

FILED
SUPREME COURT
STATE OF WASHINGTON
7/30/2024
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Court of Appeals
Division I
State of Washington
7/30/2024 1:55 PM

Supreme Court No. 1030185

WASHINGTON STATE SUPREME COURT

No. 85105-5-1

WASHINGTON STATE COURT OF APPEALS
DIVISION I

In the Receivership of:
CASTLE WALLS LLC.

JOHANSEN CONSTRUCTION COMPANY, LLC,

Petitioner,

v.

REVITALIZATION PARTNERS, L.L.C.,

Respondent/Receiver.

**RESPONDENT'S ANSWER TO MEMORANDUM OF
AMICI CURIAE ASSOCIATED GENERAL
CONTRACTORS OF WASHINGTON AND NATIONAL
UTILITY CONTRACTORS OF WASHINGTON IN
SUPPORT OF PETITION FOR REVIEW**

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I. INTRODUCTION

Amici curiae Associated General Contractors of Washington and National Utility Contractors Association of Washington (collectively, “*Amici*”) do not raise any issues suitable for this Court’s review in their memorandum (the “Memorandum”) in support of the Petition for Review filed by Johansen Construction Company, LLC (“Johansen”). The issue here is whether the Court should grant the Petition for Review, not whether the Court of Appeals decision was sound.

The Court should reject the arguments in the Memorandum and proceed to deny the Petition for Review. As a threshold matter, the Memorandum is regarding a Petition for Review, yet it does not cite or otherwise address the considerations under RAP 13.4(b)(1) and (4) for deciding the Petition for Review. Accordingly, it should be disregarded in considering the Petition for Review.

With respect to the substantive issues that *Amici* wish to have the Court review, their arguments are either (1) are duplicative of arguments already made by Johansen in its Petition for Review or (2) Johansen did not raise before the Superior Court and may not be considered now. These do not constitute grounds for review, and the Court should deny the Petition for Review.

II. BACKGROUND

A. Johansen caused \$228,863.83 to be taken out of the Receiver's bank account in violation of the automatic stay.

As the Court is aware from the prior briefing, Johansen violated the automatic stay by causing an overdraft on the bank account of respondent Revitalization Partners, L.L.C. (the "Receiver"), in its capacity as general receiver for Castle Walls LLC ("Castle Walls"), and taking the proceeds of \$228,863.83. Johansen has not returned the funds to the Receiver, despite the

order and judgment of the Superior Court entered over a year ago and the Published Opinion of the Court of Appeals affirming that order.

B. Johansen is now seeking the Court’s discretionary review of the Court of Appeals’ decision affirming the Superior Court’s order requiring Johansen to turn over the \$228,863.83 to the Receiver.

On May 1, 2024, Johansen filed its Petition for Review, seeking the Court’s discretionary review of the Published Opinion. On May 30, 2024, the Receiver filed the Respondent’s Answer to Petition for Review (the “Answer”). On July 17, 2024, the Court’s Commissioner Michael E. Johnston granted *Amici*’s motion to file the Memorandum, setting a response deadline of July 30, 2024.

III. ARGUMENT

This Court accepts discretionary review in few circumstances and should deny it here. *See* RAP 13.4(b). The Court should give no weight to the Memorandum in deciding

whether to grant the Petition for Review because (a) the Memorandum does not discuss how any grounds for review meet the standards of RAP 13.4(b)(1) and (4); (b) the Memorandum is duplicative of arguments on substantive issues regarding the Receiver's "standing in the shoes" of Castle Walls, the consistency of the Receivership Act with prior common law, and the applicability of federal bankruptcy law in interpreting the Receivership Act, which were already made by Johansen in the Petition for Review and have no merit as discussed in great detail in the Answer, and (c) the Memorandum's additional argument regarding "unjust enrichment" and "unclean hands" in connection with contractual conditions precedent is raised for the first time on appeal.

A. The Memorandum should be disregarded in making a decision on the Petition for Review because it does not discuss the considerations under RAP 13.4(b)(1) and (4).

