

57328-4

57328-4

81003-6

No. 57328-4

COURT OF APPEALS, DIVISION I  
STATE OF WASHINGTON

---

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

Appellants,

v.

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

Respondents,

and

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

Defendants.

---

APPELLANTS' OPENING BRIEF

---

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

FILED  
COURT OF APPEALS DIVISION I  
STATE OF WASHINGTON  
JES 01/22/11 11:23

ORIGINAL

## TABLE OF CONTENTS

	Page
I. ASSIGNMENTS OF ERROR .....	1
II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR .....	2
III. STATEMENT OF THE CASE .....	5
A. Factual Background .....	5
B. Procedural Background .....	7
IV. SUMMARY OF ARGUMENT .....	8
V. ARGUMENT .....	11
A. The trial court erred in dismissing Polygon’s indemnity claim on summary judgment. ....	11
1. Indemnity provisions are subject to the basic rules of contract construction. ....	11
2. The indemnity provisions in the Polygon agreements are not limited to tort claims. ....	13
3. The claims by the HOA included tort claims. ....	18
B. The corporate dissolutions of PSR and PJ do not preclude Polygon’s claims. ....	19
1. The claims against PSR arose before its dissolution. ....	22
2. The claims against PJ arose before its dissolution. ....	23
3. Post-dissolution claims are not prohibited under Washington law. ....	24
4. RCW 23B.14.060 does not apply to preclude Polygon’s claims. ....	28
C. The trial court erred in ruling that Polygon could not pursue claims against P.J. Interprize, Inc., for work performed by P.J. Interprize, the sole proprietorship. ....	30
D. The trial court erred in denying Polygon’s motion to amend its complaint. ....	34

E. The trial court erred in ruling Polygon bears the burden of establishing which defects are latent. ....	39
F. The trial court erred in striking portions of the declaration of Mark Jobe. ....	40
G. PSR and PJ are not entitled to an award of attorney fees. 44	
H. Polygon is entitled to an award of attorney fees. ....	44
VI. CONCLUSION .....	45

## TABLE OF AUTHORITIES

	Page
<b>Cases</b>	
<i>Architectonics Constr. Mgmt., Inc. v. Khorram,</i> 111 Wn. App. 725, 45 P.3d 1142 (2002) .....	23
<i>Arreygue v. Lutz,</i> 116 Wn. App. 938, 69 P.3d 881 (2003) .....	37, 38
<i>Ballard Square Condo. Owners Ass'n v. Dynasty Constr. Co.,</i> 126 Wn. App. 285, 108 P.3d 818, rev. granted, 155 P.2d 1024, 126 P.3d 820 (2005) .....	20-21, 26
<i>Beltran v. State,</i> 98 Wn. App. 245, 989 P.2d 604 (1999) .....	35
<i>Carlson v. Doekson Gross, Inc.,</i> 372 N.W.2d 902 (N.D. 1985) .....	31
<i>Caruso v. Local Union No. 690 of Int'l Bhd. of Teamsters,</i> 100 Wn.2d 343, 670 P.2d 240 (1983) .....	35
<i>Christensen v. Swedish Hosp.,</i> 59 Wn.2d 545, 368 P.2d 897 (1962) .....	18
<i>Folsom v. Burger King,</i> 135 Wn.2d 658, 958 P.2d 301 (1998) .....	41
<i>Gall Landau Young Constr. Co. v. Hedreen,</i> 63 Wn. App. 91, 816 P.2d 762 (1991) .....	34
<i>Herron v. Tribune Publ'g Co.,</i> 108 Wn.2d 162, 736 P.2d 249 (1987) .....	35
<i>Hofstee v. Dow,</i> 109 Wn. App. 537, 36 P.3d 1073 (2001) .....	18
<i>Hudson v. Condon,</i> 101 Wn. App. 866, 6 P.3d 615 (2000) .....	30
<i>Impecoven v. Dep't of Revenue,</i> 120 Wn.2d 357, 841 P.2d 752 (1992) .....	19
<i>In re Christian,</i> 180 B.R. 548 (Bankr. E.D. Mo. 1995) .....	38

<i>In re Doar</i> , 234 B.R. 203 (Bankr. N.D. Ga. 1999) .....	38
<i>In re Lundberg</i> , 152 B.R. 316 (Bankr. E.D. Okla. 1993).....	37
<i>In re Welfare of Young</i> , 24 Wn. App. 392, 600 P.2d 1312 (1979).....	42
<i>Jones v. Strom Constr. Co.</i> , 84 Wn.2d 518, 527 P.2d 1115 (1974).....	12
<i>Keegan v. Grant County Pub. Util. Dist. No. 2</i> , 34 Wn. App. 274, 661 P.2d 146 (1983).....	42
<i>Kona Enter., Inc. v. Estate of Bishop</i> , 229 F.3d 877 (9 <sup>th</sup> Cir. 2000) .....	18
<i>Ladd v. Scudder Kemper Inv., Inc.</i> , 741 N.E.2d 47 (Mass. 2001) .....	31
<i>McDowell v. Austin Co.</i> , 105 Wn.2d 48, 710 P.2d 192 (1985).....	12
<i>Michel v. Efferson</i> , 65 So. 2d 115 (La. 1953) .....	40
<i>Milner v. Nat'l Sch. of Health Tech.</i> , 73 F.R.D. 628 (E.D. Pa. 1977).....	36
<i>Parkridge Assocs., Ltd. v. Ledcor Indus., Inc.</i> , 113 Wn. App. 592, 54 P.3d 225 (2002).....	22
<i>Sheikh v. Choe</i> , 156 Wn.2d 441, 128 P.3d 574 (2006).....	11
<i>State v. Rangitsch</i> , 40 Wn. App. 771, 700 P.2d 382 (1985).....	42
<i>Toll Bridge Auth. v. Aetna Ins. Co.</i> , 54 Wn. App. 400, 773 P.2d 906 (1989).....	16
<i>Tyee Constr. Co. v. Pac. Nw. Bell Tel. Co.</i> , 3 Wn. App. 37, 472 P.2d 411 (1970).....	12
<i>U.S. Oil &amp; Refining Co. v. Lee &amp; Eastes Tank Lines, Inc.</i> , 104 Wn. App. 823, 16 P.3d 1278 (2001).....	39, 40
<i>Wilson v. Horsley</i> , 137 Wn.2d 500, 974 P.2d 316 (1999).....	35

<i>Winbun v. Moore</i> , 143 Wn.2d 206, 18 P.3d 576 (2001).....	30
--	----

**Statutes and Rules**

CR 15(a).....	35
ER 702 .....	41
ER 703 .....	43
RAP 18.1(a) .....	45
RCW 4.16.040 .....	27
RCW 4.16.326(1)(g).....	23
RCW 4.24.115 .....	16, 17
RCW 23B.....	20
RCW 23B.14.050.....	26
RCW 23B.14.050(1).....	26
RCW 23B.14.050(2).....	26
RCW 23B.14.050(2)(e).....	passim
RCW 23B.14.060.....	20-21, 28, 29
RCW 23B.14.060(1).....	28
RCW 23B.14.060(2).....	28, 29
RCW 23B.14.060(3).....	28, 29
RCW 23B.14.060(4).....	29
RCW 23B.14.340.....	passim
RCW 23B.340.....	27
RCW 64.34.445 .....	18
RCW 64.34.445(2).....	18

**Other Authorities**

5B KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE § 702.6 (4 <sup>th</sup> ed. 1999).....	42
BLACK'S LAW DICTIONARY 1489 (6 <sup>th</sup> ed. 1990).....	18

## **I. ASSIGNMENTS OF ERROR**

Appellants, Cambridge Townhomes, LLC, and Polygon Northwest Company (collectively "Polygon") assign error to the following orders entered by the trial court: (1) Order Granting in Part and Denying in Part Defendants' Motion for Summary Judgment of Plaintiffs' Claims filed May 16, 2005; (2) Order Granting Defendant P.J. Interprize, Inc.'s Motion to Strike Exhibits Attached to Declaration of Jeffrey Daly filed October 24, 2005; (3) Order Granting Pacific Star Roofing, Inc.'s Motion for Summary Judgment filed October 26, 2005; (4) Order Granting in Part and Denying in Part Defendants' Motions for Summary Judgment of Plaintiffs' Remaining Claim for Breach of Contract filed October 26, 2005; (5) Order Denying Plaintiffs' Motion for Leave to Amend Complaint filed November 17, 2005; (6) Order Granting Defendant P.J. Interprize, Inc.'s Motion for Summary Judgment of Plaintiffs' Claims filed November 22, 2005; (7) Order Denying Plaintiffs' Motion for Reconsideration and for Stay filed December 13, 2005; (8) Order Granting Pacific Star Roofing, Inc.'s Motion for Attorney's Fees filed January 31, 2006; (9) Order Awarding Plaintiffs Attorney's Fees for Reduction of Award to P.J. Interprize, Inc., filed February 2, 2006; (10) Money

Judgment filed February 7, 2006; and (11) Money Judgment filed February 21, 2006.<sup>1</sup>

## II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The indemnity provisions in Polygon's agreements with respondent subcontractors Pacific Star Roofing ("PSR") and P.J. Interprize, Inc., ("PJ") required the subcontractors to indemnify and defend Polygon with respect to *all* claims arising out of "the work of the subcontract." The indemnity provisions also include statutorily-mandated language prohibiting the subcontractors from indemnifying Polygon for its own negligence. It is undisputed the claims for which Polygon sought indemnity arose out of the defective work performed by PSR and PJ and did not arise from Polygon's sole negligence. Did the trial court err in dismissing Polygon's indemnity claim on summary judgment?

