No. 100016-2

SUPREME COURT
OF THE STATE OF WASHINGTON

1201 W NICKERSON LLC, a Washington limited liability company,

Respondent,

v.

SUPERIOR MOTOR CAR CO, LLC, a Washington limited liability company,

Petitioner.

ANSWER TO PETITION FOR REVIEW

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A. Introduction.

The Court of Appeals correctly held that substantial evidence supported the trial court's findings that petitioner Superior Motor Car Company, LLC ("Superior") had engaged in a "proven pattern" of disregarding its contractual obligation to obtain the approval of its landlord, respondent 1201 W Nickerson LLC ("Nickerson"), before altering its leased commercial property, and that its unauthorized alteration of the property by removing a distinctive stripe of blue siding from a side of the property's largest building was a material breach entitling Nickerson to repossession of the property. Superior's attempts to transmute this limited holding tied to the particular and unusual facts of this case into an issue of substantial public interest misrepresent both the Court of Appeals' decision and the record below. This Court should deny review.

B. Restatement of Issues Raised by Petitioner.

1. The Court of Appeals used the factors for determining the materiality of a breach of contract in the Restatement (Second) of Contracts § 241 (1981), which have been repeatedly applied by Washington courts. Is the Court of Appeals' decision consistent with Washington law?

2. The Court of Appeals held that substantial evidence supported the trial court's finding that Superior's persistent attempts to alter the leased property without Nickerson's authorization demonstrated a "proven pattern of lack of attention to the details of the lease, [its] lease obligations, and a disregard for the standards of good faith and fair dealing." (FF 2.20, CP 973) Does the Court of Appeals' holding based on the unique facts of this case raise an issue of substantial public interest?

3. Did the Court of Appeals correctly review for an abuse of discretion the trial court's decision not to exercise

its equitable authority in favor of Superior given its lack of good faith?

C. Restatement of the Case.

Nickerson owns real property at 1201 West Nickerson Street, Seattle, Washington. (Op. 2)[1] The property contains a warehouse, a smaller office attached to the warehouse, and two smaller buildings. (Op. 2) The warehouse—the most prominent feature on the property—had a blue stripe running along each exterior side. (Op. 2)

In January 2019, Nickerson and Superior executed a five-year commercial lease. (Ex. 1) The lease provided that Superior's "[a]lterations may be performed only within the [p]remises and only after obtaining [l]andlord's

[1] As it did in the Court of Appeals, Superior's petition presents the facts in the light most favorable to it, ignoring that a reviewing Court must view the evidence in the light most favorable to the party that prevailed in the trial court. (*See infra* § D.2) This answer includes the evidence ignored or minimized by Superior based on the Court of Appeals Opinion, cited as "Op.," and the record before the trial court.

[a]pproval" and that "[t]he placement of any sign or symbol placed in or about the Premises . . . is subject to [l]andlord's [a]pproval." (Op. 3; Ex. 1 at 5, 10, ¶¶ 4.3.2, 7.5) The lease further stated that "[l]andlord's [a]pproval" had to be in writing and that the "approval of a condition or other action" was "in the sole, unfettered, discretion of [l]andlord." (Ex. 1 at 3, ¶ 2.16) The lease also required Nickerson to perform a series of tenant improvements before Superior moved into the property. (Op. 3)

In March 2019 Superior asked Nickerson for an update on the status of the tenant improvements. (Ex. 6 at 2) Nickerson responded that it would "be out of the facility by . . . March 24th," and expressed a willingness to "discuss possible future rent subsidi[]es for [t]enant improvements," but emphasized—consistent with the lease—that "Landlord has final say on [tenant improvements] and design. Any modifications have to keep

in mind future rentability of the building." (Op. 3; Ex. 6 at 1)

Nickerson then reviewed drawings from Superior's architect for a proposed remodel and suggested a number of changes. (Ex. 123; RP 69-71) Nickerson also gave Superior permission to paint the office building, but stressed that "[t]he warehouse portion of the building was not []part of the agreement for paint" and that further discussion was required before Nickerson would give Superior permission to paint the warehouse. (Ex. 32 at 2)[2]

