

Supreme Court No. 927448  
Court of Appeals No. 70432-0-1

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WASHINGTON STATE  
SUPREME COURT

SUPREME COURT OF THE  
STATE OF WASHINGTON

Received  
Washington State Supreme Court

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KING COUNTY,

MAR 24 2016

Respondent,

Ronald R. Carpenter,  
Clerk

v.

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

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THE SURETY & FIDELITY ASSOCIATION OF  
AMERICA'S AMICUS CURIAE MEMORANDUM IN  
SUPPORT OF PETITIONS FOR REVIEW

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## **I. IDENTITY AND INTEREST OF AMICUS CURIAE**

The Surety & Fidelity Association of America (“SFAA”) is a national trade association of companies licensed to write fidelity and surety insurance in the United States. SFAA’s 410 member companies are sureties on the vast majority of contract performance and payment bonds written in the United States, including bonds written on public works projects to comply with R.C.W. 39.08.010.

## **II. COURT OF APPEALS DECISION**

*King County v Vinci Const. Grands Projets*, 191 Wn. App. 142, 364 P3d 784 (2015) was issued on November 9, 2015; reconsideration was denied on December 29, 2015.

## **III. ISSUES PRESENTED FOR REVIEW**

SFAA urges this Court to grant the petitions for review to address the Court of Appeals’ application of the rule of *Olympic Steamship Company, Inc. v. Centennial Insurance Co.*, 117 Wn.2d 27, 811 P.2d 673 (1991) to the attorney fee aspects of this case. Specifically, SFAA believes this Court should review three aspects of the Court of Appeals decision:

(1) The continued validity of the majority opinion in *Colorado Structures, Inc. v. Insurance Company of the West*, 161 Wn.2d 577, 167 P.3d 1125 (2007) that the rule of *Olympic Steamship* applies to contract performance bonds;

(2) The Court of Appeals’ extension of the rule of *Olympic Steamship* to statutory bonds on public works projects; and

(3) The propriety of the award of attorney fees in the instant case, where most or all of the fees were incurred in the dispute between the principal and the obligee rather than a dispute with the sureties over coverage of the bond.

#### **IV. SUMMARY OF ARGUMENT**

The Court of Appeals erred in awarding attorney fees to King County pursuant to *Olympic Steamship* and *Colorado Structures*. This Court should grant review and reconsider the narrow (five to four) majority decision in *Colorado Structures* that the rule of *Olympic Steamship* applies to contract performance surety bonds.

Alternatively, the Court of Appeals erred in extending the *Colorado Structures* holding to the particular type of bond involved here: a performance bond required by statute on a public project. The public owner, here King County, is not without bargaining leverage or in the vulnerable position of an insured under an insurance policy or even the private contractor-obligee in the *Colorado Structures* case. On the contrary, as a public entity soliciting bids, King County drafted both the contract requirements and the bond form. All potential bidders were presented the same contract and bond requirements and could either bid or not bid. No potential bidder could negotiate changes any more than they could negotiate changes to R.C.W. 39.08.010 *et seq.* setting out the obligations of the bonds.

Finally, even if *Olympic Steamship* and *Colorado Structures* apply to public works performance bonds, the

Court of Appeals erred in finding that this case involved “coverage.” The sureties argued that they were not liable because the contractor was not liable. Little or none of the almost \$15 million of attorney fees awarded to King County pertained to establishing the existence or amount of the *sureties*’ liability separate from the bond principal’s (VPFK) liability. The fact that VPFK and the sureties argued that VPFK owed nothing did not change the fact that the dispute was over what VPFK owed and not the coverage of the bond.

SFAA, therefore, respectfully asks this Court to grant review. If allowed to stand, the Court of Appeals’ decision will lead to increased cost and risk for contractors bidding on public projects and for sureties issuing performance bonds to such contractors. Reduced competition among contractors will lead to increases in the cost of construction. The Court of Appeals erred and, unless reversed, the decision will adversely affect contractors and the public as well as sureties.

## V. ARGUMENT

### A. The Majority Opinion in *Colorado Structures* Should be Reconsidered.

In *Colorado Structures*, the four justice plurality concluded the *Olympic Steamship* exception to the American rule regarding attorney fees applies to construction performance bonds. 161 Wn.2d at 605. The plurality opinion reasoned that *Olympic Steamship* applied to performance bonds because the parties to a performance bond, like parties to an insurance policy, do not have equal bargaining power

when the bond is purchased, and lack equal enforcement power when there is a claim. *Id.* at 600-03. The Court ultimately concluded “[t]here is little to distinguish construction performance bonds from other forms of insurance.” *Id.* at 605.

