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STATE OF WASHINGTON

Court of Appeals No. 57328-4-1

SUPREME COURT OF THE STATE OF WASHINGTON

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

Respondents,

v.

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

Petitioner.

PETITION FOR REVIEW BY THE SUPREME COURT

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A. IDENTITY OF PETITIONER

Petitioner P.J. Interprize, Inc. (hereinafter "Corporation") asks this Court to accept review of the Court of Appeals' decisions terminating review designated in Part B of this petition.

B. COURT OF APPEALS' DECISIONS

Petitioner seeks review of the Court of Appeals' unpublished decision in *Cambridge Townhomes, LLC v. Pacific Star Roofing, Inc.*, No. 57328-4-I, filed on June 11, 2007; the Court of Appeals' Order Granting Cambridge's Motion to Strike the Appendixes to the Corporation's brief, filed on June 11, 2007; and the Court of Appeals' Order Denying P.J. Interprize, Inc.'s Motion for Reconsideration, filed on October 25, 2007.¹

C. ISSUES PRESENTED FOR REVIEW

One of the fundamental issues in this case is whether the Corporation of PJ Interprises can be held responsible for an alleged liability of a sole proprietorship under a preceding, totally independent contract with Cambridge, and whose debts to Cambridge had been previously discharged in bankruptcy. The Court of Appeals found that the Corporation is a mere continuation of and successor to the sole proprietorship, even though the sole

¹ A copy of the Court of Appeals' decisions are in the Appendix at Exhibits A, B and C.

proprietorship disclosed Cambridge's unliquidated claim against him in the bankruptcy; Cambridge was designated as a creditor in the bankruptcy, the sole proprietorship was subsequently discharged in bankruptcy, the Bankruptcy Court limited Cambridge's right to pursue claims against the sole proprietorship to the extent of its insurance; and Cambridge never actually asserted a claim of successor liability against the Corporation. The Court of Appeals erroneously concluded that the mere continuation exception applied to the Corporation because the Corporation and sole proprietorship "performed the same work for the same contractor". There was no continuity of shareholders, officers, or stockholders between the sole proprietorship and the Corporation, and the Court of Appeals conceded that the Corporation did not purchase the assets of the sole proprietorship. The Court of Appeals' decision conflicts with public policy regarding a discharge in bankruptcy and results in a "windfall" to Cambridge who has been given an additional party to sue on a discharged debt.

Another issue in this case is whether Cambridge's claims against the sole proprietorship are barred under RCW 4.16.326, and whether Cambridge's motion to amend its complaint to name the sole proprietorship was properly denied. The Court of Appeals

erroneously concluded that Cambridge's breach of contract and indemnity claims against the sole proprietorship are not barred by the statute of limitations finding that a purported November 21, 2003 settlement between Cambridge and the Association meant that Cambridge was "legally adjudged liable" and that its claims "accrued" within the six year statute of repose under RCW 4.16.310. The Court of Appeals fails to comprehend the accrual of an indemnity claim and the distinction between a statute of repose and a statute of limitation. The Court of Appeals improperly struck evidence that conclusively showed that the November 21, 2003 settlement fell through because it was not funded by the December 21, 2003 deadline, and consequently, the Association filed suit against Cambridge on December 22, 2003. There was no evidence that Cambridge actually paid the Association any damages and it was never legally adjudged liable to the Association.

Additionally, RCW 4.16.326 became effective July 27, 2003, and applies to terminate the statute of limitations six years after substantial completion or termination of services listed in RCW 4.16.300, whichever is later. Even assuming Cambridge's indemnity claim accrued on November 21, 2003, Cambridge did not

file its Complaint against the sole proprietorship within six years of substantial completion of Phase II and its claims are clearly barred. The Court of Appeals erred in finding that the statute of limitations does not bar Cambridge's claims merely because the claims "accrued" within the six year period set forth in RCW 4.16.310.

Another issue of substantial public interest raised by this appeal is the conflict regarding the interpretation and scope of an indemnity clause in the context of a claim for only economic damages caused by construction defects. This case addresses the issue of whether the general language in the first paragraph of an indemnity clause can be isolated and construed independent of the remaining five paragraphs, to require a subcontractor to indemnify the Developer/General Contractor for its own statutory duties under Washington's Condominium Act, its contractual obligations to the Homeowners, and its own tortuous acts, regardless of whether the economic damages are connected with the subcontractor's breach of its own contractual duties. The Court of Appeals relied on *MacLean Townhomes, LLC v. America 1st Roofing & Builders, Inc.*, 133 Wn.App. 828, 138 P.3d 155 (2006), which was wrongly decided, to find that the general language in the indemnity agreement covers any and all damages suffered by the indemnitee,

including economic damages caused by construction defects, regardless of whether the loss is connected with the indemnitor's breach of its contractual duties. The Court of Appeals' decision in this case and in *MacLean* is in direct conflict with this court's decision in *Jones v. Strom Construction Co., Inc.*, 84 Wn.2d 518, 521, 527 P.2d 1115 (1974). Reviewing the indemnity provision in its entirety shows that the Corporation has an obligation to indemnify Cambridge only in situations involving tortious conduct, not economic damages caused by a breach of contract.

This case also addresses the issue of whether Cambridge may seek indemnity damages from the Corporation under a separate breach of contract theory, when it has no right to indemnity. The Court of Appeals did not even address this important issue. Washington law requires a separate written indemnity agreement and Cambridge should not be entitled to recover indemnity damages under a separate breach of contract theory.

D. STATEMENT OF THE CASE

Polygon Northwest Company ("Polygon") was the developer of a condominium project called the Cambridge Townhomes Condominium project. (CP 4). Cambridge Townhomes, LLC

("Cambridge") was the general contractor on the project. (CP 4). The Project was constructed in three phases. Phase I consists of Buildings 1 through 10, Phase II consists of Buildings 11 through 31, and Phase III consists of Buildings 32 to 41. (CP 98-111 and 456).