2. This Court has ruled that claims arising after a corporation's dissolution are barred. Polygon's breach of contract claims arose before the dissolutions of PSR and PJ. The legislature recently

---

<sup>1</sup> Polygon does not assign error to the following orders listed in the Amended Notice of Appeal: (1) Order Granting Defendant P.J. Interprize, Inc.'s Motion to Strike Exhibits Attached to Declaration of Jeffrey Daly filed May 10, 2005; (2) Order Granting in Part and Denying in Part JBW's Motion for Summary Judgment filed July 8, 2005; (3) Order Granting Janes Bros. Waterproofing, Inc.'s Motion to Strike filed July 8, 2005; and (4) Order Granting Defendant P.J. Interprize, Inc.'s Motion to Strike Plaintiff's Motion for Reconsideration or Clarification filed November 17, 2005.

clarified that post-dissolution claims are authorized, and RCW 23B.14.050(2)(e) specifically provides that a dissolved corporation can be sued. Did the trial court err in dismissing Polygon's breach of contract claims based upon the dissolutions of PSR and PJ?

3. Polygon sought to recover from PJ for defective work performed by PJ's predecessor, a sole proprietorship. Shortly before Polygon instituted this lawsuit, the sole proprietorship filed for bankruptcy. Polygon obtained permission from the bankruptcy court to proceed against PJ to the extent of the sole proprietorship's insurance proceeds. Did the trial court err in concluding Polygon could not proceed against PJ at all with respect to the sole proprietorship's work?

4. After the trial court ruled that Polygon could not pursue PJ with respect to work performed by the sole proprietorship, Polygon immediately moved to add the sole proprietorship as a defendant. Leave to amend a complaint should be freely given unless the amendment would cause prejudice to the opposing party. Gerald Utley was both the sole proprietor and the president of its successor, PJ. Utley was aware, from the beginning of the litigation, of Polygon's claims against the sole proprietorship, and Polygon only sought recovery from the sole proprietorship's insurers. Did the trial court abuse its discretion in denying Polygon's motion to amend?

5. PJ argued that Polygon waived its right to assert construction defects because Polygon paid for and accepted the work. The trial court ruled that PJ's liability was limited to latent defects and that Polygon bore the burden of proving the defects were latent. Waiver is an affirmative defense and the party alleging waiver bears the burden of establishing a waiver occurred. Did the trial court err in shifting the burden of proof to Polygon?

6. PJ moved to strike portions of the declaration of one of Polygon's experts on the ground he was not sufficiently qualified to offer an opinion. The trial court granted the motion, ruling the expert lacked personal knowledge. The personal knowledge requirement does not apply to experts, and the expert presented testimony to establish his qualifications. Did the trial court err in striking portions of the expert's declaration?

7. The trial court awarded attorney fees to PSR and PJ pursuant to an attorney fee clause in the indemnity provisions of the agreements with Polygon. The summary judgments in favor of PSR and PJ dismissing Polygon's claims as a matter of law should be reversed. Should the attorney fee awards also be reversed?

### III. STATEMENT OF THE CASE

#### A. Factual Background

Cambridge Townhomes, LLC, was the developer, and Polygon Northwest Company was the general contractor on the Cambridge Townhomes Condominium project (“the Project”) in Kirkland, Washington. (CP 4) The Project consists of 40 multi-unit buildings and was constructed in three phases between late 1997 and the middle of 2000. (CP 4, 456) Polygon hired numerous subcontractors to complete the work, including PSR and PJ.<sup>2</sup> (CP 544-49, 561-64) PSR performed roofing work, and PJ installed siding. (CP 140-41, 544-49)

In early 2003, the Cambridge Townhomes Owners Association (“HOA”) notified Polygon of construction defects at the Project. (CP 456, 459) Polygon and the HOA retained a neutral expert, Mark Jobe, to investigate the HOA’s claims.<sup>3</sup> (CP 456-57, 459) Jobe issued a detailed report describing the defects he discovered. (CP 459) Jobe concluded,

---

<sup>2</sup> Polygon entered into Master Agreements with PSR and PJ that applied generally to all work performed by the subcontractors for Polygon. (CP 540-43, 551-60) Polygon also entered into separate subcontracts with PSR and PJ that applied to each particular project, including Cambridge. (CP 544-49, 561-64) Thus, the applicable contracts in this case include both the Master Agreements and the Cambridge subcontracts.

<sup>3</sup> Polygon paid for Jobe’s services. (CP 2498) Polygon also agreed to pay for any attorney fees incurred by the HOA during the repair resolution process and for the costs of any arbitration or mediation services. (*Id.*)

“[C]ertain construction conditions had caused, were causing, or would cause water intrusion and/or damage at various locations at Cambridge, including damage to building paper, gypsum sheathing and framing.”  
(*Id.*) Jobe noted problems with the siding, deck rail installation, deck waterproofing, and concrete. (CP 459-60) In addition, Wetherholt and Associates prepared a report for Polygon describing several concerns with the roofing installation. (CP 662-65)

Polygon worked with the HOA to resolve the HOA’s claims without litigation and invited the subcontractors to participate in the funding process. (CP 456-57) Polygon also tendered defense of the HOA’s claims to the subcontractors pursuant to provisions in the subcontract agreements requiring the subcontractors to indemnify Polygon. (CP 5) None of the subcontractors accepted Polygon’s tender.  
(*Id.*)

In November 2003, Polygon agreed to settle the HOA’s claims for approximately \$5.3 million.<sup>4</sup> (CP 2335, 2400)

---

<sup>4</sup> Polygon and the HOA executed a settlement agreement on November 21, 2003. (CP 2527-29) After Polygon was not immediately able to fund the settlement, the HOA filed suit against Polygon, in December 2003. (CP 5) The parties settled the claim shortly after suit was filed. (*Id.*)

**B. Procedural Background**

Polygon also attempted to resolve its claims against the subcontractors without litigation. (CP 457) When those efforts proved unsuccessful, Polygon filed suit, on March 24, 2004, asserting claims for indemnification and breach of contract. (CP 1-16) In an order entered May 16, 2005, the trial court dismissed Polygon's indemnity claims against all defendants on summary judgment.<sup>5</sup> (CP 745-48) The court also ruled that Polygon could not proceed against PJ for claims against PJ's predecessor, required Polygon to prove the alleged construction defects were latent, and struck portions of a declaration filed by Mark Jobe. (CP 2015-17, 2024-28) The court subsequently dismissed Polygon's breach of contract claims against PSR and PJ in separate orders.<sup>6</sup> (CP 2022-23, 2396-98) In addition, the court denied a request by Polygon to amend its complaint. (CP 2393-95)

---

<sup>5</sup> PSR argued only that Polygon was not entitled to indemnification because the settlement with the HOA took place after PSR's dissolution. (CP 158-62) However, the trial court's May 16, 2005, order simply dismisses Polygon's indemnity claim against all defendants without specifying the basis for the dismissal. (CP 745-48) Thus, it is not clear whether the court (1) generally concluded the indemnity provisions at issue applied only to tort claims and Polygon did not assert tort claims or (2) specifically determined that PSR's dissolution required dismissal of Polygon's indemnity claim against PSR. Accordingly, Polygon addresses the merits of the indemnity claim against PSR (Section V.A) as well as the effect of PSR's dissolution on that claim (Section V.B).

<sup>6</sup> Polygon settled its claims against the remaining defendants.

On December 22, 2005, Polygon filed a Notice of Appeal seeking review of several orders entered by the trial court, including those described above. (CP 2447-89)

After Polygon appealed, PSR and PJ sought recovery of their attorney fees pursuant to a contractual provision. The trial court awarded PSR \$21,882.73 in attorney fees and costs, and awarded PJ \$205,012.75 in attorney fees and costs. (CP 2546-48, 2549-52, 2553-55, 2356-58)

#### **IV. SUMMARY OF ARGUMENT**

Polygon has paid the HOA over \$5 million in damages resulting from defective work performed by its subcontractors, including PSR and PJ. The trial court erroneously permitted the subcontractors to escape responsibility by relying upon a variety of technical defenses. The trial court's rulings should be reversed, and the subcontractors should be held liable for damages caused by their defective work.

The trial court ruled that Polygon was not entitled to indemnification from its subcontractors, concluding (1) the indemnification provisions in the subcontract agreements applied only to tort claims, and (2) the HOA's claims were not based in tort. The court ignored the plain and unambiguous language in the agreements requiring the subcontractors to indemnify Polygon with respect to *all* claims arising out of the subcontractors' work. The court also failed to recognize that the

HOA's claims were, in fact, tort claims because they were based upon the alleged breach of implied statutory warranties. Polygon is entitled to judgment in its favor as a matter of law holding that the indemnity provisions apply to the HOA's claims against Polygon.

