WASHINGTON STATE SUPREME COURT

Supreme Court No. 1028831

No. 84320-6-1

WASHINGTON STATE COURT OF APPEALS DIVISION I

In the receivership of:
APPLIED RESTORATION, INC.,

ANDERSEN CONSTRUCTION COMPANY,
Petitioner,
v.
REVITALIZATION PARTNERS, LLC,
Respondent/Receiver

JOINT MEMORANDUM OF *AMICI CURIAE* AGC AND NUCA IN SUPPORT OF PETITIONER

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I. INTRODUCTION

Amici Curiae Associated General Contractors of Washington ("AGC") and National Utility Contractors Association of Washington ("NUCA") (collectively "*Amici*"), respectfully submit this brief in support of the Petition for Review of Petitioner Andersen Construction Company ("Andersen"). *Amici* support granting review in this case and having this case heard at the same time as the case of Petitioner Johansen Construction Company, LLC ("Johansen").[1]

The Court of Appeals determined that courts and receivers may disregard the contractual rights of insolvents and creditors, overruling this Court's cases holding a receiver "stands in the shoes" of its insolvent and disregarding extensive caselaw that enforces parties' contracts as written. This Court should ensure that these contractual rights and fundamental property interests

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[1] While *Amici* previously submitted a brief in support of both Andersen and Johansen jointly, Amici submit this separate brief in accordance with the Court's June 24, 2024 Order.

are not ignored in the context of a receivership under RCW 7.60 *et seq*.

Washington's construction industry relies on contract terms to keep projects on track and allocate risk. They typically include detailed payment provisions and protections to ensure that payment flows from the project owner (the party ultimately benefiting from the new construction) to the parties performing the work. These procedures are often necessary when subcontractors face financial difficulties, as was the case with Applied Restoration Inc. ("ARI"), Andersen's subcontractor and the insolvent in receivership here. When a contractor or subcontractor defaults and fails to perform their scope of work, among other costs incurred, a project owner and/or upper-tier contractor faces increased costs due to project delays, potential liquidated damages, extended support costs for the project, and increased costs to hire replacement contractors at a higher rate. Generally, and as shown in this case, construction contracts then provide mechanisms to ensure a party avoids paying twice for

the same work, allowing for recovery and "set-off" of costs incurred as a result of the contractor's default.

Division I's decision here disregards the rights of parties to rely on explicit contractual conditions precedent for payment. As a result, the economic drivers of the Washington construction industry are now faced with the real risk of paying twice for the same work without any means to protect themselves when a contractor or subcontractor is placed in receivership. In short, the terms of the contracts that form the very basis for the receiver's claim may now be disregarded. But that has not been and should not be how Washington contract law works, including in the context of receiverships. For these reasons, AGC and NUCA respectfully ask this Court to accept review to provide guidance on these issues with a full understanding of the extent of the risks parties otherwise face.

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II. INTERESTS OF AMICI CURIAE

Associated General Contractors of Washington

AGC, in existence since 1922, is the Washington's largest, oldest, and most prominent construction industry trade association, representing and serving the commercial, industrial and highway construction industry. The three chapters of the AGC serve more than 1,000 general contractors, subcontractors, construction suppliers, and industry professionals. AGC members perform both private-sector and public-sector construction and are involved in all types of construction in the State, including office, retail, industrial, highway, healthcare, utility, educational, and civic projects.

National Utility Contractors Association of Washington

Founded in 1978, NUCA has been more than just another association; it has become the driving force for Washington's utility industry for more than 40 years. Since then, NUCA has spearheaded extensive changes that have strengthened the industry, not only for its members, but also for every utility

contractor in the State. NUCA had significant involvement in the "Call Before You Dig" law (HB857), the Public Works Trust Fund (SB4404) regulation in the early 1980s, as well as, working with AGC, the amendments to RCW 36.01.050. NUCA has 79 member-organizations performing an estimated $300 million in utility and road construction annually in Washington. NUCA members employ between 4,000-4,500 individuals.

