

57328-4

57328-4

81003-6

No. 57328-4

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

CAMBRIDGE TOWNHOMES, LLC, a Washington limited liability
company, and POLYGON NORTHWEST COMPANY, a Washington
general partnership,

Appellants,

v.

PACIFIC STAR ROOFING, INC., a Washington corporation, and P.J.
INTERPRIZE, INC., a Washington corporation,

Respondents,

and

4 BEES SIDING, INC., a Washington corporation; *et al.*,

Defendants.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2006 NOV 27 AM 10:30

APPELLANTS' REPLY BRIEF

Jerret E. Sale, WSBA #14101
Deborah L. Carstens, WSBA #17494
BULLIVANT HOUSER BAILEY PC
1601 Fifth Avenue, Suite 2300
Seattle, Washington 98101-1618
Telephone: 206.292.8930
Facsimile: 206.386.5130
Attorneys for Appellants

ORIGINAL

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. ARGUMENT	2
A. The corporate dissolutions of PSR and PJ do not preclude Polygon's claims.	2
B. The trial court erred in dismissing Polygon's indemnity claim on summary judgment.	4
1. This Court's decision in <i>MacLean</i> mandates reinstatement of Polygon's indemnity claim against PJ.	5
2. <i>MacLean</i> was correctly decided.	8
3. Thus, the trial court erred when it dismissed Polygon's indemnity claim.	10
C. Polygon may assert claims for both indemnity and breach of contract.	10
D. The trial court erred in ruling that Polygon could not pursue claims against P.J. Interprize, Inc., for work performed by P.J. Interprize, the sole proprietorship.	13
E. The trial court erred in denying Polygon's motion to amend its complaint.	15
F. The trial court erred in ruling Polygon bears the burden of proving which defects are latent.	20
G. The trial court erred in striking portions of the declaration of Mark Jobe.	21
H. PJ and PSR are not entitled to an award of attorney fees.	22
III. CONCLUSION	24

TABLE OF AUTHORITIES

	Page
Cases	
<i>1000 Va. Ltd. P'ship v. Vertecs Corp.</i> , No. 77362-9 (Wash. Sup. Ct. Nov. 9, 2006).....	18
<i>Arreygue v. Lutz</i> , 116 Wn. App. 938, 69 P.3d 881 (2003).....	19
<i>Ballard Square Condo. Owners Ass'n v. Dynasty Constr. Co.</i> , No. 76938-9 (Wash. Sup. Ct. Nov. 9, 2006).....	1, 3-4
<i>Brame v. St. Regis Paper Co.</i> , 97 Wn.2d 748, 649 P.2d 836 (1982).....	9
<i>Folsom v. Burger King</i> , 135 Wn.2d 658, 958 P.2d 301 (1998).....	21
<i>Gall Landau Young Constr. Co. v. Hedreen</i> , 63 Wn. App. 91, 816 P.2d 762 (1991).....	15
<i>In re Lundberg</i> , 152 B.R. 316 (Bankr. E.D. Okla. 1993).....	19
<i>Jones v. Best</i> , 134 Wn.2d 232, 950 P.2d 1 (1998).....	21
<i>Jones v. Strom Constr. Co.</i> , 84 Wn.2d 518, 527 P.2d 1115 (1974).....	9
<i>Karnatz v. Murphy Pac. Corp.</i> , 8 Wn. App. 76, 503 P.2d 1145 (1972).....	8-9
<i>MacLean Townhomes, L.L.C. v. Am. 1st Roofing & Builders, Inc.</i> , 133 Wn. App. 828, 138 P.3d 155 (2006).....	1, 5,-7, 8
<i>State v. Rangitsch</i> , 40 Wn. App. 771, 700 P.2d 382 (1985).....	22

<i>Urban Dev., Inc. v. Evergreen Bldg. Prods., LLC,</i> 114 Wn. App. 639, 59 P.3d 112 (2003), <i>aff'd, Fortune View Condo. Ass'n v. Fortune Star Dev.</i> <i>Co.,</i> 151 Wn.2d 534, 90 P.3d 1062 (2004).....	12
<i>Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.,</i> 122 Wn.2d 299, 858 P.2d 1054 (1993).....	10-11

Statutes and Rules

CR 15(c).....	17
RCW 23B.14.050(2)(e).....	3
RCW 23B.14.340.....	3, 4
RCW 4.16.326(1)(g).....	18

I. INTRODUCTION

Polygon filed suit against several subcontractors, including PJ and PSR, for damages caused by construction defects.¹ Polygon's complaint asserted claims for indemnity and breach of contract. The trial court dismissed Polygon's claims on two grounds: (1) the indemnity provisions in Polygon's agreement with PJ did not apply to construction defect claims and (2) Polygon could not recover for claims arising after the corporate dissolutions of PJ and PSR.