The trial court also erred in concluding the corporate dissolutions of PSR and PJ barred Polygon's claims. Polygon's claims arose *before* the dissolutions and were timely filed in accordance with RCW 23B.14.340. Even if Polygon's claims are characterized as post-dissolution claims, the legislature has clarified that such claims are not barred. RCW 23B.14.050(2)(e) also specifically provides that a dissolved corporation may be subject to suit, and the statute is not limited to pre-dissolution claims.

The trial court ruled that Polygon could not recover from PJ for defective work performed by PJ's predecessor, a sole proprietorship. The court based this conclusion on the fact that the sole proprietorship had been discharged in bankruptcy. The court failed to recognize that the bankruptcy court specifically authorized Polygon to proceed against PJ for the sole proprietorship's work, as long as Polygon sought recovery only from the sole proprietorship's insurance proceeds.

The trial court abused its discretion in denying Polygon's motion to amend its complaint to add PJ's predecessor, the sole proprietorship, as

a defendant. Such motions should ordinarily be granted in the absence of prejudice to the nonmoving party. The sole proprietorship could not have suffered any prejudice as a result of the amendment because (1) Polygon could not recover against the sole proprietorship itself; the amendment was solely to enable Polygon to reach the sole proprietorship's insurance proceeds, and (2) Gerald Utley, the sole proprietor, was the president of PJ and knew from the beginning of the litigation of Polygon's claims against the sole proprietorship.

PJ argued Polygon waived any claim arising out of construction defects because Polygon accepted and paid for the work. The trial court concluded PJ's liability was limited to latent defects and ruled that Polygon bore the burden of proving the alleged defects were latent. The party asserting waiver bears the burden of establishing the intentional and voluntary relinquishment of a known right. Thus, PJ was required to show the alleged defects were patent (i.e., known to Polygon), and the trial court erred in shifting the burden of proof to Polygon.

The trial court also erred in striking testimony submitted by Polygon's expert witness, Mark Jobe. PJ argued Jobe was not sufficiently qualified, but the trial court struck the testimony because it was not based upon personal knowledge. The personal knowledge requirement does not apply to expert testimony. Moreover, any alleged deficiencies in Jobe's

qualifications should have gone to the weight of his testimony, not its admissibility.

Finally, the trial court erred in awarding attorney fees to PSR and PJ pursuant to attorney fee clauses in the indemnity provisions of the contracts with Polygon. PSR and PJ are not entitled to dismissal of the claims against them, and they therefore are not entitled to an award of attorney fees.

Polygon respectfully requests that the rulings addressed above be reversed and that its claims against PSR and PJ be reinstated.

## V. ARGUMENT

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

Polygon sought indemnification from several subcontractors for the settlement paid to the HOA. The trial court dismissed this claim on summary judgment. A summary judgment order is subject to de novo review, and this Court engages in the same inquiry as the trial court.<sup>7</sup>

#### 1. **Indemnity provisions are subject to the basic rules of contract construction.**

The issue regarding Polygon's indemnity claim centers around the indemnity provisions in the subcontracts executed by PSR and PJ.

---

<sup>7</sup> *Sheikh v. Choe*, 156 Wn.2d 441, 447, 128 P.3d 574 (2006).

Indemnity provisions, like other contractual provisions, are subject to the basic rules of contract construction.<sup>8</sup> In particular:

[T]he intent of the parties controls; such intent must be gathered from the contract as a whole; the intent and construction afforded the provision and the whole of the contract must be reasonable so as to carry out, rather than defeat, the purpose of the overall undertaking; and where the language used is unambiguous, an ambiguity will not be read into the contract . . . .<sup>9</sup>

In *McDowell v. Austin Co.*,<sup>10</sup> the Washington Supreme Court stated, “This court has long preferred to enforce indemnity agreements as executed by the parties.”<sup>11</sup>

The Washington courts have offered specific guidance regarding the interpretation of indemnity provisions in construction contracts. For example, in *Tyee Construction Co. v. Pacific Northwest Bell*,<sup>12</sup> this Court recognized that the purpose of an indemnity provision in a construction contract “is not to share loss but to assign responsibility for certain risks to one of the parties.”<sup>13</sup>

---

<sup>8</sup> *Jones v. Strom Constr. Co.*, 84 Wn.2d 518, 520, 527 P.2d 1115 (1974).

<sup>9</sup> *Jones*, 84 Wn.2d at 520.

<sup>10</sup> *McDowell v. Austin Co.*, 105 Wn.2d 48, 710 P.2d 192 (1985).

<sup>11</sup> *McDowell*, 105 Wn.2d at 53.

<sup>12</sup> *Tyee Constr. Co. v. Pac. Nw. Bell Tel. Co.*, 3 Wn. App. 37, 472 P.2d 411 (1970).

<sup>13</sup> *Tyee*, 3 Wn. App. at 42.

**2. The indemnity provisions in the Polygon agreements are not limited to tort claims.**

Application of these rules to the indemnity provisions in the PSR and PJ agreements establishes that Polygon is entitled to indemnification, and the trial court therefore erred in dismissing Polygon's indemnification claim on summary judgment. Although the subcontract agreements between Polygon and PSR and Polygon and PJ contain different indemnity provisions, the intent of each is to broadly indemnify Polygon for all damages arising out of the subcontractor's acts or omissions.

The agreement between Polygon and PSR contains the following indemnity provision:

The SUBCONTRACTOR shall defend, indemnify and hold harmless the property owner, contractor, the lessor of the property, the property management company, related entities, and their respective officers, agents and employees, from and against all suits, claims, actions, losses, costs, penalties and damage of whatsoever kind or nature, including attorneys' fees, costs, and interest arising out of, in connection with, or incident to, the work of the subcontract, except that caused by the sole negligence of the CONTRACTOR. Should any disputes arise with respect to the applicability and/or interpretation of the right to indemnification, the prevailing party shall be entitled to recover its reasonable attorney's fees and costs in addition to any other remedy.

(CP 541) The agreement between Polygon and PJ provides:

SUBCONTRACTOR shall defend, indemnify, and hold CONTRACTOR harmless from any and all claims, demands, losses and liabilities to or by third parties arising

from, resulting from, or connected with, services performed or to be performed under this Subcontract by SUBCONTRACTOR or SUBCONTRACTOR'S agents, employees, subtier Subcontractors, and suppliers to the fullest extent permitted by law and subject to the limitations provided below.

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

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

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

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

CONTRACTOR and SUBCONTRACTOR hereby certify that these indemnification provisions were mutually

negotiated and agreed to by the parties.<sup>14</sup>

(CP 557-58)

The subcontractors argued (1) the indemnity provisions quoted above applied only to tort claims, (2) the HOA's construction defect claims were not tort claims, and therefore (3) the subcontractors owed no duty to defend or indemnify Polygon with respect to the HOA's claims. The plain language of the indemnity provisions does not support an interpretation that they apply only to tort claims. The indemnity provision in the PSR agreement obligates PSR to indemnify Polygon "from and against *all* . . . claims . . . of *whatsoever* kind and nature . . . arising out of the work of the subcontract . . ." (CP 541) Similarly, the indemnity provision in PJ's agreement requires PJ to indemnify Polygon with respect to "*any and all* claims . . . arising from . . . services performed or to be performed under this Subcontract . . . to the fullest extent permitted by law and subject to the limitations provided below." (CP 557)

The language quoted above could hardly be more expansive. The indemnity provisions in their respective subcontract agreements obligate PSR and PJ to indemnify Polygon with respect to *all* claims arising out of

---

<sup>14</sup> The indemnity provisions in the PSR and PJ agreements are identical to those at issue in *MacLean Townhomes, LLC/Polygon v. Janes Bros. Waterproofing, Inc.*, Case No. 55935-4-I. The Court heard oral argument in the *MacLean Townhomes* case on May 1, 2006.

the subcontracts.<sup>15</sup> The Jobe report cited problems with the siding installed by PJ, and the Wetherholt report discussed problems with the roofing work performed by PSR. (CP 459-60, 662-65) Under these circumstances, the HOA's claim for construction defects falls squarely within the scope of the indemnification provisions, and the trial court erred in dismissing Polygon's indemnity claim on summary judgment.

PJ contended that language in the indemnity provisions precluding indemnification for Polygon's sole negligence means that the provisions can only apply to tort claims. Such clauses likely were included to comply with the requirements of RCW 4.24.115. This statute prohibits provisions in construction agreements "purporting to indemnify against liability for damages arising out of bodily injury to persons or damage to property" caused by or resulting from the indemnitee's sole negligence. The statute further states that provisions indemnifying against liability arising out of the concurrent negligence of the indemnitor and indemnitee are "valid and enforceable only to the extent of the indemnitor's negligence and only if the agreement specifically and expressly provides therefor . . . ." RCW 4.24.115 also allows the indemnitor to waive its immunity under the

---

<sup>15</sup> The Washington courts have broadly construed the phrase "arising out of" to mean "'originating from,' 'having its origin in,' 'growing out of,' or 'flowing from.'" See, e.g., *Toll Bridge Auth. v. Aetna Ins. Co.*, 54 Wn. App. 400, 404, 773 P.2d 906 (1989).

