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NO. 92744-8

RECEIVED ELECTRONICALLY

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

KING COUNTY,

Respondent,

vs.

TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA,
a Connecticut corporation; LIBERTY MUTUAL INSURANCE
COMPANY, a Massachusetts corporation; FEDERAL INSURANCE
COMPANY, an Indiana corporation; FIDELITY AND DEPOSIT
COMPANY OF MARYLAND, a Maryland corporation; and ZURICH
AMERICAN INSURANCE COMPANY, a New York corporation,

Petitioners,

and

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

Defendants.

BRIEF OF *AMICI CURIAE*
WASHINGTON STATE ASSOCIATION OF MUNICIPAL
ATTORNEYS, ASSOCIATION OF WASHINGTON CITIES, AND
WASHINGTON STATE ASSOCIATION OF COUNTIES IN SUPPORT
OF RESPONDENT

CITY ATTORNEY'S OFFICE
VANCOUVER, WASH.

Daniel G. Lloyd, WSBA #34221
Sara Baynard-Cooke, WSBA #35697
Assistant City Attorneys
P.O. Box 1995
Vancouver, WA 98668-1995
360.487.8500 / 360.487.8501 (fax)
dan.lloyd@cityofvancouver.us
sara.baynard-cooke@cityofvancouver.us

WASHINGTON STATE
ASSOCIATION OF COUNTIES

Josh Weiss, WSBA #27647
General Counsel, WSAC
206 Tenth Avenue SE
Olympia, WA 98501
360.489.3015 / 360.753.2842 (fax)
jweiss@wacounties.org

*Counsel for Amici Curiae Wash. State Ass'n of Municipal Attorneys,
Ass'n of Wash. Cities, & Wash. State Ass'n of Counties*

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I. INTRODUCTION

Beginning in 1991 and ever since, this Court has adopted and reaffirmed the equitable rule that “[a]n insured who is compelled to assume the burden of legal action to obtain the benefit of its insurance contract is entitled to attorney fees.” *Olympic S.S. Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 54, 811 P.2d 673 (1991). Sixteen years later, the Court reaffirmed *Olympic Steamship* and extended the rule to sureties who refuse to honor their obligations with respect to performance bonds. *Colo. Structures, Inc. v. Ins. Co. of the W.*, 161 Wn.2d 577, 597-608, 167 P.3d 1125 (2007) (op. of Chambers, J.); *see also id.* at 638 (Sanders, J., dissenting).¹

This case turns on whether a law passed in 1992, which simply adopted by reference the procedural framework for civil actions having amounts in controversy under \$10,000, is “a comprehensive statutory scheme” that exempts its subject matter from *Olympic Steamship* and *Colorado Structures*. Suppl. Br. of Sureties at 1.

The answer to that question is no. *Amici curiae* respectfully ask this Court to affirm the Court of Appeals.

¹ Justice Chambers’ lead opinion was joined by only three other justices. However, Justice Sanders, while dissenting on a different issue, wrote that he “agree[d] with the majority that *Olympic Steamship* applies to surety bonds and [he] would reward attorney fees to a prevailing contractor.” *Colo. Structures*, 161 Wn.2d at 638 (Sanders, J., dissenting). As discussed in greater detail *infra*, the agreement of five justices on this issue entitles *Colorado Structures* to full precedential value.

II. IDENTITY AND INTEREST OF *AMICI CURIAE*

The Washington State Association of Municipal Attorneys (WSAMA) is a non-profit organization of municipal attorneys in Washington State. *See* <http://www.wsama.org>. WSAMA members represent the 281 municipalities throughout the state as both in-house counsel and as private, outside legal counsel.

The Association of Washington Cities (AWC) is a private, non-profit corporation that represents Washington's cities and towns before the State Legislature, the State Executive branch and regulatory agencies. Membership in the AWC is voluntary, however the association includes 100% participation from Washington's 281 cities and towns. AWC's mission is to serve its members through advocacy, education and services.

