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STATE OF WASHINGTON
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No. 102883-1

SUPREME COURT
OF THE STATE OF WASHINGTON

APPLIED RESTORATION, INC., ANDERSEN
CONSTRUCTION COMPANY,

Petitioner,

v.

REVITALIZATION PARTNERS, LLC,

Respondent.

ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	RESTATEMENT OF THE CASE	2
	A. Andersen received payment for the work of its subcontractor ARI but returned those funds to the project owner instead of paying ARI's receiver, insisting that ARI's pre-receivership debts must be offset against payment for ARI's post-receivership work.	2
	B. The Court of Appeals affirmed trial court orders requiring Andersen to turnover funds owed for ARI's post-receivership work, as well as an order rejecting Andersen's claim against ARI and a judgment against Andersen based on a finding it anticipatorily breached the subcontract.	5
III.	ARGUMENT WHY REVIEW SHOULD BE DENIED	12
	A. The Court of Appeals' turnover decision does not conflict with Washington's receivership statute and is premised on findings documenting Andersen's "wrongful" conduct.....	12
	B. The Court of Appeals correctly rejected Andersen's demand to offset pre-receivership debts against payments for ARI's post-receivership work as inconsistent with Washington law and the fundamental purpose of receivership—the equitable treatment of all creditors.	21

1.	Like any insolvency proceeding, a receivership alters the rights of the debtor and its creditors.	21
2.	Permitting Andersen to offset pre-receivership debts against the turnover funds would have violated the receivership statute's requirement to give unsecured claims lowest priority.....	27
C.	The Court of Appeals correctly affirmed the rejection of Andersen's claim and the judgment for damages caused by Andersen's anticipatory breach of contract.	30
IV.	CONCLUSION.....	31

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>In re BankVest Cap. Corp.</i> , 360 F.3d 291 (1st Cir.), <i>cert. denied</i> , 542 U.S. 919 (2004).....	22
<i>Bero v. Name Intel., Inc.</i> , 195 Wn. App. 170, 381 P.3d 71 (2016), <i>rev. denied</i> , 187 Wn.2d 1002 (2017)	13
<i>Bos. & Maine Corp. v. Chicago Pac. Corp.</i> , 785 F.2d 562 (7th Cir. 1986).....	29
<i>In re Circle K Corp.</i> , 127 F.3d 904 (9th Cir. 1997), <i>cert. denied</i> , 522 U.S. 1148 (1998).....	24
<i>CKP, Inc. v. GRS Constr. Co.</i> , 63 Wn. App. 601, 821 P.2d 63 (1991), <i>rev. denied</i> , 120 Wn.2d 1010 (1992)	30
<i>Cornish Coll. of the Arts v.</i> <i>1000 Virginia Ltd. P'ship</i> , 158 Wn. App. 203, 242 P.3d 1 (2010), <i>rev. denied</i> , 171 Wn.2d 1014 (2011)	25
<i>In re Delta Air Lines</i> , 359 B.R. 454 (Bankr. S.D.N.Y. 2006).....	28
<i>Gloyd v. Rutherford</i> , 62 Wn.2d 59, 380 P.2d 867 (1963).....	14, 17-18
<i>Jordan v. Nationstar Mortg., LLC</i> , 185 Wn.2d 876, 374 P.3d 1195 (2016).....	13

<i>Kilcullen v. Calbom & Schwab, P.S.C.</i> , 177 Wn. App. 195, 312 P.3d 60 (2013).....	19
<i>In re Nat'l Steel Corp.</i> , 316 B.R. 287 (Bankr. N.D. Ill. 2004).....	23
<i>NLRB v. Bildisco & Bildisco</i> , 465 U.S. 513, 104 S. Ct. 1188, 79 L.Ed.2d 482 (1984)	22-23
<i>Peoples Nat'l Bank of Wash. v. Peterson</i> , 82 Wn.2d 822, 514 P.2d 159 (1973).....	20
<i>St. John Med. Ctr. v.</i> <i>State ex rel. Dep't of Soc. & Health Servs.</i> , 110 Wn. App. 51, 38 P.3d 383, <i>rev. denied</i> , 146 Wn.2d 1023 (2002)	22
<i>TMT Bear Creek Shopping Ctr., Inc. v. Petco</i> <i>Animal Supplies, Inc.</i> , 140 Wn. App. 191, 165 P.3d 1271 (2007).....	20
<i>Tompson v. Huron Lumber Co.</i> , 4 Wash. 600, 30 P. 741, <i>aff'd</i> , 4 Wash. 600, 31 P. 25 (1892).....	14-15
<i>In re Univ. Med. Ctr.</i> , 973 F.2d 1065 (3rd Cir. 1992)	28
<i>Matter of Whitcomb & Keller Mortg. Co., Inc.</i> , 715 F.2d 375 (7th Cir. 1983).....	23

STATUTES

11 U.S.C. § 365	22
RCW 7.08.010.....	14

RCW 7.08.030	2
RCW 7.60.005	13
RCW 7.60.015	14
RCW 7.60.070	5, 15, 18
RCW 7.60.130	22-23, 31
RCW 7.60.160	7, 15, 18
RCW 7.60.210	3, 27
RCW 7.60.220	27
RCW 7.60.230	27

RULES AND REGULATIONS

RAP 13.4	13, 20
----------------	--------

OTHER AUTHORITIES

6 Collier on Bankruptcy (14th Ed.) 576–80)	24
3 Norton Bankr. L. & P.2d § 63:4, Part 11, § 553 (Sept. 2006)	28
<i>Restatement (Second) of Contracts</i> § 205 (1981)	19
<i>Restatement (Second) of Contracts</i> § 229 (1981)	19
<i>Restatement (Second) of Contracts</i> § 239 (1981)	19

I. INTRODUCTION

This dispute arises from a receivership over Applied Restoration, Inc. (ARI), a subcontractor that Andersen Construction Company hired for a project it managed as general contractor. As it did in the Court of Appeals, Andersen seeks this Court's aid without acknowledging the trial court's findings that it concocted a scheme to avoid the turnover of funds owed to ARI in violation of the receivership statute, Chapter 7.60 RCW. In particular, Andersen ignores findings that it "had possession of the funds owed to ARI for weeks and withheld those funds to leverage its position" and that it "wrongfully" undermined the receiver's efforts "to maximize the return for all creditors." The Court of Appeals correctly rejected Andersen's arguments as inconsistent with the trial court's findings, Washington law, and the fundamental purpose of receivership—the equitable treatment of all creditors. This Court should deny review.

II. RESTATEMENT OF THE CASE

- A. **Andersen received payment for the work of its subcontractor ARI but returned those funds to the project owner instead of paying ARI's receiver, insisting that ARI's pre-receivership debts must be offset against payment for ARI's post-receivership work.**

In 2018, Andersen agreed to serve as the general contractor constructing the Quil Ceda Creek Casino owned by the Tulalip Tribes of Washington. (CP 495-545) In May 2019, ARI and Andersen executed a \$1,917,481 subcontract for ARI to provide exterior finishing on the project. (CP 13, 17-41) Under the subcontract, ARI received monthly progress payments based on the percentage of work it completed. (CP 17, 32) In addition to its own workers, ARI subcontracted with third parties (sub-tier subs) to provide further labor and materials. (CP 13)

Due to financial difficulties, on March 31, 2020, ARI assigned its assets to Revitalization Partners, LLC, for the benefit of its creditors under RCW 7.08.030(1) and two days later Revitalization was appointed as general receiver over ARI. (CP

12-13) At the time of the appointment, ARI had not paid all sub-tier subs for their work. (CP 13) RCW 7.60.210(1) requires that any claim arising “prior to the receiver’s appointment” be submitted to the receiver who will then decide whether to allow the claim.

