

SUPREME COURT OF THE STATE OF WASHINGTON
NO. 81003-6

Court Of Appeals No. CA 57328-4-I

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

v.

4 Bees Siding, et al.

PACIFIC STAR ROOFING, INC., a Washington corporation;
P.I. INTERPRISE, INC., a Washington corporation;
Petitioners;

and

GERALD UTLEY dba PJ INTERPRIZE, a sole proprietorship,
Proposed Intervenor/Co-Petitioner

GERALD UTLEY'S PROPOSED PETITION FOR REVIEW

Mark A. Clausen, WSBA # 15693
CLAUSEN LAW FIRM, PLLC
701 Fifth Avenue, Suite 7230
Seattle, WA 98104
(206) 223-0335
(206) 223-0337 Fax
mclausen@clausenlawfirm.com

Attorney for GERALD UTLEY d/b/a PJ
INTERPRIZE, a sole proprietorship

FILED
FEB 20 2008

CLERK OF SUPREME COURT
STATE OF WASHINGTON

CLERK

BY RONALD R. CARTER

2008 FEB 20 P 4: 28

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

TABLE OF CONTENTS

	<u>Page</u>
SUPREME COURT OF THE STATE OF WASHINGTON.....	I
A. IDENTITY OF PROPOSED CO-PETITIONER.....	1
B. COURT OF APPEALS' DECISIONS	1
C. ISSUES PRESENTED FOR REVIEW.....	2
D. STATEMENT OF THE CASE.....	3
E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.	7
1. THE COURT OF APPEALS DECISION DENIED MR. UTLEY ADEQUATE DUE PROCESS BECAUSE IT DETERMINED HIS DEFENSES WITHOUT HIS PARTICIPATION AS A PARTY.....	7
2. THE COURT OF APPEALS FAILED TO APPLY THE APPLICABLE STATUTES OF LIMITATIONS TO THE CLAIMS AGAINST MR. UTLEY.....	12
3. THE COURT OF APPEALS ERRONEOUSLY DETERMINED THAT THE CLAIMS AGAINST THE SOLE PROPRIETORSHIP RELATE BACK UNDER CR 15.....	14
4. THE COURT OF APPEALS ERRED BECAUSE THE BANKRUPTCY DISCHARGE PRECLUDES FURTHER ACTION AGAINST THE SOLE PROPRIETORSHIP.....	16
F. CONCLUSION.....	19

TABLE OF AUTHORITIES

	<u>Page</u>
<i>Federal Cases</i>	
<i>Mullane v. Central Hanover Bank & Trust Co.</i> , 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950)	9
<i>Washington State Cases</i>	
<i>1000 Virginia Ltd. P'ships v. Vertecs</i> 158 Wn.2d 566, 146 P.3d 423 (2006)	5, 6, 7, 13
<i>Arreygue v. Lutz</i> , 116 Wn. App. 938, 69 P.3d 881 (2003)	18
<i>Cambridge Townhomes, LLC v. Pacific Star Roofing, Inc.</i> , No. 57328-4-1, filed on June 11, 2007	1, 19
<i>Del Guzzi Constr. Co. v. Global Nw. Ltd.</i> , 105 Wash.2d 878, 883, 719 P.2d 120 (1986)	13
<i>Duskin v. Carlson</i> , 136 Wn.2d 550, 965 P.2d 611 (1998)	9
<i>Ecology v. Acquavella</i> , 100 Wn.2d 651, 674 P.2d 160 (1983)	9
<i>Fraser v. Beutel</i> , 56 Wn. App. 725, 785 P.2d 470 (1990)	13
<i>Haberman v. WPPSS</i> , 109 Wn.2d 107, 744 P.2d 1032, 750 P.2d 254 (1987);	15
<i>In re Marriage of T.</i> , 68 Wn. App. 329, 842 P.2d 1010 (1993)	8
<i>Maynard Inv. Co., Inc. v. McCann</i> , 77 Wn.2d 616, 621, 465 P.2d 657 (1970)	9, 10
<i>North St. Ass'n v. Olympia</i> , 96 Wn.2d 359, 368, 635 P.2d 721 (1981)	15

<i>Rice v. Dow Chem. Co.</i> , 124 Wash.2d 205, 211, 875 P.2d 1213 (1994)	12
<i>Sabey v. Howard Johnson & Co.</i> , 101 Wn. App. 575, 5 P.3d 730 (2000).	6
<i>South Hollywood Hills Citizens Ass'n v. King Cy.</i> , 101 Wn.2d 68, 77, 677 P.2d 114 (1984)	15
<i>Tellinghuisen v. King Cy.</i> , 103 Wn.2d 221, 223, 691 P.2d 575 (1984)	15
<i>Vovos v. Grant</i> , 87 Wn.2d 697, 555 P.2d 1343 (1976)	8
<i>Walker v. Munro</i> , 124 Wn.2d 402, 879 P.2d 920 (1994)	9, 10
<i>Federal Statutes</i>	
11 U.S.C. § 524(a)	17
11 U.S.C. § 727	4
<i>State Statutes and Rules</i>	
CR 15	14, 15
RCW 4.16.300	13
RCW 4.16.310	12, 13
RCW 4.16.326(1)(g)	passim
<i>Other Authorities</i>	
<i>U.S. Const.</i> , amend. XIV, § 1	9
<i>Washington Const.</i> , Art. 1, § 3	9
3A L. Orland, Wash. Prac., comment § 5185, at 43-44 (3d ed. 1986 Supp.)	15

PETITION (PROPOSED)¹

A. IDENTITY OF PROPOSED CO-PETITIONER

GERALD UTLEY d/b/a PJ INTERPRIZE, a Washington Sole Proprietorship (“Mr. Utley” or “Sole Proprietorship”), asks this Court to allow him to intervene, and accept review of the Court of Appeals’ decisions designated in Part B of this petition. Mr. Utley performed construction work on a phase of the Project at issue in this appeal. Mr. Utley later incorporated Petitioner PJ Interprize, Inc., the current petitioner for review in this appeal.

B. COURT OF APPEALS’ DECISIONS

Proposed Co-Petitioner Utley 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 Appendices 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. Mr. Utley seeks review in addition to the grounds stated by PJ Interprize, Inc., to address issues that the Court of Appeals decided that affect his rights.

¹ This petition is identified as proposed and filed consistent with the Commissioner’s Letter of January 24, 2008, attached.

C. ISSUES PRESENTED FOR REVIEW

Mr. Utley's position in this appeal addresses the following issues, in addition to those raised by PJ Interprize, Inc.:

1. May an appellate court determine, as matter of law, defenses held by a person who is not and never was a party to the case and has had no opportunity to raise the defenses and have them adjudicated?
2. Does the affirmative defense created by RCW 4.16.326(1)(g) apply to actions brought after the statute's effective date?
3. Does an amended complaint relate back to the date of filing against a new party, when the failure to timely join the new party is the result of inexcusable neglect?
4. When a bankruptcy court allows a claim to proceed against a debtor in a specified action, and a party waits too long to be allowed to join that debtor in the specified action, may the creditor proceed differently than the bankruptcy court allowed?

D. STATEMENT OF THE CASE

Polygon Northwest Company ("Polygon") was the developer of the Cambridge Townhomes Condominium project ("Project"). (CP 4). Cambridge Townhomes, LLC ("Cambridge") was owner/general contractor that Polygon formed for the Project. (CP 4) (Polygon and Cambridge are jointly referred to as "Cambridge" herein). The Project was constructed in three phases. Phase 1 consisted of Buildings 1 through 10, Phase 2 consisted of Buildings 11 through 31, and Phase 3 consisted of Buildings 32 to 41. (CP 98-111 and 456).

Vinyl siding contractor, Defendant 4 Bee's Siding, Inc., subcontracted with Cambridge to install the vinyl siding and trim on Phase 1 of the Project. (CP 98-99).² On August 26, 1998, the Sole Proprietorship entered into a subcontract with Cambridge to install vinyl siding and trim on Phase 2 of the Project. (CP 98-101). The Sole Proprietorship's work on Phase 2 was completed by November 1998. (CP 98-101). The temporary certificates of occupancy for all of the buildings in Phase 2 were issued by October 1, 1999. (CP 2276-2279).

Several months after the Sole Proprietorship completed its work on Phase 2, PJ Interprize, Inc. ("Corporation"), was formed in January 1999.

² Mr. Utley performed some repair of 4 Bee's work, but the nature and extent of that work is not relevant to this appeal.

(CP 98-99). Four months later, on April 21, 1999, the Corporation entered into a new subcontract with Cambridge to install the vinyl siding and trim for Phase 3 of the Project. (CP 98-111).

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 include Cambridge Townhomes, LLC. (CP 1188). On June 10, 2004, the Debtors received a Chapter 7 bankruptcy discharge under 11 U.S.C. § 727 (CP 1206-1207). The bankruptcy order discharged the sole proprietorship's debts and liabilities to Cambridge Town homes, LLC arising from this project.

On March 24, 2004, Cambridge and Polygon sued PJ Interprize, Inc., for damages it alleged were due for construction defects on Phase I, II and III. (CP 237-252). On May 28, 2004, Cambridge and Polygon filed a motion for relief from the automatic stay in the Bankruptcy Court to pursue claims against the Corporation. (CP 277-283).

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. (CP 285-286). The Bankruptcy Court limited the relief from stay specifically to proceeding in the lawsuit

against the Corporation. (*Id.*) Polygon and Cambridge at no point sought relief from stay to file a separate action against the Debtor individually. They also did not seek to add the Utleys individually to the 2004 action at that time. The Utleys received a bankruptcy discharge, which nowhere limits the effect of the discharge of debts the Utleys incurred. (*Id.*)

In mid-2005, the Corporation moved for summary judgment dismissing breach of contract claims brought by Polygon and Cambridge, including claims on Phases I and II. (Declaration of Mark A. Clausen (hereinafter "Clausen Declaration"), Ex. 1). Judge Mertel granted the motion to dismiss the contract claims. The Order, dated October 26, 2005, stated, in pertinent part, as follows:

As a result of the bankruptcy discharge, Plaintiffs may not pursue claims against P.J. Interprize, Inc., for the sole proprietorship's work on the project, including the sole proprietorship's work on Phase I and Phase II. This does not preclude Plaintiffs from pursuing a separate declaratory judgment action against the sole proprietorship's insurance carriers for claims relating to the work performed by the sole proprietorship on Phases I and II, to the extent that insurance coverage is available. [Emphasis added]

(Clausen Declaration, Ex. 2).

On November 29, 2005, Respondents brought a separate action against the sole proprietorship, King County No. 05-2-38551-1 SEA CON, almost 7 years after substantial completion. (Clausen Declaration, Ex. 3).

When Mr. Utley moved for Summary Judgment dismissing the

Respondents' claims, they moved for a stay of the entire case pending the appeal in this matter and the Supreme Court's then-pending decision in *1000 Virginia Ltd. P'ships v. Vertecs*, 158 Wn.2d 566, 146 P.3d 423 (2006). The trial court granted the stay. (Declaration of Clausen, Ex. 4.) The trial court stated that it would entertain a motion to lift the stay when the decision in *1000 Virginia* was rendered. (*Id.*)

In March of 2007, after this Court decided the *1000 Virginia* appeal, Mr. Uteley moved to lift the stay on the action against him and consolidate the two cases. Plaintiffs opposed the motion and the Court denied it. (Clausen Declaration, ¶ 6, Ex. 5).

On June 4, 2007, Division I of the Court of Appeals issued its opinion in this case. The Court concluded, among other grounds, that the Sole Proprietorship would not be prejudiced by being added as a defendant to this, the 2004 action. Opinion at 11-13. It also concluded that the amendment adding the Sole Proprietorship would relate back to the time of the filing of the original complaint. *Id.* 12-13. It further concluded that the statute of limitations did not run on claims against Mr. Uteley. *Id.* The panel further concluded that the bankruptcy discharge did not prevent plaintiffs from pursuing claims against the Uteleys despite the bankruptcy discharge. *Id.* at 11.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.