The Washington State Association of Counties (WSAC) is a non-profit association whose membership includes elected county commissioners, council members and executives from all of Washington's 39 counties. It provides a variety of services to its member counties including advocacy training and workshops, a worker's compensation retrospective rating pool, and a forum in which to network and share best practices. Voting within WSAC is limited to county commissioners, council members and county executives; however WSAC also serves as an umbrella organization for affiliate organizations representing county road engineers, local public health officials, county administrators, emergency managers, county human service administrators, clerks of county boards, and others.

Amici curiae and their members routinely bid, manage, and supervise public works projects with the hopes that the winning bidder will fulfill all contractual obligations. Unfortunately, not all contractors live up to their promises, ultimately necessitating local governments to rely on sureties to step up and ensure that public works do not go unfinished. For *amici*'s members, and in particular the small governments that lack significant financial resources, this Court's decision will have a great impact. It will either enable them to know that their public projects will be completed, or cause them to face infinite uncertainty that hinges on whether a surety will honor its bond. As such, *amici* have a strong interest in this case.

III. STATEMENT OF THE CASE

Amici adopt the factual background as set forth by the Court of Appeals in its decision below. *King County v. Vinci Constr. Grands Projets*, 191 Wn. App. 142, 150-64, ¶¶ 8-44, 364 P.3d 784 (2015), *review granted*, 186 Wn.2d 1008 (2016).

IV. ARGUMENT

- A. This Court should adhere to the sound principles of *stare decisis* and reject the invitation to reconsider or overrule *Colorado Structures*.**

Both petitioners and *amicus curiae* Surety & Fidelity Association of America (SFAA) ask this Court to reconsider and abandon *Colorado Structures*. Suppl. Br. of Sureties at 11-18; SFAA Memo. Supp. Rvw. at 3-6. The Court should decline the invitation.

Notably, Petitioners did not ask in their petition for review to overrule *Colorado Structures*, Pet. for Rvw. at 1-2, instead raising the argument for the first time in their supplemental brief. Unless this Court orders otherwise, it considers “only the questions raised in ... the petition for review.” RAP 13.7(b). Raising an argument or an issue for the first time in a supplemental brief is insufficient. *State v. Korum*, 157 Wn.2d 614, 624, 141 P.3d 13 (2006); *State v. Collins*, 121 Wn.2d 168, 847 P.2d 919 (1993). And though SFAA made its plea prior to the Court granting review, this Court does not consider issues advanced independently by *amicus curiae*. *State v. Shale*, 182 Wn.2d 882, 886 n.4, 345 P.3d 776 (2015). Consequently, this Court need not accept either Petitioners’ or SFAA’s invitation to reconsider precedent.

But to the extent this Court expands its scope of review, it should decline to overrule *Colorado Structures*. The sureties contend that *Colorado Structures* rule should be abandoned because (a) it was merely a “four justice plurality” opinion, *see* SFAA Amicus Memo. at 3; Pet’rs’ Supp. Br. at 11, and (b) the surety-obligee-principal relationship is so fundamentally distinct from the insured-insurer context that *Olympic Steamship* should have no application, Pet’rs’ Supp. Br. at 12-17. The fundamental flaw in the sureties’ analysis is two-fold.

First, a plurality decision is entitled to precedential value, and therefore *stare decisis*, on any issue on which at least five justices agree. *In re Parentage of C.A.M.A.*, 154 Wn.2d 52, 61, 109 P.3d 405 (2005). Illustrative of this point is *Wright v. Terrell*, 162 Wn.2d 192, 170 P.3d 570

