUBMITTED this 30<sup>th</sup> day of November, 2020.

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