Two major issues justify this Court accepting review of the Court of Appeals decision that relates to Mr. Utley. First, the Court of Appeals decided Mr. Utley's defenses when neither the issues nor Mr. Utley was before the trial court. Second, the Court of Appeals failed to apply the law to determine the issues not properly before it. This includes a misreading of the applicable law relating to the statute of limitations; a failure to consider the evidence of plaintiffs' obvious neglect in moving to join Mr. Utley; and the failure to apply the applicable bankruptcy law and order. Mr. Utley obviously raises these arguments only as alternative grounds for acceptance of review. This Court in *1000 Virginia* pointed out when the Court of Appeals had exceeded its proper scope of review in a prior case. This case presents a clear case in which the Court of Appeals has exceeded the proper scope of its review.

1. The Court Of Appeals Decision Denied Mr. Utley Adequate Due Process Because It Determined His Defenses Without His Participation As A Party.

Washington courts have consistently held that a person or entity has the right to participate in litigation when he/she has a personal stake in the outcome. See, e.g., *Sabey v. Howard Johnson & Co.*, 101 Wn. App. 575, 5 P.3d 730 (2000). Any party with a protectable interest that could

be adversely affected by the result is allowed to participate in a case. *See, e.g., Vovos v. Grant*, 87 Wn.2d 697, 555 P.2d 1343 (1976); *In re Marriage of T.*, 68 Wn. App. 329, 842 P.2d 1010 (1993). Our appellate courts

The Court of Appeals opinion clearly affects Mr. Utley's fundamental interests and rights. Without any participation by Mr. Utley, and without any briefing or evidence of the claims against Mr. Utley³, the Court of Appeals held as follows:

- (1) It was an abuse of discretion not to allow Mr. Utley to be joined in the pending action, even though the plaintiffs delayed doing so for more than a year;
- (2) Plaintiffs' claims against Mr. Utley, as a matter of law and fact, relate back to the time of the filing of the original complaint;
- (3) The statute of limitations, as a matter of law and fact, had not run on the plaintiffs' claims against Mr. Utley;
- (4) The bankruptcy discharge and bankruptcy court order, as a matter of law and fact, would not bar claims against Mr. Utley as a sole proprietorship.

³ By definition, because the trial court did not allow the claims against Mr. Utley to be brought, no competent evidence supporting or refuting those claims was before the Court of Appeals.

The effect of the Court of Appeals' opinion is to determine and limit Mr. Utley's defenses without him being a party to the case at the trial or appellate levels. This violates Mr. Utley's basic due process rights. *U.S. Const.*, amend. XIV, § 1; *Washington Const.*, art. 1, § 3. Due process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950); *Duskin v. Carlson*, 136 Wn.2d 550, 965 P.2d 611 (1998); *Ecology v. Acquavella*, 100 Wn.2d 651, 674 P.2d 160 (1983). It also represents the Court of Appeals reaching issues that the trial court in the Corporation litigation did not consider — and could not have considered given its rulings.

The Court of Appeals decision is a clear example of an advisory opinion. Advisory opinions by our appellate courts are inappropriate. *Walker v. Munro*, 124 Wn.2d 402, 879 P.2d 920 (1994). The traditional rule is that an issue or theory not presented to the trial court will not be considered by the court for the first time on appeal. *Maynard Inv. Co., Inc. v. McCann*, 77 Wn.2d 616, 621, 465 P.2d 657 (1970). As an exception, a reviewing court may consider questions raised for the first time on appeal if necessary to serve the ends of substantial justice or prevent the denial of

fundamental rights. *Id.* at 622. In fact, exactly the opposite is presented here, where the Court of Appeals decision dealing with issues not raised below has resulted in the denial of substantial justice and due process.

The trial court in this appeal determined that Mr. Utley could not be joined as a party. Because of that decision, by definition the trial court did not have before it any of Mr. Utley's defenses. The lower court obviously did not have before it the question of whether the statute of limitations or statute of repose barred claims against Mr. Utley personally. Because the lower court rejected the belated amendment to join Mr. Utley, neither the parties nor the trial court could have considered – much less adjudicated – whether the rejected new claims should relate back to the date of the original complaint.

The Court of Appeals, however, considered these issues initially on appeal. This represents, at a minimum, an advisory opinion on issues not properly before it. But more fundamentally, it represents a denial of due process. Proper due process would have required (1) adequate notice to Mr. Utley that his defenses were being adjudicated; (2) an opportunity for him to present evidence related to those defenses, and to present other available defenses; (3) an opportunity for counsel to brief and argue the legal theories; and (4) the opportunity to appeal or respond to an appeal

based on the decision of a trier of fact. To date, Mr. Utley has been denied all of these fundamental rights.

Mr. Utley's lack of due process is perpetuated by the lower court's stay of the action against him personally. The trial court in the Sole Proprietorship suit stayed all action pending the outcome of this appeal. The Court made the decision while Mr. Utley's motion for summary judgment was pending. Mr. Utley therefore not only had not notice or opportunity for hearing in this case. He is prevented from having any court consider the evidence or argument supporting his defenses.

The Supreme Court should consider these issues, in addition to the issues raised by learned counsel for the Corporation. Although Mr. Utley and the Corporation's interests are largely similar, they are not identical to Mr. Utley's. The corporation worked on a different phase of the project, under a separate subcontract. The corporation was not a debtor in the bankruptcy. The Corporation could obtain a reversal that would not address the Court of Appeals' extensive treatment of Mr. Utley's defenses.

The apparent intent of the Court of Appeals' opinion is to collaterally estop Mr. Utley from litigating defenses without any due process. Given the importance of the issue and the potential effect of the Court of Appeals opinion, Mr. Utley should be allowed to participate as a party, and this court should accept review of an appellate decision below

that involves a significant question of law under the Constitutions of the State of Washington and of the United States.

2. The Court Of Appeals Failed To Apply The Applicable Statutes Of Limitations To The Claims Against Mr. Utley.

This appeal represents the opportunity for this Court to expand the application of its holding in *1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 146 P.3d 423 (2006). In this case, Cambridge did not file its action against Mr. Utley until years after RCW 4.16.326(1)(g) was in effect. The Court therefore has an opportunity to deal with the statutory application post-enactment.

RCW 4.16.310 requires a 2-step analysis in determining when it applies. This Court stated, in pertinent part, as follows:

In addressing whether a statute of limitations has run on an action arising out of construction or repair of an improvement on real property, both the relevant statute of limitations and the statute of repose set out in RCW 4.16.310 ^{FN2} must be considered. RCW 4.16.310 is a six-year statute of repose that applies to actions arising out of the construction of a building.^{FN3} As this court has explained, statutes of repose are “of a different nature than statutes of limitation.” *Rice v. Dow Chem. Co.*, 124 Wash.2d 205, 211, 875 P.2d 1213 (1994). “A statute of limitation bars plaintiff from bringing an already accrued claim after a specific period of time. A statute of repose terminates a right of action after a specified time, even if the injury has not yet occurred.” *Id.* at 211-12, 875 P.2d 1213 (citations omitted). [Footnotes omitted]

1000 Virginia Ltd. P'ship v. Vertecs, 158 Wn.2d at 574-75.

First, the cause of action must accrue within 6 years of substantial completion of the improvement; and second, a party then must file suit within the applicable statute of limitation, depending on the type of action." *1000 Virginia Ltd. P'ships v. Vertecs*, 158 Wn.2d at 574; *Del Guzzi Constr. Co. v. Global Nw., Ltd.*, 105 Wash.2d 878, 883, 719 P.2d 120 (1986).

The Court of Appeals erroneously concluded that Cambridge's claims against Mr. Utley are viable because they "accrued" within the six year statute of repose under RCW 4.16.310. RCW 4.16.326(1)(g), however, became effective July 27, 2003. It applies to Cambridge's claims against Mr. Utley, as that complaint was filed after July 27, 2003. *Fraser v. Beutel*, 56 Wn. App. 725, 785 P.2d 470 (1990). 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 affirmative defense in RCW 4.16.326(1)(g) 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. *1000 Virginia Ltd. P'ships v. Vertecs*, 158 Wn.2d at 582. 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 barred. Even assuming, *arguendo*, that

the Court of Appeals had properly considered Mr. Utley's statute of limitations defense, it erred in holding that the statute of limitations does not bar Cambridge's claims against the sole proprietorship.

Cambridge may argue that RCW 4.16.326(1)(g) cannot apply because Mr. Utley failed to raise it as an affirmative defense. That argument highlights precisely why the Court of Appeals erred in its decision. There is no claim against Mr. Utley in this matter for him to answer or affirmatively defend. Mr. Utley has not been given an opportunity in this case to raise the issue, and so it is unfair and inappropriate for the Court of Appeals to decide it against him.⁴

3. The Court Of Appeals Erroneously Determined That The Claims Against The Sole Proprietorship Relate Back Under CR 15.

The Court of Appeals determined that the trial court had abused its discretion by denying Cambridge leave to amend to add the sole proprietorship as a party. Court of Appeals Opinion at 11-13. As noted above, this question could not properly have been decided in this appeal, and should not have been decided without Mr. Utley's participation. Further, the decision is contrary to applicable law governing amendments to add new parties.

When the plaintiff has sought an amendment to add new

⁴ Assuming, *arguendo*, that the Court reaches this issue, it can assume by the parties' briefing that the issue is before the Court. Certainly the Court of Appeals impliedly did just that in reaching its decision.

defendants under CR 15(c), this Court has held that inexcusable neglect alone is a sufficient ground for denying the amendment. *Haberman v. WPPSS*, 109 Wn.2d 107, 744 P.2d 1032, 750 P.2d 254 (1987); *North St. Ass'n v. Olympia*, 96 Wn.2d 359, 368, 635 P.2d 721 (1981); *Tellinghuisen v. King Cy.*, 103 Wn.2d 221, 223, 691 P.2d 575 (1984); *South Hollywood Hills Citizens Ass'n v. King Cy.*, 101 Wn.2d 68, 77, 677 P.2d 114 (1984).

Generally, inexcusable neglect exists when no reasons for the initial failure to name the party appears in the record. *South Hollywood Hills Citizens Ass'n*, at 78. If the parties are apparent, or are ascertainable upon reasonable investigation, the failure to name them will be held to be inexcusable. See 3A L. Orland, Wash. Prac., comment § 5185, at 43-44 (3d ed. 1986 Supp.); *Tellinghuisen*, at 224 (no excuse where identity of omitted parties was matter of public record); *South Hollywood Hills Citizens Ass'n*, at 77 (no excuse because identity of omitted parties was matter of public record).

In this matter, Cambridge obviously had notice of its claims against Mr. Utley to timely seek an amendment. It sued in March 2004 for alleged damages on the Project, so it cannot claim lack of knowledge of claims against Mr. Utley. He worked on the second phase of a three-phase project from which the plaintiffs' claims arise. It cannot seriously be argued that Cambridge knew of the claims against the corporation and

lacked notice of the claims against Mr. Utley.

Plaintiffs further moved in the Utley bankruptcy action for relief from stay to pursue an action. The Bankruptcy Court's order of June 2004 allowed Cambridge to pursue such an action. Respondents then waited until almost the eve of trial to seek to add Mr. Utley as a party. The Reply Brief of the Corporation deals in more detail with the unreasonable delay in the attempt to add Mr. Utley as a party, and Mr. Utley relies upon the Corporation's briefing as well as its own.

After the trial court rejected Cambridge's 11th-hour motion to amend, it then waited until late November, 2005, to bring an action against Mr. Utley. This undisputed knowledge of its claim and failure to act upon it constitutes inexcusable neglect that would bar the relation back of the claims against Mr. Utley. Neither the trial court nor the Court of Appeals properly had this question before it. The only proper course for this Court is to accept review and reverse the Court of Appeals.

4. The Court Of Appeals Erred Because The Bankruptcy Discharge Precludes Further Action Against The Sole Proprietorship.

The Court of Appeals also determined that the Utley bankruptcy discharge did not affect Cambridge's claims against Mr. Utley. Court of Appeals opinion at 11. Federal law is clear:

11 USC § 524 Effect of discharge:

(a) A discharge in a case under this title -

(2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor ...

On February 27, 2004, Mr. and Mrs. Utley filed their Bankruptcy Petition. They listed Cambridge Townhomes, LLC as a creditor. Cambridge therefore had notice of their bankruptcy application before filing the instant suit. The Utleys received a bankruptcy discharge on June 10, 2004. The discharge order was never appealed, and the bankruptcy case is closed.