(2007) (per curiam). *Wright* considered an argument that arose from the fractured decision in *Bosteder v. City of Renton*, 155 Wn.2d 18, 117 P.3d 316 (2005), namely whether former RCW 4.96.020(1) (2001) required a tort claim to be filed as a prerequisite to a lawsuit against an individual government employee. *Wright*, 170 Wn.2d at 194-95. *Bosteder* had considered that very issue two years earlier, but that case resulted in three opinions. Justice Sanders, joined by three other justices, wrote in dissent from the lead opinion that the statute did not apply to lawsuits against individual governmental employees, and therefore no tort claim was required to sue. *Bosteder*, 155 Wn.2d at 58-59 (Sanders, J., dissenting). Justice Ireland agreed with the lead opinion “except as it holds that the claim filing statute applies to individuals.” *Id.* at 59 (Ireland, J., concurring in part, dissenting in part). The Court of Appeals in *Wright* concluded that *Bosteder* was a “plurality opinion [that] has only limited precedential value and is not binding on the courts.” *Wright v. Terrell*, 135 Wn. App. 722, 735, 145 P.3d 1230 (2006), *rev’d*, 162 Wn.2d at 195-96. This Court summarily reversed, reasoning that because “[a] majority of this court ... concluded that former RCW 4.96.020 does not apply to claims against individuals[,] [o]n this point, *Bosteder* is not a plurality decision.” *Wright*, 162 Wn.2d at 195.

Likewise, five justices agreed in *Colorado Structures* that a surety should be liable to an obligee for attorneys’ fees when it wrongfully refuses to honor its performance bond. *Colorado Structures*, 161 Wn.2d at 597-608 (op. of Chambers, J.); *see also id.* at 638 (Sanders, J.,

dissenting). Although only three other justices joined Justice Chambers' lead opinion, Justice Sanders, while dissenting on a different issue, wrote that he "agree[d] with the majority that *Olympic Steamship* applies to surety bonds and [he] would reward attorney fees to a prevailing contractor." *Colo. Structures*, 161 Wn.2d at 638 (Sanders, J., dissenting). Therefore, five justices agreed "that *Olympic Steamship* applies to surety bonds." *Id.* In turn, five justices agreed that there is no "material distinction" between insurance and surety for purposes of whether an insured or obligee is entitled to attorneys' fees when legal action is required to obtain the benefit of the contract. *Id.* at 598. And because five justices agreed on that issue, *Colorado Structures* may properly be characterized as a majority opinion entitled to precedential value.²

This leads to the second reason why the sureties' plea to abandon *Colorado Structures* should be rejected. *Stare decisis* "requires a clear showing that an established rule is incorrect *and* harmful before it is abandoned." *Walmart, Inc. v. Progressive Campaigns, Inc.*, 139 Wn.2d 623, 634, 989 P.2d 524 (1999) (citation and quotations omitted) (emphasis added). As this Court emphasized just a few months ago:

² *Amici* recognize the Court's passing mention of *Colorado Structures* as lacking a "majority rule" in *Matsyuk v. State Farm Fire & Cas. Co.*, 173 Wn.2d 643, 660 n.5, 272 P.3d 802 (2012). But footnote 5 was certainly "not ... essential to [Matsyuk's] determination," and therefore relegates that footnote to *obiter dictum*. *State ex rel. Lemon v. Langlie*, 45 Wn.2d 82, 89, 273 P.2d 464 (1954). Therefore, that footnote is "not controlling." *Grundy v. Thurston County*, 155 Wn.2d 1, 9, 117 P.3d 1089 (2005). Given that a thorough analysis of *Colorado Structures* reveals that Justice Chambers' analysis of *Olympic Steamship* in the context of performance bonds garnered a majority of the Court when one considers Justice Sanders' agreement on that issue, Justice Chambers' opinion most certainly amounts to a "majority rule."

The question is not whether we would make the same decision if the issue presented were a matter of first impression. Instead, the question is whether the prior decision is so problematic that it *must* be rejected, despite the many benefits of adhering to precedent—“promot[ing] the evenhanded, predictable, and consistent development of legal principles, foster[ing] reliance on judicial decisions, and contribut[ing] to the actual and perceived integrity of the judicial process.”

State v. Otton, 185 Wn.2d 673, 678, 374 P.3d 1108 (2016) (quoting *Keene v. Edie*, 131 Wn.2d 822, 831, 935 P.2d 588 (1997) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991))) (italics and alterations in original).

