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SUPREME COURT
OF THE STATE OF WASHINGTON

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KING COUNTY,
Respondent,
v.
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.

**RESPONDENT KING COUNTY'S ANSWER TO
AMICUS CURIAE BRIEFS**

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GLOSSARY

AGC	Associated General Contractors of Washington
AGC Br.	Brief of Amicus Curiae Associated General Contractors of Washington, filed in the Supreme Court
AWC	Association of Washington Cities
Bond	Performance and Payment Bond issued by Sureties, Trial Exhibit 6
BT2	Brightwater tunnel segment 2
BT3	Brightwater tunnel segment 3
CP	Clerk's Papers
EPB	Earth pressure balance tunnel boring machine
Ex.	Trial Exhibit
Op.	<i>King County v. Vinci Constr. Grands Projets</i> , 191 Wn. App. 142, 364 P.3d 784 (2015)
RP	Report of Proceedings for trial
SFAA	Surety & Fidelity Association of America
SFAA Br.	Amicus Curiae Brief of the Surety & Fidelity Association of America in Support of Petitioners, filed in the Supreme Court
STBM	Slurry tunnel boring machine
Sureties	Travelers Casualty and Surety Company of America, Liberty Mutual Insurance Company, Federal Insurance Company, Fidelity and Deposit Company of Maryland, and Zurich American Insurance Company

Surety Pet.	Petition for Review filed by the Sureties in the Supreme Court
Surety Br.	Opening brief filed by the Sureties in the Court of Appeals
VPFK	Vinci Construction Grands Projets/Parsons RCI/Frontier-Kemper, JV
WSAC	Washington State Association of Counties
WSAJ	Washington State Association for Justice Foundation
WSAJ Br.	Brief of Amicus Curiae Washington State Association for Justice Foundation, filed in the Supreme Court
WSAMA	Washington State Association of Municipal Attorneys
WSAMA Br.	Brief of <i>Amici Curiae</i> Washington State Association of Municipal Attorneys, Association of Washington Cities, and Washington State Association of Counties in Support of Respondent, filed in the Supreme Court

I. INTRODUCTION

In *Olympic Steamship Co. v. Centennial Insurance Co.*, 117 Wn.2d 37, 53, 811 P.2d 673 (1991), the Court unanimously held that “an award of fees is required in any legal action where the insurer compels the insured to assume the burden of legal action, to obtain the full benefit of his insurance contract” In *Colorado Structures, Inc. v. Insurance Co. of the West*, 161 Wn.2d 577, 608, 167 P.3d 1125 (2007), in turn, the Court held that “*Olympic Steamship* attorney fees apply to performance bonds.” In so holding, the Court relied on the same reasons identified in *Olympic Steamship*, including disparity in enforcement power, ensuring that the obligee is “made whole,” and the importance of providing an economic incentive for sureties to perform their contractual obligations. *Id.* at 607.

SFAA and AGC, the two amici supporting the Sureties’ arguments, ask the Court to abrogate *Colorado Structures* so that sureties are no longer liable for attorney fees when an obligee (like King County here) must assume the burden of legal action to obtain the benefit of a performance bond.¹ As discussed in Section II.A below, this argument fails both because it was not presented in the Sureties’ petition for review and because SFAA and AGC have not shown – as required to abandon

¹ As with King County’s previous briefing, a glossary of relevant abbreviations can be found after the Table of Authorities.

established precedent – that the Court’s holding in *Colorado Structures* is both incorrect and harmful.

SFAA’s and AGC’s other arguments also lack merit. As set forth in Section II.B below, there is no basis to carve out an exception to *Olympic Steamship* and *Colorado Structures* in cases involving public projects. To the contrary, there should be *greater* protection – not less – when public projects and public funds are involved. And as Section II.C below explains, King County was entitled to recover its attorney fees under *Olympic Steamship* and *Colorado Structures* because the Sureties denied liability on the Bond they issued and adopted all of VPFK’s claims and defenses. The Court of Appeals correctly decided these issues, as did the trial court, and this Court should affirm those rulings.

