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SUPREME COURT OF THE STATE OF WASHINGTON

COURT OF APPEALS, DIVISION I

Case No. 843206-I

ANDERSEN CONSTRUCTION COMPANY

Appellant,

v.

REVITALIZATION PARTNERS, LLC, et al.,

Respondent.

In the receivership of:
APPLIED RESOTRATION, INC.

APPELLANT ANDERSEN CONSTRUCTION COMPANY'S
PETITION FOR REVIEW OF THE COURT OF APPEALS'
PUBLISHED DECISION FILED ON DECEMBER 4, 2023

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I. IDENTITY OF PETITIONER

The Petitioner, Andersen Construction Company, (“Andersen”) asks this Court to accept review of the Court of Appeals’ December 4, 2023 published decision (“Decision”). Andersen is a general contractor and a third-party to a receivership proceeding involving one of its subcontractors, Applied Restoration Inc, (“ARI”), with whom Andersen contracted to perform work on a complex construction project. Respondent, Revitalization Partners, LLC (“Revitalization”), was appointed as general receiver over ARI while ARI’s work on the project was ongoing.

II. CITATION TO COURT OF APPEALS DECISION

Andersen requests review of the Decision, published on December 4, 2024, as *Matter of Applied Restoration, Inc.*, -- Wn. App. --, 539 P.3d 837 (2023), (attached as **Appendix A**). The Court of Appeals’ February 12, 2024 Order Denying Andersen’s Motion for Reconsideration is attached as **Appendix B**.

III. ISSUES PRESENTED FOR REVIEW

The Receivership Act, Chapter 7.60 RCW, was codified to enumerate and consolidate laws governing receivership proceedings, some of which were enacted by the Territorial Legislature over 150 years ago, and others which were developed through common law. Generally, the Receivership Act facilitates turnover of existing debts and payment of creditors, but it does not authorize receivers to take property in the form of payment from third parties pursuant to a contract without consideration of whether that payment is actually owed to the debtor under the terms of that contract.

The Decision here, however, creates a broader power for receivers than has ever been previously recognized by a Washington court. Under this Decision, a receiver has new authority to compel payment from third parties regardless of whether a debtor has any right to that payment under a contract. In turn, the critical protections the third-parties bargained for and negotiated within their contracts are eliminated, and third-parties

can be forced to turnover property which the debtor has no contractual or statutory right to possess, simply because the debtor ended up in receivership.

For more than 100 years, the Washington Supreme Court has held that a receiver steps into the shoes of the party in receivership and that the receiver has no greater rights to a third-party's property than the insolvent. The enactment of the Receivership Act in 2004 did not change this but *preserved* the limitations and restrictions applicable to receiverships under Washington law. In conflict with this precedent, the Decision interprets the Receivership Act as abrogating the common law: granting unchecked authority to receivers that exceeds the contractual rights of the debtor and eliminates the contractual rights of third-parties.

Moreover, the Decision permits such a turnover in the absence of the due process protections of an adjunct proceeding, required where the third-party disputes the receiver's entitlement

to turnover, and therefore conflicts with the Due Process Clauses under the Constitutions of Washington and the United States.

Additionally, there is a substantial public interest at stake regarding the protection of third-parties and creditors from over-reaching receivers. The published Decision has profound impacts, not only on the interests of contractors, but also of any third-party who contracts with a party that ends up in a receivership.

For the foregoing reasons, Andersen requests that the Court accept review under RAP 13.4(b)(1) – (4). The Decision presents the following issues for review:

1. In a receivership proceeding, whether contractual terms agreed to by a debtor and third party are relevant to determining whether property belongs to the debtor such that the receiver may compel takeover, or whether the Receivership Act renders the contract meaningless and grants a receiver unfettered rights to that property?
2. Whether there was a “bona fide dispute” with respect to the existence or nature of the receiver’s interest in the property, requiring an adjunct and contested proceeding to determine the receiver’s interest, as opposed to a summary proceeding, where the Subcontract terms entitled Andersen to withhold payment from ARI if ARI did not pay its sub-tier subcontractors, performed deficient work,

and the project Owner did not pay Andersen for the work?