A more recent application of *stare decisis* illustrates the high burden a party shoulders to justify overruling precedent. See *Deggs v. Asbestos Corp.*, No. 91969-1 (Wash. Oct. 6, 2016). In *Deggs* a plaintiff asked this Court to overrule three prior decisions “to the extent they hold that the lapsing of the statute of limitations on the underlying personal injury claim bars the personal representative from bringing a wrongful death claim.” *Id.*, slip op. at 14-15. Although the plaintiff there “ma[d]e[] a fairly persuasive argument that [those] precedents were incorrect at the time they were announced,” this Court refused to overrule precedent because the plaintiff did “not show[] that they are harmful.” *Id.* at 15. Additionally, the Court reasoned that “the legislature’s lack of response adds weight to the conclusion that [the prior decisions] have not been harmful.” *Id.* at 16.

That same rationale holds equal force here. The sureties resurrect the same arguments that the *Colorado Structures* majority rejected,

namely that performance bonds are distinct from insurance contracts, and, therefore, the policies underlying *Olympic Steamship* should have no application. Suppl. Br. of Sureties at 18. It is not enough to rehash arguments rejected by a majority of this Court in an effort to prove them incorrect. *Deggs*, slip op. at 14-16.

Additionally, the sureties advance only a meager argument as to why *Colorado Structures* is “harmful.” Suppl. Br. of Sureties at 17-18; SFAA Memo. Supp. Rvw. at 9. They contend that allowing an obligee to seek an equitable award of fees when the obligee is forced to secure its rights to a bond through litigation “will increase construction costs” because the surety and contractor will have to account for the additional risk. *Id.* They argue public works contracts will have higher prices and attract fewer bidders. SFAA Memo. Supp. Rvw. at 9. Significantly, however, they do not attempt to argue (much less offer evidence) that costs *have* increased in any sector—public or private—in the nine years since *Colorado Structures* was decided. They simply have not shown that any harm has occurred as a result of the long-standing decision.

Furthermore, the sureties’ speculative arguments regarding potential cost increases are tenuous. When sureties uphold their obligations under bonds, any risk of attorney fee awards is wholly negated. Sureties should not be entering bond contracts under the assumption that they will refuse to perform absent litigation initiated by obligees.

The lack of any harmful effect is further confirmed by the absence of any legislative action to overrule *Colorado Structures*. The legislature has not hesitated in the past to overrule this Court's view of the common law when it believed it to be contrary to the public policy of this state. *E.g., Rahman v. State*, 170 Wn.2d 810, 817-18, 246 P.3d 182 (2011), *abrogated and overruled by* LAWS OF 2011, ch. 82, § 1. That the legislature has not even attempted to abrogate *Colorado Structures* undermines any suggestion by the sureties that the decision has been harmful. *Accord Deggs*, slip op. at 16. Indeed, this Court took that exact position with respect to *Olympic Steamship*:

The Legislature has had several opportunities to limit, modify, or invalidate the rule that was announced in 1991 when *Olympic Steamship* was filed. It has not, however, chosen to do so. Such legislative acquiescence to this court's holding in *Olympic Steamship* is thus noteworthy.

McGreevy v. Or. Mut. Ins. Co., 128 Wn.2d 26, 38 n.10, 904 P.2d 731 (1995) (citation omitted). Similarly, the Legislature has had just as much opportunity "to limit, modify, or invalidate the rule" from *Colorado Structures* in the past nine years. *Id.* It has not done so. If this Court was unable to find any "harmful" effect from the wrongful death decisions reviewed in *Deggs*, the inability to prove that same second element necessary to overturn precedent is even more glaring here.

If *stare decisis* still means what it does, *Colorado Structures* should not be overruled.

B. RCW 39.04.240 does not supersede and preempt the common law that a surety is liable for attorneys' fees when it refuses to honor its performance bond.