Polygon, Cambridge and the bankruptcy court specifically addressed the extent of any pursuit of Mr. Utley in light of the bankruptcy. The bankruptcy court, based on language provided by counsel for Cambridge, limited the relief from stay to the following:

[T]he automatic stay in this proceeding is hereby lifted for the purpose of allowing Polygon Northwest Company and Cambridge Townhomes, LLC to proceed against the Debtor in the underlying state court action Polygon Northwest Company and Cambridge Townhomes, LLC v. P.J. Interprize et al, Cause No. 04-2-06304-3 SEA for the purpose of pursuing any insurance proceeds that are the result of any insurance coverage the Debtor may possess.”(emphasis added).

(CP 285-286.)

Cambridge did nothing to pursue Mr. & Mrs. Utley for well over a year. It did not file any objection to the scope of the discharge, or seek any adjudication of its rights in the bankruptcy court. Nothing in the prior bankruptcy court order or the Order of Discharge authorized pursuing a claim, or exempted the claim from discharge.

Cambridge and Polygon rely upon the decision in *Arreygue v. Lutz*, 116 Wn. App. 938, 69 P.3d 881 (2003). This decision is essentially mirrored by the previous order in bankruptcy, allowing Cambridge and Polygon to pursue “any insurance proceeds that are the result of any insurance coverage the Debtor may possess,” in this action. Respondents were given a clear, timely route in 2004 to pursue the insurance proceeds. They elected not take it until the trial court determined, in its discretion, it was too close to trial.

Judge Mertel below recognized the defect in the plaintiff’s position and attempted to resolve applicable claims against PJ Interprize, Inc. He limited plaintiffs’ claims as follows:

As a result of the bankruptcy discharge, Plaintiffs may not pursue claims against P.J. Interprize, Inc., for the sole proprietorship’s work on the project, including the sole proprietorship’s work on Phase I and Phase II. This does not preclude Plaintiffs from pursuing a separate declaratory judgment action against the sole proprietorship’s insurance carriers for claims relating to the work performed by the sole proprietorship on Phases I and II, to the extent that insurance coverage is available. [Emphasis added]

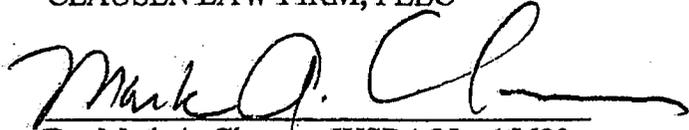
(CP 2024-28). The only rational way to read the lower court's order is that, as result of the omission of the claim from the motion for relief from stay and the bankruptcy discharge, plaintiffs lost the ability to pursue Mr. Utley personally for his work on Phases I and II. The only exception listed was very specific: a separate claim directly against the insurance carriers, if such a claim existed. Such a claim obviously would not have been subject either of a stay in bankruptcy or Mr. Utley's bankruptcy discharge.

F. CONCLUSION.

For the above reasons, Mr. Utley submits this proposed Petition for Review. He seeks the right to intervene in the pending review, and for review by this Court. If review is granted, he seeks a reversal 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.

Respectfully submitted this 20 day of February, 2008.

CLAUSEN LAW FIRM, PLLC

A handwritten signature in black ink, appearing to read "Mark A. Clausen", written over a horizontal line.

By: Mark A. Clausen, WSBA No. 15693
Attorney for Gerald Utley, et ux.
701 Fifth Avenue, Suite 7230
Seattle, WA 98104
(206) 223-0335

APPENDIX

100-100-100

RONALD R. CARPENTER
SUPREME COURT CLERK

SUSAN L. CARLSON
DEPUTY CLERK / CHIEF STAFF ATTORNEY

THE SUPREME COURT
STATE OF WASHINGTON



TEMPLE OF JUSTICE
P.O. BOX 40928
OLYMPIA, WA 98504-0928

(360) 357-2077
e-mail: supreme@courts.wa.gov
www.courts.wa.gov

RECEIVED

JAN 25 2008

Clausen Law Firm PLLC

January 24, 2008

Eileen I. McKillop
Oles Morrison Rinker & Baker LLP
701 Pike Street, Suite 1700
Seattle, WA 98101-3930

Jerret E. Sale
Deborah Lynn Carstens
Bullivant Houser Bailey PC
1601 5th Avenue, Suite 2300
Seattle, WA 98101-1618

Gregory Paul Turner
Lee Smart PS Inc.
701 Pike Street, Suite 1800
Seattle, WA 98101-3929

Mark A. Clausen
Clausen Law Firm PLLC
701 5th Avenue, Suite 7230
Seattle, WA 98104-7097

Richard D. Johnson, Clerk
Court of Appeals, Division I
One Union Square
600 University Street
Seattle, WA 98101-1176

Re: Supreme Court No. 81003-6 - Cambridge Townhomes & Polygon NW v. 4 Bees Siding,
et al.
Court of Appeals No. 57328-4-I

Clerk & Counsel:

The Court of Appeals has forwarded the Petition for Review and related Court of Appeals case file in the referenced matter. The matter has been assigned the Supreme Court cause number indicated above.

On December 17, 2007, this Court received the Respondent's "MOTION FOR EXTENSION OF TIME" to file an answer to the Petition for Review. The following notation ruling was entered on December 17, 2007, by the Supreme Court Deputy Clerk:

"Motion granted. Respondent's answer to the petition for review shall be filed by not later than February 4, 2008."

On December 10, 2007, this Court received "UTLEY'S MOTION TO INTERVENE AS A CO-PETITIONER, Or ALTERNATIVELY, TO FILE *AMICUS BRIEF*". The following notation ruling was entered on January 23, 2008, by the Supreme Court Commissioner Steven Goff:

"Gerald Utley's motion to intervene is referred to the court for consideration with the petition for review in this case. Mr. Utley may file a proposed petition for review not later than February 20, 2008. Any answers to the proposed petition should be filed by not later than March 24, 2008, and any reply (if authorized by RAP 13.4(d)) by April 16, 2008."

The Petition for Review and Motion to Intervene will be set for consideration without oral argument by a Department of the Court; see RAP 13.4(i). If the members of the Department do not unanimously agree on the manner of the disposition, consideration of the petition and motion will be continued for determination by the En Banc Court.

Usually there is at least 10 months between receipt of the Petition for Review in this court and consideration of the petition. This amount of time is built into the process to allow an answer to the petition and for the court's normal screening process. At this time it is not known on what date the matter will be determined by the Court. The parties will be advised when the Court makes a decision on the merits.

It is noted that any amicus curiae memorandum in support of or in opposition to a pending petition for review should be served and received by this Court and counsel of record for the parties and other amicus curiae by not later than 60 days from the date the Petition for Review was filed; see RAP 13.4(h).

Sincerely,



Susan L. Carlson
Supreme Court Deputy Clerk

SLC:bbm

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)

DIVISION ONE

No. 57328-4-1

UNPUBLISHED OPINION

FILED: June 4, 2007

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

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.

construction defects that resulted in leaks and water damage. At the time the suit was 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 occurred prior to June 7, 2006.¹⁴ In Ballard, RCW 23B.14.340 operated against the

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.

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 indemnification of a contractor for the contractor's sole negligence.²¹ Here, the

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 388 (1970).

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

²¹ Jones, 84 Wn.2d at 522-23.

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 P.J. Interprize, Inc." Utley's bankruptcy was discharged in June 2004.

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

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

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. Gelsenhelmer, 733 A.2d 193, 197 (1999).

Utlely 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 Utlely'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. Utlely 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

³⁶ See Arreque 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 sole proprietorship as a defendant. The court denied the motion.

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

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).

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. 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

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).

relinquishment of a known right.⁴⁶ The party asserting waiver bears the burden of 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

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

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.").

57328-4-1/15

through eight of Jobe's declaration.

ER 702 provides:

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. Randitsch, 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.

Amendment XIV.

CONSTITUTION OF UNITED STATES

AMENDMENTS

Amendment XIV. Rights Guaranteed: Privileges and Immunities of Citizenship, Due Process, and Equal Protection

Amendment XIV. Rights Guaranteed: Privileges and Immunities of Citizenship, Due Process, and Equal Protection

SECTION. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION. 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION. 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

© Lawriter Corporation. All rights reserved.

The Casemaker™ Online database is a compilation exclusively owned by Lawriter Corporation. The database is provided for use under the terms, notices and conditions as expressly stated under the online end user license agreement to which all users assent in order to access the database.

SECTION 3

WASHINGTON STATE CONSTITUTION

ARTICLE I DECLARATION OF RIGHTS

SECTION 3 PERSONAL RIGHTS

SECTION 3 PERSONAL RIGHTS

No person shall be deprived of life, liberty, or property, without due process of law.

© Lawriter Corporation. All rights reserved.

The Casemaker™ Online database is a compilation exclusively owned by Lawriter Corporation. The database is provided for use under the terms, notices and conditions as expressly stated under the online end user license agreement to which all users assent in order to access the database.

11 USC § 524**Statutes and Session Law****Title 11 - BANKRUPTCY****Chapter 5 - CREDITORS, THE DEBTOR, AND THE ESTATE****11 USC § 524 Effect of discharge****11 USC § 524. Effect of discharge****SUBCHAPTER II - DEBTOR'S DUTIES AND BENEFITS****(a) A discharge in a case under this title -**

(1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727, 944, 1141, 1228, or 1328 of this title, whether or not discharge of such debt is waived;

(2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived; and

(3) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect or recover from, or offset against, property of the debtor of the kind specified in section 541(a)(2) of this title that is acquired after the commencement of the case, on account of any allowable community claim, except a community claim that is excepted from discharge under section 523, 1228(a)(1), or 1328(a)(1), or that would be so excepted, determined in accordance with the provisions of sections 523(c) and 523(d) of this title, in a case concerning the debtor's spouse commenced on the date of the filing of the petition in the case concerning the debtor, whether or not discharge of the debt based on such community claim is waived.

(b) Subsection (a)(3) of this section does not apply if -

(1)(A) the debtor's spouse is a debtor in a case under this title, or a bankrupt or a debtor in a case under the Bankruptcy Act, commenced within six years of the date of the filing of the petition in the case concerning the debtor; and

(B) the court does not grant the debtor's spouse a discharge in such case concerning the debtor's spouse; or

(2)(A) the court would not grant the debtor's spouse a discharge in a case under chapter 7 of this title concerning such spouse commenced on the date of the filing of the petition in the case concerning the debtor; and

(B) a determination that the court would not so grant such discharge is made by the bankruptcy court within the time and in the manner provided for a determination under section 727 of this title of whether a debtor is granted a discharge.

(c) An agreement between a holder of a claim and the debtor, the consideration for which, in whole or in part, is based on a debt that is dischargeable in a case under this title is enforceable only to any extent enforceable under applicable nonbankruptcy law, whether or not discharge of such debt is

waived, only if -

(1) such agreement was made before the granting of the discharge under section 727, 1141, 1228, or 1328 of this title;

(2) the debtor received the disclosures described in subsection (k) at or before the time at which the debtor signed the agreement;

(3) such agreement has been filed with the court and, if applicable, accompanied by a declaration or an affidavit of the attorney that represented the debtor during the course of negotiating an agreement under this subsection, which states that -

(A) such agreement represents a fully informed and voluntary agreement by the debtor;

(B) such agreement does not impose an undue hardship on the debtor or a dependent of the debtor; and

(C) the attorney fully advised the debtor of the legal effect and consequences of -

(i) an agreement of the kind specified in this subsection; and

(ii) any default under such an agreement;

(4) the debtor has not rescinded such agreement at any time prior to discharge or within sixty days after such agreement is filed with the court, whichever occurs later, by giving notice of rescission to the holder of such claim;

(5) the provisions of subsection (d) of this section have been complied with; and

(6)(A) in a case concerning an individual who was not represented by an attorney during the course of negotiating an agreement under this subsection, the court approves such agreement as -

(i) not imposing an undue hardship on the debtor or a dependent of the debtor; and

(ii) in the best interest of the debtor.

(B) Subparagraph (A) shall not apply to the extent that such debt is a consumer debt secured by real property.