On April 6, Revitalization informed Andersen of its appointment as receiver. (CP 76-77) Revitalization also informed Andersen that under the receivership statute any sub-tier subs “that are owed pre-receivership funds by the estate must submit claims through the claims process.” (CP 77) Revitalization, however, assured Andersen it would continue to operate ARI and would “be paying vendors timely for the work performed post-receivership.” (CP 76-77)

Andersen accepted that assurance and continued to have ARI, as managed by Revitalization, work on the project in April and May of 2020. (CP 13, 113) ARI incurred over \$200,000 in

expenses during this time and Revitalization fully paid all sub-tier subs for post-receivership work. (CP 14, 77, 112-21)

Andersen, by its own concession, received payment from the Tribe for ARI's April 2020 work at the end of May 2020. (CP 65) Andersen, however, refused to pay Revitalization for ARI's post-receivership work unless Revitalization "guarantee[d] that it will pay all pre-receivership claims related to this Project." (CP 43; *see also* CP 113, 362)

On the morning of June 4, Revitalization informed Andersen that it halted ARI's work because of Andersen's "unwillingness to commit to paying . . . for the work being done." (CP 100) Andersen responded less than an hour later, accusing Revitalization of breaching the contract and later that day forwarded Revitalization a letter from the Tribe demanding the return of \$113,481 it paid Andersen for work performed in April. (CP 14-15, CP 45-47, 99)

The next day Revitalization requested that Andersen turnover the funds it had received from the Tribe for ARI's April 2020 work, and informed Andersen that transferring the funds to a third party would not relieve Andersen of its turnover obligation. (CP 15, CP 49) Andersen did not pay Revitalization and instead returned the funds to the Tribe. (CP 49, CP 66)

B. The Court of Appeals affirmed trial court orders requiring Andersen to turnover funds owed for ARI's post-receivership work, as well as an order rejecting Andersen's claim against ARI and a judgment against Andersen based on a finding it anticipatorily breached the subcontract.

Between May and July 2020, Revitalization filed three motions under RCW 7.60.070, which requires that a person "turn over any property over which the receiver has been appointed that is within the possession or control of that person." Revitalization's first motion, filed in May, sought an order requiring Andersen to turn over ARI's April progress payment of \$113,481. (CP 165-74; *see also* CP 88) The trial court denied

the motion as premature because payment was not yet due. (CP 13, 246-47)

A month later, Revitalization filed another motion seeking ARI's April progress payment. (CP 1-9, 104-08) Revitalization supported its motion with evidence ARI incurred \$84,164.54 in expenses in April. (CP 116-123) Andersen did not dispute ARI's expenses and instead argued it did not have possession of the funds Revitalization sought because it returned them to the Tribe. (CP 51-52) Andersen also argued it was entitled to offset the April progress payment by amounts ARI owed to sub-tier subs for pre-receivership work. (CP 53-62)

A King County superior court commissioner found Revitalization was owed \$84,164.54 for "demonstrable out of pocket costs . . . directly related to the Project" and ordered Andersen to pay Revitalization that amount. (CP 857-59) The commissioner denied Andersen's request to offset the April payment by "amounts unpaid to ARI's sub-tiers for worked

performed in January, February, and March 2020” but ruled Andersen could seek them “in an adjunct proceeding against the Receiver.” (CP 858)

The commissioner ordered Andersen to place the remaining \$29,313.46 sought by Revitalization in the court registry and directed that disposition of those funds “shall be decided by the Court in an adjunct proceeding pursuant to RCW 7.60.160.” (CP 859) The commissioner also ordered that Andersen follow the same procedure going forward, *i.e.*, pay Revitalization directly for costs ARI incurred in May and June and place any remaining amounts in the registry. (CP 858-59)

The commissioner denied Andersen’s motion for reconsideration (CP 124-32, 861-62), rejecting again Andersen’s argument it did not have possession of funds owed to ARI, and finding “Andersen was paid by the client/tribe and . . . had possession of the funds owed to ARI for weeks and withheld those funds to leverage its position.” (CP 861-62) The

commissioner further found “Andersen took affirmative action to cause the tribe to cancel . . . payment,” relying on the “reasonable inference” that the identical timing of Andersen’s email refusing to pay Revitalization and the Tribe’s letter “demanding” return of funds paid to Andersen proved Andersen had “[a]sk[ed] the client to take back the funds.” (CP 861-62; *see also* RP 13: “it seems pretty clear that the tribe didn’t figure out on their own that they needed to get that money back”; RP 60: “you’re playing games.”)¹ The commissioner additionally found that Andersen’s “conduct was wrongful” and interfered with Revitalization’s efforts “to maximize the return for all creditors.” (CP 862) Andersen filed a motion for revision of the commissioner’s order denying reconsideration, which a superior court judge denied. (CP 150-60, 864-65)

¹ The report of proceedings designated in Andersen’s statement of arrangements is cited as “RP __” and the report of proceedings designated in the respondents’ supplemental statement of arrangements is cited as “Supp. RP __.”

Andersen did not pay Revitalization directly for ARI's May costs and instead deposited the funds in the registry. (CP 415) Revitalization then filed another turnover motion seeking \$123,132.90, the amount of costs ARI incurred in May. (CP 406-20) The commissioner granted the motion in part, releasing \$81,179.70 from the registry, the amount of Revitalization's May progress payment (less a \$2,000 overpayment for ARI's April work). (CP 867-69; *see also* CP 441, 469)

In February 2021, Andersen submitted a \$941,444 claim to the receiver alleging costs of \$664,146 to complete ARI's work, plus \$45,339 to repair ARI's work, and additional amounts Andersen paid to sub-tier subs. (CP 577)² Revitalization objected to all but \$113,340 of Andersen's claim and argued that by refusing to pay Revitalization for ARI's work, Andersen

² Although Andersen assigned error to the partial denial of its claim, its claim is not part of the record. (*See* App. Br. 8; *see also* App. Br. 26: citing a declaration of Andersen's general counsel; Pet. 11, 28: citing Revitalization's objection)

anticipatorily breached the subcontract, excusing ARI from further performance and entitling it to \$177,859, the remaining subcontract balance. (CP 561-68, 802-05) Andersen responded with hundreds of pages of exhibits in support of its claim. (CP 569-801)

After a hearing on March 16, 2022, the commissioner allowed the undisputed \$113,340 as an unsecured claim. (CP 871-72) The commissioner also ruled that Andersen's payment of a sub-tier sub, PCI, entitled Andersen to "PCI's pro-rata share once that pro rata share is determined." (CP 872) (emphasis in original)

The commissioner further found Andersen anticipatorily breached the subcontract and thus was not entitled to completion or repair damages and that Revitalization was entitled to judgment against Andersen for the \$177,859 subcontract balance. (CP 854-55, 872) When entering judgment, the commissioner explained this protracted litigation stemmed from

“Andersen’s refusal to acknowledge the difference between a pre-filing claim and a post-filing claim”:

Most of this controversy has arisen out of Andersen’s refusal to acknowledge the difference between a pre-filing claim and a post-filing claim. . . . [T]hey wanted me to give them an offset which would have granted them almost 100% of their pre filing claim. That’s not appropriate. Pre-filing claims on unsecured creditors in a receivership are handled on a pro-rated basis.

(Supp. RP 11)

The Court of Appeals affirmed.³ The Court of Appeals held that neither the commissioner nor superior court abused their discretion in ordering turnover because the commissioner’s finding Andersen possessed funds owed for ARI’s April work was supported by substantial evidence and because Andersen never challenged ARI’s “demonstrable costs for labor, materials, and vendor costs related to the project.” (Op. 10-14) The Court of Appeals also affirmed the rejection of Andersen’s claim and

³ The Court of Appeals opinion is cited as “Op. ___” and attached as Appendix A.

the entry of judgment against it based on substantial evidence Andersen anticipatorily breached the subcontract (Op. 14-21), including evidence it “expressly, directly, and repeatedly told Revitalization that it would not provide further payments unless Revitalization guaranteed it would pay the ‘outstanding amounts owed’ to the sub-tier subs.” (Op. 16)

III. ARGUMENT WHY REVIEW SHOULD BE DENIED

A. The Court of Appeals’ turnover decision does not conflict with Washington’s receivership statute and is premised on findings documenting Andersen’s “wrongful” conduct.

Andersen’s arguments for review nowhere acknowledge its “wrongful” scheme to avoid turnover that interfered with Revitalization’s efforts “to maximize the return for all creditors.” (CP 862) The Court of Appeals decision simply held that neither the commissioner nor the superior court abused their discretion or equitable authority in ordering turnover based on findings—supported by substantial evidence—documenting Andersen’s

wrongful conduct. (*See* Op. 8-14)⁴ Far from being unprecedented, the decision is consistent with Washington’s receivership statute, its constitution, and this Court’s decisions, and raises no issue of substantial public interest. RAP 13.4(b).

