

81003-6

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SUPREME COURT OF THE
STATE OF WASHINGTON

Case No. 81003-6

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

Respondents,

v.

P.J. INTERPRIZE, INC., a Washington corporation,

Petitioner.

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ANSWER TO GERALD UTLEY'S
PROPOSED PETITION FOR REVIEW

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TABLE OF CONTENTS

| | Page |
|--|------|
| I. INTRODUCTION | 1 |
| II. ISSUES PRESENTED FOR REVIEW | 2 |
| III. STATEMENT OF THE CASE | 3 |
| A. Factual Background | 3 |
| B. Procedural Background | 5 |
| IV. ARGUMENT | 6 |
| A. Review is not warranted pursuant to RAP 13.4(b). | 6 |
| B. The Court of Appeals did not deny Utley due process. | 7 |
| C. The Court of Appeals correctly decided the case. | 12 |
| 1. The Court of Appeals correctly recognized that Polygon's claims against the sole proprietorship are not barred under RCW 4.16.326(1)(g). | 12 |
| D. The Court of Appeals correctly recognized that the sole proprietorship's bankruptcy does not preclude Polygon's claims. | 17 |
| V. CONCLUSION | 20 |

TABLE OF AUTHORITIES

Cases

| | |
|--|-------|
| <i>1000 Va. Ltd. P’ship v. Vertecs Corp.</i> , 158 Wn.2d 566, 146 P.3d 423 (2006)..... | 16 |
| <i>Arreygue v. Lutz</i> , 116 Wn. App. 938, 69 P.3d 881 (2003)..... | 17-18 |
| <i>Cambridge Townhomes, LLC v. Pac. Star Roofing</i> , No. 57328-4-I (Wash. Ct. App., June 11, 2007)..... | 6 |
| <i>Carlson v. Doekson Gross, Inc.</i> , 372 N.W.2d 902 (N.D. 1985)..... | 4 |
| <i>Cent. Wash. Refrigeration, Inc. v. Barbee</i> , 133 Wn.2d 509, 946 P.2d 760 (1997)..... | 17 |
| <i>In re Christian</i> , 180 B.R. 548 (Bankr. E.D. Mo. 1995)..... | 19 |
| <i>In re Doar</i> , 234 B.R. 203 (Bankr. N.D. Ga. 1999)..... | 18 |
| <i>Ladd v. Scudder Kemper Inv., Inc.</i> , 741 N.E.2d 47 (Mass. 2001)..... | 5 |
| <i>Merrigan v. Epstein</i> , 112 Wn.2d 709, 773 P.2d 78 (1989)..... | 16 |
| <i>Parkridge Assocs., Ltd. v. Ledcor Indus., Inc.</i> , 113 Wn. App. 592, 54 P.3d 225 (2002)..... | 16 |

Statutes and Other Authorities

| | |
|-------------------------|---------------|
| CR 15..... | 9 |
| CR 15(c)..... | 13-14 |
| RAP 13.4(b)..... | passim |
| RAP 13.4(b)(3)..... | 7 |
| RCW 4.16.040(1)..... | 17 |
| RCW 4.16.310..... | 16 |
| RCW 4.16.326(1)(g)..... | 2, 12, 13, 16 |

I. INTRODUCTION

Proposed petitioner, Gerald Utley, seeks review of an unpublished Court of Appeals decision reinstating indemnity and breach of contract claims asserted by respondents, Cambridge Townhomes, LLC, and Polygon Northwest Company (collectively "Polygon"), against P.J. Interprize, Inc., and Pacific Star Roofing. The Court of Appeals also reversed the trial court's denial of Polygon's motion to amend its complaint to name Utley as an additional defendant. Utley was the sole proprietor of P.J. Interprize, the predecessor to P.J. Interprize, Inc. Utley now seeks permission to submit a petition for review, arguing that the Court of Appeals erred in concluding Polygon could pursue its claims against the sole proprietorship. P.J. Interprize, Inc., ("the corporation") has previously submitted a petition for review making the same arguments.

Utley does not mention or discuss the requirements of RAP 13.4(b), which govern acceptance of review by this Court. Utley contends the Court of Appeals violated his constitutional due process rights, but he does not explain how the alleged violation involves a significant constitutional question. Moreover, the record establishes that Utley was not deprived of an opportunity to be heard because the corporation, of

which Utley is president, presented the arguments he now asserts to both the trial court and the Court of Appeals.