For the reasons explained in the dissenting opinion of Justice Madsen (joined by Justice Fairhurst), these reasons do not apply to surety bonds in general or contract performance bonds in particular. The surety does not dictate the form of the bond, and the purpose of the bond is not to protect the obligee from litigation.

In the instant case, King County does not (and cannot) claim a right to attorney fees from VPFK under the contract. If King County can collect its fees under the bond, however, the attorney fee exposure will be shifted to VPFK because it will be ultimately liable for the fees either directly as the principal obligor under the bond or by virtue of its contractual and common law obligation to indemnify the sureties. There is no fiduciary or quasi-fiduciary relationship between a public owner and its prime contractor. Yet if *Olympic Steamship* applies to contract surety bonds, any attorney fees awarded will ultimately be owed by the bond principal despite the absence of the considerations that motivated the creation of the *Olympic Steamship* rule.

Construction is a contentious business, and projects routinely include claims by and between owners, contractors, and subcontractors. The surety is often caught between an obligee arguing the principal defaulted, and a principal

arguing the obligee is in breach. The surety cannot resolve such disputes and often must await the outcome of litigation between the contracting parties. A bonded contractor or subcontractor will be at a tremendous disadvantage if its adversary can subject it to payment of attorney fees simply by including a claim on the bond along with the contract or subcontract claim.

There are good reasons for the American rule on attorney fees. It discourages litigation because a potential plaintiff cannot assume that the other side will pay all of the fees. If suit is filed, it encourages settlement because the ongoing costs of litigation fall on both parties. A one-sided fee shifting provision or rule, however, has the opposite effect. Litigants usually think they are right and expect to win. If one party will be forced to pay the other party's fees, the litigant who expects to be the favored party has less reason to settle.

In the context of construction litigation, contracts, subcontracts, and purchase orders often have bargained-for attorney fee terms. Applying *Olympic Steamship* to construction performance bonds will upset these bargained-for rights. Anyone who provided a bond will be exposed to paying the opposing party's attorney fees because the opposing party can sue the surety and claim attorney fees.

Surety bonds are different from insurance policies because an insurance policy shifts the primary risk of loss to the insurer. The insurer controls settlement and litigation of the claim because it has the primary obligation to pay. If the

insurer pays attorney fees, it pays with its own money. Under a surety bond, however, the principal retains the primary obligation. If a surety pays a loss under the bond, it has the right to recoup its loss from the principal. The surety effectively spends the principal's money because anything the surety owes, the bond principal has to pay, either directly or by reimbursing the surety. The surety is not in a position to control the claim or to resolve the dispute. This case is an excellent example of that fact. VPFK and its attorneys litigated the case with King County and its attorneys, and the sureties stood by prepared to pay if VPFK failed to do so.

SFAA respectfully urges this Court to grant review and reconsider and correct *Colorado Structures*.

**B. The Colorado Structures Holding Should Not Be Extended to a Statutory Public Works Performance Bond.**

Far from either lacking bargaining power or being at a disadvantage in the event of a default, King County dictated the terms of both the contract and the bonds and was well able to hire a replacement contractor if necessary. As the Court of Appeals noted:

King County (County) and its consultants began designing the Brightwater contract and the subcontracting documents in 2002. They conducted site investigations, soil analysis, and drafted the specifications and the bid documents. The County provided the bidders for the Central Contract with numerous bid documents (Contract Documents). These documents included the contract (Contract) itself and its "General Terms and Conditions" and "General Requirements" for performance of

the Central Contract work, as well as two geotechnical reports to assist in preparing the bids . . . .

*King County*, 191 Wn. App. at 150.

Similarly, in R.C.W. 39.08.010 it was the legislature that established the basic requirements of the required bond. Within those requirements, the public entity dictated the bond's terms. Here, King County included the bond forms in the bid documents, and all potential bidders had to be prepared to provide those bonds.

Finally, if the bond principal defaults, the public entity is not at the surety's mercy. The public entity will have the unexpended balance of the contract price and a procurement department well able to complete the work if necessary.

The predicate for the holdings in *Olympic Steamship* and *Colorado Structures* do not exist in the context of a statutory public works bond. Even if this Court does not reconsider *Colorado Structures*, it should grant review and hold that the bond principal and sureties on a statutory public works bond are not liable for the public entity's attorney fees unless the contract or bond so provide.