“Chapter 7.60 RCW governs Washington’s receivership scheme.” *Jordan v. Nationstar Mortg., LLC*, 185 Wn.2d 876, 889, 374 P.3d 1195 (2016). “Chapter 7.60 RCW gives the trial court broad discretion over receiverships”—an equitable remedy—and appellate courts review rulings in receivership for an abuse of discretion. *Bero v. Name Intel., Inc.*, 195 Wn. App. 170, 172, 175, 179, 381 P.3d 71 (2016), *rev. denied*, 187 Wn.2d 1002 (2017); *see also* RCW 7.60.005(10) (A receiver is “appointed by the court as the court’s agent, and subject to the

⁴ As the Court of Appeals noted, despite seeking review of the superior court’s order denying revision of the commissioner’s order denying reconsideration of the second turnover order, “Andersen offer[ed] no argument as to how the judge’s order denying revision was an abuse of discretion.” (Op. 10)

court's direction"). A general receiver, such as Revitalization, is "appointed to take possession and control of all or substantially all of a person's property with authority to liquidate that property and, in the case of a business . . . wind up affairs." RCW 7.60.015.

This Court has long recognized that a receiver for an insolvent business "represent[s] the corporation and *all* of its creditors" and must act towards "the end that *all* creditors should share *alike*." *Tompson v. Huron Lumber Co.*, 4 Wash. 600, 607-08, 30 P. 741 (emphasis added), *aff'd*, 4 Wash. 600 (1892); *see also Gloyd v. Rutherford*, 62 Wn.2d 59, 61, 380 P.2d 867 (1963) (a receiver must act "for the common benefit of all parties in interest"); RCW 7.08.010 (requiring that assignments for the benefit of creditors be "made for the benefit of all of the assignor's creditors"). Receivership, like bankruptcy, ensures the orderly payment of creditors and prevents a scramble to seize a debtor's assets because "the race is not to the swift alone, when

the prize is in a court of equity for equal distribution.” *Tompson*, 4 Wash. at 608.

RCW 7.60.070 authorizes a receiver to demand that a person “turn over any property over which the receiver has been appointed that is within the possession or control of that person.” RCW 7.60.070 also provides that turnover may be sought “by motion . . . unless there exists a bona fide dispute with respect to the existence or nature of the receiver’s interest in the property, in which case turnover shall be sought by means of an action under RCW 7.60.160,” which allows actions to be brought by or against the receiver in litigation “adjunct to the receivership case.” RCW 7.60.160(2).

As it did in the Court of Appeals, Andersen disregards the commissioner’s findings, adopted by the superior court, underpinning the ruling that Andersen had “possession or control” of property belonging to ARI, including specific findings that:

1) ARI was undisputedly owed over \$165,000 for its work after Revitalization's appointment as receiver. (CP 857-59, 868; *see also* CP 116-23, 417-20)

2) Andersen "had possession of the funds owed to ARI for weeks and withheld those funds to leverage its position." (CP 862)

3) The Tribe did not spontaneously cease payment for ARI's work—it did so because "Andersen took affirmative action to cause the tribe to cancel . . . payment" as part of a "wrongful" scheme to avoid turnover. (CP 861-62; *see also* RP 13, 60)

As these findings confirm, the commissioner and superior court exercised their discretion and equitable authority to order turnover because Andersen induced Revitalization to have ARI continuing working on the project without paying for its work, citing as justification only its erroneous belief (addressed below, § III.B) that its rights should be preferred over the rights of every other ARI creditor. The Court of Appeals decision does not conflict with Washington precedent for the simple reason that no other case involves such outrageous conduct.

The trial court findings also eviscerate the factual underpinning of Andersen's argument that the Court of Appeals violated the principle that a receiver acquires no "better rights than the debtor had" and its contention that the receiver compelled turnover of "property from a third-party" that did not belong to the debtor. (Pet. 14) The commissioner explicitly found the turnover funds were "owed to ARI." (CP 862) Andersen's characterization of this run of the mill receivership ruling as a due process violation based on a "bona fide dispute" over "the receiver's interest in the property" (Pet. 4, 19-22), likewise ignores that the commissioner resolved that dispute and, after providing Andersen with notice and an opportunity to be heard, found ARI had the right to be paid for its work.

Andersen misplaces reliance on *Gloyd v. Rutherford*, 62 Wn.2d 59, 380 P.2d 867 (1963), which refutes its due process argument. (See Pet. 20, 26) In *Gloyd*, an officer of a manufacturing company appealed a turnover order entered after

the trial court “construed the [parties’] contract and concluded that the [officer] was obliged, under its terms, to turn over a certain formula.” 62 Wn.2d at 60. This Court affirmed and rejected the officer’s argument “the court was without jurisdiction to construe the contract,” recognizing the rule now codified in RCW 7.60.070: “that as against a party to the suit, an adjudication as to the rights of the receiver and the duties of the party in respect of the property impounded may be made upon motion.” 62 Wn.2d at 60, 63 (quotation and quoted source omitted). This Court stressed “the exercise of such power is *not* a deprivation of due process.” 62 Wn.2d at 62 (emphasis added).

Andersen’s due process argument also ignores that both the commissioner and superior court recognized that Andersen could file an adjunct proceeding under RCW 7.60.160. (See CP 858-59, 865) Andersen never did so and instead litigated ARI’s right to the turnover funds by submitting hundreds of pages of

pleadings, declarations, and exhibits. (CP 50-103, 124-33, 141-47, 150-405, 428-545, 569-801, 812-24)

Andersen again disregards the commissioner's findings in arguing that funds it turned over for ARI's May 2020 work "had nothing to do with the Project" because the Tribe never paid it for that work. (Pet. 25) A trial court "has the authority to excuse a condition," such as the Tribe's payment, "where enforcing the condition would cause disproportionate forfeiture" or "if its occurrence has been prevented or hindered through a breach of the covenant of good faith and fair dealing." *Kilcullen v. Calbom & Schwab, P.S.C.*, 177 Wn. App. 195, 204-05, 312 P.3d 60 (2013) (citing *Restatement (Second) of Contracts* §§ 205, 229, 239 (1981)).

That is what the commissioner did here—it ordered Andersen to turn over the May funds "without regard to whether Andersen received funds from the May Billing" (CP 868) based on findings ARI was undisputedly owed for its post-receivership

work and that the Tribe only stopped paying for ARI's work because of Andersen's "wrongful" conduct. (CP 858, 862; *see also* RP 60) The commissioner's ruling comports with both the law of contracts and the maxim that "[w]illful defiance of the court's authority can never be rewarded in an equitable proceeding." *TMT Bear Creek Shopping Ctr., Inc. v. Petco Animal Supplies, Inc.*, 140 Wn. App. 191, 206, 165 P.3d 1271 (2007).

Finally, in addition to denying review based on RAP 13.4(b), this Court should deny review because Andersen's arguments were "not appropriately raised before the Court of Appeals." *Peoples Nat'l Bank of Wash. v. Peterson*, 82 Wn.2d 822, 830, 514 P.2d 159 (1973). Andersen did not raise a due process argument in the Court of Appeals and, as the Court of Appeals noted, Andersen "offer[ed] no authority for its bald assertion that the terms of the subcontract control over those of the receivership statute." (Op. 10; *see also* Pet. 19-22)

This Court should reject Andersen's distortion of the lower court decisions and deny review.

B. The Court of Appeals correctly rejected Andersen's demand to offset pre-receivership debts against payments for ARI's post-receivership work as inconsistent with Washington law and the fundamental purpose of receivership—the equitable treatment of all creditors.

The Court of Appeals correctly rejected Andersen's argument that the subcontract entitled it to offset ARI's pre-receivership debts against funds owed for ARI's post-receivership work because receivership necessarily alters the rights and obligations of a debtor and its creditors and because granting Andersen's offset would have violated the receivership statute by favoring Andersen over ARI's other creditors.