Defendant 4 Bee's Siding, Inc. subcontracted with Cambridge to install the vinyl siding and trim on Phase I of the Project. (CP 98-99). On August 26, 1998, the sole proprietorship of Gerald Utley d/b/a P.J. Interprize ("sole proprietorship") subcontracted with Cambridge to install vinyl siding and trim on Phase II of the Project. (CP 98-101). The sole proprietorship's work on Phase II was completed by November 1998. (CP 98-101). The temporary certificate of occupancies for all of the buildings in Phase II were issued on October 1, 1999. (CP 2276-2279).

The corporation of PJ Interprize, Inc. was not formed until January 1999, several months after the sole proprietorship completed its work on Phase II. (CP 98-99). Four months later, on April 21, 1999, the Corporation contracted with Cambridge under a separate subcontract to install the vinyl siding and trim for Phase III of the Project. (CP 98-111). A Master Agreement dated January 7, 1999 contains the following indemnity 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 or employees.

SUBCONTRACTOR'S duty to indemnify CONTRACTOR for liability for damages arising out of bodily injury to person 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'S 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 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 (sic), and all related expenses.

(CP 271-275), ¶(Q) (Emphasis ours).

In February 2004, Gerald Utley d/b/a P.J. Interprize, Inc. filed for bankruptcy in the United State Bankruptcy Court for the Western District of Washington. (CP 1183-1207). The Bankruptcy Petition lists the Debtors as Gerald and Mary Utley dba P.J. Interprize, Inc. (1183-1184). The schedules of creditors holding secured and unsecured claims list Cambridge Townhomes, LLC as a creditor. (CP 1188). On February 27, 2004, the Debtors received a Chapter 7 bankruptcy discharge under 11 U.S.C. § 727 (CP 1206-1207).

A month later, on March 24, 2004, Cambridge filed a Complaint against twelve (12) subcontractors, including the Corporation, for alleged deficiencies relating to the construction of the Project. (CP 237-252). The Complaint did not name the sole proprietorship as a party. (CP 237-252). The Complaint alleges causes of action against the Corporation for breach of contract, contractual indemnity, and breach of the duty to defend. The Complaint does not allege a cause of action against the Corporation for successor liability.

Two months after filing its Complaint, on May 28, 2004, Cambridge filed a "Motion for Relief from Automatic Stay to Pursue Insurance of Debtor" in the United States Bankruptcy Court to pursue its claims against the sole proprietorship. (CP 277-283). In

June 2004, Judge Thomas Glover issued an Order granting Cambridge's motion for relief from the automatic stay to pursue the sole proprietorship's insurance proceeds only. (CP 285-286).

Cambridge's asserted on appeal that it had entered into a settlement with the Association for \$5.3 million on November 21, 2003 and that its indemnity claim accrued at that time. (Appellant's Brief, page 6; CP 241). The Corporation presented additional evidence in the form of the Association's Complaint filed against Cambridge on December 22, 2003, which directly refutes Cambridge's assertion that it settled with the Association on November 21, 2003 and that its indemnity claim accrued at that time. The Court of Appeals improperly struck this evidence, and there was no evidence that Cambridge actually paid the Association anything.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. THE COURT OF APPEALS' RULING CAN NOT STAND AS IT CONFLICTS WITH PUBLIC POLICY REGARDING A DISCHARGE IN BANKRUPTCY.

Cambridge is attempting to circumvent the Bankruptcy Court's discharge and do an end-run on the Bankruptcy Court's order by seeking to hold the Corporation liable for the alleged contractual liabilities of the sole proprietorship under a successor

liability theory. The sole proprietorship listed Cambridge as a named creditor in the bankruptcy proceedings. Schedule F describes the date the claim was incurred as "2003 - asserted or potential construction defect claims". On June 10, 2004, after a "no assets finding," the sole proprietorship was awarded a Chapter 7 bankruptcy discharge. Under 11 U.S.C. § 727(b), a bankruptcy order discharges the debtors from all debts arising prior to the order. Furthermore, 11 U.S.C. § 524(a) (Supp.1989) prohibits collection efforts on those debts. Thus, Cambridge is prohibited from pursuing any claims against the sole proprietorship for its work on the Project.

On May 28, 2004, Polygon filed a motion for relief from automatic stay, requesting that the Bankruptcy Court allow it to pursue the sole proprietorship "only" to the extent of its insurance proceeds. The Bankruptcy Court granted the motion, and Cambridge was allowed to proceed against the sole proprietorship but only to the extent of its insurance proceeds.

The Court of Appeals refused to recognize the bankruptcy discharge and the Bankruptcy Court's Order, and held the Corporation to be a mere continuation of the sole proprietorship and responsible for the sole proprietorship's previously discharged

debts. The Court of Appeals' decision conflicts with the laws governing a discharge in bankruptcy.

2. CAMBRIDGE DID NOT ASSERT A CLAIM FOR SUCCESSOR LIABILITY AGAINST THE CORPORATION AND THERE ARE NO GROUNDS TO SUPPORT A MERE CONTINUATION THEORY.

A second factor weighing against Cambridge is that it never asserted a claim for successor liability against the Corporation, and never sought to amend its Complaint to assert such a claim. The Court of Appeals' consideration of this claim, in effect, allowed Cambridge to amend its pleadings on appeal. Nor did Cambridge present evidence that the Corporation is a mere continuation of the sole proprietorship. The Corporation was not incorporated until after the sole proprietorship had completed its contract on Phase II. There is no dispute that the stockholders and officers of the Corporation, including Gerry Utley, had no knowledge of any claims against the sole proprietorship at the time it was incorporated. Cambridge knew of the formation of the Corporation and entered into a separate contract with Corporation for Phase III of the project. The general rule in Washington is that a corporation that purchases the assets of another corporation is generally not liable

for the debts of the seller corporation.² This rule is subject to four limited exceptions where: (1) the purchaser expressly or impliedly agrees to assume liability; (2) the purchase is a de facto merger or consolidation; (3) the purchaser is a mere continuation of the seller; or (4) the transfer of assets is for the fraudulent purpose of escaping liability.³

To prevail on the theory of “mere continuation”, proof of **at least two elements** is required. The first element is “a common identity of the officers, directors, and stockholders in the selling and purchasing companies.”⁴ The second element is “the sufficiency of the consideration running to the seller corporation in light of the assets being sold.”⁵ Even if one accepts the Court of Appeal’s theory that the form of the predecessor business organization, be it sole proprietorship, partnership or corporation, is irrelevant, the record in this case does not support the conclusion that the Corporation is a mere continuation of the sole proprietorship. There was no common identity of officers, directors or stockholders between the two entities. Although Gerry Utley was the sole

² *Hall v. Armstrong Cork., Inc.*, 103 Wn.2d 258, 261, 692 P.2d 787 (1984).

