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SUPREME COURT OF  
THE STATE OF WASHINGTON

Court of Appeals, Division III, Cause No. 31163-5-III

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WILLIAM HOUK, et ux.,

Petitioners,

v.

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

Defendants.

NICHOLS & SHAHAN DEVELOPMENTS, LLC, a Washington Limited  
Liability Company and JOSEPH K. NICHOLS, individually,

Respondents,

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**PETITION FOR REVIEW**

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 ORIGINAL

**A. Identity of Petitioner**

Petitioner is the plaintiff and respondent below, Janice M. Houk.

**B. Citation to Court of Appeals Decision**

Mrs. Houk seeks review of the decision of the Court of Appeals, Division 3, filed herein on March 13, 2014, and the resulting attorney fee and cost award. (Appendix A.)

**C. Issues Presented for Review**

This case presents issues of substantial public interest arising from the dissolution and cancellation provisions of the Limited Liability Company Act at Chapter 25.15, RCW (“the LLC Act”), as originally written, as amended in 2006, and as amended in 2010 in response to *Chadwick Farms Owners Ass’n v. FHC, LLC*, 166 Wn.2d 178, 207 P.3d 1251 (2009). As in *Chadwick Farms*, the limited liability company (“LLC”) in this case is (or was) a single-asset real estate developer with unsatisfied warranty obligations, which allowed itself to be secretly dissolved and cancelled without making provision for those obligations. The issues presented are:

(1) Is former RCW 25.15.303 a statute of limitations, or instead a survival statute intended to preserve claims against dissolved LLCs?

(2) Does the automatic cancellation of an LLC’s “certificate of formation” under prior law toll statutes of limitations on claims against the LLC under the common law and RCW 4.16.180, because creditors were statutorily disabled from maintaining suit against a cancelled LLC?

(3) Did the 2010 amendments to the LLC Act render the defendant LLC again susceptible to suit, because cancellation of its certificate of formation became legally meaningless at that point?

(4) Is the defendant LLC estopped, under principals analogous to the doctrine of *de facto* corporations, to assert its dissolution as a defense?

(5) Assuming that the defendant LLC has no legally recognized existence “for any purpose” under the *Chadwick Farms* decision, may it be awarded prevailing-party attorney fees under the real estate purchase and sale agreement (“REPSA”) at issue in this suit?

(6) Is the defendant LLC entitled to an award of prevailing-party attorney fees when it was not a party to the REPSA?

(7) Does former RCW 25.15.303 bar claims against an LLC member sued as the named seller under a REPSA (or as the selling agent of an undisclosed principal), irrespective of his membership in an LLC?

#### **D. STATEMENT OF THE CASE**

##### **1. Statutory and Case Law History**

In 2005, Division I’s *Ballard Square* decision held that the Business Corporations Act preserved from abatement only those claims existing before dissolution of a corporation, but not claims accruing after dissolution. *Ballard Sq. Condo. v. Dynasty Constr.*, 126 Wn.App. 285, 291, 108 P.3d 818 (2005), *aff’d on other grounds*, 58 Wn.2d 603, 146 P.3d 914 (2006). Following *Ballard Square*, the Legislature took up two measures. First was SB 6596, which amended the Business Corporations Act to preserve claims arising after dissolution for a specified period.

Second was SB 6531, later codified as RCW 25.15.303, which created a new survival statute claims against dissolved LLCs:

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. . . unless an action or other proceeding thereon is not commenced within three years after the effective date of dissolution.

SB 6531 provided that claims commenced within three years of an LLC's dissolution would *not* be impaired. The bill did not say that claims would abate or be barred after three years, if not asserted. In fact, it said nothing about what would happen to claims not commenced within the three year period, but left the question open and dependent on other law.

Testimony in committee, including by the bill's sponsor Senator Brian Weinstein, shows that the purpose of SB 6531 was to create a *survival statute* for claims against dissolved LLCs, with no hint of any intent to create a limitations period:

Staff Report: "Senate Bill 6531 deals with the dissolution of limited liability corporations and the survival of claims against a limited liability corporation following its dissolution....

**"There's no express provision in the LLC law dealing with the survival of claims after dissolution. . . .** What the bill does is provide a three year period during which the dissolution of an LLC does not in any way diminish a remedy or a claim that was filed before or after the dissolution. . . .

Sen. Weinstein: ". . . [T]he reason I'm here is that . . . this *Ballard Square* decision . . . was a decision involving a corporation that dissolved and there were claims against it, and once a corporation dissolves it no longer exists, so you couldn't sue it. And there was no survival period. I knew that that was a problem for both corporations and LLCs . . . .

(Appendix B, Transcript of House Judiciary Committee Hearing on SB 6531).<sup>1</sup> (Emphasis added.) Both the House and Senate Bill Reports also speak of the measure as a “survival” statute, not a period of limitation.

The Court of Appeals in two decisions preceding *Chadwick Farms* describe former RCW 25.15.303 as a survival statute.<sup>2</sup> Likewise, *all* of the *amici curiae* and every litigant in *Chadwick Farms* who addressed RCW 25.15.303 acknowledged that it was a survival statute.<sup>3</sup>

In *Chadwick Farms*, this Court held that under the LLC Act at the time, an LLC’s “existence as a separate legal entity” was extinguished not by dissolution, as are corporations, but instead by automatic “cancellation” of its certificate of formation two years after administrative dissolution for failure to renew under RCW 25.15.070(2)(c). Thus, the Court declined to apply RCW 25.15.303 to save the claims at issue in the case because the LLCs were not only dissolved, but also cancelled. 166 Wn.2d at 188, 198.

In the course of its opinion, the *Chadwick Farms* court in *obiter dicta* comments, mischaracterized RCW 25.15.303 as a period of

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<sup>1</sup> [http://www.tvw.org/index.php?option=com\\_tvwplayer&eventID=2006021130](http://www.tvw.org/index.php?option=com_tvwplayer&eventID=2006021130)  
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<sup>2</sup> See *Emily Lane Homeowners Ass'n v. Colonial Dev., LLC*, 139 Wn. App. 315, 317, 160 P.3d 1073 (2007); and *Chadwick Farms Owners Ass'n v. FHC, LLC*, 139 Wn. App. 300, 307, 160 P.3d 1061 (2007).

<sup>3</sup> Amicus WSBA Brief (Supreme Court No. 80459-1 consolidated with 80450-8), p. 12; Amicus WSTLA Brief (*Id.*), p. 1; Appellant Colonial Development, LLC’s Brief (*Id.*), p. 11; Respondent Emily Lane Townhomes Condo Owners Association’s Brief (*Id.*), p. 1; Chadwick Farms Owners Association’s Supplemental Brief (*Id.*), p. 1; FHC, LLC’s Petition for Review (*Id.*), p. 11.

Briefs are available at:  
[http://www.courts.wa.gov/appellate\\_trial\\_courts/coaBriefs/index.cfm?fa=coaBriefs.ScHome&courtId=A08](http://www.courts.wa.gov/appellate_trial_courts/coaBriefs/index.cfm?fa=coaBriefs.ScHome&courtId=A08)

*limitations* on claims that runs from the effective date of dissolution of an LLC. 166 Wn.2d at 182, 193, 196, 202.

In response, the Legislature quickly enacted SHB 2657, effective June 10, 2010. (“The 2010 amendments”). The 2010 amendments revised the LLC Act to remove all suggestion that a “cancelled” LLC no longer exists or is incapable of being sued. Instead, an LLC that dissolves, without more, now remains subject to suit indefinitely. The 2010 amendments also changed RCW 25.15.303 by providing that its three year survival period would only come into effect if a dissolved LLC files a “certificate of cancellation.” (See Appendix C, SHB 2657, as enrolled, esp. §§ 2(2)(c), 7(4), 9 & 11.)

The House Bill Report noted that the 2010 amendments would “address and resolve two issues that need immediate attention. First, under the *Chadwick Farms* decision . . . a certificate of cancellation abates all legal claims. This decision leaves creditors in an untenable situation.” Appendix D, House Bill Report for SB 2657, p. 4.<sup>4</sup>

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<sup>4</sup> The Senate Bill Report notes that the entire concept of “cancellation” was included in the original Act not for the purposes of protecting investors or bringing about an abatement of claims, but merely to keep an aging computer system in the Secretary of State’s office functioning efficiently!

The [LLC Act] as it was proposed to us originally did not include a process of cancellation. The concept of cancellation stemmed from a concern expressed by the [Office of the Secretary of State] with their computer system and a perceived need to have a clear end to an LLC so it may be wiped off the books.

Appendix E, Senate Bill Report for SB 2657, p. 3.

The chair of the subcommittee of the WSBA committee that drafted the 2010 amendments (and a primary drafter of the original LLC Act), explained to the House Judiciary Committee that

It's really a very simple bill. I think it can fairly be described as **technical corrections**, and that's certainly the mindset we had when . . . drafting this version of the bill.

(Appendix B, Transcript of House Judiciary Committee Hearing on SHB 2657.)<sup>5</sup> (Emphasis added.) He also testified that

I don't think we intended that cancellation of the certificate would result in the inability to bring actions against the LLC or the inability of the LLC to take actions. That was the extra step that the *Chadwick Farms* court took last year that produced the anxiety among those of us who are familiar with LLC practice.

*Id.* He further explained that SHB 2657 would correct that procedural deficiency in order to provide a remedy to creditors.

[T]he bill does away with the statement . . . that the separate existence of the LLC as an entity continues until cancellation of the Certificate of Formation . . . . [It] eliminates the statement that suggests, by negative inference, that if a Certificate of Cancellation is filed the LLC goes, "poof," goes away and that was the basis for the *Chadwick Farms* decision.

*Id.*

## **2. NSD, Its Members, and the Property Sale Transaction.**

Defendant Nichols & Shahan Developments LLC ("NSD") built the defective residence which is the subject of this lawsuit. (CP 112).

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<sup>5</sup> [http://www.tvw.org/index.php?option=com\\_tvwplayer&eventID=2010011211](http://www.tvw.org/index.php?option=com_tvwplayer&eventID=2010011211)  
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NSD's managing members, defendants Joseph Nichols ("Nichols") and Burt Shahan ("Shahan"), were responsible for all major decisions of NSD. (CP 125). Presumably this includes winding up decisions.

On September 22, 2004, Nichols signed a real estate purchase and sale agreement ("REPSA") for the residence with plaintiffs. (CP 154). The REPSA identifies Nichols as the "Seller." (CP 154, 159, 160, 161). The REPSA does not reference NSD at any point. (CP 154-159, 162). When the sale was consummated around October 11 of 2004, however, title to the property was transferred by NSD to the Houks. (CP 168).

