S. Ct. No. 91039-1

IN THE SUPREME COURT – STATE OF WASHINGTON

WILLIAM HOUK, et ux.,

Petitioners.

v.

BEST DEVELOPMENT & CONSTRUCTION COMPANY., INC., et al,

Defendants

NICHOLS & SHAHAN DEVELOMENT, LLC, a Washington Limited Liability Company, and JOSEPH NICHOLS, an individual,

Respondents.

ANSWER TO PROPOSED PETITION FOR REVIEW

ROSS P. WHITE, WSBA # 12136
MICHAEL J. KAPAUN, WSBA # 36864
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I. INTRODUCTION

Discretionary review by the Supreme Court is strictly limited by Rule of Appellate Procedure 13.4(b). The Court only accepts review in a narrowly circumscribed set of cases and, even then, only if specific criteria are met. The petitioner must establish that the Court of Appeals' decision conflicts with prior Washington State precedent or otherwise presents significant legal questions. RAP 13.4(b). William[1] and Janice Houk (the "Houks") cannot meet the standard established for review, therefore the Petition for Review should be denied.

II. STATEMENT OF THE CASE

A. UNDISPUTED FACTUAL HISTORY.

In its order on summary judgment, which was co-drafted and signed by the Houks' trial counsel (CP 310), the Superior Court found that there are no questions of material fact as to the following activities:

a. 06/17/2002: Nichols & Shahan Developments, LLC was formed.

b. Defendant Joseph Nichols was at all relevant times a member and a manager of Nichols & Shahan Developments, LLC;

c. 04/09/2003: Nichols & Shahan Developments, LLC purchased the property upon which the Houk's residence was built;

[1] Mr. Houk passed away shortly after the commencement of this lawsuit. (CP 87).

d. 09/22/2004: The Houks presented their offer to purchase the residence;

e. 10/10/2004: The Houks moved into the residence early due to Mr. Houk's health condition;

f. 10/11/2004: A Warranty Deed for the Houk residence was filed;

g. 10/2/2006: Nichols & Shahan Developments, LLC was administratively dissolved by the Secretary of State and a Certificate of Administrative Dissolution was filed by Secretary of State;

h. 06/10/2010: The applicable three-year statute of limitations, RCW 25.15.303, was amended;

i. 10/02/2010: Plaintiff's Notice of Claim is served;

j. 12/16/2010: Plaintiff's Complaint is filed.

(CP 307-308).

These undisputed facts, standing alone, are sufficient to affirm the Court of Appeals' March 13, 2014 decision in this case.

B. UNDISPUTED PROCEDURAL HISTORY.

The Houks' December 16, 2010 Complaint asserted six causes of action against more than a dozen persons and entities, including NSD and Mr. Nichols in his capacity as a "principal" of NSD. (CP 3-14). The Houks' claims allege defects in the construction of a house that they purchased from NSD in October 2004. *Id.*

On June 1, 2012, NSD and Mr. Nichols filed motions for summary

judgment, asking the Superior Court to dismiss them from this lawsuit on the basis of the three-year statute of limitations contained in RCW 25.15.303. (CP 103, 107). After issuing an oral ruling on August 9, 2012 (CP 304, RP 51-60), the Superior Court entered a written Order on August 28, 2012, denying the motions for the following reasons:

> 2. The Moving Defendants argue that the three-year statute of limitations contained in RCW 25.15.303 required that the Plaintiffs commence this lawsuit no later than 10/2/2009, which was three years from the date that Nichols & Shahan Developments, LLC was administratively dissolved by the Secretary of State.
>
> 3. However, the statute of limitations in RCW 25.15.303 was amended on 6/10/2010 and has different requirements than its predecessor statute. Specifically, the amended statute of limitations required that a dissolved limited liability company, wishing to avail itself of its protections, must undertake to file a Certificate of Dissolution as set forth in RCW 25.15.273.
>
> 4. RCW 25.15.303, as amended on 6/10/2010, was in effect on the date that Plaintiff's filed their Complaint and applies to this lawsuit.
>
> 5. Neither Joseph Nichols nor Nichols & Shahan Developments, LLC undertook to file a Certificate of Dissolution as set forth in RCW 25.15.273. Rather, the LLC was administratively dissolved and the Secretary of State filed a Certificate of Administrative Dissolution on 10/2/2006.
>
> 6. Based upon the plain language of RCW 25.15.303, as amended on 6/10/2010, there is only one vehicle where statute of limitations protection applies to a dissolved LLC and its managers or members. That is