Utley further argues that the Court of Appeals made several errors in its opinion. That is not sufficient to warrant review pursuant to RAP 13.4(b), and Utley does not indicate why the issues are suitable for review. Moreover, as explained below, the Court of Appeals correctly decided the issues before it.

Because the arguments raised by Utley in his proposed petition for review have already been raised in the petition for review filed by the corporation, there is no need for the Court to consider Utley's petition. If the Court elects to consider Utley's petition, it should be denied, because Utley has failed to establish he is entitled to review under RAP 13.4(b).

II. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals deprive Utley of his due process rights by ruling on Polygon's appeal of the trial court's denial of Polygon's motion to amend its complaint where the corporation made all of the arguments before the trial court and the Court of Appeals that Utley seeks to make here?

2. Are Polygon's claims against the sole proprietorship barred under RCW 4.16.326(1)(g) where (1) those claims relate back to the filing

of Polygon's original complaint, and (2) the claims would have been timely even if the relation back doctrine did not apply?

3. Polygon obtained permission from the bankruptcy court to proceed against the sole proprietorship's insurance proceeds. Did the Court of Appeals err in ruling Polygon could amend its complaint to add Utley as a defendant for the purpose of pursuing the sole proprietorship's insurance proceeds?

III. STATEMENT OF THE CASE

A. Factual Background

Cambridge Townhomes, LLC, was the developer and Polygon Northwest Company was the general contractor on the Cambridge Townhomes Condominium project ("the Project") in Kirkland, Washington. (CP 4) The Project consists of 40 multi-unit buildings and was constructed in three phases between late 1997 and the middle of 2000. (CP 4, 456) Polygon hired numerous subcontractors to complete the work, including both the sole proprietorship and the corporation.¹ (See CP 561-64)

In early 2003, the Cambridge Townhomes Owners Association ("HOA") notified Polygon of construction defects at the Project. (CP 456,

¹ Utley incorporated effective January 1, 1999, during the time the Project was under construction.

459) Polygon worked with the HOA to resolve the HOA's claims without litigation and invited the subcontractors to participate in the funding process. (CP 456-57) Polygon also tendered defense of the HOA's claims to the subcontractors pursuant to provisions in the subcontract agreements requiring the subcontractors to indemnify Polygon. (CP 5) The subcontractors did not accept Polygon's tender. (*Id.*) In November 2003, Polygon agreed to settle the HOA's claims for approximately \$5.3 million.² (CP 2335, 2400)

On February 27, 2004, Utley and his wife filed for bankruptcy. (CP 1183-84) The bankruptcy application describes the debtor as an individual, not a corporation, and Schedule F listing creditors holding unsecured claims names only Gerald Utley and his wife as the debtors. (CP 1183, 1186-1203) However, in the section asking for "All Other Names used by the Debtor in the last 6 years" Utley answered, "dba PJ Interprize, Inc." (CP 1183) The bankruptcy then proceeded under the name "Gerald Utley dba P.J. Interprize, Inc."³ (*See* CP 1206)

² Polygon and the HOA executed a settlement agreement on November 21, 2003. (CP 2527-29) After Polygon was not immediately able to fund the settlement, the HOA filed suit against Polygon, in December 2003. (CP 5) The parties settled the claim shortly after suit was filed. (*Id.*)

³ Utley apparently confused the corporation, which took over from the sole proprietorship on January 1, 1999, with the sole proprietorship. (*See* CP 98) An individual cannot "do business as" a corporation. *See, e.g., Carlson v. Doekson Gross, Inc.*, 372 N.W.2d 902, 905 n.2 (N.D. 1985) ("An individual obviously

Polygon filed a motion for relief from stay asking the bankruptcy court's permission to proceed against the debtor "to the extent of available insurance proceeds." (CP 1211-17) The court granted the motion, allowing Polygon to proceed "against the Debtor . . . for the purpose of pursuing any insurance proceeds that are the result of any insurance coverage the Debtor may possess." (CP 1210) Utley was discharged from bankruptcy June 10, 2004. (CP 1206)