(d) In a case concerning an individual, when the court has determined whether to grant or not to grant a discharge under section 727, 1141, 1228, or 1328 of this title, the court may hold a hearing at which the debtor shall appear in person. At any such hearing, the court shall inform the debtor that a discharge has been granted or the reason why a discharge has not been granted. If a discharge has been granted and if the debtor desires to make an agreement of the kind specified in subsection (c) of this section and was not represented by an attorney during the course of negotiating such agreement, then the court shall hold a hearing at which the debtor shall appear in person and at such hearing the court shall -

(1) inform the debtor -

(A) that such an agreement is not required under this title, under nonbankruptcy law, or under any

agreement not made in accordance with the provisions of subsection (c) of this section; and

(B) of the legal effect and consequences of -

(i) an agreement of the kind specified in subsection (c) of this section; and

(ii) a default under such an agreement; and

(2) determine whether the agreement that the debtor desires to make complies with the requirements of subsection (c)(6) of this section, if the consideration for such agreement is based in whole or in part on a consumer debt that is not secured by real property of the debtor.

(e) Except as provided in subsection (a)(3) of this section, discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt.

(f) Nothing contained in subsection (c) or (d) of this section prevents a debtor from voluntarily repaying any debt.

(g)(1)(A) After notice and hearing, a court that enters an order confirming a plan of reorganization under chapter 11 may issue, in connection with such order, an injunction in accordance with this subsection to supplement the injunctive effect of a discharge under this section.

(B) An injunction may be issued under subparagraph (A) to enjoin entities from taking legal action for the purpose of directly or indirectly collecting, recovering, or receiving payment or recovery with respect to any claim or demand that, under a plan of reorganization, is to be paid in whole or in part by a trust described in paragraph (2)(B)(i), except such legal actions as are expressly allowed by the injunction, the confirmation order, or the plan of reorganization.

(2)(A) Subject to subsection (h), if the requirements of subparagraph (B) are met at the time an injunction described in paragraph (1) is entered, then after entry of such injunction, any proceeding that involves the validity, application, construction, or modification of such injunction, or of this subsection with respect to such injunction, may be commenced only in the district court in which such injunction was entered, and such court shall have exclusive jurisdiction over any such proceeding without regard to the amount in controversy.

(B) The requirements of this subparagraph are that -

(i) the injunction is to be implemented in connection with a trust that, pursuant to the plan of reorganization -

(I) is to assume the liabilities of a debtor which at the time of entry of the order for relief has been named as a defendant in personal injury, wrongful death, or property-damage actions seeking recovery for damages allegedly caused by the presence of, or exposure to, asbestos or asbestos-containing products;

(II) is to be funded in whole or in part by the securities of 1 or more debtors involved in such plan and by the obligation of such debtor or debtors to make future payments, including dividends;

(III) is to own, or by the exercise of rights granted under such plan would be entitled to own if specified contingencies occur, a majority of the voting shares of -

(aa) each such debtor;

(bb) the parent corporation of each such debtor; or

(cc) a subsidiary of each such debtor that is also a debtor; and

(IV) is to use its assets or income to pay claims and demands; and

(ii) subject to subsection (h), the court determines that -

(I) the debtor is likely to be subject to substantial future demands for payment arising out of the same or similar conduct or events that gave rise to the claims that are addressed by the injunction;

(II) the actual amounts, numbers, and timing of such future demands cannot be determined;

(III) pursuit of such demands outside the procedures prescribed by such plan is likely to threaten the plan's purpose to deal equitably with claims and future demands;

(IV) as part of the process of seeking confirmation of such plan -

(aa) the terms of the injunction proposed to be issued under paragraph (1)(A), including any provisions barring actions against third parties pursuant to paragraph (4)(A), are set out in such plan and in any disclosure statement supporting the plan; and

(bb) a separate class or classes of the claimants whose claims are to be addressed by a trust described in clause (i) is established and votes, by at least 75 percent of those voting, in favor of the plan; and

(V) subject to subsection (h), pursuant to court orders or otherwise, the trust will operate through mechanisms such as structured, periodic, or supplemental payments, pro rata distributions, matrices, or periodic review of estimates of the numbers and values of present claims and future demands, or other comparable mechanisms, that provide reasonable assurance that the trust will value, and be in a financial position to pay, present claims and future demands that involve similar claims in substantially the same manner.

(3)(A) If the requirements of paragraph (2)(B) are met and the order confirming the plan of reorganization was issued or affirmed by the district court that has jurisdiction over the reorganization case, then after the time for appeal of the order that issues or affirms the plan -

(i) the injunction shall be valid and enforceable and may not be revoked or modified by any court except through appeal in accordance with paragraph (6);

(ii) no entity that pursuant to such plan or thereafter becomes a direct or indirect transferee of, or successor to any assets of, a debtor or trust that is the subject of the injunction shall be liable with respect to any claim or demand made against such entity by reason of its becoming such a transferee or successor; and

(iii) no entity that pursuant to such plan or thereafter makes a loan to such a debtor or trust or to such a successor or transferee shall, by reason of making the loan, be liable with respect to any claim or demand made against such entity, nor shall any pledge of assets made in connection with such a loan be upset or impaired for that reason;

(B) Subparagraph (A) shall not be construed to -

(i) imply that an entity described in subparagraph (A)(ii) or (iii) would, if this paragraph were not applicable, necessarily be liable to any entity by reason of any of the acts described in subparagraph (A);

(ii) relieve any such entity of the duty to comply with, or of liability under, any Federal or State law regarding the making of a fraudulent conveyance in a transaction described in subparagraph (A)(ii) or (iii); or

(iii) relieve a debtor of the debtor's obligation to comply with the terms of the plan of reorganization, or affect the power of the court to exercise its authority under sections 1141 and 1142 to compel the debtor to do so.

(4)(A)(i) Subject to subparagraph (B), an injunction described in paragraph (1) shall be valid and enforceable against all entities that it addresses.

(ii) Notwithstanding the provisions of section 524(e), such an injunction may bar any action directed against a third party who is identifiable from the terms of such injunction (by name or as part of an identifiable group) and is alleged to be directly or indirectly liable for the conduct of, claims against, or demands on the debtor to the extent such alleged liability of such third party arises by reason of -

(I) the third party's ownership of a financial interest in the debtor, a past or present affiliate of the debtor, or a predecessor in interest of the debtor;

(II) the third party's involvement in the management of the debtor or a predecessor in interest of the debtor, or service as an officer, director or employee of the debtor or a related party;

(III) the third party's provision of insurance to the debtor or a related party; or

(IV) the third party's involvement in a transaction changing the corporate structure, or in a loan or other financial transaction affecting the financial condition, of the debtor or a related party, including but not limited to -

(aa) involvement in providing financing (debt or equity), or advice to an entity involved in such a transaction; or

(bb) acquiring or selling a financial interest in an entity as part of such a transaction.

(iii) As used in this subparagraph, the term "related party" means -

(I) a past or present affiliate of the debtor;

(II) a predecessor in interest of the debtor; or

(III) any entity that owned a financial interest in -

(aa) the debtor;

(bb) a past or present affiliate of the debtor; or

(cc) a predecessor in interest of the debtor.

(B) Subject to subsection (h), if, under a plan of reorganization, a kind of demand described in such plan is to be paid in whole or in part by a trust described in paragraph (2)(B)(i) in connection with which an injunction described in paragraph (1) is to be implemented, then such injunction shall be valid and enforceable with respect to a demand of such kind made, after such plan is confirmed, against the debtor or debtors involved, or against a third party described in subparagraph (A)(ii), if -

(i) as part of the proceedings leading to issuance of such injunction, the court appoints a legal representative for the purpose of protecting the rights of persons that might subsequently assert demands of such kind, and

(ii) the court determines, before entering the order confirming such plan, that identifying such debtor or debtors, or such third party (by name or as part of an identifiable group), in such injunction with respect to such demands for purposes of this subparagraph is fair and equitable with respect to the persons that might subsequently assert such demands, in light of the benefits provided, or to be provided, to such trust on behalf of such debtor or debtors or such third party.

(5) In this subsection, the term "demand" means a demand for payment, present or future, that -

(A) was not a claim during the proceedings leading to the confirmation of a plan of reorganization;

(B) arises out of the same or similar conduct or events that gave rise to the claims addressed by the injunction issued under paragraph (1); and

(C) pursuant to the plan, is to be paid by a trust described in paragraph (2)(B)(i).

(6) Paragraph (3)(A)(i) does not bar an action taken by or at the direction of an appellate court on appeal of an injunction issued under paragraph (1) or of the order of confirmation that relates to the injunction.

(7) This subsection does not affect the operation of section 1144 or the power of the district court to refer a proceeding under section 157 of title 28 or any reference of a proceeding made prior to the date of the enactment of this subsection.

(h) Application to Existing Injunctions. - For purposes of subsection (g) -

(1) subject to paragraph (2), if an injunction of the kind described in subsection (g)(1)(B) was issued before the date of the enactment of this Act, as part of a plan of reorganization confirmed by an order entered before such date, then the injunction shall be considered to meet the requirements of subsection (g)(2)(B) for purposes of subsection (g)(2)(A), and to satisfy subsection (g)(4)(A)(ii), if -

(A) the court determined at the time the plan was confirmed that the plan was fair and equitable in accordance with the requirements of section 1129(b);

(B) as part of the proceedings leading to issuance of such injunction and confirmation of such plan, the court had appointed a legal representative for the purpose of protecting the rights of persons that might subsequently assert demands described in subsection (g)(4)(B) with respect to such plan; and

(C) such legal representative did not object to confirmation of such plan or issuance of such

injunction; and

(2) for purposes of paragraph (1), if a trust described in subsection (g)(2)(B)(i) is subject to a court order on the date of the enactment of this Act staying such trust from settling or paying further claims -

(A) the requirements of subsection (g)(2)(B)(ii)(V) shall not apply with respect to such trust until such stay is lifted or dissolved; and

(B) if such trust meets such requirements on the date such stay is lifted or dissolved, such trust shall be considered to have met such requirements continuously from the date of the enactment of this Act.

(i) The willful failure of a creditor to credit payments received under a plan confirmed under this title, unless the order confirming the plan is revoked, the plan is in default, or the creditor has not received payments required to be made under the plan in the manner required by the plan (including crediting the amounts required under the plan), shall constitute a violation of an injunction under subsection (a)(2) if the act of the creditor to collect and failure to credit payments in the manner required by the plan caused material injury to the debtor.

(j) Subsection (a)(2) does not operate as an injunction against an act by a creditor that is the holder of a secured claim, if -

(1) such creditor retains a security interest in real property that is the principal residence of the debtor;

(2) such act is in the ordinary course of business between the creditor and the debtor; and

(3) such act is limited to seeking or obtaining periodic payments associated with a valid security interest in lieu of pursuit of in rem relief to enforce the lien.

(k)(1) The disclosures required under subsection (c)(2) shall consist of the disclosure statement described in paragraph (3), completed as required in that paragraph, together with the agreement specified in subsection (c), statement, declaration, motion and order described, respectively, in paragraphs (4) through (8), and shall be the only disclosures required in connection with entering into such agreement.

(2) Disclosures made under paragraph (1) shall be made clearly and conspicuously and in writing. The terms "Amount Reaffirmed" and "Annual Percentage Rate" shall be disclosed more conspicuously than other terms, data or information provided in connection with this disclosure, except that the phrases "Before agreeing to reaffirm a debt, review these important disclosures" and "Summary of Reaffirmation Agreement" may be equally conspicuous. Disclosures may be made in a different order and may use terminology different from that set forth in paragraphs (2) through (8), except that the terms "Amount Reaffirmed" and "Annual Percentage Rate" must be used where indicated.

(3) The disclosure statement required under this paragraph shall consist of the following:

(A) The statement: "Part A: Before agreeing to reaffirm a debt, review these important disclosures:";

(B) Under the heading "Summary of Reaffirmation Agreement", the statement: "This Summary is made pursuant to the requirements of the Bankruptcy Code";

(C) The "Amount Reaffirmed", using that term, which shall be -

(i) the total amount of debt that the debtor agrees to reaffirm by entering into an agreement of the kind specified in subsection (c), and

(ii) the total of any fees and costs accrued as of the date of the disclosure statement, related to such total amount.