II. ARGUMENT

A. The Court Should Not Abrogate The Majority Holding In *Colorado Structures*.

1. The Court Should Not Address The Argument That *Colorado Structures* Should Be Abrogated Because The Sureties Have Not Properly Presented The Issue.

As noted above, the Court in *Colorado Structures* held that “*Olympic Steamship* attorney fees apply to performance bonds.” 161 Wn.2d at 608. That, as SFAA correctly states, is “[t]he majority opinion in *Colorado Structures*.” SFAA Br. 7. In the Court of Appeals, the Sureties similarly stated that “[i]n *Colorado Structures*, a bare majority of the Supreme Court extended” *Olympic Steamship* to a claim “for payment

under a performance bond.” Surety Br. 20 (emphasis added). Four other amici – WSAMA, AWC, WSAC, and WSAJ – agree on that point.

WSAMA Br. 5-6; WSAJ Br. 8. AGC, in contrast, claims there is no such majority ruling. AGC Br. 9-10.

This issue can be resolved by reviewing *Colorado Structures*.

Four Justices joined the lead opinion. 161 Wn.2d at 608. Justice Sanders dissented on one issue but then, addressing the issue presented in this case, stated: “I agree with the majority that *Olympic Steamship* applies to surety bonds.” *Id.* at 638 (footnote omitted). Where, as here, a majority of Justices agree on a particular point, the opinion “[o]n this point ... is not a plurality decision.” *Wright v. Terrell*, 162 Wn.2d 192, 195, 170 P.3d 570 (2007). Thus, contrary to AGC’s assertion, there is a *majority holding* in *Colorado Structures* that *Olympic Steamship* applies to disputes involving performance bonds.²

Because a majority of the Court held in *Colorado Structures* that *Olympic Steamship* applies to disputes involving performance bonds, the question before the Court is not whether to “resolve the issue addressed in *Colorado Structures*” (AGC Br. 10), but rather whether “[t]he majority

² King County recognizes that the Court stated in *Matsyuk v. State Farm Fire & Casualty Co. of Illinois*, 173 Wn.2d 643, 660 n.5, 272 P.3d 802 (2012), “that *Colorado Structures* does not have a majority rule on ... whether *Olympic Steamship* fees are available in the context of a performance bond as opposed to an insurance contract,” but that observation is dicta and does not reflect all of the Justices’ holdings on the issue as indicated in the text above.

opinion in *Colorado Structures* should be reconsidered and overruled”

(SFAA Br. 7). The Court need not – and should not – address this issue

for the following two reasons:

1. The Sureties did not ask the Court to abrogate *Colorado Structures* in their petition for review. Instead, they raised the two issues discussed in Sections II.B and C below. See Surety Pet. 1-2. Accordingly, consistent with past practice, the Court should not address whether *Colorado Structures* should be abrogated. See *State v. Barker*, 143 Wn.2d 915, 919, 25 P.3d 423 (2001) (“[t]his court ordinarily will not review issues not presented in the petition for review”).
2. The Sureties and their amici do not address the relevant legal considerations. This Court has held that it “will not abandon precedent unless it is determined to be incorrect and harmful.” *State v. Trey M.*, 383 P.3d 474, 478 (Wash. 2016) (internal quotation marks and citation omitted). Because SFAA and AGC, like the Sureties in their previous briefing, do not even attempt to make such a showing, the argument is waived. *In re Marriage of Suggs*, 152 Wn.2d 74, 80, 93 P.3d 161 (2004) (argument waived where “parties failed to brief the [determinative] factors”).

For either or both of these reasons, the Court should not – and need not – decide whether *Colorado Structures* should be abrogated. In any event, as set forth below, the argument also fails on the merits.

2. SFAA’s And AGC’s Preemption Argument Also Fails On The Merits Because They Cannot Show – As They Must – That The Majority Holding In *Colorado Structures* Is Incorrect And Harmful.