B. Procedural Background

Polygon also attempted to resolve its claims against the subcontractors without litigation. (CP 457) When those efforts proved unsuccessful, Polygon filed suit, on March 24, 2004, asserting claims for indemnification and breach of contract against numerous defendants, including the corporation. (CP 1-16) After the trial court ruled that the sole proprietorship's bankruptcy precluded Polygon from pursuing claims against the corporation arising out of the sole proprietorship's work, Polygon immediately moved to amend its complaint to add the sole

cannot 'do business as' a corporation."); *see also Ladd v. Scudder Kemper Inv., Inc.*, 741 N.E.2d 47, 50 (Mass. 2001) (corporation, by definition, is not a sole proprietorship). Moreover, Utley described the debtor as an "individual," and the corporation was administratively dissolved in the middle of the bankruptcy proceedings. Thus, despite the reference to P.J. Interprize, Inc., it is apparent the bankruptcy applied only to Utley and the sole proprietorship, as the corporation acknowledged in its briefing below and as Utley admits here. (CP 141, 672); Gerald Utley's Proposed Petition for Review ("Proposed Petition for Review") at 11.

proprietorship as a defendant. (CP 2026, 2048-56) The court denied Polygon's motion. (CP 2393-95)

Polygon subsequently filed a Notice of Appeal seeking review of several orders, including the order denying its motion to amend the complaint. (CP 2447-89) In an unpublished opinion filed June 11, 2007, the Court of Appeals reversed the rulings against Polygon, including the denial of Polygon's motion to amend its complaint.⁴ The court subsequently denied the corporation's motion for reconsideration, and the corporation filed a petition for review with this Court. Utley has now filed a proposed petition, raising the same arguments asserted by the corporation.

IV. ARGUMENT

A. Review is not warranted pursuant to RAP 13.4(b).

RAP 13.4(b) does not authorize review in every case in which the Court of Appeals may have erred. Instead, a decision must fall into one of the categories listed in the rule.

Utley does not cite RAP 13.4(b) in his petition for review. Instead, he merely asserts review should be granted because he allegedly has been denied due process and because the Court of Appeals erred.

⁴ *Cambridge Townhomes, LLC v. Pac. Star Roofing*, No. 57328-4-I (Wash. Ct. App., June 11, 2007).

As explained below, Utley has not been denied due process as a result of the Court of Appeals' determination that he may be added as a defendant. Nor has Utley shown that the alleged denial of due process involves "a significant question of law under the Constitution of the State of Washington or of the Constitution of the United States ."⁵

Utley's assertions that the Court of Appeals reached the wrong decision also do not warrant review. As explained below, the court did not err, and, even if it did, error by the Court of Appeals is not one of the criterion set forth in RAP 13.4(b). Utley has not satisfied the requirements of RAP 13.4(b), and his petition for review should therefore be denied.

B. The Court of Appeals did not deny Utley due process.

Utley argues that the Court of Appeals deprived him of due process by ruling on Polygon's motion to amend. This argument must be rejected for two reasons.

First, Utley's argument fails to grasp that the court was required to rule on the motion before it in order to resolve the issue in dispute between Polygon and the corporation. Utley could not be a party until the complaint was amended, and the complaint could not be amended until the courts ruled on Polygon's motion.

⁵ RAP 13.4(b)(3).

The trial court denied Polygon's motion to amend. Polygon was aggrieved by that decision and exercised its right to appeal. On appeal, the Court of Appeals considered, as it must, the issues presented, including all arguments raised by the corporation why the complaint should not be amended to join Utley as a party. The Court of Appeals determined that the corporation's arguments were incorrect: specifically, Utley would have adequate notice of the basis for the claims against him and ample time to prepare his defenses upon remand, the statute of repose does not preclude a claim against Utley, and the statute of limitations had not run.

Utley's suggestion that neither the trial court nor the Court of Appeals could decide the issues presented because he was not a party at the time the decisions were made is wrong-headed. The courts must decide the issues presented. Until it was determined that the complaint could be amended, Utley was not a party, but that would not excuse the courts from determining, upon Polygon's motion, whether the complaint should be amended.

The corporation, as party to the action, was given all the process to which it was due and had a full and fair opportunity to oppose Polygon's motion. Upon remand, Utley will be joined as a party. He will then be afforded all rights to due process in those proceedings. His status as a

non-party cannot serve to defeat Polygon's own procedural right to move to amend under CR 15.