After Polygon filed its opening brief, two appellate decisions were issued that mandate reversal of the trial court's decisions. First, in *MacLean Townhomes v. America 1st Roofing & Builders*,² this Court ruled that the identical indemnity provision at issue here *does* apply to construction defect claims. Second, in *Ballard Square Condominium Owners Association v. Dynasty Construction Co.*,³ the Washington Supreme Court ruled that post-dissolution claims may be asserted against

¹ As in Polygon's opening brief, "Polygon" refers collectively to appellants Cambridge Townhomes, LLC, and Polygon Northwest Company; "PJ" refers to respondent P.J. Interprize, Inc.; and "PSR" refers to respondent Pacific Star Roofing.

² *MacLean Townhomes, L.L.C. v. Am. 1st Roofing & Builders, Inc.*, 133 Wn. App. 828, 138 P.3d 155 (2006). The Court's decision was issued after Polygon filed its opening brief in this case but before PJ filed its response.

³ *Ballard Square Condo. Owners Ass'n v. Dynasty Constr. Co.*, No. 76938-9 (Wash. Sup. Ct. Nov. 9, 2006). This decision was issued after Polygon filed its opening brief and after PJ and PSR filed their response briefs.

a dissolved corporation. In light of these decisions, Polygon's claims against PSR and PJ must be reinstated.

In addition, as explained below, the trial court made several erroneous rulings with respect to Polygon's claims against PJ, including (1) refusing to allow Polygon either to pursue claims against PJ's predecessor, the sole proprietorship or to name the sole proprietorship as an additional defendant, (2) requiring Polygon to prove which defects were latent instead of requiring PJ to prove which defects were patent, and (3) striking portions of the declaration of Polygon's expert witness. These rulings also should be reversed, and the case should be remanded to the trial court for further proceedings.

II. ARGUMENT

A. The corporate dissolutions of PSR and PJ do not preclude Polygon's claims.

The trial court based its dismissal of Polygon's indemnity and breach of contract claims against PSR and Polygon's breach of contract claim against PJ on its conclusion that Washington law bars post-dissolution claims.⁴ The Washington Supreme Court recently ruled that

⁴ As noted in Polygon's opening brief, the basis for the dismissal of PSR's indemnity claim is not completely clear from the court's order. *See* Appellants' Opening Brief at 7 n.3. However, PSR's arguments to the trial court and to this Court addressed only the post-dissolution issue, and the Court therefore does not need to consider any other grounds for dismissal of the indemnity claim against PSR. *See* Brief of Respondent Pacific Star Roofing, Inc., at 10-11; CP 158-62.

post-dissolution claims *may* be asserted as long as they are filed within the applicable statute of limitations period. Thus, Polygon is entitled to reinstatement of its indemnity and breach of contract claims against PSR and its breach of contract claim against PJ.

As noted in Polygon's opening brief, the legislature amended RCW 23B.14.340, effective June 7, 2006, to read:

The dissolution of a corporation . . . by administrative dissolution by the secretary of state . . . shall not take away or impair any remedy available against such corporation . . . for any right or claim existing, or any liability incurred, prior to such dissolution or arising thereafter, unless action or other proceeding thereon is not commenced within two years after the effective date of any dissolution that was effective prior to the effective date of this section or within three years after the effective date of any dissolution that is effective on or after the effective date of this section.

(New language underlined.) In *Ballard Square Condominium Owners Association v. Dynasty Construction Co.*,⁵ the Washington Supreme Court ruled that the amendment to RCW 23B.14.340 applies retroactively.⁶

PJ did not raise the post-dissolution issue in its request for dismissal of Polygon's indemnity claim. (See CP 138-57) PJ now argues, however, for the first time on appeal, that Polygon's indemnity claim did not arise until after PJ's dissolution. See Brief of Respondent P.J. Interprize, Inc., at 14-18.

⁵ *Ballard Square Condo. Owners Ass'n v. Dynasty Constr. Co.*, No. 76938-9 (Wash. Sup. Ct. Nov. 9, 2006).

⁶ *Ballard Square*, slip op. at 2. The court also explained that, even if RCW 23B.14.340 had not been amended, RCW 23B.14.050(2)(e) authorized post-dissolution claims. *Id.* at 10.

Thus, as long as a claim is filed within the required two- or three-year period following dissolution (and within the applicable statute of limitations), it is irrelevant whether the claim arose before or after dissolution.⁷

In this case, PJ and PSR were dissolved before June 7, 2006. (CP 381, 1065) Thus, Polygon had to bring suit within two years of their respective dissolutions. PSR dissolved on October 17, 2003; PJ dissolved on March 22, 2004. (*Id.*) Polygon filed suit on March 24, 2004, well within the two-year period required under RCW 23B.14.340. (CP 1) Neither PJ nor PSR asserted that Polygon's claims were barred by the statute of limitations, and there is no evidence that Polygon's claims were untimely. Under these circumstances, the trial court erred in dismissing Polygon's claims on the ground that those claims (allegedly) arose after the dissolutions of PJ and PSR, and its rulings on this issue should therefore be reversed.