If the Court does address whether *Colorado Structures* should be abrogated, the argument also fails on the merits. In *City of Federal Way v. Koenig*, 167 Wn.2d 341, 347, 217 P.3d 1172 (2009) (“*Koenig*”), the Court emphasized that “[m]aking the same arguments that the original court

thoroughly considered and decided does not constitute a showing of ‘incorrect and harmful.’” The Court further noted that “[t]his respect for precedent promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.” *Id.* (internal quotation marks and citation omitted).

Ignoring these legal principles, SFAA and AGC rehash arguments that the Court considered and decided in *Colorado Structures*. AGC argues, for example, that *Olympic Steamship* should not be applied to performance bonds because a performance bond, unlike an insurance contract, “is a three-party contract in which the principal remains primarily liable for the underlying obligation.” AGC Br. 11. SFAA also makes this point. SFAA Br. 2-3. The Court in *Colorado Structures* squarely addressed “the tripartite nature of the performance bond” and found this asserted difference between insurance contracts and performance bonds “immaterial.” 161 Wn.2d at 605 n.15. In *National Bank of Washington v. Equity Investors*, 86 Wn.2d 545, 553, 546 P.2d 440 (1976), the Court likewise recognized that surety bonds are “in the nature” of insurance contracts. *Id.* at 533 (quoting Simpson, *Simpson on*

Suretyship, pt. 1, ch. 3, § 30, p. 101 (1950)). Other courts agree.³ This attempt to undermine the reasoning in *Colorado Structures* therefore fails.

Both SFAA and AGC also claim that the Court's reasoning in *Olympic Steamship* does not apply to performance bonds because there is no disparity of bargaining power between sureties and project owners. AGC Br. 15-16; SFAA Br. 7-8. Here again, the Court rejected a similar argument in *Colorado Structures*: it recognized that "[t]he disparity of bargaining power is relevant, but *more important is the disparity of enforcement power.*" 161 Wn.2d at 603 (emphasis added). At the critical juncture when the obligee seeks coverage, the disparity in enforcement power "is compelling" and the "obligee has no leverage over the surety to compel payment, except litigation." *Id.* at 602.

³ See, e.g., *Dadeland Depot, Inc. v. St. Paul Fire & Marine Ins. Co.*, 945 So. 2d 1216, 1226 (Fla. 2006) ("[B]ecause a surety is undertaking the responsibility of indemnifying the obligee of a surety bond, an obligee is an 'insured' as that term is ordinarily understood in the traditional insurance context."); *Transamerica Premier Ins. Co. v. Brighton Sch. Dist.* 27J, 940 P.2d 348, 352 (Colo. 1997) ("A special relationship exists between a commercial surety and an obligee that is nearly identical to that involving an insurer and an insured."); *United States ex rel. Custom Grading, Inc. v. Great Am. Ins. Co.*, 952 F. Supp. 2d 1259, 1265 (D.N.M. 2013) ("The relationship between a surety and the obligee is nearly identical to the relationship between an insurer and insured, because when an obligee requests that a principal obtain a commercial surety bond to guarantee the principal's performance, the obligee is essentially insuring itself from the potentially catastrophic losses that would result in the event the principal defaults on its original obligation." (internal quotation marks, brackets, and citation omitted)). As these cases confirm, the essential purpose of performance bonds and insurance contracts is the same: they both provide protection to an "insured" in the event of calamity.

Other courts have similarly emphasized this point. In *Transamerica Premier Insurance Co.*, for example, the Colorado Supreme Court stated:

Although the parties to a suretyship agreement are on equal footing in terms of bargaining power when they enter into the agreement, it is the commercial surety who controls the ultimate decision of whether to pay claims made by the obligee under the terms of the surety bond. For this reason, the commercial surety has a distinct advantage over the obligee in its ability to control performance under the secondary agreement. As with insurers, commercial sureties must proceed with the payment of claims made pursuant to a surety bond in good faith. Otherwise, the core purpose of the suretyship agreement, which is to insulate the obligee from the risk of a default, is defeated.