³ *Hall*, 103 Wn.2d at 261-62, 692 P.2d 787.

⁴ *Cashar v. Redford*, 28 Wn. App. 394, 397, 624 P.2d 194 (1981); *accord Long v. Home Health Servs. of Puget Sound, Inc.*, 43 Wn. App. 729, 735, 719 P.2d 176, *review den’d*, 106 Wn.2d 1012 (1986).

⁵ *Cashar*, 28 Wn. App. at 397, 624 P.2d 194.

proprietorship and the President of the Corporation, the other officers and stockholders had no ownership in the sole proprietorship. Because there was no continuity of shareholders, officers, or stockholders, the general rule, if applied according to its terms, would preclude liability as a matter of law.

Another crucial factor in a “mere continuation” is the sufficiency of the consideration in light of the assets being sold. The Court of Appeals conceded that the Corporation did not purchase the assets of the sole proprietorship, and there was no evidence that any part of the sole proprietorship or its assets or liabilities continued on in the form of the Corporation. The fact that the sole proprietorship and the Corporation performed similar types of work does not bring this case within the “mere continuation” exception to the general rule of nonliability.

This case is similar to *Consolidated Services and Construction, Inc. v. S.R. McGuire Builder and General Contractor, Inc.*⁶ In *Consolidated*, the Illinois Court of Appeals refused to find successor liability because the claims were discharged in bankruptcy, despite the allegation that Marszalek continued

⁶ *Consolidated Services and Construction, Inc. v. S.R. McGuire Builder and General Contractor, Inc.*, 367 Ill. App. 3d 324, 854 N.E.2d 715 (2006).

operating Consolidated through a sole proprietorship, which used a similar business name of the corporation. The court refused to allow McGuire to pursue successor liability because it would conflict with the public policy regarding a discharge in bankruptcy.⁷ The same reasoning was reached in *Crane Const. Co. v. Klaus Masonry, LLC*.⁸

Another factor weighing against Cambridge is that a sole proprietorship, even after termination of the business entity, remains a viable defendant for suit and will remain responsible for his own acts. The sole proprietorship *cannot* avoid liability through incorporation. It is Cambridge's failure to pursue a claim against the sole proprietorship within the time limitations under RCW 4.16.326(1)(g) that prevents it from recovering against the sole proprietorship.

3. CAMBRIDGE'S CLAIMS AGAINST THE SOLE PROPRIETORSHIP ARE BARRED UNDER RCW 4.16.326(1)(g).

The Court of Appeals erroneously concluded that Cambridge's claims against the sole proprietorship are not barred because they "accrued" within the six year statute of repose under

⁷ *Consolidated Services and Construction, Inc. v. S.R. McGuire Builder and General Contractor, Inc.*, 367 Ill. App. 3d 324, 330, 854 N.E.2d 715 (2006).

⁸ *Crane Cons. Co. v. Klaus Masonry, LLC*, 114 F. Supp. 2d 1116 (D.Kan. July 06, 2000).

RCW 4.16.310. RCW 4.16.326 became effective July 27, 2003. RCW 4.16.326(1)(g) applies to Cambridge's claims against the sole proprietorship since its complaint was filed after July 27, 2003.⁹ Under RCW 4.16.326(1)(g), an action for construction defects must be filed within six years of substantial completion of construction, regardless of discovery. The temporary certificate of occupancies for Phase II were issued on October 1, 1999. The six-year statute of limitations on Cambridge's claims against the sole proprietorship expired on October 1, 2005. Thus, Cambridge's claims against the sole proprietorship are clearly barred. The Court of Appeals' erred in finding that the statute of limitations does not bar Cambridge's claims against the sole proprietorship.

4. THE COURT OF APPEALS MISAPPREHENDS THE ACCRUAL OF AN INDEMNITY CLAIM.

The Court of Appeals came to the erroneous conclusion that Cambridge was "adjudged obligated to pay damage to the Association" and its right to seek indemnity accrued at the time of the purported November 21, 2003 settlement with the Association. An indemnity claim does not begin to accrue until the party seeking indemnity pays *or* is legally adjudged obligated to pay damages to

⁹ *Fraser v. Beutel*, 56 Wn. App. 725, 785 P.2d 470 (1990).

a third-party.¹⁰ The evidence shows that the November 21, 2003 settlement fell through because it was not funded by the December 21, 2003 deadline. Consequently, the Association filed suit against Cambridge on November 22, 2003. A promise to pay a settlement amount “conditional on funding” is only a conditional promise, and establishes a mere potential, not actual, liability. An indemnity claim accrues when the payment is actually made.¹¹ Cambridge’s argument to the contrary is unsupported by legal authority and contrary to this clear precedent.

Furthermore, nothing in the record indicates that Cambridge was legally adjudged liable to the Association. “Adjudged” is defined as “to pass on judicially...and implies a judicial determination of a fact and the entry of a judgment.”¹² Simply entering into a contingent settlement agreement does not mean that a party is “legally adjudged liable” to pay. Although the Association eventually filed suit against Cambridge, there was no finding of liability in that action. The Court of Appeals improperly

¹⁰ *Parkridge Assoc., Ltd. v. Ledcor Industries, Inc.*, 113 Wn. App. 592, 598, 54 P.3d 225 (2002).

¹¹ *Central Wash. Refrigeration, Inc. v. Barbee*, 133 Wn.2d 509, 516-18, 946 P.2d 760, 764-65 (1997) (citing *Smith v. Jackson*, 106 Wn.2d 298, 302, 721 P.2d 408 (1986); *Earley v. Rooney*, 49 Wn.2d 222, 228, 299 P.2d 209 (1956); 42 C.J.S., Indemnity § 44, at 137 (1991)).