Given that *stare decisis* requires this Court to adhere to precedent, the only way for the sureties to escape its holding is to argue for an exception, which they do by way of calling RCW 39.04.240 a “comprehensive statutory scheme” that exempts public works disputes from *Colorado Structures*. Suppl. Br. of Sureties at 1, 3, 7, 11, 20. A review of RCW 39.04.240—and the fee shifting protocol it incorporates from chapter 4.84 RCW—reveals the flaw in the sureties’ analysis, and also why adopting their position would inevitably lead to the conclusion that *Olympic Steamship* has no application to insurance disputes involving an amount in controversy less than \$10,000. That is an absurd result the legislature most certainly did not intend.

1. The public works fee statute does nothing more than incorporate the scheme for cases in which the amount in controversy is less than \$10,000.

In 1992 the legislature passed Engrossed Senate Bill 6407, which was later codified at RCW 39.04.240. LAWS OF 1992, ch. 171, *codified as amended at* RCW 39.04.240. The original version of the bill had simply intended to “award to the prevailing party reasonable attorneys’ fees, costs, and interest in connection with the action.” S.B. 6407, 52nd Leg., Reg. Sess. (Wash. 1992). That version was rejected in favor of adopting the fee shifting scheme for disputes having an amount in controversy less than \$10,000. LAWS OF 1992, ch. 171. At the time, though, the reach of the passed law extended only to claims in which “the maximum amount ... is \$250,000.” FINAL B. REP. ON ENGROSSED S.B. 6407, 52nd Leg.,

Reg. Sess. (Wash. 1992) at 1. The only amendment to RCW 39.04.240 since its original enactment in 1992 was seven years later, when the legislature passed Substitute House Bill 1671, which eliminated the \$250,000 cap and extended the law’s reach to all “action[s] arising out of a public works contract.” LAWS OF 1999, ch. 107, § 1. The law, which has not been amended since, now reads in relevant part:

The provisions of RCW 4.84.250 through 4.84.280 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, except that: (a) The maximum dollar limitation in RCW 4.84.250 shall not apply; and (b) in applying RCW 4.84.280, the time period for serving offers of settlement on the adverse party shall be the period not less than thirty days and not more than one hundred twenty days after completion of the service and filing of the summons and complaint.

RCW 39.04.240(1).³

RCW 4.84.250 provides that “there shall be taxed and allowed to the prevailing party as part of the costs of the action a reasonable amount to be fixed by the court as attorneys’ fees” in any action “where the amount pleaded by the prevailing party ... [is] ten thousand dollars” or less. A plaintiff is deemed a prevailing party only when “the recovery, exclusive of costs, is as much as or more than the amount offered in settlement by the plaintiff” within time limits prescribed by RCW 4.84.280. RCW 4.84.260. A defendant, however, can be deemed the prevailing party “if the plaintiff ... recovers nothing, or if the recovery,

³ Subsection 2 provides that any clause attempting to waive RCW 39.04.240 violates public policy, but parties may agree to arbitrate. RCW 39.04.240(2).

exclusive of costs, is the same or less than the amount offered in settlement by the defendant” within time limits prescribed by RCW 4.84.280. RCW 4.84.270.

Read together, RCW 39.04.240 does nothing more than adopt the statutory scheme set forth for civil actions in which the amount in controversy, as pleaded, is \$10,000 or less, with the lone exceptions of (a) the fee shifting protocol applies to all civil actions arising out of public works contracts, regardless of their value, and (b) a procedural difference in terms of when the settlement offers used to determine who is the prevailing party are exchanged. *Compare* RCW 4.84.280 *with* RCW 39.04.240(1). Beyond that, the two protocols are identical. Therefore, as a matter of substantive law, either *both* RCW 39.04.240 *and* RCW 4.84.250-.280 statutorily supersede the common law or *neither* one does.

Consequently, it matters not whether plaintiff is a public entity seeking damages arising from a public works contract or an insured who sustains a loss less than \$10,000 and must sue his or her insurer to obtain coverage. The only difference in terms of whether the plaintiff can recover attorneys’ fees is *when* the plaintiff’s offer of settlement is exchanged. *Compare* RCW 4.84.280 *with* RCW 39.04.240(1).