1. Like any insolvency proceeding, a receivership alters the rights of the debtor and its creditors.

The Court of Appeals properly rejected Andersen's insistence that it could ignore the receivership and determine ARI's right to be paid for its work solely by "the actual terms of the subcontract." (Pet. 17) Receivership, like bankruptcy,

“empower[s] . . . [the debtor] to deal with its contracts and property in a manner it could not have done absent the bankruptcy filing.” *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528, 104 S. Ct. 1188, 1197, 79 L.Ed.2d 482 (1984);⁵ *see also In re BankVest Cap. Corp.*, 360 F.3d 291, 300 n.14 (1st Cir.) (“Bankruptcy by design involves the re-ordering of debtor-creditor relationships and the adjustment of bargains negotiated under more optimistic circumstances.”), *cert. denied*, 542 U.S. 919 (2004).

One of the ways receivership and bankruptcy alter relationships is by giving the receiver and bankruptcy trustee the right to assume or reject a debtor’s executory contracts. RCW 7.60.130; 11 U.S.C. § 365. Under RCW 7.60.130(1), “[a] general receiver may assume or reject any executory contract or

⁵ Washington courts will look to bankruptcy cases for guidance when addressing insolvency issues. *See, e.g., St. John Med. Ctr. v. State ex rel. Dep’t of Soc. & Health Servs.*, 110 Wn. App. 51, 60, 38 P.3d 383, *rev. denied*, 146 Wn.2d 1023 (2002).

unexpired lease of the person over whose property the receiver is appointed” A general receiver’s power “to assume an executory contract or unexpired lease shall not be affected by any provision in the contract or lease that would effect or permit a forfeiture, modification, or termination of it on account of . . . the receiver’s appointment” RCW 7.60.130(3).

“[M]ost courts agree that before an executory contract is assumed or rejected . . . that contract continues to exist, enforceable by the debtor-in-possession, **but not** enforceable against the debtor-in-possession.” *In re Nat’l Steel Corp.*, 316 B.R. 287, 305 (Bankr. N.D. Ill. 2004) (listing cases) (emphasis added). A debtor’s one-sided right to enforce its contractual rights provides it “flexibility and breathing space” to determine whether it should assume or reject a contract. *Bildisco*, 465 U.S. at 532, 104 S. Ct. at 1199; *see also Matter of Whitcomb & Keller Mortg. Co., Inc.*, 715 F.2d 375, 378 (7th Cir. 1983) (a trustee “is entitled to a reasonable time to make a careful and informed

evaluation as to possible burdens and benefits of an executory contract”) (quoting 6 Collier on Bankruptcy (14th Ed.) 576–80). Without this breathing space, debtors would be compelled to immediately cure all pre-insolvency defaults to preserve the right to assume or reject a contract, with the consequence that “if they later chose to reject, they would have been forced into granting a preference” since normally “any pre-petition defaults become unsecured claims against the bankruptcy estate.” *In re Circle K Corp.*, 127 F.3d 904, 910 (9th Cir. 1997), *cert. denied*, 522 U.S. 1148 (1998).

Here, the Court of Appeals correctly recognized that once a receiver was appointed “the terms of the subcontract” did not “control over those of the receivership statute.” (Op. 10) Accordingly, Andersen could not condition payment for ARI’s post-receivership work on subcontract terms requiring payment of ARI’s pre-receivership debts because as explained below (*see* § III.B.2), doing so would have violated the provisions of the

receivership statute governing the priority of claims. (See Pet. 18) Indeed, the commissioner found that Andersen's demands caused the exact prejudice a debtor's "breathing space" is intended to prevent—it interfered with Revitalization's efforts "to maintain the work flow" and "market the business to an outside buyer to maximize the return for all creditors." (CP 862)

Andersen's argument that the Court of Appeals decision rendered the terms of the subcontract "irrelevant" and that it conflicts with cases enforcing contracts "as written" (Pet. 15-19) ignores that "the general law in force at the time of the formation of the contract is a part thereof." *Cornish Coll. of the Arts v. 1000 Virginia Ltd. P'ship*, 158 Wn. App. 203, 223, 242 P.3d 1 (2010) (quotation and quoted source omitted), *rev. denied*, 171 Wn.2d 1014 (2011). The Court of Appeals thus did not "frustrate the reasonable expectations of the contracting parties" (Pet. 17) but honored them by enforcing the receivership statute that was a

part of the subcontract and that all parties understood would come into play if one of the parties was placed in receivership.

Moreover, the commissioner and superior court applied the terms of the subcontract governing the timing and amount of ARI's payments. The superior court denied Revitalization's first turnover motion because ARI's April 2020 progress payment was not yet due. (CP 246-47) The commissioner also heeded Andersen's objection that the subcontract was not a "time and materials" contract (CP 430) and limited the turnover funds for May 2020 to the amount of ARI's monthly progress payment, which was \$40,000 less than the expenses it incurred that month. (See CP 415-20, 469, 867)

In short, Andersen—not the Court of Appeals—disregards Washington law in insisting that receivership did nothing to alter its rights against ARI.

2. Permitting Andersen to offset pre-receivership debts against the turnover funds would have violated the receivership statute's requirement to give unsecured claims lowest priority.

The Court of Appeals also correctly recognized that Andersen's demanded offset of ARI's pre-receivership debts and its post-receivership payments was an improper attempt to circumvent the provisions of the receivership statute governing the priority of claims. (Op. 19) The receivership statute requires that all claims arising "prior to the receiver's appointment" be submitted to the receiver for a determination of whether the claimant is "entitled to share in distributions from the estate in accordance with the priorities provided for by this chapter or otherwise by law." RCW 7.60.210(1); RCW 7.60.220(1). RCW 7.60.230(1) sets those priorities, and generally requires pro rata payment of equal priority claims and gives general unsecured claims, such as Andersen's, lowest priority.

As the commissioner explained, Andersen's "demand[] that 'pre-filing' debts be paid from the 'post-filing' contract

payment” would require the receiver to “violat[e] the receivership statute by preferentially paying some pre-filing debts to the exclusion of other pre-filing debtors.” (CP 862) *See also In re Univ. Med. Ctr.*, 973 F.2d 1065, 1079 (3rd Cir. 1992) (“pre-petition claims against the debtor cannot be set off against post-petition debts owed to the debtor” because it “elevates an unsecured claim to secured status”) (quotation and quoted source omitted); *In re Delta Air Lines*, 359 B.R. 454, 466 (Bankr. S.D.N.Y. 2006) (where a debtor “performs work for a creditor holding a prepetition claim, the creditor may not set off its postpetition indebtedness against its prepetition claims”) (quoting 3 Norton Bankr. L. & P.2d § 63:4, Part 11, § 553 (Sept. 2006)). The commissioner’s concern was not hypothetical—Wells Fargo has a security interest in ARI’s accounts receivable (CP 7, 15) that would have been subordinated to unsecured claims if, as Andersen demanded, pre-receivership debts were offset against post-receivership payments.

The denial of Andersen's offset is thus a direct consequence of the receivership statute and there is no risk that the denial could "be weaponized to demand payment outside the receivership context." (Pet. 18) While Andersen decries this result as "inequitable" (Pet. 27), the Court of Appeals correctly recognized that equity required it. *See Bos. & Maine Corp. v. Chicago Pac. Corp.*, 785 F.2d 562, 566 (7th Cir. 1986) ("The bankruptcy law treats all pre-bankruptcy claims of the same class equally. When one claimant gets treatment that is denied to others, they have been treated inequitably."). Andersen's claims of inequity also ignore it agreed to bear the risk that a subcontractor would become insolvent. (CP 512: prime contract provision requiring Andersen to pay all contractors and indemnify the Tribe "against any and all liens")

The only thing inequitable about this case is Andersen's insistence that it should be preferred over all of ARI's other creditors. The Court of Appeals correctly rejected that result.

C. The Court of Appeals correctly affirmed the rejection of Andersen’s claim and the judgment for damages caused by Andersen’s anticipatory breach of contract.

The Court of Appeals also adhered to Washington law in affirming the partial rejection of Andersen’s claim and the judgment against it based on its anticipatory breach of contract. (See Pet. 18, 27-29) As the Court of Appeals held, “when a party makes repeated conditional threats to withhold payment due under a contract, such conduct may qualify as repudiation of the contract and an anticipatory breach that justifies the other party walking away.” (Op. 16, citing *CKP, Inc. v. GRS Constr. Co.*, 63 Wn. App. 601, 620, 821 P.2d 63 (1991), *rev. denied*, 120 Wn.2d 1010 (1992)) Andersen does not dispute this hornbook law, nor does it dispute that it “expressly, directly, and repeatedly told Revitalization that it would not provide further payments unless Revitalization guaranteed it would pay the ‘outstanding amounts owed’ to the sub-tier subs.” (Op. 16)

Andersen instead alleges that it was merely exercising its “contractual right to withhold payment” and thus did not breach

the contract. (Pet. 18) But, as discussed above, appointment of a receiver altered the parties' contractual rights and precluded Andersen from conditioning payment for ARI's post-receivership work on its payment of pre-receivership debts.