3. Whether Andersen's compliance with a court order directing Andersen to pay funds into a court registry by paying out of its own pocket, in the absence of payment from the project Owner for the work, was sufficient evidence Andersen had "possession or control" of property belonging to the debtor as required by RCW 7.60.070?
4. Whether, under RCW 7.60.130(2), which provides in pertinent part that "the receiver's right to possess or use property pursuant to any executory contract or lease shall terminate upon rejection of the contract or lease," Revitalization could still seek payment of a \$177,858.93 Subcontract Balance for work it did not perform, nine months after it rejected the Subcontract?
5. Whether Anderson's claims for project completion damages were barred under RCW 7.60.130, which requires that claims for costs due to rejection of a contract be submitted pursuant to RCW 7.60.210(2) within 30 days of rejection, when Andersen had already submitted its entire claim for costs it incurred prior to the rejection pursuant to RCW 7.60.210(2)?
6. Whether the commissioner erred in rejecting Anderson's claims on the basis Andersen anticipatorily breached the subcontract by withholding payment from ARI, where Andersen was asserting its contractual rights to withhold payment and ARI and Revitalization committed the first breach?

IV. STATEMENT OF THE CASE

A. The Subcontract.

Andersen was the general contractor on the Quil Ceda Creek Casino Project (“Project”). (CP 592-616). The Owner of the Project was the Tulalip Tribes (the “Tribe”), and ARI was one of Andersen’s subcontractors on the Project. *Id.*

Pursuant to Andersen’s Subcontract with ARI (“Subcontract”) (CP-592-616), ARI received payment from Andersen by submitting monthly applications for payment for work performed in a given month. (CP 607). Pursuant to the “pay-if-paid” terms of the Subcontract, Andersen had no obligation to issue payment to ARI (nor liability for payment due), unless Andersen received possession of the funds from the Tribe (“regardless of the reason for Owner’s nonpayment”). *Id.* The Subcontract expressly authorized Andersen to withhold payment from ARI for a number of reasons, including if ARI failed to timely pay ARI’s sub-tier subcontractors, if Andersen had reason to believe ARI’s work was incomplete or defective, or if the Tribe withheld or directed Andersen to withhold payment. (CP 606-607, 610, 614). In the event ARI stopped

work, any remaining Subcontract balance for work not performed would be offset against Andersen's claims for costs incurred to repair and complete ARI's scope of work. (CP 615).

The prime contract between Andersen and the Tribe (incorporated into the Subcontract) provided the Tribe with broad auditing power under which the Tribe retained control over the funds until Andersen paid the funds to ARI. (CP 592, 648).

ARI entered receivership March 31, 2020. At that time, ARI had stopped paying its sub-tier subcontractors on the Project and was performing incomplete and defective work (CP 72-74), meaning the Subcontract entitled Andersen to withhold payment of the April 2020 and subsequent pay applications. (CP 606-607, 610, 614).

B. Turnovers, Denial of Claim, Judgment

Although the Subcontract required ARI to timely pay its sub-tier subcontractors, ARI failed to do so for several months before it entered receivership. (CP 72-74; 610). ARI's pay application for April 2020 (the "April Billing") sought \$113,841

for work performed by both ARI and its sub-tiers in April 2020 and included a certification that ARI had timely paid its sub-tiers amounts owed through present. (CP 88-93). Based in part on this representation, Andersen requested the funds for the April Billing from the Tribe, received those funds from the Tribe on May 29, 2020, but before issuing payment to ARI through Revitalization, Andersen learned ARI had not, in fact, paid its sub-tiers \$272,236.83 for work they performed from January – March 2020. (CP 65-69).

When the Tribe learned about the sub-tiers remaining unpaid in breach of the Subcontract and contrary to ARI's certifications, on June 4, 2020, the Tribe demanded Andersen return the funds for the April Billing pursuant to their auditing power under the Prime Contract, and Andersen complied. (CP 72-74). Andersen, in turn, notified Revitalization that no amounts were due under the Subcontract due to the Tribe's dispute of the payment and ARI's failure to comply with the Subcontract. (CP 99-100). Revitalization stopped work on June

4, 2020 (*id.*) and filed a motion for turnover on June 11, 2020. (CP 1-11).

