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STATE OF WASHINGTON

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No. 78774-3  
SUPREME COURT  
OF THE STATE OF WASHINGTON

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TODD SHIPYARDS CORPORATION,

Petitioner,

v.

EDWIN HERRING, for himself and as  
Personal Representative of the Estate of ROGER HERRING,

Respondent.

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REPLY ON  
PETITION FOR REVIEW

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A. INTRODUCTION

In his answer to the petition for review filed by Todd Shipyards Corporation (“Todd”), Edwin Herring contends that Todd is foreclosed from raising the preclusive effect of the bankruptcy court’s 1988 bar date order because the issue, though raised in the trial court, was not argued to the Court of Appeals. Answer at 7–9. This is a new issue requiring a reply by Todd. RAP 13.4(d).

B. ARGUMENT

Herring cites a single case, *State v. Clark*, 124 Wn.2d 90, 104-05, 875 P.2d 613 (1994), in support of his position that this Court should not consider the question of the preclusive effect of the 1988 bar date order. Herring’s argument is flawed for several reasons.

First, *Clark* was overruled by *State v. Catlett*, 133 Wn.2d 355, 945 P.2d 700 (1997). *Clark* is no longer good authority in Washington.

Second, even if the rule Herring advances is viable after *Clark*, it is important to note that this Court has explained that it “generally” declines to review issues not presented to the Court of Appeals. In *Peoples Nat’l Bank of Wash. v. Peterson*, 82 Wn.2d 822, 514 P.2d 159 (1973), a case referenced in *Clark*, this Court declined to reach an issue neither presented to the trial court nor the Court of Appeals. This Court described the exceptions to the rule as “matters going to jurisdiction, right to maintain

the action, illegality, invasion of fundamental constitutional rights, and lack of claim for relief.” *Id.* at 830. *See also Maynard Inv. Co. v. McCann*, 77 Wn.2d 616, 621-23, 465 P.2d 657 (1970) (exception for compliance with mandatory statute); *Int’l Ass’n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 37, 42 P.3d 1265 (2002) (Court will consider issue of public importance not raised to trial court or Court of Appeals). In this case, as the question of the effect of the bankruptcy court’s 1988 bar date order is jurisdictional for the reasons set forth in Todd’s petition at 6–8, or goes to Herring’s right to maintain this action, the Court should consider the issue.

An analogous rule is RAP 13.7, pertaining to this Court’s process and jurisdiction after it accepts review in a case. RAP 13.7(c) incorporates RAP 2.5 by reference and RAP 2.5(a) provides that issues not presented *to the trial court*, may not ordinarily be considered by the appellate courts. There is an exception to that rule for lack of trial court jurisdiction. RAP 2.5(a)(1).<sup>1</sup> A similar exception should apply here as the 1988 bar date order is jurisdictional. As noted in the Petition for Review at 6–8, once the bankruptcy court has determined notice to creditors is sound, and entered an order of discharge, the bankruptcy court’s decision is res

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<sup>1</sup> Todd, of course, raised the issue in the trial court.

judicata, and deprives state courts of jurisdiction to act on the issue. Todd is entitled to raise this jurisdictional issue in this Court.

Furthermore, under RAP 2.5: “A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground.” Here, Todd is asking the Court to affirm the trial court on a ground that was presented to the trial court and with respect to which “the record has been sufficiently developed to fairly consider the ground.”

Finally, this Court has broad discretion in considering issues on review. For example, this Court has plenary authority to waive the rule, RAP 13.7(b), that its scope of review is limited to questions raised in the petition for review and the answer. *Tuerk v. Dep’t of Licensing*, 123 Wn.2d 120, 124, 864 P.2d 1382 (1994); *Kruse v. Hemp*, 121 Wn.2d 715, 721, 853 P.2d 1373 (1993). *See generally* RAP 1.2(c) (waiver of rules to serve ends of justice).

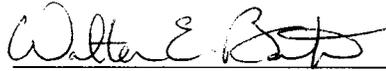
#### C. CONCLUSION

The Court should consider the issue of the preclusive effect of the 1988 bar date order.

For the reasons set forth in the Petition for Review, this Court should grant review, reverse the Court of Appeals published, split decision, and reinstate the trial court’s order on summary judgment.

DATED this 22<sup>nd</sup> day of June, 2006.

Respectfully submitted,



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