No. 102883-1

SUPREME COURT
OF THE STATE OF WASHINGTON

APPLIED RESTORATION, INC., ANDERSEN CONSTRUCTION COMPANY,

Petitioner,

v.

REVITALIZATION PARTNERS, LLC,

Respondent.

ANSWER TO JOINT MEMORANDUM OF AMICI CURIAE AGC AND NUCA IN SUPPORT OF PETITIONER

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I. INTRODUCTION

Amici raise three arguments, all of which are unpreserved and meritless. First, amici ignore the plain language of the receivership statute in arguing that because a receiver "steps into the shoes" of an insolvent, the Court of Appeals erred in holding Andersen could not transmute its unsecured claim into a secured claim by offsetting pre-receivership debt against payment for the insolvent's post-receivership work. Second, amici argue the Court of Appeals abrogated Washington contract law by recognizing one of the core purposes of receivership—altering the contractual rights of an insolvent and its creditors. Third, amici insist that equity supported Andersen's demanded offset despite findings that Andersen engaged in a "wrongful" scheme that interfered with Revitalization's efforts to "maximize the return for all creditors." This Court should reject amici's misguided arguments and deny review.

II. ARGUMENT IN RESPONSE TO AMICI

A. Amici improperly raise new arguments.

Andersen did not argue to the Court of Appeals that it must reverse the trial court because a receiver "steps into the shoes" of an insolvent or that affirming the trial court would be tantamount to a holding that the receivership statute abrogated the common law of contracts. (*See* Amici Memo 6-11). Nor did Andersen argue that the receiver's purportedly "unclean hands" precluded equitable relief. (*See* Amici Memo 13-14) This Court should reject amici's arguments because this Court "will not address arguments raised only by amicus." *See Citizens for Responsible Wildlife Mgmt. v. State*, 149 Wn.2d 622, 631, 71 P.3d 644 (2003).

B. Amici ignore the plain language of the receivership statute in arguing the Court of Appeals should have allowed Andersen to offset ARI's pre-receivership debt against payment for ARI's post-receivership work.

Amici argue that general contractors across Washington should be able to—as Andersen did here—induce a receiver to have an insolvent perform months of work and then refuse to pay

for that work unless the receiver agrees to pay its pre-receivership claim in full, regardless of its priority or the detrimental impact on other creditors. Amici's argument directly conflicts with RCW 7.60.210(1), which 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." (emphasis added) The Court of Appeals expressly relied on this language to reject Andersen's arguments below, and did not, as amici allege, implicitly rely on the doctrine of unjust enrichment. (*Compare* Op. 18-19, *with* Amici Memo 11-12)

As the commissioner explained, Andersen's refusal to pay for ARI's post-receivership work unless Revitalization paid "all pre-receivership claims related to this Project" (CP 43) upended the receivership statute's priorities:

> Anderson was demanding that "pre-filing" debts be paid from the "post-filing" contract payment.

> However, doing so would potentially put the Receiver in a position of violating the receivership statute by preferentially paying some pre-filing debts to the exclusion of other pre-filing creditors.

(CP 149) *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").

Rather than address the language of the receivership statute or explain why Andersen's unsecured claim should be favored over other claims, amici cite the same inapposite cases as Andersen. (*See* Amici Memo 9; *see also* Petition 14) These cases hold only that "[t]he receiver . . . is not vested with any higher or better right or title to the property than the insolvent had *when the receiver's title accrued*." *W. Elec. Co. v. Norway Pac. Const. & Drydock Co.*, 124 Wash. 49, 60, 213 P. 686 (1923) (emphasis added); *John A. Roeblings Sons Co. v. Frederickson Logging & Timber Co.*, 153 Wash. 580, 585, 280 P. 93 (1929)

("the receiver took over the same title which the insolvent had").[1] Here, the issue is not what rights or interests ARI had "when the receiver's title accrued," *i.e.*, when Revitalization was appointed, but whether Andersen could refuse to pay for ARI's work *after* appointment of a receiver because Revitalization had not paid "all pre-receivership claims related to this Project." (CP 43)

While amici argue Andersen's position would benefit the construction industry generally, in fact it would only benefit Andersen. If, as will often be the case and was true here, an insolvent subcontractor was performing work on more than one project, allowing a contractor on one project to prefer its own