Of course, the legislature has the power to preempt or abrogate the common law. It has done so in several contexts, such as sovereign immunity, RCW 4.92.090 *and* RCW 4.96.020, causes of action by employees against their employers for workplace injuries, Title 51 RCW, and vicarious municipal liability for the quasi-judicial acts of officials, *see*

RCW 64.40.020 and *Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, 103, 829 P.2d 746 (1992). But preemption or abrogation is never presumed, for this Court is “hesitant to recognize an abrogation or derogation from the common law absent clear evidence of the legislature’s intent to deviate from the common law.” *State v. Kurtz*, 178 Wn.2d 466, 473, 309 P.3d 472 (2013) (quoting *Potter v. Wash. State Patrol*, 165 Wn.2d 67, 76, 196 P.3d 691 (2008)); see also *State v. Kirwin*, 165 Wn.2d 818, 827, 203 P.3d 1044 (2009) (stating preemption occurs only where there is express legislative intent to preempt the field or such intent appears by necessary implication). It is not enough to assume abandonment of the common law even if the legislature “directly speaks” to an issue. *Kurtz*, 178 Wn.2d at 474 (rejecting argument that “because the legislature spoke directly to the purpose of the common law necessity defense [for medical marijuana], it intended to abrogate the common law”). As here, where the legislature did not expressly state an intention to occupy the field, the court should consider the purpose of the statute and the circumstances upon which the statute was intended to operate. *Kirwin*, 165 Wn.2d at 827.

There is absolutely nothing in either RCW 39.04.240 or RCW 4.84.250-.280 that evinces a clear legislative intent to preempt the field of attorneys’ fees for civil actions arising from surety bonds. Indeed, RCW 39.04.240 pertains only to disputes arising out of a “public works contract.” There is no mention of disputes arising out of a surety bond, which is a separate contract between different parties—a public works

contract is between the state or municipality and a contractor; a performance bond is entered between the contractor and surety. Even if, arguably, a dispute surrounding a performance bond is covered under RCW 39.04.240, both the language of the statute and legislative history show that surety bonds were never the focus. *See* LAWS OF 1992, ch. 171; *see also* FINAL B. REP. ON ENGROSSED S.B. 6407, *supra*. Considering performance bonds are not even mentioned, certainly the legislature did not intend to preempt the field concerning the award of attorneys' fees in disputes involving bonds. On that alone, this Court should conclude that the common law—and consequently *Olympic Steamship* and *Colorado Structures*—remain unchanged by these statutes.

2. Nothing in the statutory text suggests legislative intent that insureds who sustain losses under \$10,000 must forego *Olympic Steamship* fees, meaning there is no statutory basis to assume legislative preemption in RCW 39.04.240.

Nothing in the text of RCW 39.04.240 even attempts to create substantive rights different than RCW 4.84.250-.280. Given that *Colorado Structures* and *Olympic Steamship* together view insurance and surety contracts on the same level, *Colo. Structures*, 161 Wn.2d at 602, concluding that RCW 39.04.240 statutorily supersedes *Colorado Structures* for civil actions arising out of public works contracts necessarily requires one to conclude that RCW 4.84.250-.280, which is adopted by reference in RCW 39.04.240, statutorily supersedes *Olympic Steamship* for civil actions in which the amount in controversy is less than \$10,000.

Courts construe statutes “to discern and implement the intent of the legislature,” which necessarily prohibits any “reading that results in absurd results.” *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (citation and internal quotation marks omitted). Attempting to infer legislative intent from RCW 39.04.240 and RCW 4.84.250-.280 to supersede *Olympic Steamship* or *Colorado Structures* as the sureties advocate here leads to absurdity, as illustrated by the following example.

