No. 311635

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

WILLIAM HOUK, et ux

Respondents,

v.

BEST DEVELOPMENT & CONSTRUCTION CO., INC., ET AL

Defendants,

v.

NICHOLS & SHAHAN DEVELOPMENT LIC

JOSEPH NICHOLS

Petitioners.

OPENING BRIEF OF PETITIONERS

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I. INTRODUCTION

Nichols & Shahan Developments, LLC ("NSD") and Joseph K. Nichols[1] appeal from an order of the Superior Court that revived previously time-barred claims against them.

NSD was administratively dissolved by the Secretary of State on October 2, 2006 by the filing of a Certificate of Administrative Dissolution. At that time, the statute of limitations contained in RCW 25.15.303 required only that the Plaintiffs commence their action against the Defendants within three years of NSD's dissolution; *i.e.*, no later than October 2, 2009. The Plaintiffs failed to file this lawsuit until December 16, 2010 – more than fourteen months after their claims were time-barred.

The Plaintiffs have never disputed that their claims against the Defendants were time-barred by the version of RCW 25.15.303 in effect (a) at the time NSD dissolved, (b) during the three years following its dissolution, and (c) for an additional eight months after the three-year limitations period expired.

Nevertheless, the Superior Court denied the Defendants' motions for summary judgment dismissal by holding that amendments to the

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[1] As in their Motion for Discretionary Review, Petitioners NSD and Mr. Nichols are collectively referred to herein as the "Defendants".

statute of limitations in June 2010 (eight months after the Plaintiffs' claims were time-barred) applied retroactively to revive those stale claims.

More specifically, the Superior Court found that the June 2010 amendments to RCW 25.15.303 added a new procedure, whereby a dissolved LLC is now required to file a "Certificate of Dissolution" with the Secretary of State before the limitations period can begin to run. Since the Defendants, in 2006, did not file the new certificate mandated by the 2010 amendments, the Superior Court held that RCW 25.15.303 is unavailable as a defense. Stated differently, the Superior Court held that the statute of limitations would only protect the Defendants if they had filed a document that did not exist and was never required during the entire three-year limitations period following NSD's dissolution.

Where claims have been barred by a statute of limitations, courts in Washington and across the United States have long-refused to construe subsequent legislation to revive those stale claims. This is particularly so where, as here, the amended statute does not state, or even suggest, that the Legislature intended such a result.

The Superior Court's revival of time-barred claims without any direction from the Legislature to do so constitutes clear error. The Defendants respectfully ask the Court of Appeals to reverse the Superior Court's Order and dismiss the Plaintiffs' claims against them.

II. ISSUE PRESENTED FOR REVIEW

Whether the Superior Court erred in denying the Defendants' motions for summary judgment by holding that the 2010 amendments to RCW 25.15.303 revived claims that were already time-barred under the prior version of that three-year statute of limitations.

III. STATEMENT OF THE CASE

This construction defect action concerns a house that Plaintiffs William[2] and Janice Houk purchased from NSD in October 2004.

A. Factual History.

In its order on summary judgment, 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;

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;

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[2] William Houk passed away after this lawsuit was commenced. (CP 87).

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 demonstrate that the Superior Court erred in denying the Defendants' motions for summary judgment.

B. Procedural History.

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

On June 1, 2012, the Defendants 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

[3] The Plaintiffs amended their Complaint once on July 1, 2011 to correct the caption and properly name Rick's Plumbing & Heating, Inc. as an additional defendant in this matter. (CP 45-56). The substantive allegations of the original Complaint were not amended.

25.15.303. (CP 103, 107). Oral argument was heard on July 13, 2012 before Spokane County Superior Court Judge Linda G. Tompkins (CP 303, RP 1-50). 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 Defendants' 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.

9. The Moving Defendants' motions for summary judgment are DENIED.

(CP 308-309).