B. The trial court erred in dismissing Polygon's indemnity claim on summary judgment.

The trial court dismissed Polygon's indemnity claim against PJ on the ground that the indemnity provision in PJ's contract did not apply to construction defect claims. (CP 745-48) After the trial court ruled, and

⁷ *Id.*

after Polygon filed its opening brief, this Court issued its decision in *MacLean Townhomes v. America 1st Roofing & Builders*.⁸ The Court concluded the identical indemnity provision at issue here *did* apply to construction defect claims, and PJ's argument to the contrary must therefore be rejected.

1. This Court's decision in *MacLean* mandates reinstatement of Polygon's indemnity claim against PJ.

On appeal, PJ makes a number of assertions (without citation to authority) to support its argument that the indemnity provision at issue here applies only to tort claims.⁹ PJ fails to appreciate that the *MacLean* court specifically rejected this argument. PJ was the respondent in that case, and the Court construed the *identical* indemnity provision at issue here.¹⁰

In *MacLean*, a general contractor sued several subcontractors, including PJ, to recover damages incurred in defending against and

⁸ *MacLean Townhomes, L.L.C. v. Am. 1st Roofing & Builders, Inc.*, 133 Wn. App. 828, 138 P.3d 155 (2006).

⁹ See PJ's Response Brief at 27-29. PJ also incorrectly asserts that Polygon focused only on the first paragraph of the indemnity provision and ignored the remaining five paragraphs. *Id.* at 25-26. In fact, Polygon specifically addressed *each* clause of the indemnity provision in its opening brief. Appellants' Opening Brief at 17-18.

¹⁰ See *MacLean*, 133 Wn. App. at 831-32. For the Court's convenience, a copy of the indemnity provision is attached as Appendix A.

settling a claim by a condominium homeowners' association for construction defects.¹¹ The trial court dismissed the general contractor's claims, concluding the indemnification provisions in its agreements with the subcontractors applied only to tort claims.¹² This Court reversed.¹³

The first sentence of the indemnity provision at issue in *MacLean* (as here) stated:

SUBCONTRACTOR shall defend, indemnify, and hold CONTRACTOR harmless from any and all claims . . . by third parties arising from, resulting from, or connected with, services performed or to be performed under this Subcontract by SUBCONTRACTOR . . . to the fullest extent permitted by law and subject to the limitations provided below.¹⁴

The remainder of the indemnity provision in *MacLean* (as here) describes certain restrictions on tort actions.¹⁵

In *MacLean* (and its response brief here), PJ argued the inclusion of reference to tort-based claims in the indemnity provision meant that the

¹¹ *Id.* at 829.

¹² *Id.*

¹³ *Id.* at 835. The general contractor appealed the dismissal of indemnity claims against two subcontractors, PJ and Janes Brothers Waterproofing. The general contractor settled its claim against Janes while the appeal was pending, leaving PJ as the only remaining respondent. *Id.* at 829 n.1.

¹⁴ *Id.* at 831.

¹⁵ *Id.* at 831, 833.

provision could apply only to tort claims.¹⁶ This Court aptly explained the fallacy of PJ's argument:

It [PJ] would have us read the contract as though, in the first sentence above-quoted, the word "tort" was placed between the word "all" and the word "claims." However, this would dramatically alter the meaning of the phrase "any and all claims." Although the parties could have drafted the provision in the manner urged by P.J. Interprize, they did not.¹⁷

The Court added:

The five paragraphs that follow contain various specifications regarding the subcontractor's duties, none of which say that the initial characterization "any and all" is, in fact, restricted to only tort-based claims. We find that the only reasonable construction of the phrase, "subject to the limitations provided below," is that the parties merely included specific limitations on tort actions, not that they limited the subcontractor's duty to tort actions.¹⁸

Thus, as this Court correctly recognized in *MacLean*, "the indemnity provision at issue herein clearly and unambiguously is so broad as to provide that the types of claims for which the subcontractor must defend and indemnify include contract claims . . ."¹⁹ The claims against

¹⁶ *Id.* at 832; PJ's Response Brief at 26-28.

¹⁷ *MacLean*, 133 Wn. App. at 832.

¹⁸ *Id.* at 833. The Court noted that, as Polygon pointed out in its opening brief, the negligence language was included to comply with the requirements of RCW 4.24.115. *Id.* at 833 n.5.

¹⁹ *Id.* at 834.

Polygon fall squarely within the scope of the indemnity provision, and the trial court erred in ruling PJ owed no duty to defend or indemnify Polygon.

2. *MacLean* was correctly decided.