Superior sent Nickerson a notice of default in April 2019 alleging it had failed to timely complete the tenant improvements. (Op. 3; Ex. 9) Nickerson responded that Superior's own conduct had delayed the completion of tenant improvements and that Superior had breached the

[2] Superior erroneously implies Nickerson authorized all of its requested painting. (*See* Pet. 8 n.6) As noted above, Nickerson did *not* give Superior permission to paint the warehouse.

lease by installing a car lift without Nickerson's permission. (Ex. 12 at 6) The parties met at the end of May 2019 to discuss "whether future building modifications will be permitted." (Ex. 13 at 3; *see also* Ex. 16; RP 87-89, 171-73) Nickerson expressed concern that the drawings from Superior's architect "ignored all [the] recommendations made" by Nickerson and that it felt "threatened by the architect to . . . accept his designs," and by a "counter offer" from Superior's attorney made even after Nickerson had denied plans for major modifications to the property. (Ex. 13 at 3) In response, Superior reaffirmed that "any plans for building modifications would have to get Landlord approval." (Ex. 13 at 3)

Shortly after the parties' May 2019 meeting Nickerson learned that Superior planned to install carpet in the warehouse despite Nickerson telling it months earlier that it "did not have permission to glue carpet to the tile as it would ruin it." (Ex. 18 at 3) When Nickerson

confronted Superior about its plan, Superior responded it had "already purchased material and had every intention of installing the carpet" over Nickerson's objection. (Ex. 18 at 3) Two weeks later, Nickerson's workman noticed painters preparing to paint the warehouse and objected that Nickerson had not given Superior permission to paint the warehouse; Superior told Nickerson's workman to "mind your own business." (Ex. 18 at 1)

After this incident Nickerson again expressed frustration that even though it had "not given permission to paint," "the painter was already hired and plan[ned] to paint the entire facility grounds (warehouse & office)." (Ex. 18 at 2; *see also* RP 179-80) Nickerson also emphasized to Superior "this is not the first time the Landlord has said no and the Tenant has continued to pursue modifications in hopes the Landlord will change their mind" and that "*[t]oday's events is a reminder that pre-approval is*

required for all modifications of the facility." (Ex. 18 at 2-3; emphasis in original)

In late August 2019, Superior installed a sign on the north side of the warehouse. (RP 139-40, 242) Although Nickerson had told Superior the blue siding stripe could "be removed where sign is to be installed" (Ex. 32 at 2), Superior removed the siding stripe from the entire north side of the warehouse—not just where the sign was installed. (Ex. 41)

On September 4th, 2019, Nickerson sent Superior a notice of default alleging five breaches of the lease, including that it had "performed exterior modifications without prior Landlord approval." (Ex. 3 at 2 (emphasis removed)) After Superior failed to cure the breaches, Nickerson filed an unlawful detainer complaint (CP 1-4), and the case was tried in a two-day bench trial. (FF 1.1, CP 968) The trial court found that Superior materially breached the lease by removing the blue siding stripe

"along the entire side of the building," because Nickerson had only given Superior permission to remove the stripe "where the sign is to be installed," and "[t]he sign is less than 25% of the length of the building." (FF 2.17, CP 972; *see also* RP 302: "What matters is the only permission that was given was to remove the section where the sign was going up. And that's not what happened.")

In finding that Superior's breach was material, the trial court emphasized that "[a]s stated in the Lease and other documents . . . Defendant needed prior written approval from Plaintiff for all work performed on the Premises and for property modifications." (FF 2.16, CP 972) The trial court found that Nickerson had specifically negotiated for the "clearly important" "right to decide how the building looked from the outside":

> One of the clear intentions of the parties in entering into the Lease is that [Nickerson] retained the right to decide how the building looked from the outside. [Nickerson] had to approve any changes, and that was clearly

> important to [Nickerson]. It was a material issue that was brought up over and over in trial. [Nickerson] wanted to control the paint color inside the building, outside the building, as well as the floor colors.