(D) In conjunction with the disclosure of the "Amount Reaffirmed", the statements -

(i) "The amount of debt you have agreed to reaffirm"; and

(ii) "Your credit agreement may obligate you to pay additional amounts which may come due after the date of this disclosure. Consult your credit agreement.";

(E) The "Annual Percentage Rate", using that term, which shall be disclosed as -

(i) if, at the time the petition is filed, the debt is an extension of credit under an open end credit plan, as the terms "credit" and "open end credit plan" are defined in section 103 of the Truth in Lending Act, then -

(I) the annual percentage rate determined under paragraphs (5) and (6) of section 127(b) of the Truth in Lending Act, as applicable, as disclosed to the debtor in the most recent periodic statement prior to entering into an agreement of the kind specified in subsection (c) or, if no such periodic statement has been given to the debtor during the prior 6 months, the annual percentage rate as it would have been so disclosed at the time the disclosure statement is given to the debtor, or to the extent this annual percentage rate is not readily available or not applicable, then

(II) the simple interest rate applicable to the amount reaffirmed as of the date the disclosure statement is given to the debtor, or if different simple interest rates apply to different balances, the simple interest rate applicable to each such balance, identifying the amount of each such balance included in the amount reaffirmed, or

(III) if the entity making the disclosure elects, to disclose the annual percentage rate under subclause (I) and the simple interest rate under subclause (II); or

(ii) if, at the time the petition is filed, the debt is an extension of credit other than under an open end credit plan, as the terms "credit" and "open end credit plan" are defined in section 103 of the Truth in Lending Act, then -

(I) the annual percentage rate under section 128(a)(4) of the Truth in Lending Act, as disclosed to the debtor in the most recent disclosure statement given to the debtor prior to the entering into an agreement of the kind specified in subsection (c) with respect to the debt, or, if no such disclosure statement was given to the debtor, the annual percentage rate as it would have been so disclosed at the time the disclosure statement is given to the debtor, or to the extent this annual percentage rate is not readily available or not applicable, then

(II) the simple interest rate applicable to the amount reaffirmed as of the date the disclosure statement is given to the debtor, or if different simple interest rates apply to different balances, the simple interest rate applicable to each such balance, identifying the amount of such balance included in

the amount reaffirmed, or

(III) if the entity making the disclosure elects, to disclose the annual percentage rate under (I) and the simple interest rate under (II).

(F) If the underlying debt transaction was disclosed as a variable rate transaction on the most recent disclosure given under the Truth in Lending Act, by stating "The interest rate on your loan may be a variable interest rate which changes from time to time, so that the annual percentage rate disclosed here may be higher or lower."

(G) If the debt is secured by a security interest which has not been waived in whole or in part or determined to be void by a final order of the court at the time of the disclosure, by disclosing that a security interest or lien in goods or property is asserted over some or all of the debts the debtor is reaffirming and listing the items and their original purchase price that are subject to the asserted security interest, or if not a purchase-money security interest then listing by items or types and the original amount of the loan.

(H) At the election of the creditor, a statement of the repayment schedule using 1 or a combination of the following -

(i) by making the statement: "Your first payment in the amount of \$ ___ is due on ___ but the future payment amount may be different. Consult your reaffirmation agreement or credit agreement, as applicable.", and stating the amount of the first payment and the due date of that payment in the places provided;

(ii) by making the statement: "Your payment schedule will be:", and describing the repayment schedule with the number, amount, and due dates or period of payments scheduled to repay the debts reaffirmed to the extent then known by the disclosing party; or

(iii) by describing the debtor's repayment obligations with reasonable specificity to the extent then known by the disclosing party.

(I) The following statement: "Note: When this disclosure refers to what a creditor 'may' do, it does not use the word 'may' to give the creditor specific permission. The word 'may' is used to tell you what might occur if the law permits the creditor to take the action. If you have questions about your reaffirming a debt or what the law requires, consult with the attorney who helped you negotiate this agreement reaffirming a debt. If you don't have an attorney helping you, the judge will explain the effect of your reaffirming a debt when the hearing on the reaffirmation agreement is held."

(J)(i) The following additional statements:

"Reaffirming a debt is a serious financial decision. The law requires you to take certain steps to make sure the decision is in your best interest. If these steps are not completed, the reaffirmation agreement is not effective, even though you have signed it.

"1. Read the disclosures in this Part A carefully. Consider the decision to reaffirm carefully. Then, if you want to reaffirm, sign the reaffirmation agreement in Part B (or you may use a separate agreement you and your creditor agree on).

"2. Complete and sign Part D and be sure you can afford to make the payments you are agreeing to

make and have received a copy of the disclosure statement and a completed and signed reaffirmation agreement.

"3. If you were represented by an attorney during the negotiation of your reaffirmation agreement, the attorney must have signed the certification in Part C.

"4. If you were not represented by an attorney during the negotiation of your reaffirmation agreement, you must have completed and signed Part E.

"5. The original of this disclosure must be filed with the court by you or your creditor. If a separate reaffirmation agreement (other than the one in Part B) has been signed, it must be attached.

"6. If you were represented by an attorney during the negotiation of your reaffirmation agreement, your reaffirmation agreement becomes effective upon filing with the court unless the reaffirmation is presumed to be an undue hardship as explained in Part D.

"7. If you were not represented by an attorney during the negotiation of your reaffirmation agreement, it will not be effective unless the court approves it. The court will notify you of the hearing on your reaffirmation agreement. You must attend this hearing in bankruptcy court where the judge will review your reaffirmation agreement. The bankruptcy court must approve your reaffirmation agreement as consistent with your best interests, except that no court approval is required if your reaffirmation agreement is for a consumer debt secured by a mortgage, deed of trust, security deed, or other lien on your real property, like your home.

"Your right to rescind (cancel) your reaffirmation agreement. You may rescind (cancel) your reaffirmation agreement at any time before the bankruptcy court enters a discharge order, or before the expiration of the 60-day period that begins on the date your reaffirmation agreement is filed with the court, whichever occurs later. To rescind (cancel) your reaffirmation agreement, you must notify the creditor that your reaffirmation agreement is rescinded (or canceled).

"What are your obligations if you reaffirm the debt? A reaffirmed debt remains your personal legal obligation. It is not discharged in your bankruptcy case. That means that if you default on your reaffirmed debt after your bankruptcy case is over, your creditor may be able to take your property or your wages. Otherwise, your obligations will be determined by the reaffirmation agreement which may have changed the terms of the original agreement. For example, if you are reaffirming an open end credit agreement, the creditor may be permitted by that agreement or applicable law to change the terms of that agreement in the future under certain conditions.

"Are you required to enter into a reaffirmation agreement by any law? No, you are not required to reaffirm a debt by any law. Only agree to reaffirm a debt if it is in your best interest. Be sure you can afford the payments you agree to make.

"What if your creditor has a security interest or lien? Your bankruptcy discharge does not eliminate any lien on your property. A 'lien' is often referred to as a security interest, deed of trust, mortgage or security deed. Even if you do not reaffirm and your personal liability on the debt is discharged, because of the lien your creditor may still have the right to take the security property if you do not pay the debt or default on it. If the lien is on an item of personal property that is exempt under your State's law or that the trustee has abandoned, you may be able to redeem the item rather than reaffirm the debt. To redeem, you make a single payment to the creditor equal to the current value of the security property, as agreed by the parties or determined by the court."

(ii) In the case of a reaffirmation under subsection (m)(2), numbered paragraph 6 in the disclosures required by clause (i) of this subparagraph shall read as follows:

"6. If you were represented by an attorney during the negotiation of your reaffirmation agreement, your reaffirmation agreement becomes effective upon filing with the court."

(4) The form of such agreement required under this paragraph shall consist of the following:

"Part B: Reaffirmation Agreement. I (we) agree to reaffirm the debts arising under the credit agreement described below.

"Brief description of credit agreement:

"Description of any changes to the credit agreement made as part of this reaffirmation agreement:

"Signature: Date:

"Borrower:

"Co-borrower, if also reaffirming these debts:

"Accepted by creditor:

"Date of creditor acceptance:"

(5) The declaration shall consist of the following:

(A) The following certification:

"Part C: Certification by Debtor's Attorney (If Any).

"I hereby certify that (1) this agreement represents a fully informed and voluntary agreement by the debtor; (2) this agreement does not impose an undue hardship on the debtor or any dependent of the debtor; and (3) I have fully advised the debtor of the legal effect and consequences of this agreement and any default under this agreement.

"Signature of Debtor's Attorney: Date:"

(B) If a presumption of undue hardship has been established with respect to such agreement, such certification shall state that in the opinion of the attorney, the debtor is able to make the payment.

(C) In the case of a reaffirmation agreement under subsection (m)(2), subparagraph (B) is not applicable.

(6)(A) The statement in support of such agreement, which the debtor shall sign and date prior to filing with the court, shall consist of the following:

"Part D: Debtor's Statement in Support of Reaffirmation Agreement.

"1. I believe this reaffirmation agreement will not impose an undue hardship on my dependents or

me. I can afford to make the payments on the reaffirmed debt because my monthly income (take home pay plus any other income received) is \$____, and my actual current monthly expenses including monthly payments on post-bankruptcy debt and other reaffirmation agreements total \$____, leaving \$____ to make the required payments on this reaffirmed debt. I understand that if my income less my monthly expenses does not leave enough to make the payments, this reaffirmation agreement is presumed to be an undue hardship on me and must be reviewed by the court. However, this presumption may be overcome if I explain to the satisfaction of the court how I can afford to make the payments here: _____.

"2. I received a copy of the Reaffirmation Disclosure Statement in Part A and a completed and signed reaffirmation agreement."

(B) Where the debtor is represented by an attorney and is reaffirming a debt owed to a creditor defined in section 19(b)(1)(A)(iv) of the Federal Reserve Act, the statement of support of the reaffirmation agreement, which the debtor shall sign and date prior to filing with the court, shall consist of the following:

"I believe this reaffirmation agreement is in my financial interest. I can afford to make the payments on the reaffirmed debt. I received a copy of the Reaffirmation Disclosure Statement in Part A and a completed and signed reaffirmation agreement."

(7) The motion that may be used if approval of such agreement by the court is required in order for it to be effective, shall be signed and dated by the movant and shall consist of the following:

"Part E: Motion for Court Approval (To be completed only if the debtor is not represented by an attorney.). I (we), the debtor(s), affirm the following to be true and correct:

"I am not represented by an attorney in connection with this reaffirmation agreement.

"I believe this reaffirmation agreement is in my best interest based on the income and expenses I have disclosed in my Statement in Support of this reaffirmation agreement, and because (provide any additional relevant reasons the court should consider):

"Therefore, I ask the court for an order approving this reaffirmation agreement."

(8) The court order, which may be used to approve such agreement, shall consist of the following:

"Court Order: The court grants the debtor's motion and approves the reaffirmation agreement described above."

(1) Notwithstanding any other provision of this title the following shall apply:

(1) A creditor may accept payments from a debtor before and after the filing of an agreement of the kind specified in subsection (c) with the court.

(2) A creditor may accept payments from a debtor under such agreement that the creditor believes in good faith to be effective.

(3) The requirements of subsections (c)(2) and (k) shall be satisfied if disclosures required under those subsections are given in good faith.

(m)(1) Until 60 days after an agreement of the kind specified in subsection (c) is filed with the court (or such additional period as the court, after notice and a hearing and for cause, orders before the expiration of such period), it shall be presumed that such agreement is an undue hardship on the debtor if the debtor's monthly income less the debtor's monthly expenses as shown on the debtor's completed and signed statement in support of such agreement required under subsection (k)(6)(A) is less than the scheduled payments on the reaffirmed debt. This presumption shall be reviewed by the court. The presumption may be rebutted in writing by the debtor if the statement includes an explanation that identifies additional sources of funds to make the payments as agreed upon under the terms of such agreement. If the presumption is not rebutted to the satisfaction of the court, the court may disapprove such agreement. No agreement shall be disapproved without notice and a hearing to the debtor and creditor, and such hearing shall be concluded before the entry of the debtor's discharge.

(2) This subsection does not apply to reaffirmation agreements where the creditor is a credit union, as defined in section 19(b)(1)(A)(iv) of the Federal Reserve Act.