[1] *See also Morse Electro Prod. Corp. v. Beneficial Indus. Loan Co.*, 90 Wn.2d 195, 197, 579 P.2d 1341 (1978) (determining priority of interests in reserve fund created a year before receiver's appointment); *Sumner Iron Works v. Wolten*, 61 Wash. 689, 692-93, 112 P. 1109 (1911) (because title to machinery had not passed to insolvent under conditional bill of sale when receiver was appointed, seller could seek machinery's return from receiver). Amici also cite the dissent in *Walton v. Severson*, 100 Wn.2d 446, 670 P.2d 639 (1983), a case that involved an earnest money agreement executed by the receiver, not an insolvent's executory contract.

claim by offsetting pre-receivership debts and post-receivership payments would necessarily harm other creditors—including contractors on other projects—by reducing the assets available to pay their claims. But this Court has long held that a receiver must ensure "that ***all*** creditors . . . share alike" and that lone creditors cannot "proceed[] as though they could expect to be paid in full, leaving other creditors nothing." *Tompson v. Huron Lumber Co.*, 4 Wash. 600, 607-008, 30 P. 741 (emphasis added), *aff'd* 31 P. 25 (1892).

This Court should reject amici's arguments that conflict with the plain language of the receivership statute and that benefit only Andersen.

C. The Court of Appeals did not abrogate Washington contract law by correctly recognizing receivership alters the contractual rights of an insolvent and its creditors.

Far from abrogating "decades of settled law" (Amici Memo 9-11), the Court of Appeals' holding that Andersen "cannot circumvent the receivership statute" (Op. 19) is

consistent with this Court's precedent. *See Southwick, Inc. v. State, Dep't of Licensing Bus. & Pros. Div.*, 191 Wn.2d 689, 697, 426 P.3d 693 (2018) ("Parties may not contract around existing state law."); *Fischler v. Nicklin*, 51 Wn.2d 518, 522, 319 P.2d 1098 (1958) ("existing law is a part of every contract and must be read into it").

Amici's contention the Court of Appeals abrogated Washington contract law is founded on their fundamentally flawed assertion that "a party does not obtain relief from contractual conditions precedent by entering into a receivership." (Amici Memo 8) Adjusting the contractual relationships of an insolvent and its creditors is one of the core purposes of receivership, which like bankruptcy, "empower[s] . . . [the insolvent] 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). The simple fact—ignored by amici—is

that receivership is necessary precisely because an insolvent cannot avoid "injury to all parties who contract with" it (Amici Memo 14) and thus judicial "adjustment of bargains negotiated under more optimistic circumstances" is not a flaw of receivership, but "by design." *In re BankVest Cap. Corp.*, 360 F.3d 291, 300 n.14 (1st Cir.).[2]

Indeed, this Court has long rejected the notion that because a receiver "steps into the shoes" of an insolvent, the receiver is absolutely bound to a contract executed by an insolvent:

> The error in this position consists in the fact that, although the receiver of the insolvent company stands in the shoes of the corporation and has the same rights which the insolvent corporation has, he also has a greater authority and responsibility for he is the representative, not only of the insolvent corporation, but of the creditors.

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[2] As Revitalization previously explained, RCW 7.60.130 allows receivers to assume or reject an insolvent's executory contracts and reflects one way in which receivership may adjust the insolvent's contractual rights. (*See* Answer 21-26)

Wirkkala v. Wirkkala Bros. Logging Co., 109 Wash. 137, 139, 186 P. 315 (1919); *see also Rugger v. Hammond*, 95 Wash. 85, 89, 163 P. 408 (1917) ("Care must be exercised to the end that we be not led astray by the thought that the receiver stands in the shoes of the trust company and has only the rights enjoyed by . . . the trust company.").