when the limited liability company undertakes to file a Certificate of Dissolution as set forth in RCW 25.15.273. Since neither of the Moving Defendants undertook to file a Certificate of Dissolution, the statute of limitations in RCW 25.15.303 is not available as a defense to the Moving Defendants.

7. The Moving Defendants argue that the 6/10/2010 amendments to RCW 25.15.303 do not apply to this lawsuit because the statute of limitations contained in the prior version of RCW 25.15.303 did not require the filing of a Certificate of Dissolution and had already run on 10/2/2009, which was eight months prior to the statute's amendment.

8. Based upon the legislative history and plain language of the amended RCW 25.15.303, the Court is satisfied that the 6/10/2010 amendments to RCW 25.15.303, which require the filing of a Certificate of Dissolution, must be applied retroactively because they are curative and clarifying. Specifically, the 2010 amendments to the statute of limitations were meant to address the impact of *Chadwick Farms Owners Ass'n v. FHC LLC*, 166 Wn.2d 178 (2009), and to cure its result.

(CP 308-309).

On November 15, 2012, a Commissioner of the Court of Appeals granted discretionary review pursuant to RAP 2.3(b)(2), finding that the Superior Court's Order constitutes probable error that substantially alters the status quo. More specifically, the Commissioner's ruling found that:

> While the legislature may have the power to amend a statute of limitation and revive a claim that was already time-barred under the prior limitation period, authority exists that the amendment must clearly express a legislative

> intent to do so. *See* 51 Am.Jur.2d *Limitation of Actions* § 40 (2d ed. 2012). No such expression of intent exists in the amended RCW [25.15.303].

On March 13, 2014, the Court of Appeals issued a unanimous decision, granting the motions for summary judgment dismissal and awarding Mr. Nichols and NSD attorney fees.

III. ARGUMENT

A. THE HOUKS' REQUEST FOR DISCRETIONARY REVIEW DOES NOT MEET THE CRITERIA OF RAP 13.4(b).

Pursuant to RAP 13.4(b), the Supreme Court will accept review of a disposition by the Court of Appeals only if the petitioner demonstrates a conflict with a prior Washington State appellate decision or a significant question of state law or public interest is presented. The petition in this case does not meet those criteria.

B. THE COURT OF APPEALS PROPERLY CONSIDERED ONLY EVIDENCE AND ISSUES CALLED TO THE ATTENTION OF THE TRIAL COURT ON SUMMARY JUDGMENT, IN ACCORDANCE WITH RAP 9.12.

None of the substantive issues that the Houks present for review were raised in the Superior Court on summary judgment and the Court of Appeals, citing RAP 9.12, properly refused to consider them on appeal.

Although the Houks complain that the Court of Appeals should have considered new issues they raised for the first time on appeal, they fail to apply the correct standard of review. Indeed, the petition does not

even mention RAP 9.12, which bars consideration of evidence and issues that were not called to the trial court's attention on summary judgment.

Instead, the Houks rely upon RAP 2.5(a), which states that "[a] party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground." *Id.* (emphasis added). Astonishingly, the Houks then make the patently false claim that Mr. Nichols and NSD "made no suggestion that the record needed further development to decide" issues raised for the first time on appeal. (Petition for Review, pg. 10).