The Commissioner granted the receiver's motion for turnover on July 7, 2020. (CP 134-36). The order granting turnover not only found that Andersen was withholding the April Billing funds – notwithstanding that Anderson returned that payment per the Prime Contract as required by the Tribe and did not have those funds in its possession or control – but it further held Andersen was required to turn over funds for the May Billing despite no evidence (or even claim by the Receiver) that Andersen had ever possessed or controlled the May Billing funds. *Id.* Andersen moved for reconsideration (CP 148-149) and revision (CP 549-550) and was denied.

Revitalization then moved for turnover of the May Billing funds, arguing that the Subcontract terms were irrelevant and RCW 7.60.070's requirements of possession and control were irrelevant because the July 7, 2020 order authorized turnover without regard to either the Subcontract or Receivership Act's

requirements. (CP 406-13). Andersen opposed the motion, highlighting that the Receiver's sole basis for entitlement to the April Billing funds was Andersen's temporary possession of those funds before the Tribe demanded their return, but there was no evidence that the Tribe ever paid the May Billing funds (nor claim by Revitalization that the Tribe ever made the payment) which was required by both the Subcontract and RCW 7.60.070. (CP 428-438).

The Commissioner agreed with the Receiver, disregarding the requirements of *both* the Subcontract and RCW 7.60.070 (requiring the third-party have possession or control of the property in question), and entered its November 3, 2020 order requiring turnover of the May Billing funds "without regard to whether Andersen received funds from [the Owner for] the May Billing." CP 552. Pursuant to this order, Andersen submitted the required payments for both the April and May Billing into the Court Registry. CP 588.

After Revitalization stopped work, Andersen was required to repair ARI's defective work and complete ARI's scope of work, incurring significant costs. (CP 587-590, 695-731). In the meantime, Performance Contracting Inc. ("PCI"), ARI's sub-tier subcontractor, filed a claim against Andersen's payment bond for \$281,770.34 for amounts ARI failed to pay to PCI. Andersen paid the claim as required by Andersen's Prime Contract with the Tribe. (CP 675-690). Andersen also directly paid \$100,243.89 to ARI's other sub-tier subcontractor, Salmon Bay, to avoid a pending payment bond claim and lien against the Project. (CP 632-662). The Subcontract was negotiated to protect Andersen from precisely these circumstances—double and increased payment for the same work.

In February 2021, Andersen submitted a timely amended claim in the receivership for costs incurred to pay PCI and Salmon Bay, and to repair and complete ARI's work on the Project. (CP 562). While Andersen's costs totaled \$1,119,303.38, Andersen reduced its claim in the receivership by

the amount of the remaining balance of ARI's subcontract (\$177,858.93)—i.e., what amounts Andersen would need to pay if ARI had performed the work—to a claim totaling \$941,444.45. (CP 577).

In May of 2021, Revitalization rejected the Subcontract under RCW 7.60.130. (CP 559-560). As Andersen had already submitted its full claim, Andersen did not have any additional claims against the receivership estate to submit at that time and any such claims would have been duplicative. (CP 569-586). In 2022, Revitalization filed a motion opposing Andersen's claims for payment of the \$941,444.45 (CP 561-568). Andersen opposed Revitalization's motion based upon the terms of the Subcontract and RCW 7.60.070. (CP 569-586; 587-801). The Commissioner granted the opposition in part, agreeing that Andersen was not entitled to damages for repairing or completing the work because Andersen had "wrongfully" withheld payment for the April and May Billings, and that Revitalization was further entitled to payment of the remainder

of the Subcontract total (\$177,858.93) despite ARI not performing this work. (CP 807-808). Revitalization reduced its claim to the Subcontract balance to a judgment. (CP 846-847). Andersen timely appealed. (CP 848-872).

V. ARGUMENT

A. **This Court's Review is Justified Under RAP 13.4(b)(1) and (2).**

Andersen seeks discretionary review in this Court under RAP 13.4(b)(1) and (2) because the Decision is largely premised on its holding that the terms of the Subcontract are irrelevant in receivership cases, claiming the statutory powers of a receiver supersede any contractual agreement between a third party and a debtor with respect to the property at issue. *See e.g.*, Slip Op. at 9 n.5, 10, 13, 15 n.8. However, in so holding, the Decision conflicts with decisions of the Washington Supreme Court and of the Washington Court of Appeals.