**3. NSD's Notice of Houk Claims.**

Shahan was advised by the Houks of some construction defects in the residence in November of 2004. (CP 8, 50, 90). NSD was thus aware of its outstanding warranty obligations to the Houks by that time.

**4. Administrative Dissolution of NSD.**

It appears that NSD did not file its annual renewal paperwork and/or fee with the Secretary of State in 2006. The Secretary of State issued a document entitled "Certificate of Administrative Dissolution" dated October 2, 2006. (CP 174). Nichols claims that the members did not receive notice that NSD had failed to renew. (CP 192, 119, 120).

**5. NSD Continued Business Operations Following its Dissolution.**

Nichols testified that in 2005 NSD applied for insurance, and that he "brought [NSD] into the mix on building the duplex up on lot one of Qualchan Hills." (CP 295). Nichols explained that NSD "was hiring Best



Construction to build the duplex through the Overlook, LLC.” (Id.) The duplex was finished, probably, in 2007. (CP 191).

**6. Cancellation of NSD’s Certificate of Formation Tolloed All Limitations Periods on Claims Against It.**

Under the LLC Act as written at the time, NSD’s “Certificate of Formation” was automatically cancelled by the Secretary of State two years after it was administratively dissolved.<sup>6</sup> This automatic cancellation terminated the company’s legal existence, and rendered it incapable of being sued or maintaining suit as of October 2, 2008. *Chadwick Farms*, 166 Wn.2d at 195 and 199.

**7. NSD’s Susceptibility to Suit Was Restored Upon Amendment of the LLC Act.**

Effective June 10, 2010, the Legislature made substantial revisions to the LLC Act. First, the provision in RCW 25.15.070(2)(c) which stated that cancellation of a certificate of formation ended an LLC’s “separate legal existence” was excised from the Act. Second, the 2010 amendments established a new procedure whereby a dissolved LLC may notify known claimants of its dissolution, state a deadline for assertion of claims, and receive a bar to the prosecution of claims not timely asserted. RCW 25.15.298. Finally, the amendments provide that unless a “Certificate of Dissolution” is filed by an LLC, the passage of three years will not impair

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<sup>6</sup> *Chadwick Farms*, 166 Wn.2d at 190 (“[W]hen the secretary of state administratively dissolves a limited liability company for failure to pay fees or file reports (as here), cancellation of the certificate of formation automatically occurs two years later if the company does not seek reinstatement. See ... [former] RCW 25.15.290(4)...” )

a creditor's right to pursue claims against a dissolved LLC, or an LLC's rights to pursue claims itself. RCW 25.15.303 (as amended).

**8. This Suit Was Timely Commenced.**

This suit alleging defective construction and implied warranty violations was commenced six months after the effective date of the 2010 amendments, on December 16, 2010. (CP 1). Assuming, as Mrs. Houk contends, that automatic cancellation of NSD's certificate of formation on October 2, 2008 tolled statutes of limitations on claims against NSD until its immunity from suit was removed by the 2010 amendments, then six months remained on the three year period of RCW 25.15.303.

**9. Procedural History**

NSD and Nichols moved for summary judgment, arguing that this suit was instituted more than three years following dissolution of NSD, and that claims against both NSD and Nichols were barred by former RCW 25.15.303 as a "statute of limitations." (CP 175-184).

Houk responded that: (1) the REPSA was between the Houks and Nichols personally, not NSD; thus, at most, Nichols was acting on behalf of an undisclosed principal (CP 187-189); (2) even following dissolution, NSD continued to conduct business operations (CP 190-191); (3) the members of NSD were not aware of the company's dissolution, and made no winding up provisions for known obligations (CP 192-194). Houk further argued (4) that the amended version of RCW 25.15.303 applies, and claims against NSD are not barred because NSD never filed a certificate of dissolution. (CP 195-204).

The trial court denied NSD's and Nichols' motion for summary judgment, reasoning that amended RCW 25.15.303 was curative, clarifying, and meant to correct the impact of *Chadwick Farms*.

NSD and Nichols were granted interlocutory review.

Pursuant to RAP 2.5(a) and *Otis Hous. Ass'n v. Ha*, 165 Wn.2d 582, 587, 201 P.3d 309 (2009), Mrs. Houk's new counsel advanced additional legal arguments on appeal for affirming the trial court's denial of summary judgment.<sup>7</sup> Mrs. Houk noted that: (1) former RCW 25.15.303 was not a limitations period; (2) even if former RCW 25.15.303 was a limitations period, it was tolled when NSD's certificate of formation was automatically cancelled; (3) NSD is estopped to assert its dissolution under principles analogous to the *de facto corporation* doctrine; and (4) if NSD has no legal existence, it may not be awarded prevailing party fees.

NSD and Nichols responded to the additional legal arguments with comprehensive briefing, and made no suggestion that the record needed further development to decide them.

#### **10. Division III Opinion**

The Court of Appeals reversed and awarded summary judgment to NSD and Nichols. It also awarded both NSD and Nichols attorney fees under the REPSA. *Houk v. Best Dev. & Constr. Co.*, 179 Wn.App. 908, 915-16, 322 P.3d 29 (2014). Because the Court of Appeals did not

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<sup>7</sup> Under RAP 2.5(a), a party may present a ground for affirming a trial court "if the record has been sufficiently developed to fairly consider the ground" and under *Otis Hous. Ass'n*, the appellate court "may affirm the trial court on any grounds established by the pleadings and supported by the record."

mention the additional bases for affirmance identified above, or describe any exercise of reasoned discretion in declining to consider them, Mrs. Houk moved for reconsideration. The motion was denied without opinion.

#### **E. ARGUMENT**

##### **1. Former RCW 25.15.303 Was Not A Limitations Period.**

The Court of Appeals erred on an issue of substantial public interest because former RCW 25.15.303 created a survival statute to preserve claims against feared abatement upon dissolution of an LLC. It contained no period of limitations on claims against dissolved LLCs.

Former RCW 25.15.303 never says what happens to claims against a dissolved LLC *after* the three-year period has expired. It never states that claims against a dissolved LLC are barred after three years, though that is one possible reading, by negative inference. From all that appears, under section .303 what happens to claims three years after dissolution is an open question to be decided by reference to other law.<sup>8</sup>

Limitations statutes positively state that claims may not be brought after a certain period of time.<sup>9</sup> Former RCW 25.15.303 does not. Thus, the Court of Appeals' conclusion that former RCW 25.15.303 bars all

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<sup>8</sup> A survival statute differs from a statute of limitations in that a survival statute extends the life of a corporation for a limited time so that it may sue or be sued, while a statute of limitations affects the time in which a stale claim may be brought. *Ballard Sq.*, 126 Wn. App. at 289, fn 10.

<sup>9</sup> See, for example: RCW 4.16.005 (“**actions can only be commenced within the periods provided** in this chapter after the cause of action has accrued”); RCW 4.16.040, .080, (“The following actions **shall be commenced** within [six/three] years ...”); RCW 7.72.060 (“**no claim under this chapter may be brought** more than three years from the time the claimant discovered or in the exercise of due diligence should have discovered the harm and its cause”); RCW 9A.04.070(1) (“Prosecutions for criminal offenses **shall not be commenced after the periods prescribed** in this section...”)

claims three years after an LLC's dissolution rests on one possible negative inference, not on the actual language of the statute.<sup>10</sup>

The Court of Appeals, however, correctly noted that *Chadwick Farms* refers in passing to RCW 25.15.303 as a "limitations" period. However, that comment in *Chadwick Farms* was *dicta*, and not the basis for decision. The statute was not applied as a limitations period.<sup>11</sup>

*Chadwick Farms'* *dicta* suggestion that former RCW 25.15.303 was a statute of limitations was simply wrong, as demonstrated above. At best, the Court's comment describes one *possible* reading. It is more plausible that the Legislature meant that once three years passes from dissolution, unfiled claims are no longer saved from abatement, if that is what the law calls for. Had the Legislature meant that a claim not filed

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<sup>10</sup> Use of the word "unless" in RCW 25.15.030 suggests the possibility that that if three years passes following dissolution, a claim against an LLC either is or *may be* either "impaired" or "taken away," though it is not clear which, or how they are different. The trouble arises from the imprecise use of the word "unless," along with a cumbersome, double-negative structure. Like the word "or," the word "unless" is frequently ambiguous. Does "unless" in this context mean "except that dissolution *shall* take away or impair remedies if a claims is not timely filed?" Or does it mean "except that dissolution *may* impair or take away claims that are not timely filed"? Used in this fashion, the word "unless" renders the sentence structurally ambiguous. This the kind of ambiguous use of the word "unless" was identified, for example, in *Sec'y of Labor v. Excel Mining, LLC*, 334 F.3d 1, 10 (D.C. Cir. 2003), whereby a regulation was silent as to what happened under the first proposition if the second proposition following the word "unless" was true instead of false.

Note that the statute is also ambiguous about what does or could happen to claims not asserted within three years. Are they "impaired," and if so, how and to what degree? Or are they "taken away"? This ambiguity suggests that this section does not determine what happens as a result of dissolution after three years, and that the question is committed to other law.

<sup>11</sup> *Chadwick Farms*, 166 Wn.2d at 198 ("In light of our holding that RCW 25.15.303 does not permit actions against a canceled limited liability company, we **need not reach the question** whether the statute applies retroactively.") (Emphasis added.)

within three years of dissolution will be forever barred, it clearly knew how to say so, but it did not.

Former RCW 25.15.303 was enacted in the aftermath of the *Ballard Square* decision, as part of an effort to provide a survival period for claims against LLCs. On its face, former RCW 25.15.303 suggests either a survival period, or possibly a period of limitation. In light of this ambiguity, the Court should look to the legislative history<sup>12</sup>; that history demonstrates that former RCW 25.15.303 was never intended to be a limitations period at all, but only a survival statute.

Accordingly, NSD's motion to dismiss based on former RCW 25.15.303 as a *limitations period* was properly denied. Whether the statute was a limitations period or a survival period is obviously a matter of great significance to home buyers and all creditors of defunct LLCs.

**b. All Supposed Limitations Periods On Claims Against NSD Were Tolled When Its Certificate of Formation Was Automatically Cancelled.**

NSD was not subject to suit upon cancellation of its certificate of formation. At the time of the cancellation of NSD's certificate of formation, Mrs. Houk still had a full year to sue NSD and still be within the period set out in former RCW 25.15.303.