Industrial Insurance Act if (1) the agreement specifically and expressly provides for such a waiver, and (2) the waiver was mutually negotiated by the parties.

The PSR indemnity provision addresses the requirements of RCW 4.24.115 by excluding indemnification for damages “caused by the sole negligence of the CONTRACTOR.” (CP 541) Because the claims asserted by the HOA did not arise out of Polygon’s sole negligence, this limitation does not apply to preclude indemnification.

The indemnification provision in PJ’s subcontract specifically addresses each of the limitations set forth in RCW 4.24.115. The first paragraph of the provision, as discussed above, broadly requires indemnification with respect to all claims arising out of the subcontract. (CP 557) The next several paragraphs track the restrictions set forth in RCW 4.24.115. In particular, the provision (1) prohibits indemnification for damage arising from Polygon’s sole negligence, (2) limits indemnification in concurrent negligence situations to damage arising from PJ’s negligence, (3) waives PJ’s immunity under the Industrial Insurance Act, and (4) states that the indemnity provision was mutually negotiated. (CP 557-58) None of the restrictions set forth in RCW 4.24.115 and PJ’s indemnification provision are applicable here. That is, while these restrictions may apply, as required by statute, in the event of

tort liability, they do not, by reason of their inclusion, limit the application of the indemnity provision solely to torts. The only clause in the indemnification provision that is relevant to the present circumstances is the first one, which authorizes indemnification for all liability arising out of the subcontract.

**3. The claims by the HOA included tort claims.**

Moreover, even if PJ was correct that the indemnification provisions apply only to tort claims, the HOA's claims fall into this category. In particular, the HOA sought recovery under the implied warranty provisions set forth in RCW 64.34.445. (CP 498) These warranties include, among other things, promises that a condominium will be free from defective materials and will be constructed in a workmanlike manner.<sup>16</sup> Black's Law Dictionary defines "tort" as, "[a] legal wrong committed upon the person or property independent of contract."<sup>17</sup> The HOA's breach of implied warranty claims fall squarely within this definition and thus are within the scope of the indemnity agreement.

---

<sup>16</sup> RCW 64.34.445(2).

<sup>17</sup> BLACK'S LAW DICTIONARY 1489 (6<sup>th</sup> ed. 1990); *see also Kona Enter., Inc. v. Estate of Bishop*, 229 F.3d 877, 886 (9<sup>th</sup> Cir. 2000) (tort liability means a liability imposed by law in the absence of contract or agreement); *Christensen v. Swedish Hosp.*, 59 Wn.2d 545, 548, 368 P.2d 897 (1962) (a tort is a legal wrong); *Hofstee v. Dow*, 109 Wn. App. 537, 544, 36 P.3d 1073 (2001) (tort law concerned with obligations imposed by law rather than by bargain).

In sum, the plain and unambiguous language of the indemnity provisions in the PSR and PJ agreements allocates the risk of liability to the subcontractors with respect to *all* claims arising out of the subcontractors' work. The provisions are not limited to tort liability and, even if they were, the claims against Polygon by the HOA included tort claims. The undisputed evidence establishes that the HOA's claims against Polygon fall within the scope of the indemnity provisions at issue here, and the trial court therefore erred in dismissing Polygon's indemnity claim on summary judgment. The trial court's order should be reversed, and summary judgment should be granted in favor of Polygon holding that the indemnity provisions apply.<sup>18</sup>

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

Following the dismissal of Polygon's indemnity claim, PSR and PJ sought dismissal of the breach of contract claims against them. In separate rulings, the court dismissed Polygon's breach of contract claims against PSR and PJ on summary judgment. (CP 2022-23, 2396-98) As discussed above, these decisions are subject to de novo review.

---

<sup>18</sup> See, e.g., *Impeccoven v. Dep't of Revenue*, 120 Wn.2d 357, 465, 841 P.2d 752 (1992) (where facts are not in dispute, court may enter summary judgment in favor of nonmoving party).

The trial court based its rulings on the fact that PSR and PJ were dissolved corporations and therefore could not be sued. In *Ballard Square v. Dynasty Construction*<sup>19</sup> this Court held that a dissolved corporation could not be sued on a claim that arose after dissolution.<sup>20</sup> The Court explained:

Under the common law rule, all claims against a corporation terminate upon its dissolution. By statute, claims arising after dissolution survive only during the period necessary for a corporation to wind up its affairs. Because Washington's Business Corporation Act does not provide for the survival of any other post-dissolution claims, the common law rule applies. The trial court properly dismissed the Association's claim.<sup>21</sup>

The supreme court granted the plaintiff's petition for review, and the case is presently pending before that court.<sup>22</sup>

The *Ballard Square* decision was based upon an analysis of several provisions of the Washington Business Corporation Act, RCW ch. 23B. RCW 23B.14.050(2)(e) provides that dissolution of a corporation does not "[p]revent commencement of a proceeding by or against the corporation in its corporate name. . . ." RCW 23B.14.060 sets forth a procedure whereby

---

<sup>19</sup> *Ballard Square Condo. Owners Ass'n v. Dynasty Constr. Co.*, 126 Wn. App. 285, 108 P.3d 818, *rev. granted*, 155 P.2d 1024, 126 P.3d 820 (2005).

<sup>20</sup> *Ballard Square*, 126 Wn. App. at 296.

<sup>21</sup> *Id.*

<sup>22</sup> The court heard the case on March 2, 2006.

a dissolved corporation may dispose of known claims against it. RCW

23B.14.340 provides, in pertinent part:

The dissolution of a corporation . . . by administrative dissolution by the secretary of state . . . shall not take away or impair any remedy available against such corporation . . . for any right or claim existing, or any liability incurred, prior to such dissolution if action or other proceeding thereon is commenced within two years after the date of such dissolution. . . .

The *Ballard Square* court construed these provisions to preclude claims against a dissolved corporation unless those claims arose before dissolution. The Court pointed to the fact that, while the Washington Legislature adopted Section 14.06 of the Revised Model Business Corporation Act, codified at RCW 23B.14.060, it did not adopt Section 14.07, which sets forth a procedure for resolving unknown claims against a dissolved corporation.<sup>23</sup> Thus, the Court concluded Washington's statutory scheme did not specifically authorize post-dissolution claims, and it was therefore necessary to revert to the common law, which barred such claims.<sup>24</sup>

---

<sup>23</sup> *Ballard Square*, 126 Wn. App. at 292. Section 14.07 of the Revised Model Business Corporation Act allows a dissolved corporation to dispose of unknown claims by publishing a notice stating that a claim against the corporation will be barred unless a proceeding to enforce the claim is commenced within three years after publication of the notice. *Id.*

<sup>24</sup> *Id.* at 287.

As discussed below, Polygon's claims should not have been dismissed even if they are characterized as post-dissolution claims. However, the evidence establishes that the claims against PSR and PJ did, in fact, arise before the corporate dissolutions and therefore are not barred.

**1. The claims against PSR arose before its dissolution.**

As noted above, it is not clear whether the trial court dismissed Polygon's indemnity claim against PSR because of PSR's dissolution or because it concluded the indemnity provision did not cover the claims asserted by the HOA. In any event, as explained below, both Polygon's indemnity claim and its breach of contract claim arose before PSR's dissolution, and the dissolution therefore did not bar those claims.

***a. Polygon's claim under the indemnity provision arose before PSR's dissolution.***

PSR argued that the indemnity claim against it did not arise until the date Polygon became obligated to pay the HOA.<sup>25</sup> Because this did not occur until after PSR's dissolution, which was effective October 17, 2003, PSR asserts the indemnity claim is barred. (*See* CP 381) This argument ignores the fact that the indemnity provision also obligated PSR to defend Polygon against any claims arising out of the subcontract.

---

<sup>25</sup> *See Parkridge Assocs., Ltd. v. Ledcor Indus., Inc.*, 113 Wn. App. 592, 605, 54 P.3d 225 (2002) (indemnity action accrues when party seeking indemnity pays or is legally obligated to pay damages to a third party).

Polygon tendered defense of the HOA claim well before PSR's dissolution; PSR breached this obligation when it refused to defend. (See CP 457, 2083-84)<sup>26</sup>

**b. Polygon's breach of contract claim arose before PSR's dissolution.**

PSR also argued that Polygon's breach of contract claim arose at the time it settled with the HOA. This is incorrect. Polygon's breach of contract claim arose no later than the date it discovered the construction defects at the project, in early 2003.<sup>27</sup> Because PSR did not dissolve until October 2003, Polygon's breach of contract claim against PSR is a pre-dissolution claim.