1. The Decision Conflicts with Supreme Court Precedent Holding the Receiver Steps "Into the Debtor's Shoes."

The Washington Supreme Court has consistently held that appointment of a receiver does not entitle the receiver to greater

or better rights than the debtor had. See e.g., *Sumner Iron Works v. Wolten*, 61 Wash. 689, 692, 112 P. 1109 (1911) (“The appointment of a receiver could not give the lumber company any additional contractual rights, nor deprive it of any old ones”); *Roblings Sons Co. v. Frederickson Logging & Timber Co.*, 153 Wash. 580, 280 P. 93 (1929) (“A receiver can acquire no other, greater, or better interest than the debtor had in the property, and to this extent the receiver has been held to stand in the shoes of the debtor.”)

Contrary to this precedent, the Decision sets out a broad rule that the Receivership Act vests receivers with authority to summarily compel turnover of property from a third-party regardless of whether the property belonged to the debtor. See Slip Op. at 9 n.5, 10, 13, 15 n.8. ARI’s right to payment from Andersen exists because of their contractual relationship, and the Subcontract sets forth the terms of how much, when, and whether payment becomes due. By holding that those terms do not matter, the Decision gave Revitalization greater rights to payment from Andersen than ARI had under the bargained-for agreement. It is not that the terms of a contract *trump* or *supersede* the receivership statutes, but, as stated in this Court’s precedent, the

contract terms inform whether the property belongs to the debtor in the first place, such that the property is subject to receivership at all. The Decision's holding that a contract is irrelevant cannot be reconciled with this Court's precedent.

The Decision construed the Receivership Act as the source of the receiver's authority to compel turnover of property irrespective of the Subcontract. *Id.* While the legislature may supersede, modify, or abrogate the common law, "[i]t is a well-established principle of statutory construction that '[t]he common law...ought not to be deemed repealed, unless the language of a statute be clear and explicit for this purpose.'" *Potter v. Washington State Patrol*, 165 Wn.2d 67, 196 P.3d 691 (2008). A statute will only abrogate common law when its provisions "are so inconsistent with and repugnant to the prior common law that both cannot simultaneously be in force." *Id.*

No language in the Receivership Act indicates an intent so contrary or repugnant to the common law that they cannot coexist. The Court's holding was premised on its construction of RCW 7.60.005(9), defining "Property," and RCW 7.60.100(c), pertaining to the automatic stay. *Slip Op.* at 9, n.5. Neither statute states the receiver has a better right or greater title to the property

than the debtor had so as to demonstrate clear legislative intent to abrogate the common law.

To the contrary, the Washington Legislature enacted the Receivership Act in 2004 through Substitute Senate Bill 6189, which was the result of a ten-year WSBA effort to make receiverships more accessible to practitioners. The Final Senate Bill Report for SSB 6189 explicitly notes that “[t]he limitations and restrictions applicable to receiverships specifically provided for under current law are *preserved*.” F. S.B. Report on SSB 6189 at 1, 58th Leg. Reg. Sess. (Wash. 2004) (emphasis added). Attached hereto as **Appendix C**. With the enactment of the Receivership Act, the legislature intended to codify existing law – it did not grant receivers entirely new rights, power, and authority exceeding those of the insolvent and contrary to decades of settled law. By holding otherwise, the Decision merits review.

2. The Decision Conflicts with Washington Precedent that Enforces Contracts as Written.

The Decision can be construed as standing for the absolute principle that the terms of a contract relating to property are irrelevant to the receiver’s authority to demand turnover. *See e.g.*, Slip Op. at 10, 13, 15 n.8. Such a holding is contrary to

countless decisions wherein courts have held that, under the principle of freedom to contract, courts will enforce contracts as written. *See e.g., Stocker v. Shell Oil Co.*, 105 Wn.2d 546, 549–50, 716 P.2d 306 (1986) (holding, when courts fail to enforce contracts as written, they “frustrate the reasonable expectations of the contracting parties and thus interfere with their freedom to contract.”); *Grey v. Leach*, 158 Wn. App. 837, 850, 244 P.3d 970 (2010) (“Clear and unambiguous contracts are enforced as written.”).