Assuming that former section .303 *was* a statute of limitation, it was tolled upon NSD's cancellation. Statutes of limitation are tolled during the period when a plaintiff is disabled by statute from commencing

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<sup>12</sup> *Dep't of Transp. v. James River Ins. Co.*, 176 Wn.2d 390, 396, 292 P.3d 118 (2013).

suit against a defendant; but if the statute is thereafter amended to remove the disability, the limitations period commences again where it left off.<sup>13</sup>

Thus, even if former RCW 25.15.303 was a limitations period, under established precedent either: (1) the period has never expired *to this day* because NSD has no legal existence even now, in which case plaintiff's and NSD's claims for fees have both abated under *Chadwick Farms*, or else (2) the period began to run again when NSD was again made susceptible to suit upon amendment of the LLC Act in 2010, in which case this suit was timely filed. Either way, the Court of Appeals' decision that the three year supposed limitations period of former RCW 25.15.303 had expired before this suit was commenced is clear error and in conflict with this Court's decisions.

**c. A Change To The Periods for Survival of Claims Against a Corporate Type-Entity, And of Its Continued Existence, Involves No Vested Rights.**

Continuing with the assumption that former RCW 25.15.303 was a statute of limitation, the 2010 amendments to .303 apply here because it never expired. A limitations period may be changed by the Legislature and applied to any defendant as to whom it has not yet expired. *Unruh v. Cacchiotti*, 172 Wn.2d 98, 109, 257 P.3d 631 (2011). Accordingly, the

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<sup>13</sup> *Duke v. Boyd*, 133 Wn.2d 80, 94, 942 P.2d 351 (1997), *Stephens v. Stephens*, 85 Wn.2d 290, 293, 534 P.2d 571 (1975), and *Seamans v. Walgren*, 82 Wn.2d 771, 774-775, 514 P.2d 166 (1973).

Moreover, under RCW 4.16.180, limitations periods are tolled while a defendant is "absent" from the jurisdiction such that it is not subject to suit.

Court need not reach a “retroactivity” analysis of the 2010 amendments to the LLC Act, and the matter is governed by established law under *Unruh*.

Even assuming retroactive application of the 2010 amendments is required, that would be appropriate because the amendments are both curative and remedial as shown below. The 2010 amendments to the LLC Act established a new period of legal existence for LLCs by removing “cancellation” as determiner of corporate existence. Thus the amendments restored *remedies* where none previously were available by reason of procedures governing LLC renewal. But the period of legal existence of a corporate-type entity, and the period for survival of claims against such an entity, are matters of procedure, and create no vested rights. The entity exists entirely as a matter of legislative grace. The weight of authority holds that changes to survival periods are procedural, and confer no new rights: they merely preserve existing ones. Such changes are therefore ***remedial and presumptively retroactive.***<sup>14</sup>

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<sup>14</sup> In *Ballard Square*, the Supreme Court applied a new corporate survival statute retroactively, ***even when it was enacted while the litigation was pending.*** *Ballard Square Condo. Owners Ass’n v. Dynasty Constr. Co.*, 158 Wn.2d 603, 617, 146 P.3d 914 (2006), *citing 1000 Va. Ltd. P’ship v. Vervecs Corp.*, 158 Wn.2d 566, 146 P.3d 423 (2006). The Court explained that ***the length of time in which claims may be prosecuted against entities that exist purely by Legislative grace may be changed without impacting any vested rights.*** 158 Wn.2d at 617-618.

This is entirely consistent with the law nationally. See *Quintana v. Los Alamos Medical Ctr.*, 119 N.M. 312, 314, 889 P.2d 1234 (N.M. Ct. App. 1994) (“Statutes concerning the survival period of a corporation after dissolution are generally construed as procedural rather than substantive. . . . **As a remedial or procedural matter, the survival period adopted after dissolution may apply to corporations dissolved before the effective date of the new survival statute.**”); *Walden Home Builders v. Schmit*, 326 Ill. App. 386, 62 N.E.2d 11, 13 (1945) (“[T]he statute is one which merely provides a different method of winding up and administering the affairs of dissolved corporations. It creates no causes of action and deprives no one of property. . . [I]t



The 2010 amendments are also curative and retroactive. A technical correction to an ambiguous statute is curative and retroactive. *In re F.D. Processing*, 119 Wn.2d 452, 461, 832 P.2d 1303 (1992). The Legislature plainly considered the change to RCW 25.15.303 and other portions of the LLC Act to be technical corrections.

Moreover, the statute was clearly ambiguous: it is not clear from the face of the statute whether RCW 25.15.303 was meant to be a limitations period or a survival period, for example. Nor does *Chadwick Farms* foreclose the issue of ambiguity. Considered in context, the *Chadwick Farms* court said only that former RCW 25.15.303 is “unambiguous” in its reference to saving claims from “dissolution,” and not saving them from “cancellation” of an LLC’s “certification of formation.” That is far cry from saying that the provision contains no ambiguity subject to legislative correction.

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appears to be well settled that when a corporation is dissolved, its assets do not vanish and its debtors are not absolved or released. . . . No valid reason has been suggested why the amendment should not apply to corporations previously dissolved.”); *United States v. Village Corp.*, 298 F.2d 816, 816-17, 819 (4<sup>th</sup> Cir. 1962) (“The District Court held that a Virginia statute permitting the institution at any time of suits against Virginia corporations in the process of liquidation does not apply to suits against corporations the charters of which have been revoked prior to the enactment of the statute. We think it does. . . . [The statute is a] **complete reversal of the common law rule of abatement of actions upon dissolution are remedial measures entitled to a liberal construction to effectuate their purposes.**”)

See also *Haddenham v. State*, 87 Wn.2d 145, 148, 550 P.2d 9 (1976) (“Where . . . a statute is remedial and its remedial purpose is furthered by retroactive application, the presumption favoring prospective application is reversed. Remedial statutes, in general, afford a remedy, or better or forward remedies already existing for the enforcement of rights and the redress of injuries.”) (Internal citations omitted.)

The Court of Appeals cited *Dep't of Ret. Sys. v. Kralman*, 73 Wn. App. 25, 33, 867 P.2d 643 (1994) in reasoning that the amendment to RCW 25.15.303 cannot be procedural, remedial, and therefore retroactive, because it attempted to provide a claimant “with the right to proceed against persons previously outside the scope of the statute...” That analysis is clearly in error.

*Kralman* stands for the proposition that a statute providing a *new cause of action* or imposing a *new duty on a defendant* is not ordinarily retroactive.<sup>15</sup> Here, NSD’s sale of a badly defective home has always been a breach of its warranty responsibilities; the amendments to the LLC Act do not change the substantive rights and duties of the Houks or NSD. Rather, the amendments effect only the procedural matter of when and for how long the remedies will remain available against dissolved LLCs. Such changes are remedial because they relate to practice, procedures, and availability of remedies against dissolved LLCs. See *Ballard Square*, 158 Wn.2d at 617 and cases cited at footnote 14 above.

**d. NSD Is Estopped to Assert Its Dissolution as a Defense Because it Continued to Operate as a *De Facto* Limited Liability Company.**

NSD’s legitimate activities following dissolution were limited to winding up.<sup>16</sup> Because NSD never actually wound up, but continued as an

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<sup>15</sup> Specifically, in *Kralman* the amendment at issue imposed *new duties* on beneficiary banks regarding acceptance of Electronic Fund Transfer payment orders by nonexistent persons under UCC Article 4A – conduct that had not previously been regulated by the statute at all.

<sup>16</sup> Former RCW 25.15.295(1), SSB 1235 (as enrolled in 1994, §806), and RCW 25.15.270(2) (Requiring reasonable provision for known obligations and unmatured claims).

ongoing enterprise, it should be estopped under Washington law applicable to *de facto* corporations to raise its dissolved status as the predicate to its defense. No Washington case has yet applied the common law doctrine of *de facto corporation* to an LLC. However, elsewhere the doctrine has been widely applied to bar a *de facto* limited liability company from defending on the basis of its terminated corporate status.<sup>17</sup>

Accordingly, the Court of Appeals' decision conflicts with the spirit and reasoning behind the *de facto corporation* doctrine as adopted by this Court, and raises an issue of substantial public importance that has not been squarely addressed in the context of LLCs.

**e. Alternatively, The Court of Appeals' Decision Awarding NSD Its Attorney Fees Conflicts with *Chadwick Farms*, Under Which The Company Does Not Exist "For Any Purpose" And May Not Maintain a Claim for Fees.**

Alternatively, if the 2010 amendments are ineffective to restore NSD's extant status and susceptibility to suit, then it is clear under *Chadwick Farms* that NSD does not exist "for any purpose." Accordingly, the Court of Appeals decision awarding attorney fees to NSD would still be manifestly in conflict with this Court's decisions in *Chadwick Farms*.

**f. The Court of Appeals' Award of Attorney Fees Conflicts With Washington Precedent Because NSD Was Not a Party to the REPSA.**

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<sup>17</sup> See, for example, *Duray Dev., LLC v. Perrin*, 288 Mich. App. 143, 159, 792 N.W.2d 749 (Mich. Ct. App. 2010); *Matter of Hausman*, 13 N.Y.3d 408, 412, 921 N.E.2d 191 (N.Y. 2009); *Leber Assocs., LLC v. Entm't Group Fund, Inc.*, 2003 U.S. Dist. LEXIS 13009 (S.D.N.Y. July 22, 2003); *Henderson Apt. Venture v. Miller*, 2012 U.S. Dist. LEXIS 94156 (D. Nev. July 6, 2012); *Global BTG LLC v. Nat'l Air Cargo, Inc.*, 2011 U.S. Dist. LEXIS 70386 (C.D. Cal. June 29, 2011); *Fashion Brokerage Int'l, LLC v. Jhung Yuro Int'l LLC*, 2011 U.S. Dist. LEXIS 25687 (D.N.J. Mar. 14, 2011).

The fee award to NSD and Nichols by the Court of Appeals is based on language in the REPSA providing that “in any dispute relating to this transaction or this Agreement” the prevailing “Buyer, Seller, or any real estate licensee or broker” shall be awarded fees. Even setting aside questions of NSD’s existence, the record shows that NSD was not a party to the REPSA, and contains no evidence that it was an intended third party beneficiary. Accordingly, the Court of Appeals’ decision to award NSD its attorney fees is in direct conflict with *Watkins v. Restorative Care Ctr.*, 66 Wn.App. 178, 195, 831 P.2d 1085 (1992) and other cases.

Moreover, Nichols has steadfastly insisted – despite the plain language of the REPSA – that he was *not* the “Seller” under the REPSA. (CP 113, 178). It was therefore inconsistent for Nichols to claim a fee award under the REPSA because he *is* the seller. The adoption of such inconsistent positions in this setting is barred by the doctrine of judicial estoppel. *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538, 160 P.3d 13 (2007). The Court of Appeals’ failure to recognize this was error.