¹² Black’s Law Dictionary 321 (6th ed. 1990).

struck evidence of the Association's Complaint against Cambridge filed on December 22, 2003, which directly refutes Cambridge's assertion that it is indemnity claim accrued on November 21, 2003.

5. THE MACLEAN CASE IS IN DIRECT CONFLICT WITH A DECISION OF THE SUPREME COURT AND SHOULD BE OVERRULED.

The form of indemnity clause in this case is identical to the form used by thousands of developers, general contractors, and subcontractors in the State of Washington and contain almost verbatim the wording of Washington's anti-indemnity statute, RCW 4.24.115, which prohibits indemnification for "damages ...caused by...the sole negligence" of the indemnitee. The Court of Appeals relied exclusively on its earlier decision in *MacLean Townhomes, LLC v. America 1st Roofing & Builders, Inc.*, 133 Wn.App. 828, 138 P.3d 155 (2006), to find that the first paragraph of the indemnity provision required the Corporation to indemnify Cambridge for any and all damages its suffered, including economic damages caused by construction defects, regardless of whether the Corporation breached its contractual duties. The only condition necessary to invoke the duty to indemnify is that the claim have some connection with the Corporation's performance of its subcontract.

The Court of Appeals' decision in *MacLean* directly contravenes this court's decision in *Jones v. Strom Construction Co.*, 84 Wn.2d 518, 527 P.2d 1115 (1974), which overruled *Tucci & Sons v. Carl T. Madsen, Inc.*, 1 Wn.App. 1035, 467 P.2d 386 (1970), which upheld an indemnity agreement with the same general language 'arising out of, in connection with, or incident to the subcontractor's performance ***', as requiring the indemnitor to indemnify for all losses suffered by the indemnitee, 'of whatsoever kind or nature,' so long as they had some connection with the indemnitor's performance of the subcontract. The Court of Appeals adopted the same broad all inclusive interpretation of the first paragraph of the indemnity agreement, and rejected the remaining five paragraphs of the indemnity provision which tie the losses to the Corporation's "performance" of the subcontract, and only to the extent of the Corporation's negligence. It mentions nothing about Cambridge's breach of its separate statutory duties under Washington's Condominium Act, its contractual obligations to the Homeowners, or its contractual obligations as a Developer/General Contractor.

Contracts of indemnity are subject to the same rules of construction governing other contracts, i.e., the intent of the parties

controls.¹³ The intent of the parties to a contract is determined not only from the actual language of the agreement, but also from “viewing the contract as a whole, the subject matter and objective of the contract, all of the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of the respective interpretations advocated by the parties”.¹⁴ If an ambiguity exists, the court should resolve the ambiguity against the party that prepared the contractual provision.¹⁵ Contracts for indemnity are interpreted narrowly in favor of the indemnitor.¹⁶

In keeping with these principles of construction, it is not reasonable or in keeping with the overall purpose and intent of the subcontract, to isolate and read only the first paragraph of the indemnity provision independent of the remaining five paragraphs, so as to cast the Corporation into the role of an insurer of Cambridge’s performance of its separate statutory and contractual obligations, so long as the losses have some connection with the Corporation’s work. Reviewing the indemnity provision in its

¹³ *Berg v. Hudesman*, 115 Wn.2d 657, 667, 801 P.2d 222 (1990).

¹⁴ *Id.*

¹⁵ *Jones v. Strom Construction Co., Inc.*, 84 Wn.2d 518, 520, 527 P.2d 1115 (1974).

¹⁶ *Jones v. Strom Construction Co., Inc.*, 84 Wn.2d 518, 521, 527 P.2d 1115 (1974).

entirety shows that the Corporation has a duty to indemnify Cambridge only in situations involving tortious conduct. This litigation involves a breach of contract claim for economic damages, and not a tort claim for bodily injury or property damage. The indemnity provision is not a proper vehicle for Cambridge to pass-through any and all claims against it.

F. CONCLUSION

For the foregoing reasons, the Corporation respectfully requests that the Court grant this Petition and reverse the Court of Appeals' unpublished decision in *Cambridge Townhomes, LLC v. Pacific Star Roofing, Inc.*, No. 57328-4-I, filed on June 11, 2007; and its decision granting Cambridge's Motion to Strike the Appendixes filed on June 11, 2007; and its decision denying the motion for reconsideration filed on October 25, 2007. Lastly, the *MacLean* decision should be overturned because it violates *Jones* and the indemnity provision as a whole only applies to tort claims under RCW 4.24.115.

DATED this 21 day of November, 2007.

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Inc.

APPENDIX A

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

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

Appellants,)

vs.)

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

Respondents,)

and)

4 BEES SIDING, INC., a Washington)
corporation; COURTESY GLASS, INC.,)
d/b/a PACIFIC DECKTEC, a)
Washington corporation, GIARD)
CONSTRUCTION LLC, a Washington)
Limited Liability Company; INTERWEST)
INDUSTRIES, INC., a Washington)
corporation; JANES BROTHERS)
WATERPROOFING, INC., a)
Washington corporation; UNITED)
DEVELOPMENT CORPORATION d/b/a)
MILL CREEK LANDSCAPING)
SERVICES, a Washington corporation;)
PUGET SOUND FOUNDATION)
SERVICES, INC., a Washington)

DIVISION ONE

No. 57328-4-I

UNPUBLISHED OPINION

FILED: June 11, 2007

corporation; CREATIVE CONCRETE,)
INC., a Washington corporation;)
J.S. CONTRACTING, INC., a)
Washington corporation,)
)
Defendants.)
_____)

BAKER, J. — Cambridge Townhomes, a developer, and Polygon Northwest Company, a general contractor, sued subcontractors Pacific Star Roofing, Inc. and P.J. Interprize, Inc. for breach of contract and indemnification. The superior court dismissed on the subcontractors' motion for summary judgment, ruling that the contracts with the subcontractors did not obligate the subcontractors to indemnify the plaintiffs, and that the plaintiffs' claims were barred by the corporate dissolution of the subcontractors. We reverse.

I.