Although principals of equity may sometimes support a receiver’s right to step outside a contract in cases of “fraudulent sales and transfers,” that was not the case here. *See Western Electric Co. v. Norway Drydock Co.*, 124 Wash. 49, 60, 213 P. 686 (1923) (“The receiver, except as to fraudulent sales and transfers, is not vested with any higher or better right or title to the property than the insolvent had when the receiver’s title accrued.”) Instead, on one hand the Decision deprives Andersen of the rights it negotiated with respect to its payment obligations while, on the other, the Decision awards payment to ARI via Revitalization based on the existence of the Subcontract but contrary to the actual terms of the Subcontract.

Relatedly, by construing Andersen's actions of enforcing its contractual right to withhold payment as an anticipatory breach, the Decision further conflicts with precedent on the enforceability of contracts. Slip Op. at 16. The Subcontract undisputedly provides that should ARI fail to pay its sub-tier subcontractors, Andersen is entitled to retain those funds. CP 607. Despite this language, the Decision holds Andersen's claims for repair and completion damages were properly rejected because Andersen anticipatorily breached the Subcontract by *enforcing* this provision. *Id.*

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). To construe assertion of a contractual right to withhold payment (or any contractual right for that matter) as amounting to anticipatory breach renders bargained-for protections meaningless and unenforceable. Such a holding is not only contrary to precedent: it could also be weaponized to demand payment outside the receivership context where payment is not due. Fundamentally,

a party cannot be in breach, anticipatory or otherwise, if it is acting pursuant to the terms of the contract.

Because the Decision conflicts with law governing the enforceability of contracts, it merits review.

B. Under RAP 13.4(b)(3), a Significant Question of Law under the Constitutions of the Washington and the United States is involved.

RCW 7.60.070 prohibits a receiver to seek turnover of property where “there exists a bona fide dispute with respect to the existence or nature of the receiver’s interest in the property.” Under RCW 7.60.070’s plain language, where there is a “bona fide dispute” over a receiver’s interest in property, *the receiver* must then institute an adjunct proceeding under RCW 7.60.160. The carve-out in RCW 7.60.070 of disputed property from a receiver’s summary reach, and referral for an “adjunct” proceeding under RCW 7.60.160, is a critical part of the Receivership Act. The Receivership Act’s protections reflect the settled principles for receiverships when a question arises

regarding a receiver's authority as to property held by third parties:

The general rule, however, is well established that a receiver has no right ordinarily through summary proceedings, or in a summary manner, to take into custody property found in the possession of strangers to the suit, claiming adversely.

“Right of receiver to take property in summary manner or by summary proceedings from strangers to the record”, 40 A.L.R. 903 (Originally published in 1926) (2023 Update); *see also Gloyd v. Rutherford*, 62 Wn.2d 59, 61, 380 P.2d 867 (1963)(holding, “[i]t is true...that a court is reluctant to take possession, by its receiver, of property in the possession of third parties claiming title thereto; and ordinarily a receiver who claims such property must institute a separate action,” and describing with approval the “general rule,” that “courts will not interfere in a summary way as against the possession of a stranger to the action claiming by paramount title, **but will leave**

the question of title to be tried by a proper action to be brought for that purpose.”) (emphasis added).

Andersen disputed turnover of the funds for the April Billing, May Billing, and Subcontract Balance (for work not performed) pursuant to both the Subcontract and requirements for turnover under RCW 7.60.070. Andersen’s dispute constituted a “bona fide dispute” and the Receiver should have been required to bring its claims for turnover in an adjunct proceeding.

Article I, section 3 of the Washington Constitution provides, “[n]o person shall be deprived of life, liberty, or property, without due process of law.” To that end, the Washington Constitution confers a right to procedural due process: “[w]hen a state seeks to deprive a person of a protected interest, the person must ‘receive notice of the deprivation and an opportunity to be heard to guard against erroneous deprivation.’” *Yim v. City of Seattle*, 194 Wn. 2d 682, 688, 451 P.3d 694 (2019). The United States Constitution likewise

guarantees that federal and state governments will not deprive an individual of “life, liberty, or property, without due process of law.” U.S. Const. amends. V & XIV, §1.