**2. The claims against PJ arose before its dissolution.**

**a. Polygon's claim under the indemnity provision arose before PJ's dissolution.**

PJ did not dissolve until March 22, 2004. (CP 1965) By that date, PJ had breached its obligation to defend Polygon against the HOA's

---

<sup>26</sup> CP 2083-84 is a letter addressed to PJ. However, it is clear from the letter that it is a form letter sent to all subcontractors, including PSR. (See also CP 2331-32)

<sup>27</sup> See *Architectonics Constr. Mgmt., Inc. v. Khorram*, 111 Wn. App. 725, 726, 45 P.3d 1142 (2002) (claim for breach of contract accrues when party knows or, in the exercise of due diligence should know, of the breach). The *Architectonics* decision has since been superseded by statute. See RCW 4.16.326(1)(g).

claims, and Polygon had settled with the HOA. There can be no question that Polygon's indemnity claim arose before PJ's dissolution.

***b. Polygon's breach of contract claim arose before PJ's dissolution.***

Polygon's breach of contract claim against PJ, like its claim against PSR, arose in early 2003, when it learned of the construction defects from the HOA. PJ did not dissolve until approximately one year later. Thus, Polygon's breach of contract claim is a pre-dissolution claim and is not barred by *Ballard Square*.

Moreover, the breach of contract claim against PJ would still be characterized as a pre-dissolution claim even if were deemed to arise on the date of Polygon's settlement with the HOA. The settlement took place in late 2003, several months before PJ's dissolution in March 2004.

**3. Post-dissolution claims are not prohibited under Washington law.**

Following the *Ballard Square* decision, the legislature clarified its intent with respect to whether a dissolved corporation may be sued for claims arising after dissolution. The legislature amended RCW 23B.14.340, effective June 7, 2006, to read:

The dissolution of a corporation . . . by administrative dissolution by the secretary of state . . . shall not take away or impair any remedy available against such corporation . . . for any right or claim existing, or any liability incurred, prior to such dissolution or arising thereafter, unless action or other

proceeding thereon is not commenced within two years after the effective date of any dissolution that was effective prior to the effective date of this section or within three years after the effective date of any dissolution that is effective on or after the effective date of this section.

(New language underlined.) Regarding this provision, the Final Bill Report explains, "Survival provisions are *clarified* to make clear that claims arising after filing for dissolution can be asserted against the corporation, and the survival period is extended to three rather than two years." (Emphasis added.)

In this case, Polygon's claims against PSR and PJ fall directly within the scope of RCW 23B.14.340 as amended. Because the corporations were dissolved before June 7, 2006, Polygon was required to file suit within two years of dissolution. PSR dissolved on October 17, 2003; PJ dissolved on March 22, 2004. (CP 381, 1965) Polygon filed suit on March 24, 2004. (CP 1) Under these circumstances, Polygon's claims, whether characterized as pre-dissolution or post-dissolution claims, are not barred.

Even if RCW 23B.14.340 had not been amended to clarify that post-dissolution claims are authorized, Polygon's claims still should not have been dismissed. As noted above, RCW 23B.14.050(2)(e) states that a corporation's dissolution does not prevent it from being sued. The *Ballard Square* court ruled that this provision applies only to dissolved

corporations that are in the winding-up stage.<sup>28</sup> While this is true with respect to the activities listed in RCW 23B.14.050(1), no such limitation applies to the activities listed in RCW 23B.14.050(2), including suing a dissolved corporation. RCW 23B.14.050 states:

RCW 23B.14.050. Effect of Dissolution

- (1) A dissolved corporation continues its corporate existence but may not carry on any business except that appropriate to wind up and liquidate its business and affairs, including:
  - (a) Collecting its assets;
  - (b) Disposing of its properties that will not be distributed in kind to its shareholders
  - (c) Discharging or making provision for discharging its liabilities;
  - (d) Distributing its remaining property among its shareholders according to their interests; and
  - (e) Doing every other act necessary to wind up and liquidate its business and affairs.
- (2) Dissolution of a corporation does not:

\* \* \*

- (e) Prevent commencement of a proceeding by or against the corporation in its corporate name . . . .

Because RCW 23B.14.050(2)(e) is not subject to the winding-up limitation of RCW 23B.14.050(1)(a) through (e), it authorizes lawsuits

---

<sup>28</sup> *Ballard Square*, 126 Wn. App. at 287.

against a dissolved corporation regardless of whether the corporation is in the winding-up process.<sup>29</sup>

RCW 23B.14.340, before its amendment, *limited* the effect of RCW 23B.14.050(2)(e) with respect to pre-dissolution claims by requiring such claims to be commenced within two years after dissolution.<sup>30</sup> It did not *extend* the right to pursue such claims; those were already authorized under RCW 23B.14.050(2)(e). RCW 23B.14.340 imposed no such limitation on post-dissolution claims. Thus, such claims would be allowed as long as they were filed within the applicable statute of limitations.

In this case, then, even assuming Polygon's breach of contract claims arose after the dissolution of PSR and PJ, such claims would be authorized as long as they were filed within six years after their accrual.<sup>31</sup>

---

<sup>29</sup> The legislature's official comments support this interpretation:

Chapter 14 [RCW 23B.14] dissolution does not have any of the characteristics of common law dissolution, which treated corporate dissolution as analogous to the death of a natural person and abated lawsuits . . . . [RCW 23B.14.050(2)] expressly reverses all of these common law attributes of dissolution and makes clear that . . . suits by or against the corporation are not affected in any way.

Senate Journal, 51<sup>st</sup> Leg., at 3095 (Official Comments to Chapter 14 of Washington Business Corporation Act). For the Court's convenience, a copy of this document is attached as Appendix A.

<sup>30</sup> The amended statute now limits RCW 23B.14.050(2)(e) with respect to post-dissolution claims as well.

<sup>31</sup> RCW 4.16.040.

PSR dissolved in 2003 and PJ dissolved in 2004. Assuming Polygon's claims arose sometime after these dates (a necessary assumption if those claims are to be characterized as post-dissolution claims), Polygon's lawsuit filed in 2004 was necessarily timely.

**4. RCW 23B.14.060 does not apply to preclude Polygon's claims.**

PSR and PJ argued, and the trial court apparently agreed, that RCW 23B.14.060 barred Polygon's breach of contract claims. As noted above, this statute provides a mechanism whereby a dissolved corporation can dispose of known claims against it. If the dissolved corporation does not follow the requirements in the statute or if the claims at issue are unknown at the time of dissolution, the statute simply does not apply. It does not, as PSR and PJ asserted, preclude Polygon from pursuing its breach of contract and indemnity claims in this case.

RCW 23B.14.060(1) states, "A dissolved corporation may dispose of the known claims against it by following the procedure described in this section." RCW 23B.14.060(2) lists several steps that must be followed by the dissolved corporation in order to dispose of known claims, including providing written notice to the claimant and setting a deadline for asserting a claim. RCW 23B.14.060(3) states that a claim against the dissolved corporation is barred if a claimant who received notice under

RCW 23B.14.060(2) either (1) does not submit a claim by the deadline or (2) fails to commence a proceeding with 90 days following rejection of a claim. RCW 23B.14.060(4) states, “*For purposes of this section*, ‘claim’ does not include a contingent liability or a claim based on an event occurring after the effective date of dissolution.” (Emphasis added.)

RCW 23B.14.060 simply does not apply here. If PSR and PJ were aware of Polygon’s claim, they failed to follow the procedures to dispose of that claim, and the claim cannot be barred under RCW 23B.14.060(3). If PSR and PJ did not know of Polygon’s claim at the time of dissolution, the statute does not apply at all; it covers only known claims. Thus, contrary to the assertions made by PSR and PJ, RCW 23B.14.060(4), describing “contingent” claims, cannot apply. By its terms, that subsection applies only to RCW 23B.14.060.

In sum, Polygon’s indemnity claims are properly characterized as pre-dissolution claims because they arose when PSR and PJ breached their obligations to defend Polygon against the HOA’s claims in mid-2003. Polygon’s breach of contract claims also are pre-dissolution claims because they arose no later than the date Polygon discovered the construction defects, in early 2003. This discovery occurred well before the dissolutions of PSR and PJ. Even if Polygon’s claims are characterized as post-dissolution claims, the legislature’s recent

amendment to RCW 23B.14.340 clarifies that such claims are authorized. Moreover, post-dissolution claims were permissible under RCW 23B.14.050(2)(e) even without the legislature's clarification. Thus, regardless of whether Polygon's claims are characterized as pre-dissolution or post-dissolution claims, the trial court erred in dismissing those claims on summary judgment. At a minimum, there are questions of fact as to when Polygon's claims accrued, making summary judgment improper.<sup>32</sup>

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

PJ filed a motion for summary judgment asserting, among other things, that P.J. Interprize, Inc., could not be liable for work performed by Gerald Utley dba P.J. Interprize, the sole proprietorship. The sole proprietorship performed work on Phases I and II of the Project. (CP 98-99) On January 1, 1999, the sole proprietorship incorporated. (CP 1440) Polygon and the corporation executed a subcontract for performance of work on Phase III. (CP 564) The corporation also performed some work on Phases I and II. (CP 1445-54)

---

<sup>32</sup> See *Winbun v. Moore*, 143 Wn.2d 206, 213, 18 P.3d 576 (2001) (determination of when plaintiff discovered or should have discovered basis for a cause of action presents a question of fact); *Hudson v. Condon*, 101 Wn. App. 866, 875, 6 P.3d 615 (2000) (determination of when plaintiff suffered actual damage is a question of fact).