Cambridge Townhomes, LLC was the developer, and Polygon Northwest Company (collectively "Polygon") was the general contractor on the Cambridge Townhomes Condominium development. Constructed in three phases between 1997 and mid-2000, the development consists of 40 multi-unit buildings. Polygon contracted with Pacific Star Roofing, Inc. (PSR) to perform roofing work, and with P.J. Interprize, Inc. (PJ) for siding installation. Polygon's contracts with PSR and PJ contained provisions requiring the subcontractors to indemnify and defend Polygon against all claims arising out of the work of the subcontractors.

In early 2003, Polygon was notified of construction defects in the units by the Cambridge Townhomes owners association. Polygon hired experts to investigate the

claims. The experts submitted reports confirming a number of construction defects that had resulted in water damage, including defects in siding and roofing installation.

Polygon and the owners association reached a settlement agreement in November 2003. The association sued to collect on the settlement in December 2003, and the claim was settled shortly thereafter.

PSR dissolved as a corporate entity in October 2003. PJ was administratively dissolved in March 2004, for failure to file a timely annual report or license renewal.

Polygon filed suit against various subcontractors in March 2004, seeking indemnification and asserting breach of contract. The trial court dismissed Polygon's indemnity claims against all defendants, ruling that the indemnity provision in the subcontracts did not apply. The court also ruled that Polygon could not proceed against PJ Interprise's predecessor, a sole proprietorship. In addition, it struck portions of one of the expert's declarations, and required Polygon to prove the alleged construction defects were latent.

The court subsequently dismissed Polygon's breach of contract claims against PSR and PJ.

II.

PSR and PJ assert that Polygon's claims against them are barred because they are post-dissolution claims. Additionally, PJ asserts that the indemnity agreement in its contract with Polygon does not cover damages caused by construction defects. Both assertions are erroneous. Recent decisions by this court and our Supreme Court support Polygon's claims.

This court reviews summary judgment orders de novo, and engages in the same inquiry as the trial court.¹ A summary judgment will be affirmed if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.² The de novo standard of review is applied to all trial court rulings made in conjunction with a summary judgment motion.³

Corporate Dissolution

The Washington Supreme Court recently ruled that corporations are not immune to post-dissolution claims. In Ballard Square Condominium Owners Association v. Dynasty Construction Co.,⁴ the court held that, in contrast to the harsh common law rule that barred all claims against a corporation after its dissolution, Washington statutes allow claims arising after a corporation is dissolved.⁵

At common law, when a corporation dissolved, it ceased to exist for all purposes and therefore could not sue or be sued.⁶ Although the right to sue a dissolved corporation did not exist at common law, the right does now exist by statute.⁷ The common law rule has been modified by the enactment of survival statutes which permit dissolved corporations to sue and be sued as part of their winding up activities for a limited time period.⁸

In Ballard Square, an owners association brought suit against a developer over construction defects that resulted in leaks and water damage. At the time the suit was

¹ Aba Sheikh v. Choe, 156 Wn.2d 441, 447, 128 P.3d 574 (2006).

² CR 56(c); Huff v. Budbill, 141 Wn.2d 1, 7, 1 P.3d 1138 (2000).

³ Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998).

⁴ 158 Wn.2d 603, 146 P.3d 914 (2006).

⁵ Ballard Square, 158 Wn.2d at 609.

⁶ Ballard Square, 158 Wn.2d at 609.

⁷ Ballard Square, 158 Wn.2d at 619.

⁸ Ballard Square, 158 Wn.2d at 609.

brought, the developer was a dissolved corporation. The trial court granted summary judgment on the ground that the suit was barred by the developer's corporate dissolution.⁹ The Supreme Court, however, held that legislation enacted in 2006 significantly altered the statutory scheme regarding suits by and against dissolved corporations.¹⁰

In 2006, the Legislature amended RCW 23B.14.340 to read:

The dissolution of a corporation . . . 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 June 7, 2006, or within three years after the effective date of any dissolution that is effective on or after June 7, 2006.^[11] (New language underlined.)

The Ballard Square court held that this statute, read in conjunction with other related provisions of title 23B RCW, particularly RCW 23B.14.050(2)(e) (which states that dissolution of a corporation does not prevent commencement of a proceeding by or against the corporation in its corporate name), allows claims to be brought against corporations after they have been dissolved.¹² The court further held that the amendment applies retroactively.¹³ The amended statute requires that a post-dissolution cause of action be commenced within two years of dissolution if dissolution

⁹ Ballard Square, 158 Wn.2d at 608.

¹⁰ Ballard Square, 158 Wn.2d at 606 n.1.

¹¹ RCW 23B.14.340.

¹² Ballard Square, 158 Wn.2d at 606, 612.

¹³ Ballard Square, 158 Wn.2d at 606.

occurred prior to June 7, 2006.¹⁴ In Ballard, RCW 23B.14.340 operated against the owners association, because its suit was brought well over two years after dissolution.¹⁵

In the present case, PSR and PJ were dissolved prior to June 7, 2006, but Polygon filed suit on March 24, 2004, well within the two-year period required under RCW 23B.14.340.

The trial court erred in dismissing Polygon's claims on the grounds that the claims were asserted after the dissolution of PSR and PJ. We reverse that ruling.

Indemnity

PJ argues that the indemnity provision in its contract with Polygon applies only to tort claims, and does not cover claims for economic loss caused by a breach of contract. This argument was rejected in MacLean Townhomes, L.L.C v. America 1st Roofing & Builders, Inc.¹⁶

PJ argues that MacLean was wrongly decided, because it relied on our earlier ruling in Karnatz v. Murphy Pacific Corp.,¹⁷ which upheld an indemnity provision requiring a subcontractor to defend all suits "arising out of, in connection with, or incident to," the subcontractor's performance.¹⁸ Karnatz, in turn, relied on Tucci & Sons v. Carl T. Madsen, Inc.,¹⁹ which was overruled in part by Jones v. Strom Construction Co.²⁰ However, Jones overruled Tucci only to the extent that it permitted

¹⁴ Ballard Square, 158 Wn.2d at 616.

¹⁵ Ballard Square, 158 Wn.2d at 616.

¹⁶ 133 Wn. App. 828, 138 P.3d 155 (2006).