Suppose a homeowner sustains a fire loss to a few appliances in her kitchen, which amounts to a loss of \$8,000. She files a claim with her homeowners’ policy, which wrongfully denies coverage. The homeowner then sues her insurer for declaratory judgment and prevails. Under *Olympic Steamship*, she is clearly entitled to not only her losses, but also all costs and reasonable attorneys’ fees incurred in proving coverage. *Olympic S.S.*, 117 Wn.2d at 52-53. But if RCW 39.04.240 statutorily supersedes the common law for civil actions arising out of public works contracts, so too does RCW 4.84.250-.280 for civil actions with an amount in controversy under \$10,000. The plaintiff-insured in the above scenario must therefore rely on the “statutory scheme” to be made whole, meaning that if she were to fail to timely serve a settlement offer prior to trial, or if her settlement offer was too high, she would lose her “prevailing party” status (even though she had to sue to obtain the benefit of her policy) as defined by RCW 4.84.260, consequently disentiing her to have “taxed ... as a part of the costs of the action a reasonable amount to be fixed by the court as attorneys’ fees.” RCW 4.84.250.

If the sureties' position were to be adopted, an insured who sustains a loss of \$10,001 would always recover attorneys' fees when "the insurer imposes upon the insured the cost of compelling the insurer to honor its commitment," *Olympic S.S.*, 117 Wn.2d at 53, but an insured who sustains a loss of \$9,999 would not unless she beat a timely settlement offer after being forced to sue her insurer, RCW 4.84.260. That is an absurd result that cannot be what the legislature intended by enacting RCW 4.84.250-.280, meaning that cannot be what the legislature intended by passing RCW 39.04.240 when it adopted RCW 4.84.250-.280 by reference. By providing a means to obtain attorneys' fees on public works contracts based on offers to settle, the legislature did not intend RCW 39.04.240 as a comprehensive statutory scheme that would preempt the field of attorney fee awards stemming from disputes involving surety bonds.

C. Uniform application of *Colorado Structures* is sound policy given that public entities of all sizes must rely on sureties to ensure that public works are promptly completed.

A final argument advanced by the sureties rests on the view that "the County, not the Sureties, enjoyed a 'disproportionate bargaining position.'" Pet. for Rvw. at 8 (quoting *McGreevy*, 128 Wn.2d at 37). But what matters under *Colorado Structures* is not "bargaining power," but rather "disparity of *enforcement power*." 161 Wn.2d at 603 (emphasis added). There is no evidence or reason to conclude that municipal corporations or political subdivisions have disparate enforcement power given the status of the contractor's work. Public entities that finance large

public improvement projects with great financial risks need proportionate protection.

Regardless, RCW 39.08.010, which requires a performance bond on any public works project, applies across the board, from the largest political subdivision (King County) to the smallest town (Krupp),⁴ and everything in between. Thus, this Court’s decision affects each public entity—and consequently every taxpaying citizen—no matter its size. *Amici’s* members here include municipalities both large and small, including those with fewer than 20,000 residents, such as the counties of Adams, Jefferson, Ferry, and Skamania, and the cities of Ellensburg, Centralia, Cheney, and Port Orchard. These smaller governmental entities lack both bargaining power and enforcement power, and must necessarily rely on *Olympic Steamship* and *Colorado Structures* to provide an economic incentive for sureties to choose performance over litigation. See *Colo. Structures*, 161 Wn.2d at 598 (“If the maximum risk to the surety is the penal amount of its bond, a surety has nothing to lose”).

The policy reasons for *Olympic Steamship* and *Colorado Structures* are even more essential when the public entity is a smaller jurisdiction attempting to better its community by widening a road, improving a wastewater treatment facility, or building a park. When a contractor fails to live up to its promises, the public entity must have an

⁴ The Town of Krupp, located in Grant County, has a population of 50. See Washington City and Town Profiles, available at <http://mrsc.org/Home/Research-Tools/Washington-City-and-Town-Profiles.aspx> (last visited Nov. 28, 2016).

avenue to demand a swift remedy to ensure that the project in question is completed. As the Court recognized in *Colorado Structures*:

The crucial fact is that sureties, like insurance companies, face minimal incentive to perform on their contracts if the maximum loss they may incur is the amount of the bond, especially since the transaction costs of litigation are likely to dissuade contractors [or public owners] who would otherwise assert their right to full payment in court.