**g. Nichols’ Liability is as Seller or Agent of an Undisclosed Principal, Not as a Member of NSD.**

Former RCW 25.15.303 states that dissolution of a limited liability company does not impair any remedy against the “limited liability company, its managers, or its members...” But Joe Nichols’ potential liability in this case does not rest on his status as manager or member of NSD. Rather, it rests on his *individual* status as the named seller of the property, or as the agent of an undisclosed principal who was the actual

seller. As such, Nichols is jointly and *severally* liable with NSD for his *own warranties*, which he expressly or implicitly made in the REPSA. *Crown Controls v. Smiley*, 110 Wn.2d 695, 706, 756 P.2d 717 (1988).

Former RCW 25.15.303 cannot reasonably be read to confer a special limitations period for members of limited liability companies who are sued for their *own* “several” liabilities, based on personal conduct unrelated to membership in or management of an LLC.

#### **F. CONCLUSION**

Consider the upshot of the Court of Appeals’ decision herein: an LLC may now secretly allow itself to dissolve, continue to do business as a subsisting company following dissolution, and fail to make any provisions for its only warranty obligation. Yet when sued three years later, the LLC and its members automatically escape all liability based on a supposed statute of “limitations” that was not written or intended as such, and which contains no language stating that claims are barred by the passage of time.

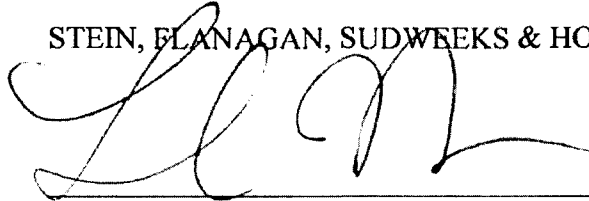
Even worse, having been immunized by a purely bureaucratic act (the now meaningless “cancellation” of its certificate of formation) that the LLC was not aware of and could not have relied upon, under the Court of Appeals’ decision herein an LLC may then recover its attorney fees on the basis of an agreement to which it was not a party, notwithstanding the fact that it may not even exist.

The Court of Appeals’ decision is in clear conflict with this Court’s precedent, and is manifestly unjust. Review should be granted.

RESPECTFULLY SUBMITTED this 2<sup>nd</sup> day of December,

2014.

STEIN, FLANAGAN, SUDWEEKS & HOUSER, PLLC

A handwritten signature in black ink, appearing to read 'L Flanagan', written over a horizontal line.

Leonard Flanagan, WSBA # 20966  
Attorneys for Petitioner

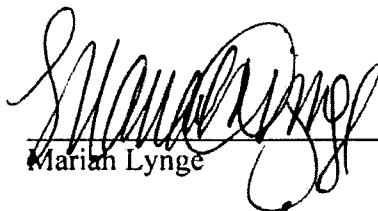
**CERTIFICATE OF SERVICE**

This is to certify that on the 22nd day of December, 2014, I did serve true and correct copy of the foregoing document with all attachments to be delivered to the following recipient(s) by the method(s) as indicated:

<b><u>Counsel for Petitioners Nichols &amp; Shahan Developments, LLC and Joseph K. Nichols</u></b> Ross P. White Michael J. Kapaun WITHERSPOON, KELLEY, DAVENPORT & TOOLE, P.S. 422 West Riverside Avenue, Suite 1100 Spokane, Washington 99201	<input type="checkbox"/> US Mail <input type="checkbox"/> FedEx <input checked="" type="checkbox"/> Hand Delivery <input type="checkbox"/> E-Mail
---	--

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

Dated this 22nd day of December, 2014 at Seattle, Washington.

  
\_\_\_\_\_  
Marian Lyng

# APPENDIX A



**FILED**  
**MARCH 13, 2014**  
In the Office of the Clerk of Court  
WA State Court of Appeals, Division III

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE**

WILLIAM HOUK and JANICE HOUK, )  
husband and wife, )  
 )  
 Respondents, )

No. 31163-5-III

v. )

**PUBLISHED OPINION**

BEST DEVELOPMENT & )  
CONSTRUCTION COMPANY, INC., a )  
Washington Corporation, DAVE WINLOW )  
dba SUNDANCE EXCAVATING, BURT )  
SHAHAN, an individual, LANCE )  
POUNDER EXCAVATION, INC., a )  
Washington Corporation, JOHN AKINS )  
MASONRY, INC., a Washington )  
Corporation, R.K. STARK )  
CONSTRUCTION CO., CHARLES )  
MAYFIELD, an individual dba CM )  
SIDING, TIM VIGIL, an individual dba TJ )  
VIGIL CONSTRUCTION, APOLLO )  
ELECTRIC, INC., a Washington )  
Corporation, GALE INSULATION, )  
WALKER ROOFING, LLC, a Washington )  
Limited Liability Company, REED )  
CONCRETE COMPANY, INC., a )  
Washington Corporation, STI )  
NORTHWEST, INC., a Washington )  
Corporation, )  
 Defendants. )

NICHOLS & SHAHAN DEVELOPMENT, )  
LLC, a Washington Limited Liability )

No. 31163-5-III  
*Houk v. Best Dev. & Constr. Co., Inc.*

Company, and JOSEPH NICHOLS, an     )  
individual,                                     )  
  Petitioners.             )

BROWN, J.—On discretionary review, real estate developers Nichols & Shahan Development, LLC (a dissolved limited liability company) and Joseph K. Nichols (collectively NSD) ask us to overturn the trial court's denial of its summary judgment motion against home purchasers and plaintiffs William and Janice Houk. NSD contends the trial court erred in not concluding the limitation provisions of RCW 25.15.303 added in 2010 are prospective and require a plaintiff to sue within three years after a certificate of dissolution is filed. We agree with NSD. Applying this law to the undisputed material facts, we reverse and grant summary judgment to NSD.

#### FACTS

In 2004, the Houks moved into a newly constructed home in NSD's development. The Houks soon began noticing multiple defects in their home, some serious. On October 2, 2006, Washington's secretary of state dissolved NSD as an LLC. On December 16, 2010, the Houks sued NSD for damages, alleging breach of contract, breach of implied warranties, and breach of express warranties, negligence, and violation of Washington's Consumer Protection Act, chapter 19.86 RCW. NSD requested summary judgment dismissal, arguing the Houks' complaint was time barred because it was filed more than three years after NSD dissolved. The trial court disagreed, concluding the recently amended RCW 25.15.303 required an LLC to file a certificate of dissolution and since NSD did not file the certificate, it was still subject to litigation. This court granted NSD's request for discretionary review.

No. 31163-5-III  
*Houk v. Best Dev. & Constr. Co., Inc.*

#### ANALYSIS

The issue is whether the trial court erred by denying NSD's request for summary judgment dismissal after it concluded the limitation provisions of RCW 25.15.303 as amended in 2010 apply retroactively.

We review the denial of a summary judgment motion de novo and perform the same inquiry as the trial court. *Macias v. Saberhagen Holdings, Inc.*, 175 Wn.2d 402, 407-08, 282 P.3d 1069 (2012). A party moving for summary judgment bears the burden of demonstrating there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c); *Atherton Condo. Apartment Owners Ass'n Bd. of Dir. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990).

Likewise, the interpretation of a statutory amendment is a question of law that we review de novo. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). We presume statutory amendments are prospective unless there is a legislative intent to apply the statute retroactively or the amendment is clearly curative or remedial. *Johnson v. Cont'l W., Inc.*, 99 Wn.2d 555, 559, 663 P.2d 482 (1983).

RCW 25.15.303 first became effective in 2006. The statute stated, "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 filing of the effective date of dissolution." RCW 25.15.303 (2006).

No. 31163-5-III

*Houk v. Best Dev. & Constr. Co., Inc.*

In 2009, our Supreme Court decided *Chadwick Farms Owners Ass'n v. FHC LLC*, 166 Wn.2d 178, 207 P.3d 1251 (2009). One issue in *Chadwick* was when does the limitations period start when distinguishing between an administratively-dissolved LLC (secretary of state cancels LLC for noncompliance) and nonadministratively-dissolved LLC (LLC dissolves itself). The court held, "If a limited liability company is dissolved upon events specified in the company agreement or the consent of the members . . . the company and its managers and members control the timing of dissolution . . . . But when the secretary of state administratively dissolves a limited liability company for failure to pay fees or file reports (as here), cancellation of the certificate of formation automatically occurs two years later if the company does not seek reinstatement." *Id.* at 190. "In either case, the critical event is the cancellation of the certificate of formation." *Id.* at 191. Once an LLC is cancelled, "it no longer exists . . . for any purpose." *Id.* at 194. The *Chadwick* court referred to RCW 25.15.303 as a "statute of limitations" and reasoned 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*, 166 Wn.2d at 195.

In 2010, our legislature amended RCW 25.15.303 to read, "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.*" (Emphasis added.)

No. 31163-5-III  
*Houk v. Best Dev. & Constr. Co., Inc.*

Under the 2006 version of RCW 25.15.303, no requirement existed for a dissolved LLC to file documentation with the secretary of state before the statute of limitations was triggered. The limitations period began to run on the LLC's "effective date of dissolution." RCW 25.15.303 (2006). It is undisputed this version of RCW 25.15.303 was in effect on the date that NSD was administratively dissolved, during the three year limitations period triggered by NSD's dissolution, and for an additional period of eight months thereafter. Under RCW 25.15.303 (2006), the Houks were required to commence their lawsuit against NSD no later than October 2, 2009, which is three years from the date that NSD was administratively dissolved. The Houks, however, filed suit on December 16, 2010. Thus, under RCW 25.15.303 (2006) their complaint was untimely.

If the amended version of RCW 25.15.303 applied retroactively then the Houks' lawsuit would be timely. As discussed above, we presume statutory amendments are prospective unless there is a legislative intent to apply the statute retroactively or the amendment is clearly curative or remedial. *Johnson*, 99 Wn.2d at 559. In the absence of a clear declaration by the legislature regarding retroactivity, as here, it is "helpful to characterize changes to a statute as . . . 'curative' or 'remedial' to assist in determining legislative intent." *Hale v. Wellpinit School Dist. No. 49*, 165 Wn.2d 494, 508, 198 P.3d 1021 (2009).

An amendment is curative and retroactive if it clarifies or technically corrects an ambiguous statute. *State v. Jones*, 110 Wn.2d 74, 82, 750 P.2d 620 (1988). The amendment must be "clearly curative" for it to be retroactively applied. *Howell v.*

No. 31163-5-III

*Houk v. Best Dev. & Constr. Co., Inc.*

*Spokane & Inland Empire Blood Bank*, 114 Wn.2d 42, 47, 785 P.2d 815 (1990). But “[w]here ambiguity is lacking in statutory language, this court 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 452, 462, 832 P.2d 1303 (1992). Thus, ambiguity in the statutory language is a condition precedent to finding that an amendment was “curative.”