By affirming turnover following a summary proceeding, the Decision not only conflicts with RCW 7.60.070, but it also deprived Andersen of its due process right to be meaningfully heard. This fact is further demonstrated by the Court’s wholesale refusal to consider the Subcontract. In practice, this holding could eliminate the rights of many similarly situated third parties from ever getting a contested hearing on whether their property must be turned over to the receivership.

By affirming the turnover and entry of judgment related to these amounts, the Decision denies Andersen’s due process protection of an adjunct proceeding and improperly authorized the taking of Andersen’s property. The Decision therefore involves a significant question of law under the constitutions of Washington and the United States.

C. Under RAP 13.4(b)(4), this Petition Involves an Issue of Substantial Public Interest that Should be Determined by the Supreme Court.

Andersen's interests are not the only interests at stake in the Decision. Multiple cases addressing the limits of a receiver's authority are now pending before the Court of Appeals. *See In the Receivership of Castle Walls LLC*, No. 85105-5-I (Div. I); *see also Elcon Corporation v. KeyBank, N.A., et. al.*; No. 86189-1-I (Div. I). Additionally, there is a substantial public interest at stake regarding the protection of third parties and creditors from over-reaching receivers, especially where such overreach is contrary to a legislative enactment.

The Decision repeatedly refers to the court's broad "equitable powers" and "general public policy considerations" in its reasoning, including in support of its holding that a receiver may command takeover regardless of the underlying contract. *See e.g.*, Slip Op. at 8, 9 n.5, 13 n.6. However, a court's authority to order equitable relief is not unlimited. "Equitable principles cannot be asserted to establish equitable relief in derogation of

statutory mandates.” *Rhoad v. McLean Trucking Co.*, 102 Wn.2d 422, 427, 686 P.2d 483 (1984). The Decision’s expansive construction of the court’s equitable authority, as well as its related view of the receiver’s statutory power, is contrary to statutory requirements and has far-reaching consequences that impact the public interest in at least four respects.

First, it is hard to imagine how any third party to a receivership proceeding could dispute the existence or nature of a receiver’s interest in property under the Court’s construction of the Receivership Act and the court’s equitable authority. Holding that a contract, which spells out the rights to property as between a debtor and third party, is irrelevant to determining the baseline issue of whether a bona fide dispute exists, leaves little room to dispute the receiver’s interest. In practical effect, it renders the adjunct proceeding requirements in RCW 7.60.160 a nullity for a broad swath of commercial circumstances where rights to property are governed by contract. Accordingly, under this Decision, the receiver’s authority to compel turnover not only

conflicts with the Receivership Act, but it also lacks any discernable limiting principal. The court's equitable powers in receiverships are not so broad as to justify such an unfettered expansion.

Second, in holding the fact that Andersen complied with a court order by making an out-of-pocket payment constituted "at least a demonstration of control over the funds," the Decision turns RCW 7.60.070 on its head. RCW 7.60.070 authorizes a receiver to demand turnover of "any property over which the receiver has been appointed that is within the possession or control of that person..." The Commissioner ordered turnover of the May Billing, concluding "the Receiver is entitled to payment on the May Billing without regard to whether Andersen received funds from [the Owner for] the May Billing." CP 552. Andersen complied with the Court's order despite never receiving the funds from the Tribe. CP 588. The funds paid into the registry, therefore, had nothing to do with the Project but was Andersen's separate money.

Notwithstanding, the Decision holds “possession or control” over funds subject to the receivership was sufficiently established when Andersen *subsequently* paid its own funds into the court registry. The Court reasoned the fact Andersen paid these funds out of pocket without first being paid by the Tribe “does not establish an abuse of discretion on the part of the trial court” but rather, “this order was a clear example of the trial court exercising its equitable powers...” Slip Op. at n. 6. However, even considering the power of a “court of equity” with respect to a receiver, “the court has no jurisdiction to authorize a receiver to take possession of property not the subject of the litigation; nor can it order property not in the possession or control of the person against whom the order is directed... to be delivered to the receiver.” *Gloyd*, 62 Wn. 2d at 62 (quoting 75 C.J.S. Receivers § 117a).