PJ contends the *MacLean* court improperly relied on earlier case law to support its conclusion that the indemnity provision was not limited to tort claims.²⁰ In particular, PJ asserts that the cases cited by the *MacLean* court have been overruled by the supreme court.²¹

In rejecting PJ's assertion that broad indemnity provisions are not allowed under Washington law, the *MacLean* court stated, "P.J. Interprize does not cite, and we did not find, a single case holding that a general contractor's right of indemnification from its subcontractors may only be triggered by a third-party tort claim against the general contractor."²² The court cited its earlier ruling in *Karnatz v. Murphy Pacific Corp.*²³ upholding an indemnity provision requiring the subcontractor to defend all suits "arising out of, in connection with, or incident to" the subcontractor's

²⁰ PJ's Response Brief at 30-32.

²¹ *Id.* at 31-32.

²² *MacLean*, 133 Wn. App. at 834.

²³ *Karnatz v. Murphy Pac. Corp.*, 8 Wn. App. 76, 503 P.2d 1145 (1972).

performance.²⁴ *Karnatz* quoted *Tucci & Sons v. Carl T. Madsen, Inc.*,²⁵ which was overruled in part by *Jones v. Strom Construction Co.*²⁶

First, *Karnatz* is still good law, and the *MacLean* court did not err in citing that decision. Second, PJ fails to note that *Jones* overruled *Tucci* only with respect to the *Tucci* court's conclusion that a subcontractor can be required to indemnify a general contractor for the general contractor's sole negligence.²⁷ *Jones* did not hold that broad indemnity provisions are unenforceable; it merely limited their application to "those cases in which some activity of the [indemnitor] contributed to the injury."²⁸

Here, there is no allegation that the damages at issue were caused by Polygon's sole negligence. Thus, the supreme court's decision in *Jones* has no application. As the *MacLean* court correctly recognized, the Washington courts have not prohibited enforcement of indemnity provisions such as those at issue here, and the court did not err in concluding those provisions are not limited to tort claims.

²⁴ *Karnatz*, 8 Wn. App. at 80.

²⁵ *Id.* at 81 (quoting *Tucci & Sons, Inc. v. Carl T. Madsen, Inc.*, 1 Wn. App. 1035, 467 P.2d 386 (1970)).

²⁶ *Jones v. Strom Constr. Co.*, 84 Wn.2d 518, 527 P.2d 1115 (1974).

²⁷ *Jones*, 84 Wn.2d at 522-23.

²⁸ *Brame v. St. Regis Paper Co.*, 97 Wn.2d 748, 649 P.2d 836 (1982) (citing *Redford v. Seattle*, 94 Wn.2d 198, 205, 615 P.2d 1285 (1980)).

3. Thus, the trial court erred when it dismissed Polygon's indemnity claim.

In sum, the trial court dismissed Polygon's indemnity claim against PJ because it concluded the indemnity provision applied only to tort claims. In *MacLean*, this Court correctly recognized that the provision is not so limited and encompasses the type of construction defect claims that are at issue here. Accordingly, the trial court's order should be reversed, and Polygon's indemnity claim against PJ should be reinstated.

C. Polygon may assert claims for both indemnity and breach of contract.

On two separate occasions, PJ argued to the trial court that Polygon could not assert a breach of contract claim because it allegedly sustained no damages other than the amount paid to settle the HOA's claims.²⁹ (CP 153-54, 1087-88) The trial court correctly rejected PJ's argument both times. (CP 747, 2026)

On appeal, PJ cites two cases to support its argument that Polygon cannot go forward with its breach of contract claim. These cases are readily distinguishable and do not support PJ's position. In *Washington State Physicians Insurance Exchange & Association v. Fisons Corp.*,³⁰ the

²⁹ PJ's Response Brief at 34.

³⁰ *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 858 P.2d 1054 (1993).

plaintiffs filed a malpractice suit against a physician alleging injuries caused by an adverse drug reaction. The physician filed a cross claim against the drug manufacturer. After the physician's insurer and the drug company each settled with the plaintiffs, the insurer asserted a CPA claim against the drug company seeking to recover the amount the insurer paid in settlement.³¹ The supreme court upheld the trial court's refusal to allow the CPA claim to go the jury, noting that the claim represented nothing more than an indirect attempt to obtain contribution from the drug company.³² Because the parties' settlements had both been determined to be reasonable, their contribution rights were extinguished by statute, and the insurer therefore was not entitled to recovery.³³

The *Fisons* court did not, as PJ asserts, broadly rule that a CPA claim is an indemnity claim in disguise and is therefore prohibited. And it certainly did not conclude that a party may not assert both a breach of contract claim and an indemnity claim, even if the same damages may support both claims. Instead, the issue before the court was whether the approval of the parties' settlements as reasonable precluded a subsequent

³¹ *Fisons*, 122 Wn.2d at 323.

³² *Id.*

³³ *Id.* at 323-24.

contribution claim. That issue is not present here, and the *Fisons* decision provides no guidance.