(FF 2.18, CP 972; *see also* FF 2.20, CP 973: "[i]n deciding that the breach was material, the Court has considered [that] . . . [t]he Defendant's removal of the metal strip deprived Plaintiff of its right to control the look and design of the building, which is a right Plaintiff reasonabl[y] expected to reserve to itself through the Lease language.")

The trial court further found that Superior never cured its unauthorized removal of the stripe "despite requests to do so" (FF 2.17, CP 972), and that Superior's breach "is part of a proven pattern of lack of attention to the details of the lease, the Defendant's lease obligations, and a disregard for the standards of good faith and fair dealing" and that "considering the above factors and a totality of the circumstances, under the facts of this case, the Defendant's breach is significant and material." (FF

2.20, CP 973; *see also* RP 303: "when I take all of this together, there has been a material breach of the lease.") Based on its findings, the trial court granted Nickerson possession of the property. (CL 3.8, CP 975)

The Court of Appeals affirmed in a May 3, 2021, unpublished decision. Applying the factors outlined in the Restatement (Second) of Contracts § 241 (1981), the Court of Appeals held that "the evidence supports the court's finding that '[o]ne of the clear intentions of the parties in entering into the Lease is that [Nickerson] retained the right to decide how the building looked from the outside,' that this 'was clearly important to [Nickerson],' and that it was a material issue." (Op. 10, quoting FF 2.18, CP 972) The Court of Appeals awarded Nickerson its attorney's fees pursuant to a prevailing party fee provision in the lease. (Op. 13-14; *see also* Ex. 1 at 18, ¶ 15.3)

D. Argument Why Review Should Be Denied.

1. The Court of Appeals' application of the Restatement factors for determining the materiality of a breach of contract is consistent with Washington law.

Superior's arguments in both this Court and the Court of Appeals are founded on the erroneous notion that Nickerson was required to perpetually tolerate its tenant's attempts to alter the property without its permission. But Washington law recognizes that Nickerson was well within its rights to treat the removal of the siding stripe from the entire north side of the warehouse as the "last straw" warranting termination of the lease. Superior's arguments to the contrary ignore the law applied by the Court of Appeals and distort its limited holding that substantial evidence supports the trial court's findings that Superior materially breached the lease.

"If a party materially breaches a contract, the other party may treat the breach as a condition excusing further

performance." *City of Woodinville v. Northshore United Church of Christ*, 166 Wn.2d 633, 647, ¶ 31, 211 P.3d 406 (2009). "A 'material breach' is one that substantially defeats the purpose of the contract, or relates to an essential element of the contract, and deprives the injured party of a benefit that he or she reasonably expected." 6A Wash. Prac., *Wash. Pattern Jury Instr. Civ.*, WPI 302.03 (7th ed). As the notes to the pattern instruction explain, "[t]he materiality of a breach is a question of fact" that "depends on the circumstances of each particular case." 6A Wash. Prac., *supra*, WPI 302.03.

The Restatement (Second) of Contracts outlines five factors that are significant in resolving the factual issue of "whether a failure to render or to offer performance is material," including "whether the breach deprives the injured party of a benefit which he reasonably expected" and "whether the breach comports with good faith and fair dealing":

> (1) whether the breach deprives the injured party of a benefit which he reasonably expected,
>
> (2) whether the injured party can be adequately compensated for the part of that benefit which he will be deprived,
>
> (3) whether the breaching party will suffer a forfeiture by the injured party's withholding of performance,
>
> (4) whether the breaching party is likely to cure his breach, and
>
> (5) whether the breach comports with good faith and fair dealing.

Restatement (Second) of Contracts § 241 (1981).

The Court of Appeals has repeatedly applied the Restatement factors. *See, e.g.*, *DC Farms, LLC v. Conagra Foods Lamb Weston, Inc.*, 179 Wn. App. 205, 221, ¶ 35, 317 P.3d 543 (2014); *Bailie Commc'ns, Ltd. v. Trend Bus. Sys.*, 53 Wn. App. 77, 82, 765 P.2d 339 (1988), *rev. denied*, 113 Wn.2d 1025 (1989); *Vacova Co. v. Farrell*, 62 Wn. App. 386, 403-05, 814 P.2d 255 (1991); *TMT Bear Creek Shopping Ctr., Inc. v. Petco Animal Supplies, Inc.*, 140 Wn.