In fact, Mr. Nichols' and NSD's Reply Brief before the Court of Appeals is replete with challenges to the adequacy of the Record on summary judgment to address these new issues[2], including:

> Stated differently, the Plaintiff's new legal arguments and factual contentions are completely devoid of articulation or support in the Record. (Reply at pg. 2).
>
> As an initial matter, it should be noted that the Plaintiffs are remiss in failing to show how the issues they raise for the first time on appeal were "sufficiently developed" in the lower court. In fact, the record needed to support the Plaintiff's new legal theories simply does not exist. (Reply at pg. 4).

[2] Despite having an insufficient Record to review these issues for the first time on appeal, Mr. Nichols' and NSD's Reply in the Court of Appeals did provide briefing to demonstrate why these new issues are not well-based in law or fact. Due to space limitations in this answer, and because the issues are not properly before the Court, many of those arguments will not be repeated herein.

> On appeal, the Plaintiffs seek to run from the issues they raised below by introducing entirely new issues that were never presented on summary judgment and for which the Record was never developed. (Reply at pg. 6).
>
> Permitting the Plaintiffs to present these new issues and arguments for the first time on appeal would be contrary to the letter and spirit of the Court's rules. Moreover, it places the Defendants at a manifestly unfair position of having to respond, in an appellate reply brief, to numerous issues of first impression without the benefit of a proper Record. (Reply at pg. 25).

In any event, it is clear that RAP 9.12, the "Special Rule for Order on Summary Judgment", is the applicable rule. RAP 9.12 provides: "On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court." *Id.* (emphasis added).

The Court of Appeals was asked to review a trial court's order denying motions for summary judgment and RAP 9.12 was the applicable rule. Although review was *de novo*, the Court of Appeals' inquiry was limited to the issues called to the trial court's attention. RAP 9.12; *Zeleck v. Everett Clinic*, 60 Wn.App. 107, 111 n. 1 (Div. I 1991) (Defendant moved for summary judgment on statute of limitations and Plaintiff could not introduce new legal theory on appeal: "This argument was not raised to the trial court; we therefore do not consider it."); *Johnson v. Reehorn*, 56 Wn.App. 692, 700 (Div. I 1990) ("This issue was not presented to the

trial court and may not be raised in the Court of Appeals").

Even courts citing RAP 2.5(a) in the context of summary judgment have held that "[w]here the trial court had no opportunity to address the issue, we decline to consider it." *Sorrel v. Eagle Healthcare, Inc.*, 110 Wn.App. 290, 299, n. 25 (Div. I 2002). *See also, Almquist v. Finley School Dist. No. 53*, 114 Wn.App. 395, 401-02 (Div. III 2002) ("Simply put, these substantial legal theories advanced on appeal were not urged upon the trial judge in the first instance. We need not entertain them for the first time here."); *Lindblad v. Boeing Co.*, 108 Wn.App. 198, 207 (Div. I 2001) ("We will not review an issue, theory, argument, or claim of error not presented at the trial court level.").

Notably, the only case cited in support of the Houks' attempt to introduce entirely new issues on appeal, *Otis Hous. Ass'n v. Ha*, 165 Wn.2d 582 (2009), does not even concern a motion for summary judgment. (Petition at pg. 10). Rather, that case dealt with a trial court's denial of a motion to compel arbitration and is completely inapposite.

The Court of Appeals decision not to entertain numerous issues and allegations that the Houks failed to call to the attention of the trial court on summary judgment is entirely consistent with the Rules of Appellate Procedure and case precedent. As a result, the petition for review fails to meet the criteria for review articulated in RAP 13.4(b).

C. THE COURT OF APPEALS PROPERLY REJECTED NEW ARGUMENTS CONTRADICTED BY THE HOUKS' PRIOR CONTENTIONS.

The Court of Appeals decision also properly declined to consider new arguments that were inconsistent with the Houks' position before the trial court. *Matthias v. Lehn & Fink Products Corp.*, 70 Wn.2d 541, 543 (1967) ("[T]he rule is well established that this court will not consider matters not presented to the trial court, nor will this court review a case on a theory different from that in which it was presented at the trial level.").