On September 25, 2012, the Defendants filed a Motion for Discretionary Review by this Court on the basis that Judge Tompkins' revival of previously time-barred claims constitutes clear or probable error. 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].

IV. ARGUMENT

A. Standard of Review.

Summary judgment must be granted when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(e). A genuine issue for trial exists only if "the evidence is such that a reasonable jury can return a verdict" for the party opposing summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Wilson v. Steinbach*, 98 Wn.2d 434, 437 (1982).

An appellate court reviews summary judgment orders *de novo*, performing the same inquiry as the trial court. *Sheikh v. Choe*, 156 Wn.2d 441, 447 (2006) (quoting *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300 (2002)). Statutory interpretation is a question of law, which is also reviewed *de novo*. *State v. Keller*, 143 Wn.2d 267, 276 (2001) (citations omitted).

On summary judgment, the Plaintiffs failed to raise any issues of material fact precluding dismissal of their claims against the Defendants. Pursuant to RCW 25.15.303 (2006), and based upon the undisputed facts considered by the Superior Court, the Defendants are entitled to summary judgment dismissal of the Plaintiffs' claims as a matter of law.

B. The Superior Court Erred By Reviving Plaintiffs' Time-Barred Claims Without Any Expression of Intent by the Legislature To Do So.

1. There is no dispute that the Plaintiffs' claims were time-barred between October 2, 2009 and June 10, 2010.

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 2009, the Washington State Supreme Court characterized RCW 25.15.303 as a "statute of limitations" and held that it "means that an action against a limited liability company, whether arising before or after

dissolution, must be brought within three years of dissolution". *Chadwick Farms Owners Ass'n v. FHC LLC*, 166 Wn.2d 178, 182, 195 (2009).

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." RCW 25.15.303 (2006).

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] Washington courts interpreting the 2006 version of RCW 25.15.303 held that the Certificate of Administrative Dissolution established the "effective date of dissolution" for administratively dissolved LLCs and triggered the statute of limitations. *Serrano on California Condominium Homeowners Ass'n v. First Pacific Development, Ltd.*, 143 Wn.App. 521, 525 (2008); *Hartford Ins. Co. v. Ohio Cas. Ins. Co.*, 145 Wn.App. 765, 774-774 (2008).

In this case, the Superior Court's Order concluded that there were no material issues of fact regarding the administrative dissolution of NSD on October 2, 2006 and the Secretary of State's filing of a Certificate of

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[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).

Administrative Dissolution on that date. (CP 114, 174, 308). It is equally undisputed that the 2006 version of RCW 25.15.303 was continuously in effect (a) on the date that NSD was administratively dissolved and the Certificate of Administrative Dissolution filed, (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 Plaintiffs to commence this lawsuit against the Defendants no later than October 2, 2009, which is three years from the date that NSD was administratively dissolved. That never happened. Instead, the Plaintiffs filed suit on December 16, 2010 – more than fourteen months after their claims were time-barred by the 2006 version of RCW 25.15.303. (CP 1-14). The Plaintiffs have never disputed the fact that their claims against the Defendants were time-barred between October 2, 2009 and June 10, 2010 (when the statute of limitations was amended).

For eight months (250 days), the Defendants were indisputably shielded from liability based on RCW 25.15.303 (2006). By denying the Defendants' motions for summary judgment, Judge Tompkins brought the Plaintiffs' claims back to life. There is no basis in law or fact to justify the Superior Court's revival of those time-barred claims.

2. The June 2010 amendments to RCW 25.15.303 are presumed to apply prospectively and cannot revive causes of action that were previously time-barred.

Effective June 10, 2010, RCW 25.15.303 was amended to read as follows:

> Except as provided in RCW 25.15.298, the dissolution of a limited liability company does not take away or impair any remedy available to or 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 the limited liability company has filed a certificate of dissolution under RCW 25.15.273, that has not been revoked under RCW 25.15.293, and an action or other proceeding thereon is not commenced within three years after the filing of the certificate of dissolution. Such an action or proceeding by or against the limited liability company may be prosecuted or defended by the limited liability company in its own name.