Colo. Structures, 161 Wn.2d at 601. King County was undoubtedly fortunate to be able to obtain financing to ensure that its Brightwater project was completed notwithstanding the sureties' resistance. That alternative, however, is wholly absent when dealing with smaller jurisdictions such as the smaller counties, second class cities, and towns represented by *amici curiae*. In that case, absent application of *Olympic Steamship* and *Colorado Structures*, a surety has zero incentive to place its interests below that of its principal and obligee because its liability will be equal to the bond amount, no matter what.

Olympic Steamship exists to "encourage the prompt payment of claims," establishing a financial incentive for an insurer to place the insured's financial interests above its own. *Olympic S.S.*, 117 Wn.2d at 53. "Such encouragement is equally appropriate for surety bonds," *Colo. Structures*, 161 Wn.2d at 602, particularly those that guarantee performance of public works contracts benefitting the smallest of our jurisdictions. The citizens that live in smaller communities deserve every bit as much as those in Seattle and King County to benefit from the swift, efficient, and cost-effective performance of public improvements.

Rejecting the sureties' attempt to overrule or create an exception to *Colorado Structures* fulfills that goal.

V. CONCLUSION

For all of the foregoing reasons, *amici curiae* respectfully ask this Court to affirm the Court of Appeals in its entirety.

RESPECTFULLY SUBMITTED on November 28, 2016.

CITY ATTORNEY'S OFFICE
VANCOUVER, WASH.

WASHINGTON STATE
ASSOCIATION OF COUNTIES

/s/ Daniel G. Lloyd

Daniel G. Lloyd, WSBA #34221
Sara Baynard-Cooke, WSBA #35697
Assistant City Attorneys
P.O. Box 1995
Vancouver, WA 98668-1995
360.487.8500/360.487.8501 (fax)
dan.lloyd@cityofvancouver.us

/s/ Josh Weiss

Josh Weiss, WSBA #27647
General Counsel, WSAC
206 Tenth Avenue SE
Olympia, WA 98501
360.489.3015/360.753.2842 (fax)
jweiss@wacounties.org

Counsel for Amici Curiae Wash. State Ass'n of Municipal Attorneys, Ass'n of Wash. Cities, & Wash. State Ass'n of Counties

CERTIFICATE OF SERVICE

I certify that on the date referenced below, I served via U.S. mail, first class, postage prepaid, a copy of the foregoing document to each and every attorney of record herein, as identified below:

Ms. Catherine Smith
Mr. Howard Goodfriend
Smith Goodfriend, P.S.
1619 8th Avenue North
Seattle, WA 98109

Mr. Thomas R. Krider
Mr. Peter Ralston
Oles Morrison Rinker &
Baker LLP
701 Pike St., Ste. 1700
Seattle, WA 98101

Mr. Fredric D. Cohen
Mr. Mitchell C. Tilner
Horvitz & Levy LLP
15760 Ventura Blvd. 18th Floor
Encino, CA 91436

Mr. David Goodnight
Mr. Karl E. Oles
Mr. Hunter Ferguson
Stoel Rives LLP
600 University St., Ste. 3600
Seattle, WA 98101-4109

Mr. Leonard Feldman
Peterson Wampold Rosato
Luna Knopp
1501 Fourth Avenue, Ste. 2800
Seattle, WA 98101

Ms. Mary DeVuono Englund
Deputy Prosecutor
900 King County Admin. Bldg.
500 Fourth Ave.
Seattle, WA 98104

DATED on November 28, 2016.

CITY ATTORNEY'S OFFICE
VANCOUVER, WASH.

By: /s/ Daniel G. Lloyd
Daniel G. Lloyd, WSBA #34221
Assistant City Attorney
P.O. Box 1995
Vancouver, WA 98668-1995
(360) 487-8500/(360) 487-8501 (fax)
dan.lloyd@cityofvancouver.us