III. ISSUES ADDRESSED BY AMICI CURIAE

A. Does a receiver still stand in the shoes of its insolvent? **Yes.**

B. Did the Receivership Act Abrogate Washington Contract Law? **No.**

C. Do equitable principles supersede express contract terms? **No.**

IV. STATEMENT OF THE CASE

There is no record that ARI or the receiver ever satisfied the conditions precedent for the demanded payments from Andersen, or ever claimed that such conditions precedent were ever satisfied. Rather, despite express contractual terms requiring

satisfaction of these conditions precedent and despite the fact that the subcontract formed the basis for the receiver's asserted claim, the receiver argued that ***neither*** the receiver ***nor*** ARI were bound by them. The trial court agreed and Division I affirmed.

AGC and NUCA both have significant interest in this Court clarifying whether express contract terms, particularly conditions precedent to payment, are now meaningless if a subcontractor enters into a receivership. They believe those terms should be respected under Washington law and that review is required to ensure that such respect is given effect by receivers and the lower courts.

V. ARGUMENT

A. The Receiver Still Stands in the Shoes of its Insolvent

As is common in the construction industry and the norm under Washington law, whether Andersen was obligated to pay ARI is defined by the express contract terms and conditions precedent in their subcontract. Under settled Washington law, conditions precedent are facts and events "that must exist or

occur before there is a right to immediate performance" and "a breach by a plaintiff of a material condition precedent relieves a defendant of liability under a contract." *Ross v. Harding*, 64 Wn.2d 231, 236, 241, 391 P.2d 526 (1964) (internal citations omitted).

The Court of Appeals concluded that an insolvent's performance of work entitles the receiver to payment for that work ***regardless of the contractual terms pertaining to payment***. *See Matter of Applied Restoration, Inc.*, 28 Wn. App. 2d 881, 893, 539 P.3d 837 (2023) ("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" (emphasis added). But submission of an invoice by a subcontractor for work performed does not automatically entitle a subcontractor to receive payment on that invoice. Rather, the legal obligation to pay and the legal right to receive payment is governed by the terms of each contract. Or has been, until now.

Under Washington law, a party does not obtain relief from contractual conditions precedent by entering into a receivership. In Andersen's case, ARI (and its receiver) was not entitled to payment because: (1) ARI failed to pay its sub-tier subcontractors; (2) ARI performed incomplete and defective work before stopping work; and (3) Andersen did not receive payment from the owner for all payments claimed by ARI. *Matter of Applied Restoration,* CP 606-607, 610, 614.

But the Court of Appeals concluded that contractual conditions precedent could be ignored by the receiver based on the trial court's equitable powers:

> 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.

Id. 28 Wn. App. 2d at 896, n. 6 (emphasis added).

The Court of Appeals has now effectively overruled this Court's line of cases holding that a receiver stands in the shoes of its insolvent decisions. *See Morse Electro Products Corp. v. Beneficial Industrial Loan Co.*, 90 Wn.2d 195, 198, 579 P.2d 1341 (1978), *Roeblings Sons Co. v. Frederickson Logging & Timber Co.*, 153 Wash. 580, 585, 280 P. 93 (1929), *Sumner Iron Works v. Wolten*, 61 Wash. 689, 692, 112 P. 1109 (1911), *Walton v. Severson*, 100 Wn.2d 446, 455, 670 P.2d 639 (1983), *Western Electric Co., Inc. v. Norway Pacific Constr. & Drydock Co.*, 124 Wash. 49, 213 P. 686 (1923). The legislature's codification of the Receivership Act and the equitable powers of the court do not grant the receiver greater rights than the insolvent.

B. The 2004 Receivership Act Did Not Abrogate Washington Contract Law

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, 77, 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.*

As addressed in Andersen' petition for review, neither the legislation nor the legislative reports suggest such a major change was made. 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).[2] With the enactment of the Receivership Act,

[2] Bill reports are available at https://app.leg.wa.gov/billsummary?BillNumber=6189&Year=2003&Initiative=false (visited 6/3/24).

the legislature intended to consolidate "the rules generally governing receivership proceedings … into a single chapter…." *Id*. There is no discussion in any report, let alone within the Act itself, of granting receivers entirely new rights, power, and authority exceeding those of the insolvent and contrary to decades of settled law.

Until this Court or the legislature expressly says otherwise, the receiver *did* step into the shoes of ARI: it had no less but not more lawful interest in any property than ARI had on the date of assignment.

C. Equitable Principles Do Not Supersede Express Contract Terms And Preclude Granting Equitable Relief To The Receivers Of Insolvents With Unclean Hands.