PJ also cites *Urban Development v. Evergreen Building Products*,³⁴ for the proposition that Washington courts do not allow claims for implied or equitable indemnity.³⁵ Aside from the fact that there is, in fact, a written indemnity agreement in this case, the *Urban Development* court specifically recognized, “A right of *implied* contractual indemnity arises when one party incurs a liability the other party should discharge by virtue of the nature of the relationship between the parties.”³⁶ The court added that the right to indemnity is not implicit in every contractual relationship; it did not hold that no such right exists.³⁷

In short, contrary to PJ’s assertion, there is no reason why Polygon cannot assert claims for both indemnity and breach of contract, as long as it does not receive a double recovery. The fact that Polygon’s breach of contract damages may be similar or identical to its indemnity damages

³⁴ *Urban Dev., Inc. v. Evergreen Bldg. Prods., LLC*, 114 Wn. App. 639, 59 P.3d 112 (2003), *aff’d*, *Fortune View Condo. Ass’n v. Fortune Star Dev. Co.*, 151 Wn.2d 534, 90 P.3d 1062 (2004)).

³⁵ PJ’s Response Brief at 35.

³⁶ *Urban Dev.*, 114 Wn. App. at 644 (citing *Cent. Wash. Refrigeration, Inc. v. Barbee*, 133 Wn.2d 509, 513, 946 P.2d 760 (1997)) (emphasis added).

³⁷ *Id.*

does not preclude recovery on the breach of contract claim, as long as Polygon can establish each element of that claim.

D. The trial court erred in ruling that Polygon could not pursue claims against P.J. Interprize, Inc., for work performed by P.J. Interprize, the sole proprietorship.

PJ contends it cannot be held liable for the sole proprietorship's work because (1) the sole proprietorship was discharged in bankruptcy and (2) Polygon did not plead and cannot prove a claim for "successor liability."³⁸ Neither argument is well-taken.

PJ asserts, "Polygon never filed a motion seeking relief from the automatic stay to pursue claims against the sole proprietorship."³⁹ In fact, this is precisely what Polygon did. PJ's argument is based upon the incorrect assumption that Polygon's motion for relief from stay applied to the corporation.⁴⁰ However, the corporation did not file for bankruptcy, so Polygon's motion and the bankruptcy court's order granting that motion necessarily applied only to the sole proprietorship.

The relief from stay order granted Polygon the authority to proceed against "the Debtor" for the purpose of recovering "the Debtor's" insurance proceeds. (CP 1210) The corporation was not "the Debtor."

³⁸ PJ's Response Brief at 35-39.

³⁹ *Id.* at 37.

⁴⁰ *Id.*

The bankruptcy petition states that the names of the debtors are Gerald Lynn Utley and Mary Ellen Utley. (CP 1183) The petition characterizes the debtor as an individual, not a corporation.⁴¹ (*Id.*) The second page of Utley's bankruptcy petition lists separate signature boxes for individual/joint debtors and corporation/partnership debtors. (CP 1184) Utley and his wife signed the individual/joint debtor box, not the corporation/partnership box. (*Id.*) It is evident, then, that the bankruptcy court's relief from stay order could only have applied to the sole proprietorship, not to the corporation. Thus, Utley's discharge in bankruptcy did not preclude Polygon from pursuing claims against the sole proprietorship, at least to the extent of any available insurance proceeds.

PJ also argues that Polygon failed to assert a "claim for successor liability" and thus cannot seek recovery for damages arising from the sole proprietorship's work.⁴² PJ cites no authority for the proposition that a separate "claim" for successor liability must be alleged in a complaint. Instead, successor liability is merely a *theory* under which one entity may be held responsible for the acts or omissions of a prior related entity.

⁴¹ The petition describes the nature of the debts as "business debts." (CP 1183) Cambridge Townhomes, LLC, is listed as an unsecured creditor with respect to "asserted or potential construction defect claims." (CP 1188)

⁴² PJ's Response Brief at 38-39.

As explained in Polygon's opening brief, the purpose of the doctrine of successor liability is to prevent an entity from escaping liability merely by "changing hats."⁴³ The same principle applies here—i.e., the sole proprietorship should not be able, by converting itself into a corporation, to wipe the slate clean with respect to any of its former acts or omissions when, in fact, there is no practical difference between the sole proprietorship and the corporation.

The trial court correctly noted that the corporation was, in fact, merely a continuation of the sole proprietorship, with the same individuals involved in the same business. (10/21/05 RP at 66) PJ does not dispute this. Instead, PJ relies only on the sole proprietorship's discharge in bankruptcy and the assertion that successor liability cannot apply to a sole proprietorship to support its argument that the corporation cannot be held liable for the sole proprietorship's actions. As explained above and in Polygon's opening brief, PJ's arguments are not well-taken, and the trial court's ruling on this issue should be reversed.