App. 191, 209, ¶ 45, 165 P.3d 1271 (2007). The pattern jury instruction defining a "material breach" also contains a note stating that "[d]epending upon the circumstances of the case, it may be appropriate to add language from the provisions of the Restatement (Second) of Contracts § 241." 6A Wash. Prac., *supra*, WPI 302.03.

The Court of Appeals applied this established law in affirming the trial court's findings that Superior materially breached its commercial lease with Nickerson. Superior argues that the Court of Appeals' decision conflicts with Washington law (Pet. 8-10), but it nowhere addresses the Restatement factors or the Court of Appeals' application of those factors, including its observation that "Nickerson reasonably expected—based on the explicit contractual provision—to retain control over Superior's modifications to the property and, in particular, its modifications to the

property's exterior." (*See* Op. 10-11)[3] Superior cannot establish that the Court of Appeals' decision conflicts with Washington law when it fails to even acknowledge the law it applied.

Rather than address the black letter law relied on by the Court of Appeals, Superior misrepresents the Court of

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[3] The Court of Appeals correctly noted that Nickerson's manager testified "the right to decide how the building looked from the outside . . . was an important part of the agreement" (Op. 10), contrary to Superior's assertion it "misstated" her testimony. (Pet. 17) Nickerson's manager testified it was "very important" that Nickerson "have control over any improvements that would be made by the tenants." (RP 189) Superior focuses on the testimony of Nickerson's manager stating it was important "any improvements that were done were done correctly" (Pet. 17), but that testimony only underscores that the right to control alterations was, as the trial court found, "clearly important" to Nickerson, and a right it "reasonabl[y] expected to reserve to itself through the Lease." (*See* FF 2.18, 2.20, CP 972-73) Superior's hair-splitting of this testimony also ignores the documentary evidence, including the lease itself, confirming that the right to control alterations to the property and its outward appearance was a material term of the lease. (*See* §§ C, *supra*, D.2, *infra*; *see also* Op. 10: noting that, in addition to the trial testimony, the trial court's finding was "supported by the written record and lease provision")

Appeals' decision by arguing it held that breaching "'one of the multiple functions of the contractual relationship' can justify eviction of a lease for material breach." (Pet. 9 (quoting Op. 11-12)) Superior omits the language immediately preceding the quoted passage, in which the Court of Appeals rejected Superior's contention—repeated in its petition (*see* Pet. 7, 13)—that "the *only* purpose of the lease was for it to occupy the building and Nickerson to receive rent" because substantial evidence supported the trial court's finding that "a primary function of the lease" was for "Nickerson [to] retain the right for approval of Superior's exterior alterations." (Op. 11) As explained below, the Court of Appeals' actual holding that substantial evidence supported the trial court's findings applied established standards of appellate review and is entirely consistent with Washington law.

2. The Court of Appeals correctly held that substantial evidence supported the trial court's findings that Superior's attempts to alter the property without permission were a material breach of contract.

Not content to simply ignore the law applied by the Court of Appeals, Superior also ignores the evidence that was critical to both the trial court's findings and the Court of Appeals' decision in arguing review is necessary to protect tenants from eviction for "breaching a minor or immaterial term in a lease." (Pet. 11) Superior's breach was not "minor" or "immaterial." It was—as the trial court found—"significant and material." (FF 2.20, CP 973) Superior's lengthy discussion of public policy is nothing more than an improper request for this Court to reweigh the evidence in this case under the guise of protecting tenant's rights. (*See* Pet. 10-18) Consistent with bedrock principles of appellate review, this Court should decline that request.