RCW 25.15.303 (2010) (emphasis added).

As noted in the Superior Court's Order, this amended statute imposed the new and "different" obligation on dissolved LLCs to file a Certificate of Dissolution "under RCW 25.15.273" before the three-year limitations period begins to run. (CP 308).

Even though this requirement did not exist when NSD was dissolved, or at any time during the three-year limitations period following its dissolution, Judge Tompkins imposed the obligation of filing a Certificate of Dissolution on the Defendants. (CP 308-309). Thus, the Superior Court denied the Defendants' motions for summary judgment

because they did not file a document that did not previously exist and which the law never required when NSD dissolved.[5] 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. "Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." *Id.*

The presumption against retroactivity is so deeply rooted in American jurisprudence that the Supreme Court found it "not surprising that the antiretroactivity principle finds expression in several provisions

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[5] In its Order, the Superior Court acknowledged that the Secretary filed a Certificate of Administrative Dissolution for NSD on October 2, 2006. (CP 308). Though not the same as the "certificate of dissolution under RCW 25.15.273" that was later mandated by the 2010 amendments, the Certificate of Administrative Dissolution kept on file by the Secretary of State and did provide public notice of NSD's dissolution in 2006. (CP 174). As with other corporate documents obtained by Defendants' counsel, the 2006 certificate was easily obtained from the Secretary of State's office for a mere ten dollar copying charge. (CP 278).

of our Constitution", including (1) the *Ex Post Facto* Clause applicable to penal legislation; (2) the prohibition on laws "impairing the Obligation of Contracts" in Article I, §10, cl. 1; (3) the Takings Clause of the Fifth Amendment; (4) the prohibitions on Bills of Attainder in Art. I, §§ 9-10; and (5) the Due Process Clause. *Landgraf*, 511 U.S. at 266.

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), *citing Lane*, 21 Wn.2d at 423, *Seattle v. DeWolfe*, 17 Wn. 349 (1897), and Annot., Construction of Statutes of Limitations as Regards Their Retrospective Application to Causes of Action Already Barred, 67 A.L.R. 297, 309-11 (1930).

There is no dispute that the Plaintiffs' claims against the Defendants were time-barred by RCW 25.15.303 (2006) on October 2, 2009. *See* Section IV(B)(1, *supra*. In order to revive the Plaintiffs' claims, the Superior Court was required to overcome a very strong presumption that the June 2010 amendments to RCW 25.15.303 were intended to apply only prospectively.

Under Washington law, that presumption can only be overcome if (1) the Legislature explicitly provides for retroactivity, (2) the amendment is curative, or (3) the amendment is 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 or implied direction from the Legislature to overcome the presumption against retroactivity; particularly with respect to claims that were already time-barred by the statute of limitations.

3. The plain language of RCW 25.15.303, as amended in June 2010, does not call for retroactive application of the new filing requirement.

Where retroactivity is alleged, courts look to the plain terms of subsequent legislation to determine whether "it is apparent the legislature intended retroactive application" of the new or amended statutory scheme. *Kittilson*, 23 Wn.App. at 411 (citations omitted).

The requirement of filing a Certificate of Dissolution was not added to RCW 25.15.303 until its amendment on June 10, 2010. The amended statute is entirely silent on whether this new filing requirement is to be applied retroactively – much less whether it is to be binding upon LLCs for whom the statute of limitations had already run.[6] The absence of any specific direction from the Legislature is so apparent that even the

[6] The legislative history from the 2010 amendments to RCW 25.15.303 is equally silent with respect to the retroactive application of the new filing requirement.

Plaintiffs conceded that "the statute does not contain any explicit instructions that the 2010 enactment is to be retroactive". (CP 199).