The single issue presented for review in the Court of Appeals was whether time-barred causes of action were revived by subsequent amendment to a statute of limitations. Until the Houks filed their response brief in the Court of Appeals, there was no dispute that RCW 25.15.303 is a statute of limitations. The Houks' creative attempt to take a contrary stance on appeal was apparently not well-received by the Court of Appeals, given that the Washington State Supreme Court, the Court of Appeals, and even the Houks consistently referred to RCW 25.15.303 as a statute of limitations.

In *Chadwick Farms Owners Ass'n v. FCH, LLC,* 166 Wn.2d 178, 195 (2009), the majority opinion unequivocally characterized RCW 25.15.303 as a "statute of limitations" that required commencement of an action against a limited liability company within three years of its

dissolution.[3] Although the Court was divided on issues related to the effect of a limited liability company's "cancellation", even the four dissenting justices agreed that RCW 25.15.303 is a statute of limitations. *Id.* at 207 (C. Johnson, dissenting). In other words, the Court unanimously agreed that RCW 25.15.303 is a statute of limitations.

In *Serrano on Cal. Condo. Homeowners Ass'n v. First Pac. Dev., Ltd.*, 143 Wn.App. 521, 524 (Div. I 2008), the Court of Appeals likewise determined that RCW 25.15.303 was a statute of limitations and applied it as such.

The Houks' claim that RCW 25.15.303 is not a statute of limitations is puzzling, given that they took a contrary position on summary judgment and in response to the Motion for Discretionary Review before the Court of Appeals. There, the Houks referred to RCW 25.15.303 as a statute of limitations approximately 30 times. (CP 194-197, 200, 202-204; RP 22, 23, 27, 33, 42; Janice Houk's Reply [sic] Brief [to Defendants' Motion for Discretionary Review] at 1, 10, 12, 13).

As explained above, the Houks are prohibited from raising new issues for the first time on appeal; particularly where those issues are inconsistent with their prior arguments. The Houks' new argument that

[3] Division III Court of Appeals Chief Judge Korsmo, who signed the unanimous opinion in this case, was intimately familiar with the decision in *Chadwick Farms*, having joined its majority opinion in a pro tempore capacity.

RCW 25.15.303 is not a statute of limitations lacked credibility in the Court of Appeals and fails to satisfy any basis for granting discretionary review now.

D. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH ANY DECISION OF THE SUPREME COURT OR OTHER COURTS OF APPEALS.

Because the petition for review only discusses legal issues that were never brought to the attention of the Superior Court, it is easy to lose sight of the simplicity of the motion for summary judgment at issue; *i.e.*, whether the Superior Court erred in holding that the 2010 amendments to RCW 25.15.303 revived claims that were already time-barred under the prior version of that statute.

RCW 25.15.303 first became effective on June 7, 2006, which was approximately four months before the administrative dissolution of NSD. (CP 114, 174, 308). As originally enacted, the statute read as follows:

> The dissolution of a limited liability company does not take away or impair any remedy available against that limited liability company, its managers, or its members for any right or claim existing, or any liability incurred at any time, whether prior to or after dissolution, unless an action or other proceeding thereon is not commenced within three years after the effective date of dissolution. Such an action or proceeding against the limited liability company may be defended by the limited liability company in its own name.

RCW 25.15.303 (2006). In *Chadwick Farms*, this Court stated that this statute of limitations "means that an action against a limited liability

company, whether arising before or after dissolution, must be brought within three years of dissolution". 166 Wn.2d 182, 195.