As it did in the Court of Appeals, Superior ignores the standard of review, which requires a reviewing court to view the evidence in the light most favorable to the party that prevailed at trial. *City of Univ. Place v. McGuire*, 144 Wn.2d 640, 652, 30 P.3d 453 (2001). Superior instead presents the facts in the light most favorable to it and disregards the context that was critical to the trial court's finding that Superior's removal of the siding strip was not merely a "single aesthetic change" (Pet. 3), but the culmination of a "proven pattern of lack of attention to the details of the lease, [its] lease obligations, and a disregard for the standards of good faith and fair dealing." (FF 2.20,

CP 973; *see also* RP 303: "when I take all of this together, there has been a material breach of the lease")[4]

In particular, the trial court relied on Nickerson's June 2019 reminder to Superior that "pre-approval is required for all modifications" after it hired painters to paint the warehouse without Nickerson's knowledge, let alone its permission:

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[4] Superior's assertions regarding its removal of the siding stripe epitomize its disregard for the standard of review. Superior asserts an email from Nickerson's manager authorized it to remove the entire siding stripe (Pet. 4), but, as the Court of Appeals observed, the "e-mail to Superior clearly stated that the stripe could be removed where Superior intended to install the sign only." (Op. 9; *see also* Ex. 32 at 2: siding stripe could "be removed where sign is to be installed") Superior also relies on a drawing that omits the siding stripe from *all* sides of the building (Pet. 4), but the Court of Appeals correctly deferred to the trial court's determination that image demonstrated a lack of detail and not, as Superior alleges, authorization to remove the entire stripe. (Op. 9) Finally, Superior contends its removal of the siding stripe was only "temporary" and not "irreversible" (Pet. 1, 7), but, as the trial court found, it was undisputed that, as of trial, Superior had not replaced the stripe or even attempted to replace it (FF 2.19-2.20, CP 973; Ex. 41), or complied with Nickerson's request that it "be returned undamaged to Landlord." (Ex. 32 at 1)

> What is most important is Exhibit 18, the third to last paragraph says, from [Nickerson] to defendants . . . "Today's events is a reminder that pre-approval is required for all modifications of the facility. . . ." All right. The lease says you've got to get permission. The email says you've got to get permission. I don't think it's controverted that you've got to get permission.

(RP 297-98; *see also* RP 303: Nickerson "had to approve any changes, and that was important to them. It was a material thing, which has been brought up over and over in the trial.")[5]

Superior's attempt to paint the warehouse was not its only breach of the lease's requirement that alterations "be performed . . . only *after* obtaining [l]andlord's

[5] The trial court did not, as Superior asserts, exclude any evidence "about other contemplated 'changes' to the building." (Pet. 8 (citing RP 185)) The cited ruling excluded only testimony about additional problems with how Superior installed its sign after removing the entire siding stripe. As the trial court's oral remarks and written decision make clear, Superior's repeated attempts to alter the property without Nickerson's permission prior to its removal of the siding stripe were critical to its decision.

[a]pproval." (Ex. 1 at 5, ¶ 4.3.2 (emphasis added)) Superior installed a car lift without Nickerson's approval (Ex. 12 at 5), refuting its assertion it did not make "any unauthorized 'changes' to the premises, other than" removing the stripe. (Pet. 8 n.6) Similarly, when Nickerson denied Superior's request to install carpet in the warehouse, Superior nonetheless purchased carpet and bluntly told Nickerson that—despite the lack of authorization—it "had every intention of installing the carpet." (Ex. 18 at 3) Superior also ignored Nickerson's recommendations for its proposed remodel of the property, and instead threatened Nickerson to accept "plans for major modifications that already had been denied." (Ex. 13 at 3)

Superior persisted in its unauthorized attempts to alter the property despite Nickerson's frequent reminders that it "ha[d] final say on [tenant improvements] and design" and that "[a]ny modifications have to keep in mind future rentability of the building." (Ex. 6 at 1; Ex. 12 at 6;

see also Ex. 18 at 2-3, "this is not the first time the Landlord has said no and the tenant has continued to pursue modifications in hopes the Landlord will change their mind."; Ex. 19 at 1: email from Nickerson's manager regarding architectural drawings advising Superior that "[f]inal approval cannot be granted until I have building permit quality drawings")