(Pub. L. 95-598, Nov. 6, 1978, 92 Stat. 2592; Pub. L. 98-353, title III, Secs. 308, 455, July 10, 1984, 98 Stat. 354, 376; Pub. L. 99-554, title II, Secs. 257(o), 282, 283(k), Oct. 27, 1986, 100 Stat. 3115-3117; Pub. L. 103-394, title I, Secs. 103, 111(a), title V, Sec. 501(d)(14), Oct. 22, 1994, 108 Stat. 4108, 4113, 4145; Pub. L. 109-8, title II, Secs. 202, 203(a), title XII, Sec. 1210, Apr. 20, 2005, 119 Stat. 43, 194.)

Lawriter Corporation. All rights reserved.

The Casemaker Online database is a compilation exclusively owned by Lawriter Corporation. The database is provided for use under the terms, notices and conditions as expressly stated under the online end user license agreement to which all users assent in order to access the database.

11 USC § 727**Statutes and Session Law****Title 11 - BANKRUPTCY****Chapter 7 - LIQUIDATION****11 USC § 727 Discharge****11 USC § 727. Discharge****SUBCHAPTER II - COLLECTION, LIQUIDATION, AND DISTRIBUTION OF THE ESTATE**

(a) The court shall grant the debtor a discharge, unless -

(1) the debtor is not an individual;

(2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed -

(A) property of the debtor, within one year before the date of the filing of the petition; or

(B) property of the estate, after the date of the filing of the petition;

(3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case;

(4) the debtor knowingly and fraudulently, in or in connection with the case -

(A) made a false oath or account;

(B) presented or used a false claim;

(C) gave, offered, received, or attempted to obtain money, property, or advantage, or a promise of money, property, or advantage, for acting or forbearing to act; or

(D) withheld from an officer of the estate entitled to possession under this title, any recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs;

(5) the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities;

(6) the debtor has refused, in the case -

(A) to obey any lawful order of the court, other than an order to respond to a material question or to testify;

(B) on the ground of privilege against self-incrimination, to respond to a material question approved

by the court or to testify, after the debtor has been granted immunity with respect to the matter concerning which such privilege was invoked; or

(C) on a ground other than the properly invoked privilege against self-incrimination, to respond to a material question approved by the court or to testify;

(7) the debtor has committed any act specified in paragraph (2), (3), (4), (5), or (6) of this subsection, on or within one year before the date of the filing of the petition, or during the case, in connection with another case, under this title or under the Bankruptcy Act, concerning an insider;

(8) the debtor has been granted a discharge under this section, under section 1141 of this title, or under section 14, 371, or 476 of the Bankruptcy Act, in a case commenced within 8 years before the date of the filing of the petition;

(9) the debtor has been granted a discharge under section 1228 or 1328 of this title, or under section 660 or 661 of the Bankruptcy Act, in a case commenced within six years before the date of the filing of the petition, unless payments under the plan in such case totaled at least -

(A) 100 percent of the allowed unsecured claims in such case; or

(B)(i) 70 percent of such claims; and

(ii) the plan was proposed by the debtor in good faith, and was the debtor's best effort;

(10) the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter;

(11) after filing the petition, the debtor failed to complete an instructional course concerning personal financial management described in section 111, except that this paragraph shall not apply with respect to a debtor who is a person described in section 109(h)(4) or who resides in a district for which the United States trustee (or the bankruptcy administrator, if any) determines that the approved instructional courses are not adequate to service the additional individuals who would otherwise be required to complete such instructional courses under this section (The United States trustee (or the bankruptcy administrator, if any) who makes a determination described in this paragraph shall review such determination not later than 1 year after the date of such determination, and not less frequently than annually thereafter.); or

(12) the court after notice and a hearing held not more than 10 days before the date of the entry of the order granting the discharge finds that there is reasonable cause to believe that -

(A) section 522(q)(1) may be applicable to the debtor; and

(B) there is pending any proceeding in which the debtor may be found guilty of a felony of the kind described in section 522(q)(1)(A) or liable for a debt of the kind described in section 522(q)(1)(B).

(b) Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter, and any liability on a claim that is determined under section 502 of this title as if such claim had arisen before the commencement of the case, whether or not a proof of claim based on any such debt or liability is filed under section 501 of this title, and whether or not a claim based on any such debt or

liability is allowed under section 502 of this title.

(c)(1) The trustee, a creditor, or the United States trustee may object to the granting of a discharge under subsection (a) of this section.

(2) On request of a party in interest, the court may order the trustee to examine the acts and conduct of the debtor to determine whether a ground exists for denial of discharge.

(d) On request of the trustee, a creditor, or the United States trustee, and after notice and a hearing, the court shall revoke a discharge granted under subsection (a) of this section if -

(1) such discharge was obtained through the fraud of the debtor, and the requesting party did not know of such fraud until after the granting of such discharge;

(2) the debtor acquired property that is property of the estate, or became entitled to acquire property that would be property of the estate, and knowingly and fraudulently failed to report the acquisition of or entitlement to such property, or to deliver or surrender such property to the trustee;

(3) the debtor committed an act specified in subsection (a)(6) of this section; or

(4) the debtor has failed to explain satisfactorily -

(A) a material misstatement in an audit referred to in section 586(f) of title 28; or

(B) a failure to make available for inspection all necessary accounts, papers, documents, financial records, files, and all other papers, things, or property belonging to the debtor that are requested for an audit referred to in section 586(f) of title 28.

(e) The trustee, a creditor, or the United States trustee may request a revocation of a discharge -

(1) under subsection (d)(1) of this section within one year after such discharge is granted; or

(2) under subsection (d)(2) or (d)(3) of this section before the later of -

(A) one year after the granting of such discharge; and

(B) the date the case is closed.

(Pub. L. 95-598, Nov. 6, 1978, 92 Stat. 2609; Pub. L. 98-353, title III, Sec. 480, July 10, 1984, 98 Stat. 382; Pub. L. 99-554, title II, Secs. 220, 257(s), Oct. 27, 1986, 100 Stat. 3101, 3116; Pub. L. 109-8, title I, Sec. 106(b), title III, Secs. 312(1), 330(a), title VI, Sec. 603(d), Apr. 20, 2005, 119 Stat. 38, 86, 101, 123.)

Lawriter Corporation. All rights reserved.

The Casemaker Online database is a compilation exclusively owned by Lawriter Corporation. The database is provided for use under the terms, notices and conditions as expressly stated under the online end user license agreement to which all users assent in order to access the database.

4.16.300**Statutes and Session Law****Title 4 CIVIL PROCEDURE****Chapter 4.16 LIMITATION OF ACTIONS**

4.16.300 Actions or claims arising from construction, alteration, repair, design, planning, survey, engineering, etc., of improvements upon real property.

4.16.300 Actions or claims arising from construction, alteration, repair, design, planning, survey, engineering, etc., of improvements upon real property.

RCW 4.16.300 through 4.16.320 shall apply to all claims or causes of action of any kind against any person, arising from such person having constructed, altered or repaired any improvement upon real property, or having performed or furnished any design, planning, surveying, architectural or construction or engineering services, or supervision or observation of construction, or administration of construction contracts for any construction, alteration or repair of any improvement upon real property. This section is specifically intended to benefit persons having performed work for which the persons must be registered or licensed under RCW 18.08.310, 18.27.020, 18.43.040, 18.96.020, or 19.28.041, and shall not apply to claims or causes of action against persons not required to be so registered or licensed.

[2004 c 257 § 1; 1986 c 305 § 703; 1967 c 75 § 1.]

NOTES:

Severability -- 2004 c 257: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [2004 c 257 § 2.]

Preamble -- Report to legislature -- Applicability -- Severability -- 1986 c 305: See notes following RCW 4.16.160.

Lawriter Corporation. All rights reserved.

The Casemaker Online database is a compilation exclusively owned by Lawriter Corporation. The database is provided for use under the terms, notices and conditions as expressly stated under the online end user license agreement to which all users assent in order to access the database.

4.16.310**Statutes and Session Law****Title 4 CIVIL PROCEDURE****Chapter 4.16 LIMITATION OF ACTIONS**

4.16.310 Actions or claims arising from construction, alteration, repair, design, planning, survey, engineering, etc., of improvements upon real property -- Accrual and limitations of actions or claims.

4.16.310 Actions or claims arising from construction, alteration, repair, design, planning, survey, engineering, etc., of improvements upon real property -- Accrual and limitations of actions or claims.

All claims or causes of action as set forth in RCW 4.16.300 shall accrue, and the applicable statute of limitation shall begin to run only during the period within six years after substantial completion of construction, or during the period within six years after the termination of the services enumerated in RCW 4.16.300, whichever is later. The phrase "substantial completion of construction" shall mean the state of completion reached when an improvement upon real property may be used or occupied for its intended use. Any cause of action which has not accrued within six years after such substantial completion of construction, or within six years after such termination of services, whichever is later, shall be barred:

PROVIDED, That this limitation shall not be asserted as a defense by any owner, tenant or other person in possession and control of the improvement at the time such cause of action accrues. The limitations prescribed in this section apply to all claims or causes of action as set forth in RCW 4.16.300 brought in the name or for the benefit of the state which are made or commenced after June 11, 1986.

If a written notice is filed under RCW 64.50.020 within the time prescribed for the filing of an action under this chapter, the period of time during which the filing of an action is barred under RCW 64.50.020 plus sixty days shall not be a part of the period limited for the commencement of an action, nor for the application of this section.

[2002 c 323 § 9; 1986 c 305 § 702; 1967 c 75 § 2.]

NOTES:

Preamble -- Report to legislature -- Applicability -- Severability -- 1986 c 305: See notes following RCW 4.16.160.

Lawriter Corporation. All rights reserved.

The Casemaker Online database is a compilation exclusively owned by Lawriter Corporation. The database is provided for use under the terms, notices and conditions as expressly stated under the online end user license agreement to which all users assent in order to access the database.

4.16.326**Statutes and Session Law****Title 4 CIVIL PROCEDURE****Chapter 4.16 LIMITATION OF ACTIONS****4.16.326 Actions or claims for construction defect claims -- Comparative fault.****4.16.326 Actions or claims for construction defect claims -- Comparative fault.**

(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:

(a) To the extent it is caused by an unforeseen act of nature that caused, prevented, or precluded the activities defined in RCW 4.16.300 from meeting the applicable building codes, regulations, and ordinances in effect at the commencement of construction. For purposes of this section an "unforeseen act of nature" means any weather condition, earthquake, or manmade event such as war, terrorism, or vandalism;

(b) To the extent it is caused by a homeowner's unreasonable failure to minimize or prevent those damages in a timely manner, including the failure of the homeowner to allow reasonable and timely access for inspections and repairs under this section. This includes the failure to give timely notice to the builder after discovery of a violation, but does not include damages due to the untimely or inadequate response of a builder to the homeowner's claim;

(c) To the extent it is caused by the homeowner or his or her agent, employee, subcontractor, independent contractor, or consultant by virtue of their failure to follow the builder's or manufacturer's maintenance recommendations, or commonly accepted homeowner maintenance obligations. In order to rely upon this defense as it relates to a builder's recommended maintenance schedule, the builder shall show that the homeowner had written notice of the schedule, the schedule was reasonable at the time it was issued, and the homeowner failed to substantially comply with the written schedule;

(d) To the extent it is caused by the homeowner or his or her agent's or an independent third party's alterations, ordinary wear and tear, misuse, abuse, or neglect, or by the structure's use for something other than its intended purpose;

(e) As to a particular violation for which the builder has obtained a valid release;

(f) To the extent that the builder's repair corrected the alleged violation or defect;

(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 of construction, or during the period within six years after the termination of the services enumerated in RCW 4.16.300, whichever is later;

(h) As to any causes of action to which this section does not apply, all applicable affirmative defenses are preserved.

(2) This section does not apply to any civil action in tort alleging personal injury or wrongful death

to a person or persons resulting from a construction defect.

[2003 c 80 § 1.]

Lawriter Corporation. All rights reserved.

The Casemaker Online database is a compilation exclusively owned by Lawriter Corporation. The database is provided for use under the terms, notices and conditions as expressly stated under the online end user license agreement to which all users assent in order to access the database.

339 U.S. 306; MULLANE v. CENTRAL HANOVER TR. CO.

MULLANE, SPECIAL GUARDIAN, v. CENTRAL HANOVER BANK & TRUST CO., TRUSTEE,
ET AL.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 378.