The second reason Utley's due process argument must be rejected is that Utley did, in fact, have an opportunity to be heard regarding all of the issues he now raises. Utley claims the lower court should not have been able to rule that (1) the trial court abused its discretion in denying Polygon's motion to amend the complaint, (2) Polygon's claims against the sole proprietorship relate back to the filing of the complaint against the corporation, (3) the statute of limitations does not bar Polygon's claims against the sole proprietorship, and (4) his bankruptcy discharge does not bar Polygon's claims.⁶

Utley ignores the fact that these issues were presented and argued to both the trial court and the Court of Appeals. In its opposition to Polygon's motion for leave to amend its complaint, the corporation argued: (1) allowing Polygon to amend its complaint would violate Utley's bankruptcy discharge (CP 2254-57); (2) Polygon's claims against the sole proprietorship are barred by the statute of limitations (CP 2257); and (3) Polygon's claims against the sole proprietorship do not relate back to the filing of the complaint against the corporation (CP 2257-58). The

⁶ Proposed Petition for Review at 8.

corporation reiterated these arguments in its response brief and motion for reconsideration filed in the Court of Appeals, and has stated those arguments again in its petition for review.⁷ Thus, contrary to Utley's assertion, the arguments he now asserts before this Court were, in fact, raised in both the trial court and the Court of Appeals, albeit by the corporation.⁸

In addition, it is important to note that the trial court primarily based its denial of Polygon's motion to amend on the fact that trial was soon approaching. (11/22/05 RP at 19-21) This concern obviously is mooted by the fact that a new trial date will be set once the case is remanded to the trial court for further proceedings

Utley asserts the interests of the sole proprietorship and the corporation, while similar, are not identical.⁹ For example, he points out that the sole proprietorship and the corporation worked on different phases

⁷ Brief of Respondent P.J. Interprize, Inc. at 39-44; Respondent P.J. Interprize, Inc.'s Motion for Reconsideration at 4-5, 18-19; Petition for Review by the Supreme Court ("Corporation's Petition for Review") at 10-11, 14-15. The corporation did not specifically discuss the relation back doctrine in its appellate briefing but did argue that Polygon's claims against the sole proprietorship were barred by the statute of limitations.

⁸ In addition, the record establishes that Utley has been directly involved with this litigation throughout its course, including filing declarations in support of the arguments asserted by the corporation. (*See, e.g.*, CP 97-111, 1618-22)

⁹ Proposed Petition for Review at 11.

of the Project and that the “corporation was not a debtor in the bankruptcy.”¹⁰

However, as noted above, the corporation made all of the arguments Utley now seeks to raise, even when those arguments may have involved only claims against the sole proprietorship. In addition, as the Court of Appeals explained, “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 prepare its defenses.”¹¹

Significantly, Polygon does not, and cannot, seek to recover from Utley personally. Pursuant to the Bankruptcy court’s ruling, Polygon’s recovery is limited to any proceeds that may be available under the sole proprietorship’s insurance policies. Thus, Utley cannot be prejudiced by the Court of Appeals’ determination that he may be named as a defendant.

¹⁰ *Id.* Interestingly, Utley earlier asserted that Polygon obtained leave from the bankruptcy court to proceed against the *corporation’s* insurance proceeds. *Id.* at 4. The corporation also repeatedly argued that the order granting Polygon’s motion for relief from stay pertained only to the corporation. *See, e.g.*, Brief of Respondent P.J. Interprize, Inc., at 9. As Polygon explained in its earlier briefing, the bankruptcy, in fact, applied only to the sole proprietorship and did not involve or affect the corporation. Thus, as the Court of Appeals correctly recognized, Polygon obtained leave to proceed against the *sole proprietorship* in order to recover from its insurers. Slip op. at 8.

¹¹ *Id.* at 12-13.

In sum, Utley has neither shown that he has been deprived of any constitutional rights or that this case involves a significant constitutional question. His proposed petition for review should not be granted on those grounds.

C. The Court of Appeals correctly decided the case.

As noted above, a party does not gain Supreme Court review by arguing the Court of Appeals wrongly decided a case. The petitioner must show that the criteria set forth in RAP 13.4(b) apply. Nonetheless, as discussed below, the Court of Appeals correctly decided the issues presented.

1. The Court of Appeals correctly recognized that Polygon's claims against the sole proprietorship are not barred under RCW 4.16.326(1)(g).

In response to Polygon's motion to amend its complaint to add the sole proprietorship as a defendant, the corporation argued, among other things, that the amendment would be futile because the claims against the sole proprietorship were time-barred. The Court of Appeals rejected this argument, and Utley now argues that this ruling was error.¹² The corporation made this same argument in its petition for review.¹³

¹² Slip op. at 12-13; Proposed Petition for Review at 12-14.