Relating to RCW 25.15.303 (2006), the *Chadwick* court stated, “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.” 165 Wn.2d at 195. One cannot cure an ambiguity where none exists. Because our 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 be interpreted as curative.

Similarly, the strong presumption against retroactivity may be overcome where a statute is “remedial.” *In re F.D. Processing, Inc.*, 119 Wn.2d at 462-63. “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.” *Id.* (quoting *In re Mota*, 114 Wn.2d 465, 471, 788 P.2d 538 (1990)). “A ‘right’ is a legal consequence deriving from certain facts, while a remedy is a procedure prescribed by law to enforce a right.” *Dep’t of Ret. Sys. v. Kralman*, 73 Wn. App. 25, 33, 867 P.2d 643 (1994) (citing *Hammack v. Monroe St. Lumber Co.*, 54 Wn.2d 224, 231, 339 P.2d 684 (1959)). “A statute which provides a claimant with the right to proceed against persons

No. 31163-5-III

*Houk v. Best Dev. & Constr. Co., Inc.*

previously outside the scope of the statute deals with a substantive right, and therefore applies prospectively only." *Kralman*, 73 Wn. App. at 33.

Here, the Houks' claims against NSD were time barred by RCW 25.15.303 (2006) beginning on October 2, 2009. From that date forward, the Houks no longer had a legal right to proceed with their claims against NSD and NSD had a legal right to assert the statute of limitations as a complete defense. The 2010 amendments to RCW 25.15.303 created a new substantive remedy that is outside the scope of the former statute that would, if retroactively applied, deny NSD the right to assert the statute of limitations as a complete defense. Accordingly, the 2010 amendments are not remedial.

Because the Houks have failed to show legislative intent to apply RCW 25.15.303 retroactively or that the amendments are clearly curative or remedial, we follow the presumption that the statute is prospective. Thus, the trial court erred in concluding differently. Therefore, the Houks' claims are time barred. Accordingly, we reverse the trial court and grant summary dismissal of the Houks' suit.

We note the Houks ask for affirmative relief in their response brief, asking us to allow them to amend their complaint to add additional causes of action. The Houks, as respondents, may not request affirmative relief without proper notice. See RAP 5.1(d) (requiring the filing of a notice of cross-review to request affirmative relief). Moreover, the additional causes of action alleged against NSD and Mr. Nichol are issues raised for the first time on appeal. Under RAP 9.12, arguments not brought to the attention of the trial court at the time of summary judgment may not be considered by the appellate

No. 31163-5-III  
*Houk v. Best Dev. & Constr. Co., Inc.*

court. Accordingly, these issues are not properly before us. Nevertheless, based on the reasoning above, further claims against NSD would be time barred. RCW 25.15.303.

Finally, relying on RCW 4.84.330, NSD requests attorney fees on appeal. RCW 4.84.330 states that a contract containing an attorney fees provision entitles the prevailing party in an enforcement action to recover reasonable attorney fees and costs. The parties' 2004 real estate contract lists Mr. Nichols<sup>1</sup> as the seller and the Houks as the purchaser. Their contract states, "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." Clerk's Papers at 157.

Where a contract provides for an award of reasonable attorney fees to the prevailing party, such an award "shall" be made. RCW 4.84.330. Here, the parties' contract contains an attorney fee provision and several of their claims are based on the contract, including violation of implied warranties. *See Burbo v. Harley C. Douglass, Inc.*, 125 Wn. App. 684, 701-02, 106 P.3d 258 (2005) ("the implied warranty of habitability is an implied-in-law term of the contract for sale for the purposes of attorney fees.") NSD prevails here. Thus, we grant attorney fees request.

Reversed.

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<sup>1</sup> The Houks attempt to distinguish Mr. Nichols from NSD in their argument that fees are unwarranted, arguing Mr. Nichols was not acting on his own behalf but on behalf of NSD; thus, he cannot receive fees. However, both parties are combined for purposes of this appeal and for purposes of representation by their attorney.



No. 31163-5-III  
*Houk v. Best Dev. & Constr. Co., Inc.*

Brown, J.  
Brown, J.

WE CONCUR:

Korsmo, C.J.  
Korsmo, C.J.

Fearing, J.  
Fearing, J.

The Court of Appeals  
of the  
State of Washington  
Division III

JUL 25 2014

COURT OF APPEALS  
DIVISION III

WILLIAM HOUK, et ux.,	)	No. 31163-5-III
	)	
Respondent,	)	
	)	
v.	)	COMMISSIONER'S RULING
	)	
BEST DEVELOPMENT & CONSTRUCTION,	)	
	)	
Petitioners.	)	
_____	)	

On March 14, 2013, the Court filed its published opinion which reversed the superior court's decision to deny Best Development & Construction's motion for summary judgment and dismiss William Houk's action against it on statute of limitations grounds.<sup>1</sup> *Houk v. Best Development & Construction Co., Inc.* 179 Wn. App. 908, 322 P.3d 29 (2014). The Court also granted Best's request that it award it reasonable attorney

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<sup>1</sup> Specifically, the superior court had held that the amendment to RCW 25.13.303 applied retroactively to revive the Houks' cause of action, which was time-barred before the Legislature had amended the statute.

No. 31163-5-III

fees on appeal pursuant to a contract provision therefor. *See also* RCW 4.84.330. Best timely filed its affidavit of attorney fees and its cost and expense bill. And, on July 8, 2014, it filed its amended affidavit of fees and its amended cost and expense bill. The amended documents requested that the Court order Houk to pay it \$46,671.77 in attorney fees and \$4,404 in costs and expenses. Houk timely objected on the basis the fees were not reasonable and that the parties' contract did not provide for, nor did this Court award, expenses.

The amended affidavit of fees requests an award for a total of approximately eight, forty-hour weeks (318.8 hours) of attorney time at the appellate level. Best's counsel appropriately reduced its billable hourly rate to \$190 and \$160 for the three attorneys' time. This Court agrees with Houk that 318.8 hours is an unreasonable amount of time for Best's attorneys to have worked on this appeal. The issues on review were limited to (1) whether, under the 2006 version of RCW 25.15.303, a requirement existed for a dissolved LLC to file documentation with the secretary of state before the statute of limitations was triggered, and (2) whether the legislature intended to apply the amendments to RCW 25.15.303 retroactively or whether the amendments were clearly curative or remedial, so as to support retroactive application. Best filed a 25 page opening brief, much of which mirrored to its motion for discretionary review. Both documents incorporated arguments that Best first asserted in superior court in its motion

No. 31163-5-III

for summary judgment and in its reply to Houk's response to its motion. Further, this Court observes that the issues, while they involved arguments with respect to a statute that the appellate courts had not previously addressed, were not complicated. Rather, the Court on review used principles of well-settled law to decide the case.

Finally, Best cites the additional issues that Houk raised in its respondent's brief, which it addressed at pages 17-24 of its reply brief, as support for its fee request. The Court, in its opinion, disposed of those additional issues as follows:

We note the Houks ask for affirmative relief in their response brief, asking us to allow them to amend their complaint to add additional causes of action. The Houks, as respondents, may not request affirmative relief without proper notice. *See* RAP 5.1(d) (requiring the filing of a notice of cross-review to request affirmative relief). Moreover, the additional causes of action alleged against NSD and Mr. Nichol are issues raised for the first time on appeal. Under RAP 9.12, arguments not brought to the attention of the trial court at the time of summary judgment may not be considered by the appellate court. Accordingly, these issues are not properly before us. Nevertheless, based on the reasoning above, further claims against NSD would be time barred. RCW 25.15.303.

*Houk*, 322 P.3d at 32. These issues do not support the amount of work Best expended in answering them.

Therefore, this Court awards attorney fees for only three of the eight weeks requested, for a total of \$17,501.91, to be paid by Houk.

As for Best's expense request, specifically for copy expenses and Westlaw research charges during review, Houk points out that the parties' contract only provided for attorneys' fees, not expenses, if a dispute arose. *See* CP 157. ("If Buyer, Seller, or

No. 31163-5-III


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.”)

RCW 4.84.330 provides, as follows: “In any action on a contract . . . , where such contract . . . specifically provides that attorneys' fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party . . . , shall be entitled to reasonable attorneys' fees in addition to costs and necessary disbursements.” Further, “[a]ttorneys' fees provided for by this section shall not be subject to waiver by the parties to any contract . . . . Any provision in any such contract . . . which provides for a waiver of attorneys' fees is void.” (Emphasis added.) The latter provision does not mention “costs and necessary disbursements.”

Here, the parties' contract provides for attorney fees, but not for expenses. Therefore, this Court denies Best's request for its expenses on review. However, as prevailing party, it is entitled to its statutory costs, in the amount of \$1,110.58.

Accordingly, IT IS ORDERED, Best is awarded \$17,501.91 in attorneys' fees and \$1,110.58 in statutory costs, to be paid by Houk.

July 25 , 2014

  
Monica Wasson  
Commissioner

FILED

JUL 25 2014

COURT OF APPEALS  
STATE OF WASHINGTON

**COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON**

WILLIAM HOUK and JANICE HOUK, )  
 husband and wife, )  
 Respondents )  
 vs. )  
 BEST DEVELOPMENT & CONSTRUCTION )  
 COMPANY, INC., et al, )  
 Petitioners )

**MANDATE**

No. 31163-5-III

Spokane County No. 10-2-05239-3

The State of Washington to: The Superior Court of the State of Washington,  
in and for Spokane County


This is to certify that the Opinion of the Court of Appeals of the State of Washington, Division III, filed on March 13, 2014 became the decision terminating review of this court in the above-entitled case on July 25, 2014. The cause is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the Opinion.

**IT IS ORDERED, Best is awarded \$17,501.91 in attorneys' fees and \$1,110.58 in statutory costs, to be paid by Houk.**

**Summary:**

**Judgment Creditor: Best Development & Construction: \$18,612.49**  
**Judgment Debtor: William and Janice Houk: \$18,612.49**

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Spokane, this 25th day of July, 2014.