The Court’s construction of RCW 7.60.070 could be used to require third parties to turnover their own property without regard to whether they are in possession or control of property

subject to the receivership. Such a holding, including as applied in this case, places contractors in an inequitable position: receivers may demand turnover from contractors whether or not the owner paid them for that work and whether or not payment is actually due under the subcontract. The contractor, in turn, is left with no recourse from the owner or the subcontractor and no statutory protection of its rights. On balance, the equities do not sustain such a broad grant of power that conflicts with the limitations of RCW 7.60.070 and common law.

Third, in affirming partial dismissal of Andersen's claim for damages incurred to repair and complete the work when Revitalization abandoned the project, the Decision interpreted RCW 7.60.130(2) narrowly to preclude timely submitted claims that do not result from rejection of a contract. This construction is contrary to RCW 7.60.210(2) and impacts the public interest in confining the types of claims that can be asserted in a receivership.

By its plain terms, RCW 7.60.130(2) requires that a “claim of a party to an executory contract...resulting from a general receiver’s rejection of it shall be served...within thirty days following the rejection.” Before Revitalization rejected the contract, Andersen already incurred all the costs it was seeking from the receivership and submitted an amended proof of claim under RCW 7.60.210(2) in February 2021. (CP 562). Andersen did not incur additional costs *resulting* from the rejection, which happened three months *after* it submitted its amended proof claim. CP at 587-90. Any further claim would be duplicative.

The Court’s construction of RCW 7.60.130(2) would bar timely asserted claims for damages other than those “resulting from rejection” where no such limitation exists.

Fourth, the Decision undermines statutory limitations on a receiver’s rights to property following rejection of a contract. RCW 7.60.130(2) provides in pertinent part that “the receiver’s right to possess or use property pursuant to any executory

contract or lease **shall terminate upon rejection of the contract** or lease.” (emphasis **added**).

Revitalization sought payment of the Subcontract Balance, which was the amount remaining in the total subcontract price for future work ARI never performed after abandoning the project, nine months after Revitalization rejected the Subcontract. CP at 588. Allowing Revitalization to obtain turnover of funds pursuant to a rejected Subcontract for work ARI **did** not perform and was not entitled to under the Subcontract is contrary to RCW 7.60.130(2).

As is **evident** from these four examples, the Court’s construction of receivership statutes is either overly narrow and contrary to their plain language, or overly broad and contrary to their plain language. This **disparate** treatment of statutes contrary to their plain terms, and contrary to the public interest, is not justified under general principles of equity and has a far-reaching impact on all parties who enter into contracts that, under this

Decision, would be invalidated. The Decision merits this Court's review under RAP 13.4(b)(4).

VI. CONCLUSION

For the reasons set forth above, this Court should accept review of the Court of Appeals Decision.

I certify that this brief contains 4,982 words, in compliance with RAP 18.17.

RESPECTFULLY SUBMITTED this 13th day of March, 2024.

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DECLARATION OF SERVICE

On March 13, 2024, I caused to be served a true and correct copy of the foregoing document to be served on counsel of record stated below, via the Washington Courts E-Portal:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 13th day of March, 2024, at Seattle, Washington.

By: /s/Sarah King
Sarah King, *Legal Assistant*

APPENDIX A

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. 82096-6-1 (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

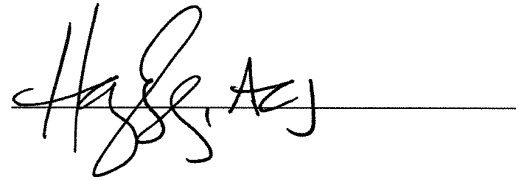
Andersen requests attorney fees, costs, and expenses incurred herein pursuant to article 11.5 of the subcontract which provides that the prevailing party shall be entitled to such an award. Because Andersen has not prevailed, we reject its request for fees and costs.

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.