The Petition for Review is based on RAP 13.4(b)(1) and (4). The first of those considerations is “[i]f the decision of the Court of Appeals is in conflict with a decision of the Supreme Court.” RAP 13.4(b)(1). The second consideration is “[i]f the petition involves an issue of substantial public interest that should be determined by the Supreme Court.” RAP 13.4(b)(4). But the Memorandum does not mention either of these rules, much less explain how they apply to the Published Opinion of the Court of Appeals or provide any authority to support that these considerations are present. Accordingly, the Court should disregard the Memorandum and proceed to deny the Petition for Review for the reasons explained extensively in the Answer.

B. The Memorandum should be disregarded because it is duplicative of arguments in the Petition for Review, in violation of RAP 10.3(e).

The Memorandum violates RAP 10.3(e) by duplicating arguments in the Petition for Review. RAP 10.3(e) provides: “Amicus must review all briefs on file and avoid repetition of matters in other briefs.” RAP 10.3(e).

The first three arguments in the Memorandum regarding the Receiver “standing in the shoes of the insolvent,” non-abrogation of common law by the Receivership Act, and the applicability of federal bankruptcy law in interpreting the Receivership Act are the same as Johansen’s arguments in its Petition for Review. (*Compare* Memorandum at 5-12 *with* Petition for Review at 14-20.) *Amici* overtly demonstrate this duplication by citing to the Petition for Review itself and relying on the case law citations already provided there by Johansen. (*See* Memorandum at 8 n.2, 9 n.3.) They also point to

the same legislative history. (*Compare* Memorandum at 11-12 *with* Petition for Review at 19-20.) The Receiver has already answered Johansen's arguments in elaborate detail and incorporates them herein by this reference to the extent the Court wishes to consider the Memorandum nonetheless and evaluate why it lacks merit. (*See* Respondent's Answer to Petition for Review at 10-32.)

Otherwise, *Amici* provide no additional helpful information in the Memorandum. Their citations to authorities outside the Petition for Review are boilerplate references to generic statutory interpretation and contract law principles¹ that have nothing to do with excusing Johansen for the specific violation of the automatic stay of RCW 7.60.110(1) it

¹ (Memorandum at 6 (citing *Ross v. Harding*, 64 Wn.2d 231, 236, 391 P.2d 526 (1964)); Memorandum at 11 (citing *Potter v. Washington State Patrol*, 165 Wn.2d 67, 77, 196 P.3d 691 (2008)).)

committed by taking \$228,863.83 out of the Receiver's bank account and not giving it back when requested by the Receiver and ordered by the Superior Court.

C. The Memorandum should be disregarded because it improperly raises a new argument regarding “unjust enrichment” and “unclean hands” and their relationship to contractual conditions precedent.

The Court does not consider issues raised first and only by amicus. *See Mains Farm Homeowners Ass’n v. Worthington*, 121 Wn.2d 810, 827, 854 P.2d 1072, 1080 (1993) (citing *Coburn v. Seda*, 101 Wn.2d 270, 279, 677 P.2d 173, 178 (1984)); *Citizens for Responsible Wildlife Mgmt. v. State*, 149 Wn.2d 622, 631, 71 P.3d 644, 649 (2003) (citing *Sundquist Homes, Inc. v. Snohomish County Pub. Util. Dist. No. 1*, 140 Wn.2d 403, 413, 997 P.2d 915, 920 (2000)). “The appellate court may refuse to review any claim of error which was not raised in the trial court.” RAP 2.5(a).

Amici point to no instance in the record below where Johansen ever raised the issues of “unjust enrichment” or “unclean hands” and how they relate to whether certain contractual conditions precedent were met for payment. (*See* Memorandum at 12-15.) Indeed, Johansen never did, and these issues are not mentioned in the Published Opinion that is subject to Johansen’s Petition for Review. The Court should ignore *Amici*’s effort to raise them for the first time now in the guise of the Memorandum.

To the extent the Court nonetheless wishes to consider these new arguments, it should begin by recognizing that *Amici* premise their argument on fabricated wording that does not exist in the Published Opinion. The Memorandum inexplicably refers to the Published Opinion having a “conclusion that the insolvent Castle Walls was equitably entitled to payment for ‘work performed’ . . . apparently because it would be unfair or

unjust to withhold payment, regardless of the express provisions in the contract with Johansen.” (Memorandum at 12.) The Published Opinion has no such quoted language or conclusion.