¹⁷ 8 Wn. App. 76, 503 P.2d 1145 (1972).

¹⁸ Karnatz, 8 Wn. App. at 80.

¹⁹ 1 Wn. App. 1035, 467 P.2d 386 (1970).

²⁰ 84 Wn. 2d 518, 527 P.2d 1115 (1974).

indemnification of a contractor for the contractor's sole negligence.²¹ Here, the indemnity agreement specifically excludes claims based on the indemnitee's sole negligence.

PJ further argues that Polygon cannot enforce the indemnity provision unless it shows proof of payment to the owners association. We disagree. Indemnity actions accrue when the party seeking indemnity pays or is legally adjudged obligated to pay damages to a third party.²² Polygon was ~~adjudged obligated to~~ pay damages to the association, and its right to seek indemnity from PJ accrued at that time.

We reverse the trial court's order dismissing Polygon's indemnity claims.

Sole Proprietorship

Polygon originally contracted with Gerald Utley, d/b/a P.J. Interprize, a sole proprietorship, in August 1998. The sole proprietorship performed work on phases I and II of the project. P.J. Interprize subsequently incorporated in January 1999. Polygon then executed a contract with the corporation for work on phase III of the project. The corporation also performed some work on phases I and II.

In February 2004, Gerald Utley filed for bankruptcy. The bankruptcy petition describes the debtor as an individual, not a corporation, and lists only Gerald Utley and his wife as debtors. However, in the section asking what other names the debtor had used in the previous six years, Utley listed "d/b/a PJ Interprize, Inc." Utley's bankruptcy was discharged in June 2004.

²¹ Jones, 84 Wn.2d at 522-23.

²² Central Wash. Refrigeration, Inc. v. Barbee, 133 Wn.2d 509, 517, 946 P.2d 760 (1997).

Polygon filed a motion for relief, asking the bankruptcy court for permission to proceed against the debtor "to the extent of available insurance proceeds." The court granted the motion, allowing Polygon to proceed against the debtor for the purpose of pursuing any insurance proceeds that might be available. Under that ruling, Polygon was not barred from pursuing claims against the sole proprietorship in order to recover from its insurance carriers.

The trial court concluded that Utley's bankruptcy discharge barred Polygon from pursuing claims against the corporation for the sole proprietorship's work on the project. While the court stated that Polygon could pursue a declaratory judgment action against the sole proprietorship's insurance carriers, it was silent on the matter of the bankruptcy court's order permitting Polygon to proceed against the sole proprietorship itself.

The court opined that the corporation was a continuation of the sole proprietorship. The court believed the corporation had assumed the liabilities of the sole proprietorship, and given that it was "the same people and they're doing the same business," the corporation was a continuation of the sole proprietorship.²³ However, the court believed it did not need to reach a decision regarding successor liability because it concluded that the bankruptcy discharge precluded Polygon from pursuing claims against the corporation arising out of the sole proprietorship's work.

The general rule in Washington is that a corporation purchasing the assets of another corporation does not, by reason of the purchase of assets, become liable for the debts and liabilities of the selling corporation, except where: (1) the purchaser expressly or impliedly agrees to assume liability; (2) the purchase is a de facto merger

²³ Report of Proceedings (Oct. 21, 2005), at 66.

or consolidation; (3) the purchaser is a mere continuation of the seller; or (4) the transfer of assets is for the fraudulent purpose of escaping liability.²⁴ The four exceptions to the general rule were developed to protect the rights of commercial creditors and dissenting shareholders following corporate acquisitions.²⁵ The purpose of the mere continuation theory is to prevent the corporation from escaping liability by merely changing hats.²⁶

To establish that a successor corporation is merely a continuation of its predecessor for purposes of determining the successor's legal obligations, a plaintiff must establish at least two factors: (1) a common identity of the officers, directors, and stockholders between the companies and (2) that the new company gave inadequate consideration for the assets transferred.²⁷ A transfer of all or substantially all of the predecessor corporation's assets is an implied third element of the mere continuation theory.²⁸

In the present case, one corporation did not purchase the assets of another. Rather, the sole proprietorship incorporated. Whether a corporation can be a mere continuation of a sole proprietorship appears to be a question of first impression in this state, although our Supreme Court, in reviewing the history of the mere continuation

²⁴ Hall v. Armstrong Cork, Inc., 103 Wn.2d 258, 261-62, 692 P.2d 787 (1984).

²⁵ Hall, 103 Wn.2d at 262.

²⁶ Gall Landau Young Const. Co. v. Hedreen, 63 Wn. App. 91, 96-97, 816 P.2d 762 (1991).

²⁷ Gall Landau Young, 63 Wn. App. at 97.

²⁸ Gall Landau Young, 63 Wn. App. at 97. But cf. Eagle Pac. Ins. Co. v. Christensen Motor Yacht Corp., 85 Wn. App. 695, 706 n. 1, 934 P.2d 715 (1997), aff'd on other grounds, 135 Wn.2d 894, 135 Wn.2d 896, 959 P.2d 1052 (1998) (declining to adopt the third factor).

exception, noted that the exception was first expanded by a federal court when it found a corporation to be a mere continuation of a predecessor sole proprietorship.²⁹

The Supreme Court of New York dealt squarely with this issue in Monroe v. Interlock Steel Company, Inc.³⁰ The plaintiff in Monroe sued a corporation for personal injuries sustained when using a machine manufactured by the corporation's predecessor, a sole proprietorship.³¹ The court held that the general rule of nonliability was inapplicable, and that the successor corporation, which was engaged in the same business, under the same ownership and control, was a mere continuation of the prior enterprise, unprotected from suits arising out of acts of the sole proprietorship.³² Noting the inequities which could occur if the doctrine that corporations are separate and distinct entities is blindly accepted, the court reasoned that a corporation could escape liability by using reorganization to make cosmetic changes in essentially the same business, leaving plaintiffs without remedy.³³ A sole proprietor who transfers assets to a new corporation, the court held, becomes akin to a predecessor corporation shorn of its assets.³⁴

Similarly, the Supreme Court of Connecticut held that the transformation of a sole proprietorship into a limited liability company creates in the new business entity rights and obligations previously held by the sole proprietorship.³⁵

²⁹ Martin v. Abbott Labs., 102 Wn.2d 581, 611, 689 P.2d 368 (1984).