E. The trial court erred in denying Polygon's motion to amend its complaint.

Polygon sought leave to amend its complaint to name Gerald Utley d/b/a P.J. Interprize as an additional defendant after the trial court ruled

⁴³ See *Gall Landau Young Constr. Co. v. Hedreen*, 63 Wn. App. 91, 96-97, 816 P.2d 762 (1991).

that Polygon could not proceed against P.J. Interprize, Inc., for work performed by the sole proprietorship. PJ contends the trial court properly denied Polygon's motion to amend because (1) Polygon waited too long to add the sole proprietorship as a defendant, (2) the sole proprietorship would be prejudiced by the amendment, (3) claims against the sole proprietorship were barred by the statute of limitations, and (4) the claims against the sole proprietorship were discharged in bankruptcy.⁴⁴ None of these arguments is well-taken, and the trial court's ruling should be reversed.

First, Polygon's delay in naming the sole proprietorship was due in large part to PJ's repeated blurring of the distinction between the sole proprietorship and the corporation.⁴⁵ It was not until the trial court ruled that Polygon could not proceed against the corporation for work performed by the sole proprietorship that it became evident Polygon would need to amend its complaint. Polygon filed its motion to amend approximately one week after the court's ruling; it should not be said to have "unduly delayed" its request to amend the complaint.

Second, there is no evidence of any prejudice to either the corporation or the sole proprietorship. PJ asserts its counsel could not

⁴⁴ PJ's Response Brief at 40-44.

⁴⁵ See Appellants' Opening Brief at 33-34.

represent both the sole proprietorship and the corporation because that would constitute a “direct conflict of interest.”⁴⁶ PJ does not explain why this is so. Both the sole proprietorship and the corporation were headed by Gerald Utley, and there is no apparent conflict between the interests of the two entities. And, as noted in Polygon’s opening brief, Utley was well aware of both the litigation and the claims against the sole proprietorship and would not have been prejudiced as a result of the amendment.

Moreover, as explained above, the decisions in *MacLean* and *Ballard Square* require reversal and remand to the trial court for further proceedings. Utley will have ample time to respond to Polygon’s claims against the sole proprietorship following remand and the setting of a new trial date.

Third, amending the complaint to add the sole proprietorship would not have been futile, as PJ claims, because the claims against the sole proprietorship would not be barred by the statute of limitations. PJ does not address CR 15(c), which describes the circumstances under which an amendment to a pleading relates back to the date of the original pleading. Those circumstances are present here—i.e., the amendment involves the same occurrence set forth in the original complaint and Utley

⁴⁶ PJ’s Response Brief at 41.

would not be prejudiced—and the amended complaint therefore would be deemed to have been filed March 24, 2004.

Even if there is no relation back, Polygon's claims against the sole proprietorship would not be barred. PJ asserts that, because construction on Phase II was substantially complete by October 1, 1999, Polygon had to file its claim against the sole proprietorship by October 1, 2005.⁴⁷ In support of this assertion, PJ cites RCW 4.16.310. This statute simply provides that a cause of action must *accrue* within six years of substantial completion; it does not require that a lawsuit be filed within that time period. The undisputed evidence establishes that Polygon's claims against the sole proprietorship accrued in early 2003, when Polygon discovered the construction defects at issue here. (CP 456, 459) This is well within the six-year period set forth in RCW 4.16.310.⁴⁸ Polygon moved to amend its complaint within six years of the accrual of its claims against

⁴⁷ PJ's Response Brief at 42.

⁴⁸ Nor is Polygon's claim barred by RCW 4.16.326(1)(g), which provides that the applicable contract statute of limitations expires six years after substantial completion, regardless of discovery. In *1000 Va. Ltd. P'ship v. Vertecs Corp.*, No. 77362-9 (Wash. Sup. Ct. Nov. 9, 2006), the supreme court recognized that RCW 4.16.326(1)(g) does not apply retroactively to causes of action arising before its enactment. Slip op. at 24. The court further ruled that the discovery rule should apply to "contract claims involving latent construction defects." *Id.* at 13. Because Polygon discovered the construction defects at issue in early 2003—before the July 27, 2003, effective date of RCW 4.16.326(1)(g) and less than six years before Polygon moved to amend its complaint on November 4, 2005—its claim is not time-barred. (See CP 456, 459, 2048-56)

the sole proprietorship, and the statute of limitations therefore does not bar Polygon's claims.

Finally, Utley's discharge in bankruptcy does not preclude amendment of the complaint. As noted above, Polygon obtained permission to proceed against the sole proprietorship, *not* the corporation, for the purpose of recovering from the sole proprietorship's insurers. Moreover, even if Polygon had not obtained relief from stay, it could still pursue a claim against the sole proprietorship as long as any recovery was limited to insurance proceeds. In *Arreygue v. Lutz*,⁴⁹ discussed at length in Polygon's opening brief, Division III ruled that the defendant's bankruptcy discharge did not bar a lawsuit against her for the sole purpose of recovering from her insurer. The court explained, "[T]he plaintiff may continue a lawsuit initiated before the bankruptcy was filed or commence a lawsuit after the discharge is granted. In either case, the debtor does not need the permission of the bankruptcy court."⁵⁰

Inexplicably, PJ does not mention applicable Washington law, the *Arreygue* decision, in its response. Instead, PJ continues to rely on *In re Lundberg*,⁵¹ a decision from an Oklahoma bankruptcy court which reflects

⁴⁹ *Arreygue v. Lutz*, 116 Wn. App. 938, 69 P.3d 881 (2003).