Andersen also takes issue with the Court of Appeals' holding that Andersen's claim was not timely under RCW 7.60.130. (See Pet. 27-28; see also Op. 15) But Andersen never addressed the timeliness of its claim in its briefing before the Court of Appeals. (Op. 5 n.4) Regardless, the Court of Appeals considered the merits of Andersen's claim and affirmed its rejection given the substantial evidence Andersen anticipatorily breached the subcontract. The rejection of Andersen's claim based on its uniquely obstructive conduct is not an issue of substantial public interest.

IV. CONCLUSION

This Court should deny review.

This document contains 4,902 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Dated this 13th day of May, 2024.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Receivership of:

APPLIED RESTORATION, INC.

ANDERSEN CONSTRUCTION
COMPANY,

Appellant,

v.

REVITALIZATION PARTNERS, LLC,

Respondent.

No. 84320-6-I

DIVISION ONE

PUBLISHED OPINION

HAZELRIGG, A.C.J. — Andersen Construction Company appeals two separate orders for turnover issued by a court commissioner in favor of receiver Revitalization Partners, LLC, and challenges the superior court's denial of its motion for revision. Andersen also argues the commissioner erred when they disallowed its claims against Applied Restoration, Inc. and entered final judgment in favor of the receiver. Because the record establishes that Andersen repeatedly refused to comply with the court orders pursuant to the receivership statute and because Andersen fails to demonstrate any error arising from the decisions of either the commissioner or judge in this matter, we affirm.

FACTS

In May 2019, Applied Restoration, Inc. (ARI) and Andersen Construction Company entered into an agreement (subcontract) for ARI to perform work on the construction of the Quil Ceda Creek Casino (project), owned by the Tulalip Tribes of Washington (owner). ARI served as a subcontractor for Andersen, the general contractor on the project. In accordance with the agreement, ARI employed nine to ten laborers per day who worked directly on the project and also subcontracted with third parties (sub-tier subs) who provided further labor and materials for ARI's work on the project. Through March 2020, Andersen paid ARI for the work that it had performed pursuant to the billing process and terms set out in the subcontract and prime contract.¹ On March 31, due to ongoing financial difficulties, ARI assigned all of its assets to Revitalization Partners, LLC and, on April 2, the trial court entered an order appointing Revitalization as the general receiver of ARI's property and assets. At the time of the assignment, ARI had not paid all sub-tier subs for their work on the project, in violation of the subcontract. On April 6, Revitalization contacted Andersen, explained that ARI had been placed into receivership and identified itself as the receiver.² Revitalization assured Andersen that it would continue to operate ARI and fulfill its obligations on the project as previously agreed.

¹ The subcontract expressly incorporated various terms and provisions set out in the prime contract between Andersen and the owner.

² "Receivership" simply means "the case in which the receiver is appointed." RCW 7.60.005(11). A "general receivership" is "a receivership in which a general receiver is appointed" and a "custodial receivership" is "a receivership in which a custodial receiver is appointed." *Id.*

Thereafter, Andersen stopped paying ARI and did not pay Revitalization for the work performed post-assignment. Revitalization demanded assurance from Andersen that it would pay ARI for the work, but Andersen refused absent certain conditions: "If the Receiver cannot guarantee that it will pay all pre-receivership claims related to this Project, then Andersen cannot issue April's payment, the Receiver must reject the subcontract agreement and Andersen will find another subcontractor." According to Andersen, Revitalization was not entitled to payment from Andersen because the "unequivocal language of the Subcontract between Andersen and ARI . . . control[led] the terms of payment to ARI and/or the Receiver." Revitalization had paid sub-tier subs \$42,467.25 for post-assignment work and ARI extended over \$200,000.00 on work and materials for the project during that time.

Between May and July 2020, Revitalization filed three motions against Andersen for turnover of the subcontract funds pursuant to RCW 7.60.005(9) and .070. On May 15, Revitalization filed its first motion, seeking \$157,342.97, but that motion was denied as the project owner had not yet paid Andersen, accordingly it had neither possession or control of the funds. The statute requires either possession or control of funds as a prerequisite to turnover. RCW 7.60.070. Roughly two weeks later, the owner issued payment to Andersen for work ARI had completed in April 2020. Revitalization then requested confirmation from Andersen that it would pay ARI for post-assignment work but, on June 3, Andersen again refused to do so unless Revitalization guaranteed that it would pay all pre-assignment claims related to the project.

On June 4, Revitalization told Anderson that ARI's employees would not be working on the project that day due to "Andersen's unwillingness to commit to paying [ARI] for the work being done, as well as the completed work." That same day, Andersen forwarded a letter to Revitalization from the owner to demand return of its \$113,480.89 payment to Andersen for the work on the project in April. On June 5, Revitalization demanded Andersen turn over the subcontract funds for the May billing and provided notice of another action for turnover, but Andersen refused and, further, remitted the April funds to the owner.

On June 11, Revitalization filed a second motion for turnover for the April billing. On July 7, after reviewing the motion, accompanying declarations, and exhibits, the superior court commissioner granted the motion and ordered Andersen to pay the subcontract funds to Revitalization for both April and May 2020. The order required Andersen to pay Revitalization for labor, materials, and vendor costs directly related to the project and to place the balance of the amount set out in each month's billing into the court registry. Further, the court ordered Andersen to follow the same payment pattern for the month of June, due on August 20. Andersen then filed a motion for reconsideration of the order, but the commissioner rejected Andersen's arguments and denied reconsideration. Subsequently, Andersen filed a motion for revision of the commissioner's denial of reconsideration by a superior court judge. The court denied the motion for revision.

On July 29, as Andersen had not complied with the commissioner's previous turnover order regarding payment for the month of May, Revitalization filed a third motion for turnover. Though Andersen had placed most of the funds

for the May billing into the court registry pending outcome of the motion, the previous order required Anderson pay those funds directly to Revitalization. On November 3, the commissioner granted the third motion for turnover, in part, and ordered the funds for the May billing to be released to Revitalization.³

On February 26, 2021, Andersen filed an amended proof of claim wherein it asserted an unsecured debt of \$941,444.45 against ARI and Revitalization based on the following: “(i) alleged incomplete work by ARI (\$664,146), (ii) cost to repair north exterior (\$45,339), (iii) amounts to be retained for subcontractor payments (\$18,139.82), (iv) amounts paid by Andersen to subcontractors Salmon Bay and PCI [(Performance Contracting, Inc.)] (\$302,098.92), and (v) insurance costs (\$13,096.40).” Andersen additionally sought \$76,483.24 as reimbursement for its direct payment to PCI. Though the foregoing amounts total \$1,119,303.38, Andersen still owed \$177,858.93 to Revitalization for work completed post-assignment and sought to offset that amount by reducing the claim to \$941,444.45.

On April 21, 2021, Revitalization filed a motion to authorize rejection of the executory contract with Andersen pursuant to RCW 7.60.130. The motion expressly requested that the court authorize Revitalization’s rejection of the subcontract between ARI and Andersen. On May 14, the commissioner granted the motion and authorized Revitalization to reject the subcontract.⁴

³ Andersen filed a motion for discretionary review of the July 7 and November 3 orders granting turnover, which this court denied. Ruling Den. Rev., *Andersen Constr. Co., v. Revitalization Partners, LLC*, No. 82096-6-I (Wash. Ct. App. May 7, 2021).

⁴ In briefing, Revitalization asserts that Andersen did not seek rejection damages under RCW 7.60.130(2) within the statutorily proscribed timeframe, thus waiving any such recovery on that basis. Andersen has not responded to that contention.