To the contrary, the plain language of RCW 25.15.303 (2010) compels the opposite conclusion. As amended, the statute provides that the three-year statute of limitations will only be available to an LLC that "has filed a certificate of dissolution under RCW 25.15.273, that has not been revoked under RCW 25.15.293". *Id.* (emphasis added).

The amended statute's reference to RCW 25.15.273 is particularly telling of the Legislature's intent, because Section 273 did not exist prior to the June 2010 amendments and the "certificate of dissolution under RCW 25.15.273" referenced in the amended Section 303 was, in multiple bill reports, characterized by the Legislature as a "new document". (CP 243, 246, 249).

When engaging in statutory interpretation, Washington courts avoid adopting constructions of statutes that yield "unlikely, strange or absurd consequences." *State v. Keller*, 143 Wn.2d 267, 277 (2001), *citing State v. Contreras*, 124 Wn.2d 741, 747 (1994), *Upjohn v. Russell*, 33 Wn.App. 777, 780 (1983). *See also*, *Densley v. Dep't of Ret. Sys.*, 162 Wn.2d 210, 221 (2007). It is unlikely, strange and absurd to assume that the Legislature intended for previously-dissolved LLCs, no longer in business, to file a document that did not exist when they dissolved. The

only sensible reading of this amendment is that the Legislature intended for it to apply prospectively, because the statute of limitations had already run on claims against numerous dissolved LLCs that were never required to file such a document.[7]

Moreover, if the Legislature intended to revive time-barred claims and require all previously-dissolved LLCs to file this "new document", it could have easily said so. In contrast to the language found in RCW 25.15.303 (2010), which is silent on revival of claims, the following is an example of clear legislative intent to revive time-barred claims:

> Notwithstanding any other provision of law or contract, any insurance claim for damages arising out of the Northridge earthquake of 1994 which is barred as of the effective date of this section solely because the applicable statute of limitations has or had expired is hereby revived and a cause of action thereon may be commenced provided that the action is commenced within one year of the effective date of this section.

Cal. Civ. Proc. Code § 340.9; *see also, Campanelli v. Allstate Life Ins. Co.*, 322 F.3d 1086 (9th Cir. 2003) (holding that Cal. Civ. Proc. Code § 340.9 retroactively abrogates all existing statutes of limitations barring insureds' state law causes of action and revives those otherwise time-barred claims). This statutory language stands in stark contrast with that

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[7] By holding that the new filing requirement must be applied retroactively, the Superior Court adopted an interpretation of RCW 25.15.303 that would effectively revoke its protections for all LLCs dissolved prior to June 10, 2010. *See* Section IV (C), *infra*.

of RCW 25.15.303 (2010), which does not imply, much less explicitly provide, that retroactivity or revival of claims was ever contemplated by the Washington State Legislature.

The Superior Court's Order, which found that the plain language of RCW 25.15.303 (2010) calls for retroactive application of its amended provisions, is clearly in error and should be reversed.

4. The June 2010 amendments to RCW 25.15.303 are not "curative" because the Supreme Court held that the prior version of that statute was unambiguous.

Despite the strong presumption against retroactivity, courts may in some instances apply amendments to a statute retroactively if they are "curative" in nature. *In re F.D. Processing, Inc.*, 119 Wn.2d 452, 461-462 (1992). In its Order reviving the Plaintiffs' time-barred claims, the Superior Court determined that the June 2010 amendments to RCW 25.15.303 were "curative and clarifying" such that they should be applied retroactively. (CP 309). More specifically, the Superior Court found that the new filing requirements in the statute "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." *Id.* This was also clear error.

"A curative amendment clarifies or technically corrects an ambiguous statute." *Sprint Int'l Communications Cor. v. Dep't of Revenue*, 154 Wn.App. 926, 939 (2010)(emphasis added). But "[w]here ambiguity

is lacking in statutory language, [the Supreme Court of Washington] presumes an amendment to the statute constitutes a substantive change in the law, and the amendment presumptively is not retroactively applied." *In re F.D. Processing, Inc.*, 119 Wn.2d at 462 (emphasis added). In other words, ambiguity in the statutory language is a condition precedent to finding that an amendment was "curative".