⁵⁰ *Arreygue*, 116 Wn. App. at 944.

⁵¹ *In re Lundberg*, 152 B.R. 316 (Bankr. E.D. Okla. 1993).

the minority viewpoint. PJ's reliance on *Lundberg* is improper when there is binding Washington law on point. Under Washington law, Polygon may proceed against the sole proprietorship for the purpose of obtaining insurance proceeds.

In sum, any delay by Polygon in moving to amend its complaint did not result from inexcusable neglect. Polygon requested such relief immediately after the trial court ruled that, even though the corporation was a continuation of the sole proprietorship, Polygon could not proceed against the corporation with respect to work performed by the sole proprietorship. Moreover, PJ has failed to show any prejudice resulting from an amendment to the complaint, and such an amendment would not be futile. The trial court abused its discretion in denying Polygon's motion to amend, and this ruling should therefore be reversed.

F. The trial court erred in ruling Polygon bears the burden of proving which defects are latent.

PJ asserts Cambridge "confuses" the issue regarding which party bears the burden of proof on this issue.⁵² In fact, it is PJ who is confused. As PJ points out, a party may waive its right to assert a breach of contract

⁵² PJ's Response Brief at 45.

claim if it accepts performance in spite of patent defects.⁵³ Waiver is an affirmative defense, with the burden of proof on the defendant.⁵⁴

In order to recover for PJ's defective work, Polygon bears the initial burden of showing that work was defective. In order to establish waiver, however, PJ bears the burden of proof, including the burden to prove such defects were patent. Polygon does not bear the burden of proving the absence of PJ's defense—i.e., latency—and the trial court's ruling to this effect should therefore be reversed.

The trial court erred in striking portions of the declaration of Mark Jobe.

PJ contends the trial court did not abuse its discretion in rejecting portions of Jobe's expert testimony.⁵⁵ First, as Polygon pointed out in its opening brief, the appellate courts engage in de novo review of evidentiary rulings made in connection with summary judgment motions.⁵⁶ The cases cited by PJ regarding the abuse of discretion standard involved testimony presented at trial and thus are readily distinguishable.

⁵³ *Id.* at 44-45.

⁵⁴ *Jones v. Best*, 134 Wn.2d 232, 242, 950 P.2d 1 (1998).

⁵⁵ PJ's Response Brief at 46.

⁵⁶ *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998) (de novo standard of review applied to all trial court rulings made in conjunction with a summary judgment motion).

Second, the trial court erred in excluding Jobe's testimony. PJ asserts that testimony was properly excluded because Jobe was not present at the jobsite.⁵⁷ Not surprisingly, PJ cites no authority for this proposition, and it is difficult to envision a situation in which an expert witness *would* be present when a claim arose.

Moreover, contrary to PJ's assertion, Jobe's declaration establishes that he had ample construction experience and was qualified to offer an opinion regarding whether the defects at issue were patent or latent. (See CP 1599) And, any alleged deficiencies in Jobe's qualifications should have gone to the weight of his testimony, not its admissibility.⁵⁸ The trial court's ruling striking portions of Jobe's testimony should be reversed.

H. PJ and PSR are not entitled to an award of attorney fees.

PJ and PSR assert they are entitled to recover attorney fees incurred in connection with responding to Polygon's indemnity claim.⁵⁹ PJ asserts it is entitled to recover attorney fees because "the indemnity clause [in the Master Agreement] provides that should any dispute arise with respect to the applicability and/or interpretation of the rights to indemnification, the prevailing party shall be entitled to recover its

⁵⁷ PJ's Response Brief at 46.

⁵⁸ *State v. Rangitsch*, 40 Wn. App. 771, 779, 700 P.2d 382 (1985).

⁵⁹ PJ's Response Brief at 47; PSR's Response Brief at 17.

reasonable attorney fees and costs in addition to any other remedy.”⁶⁰ PJ contends, however, that Polygon is not entitled to recover its attorney fees if it prevails because the subcontract does not contain an attorney fee provision.⁶¹ PJ does not explain why its right to attorney fees is governed by the Master Agreement while Polygon’s is governed by the subcontract. In fact, the Master Agreement applies to Polygon as well, and Polygon is therefore entitled to an attorney fee award if it prevails.