Superior's contention that the Court of Appeals "create[d] an impermissibly liberal standard for evictions" entirely ignores this context and history. (Pet. 10-11) Superior does not acknowledge its pressure on Nickerson to accept modifications that Nickerson had already rejected, nor that it repeatedly proceeded with plans to alter the property even after expressly rejected by Nickerson. To the contrary, Superior continues to ignore the evidence relied on by both the trial court and Court of Appeals by asserting there is no evidence it "*continuously*

made *changes* without approval.'" (Pet. 8, quoting Op. 11 (emphasis in original))

Far from "extend[ing] the law" (Pet. 12), the Court of Appeals applied established standards of appellate review in deferring to the trial court's finding—based on the substantial evidence just cited—that Superior's removal of the siding stripe materially breached the lease because it was the capstone on "a proven pattern" of disregarding the lease's requirement that it obtain Nickerson's approval before altering the property. (FF 2.20, CP 973) Superior's contention that "[p]reserving the stripe was never a material term in the lease" confirms that its petition is simply an improper request for this Court review the evidence de novo. (Pet. 17; *see also* Pet. 10 n.8) But this Court may "not substitute [its] judgment for that of the trial court even though [it] might have resolved a factual dispute differently." *Cent. Puget Sound Reg'l Transit Auth. v. WR-*

SRI 120th N. LLC, 191 Wn.2d 223, 251, ¶ 59, 422 P.3d 891 (2018) (internal quotation and alterations omitted).

The out-of-state cases cited by Superior (*see* Pet. 14-16)—all of which are trial court decisions or *affirm* a trial court decision—underscore that the materiality of a breach is a question of fact to be resolved—as it was here—according to the "circumstances of each particular case." 6A Wash. Prac., *supra*, WPI 302.03.[6] This case is thus not an "outlier nationwide" (Pet. 14), but entirely consistent with well-established law. If any aspect of this case is an "outlier," it is Superior's "consistent failure to abide by the

[6] As Superior concedes (Pet. 13), the only Washington cases it cites, *Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 522, 799 P.2d 250 (1990) and *Westlake View Condo. Ass'n v. Sixth Ave. View Partners, LLC*, 146 Wn. App. 760, 770, 193 P.3d 161 (2008), did not address the materiality of a breach of a commercial lease, and instead addressed only whether "aesthetic" issues violated the implied warranty of *habitability*.

explicit provision that Nickerson retain control of the property's exterior." (Op. 11)

3. The Court of Appeals correctly reviewed for an abuse of discretion the trial court's determination that it would not exercise its authority to grant Superior equitable relief given its lack of good faith.

Superior again upends established standards of appellate review in arguing that the Court of Appeals should have reviewed the trial court's decision not to grant it equitable relief de novo instead of for an abuse of discretion. Relying on *Borton & Sons, Inc. v. Burbank Prop., LLC*, 196 Wn.2d 199, 471 P.3d 871 (2020), Superior argues that the Court of Appeals should have applied a de novo standard because the issue in this case is "whether equitable relief is appropriate." (Pet. 18-20) But *Borton* resolved "the threshold question of whether an equitable remedy was available" and reversed the trial court's grant of an equitable grace period because the tenant did "not

make the required showing that it suffered an inequitable forfeiture." 196 Wn.2d at 207, 214, ¶¶ 16, 38; *see also Borton*, 196 Wn.2d at 204, 206, ¶¶ 10, 15 (framing the issue as whether "the trial court ha[d] discretion to grant . . . an equitable grace period"; explaining that in *Crafts v. Pitts*, 161 Wn.2d 16, 162 P.3d 382 (2007) this Court "reviewed the equitable remedy for abuse of discretion only after establishing that the party had a *legal* right to specific performance") (emphasis in original).