940 P.2d at 353.⁴ Contrary to SFAA's and AGC's arguments, the *critical* issue is not bargaining power but rather enforcement power.

Here, as in *Colorado Structures*, the disparity in enforcement power is compelling. When the Sureties were notified of King County's notice of default, VPFK was months behind schedule, both STBMs were inoperable, and VPFK had not even started to repair either STBM. RP 4545-46. Rather than cure the default, VPFK did the opposite: as explained at pages 6-8 of the County's answer to VPFK's and the Sureties' petitions for review, VPFK secretly formulated its "dead weight

⁴ Other courts agree that sureties must proceed in good faith. As one court observed, courts "have uniformly held that ... a surety owes a duty of good faith to the obligee." *Int'l Fid. Ins. Co. v. Vimas Painting Co.*, No. 2:07-CV-298, 2008 WL 926577, at *5 (S.D. Ohio Apr. 3, 2008) (citing cases). Washington courts, too, have recognized that an insurer "has a quasi-fiduciary duty to act in good faith toward its insured." *Cedell v. Farmers Ins. Co. of Wash.*, 176 Wn.2d 686, 696, 295 P.3d 239 (2013).

strategy” (Ex. 122), whereby “instead of rushing to try to solve problems, we do the opposite” (Ex. 118). Faced with a half-finished project, looming deadlines, and an uncooperative contractor, King County had no leverage to force the Sureties to perform their contractual obligations.

SFAA nevertheless claims that “if the bond principal defaults, the obligee is not in a vulnerable position similar to an insured.” SFAA Br. 9. But contrary to SFAA’s suggestion, public entities like the County do not have unlimited time or money. Here, for example, timely completion of VPFK’s work was vitally important because the wastewater system would not be operational as promised to King and Snohomish County residents until all of the tunnels and pipelines were completed. RP 678-79. Left with no choice, King County agreed to pay JDC *millions of dollars* to complete VPFK’s work. Ex. 3022. It then “had to take legal action to obtain the benefit of the performance bond,” which generated fees and costs in excess of *\$14 million*. Op. ¶¶ 43, 104. Moreover, as WSAMA, AWC, and WSAC explain (WSAMA Br. 17-19), the Court’s decision in this case will affect numerous municipalities, small counties, and other project owners that – like the County – rely on sureties for “prompt and certain payment.” *Colo. Structures*, 161 Wn.2d at 605. As the Court explained in *Colorado Structures*, “[t]his is substantially similar to the

situation before the court in *Olympic Steamship*, and we agree with the Court of Appeals that it applies.” *Id.* at 606.

But even if the Court focuses on bargaining power rather than enforcement power, the Sureties are *five large and sophisticated insurance companies* and can hardly be described as lacking in bargaining power. In addition, there is no evidence that King County provided to bidders anything other than an industry standard and surety-approved form document. *See id.* at 600 (recognizing “use of form contracts”). While SFAA claims that sureties “do not dictate the terms of the performance bond” (SFAA Br. 8), sureties can of course choose not to execute a bond that is for any reason unacceptable, or adjust their premiums accordingly. Either way, sureties – not obligees – have the “final word” (SFAA Br. 8) on what terms are acceptable and at what price. Here, of course, the Sureties voiced no objection to the Bond and expressly agreed to be bound by it. Ex. 3001.

Nor have SFAA and AGC shown that *Colorado Structures* is “harmful,” as is also required to overturn established precedent. *See supra* at 4. The Court decided *Colorado Structures* in 2007, yet there is no evidence that contractors have stopped or will stop bidding on public projects. Nor is there any evidence that contractors are unable to obtain performance bonds or owners are unable to pay for those bonds on public

projects. To the contrary, three organizations that represent the counties and municipalities in this state – WSAMA, AWC, and WSAC – have submitted an amicus brief disputing that argument. WSAMA Br. 8.