Under the 2006 version of RCW 25.15.303, there was absolutely no requirement that a dissolved limited liability company ("LLC") file any sort of documentation with the Secretary of State before the statute of limitations was triggered. Rather, the limitations period began to run on the LLC's "effective date of dissolution." In the case of an administratively dissolved LLC, the Secretary of State would file a Certificate of Administrative Dissolution, which provided constructive public notice of the dissolution.[4] The Certificate of Administrative Dissolution established the "effective date of dissolution" for administratively dissolved LLCs and triggered the statute of limitations. *Serrano*, 143 Wn.App. at 525 (2008); *Hartford Ins. Co. v. Ohio Cas. Ins. Co.*, 145 Wn.App. 765, 774-774 (2008).

In this case, it is undisputed that NSD was dissolved on October 2, 2006 and the Secretary of State filed a Certificate of Administrative Dissolution on that date.[5] (CP 114, 174, 308). As noted in the Court of

[4] LLCs may be administratively dissolved by the Secretary of State for a number of reasons, including (as in the case of NSD) failure to renew its license or file an annual report. RCW 25.15.280. (CP 174).

[5] The Certificate of Administrative Dissolution is kept on file by the Secretary of State and provided public notice of NSD's dissolution in 2006. (CP 174). In other words, NSD did not "secretly dissolve" as the Houks now allege. The certificate was easily obtained from the Secretary of State's office for a mere ten dollar copying charge. (CP 278).

Appeals' decision, it is also undisputed that the 2006 version of RCW 25.15.303 was continuously in effect (a) on the date that NSD was administratively dissolved, (b) during the entire three-year limitations period that was triggered by NSD's dissolution, and (c) for an additional period of eight months thereafter.

Based upon these undisputed facts, it is clear that RCW 25.15.303 (2006) required the Houks to commence this lawsuit against the NSD and Mr. Nichols no later than October 2, 2009 – three years from the date of NSD's dissolution. That never happened. Instead, the Houks filed suit on December 16, 2010 – more than fourteen months after their claims were time-barred. (CP 1-14).

For eight months, NSD and Mr. Nichols were indisputably shielded from liability based on RCW 25.15.303 (2006). Nevertheless, the Superior Court accepted the Houks' argument that June 10, 2010 amendments to RCW 25.15.303 revived the Houks' time-barred causes of action. Specifically, the Superior Court noted that the amended statute now required a dissolving LLC to file its own "Certificate of Dissolution" before the limitations period is triggered. (CP 308).

The Superior Court thus denied the motions for summary judgment because NSD and Mr. Nichols did not personally file a document that the law never required when NSD dissolved. (CP 308-309). Given the law's

strong presumption against retroactive application of statutory amendments, this was clear error.

In the United States, courts have long disfavored statutory retroactivity and presume that new statutory requirements are to be applied prospectively. *Landgraf v. USI Film Products*, 511 U.S. 244, 268-70 (1994). Indeed, "the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Id.* at 265.

Consistent with this presumption against retroactivity, the Ninth Circuit has routinely held that changes to statutes of limitations do not revive claims that were previously time-barred: "[A] statute of limitations may not be applied retroactively to revive a claim that would otherwise be stale under the old [statutory] scheme." *Chenault v. U.S. Postal Serv.*, 37 F.3d 535, 538 (9th Cir. 1994); *Bulgo v. Munoz*, 853 F.2d 710, 715 (9th Cir. 1988) (declining to give retroactive effect to amendment to statute of limitations, which would have revived plaintiff's time-barred claim); *Maldonado v. Harris*, 370 F.3d 945, 955 (9th Cir. 2004) ("Under California law, an extension of a statute of limitations will not apply to claims already barred under the prior statute of limitations unless the Legislature explicitly provides otherwise.").

Likewise, in Washington State "[i]t is well accepted that statutes of limitation and other statutes providing exceptions to them are to be given prospective application only." *Torkelson v. Roerick*, 24 Wn.App. 877, 879 (1979), *citing O'Donoghue v. State*, 66 Wn.2d 787, 790 (1965), *Lane v. Department of Labor & Indus.*, 21 Wn.2d 420, 423 (1944). In a very important Division III opinion that was later adopted as the opinion of the Washington State Supreme Court, the Court of Appeals held that:

> After a right is barred by an existing statute of limitations, the court will not construe subsequent legislation so as to remove the bar or revive the cause of action unless by the plain terms of the subsequent legislation or by necessary implication it is apparent the legislature intended retroactive application.