  
 Clerk of the Court of Appeals, State of Washington  
 Division III

cc: Michael John Kapaun  
Ross P. White  
Kenneth W. Strauss  
Leonard D. Flanagan  
Hon. Linda G. Tompkins

NOV -4 2014

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

WILLIAM HOUK, et ux.,	)	No. 31163-5-III
	)	
Respondents,	)	
	)	
v.	)	
	)	
BEST DEVELOPMENT & CONSTRUCTION COMPANY, INC., et al.,	)	
	)	
Defendants,	)	ORDER WITHDRAWING MANDATE AND GRANTING IN PART MOTION TO MODIFY
	)	
NICHOLAS & SHAHAN DEVELOPMENT, LLC, a Washington Limited Liability Company, and JOSEPH NICHOLS, an individual,	)	
	)	
Petitioners.	)	

THE COURT has considered petitioners' motion to modify the Commissioner's Ruling of July 25, 2014, and is of the opinion the motion should be granted in part.

Therefore,

IT IS ORDERED, the July 25, 2014 mandate is hereby withdrawn.

IT IS FURTHER ORDERED, the motion to modify is hereby granted in part and the Commissioner's Ruling is modified as follows:

No. 31163-5-III  
*Houk v. Best Development*

The fees awarded by the ruling are awarded only to Nicholas & Shahan Development LLC and Joseph Nichols, not to Best Development & Construction Co., Inc.;

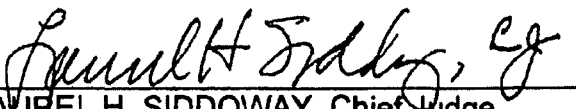
The amount of the fees awarded is increased from \$17,501.91 to \$19,573.50 in order to reflect the intent of the court commissioner, which was to award 3/8 of the fees identified by petitioners' amended fee affidavit attesting to fees incurred in the appellate process *before* the petitioners' own proposed write-offs, not *after* those write-offs (see affidavit filed on July 8, 2014 at p. 3);

By way of clarification, the commissioner's award was a reasonable award of fees for all legal services reflected in the July 8, 2014 fee affidavit, including the services performed in the course of attempting to obtain discretionary review while the case was still pending in the trial court.

DATED: November 4, 2014

PANEL: Judges Siddoway, Brown, Korsmo.

FOR THE COURT:

  
LAUREL H. SIDDOWAY, Chief Judge



# APPENDIX B

House Judiciary Committee hearings, 2/20/06

Staff Report:

“Senate Bill 6531 deals with the dissolution of limited liability corporations and the survival of claims against an LLC following its dissolution. LLCs are something of a hybrid between corporations and general partnerships. It’s possible to create an LLC in which, unlike the partners of a general partnership, the members of an LLC are insulated from liability in much the same way as shareholders of a corporation are insulated from liability beyond the amount of their own shares in the corporation. And at the same time, unlike a corporation, the LLC is a pass-through entity for tax purposes, and in that regard is treated like a general partnership. Like a corporation, an LLC is strictly a creature of statute, and it’s created and dissolved in accordance with prescribed methods in the RCWs.

“This bill deals with the dissolution of an LLC, and that can occur in any number of ways, including reaching the dissolution date that’s been set in the certificate of formation of an LLC, or the happening of some events that are listed in the certificate of formation that would cause the dissolution, or by the mutual consent of all the members of the LLC, or by the dissociation of all the members through death or bankruptcy or some other disability, by judicial action, or by administrative action.

“There’s no express provision in the LLC law dealing with the survival of claims after dissolution. So this is one of the issues that was dealt with with regard to corporations that you just heard about, and what the bill does is provide a three year period during which the dissolution of an LLC does not in any way diminish a remedy for a claim that was filed before or after the dissolution.

“And I’d be glad to answer any questions.”

....

Senator Brian Weinstein:

“The reason I’m here, I guess I’ll do what Senator Brandland did, the reason I’m here is that I heard this *Ballard Square* decision that the last witness, John Steel talked about, from the Bar, this was a decision involving a corporation that dissolved and there were claims against it, and once a corporation dissolves it no longer exists, so you couldn’t sue it. And there was no survival period. I knew that that was a problem for both corporations and LLCs, and as a matter of fact I contacted Gale Stone from the Bar and she put me in touch with John Steel and it turned out that the Bar was working on the Bill that you just heard previous to this. Now I thought, “That’s great, we need that.”

“And I talked to John Steel a little bit and gave him my input on that bill, and when you asked if there was any controversy in the Senate, I think what he was alluding to was that

he worked the entire issue before he brought the bill, because there was no controversy in the Senate on that bill or this bill.

“So what happened was that I spoke to John and Gale Stone and found out that the Bar did put together this comprehensive bill that had to do with corporations. When I asked him, well why don’t you just do it for LLCs as well, he said “Well, that’s a whole different department; we are working on that, but that’s going to be a couple of years.” So I thought well in the meantime, we should take care of this little problem of allowing a three year window in order to sue an LLC that if they dissolved. So I ran the language by the Bar Association, I worked with them, they said this is fine for the meantime, we have no problem with it, it’s well-worded, and they put their blessing on it, and so I ran the bill, and here’s where we are, it passed the Senate unanimously, and I guess I can answer any questions, too.

....

Chairwoman Pat Lance:

“But I imagine it does have some interesting consequences for those who might have relied on there not being this three year window, which is the reason why you’re here with the Bill...So um...

Senator Brian Weinstein:

“Well, it doesn’t make sense to me that an LLC could dissolve and just have its claims go into Never-Never Land, and so if people were relying on it, they shouldn’t have been relying upon it because it’s almost fraudulent in my opinion. And that’s what the Bar saw fit to do, at least with the Corporations statute.

Representative Jay Rodne:

“Thank you Madame Chair, and thank you, Senator for coming before the Committee. I applaud what you’re trying to do in this bill, and you know a lot of these particular LLC cases involve the construction industry, where an entity will form, for one project, and then quickly wind down after the project is – is concluded, but, you know, what requirement does that winding down LLC have to maintain any kind of insurable interest or bond for the three year duration? I mean, are we creating a right without any means of a realistic remedy?

Senator Brian Weinstein:

“Well, this is not a perfect bill, and it certainly doesn’t afford a claimant a great remedy, but if the LLC actually had a bond, or actually was insured, without this bill that insurance is worthless to the claimant, the bond is worthless to the claimant. If you pass this bill, at least the claimant can go after the bond or the insurance. That’s all they can do at this point. I mean, that’s all they will be able to do after this bill passes, if it does

pass of course. But, right now, the claimant could be left with a situation where they could, let's say an LLC could have done faulty work on their home or something, and dissolved, and they could be an insured LLC, they could have a bond, but since they dissolved, they are no longer recognized as a legal entity, so you can't sue and go after the bond or the insurance. I know certain states, I practiced a little bit in Louisiana, Louisiana did have a direct action statute where you can go against an insurance company, but Washington doesn't, so..."

# APPENDIX C

CERTIFICATION OF ENROLLMENT

**SUBSTITUTE HOUSE BILL 2657**

61st Legislature  
2010 Regular Session

Passed by the House March 6, 2010  
Yeas 95 Nays 0

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**Speaker of the House of Representatives**

Passed by the Senate March 2, 2010  
Yeas 46 Nays 0

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**President of the Senate**

Approved

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**Governor of the State of Washington**

CERTIFICATE

I, Barbara Baker, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that the attached is **SUBSTITUTE HOUSE BILL 2657** as passed by the House of Representatives and the Senate on the dates hereon set forth.

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**Chief Clerk**

FILED

**Secretary of State  
State of Washington**

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**SUBSTITUTE HOUSE BILL 2657**

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AS AMENDED BY THE SENATE

Passed Legislature - 2010 Regular Session

**State of Washington                      61st Legislature                      2010 Regular Session**

**By** House Judiciary (originally sponsored by Representative Pedersen)

READ FIRST TIME 02/03/10.

1            AN ACT Relating to the dissolution of limited liability companies;  
2 amending RCW 25.15.005, 25.15.070, 25.15.085, 25.15.095, 25.15.270,  
3 25.15.290, 25.15.293, 25.15.295, 25.15.303, 25.15.340, and 25.15.805;  
4 adding new sections to chapter 25.15 RCW; and repealing RCW 25.15.080.

5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

6            **Sec. 1.** RCW 25.15.005 and 2008 c 198 s 4 are each amended to read  
7 as follows:

8            The definitions in this section apply throughout this chapter  
9 unless the context clearly requires otherwise.

10            (1) "Certificate of formation" means the certificate referred to in  
11 RCW 25.15.070, and the certificate as amended.

12            (2) "Event of dissociation" means an event that causes a person to  
13 cease to be a member as provided in RCW 25.15.130.

14            (3) "Foreign limited liability company" means an entity that is  
15 formed under:

16            (a) The limited liability company laws of any state other than this  
17 state; or

18            (b) The laws of any foreign country that is: (i) An unincorporated  
19 association, (ii) formed under a statute pursuant to which an

1 association may be formed that affords to each of its members limited  
2 liability with respect to the liabilities of the entity, and (iii) not  
3 required, in order to transact business or conduct affairs in this  
4 state, to be registered or qualified under Title 23B or 24 RCW, or any  
5 other chapter of the Revised Code of Washington authorizing the  
6 formation of a domestic entity and the registration or qualification in  
7 this state of similar entities formed under the laws of a jurisdiction  
8 other than this state.

9 (4) "Limited liability company" and "domestic limited liability  
10 company" means a limited liability company having one or more members  
11 that is organized and existing under this chapter.

12 (5) "Limited liability company agreement" means any written  
13 agreement of the members, or any written statement of the sole member,  
14 as to the affairs of a limited liability company and the conduct of its  
15 business which is binding upon the member or members.

16 (6) "Limited liability company interest" means a member's share of  
17 the profits and losses of a limited liability company and a member's  
18 right to receive distributions of the limited liability company's  
19 assets.

20 (7) "Manager" or "managers" means, with respect to a limited  
21 liability company that has set forth in its certificate of formation  
22 that it is to be managed by managers, the person, or persons designated  
23 in accordance with RCW 25.15.150(2).

24 (8) "Member" means a person who has been admitted to a limited  
25 liability company as a member as provided in RCW 25.15.115 and who has  
26 not been dissociated from the limited liability company.

27 (9) "Person" means an individual, corporation, business trust,  
28 estate, trust, partnership, limited liability company, association,  
29 joint venture, government, governmental subdivision, agency, or  
30 instrumentality, or a separate legal entity comprised of two or more of  
31 these entities, or any other legal or commercial entity.

32 (10) "Professional limited liability company" means a limited  
33 liability company which is organized for the purpose of rendering  
34 professional service and whose certificate of formation sets forth that  
35 it is a professional limited liability company subject to RCW  
36 25.15.045.

37 (11) "Professional service" means the same as defined under RCW  
38 18.100.030.



1           (12) "Record" means information that is inscribed on a tangible  
2 medium or that is stored in an electronic or other medium and is  
3 retrievable in perceivable form.