On February 27, 2004, Utley and his wife filed for bankruptcy. (CP 1183-84) The bankruptcy application describes the debtor as an individual, not a corporation, and Schedule F listing creditors holding unsecured claims names only Gerald Utley and his wife as the debtors. (CP 1183, 1186-1203) However, in the section asking for "All Other Names used by the Debtor in the last 6 years" Utley answered, "dba PJ Interprize, Inc." (CP 1183) The bankruptcy then proceeded under the name "Gerald Utley dba P.J. Interprize, Inc."<sup>33</sup> (See CP 1206)

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

---

<sup>33</sup> Utley apparently confused the corporation, which took over from the sole proprietorship on January 1, 1999, with the sole proprietorship. (See CP 98) An individual cannot "do business as" a corporation. See, e.g., *Carlson v. Doekson Gross, Inc.*, 372 N.W.2d 902, 905 n.2 (N.D. 1985) ("An individual obviously cannot 'do business as' a corporation."); see also *Ladd v. Scudder Kemper Inv., Inc.*, 741 N.E.2d 47, 50 (Mass. 2001) (corporation, by definition, is not a sole proprietorship). Moreover, Utley described the debtor as an "individual," and the corporation was administratively dissolved in the middle of the bankruptcy proceedings. Thus, despite the reference to P.J. Interprize, Inc., it is apparent the bankruptcy applied only to Utley and the sole proprietorship, as PJ acknowledged in its briefing below. (CP 141, 672)

The trial court in this case concluded the sole proprietorship's bankruptcy precluded Polygon from pursuing claims against the corporation arising out of the sole proprietorship's work. (CP 2026) The court apparently ignored the bankruptcy court's ruling *specifically authorizing* Polygon to proceed with its claim against PJ solely for the purpose of ultimately recovering from the sole proprietorship's insurers. Under these circumstances, the trial court's ruling that Polygon could not proceed against the corporation because of the sole proprietorship's bankruptcy was in error and should be reversed.

Because the trial court concluded the sole proprietorship's bankruptcy precluded Polygon from pursuing claims against PJ for the sole proprietorship's work, it did not decide whether the corporation was merely a "continuation" of the sole proprietorship and thus liable for the sole proprietorship's obligations. The court explained:

[A]bsent the discharge in bankruptcy, my inclination is that it is [a continuation]; it's the same people and they're doing the same business, and all of this is a continuation. But I don't reach that decision. I don't have to because the discharge in bankruptcy says that there are no liabilities of this sole proprietorship that go beyond this date.

(10/21/05 RP at 66)

The trial court's inclination was correct, although its reasoning regarding the effect of the sole proprietorship's bankruptcy was not.<sup>34</sup> As the court recognized, Utley was both the sole proprietor and the president of the corporation. (See CP 98) Both the sole proprietorship and the corporation performed the same work—siding. (CP 99, 1829, 2079) The directors of the corporation were employees of the sole proprietorship and Utley's family members. (CP 1825-29, 2078-79)

And, significantly, PJ itself has repeatedly ignored the distinction between the sole proprietorship and the corporation. As noted above, Utley listed his dba as "P.J. Interprize, Inc." when filing for bankruptcy even though he was filing only on behalf of himself and the sole proprietorship. (CP 1183) Utley also stated in a declaration that the corporation is now bankrupt when, in fact, it simply administratively dissolved. (CP 98) In its answer to Polygon's complaint, which named only the corporation as a defendant, PJ admitted it signed the August 26, 1998, Master Agreement that was, in fact, executed by the sole proprietorship. (CP 21) PJ further admitted that it contracted to perform work on Phase II and repair work on Phase I. (CP 22) PJ now claims that

---

<sup>34</sup> PJ incorporated on January 1, 1999, several years before Utley filed for bankruptcy. The corporation became responsible for the obligations of the sole proprietorship at the time of incorporation, and this responsibility did not disappear merely because Utley subsequently filed for bankruptcy. Moreover, as discussed above, the bankruptcy court specifically authorized Polygon to proceed against PJ with respect to the sole proprietorship's insurance proceeds.

only the sole proprietorship performed work on Phases I and II of the Project. However, the corporation submitted invoices for work on both of those phases. (CP 1445-53) Finally, PJ filed a third-party complaint against its subcontractors, at least one of whom worked only on Phase II of the Project. (CP 26-30, 1838-39) As the trial court correctly recognized, the corporation was merely a continuation of the sole proprietorship and, as such, can be held directly liable for the sole proprietorship's obligations.<sup>35</sup>

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

After the court ruled that Polygon could not proceed against P.J. Interprize, Inc., for work performed by the sole proprietorship, Polygon promptly moved to amend the complaint to specifically name the sole proprietorship as an additional defendant. (CP 2048-56) The court denied Polygon's motion. (CP 2393-95) This ruling is reviewed for abuse of

---

<sup>35</sup> See, e.g., *Gall Landau Young Constr. Co. v. Hedreen*, 63 Wn. App. 91, 97, 816 P.2d 762 (1991). In *Gall*, the court explained that, as a general rule, a corporation purchasing the assets of a corporation does not automatically become liable for the seller's debts and liabilities. *Gall*, 63 Wn. App. at 96. An exception to the rule arises, however, when the purchaser is a "mere continuation" of the seller. *Id.* The purpose of the "mere continuation" exception is to prevent a corporation from escaping liability from merely "changing hats." *Id.* at 96-97. The same principle applies here, to prevent the sole proprietorship from escaping liability simply by incorporating.

discretion.<sup>36</sup> A trial court abuses its discretion when “the discretion exercised is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.”<sup>37</sup> As explained below, the trial court abused its discretion in refusing to allow Polygon to amend its complaint, and this decision should be reversed.

CR 15(a) specifically provides that leave to amend a pleading “shall be freely given when justice so requires.” The Washington courts have construed this to mean that an amendment should be permitted unless it will prejudice the opposing party.<sup>38</sup>

In this case, there can be no prejudice to the sole proprietorship if it is added as a defendant. Gerald Utley, the sole proprietor of P.J. Interprize, has been aware of this litigation from its inception in his role as the president of P.J. Interprize, Inc. Utley also has known that Polygon was seeking recovery for the sole proprietorship’s defective work;

---

<sup>36</sup> *Wilson v. Horsley*, 137 Wn.2d 500, 505, 974 P.2d 316 (1999).

<sup>37</sup> *Beltran v. State*, 98 Wn. App. 245, 256, 989 P.2d 604 (1999).

<sup>38</sup> *Wilson*, 137 Wn.2d at 505 (touchstone for denial of a motion to amend is the prejudice such amendment would cause to the nonmoving party); *Herron v. Tribune Publ’g Co.*, 108 Wn.2d 162, 736 P.2d 249 (1987) (leave to amend should be freely given except where prejudice to opposing party would result); *Caruso v. Local Union No. 690 of Int’l. Bhd. of Teamsters*, 100 Wn.2d 343, 349, 670 P.2d 240 (1983) (quoting *United States v. Hougham*, 364 U.S. 310, 316 (1960)) (same).

Polygon specifically sought (and was granted) permission from the bankruptcy court to do so.

In *Milner v. National School of Health Technology*,<sup>39</sup> the plaintiff filed an employment discrimination suit against her employer, a sole proprietorship. Thereafter, the business incorporated, and the plaintiff sought to add the corporation as a named defendant. The court granted the plaintiff's request, noting that the individual defendant was the principal in both the sole proprietorship and the corporation. The court concluded, "It is clear, therefore, that the notice and absence of prejudice requirements are met in this case."<sup>40</sup>

Similarly, in this case, it is clear that the notice and absence of prejudice requirements are satisfied with respect to the sole proprietorship. This is particularly true because, as discussed below, Polygon sought to name the sole proprietorship for the limited purpose of eventually seeking recovery from the sole proprietorship's insurers.

PJ argued to the trial court that adding the sole proprietorship as a defendant would violate the bankruptcy discharge. In support of this contention, PJ relied upon a single case from a bankruptcy court in

---

<sup>39</sup> *Milner v. Nat'l Sch. of Health Tech.*, 73 F.R.D. 628 (E.D. Pa. 1977).

<sup>40</sup> *Id.* at 631.

Oklahoma.<sup>41</sup> PJ ignored Washington case law directly on point and the fact that the bankruptcy court specifically authorized Polygon to proceed against the sole proprietorship for the purpose of obtaining insurance proceeds.