The Court of Appeals' conclusion – that ARI was equitably entitled to payment for work performed – effectively sounds in the doctrine of unjust enrichment. "Unjust enrichment is the method of recovery for the value of the benefit retained absent any contractual relationship because notions of fairness

and justice require it." *Young v. Young*, 164 Wn.2d 477, 484, 191 P.3d 1258 (2008).

The Court of Appeals' reasoning appears to be that because ARI performed work, it would be unfair or unjust to withhold payment regardless of the contents of its subcontract with Andersen. However, Washington's law is clear that such notions of fairness and justice do not require payment if a written contract addresses the terms of payment: "[t]he courts will not allow a claim for unjust enrichment in contravention of a provision in a valid express contract." *MacDonald v. Hayner*, 43 Wn. App. 81, 86, 715 P.2d 519 (1986). Thus, the fact that ARI performed work does not create an equitable right to payment for that work when ARI's subcontract with Andersen provides that payment is not owed. *Id.*

Similarly, the "broad equitable powers of the trial court" upon which the Court of Appeals relies do ***not*** extend so far as to permit the trial court to disregard the subcontracts' express payment terms. "[C]ourts do not have the power, under the guise

of interpretation, to rewrite contracts the parties have deliberately made for themselves." *McCormick v. Dunn & Black, P.S.*, 140 Wn. App. 873, 891–92, 167 P.3d 610 (2007). "Courts may not interfere with the freedom of contract or substitute their judgment for that of the parties to rewrite the contract...." *Id*.

Here, ARI submitted certifications with its payment applications certifying that they had satisfied all contractual conditions to payment. ARI repeatedly and *falsely* certified that it had discharged and released Andersen and the project owner from liability arising out of ARI's scope of work under the subcontract and had satisfied the conditions precedent to progress payments under the subcontract, but ARI had not actually satisfied these conditions. Andersen did not have an obligation to pay ARI due to ARI's failure to satisfy the conditions precedent to payment.

It is black letter law that a party with unclean hands cannot seek or obtain equitable relief. *Kramarevcky v. Department of Social & Health Services*, 122 Wn.2d 738, 743 n.1, 863 P.2d 535

(1993) (Under the "clean hands" doctrine, a court may not grant equitable relief to a party at fault in the transaction at issue) *citing Mutual of Enumclaw Ins. Co. v. Cox*, 110 Wn.2d 643, 650-651, 757 P.2d 499 (1988). And yet, the Court of Appeals affirmed the trial court's "equitable choice" (*i.e.,* to grant equitable relief) to ***ignore*** the conditions precedent to payment in contravention of long-held Washington law and the most basic principle that the receivers had ***only the rights (and unclean hands) of the insolvents at the time of assignment***. *Matter of Applied Restoration* at 891, n. 5

This Court not only has the opportunity to clarify that the Court of Appeals' material changes to the law in rejecting this Court's decisions is not what the law is, but can also prevent substantial future injury to all parties who contract with a party that enters receivership and who, under these decisions, can no longer rely upon their contracts (and Washington contract law) for guidance.

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VI. CONCLUSION

The construction industry relies on contracts to allocate risk, including detailed payment provisions that include conditions precedent to avoid double payment and project delays, and to ensure that those doing the work get paid as agreed to pursuant to fixed terms. These important procedures should not be cast aside upon a subcontractor being placed into a receivership under the guise of unmoored "equity" principles that do not exist. This Court's guidance is necessary to confirm and restore the long-settled law that the rights of contracting parties across the State are not disregarded upon the appointment of a receiver, who is bound by Washington law and possesses no more, and no less, than the rights of its insolvent.

AGC and NUCA respectfully request this Court accept review to confirm that the claimed equitable interests of an insolvents' creditors do not create a right to payment that does not exist under their written contracts nor is manufactured from undefined "equity"; and that the equitable powers of the trial

court cannot override the judgment of the parties to a contract, settled Washington law, or otherwise interfere with this State's fiercely protected freedom to contract.

The undersigned certifies that this consolidated memorandum is 2,484 (2,500 maximum) words, exclusive of words contained in any appendices, the title sheet, the table of contents, the table of authorities, the certificate of compliance, the certificate of service, signature blocks, and any pictorial images. The word count was computed using the word count function in Microsoft Word.

RESPECTFULLY SUBMITTED this 9th day of July, 2024.

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DECLARATION OF SERVICE

On July 9, 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 9th day of July, 2024, at Seattle, Washington.

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