On February 3, 2022, Revitalization filed an objection to Andersen's claim and sought leave of the court to disallow a portion of the unsecured claim. A hearing on the motion was conducted on March 16, at the conclusion of which the court entered an order disallowing Andersen's claims. Specifically, the order disallowed \$1,006,023.09 of Andersen's claim, allowed \$113,340.29 as an unsecured claim, and prohibited the \$177,858.93 offset sought by Andersen. Andersen was ordered to pay Revitalization that amount due under the subcontract directly. However, despite repeated requests from Revitalization, Andersen did not make the payment and Revitalization filed a motion seeking a contempt finding for Andersen's failure to remit payment. Though the court did not hold Andersen in contempt, it entered an order providing that the remedy for further noncompliance would be to "reduce the obligation to a judgment."

On June 10, 2022, Revitalization filed a motion to enter final judgment against Andersen. The motion was heard on June 27 and, despite filing a written objection to the judgment, Andersen failed to appear for the hearing. The commissioner entered judgment in favor of Revitalization in the amount of \$177,858.93.

Andersen timely appealed.

ANALYSIS

I. Procedural Posture and Standard of Review

Andersen first assigns error to the commissioner's orders that granted the receiver's second and third motions for turnover. According to Andersen, under RCW 7.60.070, the orders of turnover for April and May billings were erroneous

because Andersen did not have possession or control over those funds when the turnover was demanded. However, because of the manner by which Andersen has pursued review in this case, neither the commissioner's July 7 order on the second motion for turnover concerning the April billings nor the July 17 denial of Andersen's motion for reconsideration of that order are directly before this court.

On July 7, 2020, the commissioner granted Revitalization's second motion for turnover in part and, on July 17, 2020, denied Andersen's motion for reconsideration of that order. Andersen then filed a motion for revision of the commissioner's July 17 order, but the superior court judge denied that motion. Because Andersen challenges the superior court's denial of revision in its notice of appeal to this court, the commissioner's two previous orders upon which that denial of revision was based are outside the scope of our review. "Once the superior court makes a decision on revision, the appeal is from that decision." *Faciszewski v. Brown*, 187 Wn.2d 308, 313 n.2, 386 P.3d 711 (2016). Accordingly, "this court reviews the superior court's ruling, not the commissioner's." *Maldonado v. Maldonado*, 197 Wn. App. 779, 789, 391 P.3d 546 (2017). The superior court's denial of a motion for revision "constitutes an adoption of the commissioner's decision, and the court is not required to enter separate findings and conclusions." *Id.* We review the denial of a motion for revision for an abuse of discretion, which exists when the court's decision is "exercised on untenable grounds or for untenable reasons, or if its decision was reached applying the wrong legal standard." *River House Dev., Inc. v. Integrus Architecture, P.S.*, 167 Wn. App. 221, 231, 272 P.3d 289 (2012); *Maldonado*, 197 Wn. App. at 789.

Receiverships are an equitable remedy and trial courts are “accorded great flexibility in fashioning relief under [their] equitable powers.” *Bero v. Name Intel., Inc.*, 195 Wn. App. 170, 179, 381 P.3d 71 (2016); *Friend v. Friend*, 92 Wn. App. 799, 803, 964 P.2d 1219 (1998). In matters of equity, trial courts have inherent authority beyond that expressly granted by the legislature. See *Allen v. Am. Land Rsch.*, 95 Wn.2d 841, 852, 631 P.2d 930 (1981) (“The superior court’s inherent authority to enforce orders and fashion judgments is not dependent on the statutory grant.”). Thus, “[w]e review the authority of a trial court to fashion equitable remedies under the abuse of discretion standard.” *In re Foreclosure of Liens*, 123 Wn.2d 197, 204, 867 P.2d 605 (1994).

Chapter 7.60 RCW also provides trial courts with broad discretion over receiverships. *Bero*, 195 Wn. App. at 175. For example, courts have discretion to appoint and terminate receivers and to “manage the duration of the extraordinary remedy.” *Mony Life Ins. Co. v. Cissne Fam., LLC*, 135 Wn. App. 948, 952, 148 P.3d 1065 (2006); *Bero*, 195 Wn. App. at 178. Once the trial court appoints a receiver, that person becomes an agent of the court and retains “broad powers to manage the receivership property, liquidate assets, and satisfy creditors.” *Bero*, 195 Wn. App. at 175.

With these equitable and statutory powers in mind, we review the trial court’s rulings regarding the receivership that order turnover, disallow claims, and enter judgment, for an abuse of discretion. Again, an abuse occurs when a decision is “manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *Mony Life Ins.*, 135 Wn. App. at 952-53 (internal quotation

marks omitted) (quoting *T.S. v. Boy Scouts of Am.*, 157 Wn.2d 416, 423, 138 P.3d 1053 (2006)). The trial court's findings of fact are reviewed for substantial evidence, which exists when there is "a sufficient quantum of evidence in the record to persuade a reasonable person that the declared premise is true." *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000).

II. Turnover Orders

A "[r]eceiver" is a "person appointed by the court as the court's agent, and subject to the court's direction, to take possession of, manage, or dispose of property of a person." RCW 7.60.005(10). Pursuant to RCW 7.60.070, "Upon demand by a receiver . . . any person shall turn over any property over which the receiver has been appointed that is within the possession or control of that person unless otherwise ordered by the court for good cause shown." Property is defined in this chapter as "all right, title, and interests, both legal and equitable, and including any community property interest, in or with respect to any property of a person with respect to which a receiver is appointed, regardless of the manner by which the property has been or is acquired." RCW 7.60.005(9).⁵ Further, once a trial court enters an order appointing a receiver, an automatic stay that is applicable to all persons arises of "[a]ny act to obtain possession of estate property from the

⁵ Andersen argues in its brief that the trial court erred in entering both orders for turnover because "Andersen did not have property belonging to ARI" as defined by the subcontract. Its argument largely relies on the contention that the terms of the subcontract supersede the provisions of the receivership statute, such as RCW 7.60.070 and .110(c). However, as set out in detail herein, Andersen offers no authority in support of this position which is clearly at odds with both the court's equitable powers and general public policy considerations.

receiver, or to interfere with, or exercise control over, estate property.” RCW 7.60.110(1)(c).

A. April Billing

The April billing funds were addressed in the order granting the second motion for turnover, the order denying reconsideration of that turnover order, and the superior court's order denying revision of the order denying reconsideration. Though we elect to address the arguments of the parties regarding this assignment of error and go to the original ruling by the commissioner, we note that Andersen offers no argument as to how the judge's order denying revision was an abuse of discretion.

When it granted the second motion for turnover, the trial court found that Andersen was withholding the April billing, which amounted to \$113,481.00, and that Andersen's claim for an offset of \$272,236.83 against that billing was not appropriate. Andersen was ordered to pay \$113,481.00 of the subcontract funds as follows: \$84,164.54 to Revitalization for costs directly related to the project and \$29,313.46 to be placed in the court registry for the balance of the April billing. Those payments were due on July 15, 2020.

First, Andersen's argument that it did not have any property belonging to Revitalization for the April billing *under the terms of the subcontract* is irrelevant. Andersen offers no authority for its bald assertion that the terms of the subcontract control over those of the receivership statute. Again, under RCW 7.60.006(9), property belonging to the receiver includes “all right, title, and interests, both legal and equitable, and including any community property interest, in or with respect to

any property of a person with respect to which a receiver is appointed, regardless of the manner by which the property has been or is acquired.” Because there is no dispute that the work addressed in the April billing was performed, Revitalization, as the receiver, had a right to payment for that work; the funds belonged to Revitalization.

Second, Andersen cites to *United States v. Aubrey*, in support of its argument that the April funds were Tribal property and Andersen never had control of them. 800 F.3d 1115 (9th Cir. 2015). Andersen’s reliance on *Aubrey* is misplaced. In that case, the United States was prosecuting a contractor who had contracted directly with a Tribal organization and the dispute concerned federal funds that had been transferred to the Tribal organization. The case is materially distinguishable on those facts alone.

Here, the court’s finding that Andersen was in possession or control of the property is supported by substantial evidence. As the commissioner explained after reviewing the correspondence from both the owner and Andersen, it was clear “that Andersen was paid by the [owner] and Andersen took affirmative action to cause the [owner] to cancel payment.” This was confirmed by the content and timing of e-mails between the parties, Andersen’s own declaration, and the letter from the owner that Andersen forwarded to Revitalization.