In *Arreygue v. Lutz*,<sup>42</sup> the plaintiff was injured in an automobile accident. A few months after the accident, the driver of the other car filed for bankruptcy and listed the plaintiff as one of her creditors. Thereafter, the driver was discharged in bankruptcy.<sup>43</sup>

Nearly three years after the accident, the plaintiff filed suit against the bankrupt driver. The defendant moved for summary judgment on the ground the claim against her had been discharged in bankruptcy. The plaintiff responded by acknowledging that she could not recover from the defendant personally due to the bankruptcy discharge. However, the plaintiff asserted she was entitled to proceed against the defendant in order to recover funds from the defendant's insurer. The trial court granted the summary judgment motion, and the plaintiff appealed.<sup>44</sup>

---

<sup>41</sup> See *In re Lundberg*, 152 B.R. 316 (Bankr. E.D. Okla. 1993).

<sup>42</sup> *Arreygue v. Lutz*, 116 Wn. App. 938, 69 P.3d 881 (2003).

<sup>43</sup> *Arreygue*, 116 Wn. App. at 939-40.

<sup>44</sup> *Id.* at 940.

The court of appeals reversed, concluding the defendant's bankruptcy discharge did not prohibit a lawsuit against her for the sole purpose of recovering from her insurer. The court added, "[T]he plaintiff may continue a lawsuit initiated before the bankruptcy was filed or commence a lawsuit after the discharge is granted. In either case, the debtor does not need the permission of the bankruptcy court."<sup>45</sup>

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

---

<sup>45</sup> *Id.* at 944. The *Arreygue* decision is in accord with cases from other jurisdictions addressing this issue. See *In re Doar*, 234 B.R. 203, 204 (Bankr. N.D. Ga. 1999) (bankruptcy law is clear and nearly unanimous that a debtor may be sued for purposes of establishing liability as a prerequisite to proceeding against the debtor's liability insurer); *In re Christian*, 180 B.R. 548, 549-50 (Bankr. E.D. Mo. 1995) (vast majority of cases have allowed creditor to maintain suit against debtor to establish liability for insurance purposes).

In sum, the sole proprietorship would not be prejudiced by being named as an additional defendant because (1) Utley was aware of the litigation and Polygon's claims against the sole proprietorship from the inception of the lawsuit and (2) Polygon is only seeking to recover from the sole proprietorship's insurers, not the sole proprietorship itself. Under these circumstances, the trial court abused its discretion in refusing to allow Polygon to amend its complaint, and this ruling should be reversed.

**E. The trial court erred in ruling Polygon bears the burden of establishing which defects are latent.**

PJ argued, "Plaintiffs have waived any right to seek damages against PJ Interprize because they inspected, accepted and paid for the work." (CP 1091) The trial court agreed, with respect to patent defects, concluding, "P.J. Interprize, Inc.'s liability is limited to those defects which are latent." (CP 2026) The court added, "Plaintiffs have the burden of proving those defect which are alleged to be latent." (*Id.*)

In fact, PJ bears this burden. PJ is asserting the defense of waiver against Polygon. "Waiver is the intentional and voluntary relinquishment of a known right."<sup>46</sup> The party alleging waiver bears the burden of

---

<sup>46</sup> *U.S. Oil & Refining Co. v. Lee & Eastes Tank Lines, Inc.*, 104 Wn. App. 823, 830, 16 P.3d 1278 (2001) (quoting *Jones v. Best*, 134 Wn.2d 232, 241, 950 P.2d 1 (1998)).

establishing the intentional relinquishment of a known right.<sup>47</sup> Thus, PJ bears the burden of establishing that the alleged defects were patent; Polygon is not required to prove the defects were latent.<sup>48</sup>

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

In response to PJ's assertion that Polygon waived its right to allege construction defects, Polygon submitted the declaration of Mark Jobe, the expert hired by the HOA and Polygon to investigate the construction defects at the Project. (*See* CP 1598-1601)

Polygon submitted Jobe's declaration and testimony from several other witnesses to show the defects at issue were latent and could not have been discovered during the construction process. Jobe disputed PJ's assertion that there was nothing about the work performed by PJ that was not visible at the time of construction. (CP 1599) He based his opinion on his experience as a general contractor, construction manager, and superintendent coordinating the work of subcontractors and on his inspection of the Project in 2003. (*Id.*) Jobe testified that the nature of siding installation precluded Polygon personnel from examining each step

---

<sup>47</sup> *U.S. Oil*, 104 Wn. App. at 830.

<sup>48</sup> *See Michel v. Efferson*, 65 So. 2d 115, 119 (La. 1953) (burden of proof on builder to show homeowner had knowledge of defects in construction and that she intentionally waived the right to assert such defects).

of the work as it occurred to determine whether it had been performed correctly. (CP 1599-1600)

PJ moved to strike portions of the Jobe declaration on the ground that Jobe was not sufficiently qualified. (CP 1850-51) Although PJ cited to portions of Jobe's deposition allegedly supporting its assertion, it failed to submit the deposition excerpts to the court.

Nevertheless, the trial court granted PJ's motion in part, striking paragraphs five through eight of Jobe's declaration. (CP 2016) Because Polygon submitted the Jobe declaration in connection with a summary judgment motion, the trial court's order striking portions of the Jobe declaration is subject to de novo review.<sup>49</sup>

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.

The Washington courts have repeatedly recognized that, 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

---

<sup>49</sup> *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998) (de novo standard of review applied to all trial court rulings made in conjunction with a summary judgment motion).

testimony.<sup>50</sup> In this case, Jobe testified, “In addition to my role as an inspector, I have also worked as a general contractor and construction manager on many projects of various types, including building enclosure repairs to condominiums such as Cambridge. In that capacity I have served as a site superintendent myself on several occasions.” (CP 1599) The opinions proffered by Jobe related directly to his experience as a site superintendent, construction manager, and general contractor. Jobe was qualified to offer an opinion regarding the nature of the construction process at the Project, and any deficiencies in his qualifications should go to the weight, not the admissibility, of Jobe’s testimony. Thus, even if PJ’s unsupported allegations regarding Jobe’s qualifications are considered, Jobe’s declaration should not have been stricken on this basis.

The trial court acknowledged that the issues raised by PJ regarding Jobe’s qualifications “go the weight of the statements” rather than their admissibility. (10/21/05 RP at 49) The court apparently granted PJ’s motion because of concerns that Jobe lacked personal knowledge regarding the Cambridge site—i.e., he was not there during the construction process. (*Id.* at 50) The trial court failed to appreciate the

---

<sup>50</sup> *State v. Rangitsch*, 40 Wn. App. 771, 779, 700 P.2d 382 (1985); *Keegan v. Grant County Pub. Util. Dist. No. 2*, 34 Wn. App. 274, 283, 661 P.2d 146 (1983); *In re Welfare of Young*, 24 Wn. App. 392, 397, 600 P.2d 1312 (1979); see also 5B KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE § 702.6 (4<sup>th</sup> ed. 1999).

distinction between Jobe's capacity as a fact witness (based upon his investigation of the Project in early 2003) and his capacity as an expert witness (based upon his experience as a contractor). The testimony at issue was provided in Jobe's capacity as an expert, and PJ's challenge to that testimony was based only upon Jobe's alleged lack of expert qualifications.

ER 703 provides that an expert may rely upon various sources of information in providing an opinion. These sources include, *but are not limited to*, personal knowledge. The rule states:

The facts or data in the 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. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.<sup>51</sup>

In this case, Jobe based his opinion upon his investigation of the Project in early 2003 as well as his years of experience in the construction industry. (CP 1599) The fact that Jobe was not at the site during construction does not preclude him from offering an opinion regarding the nature of the construction process. To the extent the trial court rejected Jobe's testimony based upon lack of personal knowledge, this ruling was in error, and should be reversed.

---

<sup>51</sup> ER 703.

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

The trial court awarded PSR \$21,882.73 in attorney fees and costs and awarded PJ \$205,012.75 in attorney fees and costs. (CP 2546-48, 2549-52, 2553-55, 2356-58) The court awarded fees and costs pursuant to the attorney fee clause in the indemnity provision of the subcontracts. The indemnity provision in the PSR agreement states, "Should any disputes arise with respect to the applicability and/or interpretation of the right to indemnification, the prevailing party shall be entitled to recover its reasonable attorney's fees and costs in addition to any other remedy." (CP 541) The indemnity provision in the PJ agreement states, "SUBCONTRACTOR'S duty to defend, indemnify, and hold CONTRACTOR harmless as to all claims, demands, losses, and liabilities shall include CONTRACTOR'S personnel related costs, reasonable attorney fees, court costs, and all related expenses." (CP 558)

As explained above, the summary judgments in favor of PSR and PJ should be reversed. Because PSR and PJ are not entitled to prevail, the awards of attorney fees and costs in their favor must also be reversed.

**H. Polygon is entitled to an award of attorney fees.**

As explained above in Section A, Polygon is entitled to judgment as a matter of law on the issue of whether the indemnity provisions in the PSR and PJ agreements apply. In accordance with the attorney fee

provision set forth in Section G above and RAP 18.1(a), Polygon is entitled to reasonable attorney fees and expenses incurred on review with respect to its indemnity claim. In addition, if Polygon ultimately prevails on its breach of contract claim, it should be entitled to recover all attorney fees incurred on appeal, and Polygon requests that the Court issue a ruling to this effect.