¹³ Corporation's Petition for Review at 14-15.

Utley relies upon RCW 4.16.326(1)(g) to support his claim that Polygon's claims against the sole proprietorship are untimely.¹⁴ RCW 4.16.326(1)(g), which went into effect July 27, 2003, states:

(1) Persons engaged in any activity defined in RCW 4.16.300 may be excused, in whole or in part, from any obligation, damage, loss, or liability for those defined activities under the principles of comparative fault for the following affirmative defenses:

* * *

(g) To the extent that a cause of action does not accrue within the statute of repose pursuant to RCW 4.16.310 or that an actionable cause as set forth in RCW 4.16.300 is not filed within the applicable statute of limitations. In contract actions the applicable contract statute of limitations expires, regardless of discovery, six years after substantial completion, or during the period enumerated in RCW 4.16.300, whichever is later

This statute does not bar either Polygon's breach of contract claim or its indemnity claim against the sole proprietorship.¹⁵ First, Polygon's claims against the sole proprietorship are not barred because Polygon's proposed amendment adding the sole proprietorship as a defendant relates back to the date of the original complaint—March 24, 2004.¹⁶ CR 15(c)

¹⁴ Proposed Petition for Review at 12-14.

¹⁵ Utley fails to distinguish between Polygon's breach of contract and indemnity claims or acknowledge that these claims are treated differently under RCW 4.16.326(1)(g).

¹⁶ See slip op. at 12-13.

explains:

Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

As noted above, the Court of Appeals concluded the requirements of CR 15(c) were satisfied here, and thus the amendment to add the sole proprietorship would relate back to the filing of Polygon's original complaint.¹⁷

Utley contends the relation back doctrine does not apply because Polygon's delay in seeking to add the sole proprietorship constitutes "inexcusable neglect."¹⁸ Utley fails to acknowledge that Polygon's delay in naming the sole proprietorship was due in large part to the corporation's repeated blurring of the distinction between the two entities, which continues to this day. For example, on page four of his proposed petition

¹⁷ Slip op. at 12-13.

¹⁸ Proposed Petition for Review at 14-16.

for review, Utley notes, “Gerald Utley d/b/a P.J. Interprize, Inc. filed for bankruptcy” He adds, “In June 2004, the Bankruptcy court granted relief from the automatic stay to allow Polygon and Cambridge to pursue P.J. Interprize, Inc.’s insurance proceeds in that action.”¹⁹ However, on page 11 of his proposed petition for review, Utley asserts, “The corporation was not a debtor in the bankruptcy.”²⁰

Utley also fails to recognize that 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. Under these circumstances, the Court of Appeals correctly concluded the amendment adding the sole proprietorship as a defendant relates back to the filing of the original complaint.

Moreover, even if the relation back doctrine did not apply, Polygon’s claims against the sole proprietorship would not be time-barred. Polygon’s breach of contract claim accrued, at the latest, in early 2003, when it discovered the construction defects at issue—several months

¹⁹ *Id.* at 4.

²⁰ Other examples of the failure to distinguish between the sole proprietorship and the corporation are cited at pages 33-34 of Appellants’ Opening Brief.

before the effective date of RCW 4.16.326(1)(g).²¹ (CP 456, 459) When a cause of action accrues before the enactment of a new statute of limitations, the limitations period begins to run from the effective date of the statute that makes the change.²² Thus, the six-year contract statute of limitations did not begin to run until July 27, 2003, meaning that Polygon has until July 27, 2009, to file suit against the sole proprietorship.

Nor would Polygon's indemnity claim against the sole proprietorship be time-barred. That action accrued November 21, 2003, when Polygon settled, and became legally obligated to make payment on, the HOA's claim.²³ Polygon filed suit March 24, 2004. The six-year statute of limitations/statute of repose set forth in RCW 4.16.326(1)(g) applies only to contract actions, not to indemnity actions. Thus, Polygon's indemnity claim was timely as long as (1) the claim accrued within six years of substantial completion, in accordance with RCW 4.16.310, and

²¹ See *1000 Va. Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 582, 146 P.3d 423 (2006). If, as Utley asserts, the cause of action accrued in 1999, it also accrued before the effective date of RCW 4.16.326(1)(g). The statute does not apply retroactively. *1000 Va.*, 158 Wn.2d at 435-36.