4           (13) "State" means the District of Columbia or the Commonwealth of  
5 Puerto Rico or any state, territory, possession, or other jurisdiction  
6 of the United States other than the state of Washington.

7           **Sec. 2.** RCW 25.15.070 and 1994 c 211 s 201 are each amended to  
8 read as follows:

9           (1) In order to form a limited liability company, one or more  
10 persons must execute a certificate of formation. The certificate of  
11 formation shall be filed in the office of the secretary of state and  
12 set forth:

13           (a) The name of the limited liability company;

14           (b) The address of the registered office and the name and address  
15 of the registered agent for service of process required to be  
16 maintained by RCW 25.15.020;

17           (c) The address of the principal place of business of the limited  
18 liability company;

19           (d) If the limited liability company is to have a specific date of  
20 dissolution, the latest date on which the limited liability company is  
21 to dissolve;

22           (e) If management of the limited liability company is vested in a  
23 manager or managers, a statement to that effect;

24           (f) Any other matters the members decide to include therein; and

25           (g) The name and address of each person executing the certificate  
26 of formation.

27           (2) Effect of filing:

28           (a) Unless a delayed effective date is specified, a limited  
29 liability company is formed when its certificate of formation is filed  
30 by the secretary of state. A delayed effective date for a certificate  
31 of formation may be no later than the ninetieth day after the date it  
32 is filed.

33           (b) The secretary of state's filing of the certificate of formation  
34 is conclusive proof that the persons executing the certificate  
35 satisfied all conditions precedent to the formation (~~except in a~~  
36 ~~proceeding by the state to cancel the certificate~~)).

1 (c) A limited liability company formed under this chapter shall be  
2 a separate legal entity(~~(, the existence of which as a separate legal~~  
3 ~~entity shall continue until cancellation of the limited liability~~  
4 ~~company's certificate of formation)~~).

5 **Sec. 3.** RCW 25.15.085 and 2002 c 74 s 17 are each amended to read  
6 as follows:

7 (1) Each document required by this chapter to be filed in the  
8 office of the secretary of state shall be executed in the following  
9 manner, or in compliance with the rules established to facilitate  
10 electronic filing under RCW 25.15.007, except as set forth in RCW  
11 25.15.105(4)(b):

12 (a) Each original certificate of formation must be signed by the  
13 person or persons forming the limited liability company;

14 (b) A reservation of name may be signed by any person;

15 (c) A transfer of reservation of name must be signed by, or on  
16 behalf of, the applicant for the reserved name;

17 (d) A registration of name must be signed by any member or manager  
18 of the foreign limited liability company;

19 (e) A certificate of amendment or restatement must be signed by at  
20 least one manager, or by a member if management of the limited  
21 liability company is reserved to the members;

22 (f) A certificate of (~~cancellation~~) dissolution must be signed by  
23 the person or persons authorized to wind up the limited liability  
24 company's affairs pursuant to RCW 25.15.295(~~(+1)~~) (3);

25 (g) If a surviving domestic limited liability company is filing  
26 articles of merger, the articles of merger must be signed by at least  
27 one manager, or by a member if management of the limited liability  
28 company is reserved to the members, or if the articles of merger are  
29 being filed by a surviving foreign limited liability company, limited  
30 partnership, or corporation, the articles of merger must be signed by  
31 a person authorized by such foreign limited liability company, limited  
32 partnership, or corporation; and

33 (h) A foreign limited liability company's application for  
34 registration as a foreign limited liability company doing business  
35 within the state must be signed by any member or manager of the foreign  
36 limited liability company.

1           (2) Any person may sign a certificate, articles of merger, limited  
2 liability company agreement, or other document by an attorney-in-fact  
3 or other person acting in a valid representative capacity, so long as  
4 each document signed in such manner identifies the capacity in which  
5 the signator signed.

6           (3) The person executing the document shall sign it and state  
7 beneath or opposite the signature the name of the person and capacity  
8 in which the person signs. The document must be typewritten or  
9 printed, and must meet such legibility or other standards as may be  
10 prescribed by the secretary of state.

11           (4) The execution of a certificate or articles of merger by any  
12 person constitutes an affirmation under the penalties of perjury that  
13 the facts stated therein are true.

14           **Sec. 4.** RCW 25.15.095 and 2002 c 74 s 18 are each amended to read  
15 as follows:

16           (1) The original signed copy, together with a duplicate copy that  
17 may be either a signed, photocopied, or conformed copy, of the  
18 certificate of formation or any other document required to be filed  
19 pursuant to this chapter, except as set forth under RCW 25.15.105 or  
20 unless a duplicate is not required under rules adopted under RCW  
21 25.15.007, shall be delivered to the secretary of state. If the  
22 secretary of state determines that the documents conform to the filing  
23 provisions of this chapter, he or she shall, when all required filing  
24 fees have been paid:

25           (a) Endorse on each signed original and duplicate copy the word  
26 "filed" and the date of its acceptance for filing;

27           (b) Retain the signed original in the secretary of state's files;  
28 and

29           (c) Return the duplicate copy to the person who filed it or the  
30 person's representative.

31           (2) If the secretary of state is unable to make the determination  
32 required for filing by subsection (1) of this section at the time any  
33 documents are delivered for filing, the documents are deemed to have  
34 been filed at the time of delivery if the secretary of state  
35 subsequently determines that:

36           (a) The documents as delivered conform to the filing provisions of  
37 this chapter; or

1 (b) Within twenty days after notification of nonconformance is  
2 given by the secretary of state to the person who delivered the  
3 documents for filing or the person's representative, the documents are  
4 brought into conformance.

5 (3) If the filing and determination requirements of this chapter  
6 are not satisfied completely within the time prescribed in subsection  
7 (2)(b) of this section, the documents shall not be filed.

8 (4) Upon the filing of a certificate of amendment (or judicial  
9 decree of amendment) or restated certificate in the office of the  
10 secretary of state, or upon the future effective date or time of a  
11 certificate of amendment (or judicial decree thereof) or restated  
12 certificate, as provided for therein, the certificate of formation  
13 shall be amended or restated as set forth therein. ~~((Upon the filing  
14 of a certificate of cancellation (or a judicial decree thereof), or  
15 articles of merger which act as a certificate of cancellation, or upon  
16 the future effective date or time of a certificate of cancellation (or  
17 a judicial decree thereof) or of articles of merger which act as a  
18 certificate of cancellation, as provided for therein, or as specified  
19 in RCW 25.15.290, the certificate of formation is canceled.))~~

20 **Sec. 5.** RCW 25.15.270 and 2009 c 437 s 1 are each amended to read  
21 as follows:

22 A limited liability company is dissolved and its affairs shall be  
23 wound up upon the first to occur of the following:

24 (1)(a) The dissolution date, if any, specified in the certificate  
25 of formation. If a dissolution date is not specified in the  
26 certificate of formation, the limited liability company's existence  
27 will continue until the first to occur of the events described in  
28 subsections (2) through (6) of this section. If a dissolution date is  
29 specified in the certificate of formation, the certificate of formation  
30 may be amended and the existence of the limited liability company may  
31 be extended by vote of all the members.

32 (b) This subsection does not apply to a limited liability company  
33 formed under RCW 30.08.025 or 32.08.025;

34 (2) The happening of events specified in a limited liability  
35 company agreement;

36 (3) The written consent of all members;

1 (4) Unless the limited liability company agreement provides  
2 otherwise, ninety days following an event of dissociation of the last  
3 remaining member, unless those having the rights of assignees in the  
4 limited liability company under RCW 25.15.130(1) have, by the ninetieth  
5 day, voted to admit one or more members, voting as though they were  
6 members, and in the manner set forth in RCW 25.15.120(1);

7 (5) The entry of a decree of judicial dissolution under RCW  
8 25.15.275; or

9 (6) The ~~((expiration of five years after the effective date of  
10 dissolution under RCW 25.15.285 without the reinstatement))~~  
11 administrative dissolution of the limited liability company by the  
12 secretary of state under RCW 25.15.285(2), unless the limited liability  
13 company is reinstated by the secretary of state under RCW 25.15.290.

14 NEW SECTION. Sec. 6. A new section is added to chapter 25.15 RCW  
15 to read as follows:

16 (1) After dissolution occurs under RCW 25.15.270, the limited  
17 liability company may deliver to the secretary of state for filing a  
18 certificate of dissolution signed in accordance with RCW 25.15.085.

19 (2) A certificate of dissolution filed under subsection (1) of this  
20 section must set forth:

21 (a) The name of the limited liability company; and

22 (b) A statement that the limited liability company is dissolved  
23 under RCW 25.15.270.

24 Sec. 7. RCW 25.15.290 and 2009 c 437 s 2 are each amended to read  
25 as follows:

26 (1) A limited liability company that has been administratively  
27 dissolved under RCW 25.15.285 may apply to the secretary of state for  
28 reinstatement within five years after the effective date of  
29 dissolution. The application must be delivered to the secretary of  
30 state for filing and state:

31 (a) ~~((Recite))~~ The name of the limited liability company and the  
32 effective date of its administrative dissolution;

33 (b) ~~((State))~~ That the ground or grounds for dissolution either did  
34 not exist or have been eliminated; and

35 (c) ~~((State))~~ That the limited liability company's name satisfies  
36 the requirements of RCW 25.15.010.

1 (2) If the secretary of state determines that ~~((the))~~ an  
2 application contains the information required by subsection (1) of this  
3 section and that the name is available, the secretary of state shall  
4 reinstate the limited liability company and give the limited liability  
5 company written notice, as provided in RCW 25.15.285(1), of the  
6 reinstatement that recites the effective date of reinstatement. If the  
7 name is not available, the limited liability company must file with its  
8 application for reinstatement an amendment to its certificate of  
9 formation reflecting a change of name.

10 (3) When ~~((the))~~ reinstatement ~~((is))~~ becomes effective, it relates  
11 back to and takes effect as of the effective date of the administrative  
12 dissolution and the limited liability company may resume carrying on  
13 its ~~((business))~~ activities as if the administrative dissolution had  
14 never occurred.