In this case, it is impossible to establish that condition precedent because the Washington State Supreme Court definitively ruled that RCW 25.15.303 (2006) was unambiguous. *Chadwick Farms Owners Ass'n v. FHC LLC.* 166 Wn.2d 178, 195 (2009) ("The plain language in RCW 25.15.303 and the other provisions in the Act resolve the statute's meaning. Because we find no ambiguity, we have no reason to consider legislative history.")(emphasis added).[8]

One cannot cure an ambiguity where none exists. Because the Supreme Court determined that the 2006 version of RCW 25.15.303 was unambiguous, the 2010 amendments to that statute (particularly those adding a new filing requirement) cannot possibly be interpreted as

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[8] Likewise, the 2010 bill reports from both the House and Senate Judiciary Committees indicate that the legislative sponsor of the 2010 amendments, Representative Jamie Pedersen, agreed with the Supreme Court's finding that the 2006 version of the statute was unambiguous: "I would also like to point out that I agree with the Supreme Court's interpretation of the statute in Chadwick." (CP 244, 247).

"curative".[9] Rather, the 2010 amendments are presumed to constitute substantive changes to the law, which cannot be applied retroactively. *In re F.D. Processing, Inc.*, 119 Wn.2d at 462.

The Superior Court erred by holding that amendments to a decidedly unambiguous statute were "curative" and should be reversed.

5. The June 2010 amendments to RCW 25.15.303 are not "remedial" because, as interpreted by the Superior Court, they affect substantive and vested rights.

In Washington, the strong presumption against retroactivity may be overcome where a statute is "remedial". *In re F.D. Processing, Inc.*, 119 Wn.2d 452, 462-63 (1992)("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."). "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.

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[9] The Superior Court also erred in its specific finding that the Legislature's addition of a filing requirement was meant to cure the result of *Chadwick Farms*. The issue in *Chadwick Farms* was whether cancellation of an LLC, which had previously been dissolved, would abate claims against the LLC before the three-year statute of limitations in RCW 25.15.303 had run. *Chadwick Farms*, 166 Wn.2d at 195. Whether a certificate of dissolution must filed by a dissolved LLC before the statute of limitations begins to run simply was not at issue in *Chadwick Farms*, because the 2006 version of the statute of limitations had no such requirement.

There is no dispute that the Plaintiffs' claims against the Defendants were time-barred by RCW 25.15.303 (2006) on October 2, 2009. *See* Section IV(B)(1), *supra*. From that date forward, the Plaintiffs no longer had a legal right to proceed with their claims against the Defendants and the Defendants had a legal right to assert the statute of limitations as a complete defense.

Although the Superior Court's Order did not hold that the 2010 amendments were remedial[10], such that they can be applied retroactively, the effect of the court's decision was to give the Plaintiffs a new right to assert claims against the Defendants and to deprive the Defendants of their right to assert the statute of limitations as a complete defense. This was clear error and warrants reversal of the Superior Court's Order.

C. The Superior Court's Order Effectively Revoked RCW 25.15.303 As A Defense For All LLCs Dissolved Prior to June 10, 2010.

In denying the Defendants' motions for summary judgment, the Superior Court's Order stated that RCW 25.15.303 was not available as a defense, simply because the Defendants did not, in 2006, file the Certificate of Dissolution mandated by the 2010 amendments. (CP 309).

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[10] The Plaintiffs, likewise, did not argue in any of their briefing on summary judgment that the 2010 amendments to RCW 25.15.303 are "remedial". Rather, the Plaintiffs' briefing argued that the amendments were "curative". (CP 198-200)

The Superior Court's Order, taken to its logical conclusion, would effectively revoke RCW 25.15.303 as a defense for all LLCs that dissolved prior to June 10, 2010.