Moreover, as these governmental amici *correctly* note, “[w]hen sureties uphold their obligations under bonds, any risk of attorney fee awards is wholly negated.” *Id.* The Court recognized in *Colorado Structures* that a surety is not liable for attorney fees if it “*agreed to pay* under the bond, but had a factual dispute with [the obligee] as to the amount of the payment.” 161 Wn.2d at 606 (emphasis added). A *responsible* surety can avoid *Olympic Steamship* fees by agreeing to pay under a bond while disputing *solely* the amount of the claim. Far from being “harmful,” the result benefits obligees without undermining the surety’s financial interests. SFAA and AGC ignore this point entirely.

Indeed, this case illustrates why obligees should recover *Olympic Steamship* fees in disputes involving performance bonds. Contrary to AGC’s assertion that “there was no wrongful denial of payment by the Sureties in this case” (AGC Br. 13), that is precisely what happened. In response to the County’s claim, the Sureties insisted that they needed to conduct an extended investigation (Ex. 158 at 5) and then – months later – denied the County’s claim by adopting VPFK’s defenses (Ex. 162 at 20-21). The Sureties then hired their own experts, joined VPFK’s summary

judgment motions, filed their own motions and proposed jury instructions, and argued in closing that their consultants had “confirmed what VPFK had been saying all along, that there was no default.” RP 7022. The jury *rejected* VPFK’s defenses after a *three-month* trial (CP 1316-29) and thereby rejected the Sureties’ sole reason for denying the County’s claim. No less so than in litigation with insurance companies, fee awards are needed to discourage vexatious litigation by sureties and ensure that obligees are “made whole.” *Colo. Structures*, 161 Wn.2d at 607.

Nor does such an award “inequitably impose[] the sureties’ faults on the third-party contractor,” as AGC also claims. AGC Br. 14. Because VFPK was purportedly obligated to indemnify the Sureties, it should have litigated the case more economically. Instead, it adopted a scorched-earth litigation strategy, which included:

- filing eight motions to delay, dismiss, or continue the case (CP 1089, 1419-20, 1445 ¶ 34, 7406-20);
- refusing to clearly articulate its claims and defenses, leading the trial court to remark “I have never had as much trouble figuring out what people’s claims are and drafting jury instructions as I am having in this case” (RP 6432);
- requiring King County to take 15 depositions in Europe rather than making witnesses available for deposition in Seattle (CP 1446 ¶ 36); and
- failing to produce documents, answer interrogatories, and make witnesses available for deposition until ordered to do so – in *numerous* instances – by the special master, Judge Robert Alsdorf (ret.) (CP 1420-21, 1446 ¶¶ 37-38).

The Sureties, represented at trial *by the same attorneys*, joined in these delay tactics. CP 1435 ¶ 7. On this record, awarding *Olympic Steamship* fees to King County is not remotely inequitable.⁵

SFAA and AGC also ignore another relevant consideration:

“legislative acquiescence.” *Koenig*, 167 Wn.2d at 348. In refusing to overturn a prior decision, the Court in *Koenig* explained: “By not modifying the [Public Record Act’s] definition of agency to include the judiciary, the legislature has implicitly assented to our holding in *Nast* that the PRA does not apply to the judiciary and judicial records.” *Id.* The fact that the legislature has not attempted to limit, abrogate, or otherwise overrule *Colorado Structures* confirms, as argued above, that the majority holding is neither incorrect nor harmful.

Lastly, the cases cited by SFAA and AGC do not support their argument. As SFAA notes, courts *in other states* “have ruled that, absent some specific provision in the contract between the parties for such an

⁵ There is also evidence that VPFK attempted to avoid discovery by limiting email communications regarding its dead-weight strategy to individuals located outside the United States. *See* Ex. 124 (“Given the legislation in the United States, I prefer not to send this email to Thierry [Portafaix]; I’d rather leave it to Eric [Chambraud] to convey the message verbally because it could be used against us....”). That assumption that foreign emails are not discoverable turned out to be incorrect when King County obtained this document in discovery. VPFK also looked for ways to shift financial responsibility to King County *in mediation*. *See* Ex. 148 (“My strategy will be to ensure that the Client and the Mediators ask that Jay Dee’s EPB finish the BT3 tunnel (mining and pipes) and that we finish BT2 with our slurry machine. In this case in addition to the PAT [*i.e.*, cost overrun on the project] being \$87.2M instead of 115, we will have a much stronger case to get Change Orders on all pending issues.”). There is nothing unfair about VPFK being ultimately responsible for its conduct: it was well aware of its indemnity duty and its scorched-earth litigation tactics were part of a mutual strategy with the Sureties.