Here, unlike *Borton*, the issue was not whether the trial court had the authority to grant Superior equitable relief were it inclined to do so—Superior stressed to the trial court that it had such discretion, and the parties did not dispute on appeal that the trial court had the authority to award equitable relief. (*See* RP 287-88; CP 705-22; App. Br. 32-33; Resp. Br. 39-41) As this Court explained in *Borton*, "the fashioning of an equitable remedy is a distinct

question from whether an equitable remedy is *available* as a matter of law." 196 Wn.2d at 207, ¶ 16 (emphasis added).[7]

The trial court—fully apprised of its discretion to grant equitable relief—determined that the facts did not warrant such relief, contrary to Superior's assertion it did not "consider less drastic remedies than forfeiture." (Pet. 18) That determination is, as the Court of Appeals recognized, reviewed for an abuse of discretion. (Op. 12-13); *see also Borton*, 196 Wn.2d at 206, ¶ 13 ("we review the *fashioning* of equitable remedies for an abuse of discretion") (emphasis in original). As Superior itself previously acknowledged, a trial court's discretion to

[7] Superior also ignores that if, as it argues, the issue was whether the trial court had the authority to grant it equitable relief, then the proper remedy after resolving that issue would be for this Court to remand to the trial court for it to fashion an equitable remedy in the first instance, not for this Court to award it equitable relief. *See Borton*, 196 Wn.2d at 211, ¶ 28 (explaining that this Court has previously "remanded the question of whether [a party] was entitled to an equitable grace period to the trial court").

fashion equitable relief includes the discretion to award no relief at all. (App. Br. 32: arguing equitable relief "*may* be warranted in limited circumstances" (emphasis added)) *See also Borton*, 196 Wn.2d at 212, ¶ 33 ("equitable relief is an extraordinary remedy that is available only in very limited circumstances.").

The trial court acted well within its discretion in denying Superior equitable relief. The trial court found Superior's repeated disregard for its obligations under the lease evidenced a lack of good faith. (FF 2.20, CP 973) That finding alone confirms Superior was not entitled to equitable relief because "[e]quity will not interfere on behalf of a party whose conduct in connection with the subject-matter or transaction in litigation has been unconscientious, unjust, or marked by the want of good faith." *Income Investors v. Shelton*, 3 Wn.2d 599, 602, 101 P.2d 973 (1940). Superior's allegations that Nickerson—not it—acted in bad faith (Pet. 18) once again ask this Court

to review the evidence de novo and make its own findings, a request that is particularly improper with respect to allegations of bad faith. *See* David DeWolf, et al, 25 Wash. Prac., *Contract Law and Practice* § 5.13 (3rd ed.) ("the determination of good faith and fair dealing is an issue for the trier of fact.").

Contrary to Superior's assertion there were other "adequate remedies" (Pet. 12), as detailed above, ample evidence supports the trial court's determination that Nickerson had no remedy short of repossession against an intransigent tenant that refused to heed its numerous admonitions that the lease required prior approval of any alterations to the property. As with its other arguments, Superior's invocation of equitable principles is a thinly veiled request for this Court to substitute its judgment for the trial court's judgment.

E. This Court should award Nickerson its attorney's fees.

This Court should award Nickerson its attorney's fees incurred in drafting this answer under the provision of the lease providing for an award of attorney's fees "[i]f either Party employs an attorney to enforce any rights under this Agreement." (Ex. 1 at 18, ¶ 15.3; emphasis removed); *see also* RAP 18.1(a), (j).

F. Conclusion.

This Court should deny review and award Nickerson its attorney's fees.

I certify that this answer is in 14 point Georgia font and contains 4,990 words, in compliance with the Rules of Appellate Procedure. RAP 18.17 (b).

Dated this 16th day of September, 2021.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on September 16, 2021, I arranged for service of the foregoing Answer to Petition for Review, to the Court and to the parties to this action as follows:

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DATED at Seattle, Washington this 16th day of September, 2021.

/s/ Andrienne E. Pilapil
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SMITH GOODFRIEND, PS

September 16, 2021 - 2:33 PM

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Appellate Court Case Number:	100,016-2
Appellate Court Case Title:	1201 W Nickerson LLC v. Superior Motor Car Co., LLC

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