This is not mere hyperbole. The Certificate of Dissolution required by RCW 25.15.303 (2010) is an entirely new document, mandated by a statute (RCW 25.15.273) that did not exist prior to the June 2010 amendments. It goes without saying that LLCs dissolved prior to the 2010 amendments would not have filed a document that did not exist and was not required – particularly where a Certificate of Administrative Dissolution had already been filed by the Secretary of State. Under the Superior Court's Order, none of those dissolved LLCs could avail themselves of the protections afforded by RCW 25.15.303.

There are an untold number of dissolved LLCs in Washington (and their managers/members) that have fairly relied upon the provisions of RCW 25.15.303 (2006) as a bar against future claims. "In a free, dynamic society, creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions." *Landgraf*, 511 U.S. at 265-66. The Superior Court's Order, if affirmed, would deprive many previously-dissolved LLCs of any confidence in the legal consequence of their compliance with a statute of limitations that had run its course.

V. REQUEST FOR ATTORNEY FEES

RCW 4.84.330 requires the Court to award the prevailing party reasonable attorneys' fees where a contract provides for recovery of attorneys' fees. *Singleton v. Frost*, 108 Wn.2d 723, 727-8 (1987). When a contract provides for payment of fees, the prevailing party is also entitled to fees and costs incurred on appeal. RAP 18.1; *Quality Food Centers v. Mary Jewell T, LLC*, 134 Wn. App. 814 (Div. I 2006) (trial judge erroneously denied defendant attorney fees at trial for successful defense of suit; defendant also entitled to attorney fees on appeal).

Should they prevail on this appeal, the Defendants respectfully request that the Court award their reasonable attorney fees and costs in defending against this time-barred lawsuit, at the trial court level and on appeal, pursuant to the Real Estate Purchase and Sale Agreement executed by the parties (the "Purchase Agreement"). (CP 97, 157).

The Purchase Agreement, upon which the Plaintiffs allege causes of action against the Defendants for, *inter alia*, breach of contract, 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).

In the recent case of *Davey v. Windermere Services. Co.*, the Court of Appeals awarded attorneys' fees and costs, at trial and on appeal, based on an attorney fees provision that is identical to the one contained in the Purchase Agreement. 172 Wn.App. 1011 (Div. III 2012) ("The purchase agreement executed by the Daveys and prepared by Windermere allows the prevailing party to recover reasonable attorney fees if any of the parties are involved in a dispute related to any aspect of the transaction or the agreement."), *review denied*, 177 Wn.2d 1005 (2013).

The Plaintiffs' suit against the Defendants is based on and related to aspects of the Purchase Agreement that was executed by the Plaintiffs and Mr. Nichols in his capacity as a manager of NSD. (CP 97, 113, 157). In addition to dismissing the Plaintiffs' lawsuit, the Defendants respectfully request that the Court of Appeals award their reasonable attorneys' fees and costs in defending against this time-barred lawsuit.

VI. CONCLUSION

This is a truly exceptional case of clear error by the Superior Court, which revived time-barred claims against the Defendants without any direction from the Legislature to do so. The Defendants respectfully ask the Court to reverse the Superior Court's Order, dismiss the Plaintiff's time-barred claims against the Defendants, and award the Defendants their reasonable costs and attorneys' fees.

DATED this 17th day of July, 2013.

WITHERSPOON · KELLEY

ROSS P. WHITE, WSBA No. 12136
MICHAEL J. KAPAUN, WSBA No. 36864

Counsel for Defendants / Petitioners

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 the 17th day of July, 2013, the foregoing was filed with the Court of Appeals, Division III, and delivered to the following persons in manner indicated:

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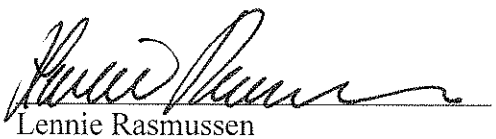

Lennie Rasmussen