Even assuming the appointment of a receiver did nothing *legally* to alter the parties' relationship, the commissioner found that—as a matter of *fact*—Revitalization had the right to be paid under the subcontract for ARI's April and May 2020 work. Amici's assertion Revitalization never "satisfied the conditions precedent for the demanded payments" (Amici Memo 5) ignores that the commissioner found that Andersen anticipatorily breached the subcontract and thus "the Receiver was correct in not sending workers based upon Andersen's conduct." (RP 88; *see also* CP 561-68, 802-05, 868) Amici also ignore the commissioner's finding that Andersen "had possession of the

funds owed to ARI for weeks and withheld those funds to leverage its position" and that the Tribe would have continued to pay Andersen for ARI's work if Andersen had not taken "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)

Accordingly, Revitalization did not need to satisfy the conditions precedent to payment—they were excused by Andersen's anticipatory breach and bad faith. The Court of Appeals correctly recognized as much and did not, as amici allege, "conclude that contractual conditions precedent could be ignored." (*Compare* Amici Memo 8, *with* 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)) *See also Kilcullen v. Calbom & Schwab, P.S.C.*, 177 Wn. App. 195, 204-05, 312 P.3d 60 (2013) (a court "has the authority to excuse a condition," "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.") (citing *Restatement (Second) of Contracts* §§ 205, 229, 239 (1981)).

This Court should reject amici's legally and factually flawed argument that the Court of Appeals abrogated Washington contract law.

D. Amici again distort Washington law and the facts of this case in arguing the Receiver's purportedly unclean hands barred equitable relief.

Amici's contention that Andersen should not have been ordered to turnover payment for ARI's work in April and May of 2020 because of Revitalization's purportedly unclean hands is meritless. Amici contend that Revitalization has unclean hands based on their assertion that ARI failed "to satisfy the conditions precedent to payment." (Amici Memo 13) As just explained, those conditions were waived by Andersen's anticipatory breach and bad faith.

Regardless, as the case amici cites recognizes, the unclean hands doctrine asks whether a party is "free from fault *in the transaction at issue*." *Kramarevcky v. Dep't of Soc. & Health Servs.*, 122 Wn.2d 738, 743, 863 P.2d 535 (1993) (emphasis added). Here, the "transaction at issue" is the work Revitalization directed ARI to perform in April and May of 2020. Revitalization's "hands" are entirely clean regarding this transaction—Revitalization fully paid all of the sub-tier subcontractors for worked performed after its appointment. (*See* CP 77, 112-23) And, as explained above, Revitalization only refused to pay pre-receivership claims of sub-tier subcontractors because it would violate the receivership statute to favor their claims. In contrast, Andersen engaged in a "wrongful" scheme to avoid turnover that interfered with Revitalization's efforts "maximize the return for all creditors." (CP 862; *see also* RP 13, 60)

Amici's unclean hands argument also fails because equitable defenses that might apply to an insolvent do not apply "against the receiver, in view of the fact that he stands, not only in the shoes of the [the insolvent], but also in the shoes of bona fide creditors of that company." *Giesler v. Sedro Hardwood Co.*, 167 Wash. 647, 653, 9 P.2d 1104 (1932); *see also F.D.I.C. v. O'Melveny & Myers*, 61 F.3d 17, 19 (9th Cir. 1995) ("defenses based on a party's unclean hands or inequitable conduct do not generally apply against that party's receiver."). Indeed, "it would be a very strange application of" equity to apply equitable defenses to "innocent creditors . . . or to the receiver who represents them." *Washington Mill Co. v. Sprague Lumber Co.*, 19 Wash. 165, 171, 52 P. 1067 (1898); *see also O'Melveny*, 61 F.3d at 19 ("while a party may itself be denied a right or defense on account of its misdeeds, there is little reason to impose the same punishment on a trustee, receiver or similar innocent entity that steps into the party's shoes").

Finally, amici erroneously allege the Court of Appeals left contractors "without any means to protect themselves when a contractor or subcontractor is placed in receivership." (Amici Memo 3) Amici ignores that in its contract with the Tribe Andersen agreed to bear the risk a subcontractor would become insolvent and default on its obligations. (*See* CP 512) It is not a court's responsibility to "protect" a party from risks they willingly accept. Far from trampling the parties' "freedom of contract" (Amici Memo 13), the Court of Appeals allowed the risk of an insolvent subcontractor to fall precisely where Andersen and the Tribe agreed it would—on Andersen.

In short, amici—not the Court of Appeals—invert equitable principles by asserting that Revitalization should have been barred from seeking recovery against Andersen.

III. CONCLUSION

This Court should deny review.

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Dated this 30 day of July, 2024.

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