#### VI. CONCLUSION

For the reasons set forth above, Polygon respectfully requests that the orders listed in Section I above be REVERSED and that this case be remanded to the trial court for further proceedings.

DATED this 21st day of June, 2006.

BULLIVANT HOUSER BAILEY PC

By: *Deborah L. Carstens*  
Jerret E. Sale, WSBA #14101  
Deborah L. Carstens, WSBA #17494

Attorneys for Appellants

**CERTIFICATE OF SERVICE**

The undersigned certifies that on June 21, 2006, I caused to be

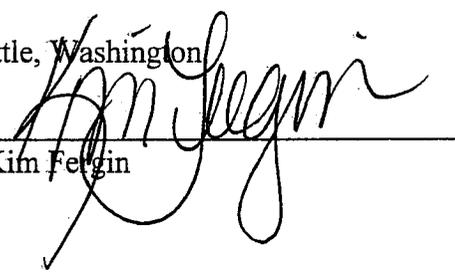
served this document to:

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

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

I declare under penalty of perjury under the laws of the State of

Washington this June 21, 2006, at Seattle, Washington

  
\_\_\_\_\_  
Kim Felgin

# APPENDIX A

## APPENDIX A: BUSINESS CORPORATION ACT COMMENTS

## COMMENTS

## CHAPTER 1. GENERAL PROVISIONS

## Section 1.01 Short Title.

The short title provided by Proposed section 1.01 creates a convenient name for Washington's business corporation act.

See the Introduction for a general description of the development of the Proposed Act, including its substantial reliance on the provisions in the Revised Model Business Corporation Act, the purposes it is intended to serve, the principles under which the Revised Model Act was prepared, and the roles of Cross References and Comments.

## Section 1.02 Reservation of Power to Amend or Repeal.

Provisions similar to Wash. Const. art. XII, section 1, and Proposed section 1.02 have their genesis in *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat) 518 (1819), which held that the United States Constitution prohibited the application of newly enacted statutes to existing corporations while suggesting the efficacy of a reservation of power similar to Proposed section 1.02. The purpose of Wash. Const. art. XII, section 1, and Proposed section 1.02 is to avoid any possible argument that a corporation has contractual or vested rights in any specific statutory provision and to ensure that the state may in the future modify its corporation statutes as it deems appropriate and require existing corporations to comply with the statutes as modified. See generally *Seattle Trust & Savings Bank v. McCarthy*, 94 Wash. 2d 605 (1980).

All articles of incorporation or certificates of authority granted under the Proposed Act are subject to the reservation of power set forth in Proposed section 1.02. Further, corporations "governed" by this Act—which include all corporations formed or qualified under earlier, general incorporation statutes that contain a reservation of power—are also subject to the reservation of power of Proposed section 1.02 and bound by subsequent amendments to the Act.

## Section 1.20 Filing Requirements.

Proposed section 1.20 standardizes the filing requirements for all documents required or permitted by the Proposed Act to be filed with the secretary of state. In a few instances, other sections of the Act impose additional requirements which must also be complied with if the document in question is to be filed. Proposed section 1.20 relates only to documents which the Proposed Act expressly requires or permits to be filed with the secretary of state; it does not authorize or direct the secretary of state to accept or reject for filing other documents relating to corporations and does not treat documents required or permitted to be filed under other statutes.

The purposes of the filing requirements of chapter 1 are: (1) to simplify the filing requirements by the elimination of formal or technical requirements that serve little purpose, (2) to minimize the number of pieces of paper to be processed by the secretary of state, and (3) to eliminate all possible disputes between persons seeking to file documents and the secretary of state as to the legal efficacy of documents.

The requirements of Proposed section 1.20 may be summarized as follows: (1) To be eligible for filing, a document must be typed or printed and in the English language (except to the limited extent permitted by Proposed subsection 1.20(e)).

(2) To be filed, a document must simply be executed by a corporate officer. Proposed subsection 1.21(f). No specific corporate officer is designated as the appropriate officer to sign though the signing officer must designate the office or the capacity in which the officer signs the document. Among the officers who are expressly authorized to sign a document is the chairperson of the board of directors, a choice that may be appropriate if the corporation has a board of directors but has not appointed officers. If a corporation has not been formed or has neither officers nor a board of directors, an incorporator may execute the document. Many organizations, like lenders or title companies, may desire that specific documents

red: Violation.  
ments.

ust make a recommendation to the approved, unless it determines that in circumstances it should make no determination, it must describe the basis for its determination, to the dissolve to the shareholders.

ust receive the vote of two-thirds of oration to vote on the proposal. As rejected the RMA majority vote the two-thirds standard in the old rporation may reduce the required group entitled to vote separately in

z statutory right to vote on proposals r together with voting shares) by the ion, the rights of all classes or series ation. The articles of incorporation, r series of shares are entitled to vote e of specific provision in the articles tion entitled to vote generally by the 1 dissolution. The articles of incorpo age of votes is required to approve ion 14.02.

ubmission of a proposal to the share- eceiving a specified percentage of es or series, voting by separate vot-

tion to revoke the dissolution under

ation of the RMA drafters to omit a r consent of shareholders. See old that provision offered that the Pro- ction of the board of directors. The ctors (see Proposed section 8.21) and at a meeting. Those provisions were orations. Thus, voluntary dissolution unnecessary.

makes the decision to dissolve a mat- hen the corporation must begin the ts business except to the extent nec-

ion may be filed at the commence- . This is the only filing required for ark the completion of winding-up ; for certain purposes even after the after satisfaction of all creditors are filing the articles is specified, and it ll winding up is far along or even sections 14.01 and 14.03 that a copy with the articles of dissolution will any cases until the winding up is

articles of dissolution are effective, a "dissolved corporation," although 4.05 for purposes of winding up.

in 120 days of the effective date of inality of dissolution, the decision to

revoke dissolution generally requires shareholder authorization (unless the dissolution was approved solely by the initial director or incorporators under Proposed section 14.01). Proposed subsection 14.04(b), however, contemplates that the board of directors may revoke dissolution if specifically granted that authority in advance by the shareholders when approving the dissolution. Such authorization is often included in proposals to dissolve that are contingent upon the effectuation of another transaction, such as a sale of corporate assets not in the ordinary course of business.

Certain other action requiring shareholder approval may be revoked by the board of directors without express shareholder approval. (See Proposed sections 11.03 and 12.02). By contrast, dissolution under Proposed section 14.04 may not be revoked by the board of directors without approval of the shareholders.

Articles of revocation of dissolution must be filed to reflect the decision to resume the business of the corporation. The information required in these articles parallels the information required in the original articles of dissolution.

The effect of articles of revocation of dissolution is to eliminate the requirement that the corporation cease to conduct its business except as part of the winding-up process and permit it to resume its business without limitation and as if dissolution had never occurred.

#### Section 14.05 Effect of Dissolution.

Proposed subsection 14.05(a) provides that dissolution does not terminate the corporate existence but simply requires the corporation thereafter to devote itself to winding up its affairs and liquidating its assets; after dissolution, the corporation may not carry on its business except as may be appropriate for winding-up.

The Proposed Act uses the term "dissolution" in the specialized sense described above and not to describe the final step in the liquidation of the corporate business. This is made clear by Proposed subsection 14.05(b), which provides that chapter 14 dissolution does not have any of the characteristics of common law dissolution, which treated corporate dissolution as analogous to the death of a natural person and abated lawsuits, vested equitable title to corporate property in the shareholders, imposed the fiduciary duty of trustees on directors who had custody of corporate assets, and revoked the authority of the registered agent. Proposed subsection 14.05(b) expressly reverses all of these common law attributes of dissolution and makes clear that the rights, powers, and duties of shareholders, the directors, and the registered agent are not affected by dissolution and that suits by or against the corporation are not affected in any way.

#### Section 14.06 Known Claims Against A Dissolved Corporation.

Proposed section 14.06 provides a new and simplified system for handling known claims against a dissolved corporation. Proposed section 14.06 deals solely with known claims. A claim is a "known" claim even if it is unliquidated (see Proposed subsection 14.06(d)); a claim that is contingent or has not matured so that there is no immediate right to bring suit is not a "known" claim.

Known claims are handled in Proposed section 14.06 through a process of written notice to claimants; the written notice must contain the information described in Proposed subsection 14.06(b). Such notice appears to satisfy the requirements set forth in *Tulsa Professional Collection Services, Inc. v. Pope*, 108 S. Ct. 1340 (1988) (which would be relevant only in the event that some aspect of the procedure was considered to be state action). Proposed subsection 14.06(c) then provides fixed deadlines by which claims are barred under various circumstances, as follows:

(1) If a claimant receives written notice satisfying Proposed subsection 14.06(b) but fails to file the claim by the deadline specified by the corporation, the claim is barred by Proposed subsection 14.06(c)(1).

(2) If a claimant receives written notice satisfying Proposed subsection 14.06(b) and files the claim as required:

(i) but the corporation rejects the claim, the claimant must commence a proceeding to enforce the claim within 90 days of the rejection or the claim is barred by Proposed subsection 14.06(c)(2); or