³⁰ 487 N.Y.S.2d 1013 (1985).

³¹ Martin, 487 N.Y.S.2d at 1014.

³² Martin, 487 N.Y.S.2d at 1015.

³³ Martin, 487 N.Y.S.2d at 1015.

³⁴ Martin, 487 N.Y.S.2d at 1015.

³⁵ C & J Builders and Remodelers, LLC v. Geisenheimer, 733 A.2d 193, 197 (1999).

Utley was both the sole proprietor and the president of the corporation. The sole proprietorship and the corporation performed the same work for the same contractor. The directors of the corporation were Utley's family members and long-time employees of the sole proprietorship.

Numerous other factors suggest that the corporation was a mere continuation of the sole proprietorship. Utley listed his d/b/a as P.J. Interprize, Inc, when filing for bankruptcy, even though he was filing only on behalf of himself and the sole proprietorship. He stated in a declaration that the corporation was bankrupt when, in fact, it was the sole proprietorship that was bankrupt; the corporation was administratively dissolved. In its answer to Polygon's complaint, which named only the corporation as a defendant, PJ stated that it signed a master agreement with Polygon in August 1998. In fact, that agreement was signed by the sole proprietorship, before PJ incorporated.

Under the persuasive authority of Monroe and C & J Builders, we hold that the corporation was merely a continuation of the sole proprietorship, and, as such, can be held liable for the sole proprietorship's obligations. We further hold that the bankruptcy proceeding does not bar Polygon's claims against the sole proprietorship insofar as they relate to recovery of insurance proceeds.³⁶

Amended Complaint

After the court ruled that Polygon could not proceed against PJ for work performed by the sole proprietorship, Polygon moved to amend the complaint to include the sole proprietorship as a defendant. The court denied the motion.

³⁶ See Arreygue v. Lutz, 116 Wn. App. 938, 69 P.3d 881 (2003) (bankruptcy discharge does not bar suit for the sole purpose of insurance recovery).

The decision to grant leave to amend the pleadings is within the discretion of the trial court.³⁷ Civil Rule 15(a) provides that leave to amend shall be freely given when justice so requires.³⁸ These rules serve to facilitate proper decisions on the merits, to provide parties with adequate notice of the basis for claims and defenses asserted against them, and to allow amendment of the pleadings except where amendment would result in prejudice to the opposing party.³⁹ An amendment should be permitted unless it will prejudice the opposing party.⁴⁰ A trial court's decision to grant or deny leave to amend is reviewed for manifest abuse of discretion.⁴¹

Civil Rule 15 also provides that an amendment to a pleading relates back to the date of the original pleading when the claim asserted in the amended pleading arose out of the occurrence set forth in the original pleading, and the amendment changes the party against whom the claim is asserted.⁴² This relation back is permitted if the party to be brought in by amendment has received such notice of the action that the party will not be prejudiced in maintaining a defense on the merits, and knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.⁴³

Given the continuity between the sole proprietorship and the corporation, the sole proprietorship would not be prejudiced by being added as a defendant. The sole proprietorship would have adequate notice of the basis for the claims and ample time to

³⁷ Wilson v. Horsely, 137 Wn.2d 500, 505, 974 P.2d 316 (1999).

³⁸ CR 15(a).

³⁹ Caruso v. Local Union No. 690 of Int'l Bhd. of Teamsters, 100 Wn.2d 343, 349, 670 P.2d 240 (1983).

⁴⁰ Wilson, 137 Wn.2d at 505.

⁴¹ Wilson, 137 Wn.2d at 505.

⁴² CR 15(c).

⁴³ CR 15(c).

prepare its defenses. Nor would such an amendment be rendered futile by the statute of limitations or the statute of repose. Under RCW 4.16.310, which governs the accrual of construction claims, all claims or causes of action shall accrue, and the applicable statute of limitation shall begin to run, only during the period within six years after substantial completion of construction.⁴⁴ RCW 4.16.310 is a statute of repose, rather than a statute of limitation, because it establishes the time period in which a cause of action must accrue, rather than the time period after accrual in which a plaintiff must commence an action.⁴⁵ Here, construction was substantially completed in 1999 and Polygon's claim accrued in early 2003, well within the six-year period set forth in the statute. The statute of limitations therefore does not bar Polygon's claims.

We hold that the trial court erred in denying Polygon's motion to amend its complaint to add the sole proprietorship as a defendant, and reverse.

Burden of Proof

PJ argued that Polygon waived any right to seek damages against PJ because it inspected, accepted, and paid for the work. The trial court ruled that PJ's liability was limited to latent defects, and that Polygon bore the burden of proving those defects alleged to be latent.

PJ is asserting the defense of waiver. Waiver is the intentional and voluntary relinquishment of a known right.⁴⁶ The party asserting waiver bears the burden of

⁴⁴ RCW 4.16.310.

⁴⁵ Escude v. King County Pub. Hosp. Dist., 117 Wn. App. 183, 192 n.8, 69 P.3d 895 (2003).

⁴⁶ U. S. Oil & Ref. Co. v. Lee & Eastes Tank Lines, Inc., 104 Wn. App. 823, 830, 16 P.3d 1278 (2001).

proving an intention to relinquish the right.⁴⁷ PJ consequently bears the burden of establishing the alleged defects were patent.⁴⁸ The trial court was in error when it ruled Polygon bore the burden of establishing latency.

Expert's Declaration

Polygon submitted a declaration by Mark Jobe, one of the experts hired to investigate construction defects in response to the association's complaints. Based on his experience as a general contractor, construction manager, and superintendent coordinating the work of subcontractors, Jobe disputed PJ's assertion that Polygon inspected PJ's work during construction, and that there was nothing about the installation that was not visible at the time of construction. He stated that the nature of the work involved in installing siding made it impossible for Polygon to supervise installation every step of the way without requiring a superintendent to "stand behind the installer as the materials were being installed," a proposition he termed unrealistic, particularly in light of the scope of the project.