As explained above, the dismissal of that claim should be reversed in light of the recent *MacLean* and *Ballard Square* decisions, and summary judgment should be entered in favor of Polygon on this issue.⁶²

Accordingly, Polygon, not PJ and PSR, is entitled to an award of attorney fees incurred on appeal.

⁶⁰ PJ’s Response Brief at 47. This is actually a paraphrase of the indemnity provision in the PSR Master Agreement, not the PJ Master Agreement. (See CP 541) The PJ agreement also provides for attorney fees, however. (See CP 558)

⁶¹ PJ’s Response Brief at 48.

⁶² Contrary to PSR’s assertion, Polygon does not argue it is entitled to summary judgment on its indemnity claim in its entirety. The trial court granted summary judgment in favor of PJ and PSR on the indemnity issue on the grounds that (1) the indemnity provision in the PJ agreement did not apply to tort claims and (2) Polygon’s indemnity claim against PSR was barred as a post-dissolution claim. Polygon is entitled to summary judgment on these issues, and it is entitled to recover attorney fees incurred in litigating these issues.

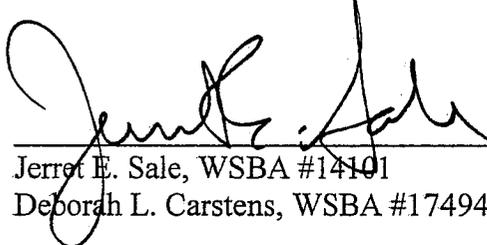
III. CONCLUSION

For the reasons set forth above and in Polygon's opening brief, Polygon respectfully requests that the trial court decisions appealed from be REVERSED.

DATED this 22nd day of November, 2006.

BULLIVANT HOUSER BAILEY PC

By



Jerrol E. Sale, WSBA #14101

Deborah L. Carstens, WSBA #17494

Attorneys for Appellants Cambridge Townhomes
and Polygon Northwest Company

CERTIFICATE OF SERVICE

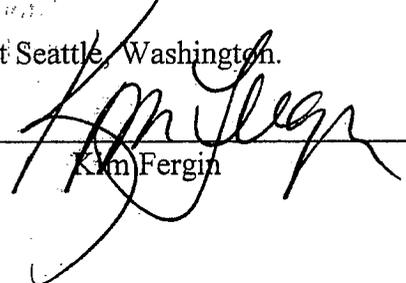
The undersigned certifies that on November 22, 2006, I caused to

be served this document to:

Eileen I. McKillop hand delivery.
Oles Morrison Rinker & Baker first class mail.
701 Pike St., Ste. 1700 facsimile.
Seattle, WA 98101-3930

Gregory P. Turner hand delivery.
Lee Smart Cook Martin & first class mail.
Patterson, P.S., Inc. facsimile.
701 Pike St., Ste. 1800
Seattle, WA 98101-3929

I declare under penalty of perjury under the laws of the State of
Washington this November 22, 2006, at Seattle, Washington.



Kim Fergin

3514335.1

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2006 NOV 27 AM 10:30

APPENDIX A

INDEMNITY PROVISION IN PJ MASTER AGREEMENT

SUBCONTRACTOR shall defend, indemnify, and hold CONTRACTOR harmless from any and all claims, demands, losses and liabilities to or by third parties arising from, resulting from, or connected with, services performed or to be performed under this Subcontract by SUBCONTRACTOR or SUBCONTRACTOR'S agents, employees, subtier Subcontractors, and suppliers to the fullest extent permitted by law and subject to the limitations provided below.

SUBCONTRACTOR'S duty to indemnify CONTRACTOR shall not apply to liability from damages arising out of bodily injury to persons or damages to the property caused by, or resulting from, the sole negligence of CONTRACTOR, or CONTRACTOR'S agent[s] or employees.

SUBCONTRACTOR'S duty to indemnify CONTRACTOR for liability for damages arising out of bodily injury to persons or damages to property caused by or resulting from the concurrent negligence of CONTRACTOR or CONTRACTOR'S agents or employees shall apply only to the extent of negligence of SUBCONTRACTOR or SUBCONTRACTOR'S agents, employees, and subtier Subcontractors and suppliers.

SUBCONTRACTOR specifically and expressly waives any immunity that may be granted it under the Washington State Industrial [Insurance] Act, Title 51, RCW. Further, the indemnification obligation under this Subcontract shall not be limited in any way by any limitation on the amount or type of damages, compensation, or benefits payable to or for any third party under Worker's Compensation Acts, Disability Benefit Acts, or other employee benefits acts.

SUBCONTRACTOR'S duty to defend, indemnify, and hold CONTRACTOR harmless as to all claims, demands, losses, and liabilities shall include CONTRACTOR'S personnel related costs, reasonable attorney fees, court [costs], and all related expenses.

CONTRACTOR and SUBCONTRACTOR hereby certify that these indemnification provisions were mutually negotiated and agreed to by the parties.

(CP 557-58)