award or statutory authority for such a grant, a surety is not liable for attorney's fees on the performance bond." SFAA Br. 7-9. But as AGC acknowledges elsewhere in its brief, attorney fees are recoverable in Washington if a "contract, statute, or recognized equitable principle" so provides. AGC Br. 5 (emphasis added). Here, the recognized equitable principle is set forth in *Olympic Steamship*, which the Court extended to performance bonds (also for equitable reasons) in *Colorado Structures*. As a result, the out-of-state cases cited by SFAA are inapposite.⁶

AGC's discussion of case law is likewise flawed. AGC claims that the Court in *Colorado Structures* misinterpreted *Estate of Jordan v. Hartford Accident & Indemnity Co.*, 120 Wn.2d 490, 844 P.2d 403 (1993), and *Axess International Ltd. v. Intercargo Insurance Co.*, 107 Wn. App. 713, 30 P.3d 1 (2001). AGC Br. 11. Not so. In *Jordan*, the Court applied *Olympic Steamship* to a fidelity bond, which is exactly what the Court stated in *Colorado Structures*. 161 Wn.2d at 598. In *Axess*, the Court of

⁶ AGC similarly misinterprets *Contractors Equipment Maintenance Co. ex rel. United States v. Bechtel Hanford, Inc.*, 514 F.3d 899 (9th Cir. 2008). AGC Br. 7. While the court there applied Washington law regarding *interpretation of contracts*, its attorney fee ruling – which was issued in a previous appeal – was based on the "American Rule governing the award of attorney's fees in federal court" in Miller Act cases. *Contractors Equip. Maint. Co. ex rel. United States v. Bechtel Hanford, Inc.*, 150 F. App'x 585, 587 (9th Cir. 2005) (internal quotation marks and citation omitted). That *federal* rule permits attorney fees awards only if authorized by "statute or enforceable contract." *Id.* Washington law, as noted, also permits fee awards based on equitable principles – as confirmed by *Olympic Steamship*. In addition, contrary to AGC's argument that performance bonds are not interpreted any differently than commercial contracts (AGC Br. 5), the Court held in *Colorado Structures* that an ambiguous performance bond, like an ambiguous insurance policy, "should be construed in favor of liability of the surety." 161 Wn.2d at 588 (internal quotation marks and citation omitted).

Appeals applied *Olympic Steamship* to a surety bond, just as the Court stated in *Colorado Structures*. *Id.* The Court in *Colorado Structures* recognized that these previous cases did not involve “performance bonds,” but rejected the surety’s argument that this was a meaningful difference: “given the underlying principles of *Olympic Steamship* and the nature of a performance bond, which guarantees the performance of the principal, we fail to find a material distinction.” *Id.* In this respect as well, AGC is rehashing arguments that the Court rejected in *Colorado Structures*.

In short, governmental entities, no less than private entities, want protection from expenses arising from litigation, not vexatious, time-consuming, and expensive litigation with a surety. And they deserve to be made whole where, as here, they are compelled to assume the burden of legal action to obtain the benefit of a performance bond. For all these reasons, if the Court addresses whether *Colorado Structures* should be abrogated, it should hold – as in *Koenig*– that there is “no reason to violate the doctrine of stare decisis here.” 167 Wn.2d at 348.