Kittilson v. Ford, 23 Wn.App. 402, 411 (1979) *aff'd*, 93 Wn.2d 223 (1980) (citations omitted).

Under Washington law, the basic presumption against retroactivity can only be overcome if the Legislature explicitly provides for retroactivity or the amendment is "curative" or "remedial". *Loeffelholz v. Univ. of Washington*, 175 Wn.2d 264, 271 (2012); *Densley v. Dep't of Ret. Sys.*, 162 Wn.2d 210, 223 (2007).

With respect to the June 2010 amendments to RCW 25.15.303, there is a complete lack of any express direction from the Legislature to overcome the presumption against retroactivity.

The 2010 amendments were also not curative, because an amendment is curative and retroactive only if it clarifies or technically corrects an ambiguous statute. *State v. Jones*, 110 Wn.2d 74, 82 (1988). Ambiguity in the statutory language is therefore a condition precedent to finding that an amendment was curative. However, in *Chadwick Farms*, this Court stated, "The plain language in RCW 25.15.303 and the other provisions of the Act resolve the statute's meaning. Because we find no ambiguity, we have no reason to consider legislative history." 165 Wn.2d at 195. Because this Court determined the 2006 version of RCW 25.15.303 was unambiguous, the 2010 amendments cannot be curative.

The amendments also cannot be remedial. "An amendment is deemed remedial and applied retroactively when it relates to practice, procedure or remedies, and does not affect a substantive or vested right." *In re F.D. Processing, Inc.*, 119 Wn.2d 452, 462-63 (1992). "A statute which provides a claimant with the right to proceed against persons previously outside the scope of the statute deals with a substantive right, and therefore applies prospectively only." *Dep't of Ret. Sys. v. Kralman*, 73 Wn.App. 25, 33 (Div. III 1994), *citing Kittilson*, 23 Wn.App. at 411. As explained above, the Houks' action was time-barred on October 2, 2009. From that date forward, the Houks no longer had a legal right to proceed against NSD and Mr. Nichols, each of whom had a legal right to

assert the statute of limitations as a complete defense. If applied retroactively, the 2010 amendments to RCW 25.15.303 would give the Houks a new substantive right to proceed against NSD and Mr. Nichols. As a result, the amendments are not remedial and cannot be applied retroactively.

Consistent with established Washington State precedent, the Court of Appeals correctly determined that the 2010 amendments cannot be applied retroactively to revive time-barred claims against NSD and Mr. Nichols. The ruling does not conflict with established precedent and there is no basis under RAP 13.4(b) to grant the petition for review.

E. THE PETITION DOES NOT PRESENT AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST.

The Court of Appeals' interpretation of RCW 25.15.303, as it existed from June 7, 2006 until the amendments of June 10, 2010, will not result in the dismissal of numerous claims against dissolved LLCs and their members/managers, as the Houks suggest. The facts of this case are unique, in that NSD was dissolved shortly after the statute of limitations went into effect and the limitations period expired eight months before the statute was amended. In other words, the Houks' claims were already time-barred when the statute was amended. Only a narrow band of LLCs that dissolved between June 7, 2006 and June 10, 2007 (three years before

the amendments) will be similarly-situated.

Stated differently, lawsuits against LLCs that administratively dissolved after June 10, 2007 (more than seven years ago) will not result in the revival of time-barred claims, because the limitations period at issue will not have expired before the 2010 amendments went into effect.

As a result of the Court of Appeals' decision in this case, the public interest has been protected, because the citizens of this state can continue to feel assured that time-barred causes of action will not be revived by the courts without legislative direction. There is no reason to grant the petition for review under RAP 13.4(b)(4).