The case citations by *Amici* in connection with “unjust enrichment” have nothing to do with the fact pattern or legal authorities involved in this case. *Amici* leap from their imaginary holding about “work performed” to the supposition that the Published Opinion must have affirmed the Turnover Order based on an “unjust enrichment” theory, without regard to the contractual relationship between Castle Walls and Johansen.

But the Turnover Order was not obtained on the basis of an “unjust enrichment” claim by the Receiver. The Receiver never argued for that in the Turnover Motion, and there is nothing in the Published Opinion that refers to the concept.

Castle Walls and Johansen had a contractual relationship. (Published Opinion at 1.) Johansen disrupted the status quo of that contractual relationship and exercised remedies with respect to the Receiver's bank account, due to an alleged breach by Castle Walls, in violation of the automatic stay.

The Published Opinion is not based on valuing a benefit absent a contractual relationship, which is the issue in *Young v. Young*, 164 Wn.2d 477, 484, 191 P.3d 1258 (2008). The Published Opinion also does not disregard the contract in order to determine that Johanson must turn over the \$228,863.83 that it unlawfully took from the Receiver's bank account. *See Chandler v. Washington Toll Bridget Authority*, 17 Wn.2d 591, 604, 137 P.2d 97 (1943). There is no invocation of a "quasi contract" unjust enrichment claim arising from an implied duty of the parties not based on consent or agreement, in contravention of a provision of a valid express contract. *See*

MacDonald v. Hayner, 43 Wn. App. 81, 85-86, 715 P.2d 519 (1986).

Rather, the Published Opinion recognizes the existence of the contract, and it properly affirms the Superior Court's application of the automatic stay, the turnover power, and claim priorities to Johansen's rights and remedies as a creditor based on the contract. While receivership overall is an equitable proceeding to which an abuse of discretion appellate standard applies, the Superior Court and Court of Appeals did not fashion an equitable "unjust enrichment" claim for the Receiver untethered to the contract. They simply applied the plain language of the Receivership Act and held how those contractual rights are enforced in a receivership.

Johansen's rights are not worthless, as *Amici* fret. They simply exist within a playing field as defined by statute and under the jurisdiction of the Superior Court. Johansen went out

of bounds, and the ball has to go back to the line of scrimmage, where the rules of distribution will play out.

Amici point to no legal authority that would create an exception to the Receiver's protections, powers, and priorities involving a contractual relationship on the basis of an allegation that Castle Walls had "unclean hands." *Kramarevsky v. Department of Social & Health Services*, 122 Wn.2d 738, 743 n.1, 863 P.2d 535 (1993). Requiring clean hands has nothing to do with receiverships or contracts. *Kramarevsky* only addresses whether a party may assert an equitable estoppel claim, which is not relevant here. The Published Opinion was correct to require Johansen to give back the money it took from the Receiver and should not be subject to further review.

IV. CONCLUSION

The Court should disregard the Memorandum and proceed to deny the Petition for Review. The Court of Appeals

thoroughly analyzed the unambiguous Receivership Act and applied this equitable proceeding's abuse of discretion standard to affirm the Turnover Order. The Memorandum sets forth no basis for reviewing the Published Opinion, which should be allowed to stand without further delay. Then the Receiver can finally enforce the Superior Court-ordered payment obligation that Johansen has disrespected for over a year and thereby bring closure to Castle Walls' receivership proceeding for patient creditors with a distribution of funds in accordance with the Receivership Act's priorities.

I certify that the foregoing document contains 1,926 words, in compliance with RAP 18.17.

DATED this 30th day of July, 2024.

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CERTIFICATE OF SERVICE

I, Edgar Y. Rosales, certify under penalty of perjury under the laws of the State of Washington that I am a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On July 30, 2024, I caused delivery of a true copy of the foregoing *RESPONDENT'S ANSWER TO MEMORANDUM OF AMICI CURIAE ASSOCIATED GENERAL CONTRACTORS OF WASHINGTON AND NATIONAL UTILITY CONTRACTORS OF WASHINGTON IN SUPPORT OF PETITION FOR REVIEW* to all parties listed, and in the manner(s) indicated below:

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DATED this 30th day of July, 2024, in Arlington,
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/s/ Edgar Y. Rosales

Edgar Y. Rosales, Paralegal

MILLER NASH LLP

July 30, 2024 - 1:55 PM

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