B. The Court Should Not Create An Exception To *Colorado Structures* For Cases Arising Out Of Public Projects.

Both SFAA and AGC also argue that, even if *Colorado Structures* applies in cases involving private projects, it should not apply in cases involving public projects because governmental entities can in some cases recover attorney fees under RCW 4.84.250-.280 as modified by RCW

39.04.240. SFAA Br. 14; AGC Br. 17-20. This, as King County has explained, is a preemption argument. The dispositive issue is whether the Legislature “preempted the field” by making the statutory modification in RCW 39.04.240 the “exclusive means to recover attorney fees” in disputes arising out of public projects. *McGreevy v. Or. Mut. Ins. Co.*, 128 Wn.2d 26, 38, 904 P.2d 731 (1995). To find preemption, there must be “an exclusivity statement or clear evidence of the legislature’s intent to abrogate the common law.” *Potter v. Wash. State Patrol*, 165 Wn.2d 67, 89, 196 P.3d 691 (2008).

Despite these requirements, AGC and SFAA do not even attempt to point to any exclusivity statement. Nor can they, because there is no exclusivity language in RCW 39.04.240. Instead, AGC relies on the “legislative intent” of RCW 39.04.240, which it claims is to encourage settlement. SFAA Br. 18-19. But that does not show – nor is it “clear evidence” – that the Legislature intended to make RCW 39.04.240 the *exclusive means* for governmental entities to recover attorney fees in disputes arising out of public works contracts. Indeed, nothing prevented the parties here from making settlement offers under RCW 4.84.260-.270 and triggering those provisions without affecting King County’s *separate and additional* rights under *Colorado Structures*.

In addition, as WSAJ notes, *Olympic Steamship* fees serve a different purpose than RCW 39.04.240: while RCW 39.04.240 purportedly encourages settlement, *Olympic Steamship* fees provide a financial incentive for sureties to promptly perform their contractual obligations and thereby *avoid* litigation with their obligee as well as ensure that the obligee is made whole if compelled to sue the surety to obtain the benefit of a bond. WSAJ Br. 12-17; *Colo. Structures*, 161 Wn.2d at 607-08. These are *complementary* purposes, none of which precludes another. This, too, is fatal to any preemption argument.

Unable to find any clear evidence of preemption in RCW 39.04.240, SFAA and AGC rely on RCW 4.84.330. SFAA Br. 17; AGC Br. 18. But RCW 4.84.330 also is not “clear evidence” that the Legislature intended to make RCW 39.04.240 the exclusive means for governmental entities to recover attorney fees in disputes arising out of public projects. Indeed, RCW 4.84.330 does not even apply here. That statute is expressly limited to cases where a “contract or lease specifically provides that attorneys’ fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties.” *Id.* There is no such contractual fee provision at issue here, so RCW 4.84.330 is inapplicable.

Nor is there anything improper about allowing a specified class of litigants to recover attorney fees if they prevail. SFAA Br. 14; AGC Br. 18-19. The Court squarely addressed that issue in *McGreevy*, where an amicus argued that *Olympic Steamship* “is ‘one-sided’ in that it authorizes an award of attorney fees exclusively to insureds.” 128 Wn.2d at 37. The Court responded: “This criticism is unwarranted because there is precedent for such ‘one-sided’ attorney fee provisions in statutes.” *Id.* at 37-38. As one example, the Court cited the Consumer Protection Act, where the Legislature authorized plaintiffs, but not defendants, to recover their attorney fees if they prevail. *Id.* at 38; RCW 19.86.090. This legislative acceptance of one-sided fee provisions is another reason that RCW 4.84.330 has no significance here.

AGC also claims that the Court has the power to craft equitable remedies only “in the absence of governing statutes.” AGC Br. 19-20. But that is not what the cases cited by AGC hold. In *Dayton v. Farmers Insurance Group*, 124 Wn.2d 277, 280, 876 P.2d 896 (1994), the Court held that Washington courts can award attorney fees on equitable grounds “where the specific facts and circumstances warrant.” One example, cited in *Dayton* and relevant here, is *Olympic Steamship* fees. *Id.* In *In re Parentage of L.B.*, 155 Wn.2d 679, 683, 122 P.3d 161 (2005), the Court similarly recognized that “[t]he equitable power of the courts” is

“well recognized.” Neither case remotely supports AGC’s preemption argument.