Once the owner issued payment to Andersen for work ARI had completed in April, Revitalization requested confirmation from Andersen that it would pay for the post-assignment work. However, on June 3, Andersen refused to do so without express agreement that Revitalization would pay all pre-assignment claims from

the sub-tier subs. On June 4, in response to this refusal, Revitalization told Anderson that its employees would not be working on the project that day. Andersen responded by accusing Revitalization of breaching the subcontract and, later that same day, forwarded a letter to Revitalization from the owner that demanded return of the April billing funds from Andersen. The commissioner expressly found the timing of the e-mails and the word choice in the owner's letter stating, "[i]t has come to the [owner's] attention . . .," established that Andersen had possession of the April funds, even if temporarily, and withheld them. On June 5, Revitalization demanded Andersen turn over the funds, but Andersen refused and instead returned them to the owner.

Pursuant to RCW 7.60.070, Andersen was required to "turn over any property over which the receiver ha[d] been appointed that [was] within [its] possession or control." Because substantial evidence supports the trial court's finding that "Andersen had possession of the funds owed to ARI" and "withheld those funds," this finding was proper. Moreover, as Revitalization correctly asserts in briefing, "If a party could simply avoid the consequences of a receivership by transferring estate property, the statute would be useless in effectuating its goals—achieving equity for all creditors."

Accordingly, the commissioner's order on turnover as to the April billing was not an abuse of discretion and, therefore, the superior court did not abuse its discretion in denying Andersen's motion for revision of the commissioner's order denying reconsideration of the order for turnover.

B. May Billing

Regarding the order granting the third motion for turnover, Andersen again argues that the terms of the subcontract are controlling and asserts that it never had possession or control of the May billing funds. Neither argument holds merit; the former lacks any supporting authority and the latter is refuted by the fact the Andersen placed \$81,179.70 into the court registry for the May billing, at least a rebuttable demonstration of control over the funds.⁶ The commissioner's order granting the second motion for turnover set out the specific procedure Andersen was to follow for the funds relating to the April and May billings. When Andersen failed to comply with the court's requirements as to the May billing, the commissioner granted the third motion for turnover, which ordered the release of funds that Andersen had placed into the court registry for that billing.

Andersen further argues that both turnover orders were erroneous "due to a bona fide dispute over the funds." We disagree. Under RCW 7.60.070, Andersen was required to turn over the property to Revitalization "unless there exist[ed] a bona fide dispute with respect to the existence or nature of the receiver's interest in the property, in which case turnover shall be sought by means of an action under RCW 7.60.160." Andersen cites to the commissioner's order granting the receiver's second motion for turnover and argues that, because "portions of the funds related to the April Billing were to be placed in the court registry," RCW

⁶ While Andersen asserts that these funds did not constitute the May billing because Andersen paid them out of pocket without first being paid by the owner, that alone does not establish an abuse of discretion on the part of the trial court. Rather, this order was a clear example of the trial court exercising its equitable powers and, considering Andersen's continued refusal to abide by the court's previous orders under the receivership statute, the trial court's order was not beyond its authority. See *Friend*, 92 Wn. App. at 803-04.

7.60.160 should have governed the action. However, Andersen fails to understand that the funds that it was ordered to pay directly to the receiver, \$84,164.54 for demonstrable costs for labor, materials, and vendor costs related to the project, were not disputed. As there was no bona fide dispute, there was no abuse of the discretion by the commissioner or the superior court on revision.

Andersen next contends that the turnover orders were erroneous because they conflicted with the court's previous orders in the "Foushee matter." That matter, which involved ARI and a different owner, is distinguishable and immaterial. While Andersen argues that the facts are "nearly identical," it ignores the key distinction that Foushee had neither control nor possession of the funds the receiver demanded but, as established here, Andersen did. More critically, despite Andersen's argument to the contrary, a different ruling based on distinct facts in a tangentially related matter involving the same receivership does not trigger application of the law of the case doctrine. "Except in the case of jury instructions, the law of the case doctrine requires a prior appellate court decision in the same case." *In re Est. of Jones*, 170 Wn. App. 594, 605, 287 P.3d 610 (2012). Because the commissioner's orders in the Foushee matter constitute neither jury instructions nor the decision of an appellate court, the rule of the case doctrine is inapplicable here.

III. Rejection of Andersen's Claims

Andersen avers the trial court erred in rejecting its claims and ordering it to pay the subcontract balance to the receiver. Specifically, Andersen challenges the

rejection of claims for the “retention balance (\$18,139.81),”⁷ costs it asserted were required to repair ARI’s “defective work (\$45,339.00),” and costs of completing ARI’s “abandoned work (\$664,146.00).”

The receivership statute is instructive and controlling⁸ here; according to the relevant provisions, Andersen had 30 days following Revitalization’s rejection of the subcontract to file a claim for damages on that basis. A general receiver may “reject any executory contract or unexpired lease of the person over whose property the receiver is appointed upon order of the court following notice to the other party to the contract or lease upon notice and a hearing.” RCW 7.60.130(1). Such a rejection “shall be treated as a breach of the contract or lease occurring immediately prior to the receiver’s appointment” and any claim of a party to the contract or lease, based on the receiver’s rejection of it, “shall be served upon the receiver in the manner provided for by RCW 7.60.210 within thirty days following the rejection.” RCW 7.60.130(2). Because Andersen failed to file a claim for damages within the 30 days after the court permitted Revitalization to reject the subcontract, those claims were properly barred.

⁷ In construction contracts, “retainage” refers to the percentage that the owner or general contractor may withhold from each progress payment to the contractor or subcontractor until final completion of the project. Steven Walt & Emily L. Sherwin, *Contribution Arguments in Commercial Law*, 42 EMORY L.J. 897, 907-08 (1993).

Andersen explicitly asserts that it is entitled to the “reimbursement” of \$18,138.81 for the retention of three sub-tier subs that Revitalization had not paid, however, it fails to provide any statutory basis that would entitle it to such a “reimbursement.”

⁸ The majority of Andersen’s argument, once again, focuses on the terms of the subcontract rather than those found in the receivership statute and argues, without authority, that the former is controlling. The commissioner correctly disagreed.

Andersen next challenges the commissioner's order disallowing claims for completion damages⁹ based on its determination that Andersen anticipatorily breached the subcontract. According to Andersen, it did not anticipatorily breach the subcontract and ARI breached the subcontract first by abandoning the work.

An anticipatory breach is a “positive statement or action by the promisor indicating distinctly and unequivocally that [they] either will not or cannot substantially perform any of [their] contractual obligations.” *Olsen Media v. Energy Scis., Inc.*, 32 Wn. App. 579, 585, 648 P.2d 493 (1982) (quoting *Lovric v. Dunatov*, 18 Wn. App. 274, 282, 567 P.2d 678 (1977)). “A party's intent not to perform may not be implied from doubtful and indefinite statements that performance may or may not take place.” *Wallace Real Est. Inv., Inc. v. Groves*, 124 Wn.2d 881, 898, 881 P.2d 1010 (1994). However, when a party makes repeated conditional threats to withhold payment due under a contract, such conduct may qualify as repudiation of the contract and an anticipatory breach that justifies the other party walking away. See *CKP, Inc. v. GRS Constr. Co.*, 63 Wn. App. 601, 620, 821 P.2d 63 (1991).

Here, Andersen expressly, directly, and repeatedly told Revitalization that it would not provide further payments unless Revitalization guaranteed it would pay the “outstanding amounts owed” to the sub-tier subs under the terms of the subcontract. Although Revitalization explained to Andersen that it was prohibited

⁹ Completion damages are those “incurred to complete the contract following the owner's just termination of the contract for default or the contractor's wrongful repudiation of the contract or wrongful abandonment of the project.” 6 PHILIP L. BRUNER & PATRICK J. O'CONNOR, JR., BRUNER & O'CONNOR ON CONSTRUCTION LAW § 19:78 (2023). Typically, they are measured by “the reasonable cost to complete the contract in conformance with its terms, less unpaid contract funds.” *Id.*

from doing so by the plain language of the receivership statute, Andersen would not yield and reiterated its refusal to pay the funds unless Revitalization satisfied its condition. In an e-mail to Revitalization, Andersen explicitly stated that “[i]f the Receiver cannot guarantee that it will pay all pre-receivership claims related to this Project, then Andersen cannot issue April’s payment, the Receiver must reject the subcontract agreement and Andersen will find another subcontractor.” According to Andersen, Revitalization was not entitled to payment from Andersen as the “unequivocal language of the Subcontract between Andersen and ARI . . . control[led] the terms of payment to ARI and/or the Receiver.”¹⁰

Based on its continuous threats and, as the commissioner noted, the fact that “[t]hroughout this matter Andersen has been obstructive to the receivership process,” we conclude that substantial evidence supports the commissioner’s implicit finding that Andersen anticipatorily breached the subcontract before the court granted Revitalization permission to reject it. Because Andersen anticipatorily breached the subcontract and was thus not entitled to completion damages, the trial court did not err in disallowing this portion of its claim.