Argued February 8, 1950.

Decided April 24, 1950.

A trust company in New York which had exclusive management and control of a common trust fund established by it under 100-c of the New York Banking Law petitioned under that section for a judicial settlement of accounts which would be binding and conclusive as to any matter set forth therein upon everyone having any interest in the common fund or in any participating trust. In this common fund the trust company had invested assets of numerous small trusts of which it was trustee and of which some of the beneficiaries were residents and some nonresidents of the State. The only notice of this petition given beneficiaries was by publication in a local newspaper pursuant to 100-c (12). Held:

1. Whether such a proceeding for settlement of accounts be technically in personam, in rem, or quasi in rem, the interest of each state in providing means to close trusts that exist by the grace of its laws and are administered under the supervision of its courts is such as to establish beyond doubt the right of its courts to determine the interests of all claimants, resident or nonresident, provided its procedure accords full opportunity to appear and be heard. Pp. 311-313.

2. The statutory notice by publication is sufficient as to any beneficiaries whose interests or addresses are unknown to the trustee, since there are no other means of giving them notice which are both practicable and more effective. Pp. 313-318.

3. Such notice by publication is not sufficient under the Fourteenth Amendment as a basis for adjudication depriving of substantial property rights known persons whose whereabouts are also known, since it is not impracticable to make serious efforts to notify them at least by ordinary mail to their addresses on record with the trust company. Pp. 318-320.

299 N. Y. 697, 87 N. E. 2d 73, reversed.

Overruling objections to the statutory notice to beneficiaries by publication authorized by 100-c of the New York Banking Law, a New York Surrogate's Court entered a final decree accepting an accounting of the trustee of

a common trust fund established pursuant to that section. 75 N. Y. S. 2d 397. This decree was affirmed by the Appellate Division of the Supreme Court of New York (see 274 App. Div. 772, 80 N. Y. S. 2d 127) and the Court of Appeals of New York (299 N. Y. 697, 87 N. E. 2d 73). On appeal to this Court, reversed, p. 320.

Kenneth J. Mullane argued the cause and filed a brief for appellant.

Albert B. Maginnes argued the cause for the Central Hanover Bank & Trust Co., appellee. With him on the brief was J. Quincy Hunsicker, 3rd.

James N. Vaughan submitted on brief for Vaughan, appellee.

Peter Keber and C. Alexander Capron filed a brief for the New York State Bankers Association, as amicus curiae, urging affirmance.

MR. JUSTICE JACKSON delivered the opinion of the Court.

This controversy questions the constitutional sufficiency of notice to notice to beneficiaries on judicial settlement of accounts by the trustee of a common trust fund established under the New York Banking Law. The New York Court of Appeals considered and overruled objections that the statutory notice contravenes requirements of the Fourteenth Amendment and that by allowance of the account beneficiaries were deprived of property without due process of law. 299 N. Y. 697, 87 N. E. 2d 73. The case is here on appeal under 28 U.S.C. 1257.

Common trust fund legislation is addressed to a problem appropriate for state action. Mounting overheads have made administration of small trusts undesirable to corporate trustees. In order that donors and testators of moderately sized trusts may not be denied the service of corporate fiduciaries, the District of Columbia and some

thirty states other than New York have permitted pooling small trust estates into one fund for investment administration. (fn*) The income, capital gains, losses and expenses of the collective trust are shared by the constituent trusts in proportion to their contribution. By this plan, diversification of risk and economy of management can be extended to those whose capital standing alone would not obtain such advantage.

Statutory authorization for the establishment of such common trust funds is provided in the New York Banking Law, 100-c (c. 687, L. 1937, as amended by c. 602, L. 1943 and c. 158, L. 1944). Under this Act a trust company may, with approval of the State Banking Board, establish a common fund and, within prescribed limits,

invest therein the assets of an unlimited number of estates, trusts or other funds of which it is trustee. Each participating trust shares ratably in the common fund, but exclusive management and control is in the trust company as trustee, and neither a fiduciary nor any beneficiary of a participating trust is deemed to have ownership in any particular asset or investment of this common fund. The trust company must keep fund assets separate from its own, and in its fiduciary capacity may not deal with itself or any affiliate. Provisions are made for accounting twelve to fifteen months after the establishment of a fund and triennially thereafter. The decree in each such judicial settlement of accounts is made binding and conclusive as to any matter set forth in the account upon everyone having any interest in the common fund or in any participating estate, trust or fund.

In January, 1946, Central Hanover Bank and Trust Company established a common trust fund in accordance with these provisions, and in March, 1947, it petitioned the Surrogate's Court for settlement of its first account as common trustee. During the accounting period a total of 113 trusts, approximately half inter vivos and half testamentary, participated in the common trust fund, the gross capital of which was nearly three million dollars. The record does not show the number or residence of the beneficiaries, but they were many and it is clear that some of them were not residents of the State of New York.

The only notice given beneficiaries of this specific application was by publication in a local newspaper in strict compliance with the minimum requirements of N. Y. Banking Law 100-c (12): "After filing such petition [for judicial settlement of its account] the petitioner shall cause to be issued

by the court in which the petition is filed and shall publish not less than once in each week

for four successive weeks in a newspaper to be designated by the court a notice or citation addressed generally without naming them to all parties interested in such common trust fund and in such estates, trusts or funds mentioned in the petition, all of which may be described in the notice or citation only in the manner set forth in said petition and without setting forth the residence of any such decedent or donor of any such estate, trust or fund." Thus the only notice required, and the only one given, was by newspaper publication setting forth merely the name and address of the trust company, the name and the date of establishment of the common trust fund, and a list of all participating estates, trusts or funds.

At the time the first investment in the common fund was made on behalf of each participating estate, however, the trust company, pursuant to the requirements of 100-c (9), had notified by mail each person of full age and sound mind whose name and address were then known to it and who was "entitled to share in the income therefrom . . . [or] . . . who would be entitled to share in the principal if the event upon which such estate, trust or fund will become distributable should have occurred at the time of sending such notice." Included in the notice was a copy of those provisions of the Act relating to the sending of the notice itself and to the judicial settlement of common trust fund accounts.

Upon the filing of the petition for the settlement of accounts, appellant was, by order of the court pursuant to 100-c (12), appointed special guardian and attorney for all persons known or unknown not otherwise appearing who had or might thereafter have any interest in the income of the common trust fund; and appellee Vaughan was appointed to represent those similarly interested in the principal. There were no other appearances on behalf of any one interested in either interest or principal.

Appellant appeared specially, objecting that notice and the statutory provisions for notice to beneficiaries were inadequate to afford due process under the Fourteenth Amendment, and therefore that the court was without jurisdiction to render a final and binding decree. Appellant's objections were entertained and overruled, the Surrogate holding that the notice required and given was sufficient. 75 N. Y. S. 2d 397. A final decree accepting the accounts has been entered, affirmed by the Appellate Division of the Supreme Court, 275 App. Div. 769, 88 N. Y. S. 2d 907, and by the Court of Appeals of the State of New York, 299 N. Y. 697, 87 N. E. 2d 73.

The effect of this decree, as held below, is to settle "all questions respecting the management of the common fund." We understand that every right which beneficiaries would otherwise have against the trust company, either as trustee of the common fund or as trustee of any individual trust, for improper management of the common trust fund during the period covered by the accounting is sealed and wholly terminated by the decree. See *Matter of Hoaglund*, 194 Misc. 803, 811-812, 74 N. Y. S. 2d 156, 164, aff'd 272 App. Div. 1040, 74 N. Y. S. 2d 911, aff'd 297 N. Y. 920, 79 N. E. 2d 746; *Matter of Bank of New York*, 189 Misc. 459, 470, 67 N. Y. S. 2d 444, 453; *Matter of Security Trust Co. of Rochester*, id. 748, 760, 70 N. Y. S. 2d 260, 271; *Matter of Continental Bank & Trust Co.*, id. 795, 797, 67 N. Y. S. 2d 806, 807-808.

We are met at the outset with a challenge to the power of the State - the right of its courts to adjudicate at all as against those beneficiaries who reside without the State of New York. It is contended that the proceeding is one in personam in that the decree affects neither title to nor possession of any res, but adjudges only personal rights of the beneficiaries to surcharge their trustee for negligence or breach of trust. Accordingly, it is said, under the strict doctrine of *Pennoyer v. Neff*, 95 U.S. 714, the Surrogate

is without jurisdiction as to nonresidents upon whom personal service of process was not made.

Distinctions between actions in rem and those in personam are ancient and originally expressed in procedural terms what seems really to have been a distinction in the substantive law of property under a system quite unlike our own. Buckland and McNair, Roman Law and Common Law, 66; Burdick, Principles of Roman Law and Their Relation to Modern Law, 298. The legal recognition and rise in economic importance of incorporeal or intangible forms of property have upset the ancient simplicity of property law and the clarity of its distinctions, while new forms of proceedings have confused the old procedural classification. American courts have sometimes classed certain actions as in rem because personal service of process was not required, and at other times have held personal service of process not required because the action was in rem. See cases collected in Freeman on Judgments, 1517 et seq. (5th ed.).

Judicial proceedings to settle fiduciary accounts have been sometimes termed in rem, or more indefinitely quasi in rem, or more vaguely still, "in the nature of a proceeding in rem." It is not readily apparent how the courts of New York did or would classify the present proceeding, which has some characteristics and is wanting in some features of proceedings both in rem and in personam. But in any event we think that the requirements of the Fourteenth Amendment to the Federal Constitution do not depend upon a classification for which the standards are so elusive and confused generally and which, being primarily for state courts to define, may and do vary from state to state. Without disparaging the usefulness of distinctions between actions in rem and those in personam in many branches of law, or on other issues, or the reasoning which underlies them, we do not rest the power of the State to resort to constructive service in this proceeding

upon how its courts or this Court may regard this historic antithesis. It is sufficient to observe that, whatever the technical definition of its chosen procedure, the interest of each state in providing means to close trusts that exist by the grace of its laws and are administered under the supervision of its courts is so insistent and rooted in custom as to establish beyond doubt the right of its courts to determine the interests of all claimants, resident or nonresident, provided its procedure accords full opportunity to appear and be heard.

Quite different from the question of a state's power to discharge trustees is that of the opportunity it must give beneficiaries to contest. Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.

In two ways this proceeding does or may deprive beneficiaries of property. It may cut off their rights to have the trustee answer for negligent or illegal impairments of their interests. Also, their interests are presumably subject to diminution in the proceeding by allowance of fees and expenses to one who, in their names but without their knowledge, may conduct a fruitless or uncompensatory contest. Certainly the proceeding is one in which they may be deprived of property rights and hence notice and hearing must measure up to the standards of due process.

Personal service of written notice within the jurisdiction is the classic form of notice always adequate in any type of proceeding. But the vital interest of the State in bringing any issues as to its fiduciaries to a final settlement can be served only if interests or claims of individuals who are outside of the State can somehow be determined. A construction of the Due Process Clause which

would place impossible or impractical obstacles in the way could not be justified.

Against this interest of the State we must balance the individual interest sought to be protected by

the Fourteenth Amendment. This is defined by our holding that "The fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394. This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.

The Court has not committed itself to any formula achieving a balance between these interests in a particular proceeding or determining when constructive notice may be utilized or what test it must meet. Personal service has not in all circumstances been regarded as indispensable to the process due to residents, and it has more often been held unnecessary as to nonresidents. We disturb none of the established rules on these subjects. No decision constitutes a controlling or even a very illuminating precedent for the case before us. But a few general principles stand out in the books.

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Milliken v. Meyer*, 311 U.S. 457; *Grannis v. Ordean*, 234 U.S. 385; *Priest v. Las Vegas*, 232 U.S. 604; *Roller v. Holly*, 176 U.S. 398. The notice must be of such nature as reasonably to convey the required information, *Grannis v. Ordean*, supra, and it must afford a reasonable time for those interested to make their appearance, *Roller v. Holly*, supra, and cf. *Goodrich v. Ferris*, 214 U.S. 71. But if with due regard for the practicalities and peculiarities of the case these conditions

are reasonably met, the constitutional requirements are satisfied. "The criterion is not the possibility of conceivable injury but the just and reasonable character of the requirements, having reference to the subject with which the statute deals." *American Land Co. v. Zeiss*, 219 U.S. 47, 67; and see *Blinn v. Nelson*, 222 U.S. 1, 7.