F. THE COURT OF APPEALS PROPERLY AWARDED ATTORNEY FEES TO MR. NICHOLS AND NSD.

The Houks also seek review of the Court of Appeals' order granting Mr. Nichols and NSD attorneys' fees. The Court of Appeals understood and correctly applied Washington hornbook law regarding a prevailing party's ability to recover attorneys' fees based on a contract.

RCW 4.84.330 requires Washington courts to award reasonable attorneys' fees and costs to the prevailing party on a contract, where the contract provides for the prevailing party to recover such fees and costs. *Singleton v. Frost*, 108 Wn.2d 723, 727-8 (1987).

The Purchase Agreement, upon which the Houks alleged their causes of action provides: "If Buyer, Seller, or any real estate licensee or broker involved in this transaction is involved in any dispute relating to any aspect of this transaction or this Agreement, each prevailing party shall recover their reasonable attorneys' fees. This provision shall survive Closing." (CP 97, 157).

The Houks' suit against Mr. Nichols and NSD was based on and related to aspects of the Purchase Agreement that was executed by the Houks and Mr. Nichols in his capacity as a manager of NSD. (CP 97, 113, 157). The Houks, who continuously argued that Mr. Nichols was a party to the REPSA, were judicially estopped from denying that he is entitled to receive an award of attorney fees. The Court of Appeals correctly awarded Mr. Nichols and NSD their fees on appeal in accordance with established Washington precedent and there is no basis for discretionary review under RAP 13.4(b).

IV. FEES ON APPEAL

When a contract or agreement provides for recovery of attorney fees, the prevailing party is also entitled to its reasonable fees and costs incurred on appeal. RAP 18.1(a). In addition, RAP 18.1(j) provides that if a party is awarded fees in the Court of Appeals and successfully opposes a petition for review to the Supreme Court, fees may be awarded for

opposing the petition. Mr. Nichols and NSD were rightfully awarded fees by the Court of Appeals and respectfully request that the Court award attorney fees and costs for responding to the Houks' petition for review.

V. CONCLUSION

Where claims have been barred by a statute of limitations, courts have long-refused to construe subsequent legislation to revive stale claims. After inviting the Superior Court to commit clear error on this issue, the Houks attempted to abandon their arguments by raising entirely new issues for the first time on appeal. Those issues are not well-based in law or the Record, and the Court of Appeals rightly refused to consider them pursuant to RAP 9.12.

The Houks cannot meet their high burden to show that the Court of Appeals' opinion presents a matter of substantial public interest or is in conflict with any existing decision of this Court or of any of the other Courts of Appeals. The Petition for Review should, therefore, be denied.

RESPECTFULLY SUBMITTED, this 23rd day of January 2015.

WITHERSPOON · KELLEY

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Counsel for Joseph Nichols and Nichols & Shahan Developments, LLC

PROOF OF SERVICE

Pursuant to RCW 9A.72.085, the undersigned hereby certifies under penalty of perjury under the laws of the state of Washington, that on January 23, 2015, the foregoing was filed with the Washington State Supreme Court, and delivered to the following persons in manner indicated:

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- ☐ Facsimile Transmission
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Received 1-23-15

The Exhibit attachment is too many pages to file by e-mail. Please send those by regular mail.

Thank you

From: Alicia Asplint [mailto:AliciaA@witherspoonkelley.com]
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To: OFFICE RECEPTIONIST, CLERK
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William Houk, et ux. v. Nichols & Shahan Development, LLC, et al.
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Attached please find following for filing:

1. Answer to Petitioner's Motion for Extension of Time to File Petition for Review and Request for Dismissal;
2. Declaration of Ross P. White in Opposition to Petitioner's Motion for Extension of Time to File Petition for Review with Exhibits; and
3. Answer to Proposed Petition for Review.

I would ask that you please file the above documents and email back conformed copies of front pages only of each document to me at your convenience. Thank you.

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