C. **This Case Did Not Involve Coverage of the Bond and so the Lower Courts Erred in Awarding *Olympic Steamship* Attorney Fees.**

This dispute concerned whether the construction contract was breached and responsibility for the completion costs. The surety bond was liable for whatever breach of contract damages King County might recover. The sureties

adopted VPFK's defenses and primarily argued that they were not indebted to King County because VPFK was not indebted to King County. The litigated issues were all based on the construction contract and problems on the project; the litigation did not concern the terms of the bond. The same attorneys were able to represent VPFK and the sureties at trial precisely because VPFK's defenses were the sureties' defenses.

By contrast, in *Colorado Structures* the surety disputed its liability under the bond even if the bond principal breached the bonded subcontract. Here, the dispute is over whether VPFK breached its contract and, if so, the amount of damages it owes King County. There is no real dispute that whatever those damages turn out to be, the bond will cover them if necessary.

As the Court said in *Colorado Structures*:

Generally, when an insured must bring suit against its own insurer to obtain a legal determination interpreting the meaning or application of an insurance policy, it is a coverage dispute. This case *would be* in the nature of a claims dispute if West had agreed to pay under the bond, but had a factual dispute with Structures as to the amount of the payment.

161 Wn.2d at 606 (emphasis in original).

Here, the Court of Appeals recognized the distinction between a coverage dispute and a dispute over the value of the claim but erroneously concluded there must be a coverage

dispute because the sureties adopted the principal's position that it had not breached the contract. The court stated:

Because the Sureties denied liability when it (*sic.*) expressly adopted VPFK's defenses, the County could only obtain the benefit of the Bond by defeating VPFK's defenses. The Sureties' claims arose out of the same set of facts and were based on related legal theories and defied segregation.

*King County*, 191 Wn. App. at 189.

SFAA respectfully suggests that the issues litigated in this case had nothing to do with the coverage of the bond. The lower courts determined the amount owed by the sureties, *i.e.* the amount King County was entitled to recover from VPFK, not whether the sureties were liable for VPFK's debt.

**D. Logic and the Public Interest Require Reversal of the Lower Courts.**

If allowed to stand, the Court of Appeals' award of attorney fees will mean that any construction contractor considering a bid on a Washington public project, and its prospective sureties, will have to account for the risk that, in the event of a dispute, the contractor and surety may have to pay the public entity's attorney fees.

Contractors will either decline to bid or bid a higher amount. Sureties will either decline to provide bonds or will tighten their underwriting standards. Public works contracts will attract fewer bidders and have higher prices.

The legislature could weigh the competing costs and interests and amend R.C.W. 39.08.010 to require the bond to

cover the public entity's attorney fees if it thought that the balance favored doing so. But it has not done so, and there is no basis for a judicial expansion of *Olympic Steamship* where the factors underlying that decision are absent in the context of a breach of contract action between a public entity and its contractor.

## VI. CONCLUSION

SFAA urges this Court to grant review and either (1) reverse the erroneous majority opinion in *Colorado Structures* that *Olympic Steamship* attorney fees are available in a suit on a performance surety bond; (2) decline to extend the *Colorado Structures* attorney fee holding to statutory public works performance bonds; or (3) reverse the attorney fee award of the trial court and Court of Appeals because the dispute between King County and the sureties was not over the coverage of the bond.

DATED: March 22, 2016.

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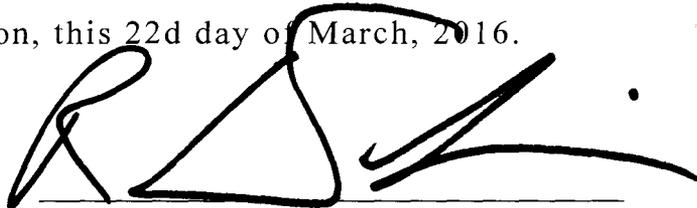
**CERTIFICATE OF SERVICE**

I certify that on the date shown below, a copy of THE SURETY & FIDELITY ASSOCIATION OF AMERICA'S AMICUS CURIAE MEMORANDUM IN SUPPORT OF PETITIONS FOR REVIEW was sent as stated below.

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I declare under penalty of perjury under the laws of  
the state of Washington, this 22d day of March, 2016.



R. Daniel Lindahl  
Attorney for SFAA