Andersen further contends that the trial court erred by ordering payment of the “subcontract balance,” i.e., the \$177,858.93 that Andersen sought as an

¹⁰ As Andersen had posted a payment bond on the project, it faced liability under the subcontract in the event that Revitalization failed to pay its sub-tier subs in full. In order to avoid its own liability under the terms of the subcontract, Andersen chose to pay the sub-tier subs pursuant to the subcontract and in violation of the receivership statute.

It is unclear whether compliance with the requirements of the receivership statute would constitute a defense to any claims against Andersen for breach of the payment terms set out in the contract with the project owner, and the parties have made no such argument. In other words, while Andersen insists that it had no choice but to withhold payment to Revitalization, Andersen may have made a strategic choice to prioritize the subcontract above the receivership statute.

offset.¹¹ Strangely, Andersen asserts there is “no evidence in the record” that the subcontract balance was owed to Revitalization. However, at the contempt hearing on Andersen’s failure to comply with its payment obligations, Andersen confirmed that it sought to “offset” the \$177,858.93 from the amount it owed to Revitalization because it had already paid the subcontractor PCI in full. The trial court rejected Andersen’s attempted offset and explained that the payment to the subcontractor PCI was wrongful. The court concluded that Andersen was only entitled to an offset in an amount equal to a pro-rata share. In the order disallowing Andersen’s claims, the court reiterated that “Andersen paid the subcontractor (wrongfully) PCI in full. PCI should only have pro-rata share as other unsecured creditors will. Andersen is entitled to PCI’s pro-rata share once that pro-rata share is determined.” Accordingly, the trial court prohibited “the offset sought by Andersen in its [c]laim in the amount of \$177,858.93” and required Andersen to pay that amount directly to Revitalization.

Under RCW 7.60.210, the submission of all claims in general receiverships “arising prior to the receiver’s appointment, must be served in accordance with this chapter, and any claim not so filed is barred from participating in any distribution to creditors in any general receivership.” RCW 7.60.230 provides the priorities for distribution of payment to creditors for the allowed claims in a general receivership. Pursuant to the statutory priorities, creditors with general unsecured claims are paid on a pro-rata basis after all other claims have been distributed. RCW

¹¹ Again, Andersen relies on its position that it did not anticipatorily breach the subcontract and insists that Revitalization abandoned the project. As we have explained, this argument is belied by the record.

7.60.230(1)(h). Because Andersen's claim is unsecured and does not fall within any exception to the priority scheme, Andersen shall receive distribution for that claim on a pro-rata basis along with any other unsecured creditors. Andersen chose to pay its subcontractors for claims that arose before ARI was placed into receivership and sought reimbursement of those payments in full as an offset. Its arguments on appeal are as unpersuasive as they were in the trial court; Andersen cannot circumvent the receivership statute and, though it paid its subcontractors in full, it is only entitled to a pro-rata distribution of its claim.

Andersen's final challenge to the award of the subcontract balance to Revitalization is the assertion that it is barred by the law of the case doctrine because it conflicts with the commissioner's turnover order. As already established, that doctrine has no bearing in this context.

III. Entry of Judgment against Andersen

When Andersen failed to comply with the court's order on the turnover motions, Revitalization moved for a finding of contempt. While the court declined to find that Andersen was in contempt, it expressly noted that a remedy for Andersen's continued failure to comply could be entry of judgment. After payment had still not been made, Revitalization moved for entry of judgment, to which Andersen objected in writing. However, despite filing formal opposition to Revitalization's action, Andersen failed to appear for the hearing on the motion and the trial court entered judgment in favor of Revitalization.

Andersen argues that the trial court erred in entering judgment against it for the same reasons it asserts that the court erred with regard to the order disallowing

its claims. These arguments have been addressed herein and need not be repeated. Andersen further avers that the court erred by refusing the request in its written opposition to “enter express findings of fact linking the judgment amount to documents in the record.” Revitalization contends that the trial court did not err as to the form of the judgment because the trial court had already addressed the issues, did not require additional proceedings, and made oral findings of fact.

As it did in its written objection to the entry of judgment, Andersen cites *Pacific Marine Insurance Co. v. Department of Revenue*, 181 Wn. App. 730, 737, 329 P.3d 101 (2014) in its opening brief and claims the case stands for the proposition Andersen characterized, in both its pleading in the trial court and appellate briefing, as an “[a]ppellate court cannot affirm a superior court’s entry of judgment if the grounds are not supported by the court record.” No such rule statement lives in that opinion. In *Pacific Marine*, the court simply provided the common rule that an appellate court “may affirm the superior court’s summary judgment decision on any ground supported by the record.” *Id.*

Beyond the mischaracterization of the language in *Pacific Marine*, Andersen cites no authority for its assertion that the trial court was required to provide explicit written findings of fact. This court need not consider arguments for which a party has not cited authority. *Norcon Builders, LLC v. GMP Homes VG, LLC*, 161 Wn. App. 474, 486, 254 P.3d 835 (2011). Moreover, the trial court made oral findings. The commissioner found that awarding Andersen what it sought would have provided Andersen an amount close to its pre-filing, rather than post-filing, claim. The trial court clearly stated, “That’s not appropriate.” Andersen does not

challenge the court's oral findings. Unchallenged findings are treated as verities on appeal. *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 407, 858 P.2d 494 (1993). Absent any authority to the contrary, the trial court did not err by not entering written findings of fact in this case.

IV. Attorney Fees

Andersen requests attorney fees, costs, and expenses incurred herein pursuant to article 11.5 of the subcontract which provides that the prevailing party shall be entitled to such an award. Because Andersen has not prevailed, we reject its request for fees and costs.

Revitalization also seeks an award of attorney fees pursuant to RCW 7.60.080 and RAP 18.9(a). Under RAP 18.9(a), this court may order a party who files a frivolous appeal “to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply or to pay sanctions to the court.” *Kinney v. Cook*, 150 Wn. App. 187, 195, 208 P.3d 1 (2009) (quoting RAP 18.9(a)). Such sanctions include “an award of attorney fees and costs to the opposing party.” *Id.* (quoting *Yurtis v. Phipps*, 143 Wn. App. 680, 696, 181 P.3d 849 (2008)). “[A]n appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal.” *Streater v. White*, 26 Wn. App. 430, 435, 613 P.2d 187 (1980). While we reject Andersen's arguments, they were not frivolous. Accordingly, we decline to award fees as a sanction.

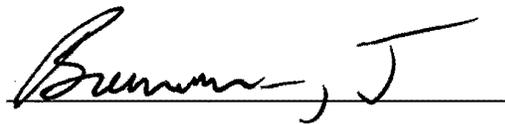
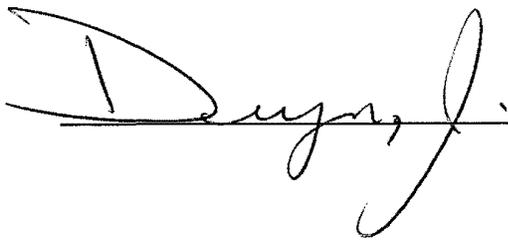
Revitalization further asserts Andersen's repeated opposition to the cooperation required under RCW 7.60.080 resulted in frivolous litigation and

excessive legal fees. However, the plain language of the statute is devoid of any mention of attorney fees and we similarly decline to award them on that proffered basis.

Affirmed.



WE CONCUR:



WENOKUR RIORDAN PLLC

May 13, 2024 - 3:21 PM

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