But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected, compare *Hess v. Pawloski*, 274 U.S. 352, with *Wuchter v. Pizzutti*, 276 U.S. 13, or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes.

It would be idle to pretend that publication alone, as prescribed here, is a reliable means of acquainting interested parties of the fact that their rights are before the courts. It is not an accident that the greater number of cases reaching this Court on the question of adequacy of notice have been concerned with actions founded on process constructively served through local newspapers. Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed. The chance of actual notice is further reduced when, as here, the notice required does not even name those whose attention it is supposed to attract, and does not inform acquaintances who might call it to attention. In weighing its sufficiency on the basis of equivalence with actual notice, we are unable to regard this as more than a faint.

Nor is publication here reinforced by steps likely to attract the parties' attention to the proceeding. It is true that publication traditionally has been acceptable as notification supplemental to other action which in itself may reasonably be expected to convey a warning. The ways of an owner with tangible property are such that he usually arranges means to learn of any direct attack upon his possessory or proprietary rights. Hence, libel of a ship, attachment of a chattel or entry upon real estate in the name of

law may reasonably be expected to come promptly to the owner's attention. When the state within which the owner has located such property seizes it for some reason, publication or posting affords an additional measure of notification. A state may indulge the assumption that one who has left tangible property in the state either has abandoned it, in which case proceedings against it deprive him of nothing, cf. *Anderson National Bank v. Lueckett*, 321 U.S. 233 ; *Security Savings Bank v. California*, 263 U.S. 282 ; or that he has left some caretaker under a duty to let him know that it is being jeopardized. *Ballard v. Hunter*, 204 U.S. 241 ; *Huling v. Kaw Valley R. Co.*, 130 U.S. 559 . As phrased long ago by Chief Justice Marshall in *The Mary*, 9 Cranch 126, 144, "It is the part of common prudence for all those who have any interest in [a thing], to guard that interest by persons who are in a situation to protect it."

In the case before us there is, of course, no abandonment. On the other hand these beneficiaries do have a resident fiduciary as caretaker of their interest in this property. But it is their caretaker who in the accounting becomes their adversary. Their trustee is released from giving notice of jeopardy, and no one else is expected to do so. Not even the special guardian is required or apparently expected to communicate with his ward and client, and, of course, if such a duty were merely transferred from the trustee to the guardian, economy would not be served and more likely the cost would be increased.

This Court has not hesitated to approve of resort to publication as a customary substitute in another class of cases where it is not reasonably possible or practicable to give more adequate warning. Thus it has been recognized that, in the case of persons missing or unknown, employment of an indirect and even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights. *Cunnius v. Reading School District*, 198 U.S. 458 ; *Blinn v. Nelson*, 222 U.S. 1 ; and see *Jacob v. Roberts*, 223 U.S. 261 .

Those beneficiaries represented by appellant whose interests or whereabouts could not with due diligence be ascertained come clearly within this category. As to them the statutory notice is sufficient. However great the odds that publication will never reach the eyes of such unknown parties, it is not in the typical case much more likely to fail than any of the choices open to legislators endeavoring to prescribe the best notice practicable.

Nor do we consider it unreasonable for the State to dispense with more certain notice to those beneficiaries whose interests are either conjectural or future or, although they could be discovered upon investigation, do not in due course of business come to knowledge of the common trustee. Whatever searches might be required in another situation under ordinary standards of diligence, in view of the character of the proceedings and the nature of the interests here involved we think them unnecessary. We recognize the practical difficulties and costs that would be attendant on frequent investigations into the status of great numbers of beneficiaries, many of whose interests in the common fund are so remote as to be ephemeral, and we have no doubt that such impracticable and extended searches are not required in the

name of due process. The expense of keeping informed from day to day of substitutions among even current income beneficiaries and presumptive remaindermen, to say nothing of the far greater number of contingent beneficiaries, would impose a severe burden on the plan, and would likely dissipate its advantages. These are practical matters in which we should be reluctant to disturb the judgment of the state authorities.

Accordingly we overrule appellant's constitutional objections to published notice insofar as they are

urged on behalf of any beneficiaries whose interests or addresses are unknown to the trustee.

As to known present beneficiaries of known place of residence, however, notice by publication stands on a different footing. Exceptions in the name of necessity do not sweep away the rule that within the limits of practicability notice must be such as is reasonably calculated to reach interested parties. Where the names and postoffice addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency.

The trustee has on its books the names and addresses of the income beneficiaries represented by appellant, and we find no tenable ground for dispensing with a serious effort to inform them personally of the accounting, at least by ordinary mail to the record addresses. Cf. *Wuchter v. Pizzutti*, supra. Certainly sending them a copy of the statute months and perhaps years in advance does not answer this purpose. The trustee periodically remits their income to them, and we think that they might reasonably expect that with or apart from their remittances word might come to them personally that steps were being taken affecting their interests.

We need not weigh contentions that a requirement of personal service of citation on even the large number of known resident or nonresident beneficiaries would, by

reasons of delay if not of expense, seriously interfere with the proper administration of the fund. Of course personal service even without the jurisdiction of the issuing authority serves the end of actual and personal notice, whatever power of compulsion it might lack. However, no such service is required under the circumstances. This type of trust presupposes a large number of small interests. The individual interest does not stand alone but is identical with that of a class. The rights of each in the integrity of the fund and the fidelity of the trustee are shared by many other beneficiaries. Therefore notice reasonably certain to reach most of those interested in objecting is likely to safeguard the interests of all, since any objection sustained would inure to the benefit of all. We think that under such circumstances reasonable risks that notice might not actually reach every beneficiary are justifiable. "Now and then an extraordinary case may turn up, but constitutional law like other mortal contrivances has to take some chances, and in the great majority of instances no doubt justice will be done." *Blinn v. Nelson*, supra, 7.

The statutory notice to known beneficiaries is inadequate, not because in fact it fails to reach everyone, but because under the circumstances it is not reasonably calculated to reach those who could easily be informed by other means at hand. However it may have been in former times, the mails today are recognized as an efficient and inexpensive means of communication. Moreover, the fact that the trust company has been able to give mailed notice to known beneficiaries at the time the common trust fund was established is persuasive that postal notification at the time of accounting would not seriously burden the plan.

In some situations the law requires greater precautions in its proceedings than the business world accepts for its own purposes. In few, if any, will it be satisfied with

less. Certainly it is instructive, in determining the reasonableness of the impersonal broadcast notification here used, to ask whether it would satisfy a prudent man of business, counting his pennies but finding it in his interest to convey information to many persons whose names and addresses are in his files. We are not satisfied that it would. Publication may theoretically be available for all the world to see, but it is too much in our day to suppose that each or any individual beneficiary does or could examine all that is published to see if something may be tucked away in it that affects his property interests. We have before indicated in reference to notice by publication that, "Great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adherence to fact."

McDonald v. Mabee, 243 U.S. 90, 91.

We hold that the notice of judicial settlement of accounts required by the New York Banking Law 100-c.(12) is incompatible with the requirements of the Fourteenth Amendment as a basis for adjudication depriving known persons whose whereabouts are also known of substantial property rights. Accordingly the judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

[Footnote *] Ala. Code Ann., 1940, Cum. Supp. 1947, tit. 58, 88 to 103, as amended, Laws 1949, Act 262; Ariz. Code Ann., 1939, Cum. Supp. 1949, 51-1101 to 51-1104; Ark. Stat. Ann. 1947, 58-110 to 58-112; Cal. Bank. Code Ann., Deering, 1949, 1564; Colo. Stat. Ann., 1935, Cum. Supp. 1947, c. 18, 173 to 178; Conn. Gen. Stat. 1949 Rev., 5805; Del. Rev. Code, 1935, 4401, as amended, Laws, 1943, c. 171, Laws 1947, c. 268; (D.C.) 63 Stat. 938; Fla. Stat., 1941, 655.29 to 655.34; Ga. Code Ann., 1937, Cum. Supp. 1947, 109-601 to 109-622; Idaho Code Ann., 1949, Cum. Supp. 1949, 68-701 to 68-703; Ill. Rev. Stat., 1949, c. 16 1/2, 57 to 63; Ind. Stat. Ann., Burns, 1950, 18-2009 to 18-2014; Ky. Rev. Stat., 1948, 287.230; La. Gen. Stat. Ann., 1939, 9850.64; Md. Ann. Code Gen. Laws, 1939, Cum. Supp. 1947, art. 11, 62A; Mass. Ann. Laws, 1933, Cum. Supp. 1949, c. 203A; Mich. Stat. Ann., 1943, 23.1141 to 23.1153; Minn. Stat., 1945, 48:84, as amended, Laws 1947, c. 234; N. J. Stat. Ann., 1939, Cum. Supp. 1949, 17:9A-36 to 17:9A-46; N. C. Gen. Stat., 1943, 36-47 to 36-52; Ohio Gen. Code Ann. (Page, 1946) 715 to 720, 722; Okla. Stat., 1941, Cum. Supp. 1949, tit. 60, 162; Pa. Stat. Ann., 1939, Cum. Supp. 1949, tit. 7, 819-1109 to 819-1109d; So. Dak. Laws 1941, c. 20; Tex. Rev. Civ. Stat. Ann., 1939, Cum. Supp. 1949, art. 7425b-48; Vt. Stat., 1947 Rev., 8873; Va. Code Ann., 1950, 6-569 to 6-576; Wash. Rev. Stat. Ann., Supp. 1943, 3388 to 3388-6; W. Va. Code Ann., 1949, 4219(1) et seq.; Wis. Stat., 1947, 223.055.

MR. JUSTICE BURTON, dissenting.

These common trusts are available only when the instruments creating the participating trusts permit participation in the common fund. Whether or not further notice to beneficiaries should supplement the notice and representation here provided is properly within the discretion of the State. The Federal Constitution does not require it here.

© Lawriter Corporation. All rights reserved.

The Casemaker™ Online database is a compilation exclusively owned by Lawriter Corporation. The database is provided for use under the terms, notices and conditions as expressly stated under the online end user license agreement to which all users assent in order to access the database.

CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

I am employed by the law firm of: Clausen Law Firm PLLC.

At all times hereinafter mentioned, I was and am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.

On the date set forth below, I served in the manner noted Utley's

Motion To Intervene/File *Amicus* Brief on the following person(s):

Counsel for Cambrige Townhomes and Polygon Northwest Company

Mark F. O'Donnell, Esq.
Jeffrey W. Daley, Esq.
Preg O'Donnell & Gillett PLLC
1800 9th Avenue
Suite 1500
Seattle, WA 98101-1340

Jerret E. Sale, Esq.
Deborah Lynn Carstens, Esq.
Bullivant Houser Bailey PC
1601 5th Ave Ste 2300
Seattle, WA 98101-1618

Counsel for Pacific Star Roofing

Gregory Paul Turner, Esq.
Lee Smart P.S., Inc.
701 Pike Street Suite 1800
Seattle, WA 98101-3929

Counsel for PJ Interprize

Eileen I. McKillop, Esq.
Oles Morrison Rinker & Baker
LLP
701 Pike Street, Suite 1700
Seattle, WA 98101-3930

SIGNED in Seattle, Washington this February 20, 2007



Lisa Vulin

SUPREME COURT OF THE STATE OF WASHINGTON

CAMBRIDGE TOWNHOMES, LLC; ET AL.
Plaintiff/Petitioner

vs

4 BEES SIDING; ET AL.

Defendant/Respondent

No. 81003-6
DECLARATION OF
EMAILED DOCUMENT
(DCLR)

Pursuant to the provisions of GR 17, I declare as follows:

1. I am the party who received the foregoing facsimile transmission for filing.
2. My address is: 119 W. Legion Way, Olympia, WA 98501
3. My phone number is (360) 754-6595
4. The e-mail address where I received the document is: oly@abclegal.com.
5. I have examined the foregoing document, determined that it consists of 76 pages, including this Declaration page, and that it is complete and legible.

I certify under the penalty of perjury under the laws of the State of Washington that the above is true and correct.

Dated: February 20, 2008, at Olympia, Washington.

Signature: 

Print Name: BECKY GOGAN