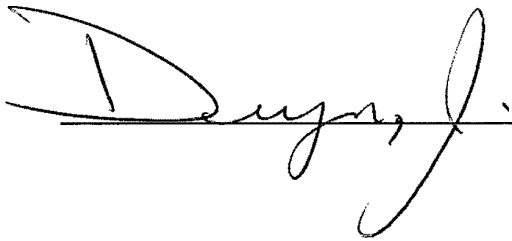
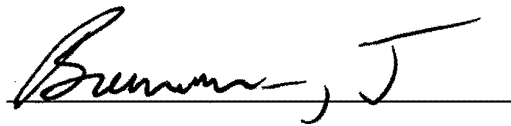
Revitalization further asserts Andersen's repeated opposition to the cooperation required under RCW 7.60.080 resulted in frivolous litigation and

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.

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WE CONCUR:

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APPENDIX B

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

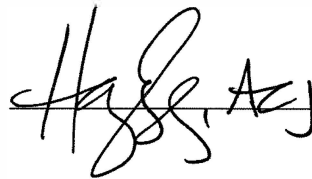
ORDER DENYING MOTION
FOR RECONSIDERATION

Appellant filed a motion for reconsideration on December 26, 2023. A panel of the court called for an answer to the motion, which Respondent filed on February 5, 2024. After consideration of the motion and the answer the panel has determined that the motion for reconsideration shall be denied.

Now, therefore, it is hereby

ORDERED that the order for reconsideration is denied.

FOR THE COURT:



A handwritten signature in black ink, appearing to read 'H. G. ...', is written over a horizontal line.

APPENDIX C

FINAL BILL REPORT

SSB 6189

PARTIAL VETO

C 165 L 04

Synopsis as Enacted

Brief Description: Regulating receiverships.

Sponsors: Senate Committee on Judiciary (originally sponsored by Senators Johnson, Kline, Esser and Roach).

Senate Committee on Judiciary

House Committee on Judiciary

Background: A receiver is a person appointed by a court to take charge, as the court's own agent, over property of a party. A receivership is the means by which a court takes property into custody pending litigation. A receiver in appropriate circumstances may be appointed over all of a person's assets, and given the power to liquidate those assets for the general benefit of creditors. In other circumstances, a receiver may serve simply a caretaking role. Washington's current receivership chapter consists of five sections, most of which were originally enacted by the Territorial Legislature over 150 years ago.

Summary: The rules generally governing receivership proceedings are consolidated into a single chapter. Chapter 7.08 RCW, dealing with general assignments for the benefit of creditors, is modified to include the procedures applicable to the judicial administration of an assignee's administration and liquidation of assets into those applicable in a general liquidating receivership. The rules applied to general liquidating receiverships versus the rules applied when a receiver serves a temporary custodial function are clarified.

As an aid to practitioners, a single section is created to list all circumstances in which a receiver's appointment is permissible. The procedures, notice, and time lines for the appointment of receivers are specified. Any person may serve as a receiver unless the person has been convicted or is controlled by a person convicted of a felony moral turpitude (dishonesty of a high degree), is a party to action or has a special relationship to a party, has an adverse interest to a party affected by the receivership, or is a sheriff of any county. The nature and form of bond required of receivers is specified.

The powers and duties of receivers are specified. The power of a receiver in a general liquidating receivership to assume or reject executory contracts and unexpired leases is codified. Provisions of a contract specifying the consequences of a party's bankruptcy that would prevent a receiver from assuming a contract are made unenforceable. The power of a general liquidating receiver to sell property free and clear of liens is clarified.

The redemption rights of owners of agricultural and homestead property are protected against the inappropriate circumvention by the use of receiverships. The limitations and restrictions applicable to receiverships specifically provided for under current law are preserved.

A temporary stay of certain creditor actions, in cases in which all of a person's property is placed in the hands of a receiver, is imposed to provide the receiver with an opportunity to address emergent situations, while giving anyone stayed the opportunity to seek relief from the stay for good cause. A comprehensive claims procedure and system of priorities in general liquidating receiverships is established.

Duplicative, inconsistent and archaic statutes are repealed.

Votes on Final Passage:

Senate 49 ●
House 95 ● (House amended)
Senate 49 ● (Senate concurred)

Effective: June 10, 2004

Partial Veto Summary: The veto restores three statutory provisions that were inadvertently repealed.

AHLERS CRESSMAN & SLEIGHT PLLC

March 13, 2024 - 4:28 PM

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Appellate Court Case Number: 84320-6
Appellate Court Case Title: In the Receivership of: Applied Restoration, Inc.

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