²² *Merrigan v. Epstein*, 112 Wn.2d 709, 717, 773 P.2d 78 (1989).

²³ See *Parkridge Assocs., Ltd. v. Ledcor Indus., Inc.*, 113 Wn. App. 592, 603-04, 54 P.3d 225 (2002) (defendant's indemnification claim accrued *either* when it reached settlement agreement with third party *or* when it actually made payment to third party).

(2) Polygon filed suit within six years after the claim accrued.²⁴ Both of these requirements have been satisfied here, and Polygon's indemnity claim against the sole proprietorship therefore is not time-barred.

D. The Court of Appeals correctly recognized that the sole proprietorship's bankruptcy does not preclude Polygon's claims.

Utley contends Polygon cannot proceed against the sole proprietorship because he was discharged in bankruptcy.²⁵ However, the bankruptcy court specifically authorized Polygon to proceed against the sole proprietorship to the extent of its insurance proceeds. That is, although Polygon may not recover damages directly from the sole proprietorship, it may file suit against the sole proprietorship in order to seek recovery of the sole proprietorship's insurance proceeds.

Contrary to Utley's assertion, the decision in *Arreygue v. Lutz*²⁶ is directly on point. In *Arreygue*, the plaintiff was injured in an automobile accident. A few months after the accident, the driver of the other car filed

²⁴ See *Cent. Wash. Refrigeration, Inc. v. Barbee*, 133 Wn.2d 509, 517, 946 P.2d 760 (1997) (statute of limitations begins to run on indemnity claim when party seeking indemnity pays or is legally adjudged obligated to pay damages to a third party). Because the indemnity agreement in this case was set forth in a written contract, the six-year statute of limitations applicable to such contracts should apply. See RCW 4.16.040(1).

²⁵ Proposed Petition for Review at 16-19.

²⁶ *Arreygue v. Lutz*, 116 Wn. App. 938, 69 P.3d 881 (2003).

for bankruptcy and listed the plaintiff as one of her creditors. Thereafter, the driver was discharged in bankruptcy.²⁷

Nearly three years after the accident, the plaintiff filed suit against the bankrupt driver. The defendant moved for summary judgment on the ground the claim against her had been discharged in bankruptcy. The plaintiff responded by acknowledging that she could not recover from the defendant personally due to the bankruptcy discharge. However, the plaintiff asserted she was entitled to proceed against the defendant in order to recover funds from the defendant's insurer. The trial court granted the summary judgment motion, and the plaintiff appealed.²⁸

The Court of Appeals reversed, concluding the defendant's bankruptcy discharge did not prohibit a lawsuit against her for the sole purpose of recovering from her insurer. The court added, "[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."²⁹

²⁷ *Arreygue*, 116 Wn. App. at 939-40.

²⁸ *Id.* at 940.

²⁹ *Id.* at 944. The *Arreygue* decision is in accord with cases from other jurisdictions addressing this issue. See *In re Doar*, 234 B.R. 203, 204 (Bankr. N.D. Ga. 1999) (bankruptcy law is clear and nearly unanimous that a debtor may be sued for purposes of establishing liability as a prerequisite to proceeding against the debtor's liability insurer); *In re Christian*, 180 B.R. 548, 549-50

In this case, Polygon obtained the express permission of the bankruptcy court to proceed against the sole proprietorship in order to recover any applicable insurance proceeds. Under these circumstances, the bankruptcy discharge of the sole proprietorship cannot preclude Polygon from naming the sole proprietorship as an additional defendant for the purpose of establishing the sole proprietorship's liability and thus potentially recovering from the sole proprietorship's insurers. And, because Polygon cannot recover against the sole proprietorship itself, the sole proprietorship cannot suffer any prejudice as a result of being named as an additional defendant.

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(Bankr. E.D. Mo. 1995) (vast majority of cases have allowed creditor to maintain suit against debtor to establish liability for insurance purposes).

V. CONCLUSION

For the reasons set forth above, Polygon respectfully requests that Utley's Proposed Petition for Review be DENIED.

DATED this 11th day of April, 2008.

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The undersigned certifies that on this 11th day of April, 2008, I caused to be served this document to:

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I declare under penalty of perjury under the laws of the State of Washington this 11th day of April, 2008, at Seattle, Washington.



Kim Fergin