Lastly, AGC’s and SFAA’s preemption argument also proves too much. If the Court were to find preemption based on the legislative intent of RCW 39.04.240 or the contractual fee limitations in RCW 4.84.330, the consequences would be profound. For example:

- Such a holding would fundamentally alter the “clear evidence” standard in *McGreevy*, *Potter*, and other similar cases. It would also mean that the statutory remedy for unlawful impoundments would preempt the common law remedy for conversion – overruling *Potter* (165 Wn.2d at 89) – and the attorney fee provision in RCW 19.86.170 would preempt *Olympic Steamship* – overruling *McGreevy* (128 Wn.2d at 38-39).
- As WSAMA, AWC, and WSAC explain (WSAMA Br. 12), policyholders would not be entitled to *Olympic Steamship* fees in cases “where the maximum amount of the pleading under this section shall be ten thousand dollars,” as required to trigger the fee provisions in RCW 4.84.250. The same would be true in cases involving mandatory arbitration, where a party can recover fees under RCW 7.06.050-.060 if the party requesting a trial de novo does not improve its position as compared to the arbitration award or offer of compromise.

For all these reasons, the Court of Appeals’ well-reasoned preemption analysis (Op. ¶¶ 105-110) should be affirmed.

C. Because This Case Involves A Coverage Dispute, King County Was Entitled To Recover Its Attorney Fees Under *Colorado Structures And Olympic Steamship*.

Finally, stepping beyond its role as a friend of the court to advocate for the Sureties, SFAA (but not AGC) argues that “[e]ven if the *Olympic Steamship* rule applied in this case, there would be no basis to award fees because the dispute between King County and the Sureties was

not over coverage of the performance bond.” SFAA Br. 15. That assertion is incorrect, as the Sureties expressly *denied coverage*. See *supra* at 10; Ex. 158 at 5; Ex. 162 at 20-21. As summarized by the Court of Appeals, “the Sureties did not acknowledge that VPFK was in default, denied that the County was entitled to recover under the Bond, and did not agree to pay under the Bond. In other words, it flatly denied coverage under the Bond, forcing the County to compel it to honor its commitment to do so.” Op. ¶ 119. That, clearly, is a coverage dispute.

Also, contrary to SFAA’s argument that the dispute in this case “was between VPFK and the County over responsibility under the contract for certain costs” (SFAA Br. 17), that is not how the Sureties approached the coverage issue. Instead of conceding coverage and allowing VPFK and the County to litigate “responsibility under the contract,” the Sureties denied coverage under the Bond *by adopting all of VPFK’s claims and defenses*. See *supra* at 10-11. As a result, King County could not prevail on its claim against the Sureties without establishing its claim against VPFK. Given that complete overlap between VPFK’s claims and defenses and the Sureties’ denial of coverage, the trial court did not abuse its discretion when it determined that the attorney fees could not be segregated. CP 4489 ¶¶ 19-20. The Court of Appeals correctly upheld that ruling. Op. ¶¶ 112-119.

Lastly, contrary to SFAA's reliance on *Colorado Structures* (SFAA Br. 17), the Court's holding there provides additional support for the trial court's fee award. Addressing the distinction between a "coverage dispute," for which *Olympic Steamship* fees are recoverable, and a "claims dispute," for which such fees are not recoverable, the Court held that "[t]his case *would be* in the nature of a claims dispute if West [the surety] had *agreed to pay* under the bond." *Colo. Structures*, 161 Wn.2d at 606 (first emphasis in original; second emphasis added). The Sureties had that option, but decided instead to deny coverage and refuse to pay under the Bond. They are therefore liable for King County's attorney fees.

III. CONCLUSION

For the foregoing reasons, the Court should affirm.

DATED: December 28, 2016 PETERSON | WAMPOLD | ROSATO |
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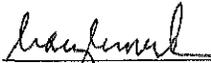
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Enclosed for filing in the above-referenced matter is the Respondent King County's Answer to Amicus Curiae Briefs.

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