PJ moved to strike Jobe's declaration on the ground that Jobe was not present during construction of the project and had no experience in condominium developments. The trial court granted PJ's motion in part, striking paragraphs five through eight of Jobe's declaration.

ER 702 provides:

⁴⁷ Jones v. Best, 134 Wn.2d 232, 241-42, 950 P.2d 1 (1998); Perez v. Perez, 11 Wn. App. 429, 432, 523 P.2d 455 (1974), overruled on other grounds, Brown v. Brown, 100 Wn.2d 729, 675 P.2d 1207 (1984).

⁴⁸ See Michel v. Efferson, 65 So.2d 115, 119 (1953) ("The defense of waiver is a special one and the burden of proof is on the defendants to show that the plaintiff had knowledge of the defects in construction and that she intentionally waived same.").

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.^[49]

Once an expert witness's basic qualifications are established, any deficiencies in those qualifications go to the weight, rather than the admissibility, of the expert's testimony.⁵⁰

Jobe was qualified to offer his opinion by virtue of his knowledge, experience, and training. Once the court admitted his declaration, any alleged deficiencies in his qualifications should have gone to the weight of his testimony. The trial court acknowledged that Jobe's qualifications went to the weight of the statements, but expressed concern about Jobe's lack of personal knowledge due to the fact he was not present during construction.

Such personal knowledge is not required of an expert witness. The facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing.⁵¹

Jobe based his opinion upon his investigation and his experience in the construction trades. It was not necessary for him to have been on site during construction to proffer his expert opinion. To the extent the trial court rejected Jobe's testimony based upon lack of personal knowledge, we reverse.

⁴⁹ ER 702.

⁵⁰ State v. Rangitsch, 40 Wn. App. 771, 779, 700 P.2d 382 (1985); Keegan v. Grant County Pub. Util. Dist. No. 2, 34 Wn. App. 274, 283, 661 P.2d 146 (1983).

⁵¹ ER 703.

Attorney Fees

Whether a party is entitled to attorney fees is an issue of law, and is reviewed de novo.⁵²

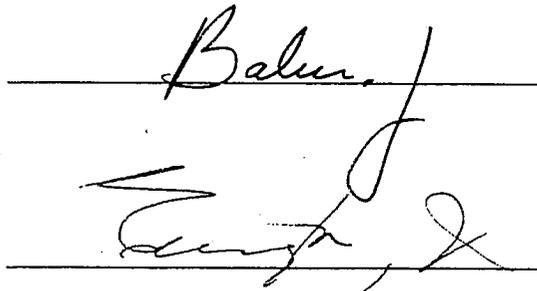
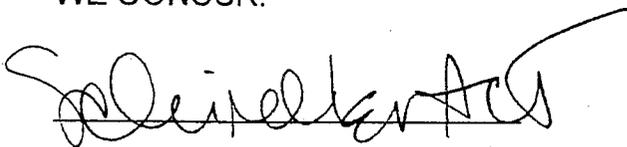
The trial court awarded PSR \$21,882.73 in attorney fees and costs, and awarded PJ \$205,012.75 in attorney fees and costs. The fees were awarded pursuant to attorney fee clauses in the indemnity agreement provisions of the subcontracts.

The agreement with PSR states, "Should any disputes arise with respect to the applicability and/or interpretation of the right to indemnification, the prevailing party shall be entitled to recover its reasonable attorney's fees and costs in addition to any other remedy." Under this provision, and in accordance with RAP 18.1, Polygon is entitled to reasonable attorney fees and costs incurred on review.

The provision in the PJ contract states, "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." As this is not clearly a prevailing party agreement, award of attorney fees with respect to PJ will abide the results on remand.

REVERSED AND REMANDED.

WE CONCUR:



⁵² Ethridge v. Hwang, 105 Wn. App. 447, 460, 20 P.3d 958 (2001).

APPENDIX B

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

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

Appellants,)

vs.)

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

Respondents,)

and)

4 BEES SIDING, INC., a Washington)
corporation; COURTESY GLASS, INC.,)
d/b/a PACIFIC DECKTEC, a)
Washington corporation, GIARD)
CONSTRUCTION LLC, a Washington)
Limited Liability Company; INTERWEST)
INDUSTRIES, INC., a Washington)
corporation; JANES BROTHERS)
WATERPROOFING, INC., a)
Washington corporation; UNITED)
DEVELOPMENT CORPORATION d/b/a)
MILL CREEK LANDSCAPING)
SERVICES, a Washington corporation;)
PUGET SOUND FOUNDATION)
SERVICES, INC., a Washington)

DIVISION ONE

No. 57328-4-I

ORDER GRANTING APPELLANTS'
MOTION TO STRIKE

corporation; CREATIVE CONCRETE,)
INC., a Washington corporation;)
J.S. CONTRACTING, INC., a)
Washington corporation,)
)
Defendants.)
_____)

The appellants, Cambridge Townhomes, LLC, and Polygon Northwest Company having filed a motion to strike the appendixes to the Brief of the Respondent P.J. Interprize, Inc., and the panel having determined that the motion should be granted; now, therefore, it is hereby

ORDERED that the motion to strike be, and the same is, hereby granted.

Dated this 11th day of June, 2007.

FOR THE COURT:



Judge

APPENDIX C

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

CAMBRIDGE TOWNHOMES, LLC, a)
Washington limited liability company;)
POLYGON NORTHWEST COMPANY,)
a Washington general partnership,)
Appellants,)

vs.)

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

and)

4 BEES SIDING, INC., a Washington)
corporation; COURTESY GLASS, INC.,)
d/b/a PACIFIC DECKTEC, a)
Washington corporation, GIARD)
CONSTRUCTION LLC, a Washington)
Limited Liability Company; INTERWEST)
INDUSTRIES, INC., a Washington)
corporation; JANES BROTHERS)
WATERPROOFING, INC., a)
Washington corporation; UNITED)
DEVELOPMENT CORPORATION d/b/a)
MILL CREEK LANDSCAPING)
SERVICES, a Washington corporation;)
PUGET SOUND FOUNDATION)
SERVICES, INC., a Washington)

DIVISION ONE

No. 57328-4-I

ORDER DENYING MOTION
FOR RECONSIDERATION