15 ~~((4) If an application for reinstatement is not made within the  
16 five-year period set forth in subsection (1) of this section, or if the  
17 application made within this period is not granted, the limited  
18 liability company's certificate of formation is deemed canceled.))~~

19 **Sec. 8.** RCW 25.15.293 and 2009 c 437 s 3 are each amended to read  
20 as follows:

21 (1) A limited liability company ~~((voluntarily))~~ dissolved under RCW  
22 25.15.270 (2) or (3) that has filed a certificate of dissolution under  
23 section 6 of this act may ~~((apply to the secretary of state for~~  
24 ~~reinstatement))~~ revoke its dissolution within one hundred twenty days  
25 ~~((after the effective date))~~ of filing its certificate of dissolution.  
26 ~~((The application must:~~

27 ~~(a) Recite the name of the limited liability company and the~~  
28 ~~effective date of its voluntary dissolution;~~

29 ~~(b) State that the ground or grounds for voluntary dissolution have~~  
30 ~~been eliminated; and~~

31 ~~(c) State that the limited liability company's name satisfies the~~  
32 ~~requirements of RCW 25.15.010.~~

33 ~~(2) If the secretary of state determines that the application~~  
34 ~~contains the information required by subsection (1) of this section and~~  
35 ~~that the name is available, the secretary of state shall reinstate the~~  
36 ~~limited liability company and give the limited liability company~~  
37 ~~written notice of the reinstatement that recites the effective date of~~

1 reinstatement. If the name is not available, the limited liability  
2 company must file with its application for reinstatement an amendment  
3 to its certificate of formation reflecting a change of name.

4 ~~(3) When the reinstatement is effective, it relates back to and  
5 takes effect as of the effective date of the voluntary dissolution and  
6 the limited liability company may resume carrying on its business as if  
7 the voluntary dissolution had never occurred.~~

8 ~~(4) If an application for reinstatement is not made within the one  
9 hundred twenty day period set forth in subsection (1) of this section,  
10 or if the application made within this period is not granted, the  
11 secretary of state shall cancel the limited liability company's  
12 certificate of formation.)~~

13 (2) (a) Except as provided in (b) of this subsection, revocation of  
14 dissolution must be approved in the same manner as the dissolution was  
15 approved unless that approval permitted revocation in some other  
16 manner, in which event the dissolution may be revoked in the manner  
17 permitted.

18 (b) If dissolution occurred upon the happening of events specified  
19 in the limited liability company agreement, revocation of dissolution  
20 must be approved in the manner necessary to amend the provisions of the  
21 limited liability company agreement specifying the events of  
22 dissolution.

23 (3) After the revocation of dissolution is approved, the limited  
24 liability company may revoke the dissolution and the certificate of  
25 dissolution by delivering to the secretary of state for filing a  
26 certificate of revocation of dissolution that sets forth:

27 (a) The name of the limited liability company and a statement that  
28 the name satisfies the requirements of RCW 25.15.010; if the name is  
29 not available, the limited liability company must file a certificate of  
30 amendment changing its name with the certificate of revocation of  
31 dissolution;

32 (b) The effective date of the dissolution that was revoked;

33 (c) The date that the revocation of dissolution was approved;

34 (d) If the limited liability company's managers revoked the  
35 dissolution, a statement to that effect;

36 (e) If the limited liability company's managers revoked a  
37 dissolution approved by the company's members, a statement that

1 revocation was permitted by action by the managers alone pursuant to  
2 that approval; and

3 (f) If member approval was required to revoke the dissolution, a  
4 statement that revocation of the dissolution was duly approved by the  
5 members in accordance with subsection (2) of this section.

6 (4) Revocation of dissolution and revocation of the certificate of  
7 dissolution are effective upon the filing of the certificate of  
8 revocation of dissolution.

9 (5) When the revocation of dissolution and revocation of the  
10 certificate of dissolution are effective, they relate back to and take  
11 effect as of the effective date of the dissolution and the limited  
12 liability company resumes carrying on its activities as if the  
13 dissolution had never occurred.

14 **Sec. 9.** RCW 25.15.295 and 1994 c 211 s 806 are each amended to  
15 read as follows:

16 ~~((1) Unless otherwise provided in a limited liability company~~  
17 ~~agreement, a manager who has not wrongfully dissolved a limited~~  
18 ~~liability company or, if none, the members or a person approved by the~~  
19 ~~members or, if there is more than one class or group of members, then~~  
20 ~~by each class or group of members, in either case, by members~~  
21 ~~contributing, or required to contribute, more than fifty percent of the~~  
22 ~~agreed value (as stated in the records of the limited liability company~~  
23 ~~required to be kept pursuant to RCW 25.15.135) of the contributions~~  
24 ~~made, or required to be made, by all members, or by the members in each~~  
25 ~~class or group, as appropriate, may wind up the limited liability~~  
26 ~~company's affairs. The superior courts, upon cause shown, may wind up~~  
27 ~~the limited liability company's affairs upon application of any member~~  
28 ~~or manager, his or her legal representative or assignee, and in~~  
29 ~~connection therewith, may appoint a receiver.~~

30 ~~(2) Upon dissolution of a limited liability company and until the~~  
31 ~~filing of a certificate of cancellation as provided in RCW 25.15.080,~~  
32 ~~the persons winding up the limited liability company's affairs may, in~~  
33 ~~the name of, and for and on behalf of, the limited liability company,~~  
34 ~~prosecute and defend suits, whether civil, criminal, or administrative,~~  
35 ~~gradually settle and close the limited liability company's business,~~  
36 ~~dispose of and convey the limited liability company's property,~~



1 ~~discharge or make reasonable provision for the limited liability~~  
2 ~~company's liabilities, and distribute to the members any remaining~~  
3 ~~assets of the limited liability company.)~~

4 (1) A limited liability company continues after dissolution only  
5 for the purpose of winding up its activities.

6 (2) In winding up its activities, the limited liability company:

7 (a) May file a certificate of dissolution with the secretary of  
8 state to provide notice that the limited liability company is  
9 dissolved, preserve the limited liability company's business or  
10 property as a going concern for a reasonable time, prosecute and defend  
11 actions and proceedings, whether civil, criminal, or administrative,  
12 transfer the limited liability company's property, settle disputes, and  
13 perform other necessary acts; and

14 (b) Shall discharge the limited liability company's liabilities,  
15 settle and close the limited liability company's activities, and  
16 marshal and distribute the assets of the company.

17 (3) Unless otherwise provided in a limited liability company  
18 agreement, the persons responsible for managing the business and  
19 affairs of a limited liability company under RCW 25.15.150 are  
20 responsible for winding up the activities of a dissolved limited  
21 liability company. If a dissolved limited liability company does not  
22 have any managers or members, the legal representative of the last  
23 person to have been a member may wind up the activities of the  
24 dissolved limited liability company, in which event the legal  
25 representative is a manager for the purposes of RCW 25.15.155.

26 (4) If the persons responsible for winding up the activities of a  
27 dissolved limited liability company under subsection (3) of this  
28 section decline or fail to wind up the limited liability company's  
29 activities, a person to wind up the dissolved limited liability  
30 company's activities may be appointed by the consent of the transferees  
31 owning a majority of the rights to receive distributions as transferees  
32 at the time consent is to be effective. A person appointed under this  
33 subsection:

34 (a) Is a manager for the purposes of RCW 25.15.155; and

35 (b) Shall promptly amend the certificate of formation to state:

36 (i) The name of the person who has been appointed to wind up the  
37 limited liability company; and

38 (ii) The street and mailing address of the person.

1       (5) The superior court may order judicial supervision of the  
2 winding up, including the appointment of a person to wind up the  
3 dissolved limited liability company's activities, if:

4       (a) On application of a member, the applicant establishes good  
5 cause; or

6       (b) On application of a transferee, a limited liability company  
7 does not have any managers or members and within a reasonable time  
8 following the dissolution no person has been appointed pursuant to  
9 subsection (3) or (4) of this section.

10       NEW SECTION. Sec. 10. A new section is added to chapter 25.15 RCW  
11 to read as follows:

12       (1) A dissolved limited liability company that has filed a  
13 certificate of dissolution with the secretary of state may dispose of  
14 the known claims against it by following the procedure described in  
15 subsection (2) of this section.

16       (2) A dissolved limited liability company may notify its known  
17 claimants of the dissolution in a record. The notice must:

18       (a) Specify the information required to be included in a known  
19 claim;

20       (b) Provide a mailing address to which the known claim must be  
21 sent;

22       (c) State the deadline for receipt of the known claim, which may  
23 not be fewer than one hundred twenty days after the date the notice is  
24 received by the claimant; and

25       (d) State that the known claim will be barred if not received by  
26 the deadline.

27       (3) A known claim against a dissolved limited liability company is  
28 barred if the requirements of subsection (2) of this section are met  
29 and:

30       (a) The known claim is not received by the specified deadline; or

31       (b) In the case of a known claim that is timely received but  
32 rejected by the dissolved limited liability company, the claimant does  
33 not commence an action to enforce the known claim against the limited  
34 liability company within ninety days after the receipt of the notice of  
35 rejection.

36       (4) For purposes of this section, "known claim" means any claim or  
37 liability that either:

1 (a)(i) Has matured sufficiently, before or after the effective date  
2 of the dissolution, to be legally capable of assertion against the  
3 dissolved limited liability company, whether or not the amount of the  
4 claim or liability is known or determinable; or (ii) is unmatured,  
5 conditional, or otherwise contingent but may subsequently arise under  
6 any executory contract to which the dissolved limited liability company  
7 is a party, other than under an implied or statutory warranty as to any  
8 product manufactured, sold, distributed, or handled by the dissolved  
9 limited liability company; and

10 (b) As to which the dissolved limited liability company has  
11 knowledge of the identity and the mailing address of the holder of the  
12 claim or liability and, in the case of a matured and legally assertable  
13 claim or liability, actual knowledge of existing facts that either (i)  
14 could be asserted to give rise to, or (ii) indicate an intention by the  
15 holder to assert, such a matured claim or liability.

16 **Sec. 11.** RCW 25.15.303 and 2006 c 325 s 1 are each amended to read  
17 as follows:

18 Except as provided in section 10 of this act, the dissolution of a  
19 limited liability company does not take away or impair any remedy  
20 available to or against that limited liability company, its managers,  
21 or its members for any right or claim existing, or any liability  
22 incurred at any time, whether prior to or after dissolution, unless the  
23 limited liability company has filed a certificate of dissolution under  
24 section 6 of this act, that has not been revoked under RCW 25.15.293,  
25 and an action or other proceeding thereon is not commenced within three  
26 years after the ((effective date)) filing of the certificate of  
27 dissolution. Such an action or proceeding by or against the limited  
28 liability company may be prosecuted or defended by the limited  
29 liability company in its own name.

30 **Sec. 12.** RCW 25.15.340 and 1994 c 211 s 907 are each amended to  
31 read as follows:

32 (1) A foreign limited liability company doing business in this  
33 state may not maintain any action, suit, or proceeding in this state  
34 until it has registered in this state, and has paid to this state all  
35 fees and penalties for the years or parts thereof, during which it did  
36 business in this state without having registered.

1           (2) Neither the failure of a foreign limited liability company to  
2 register in this state ((does not impair)) nor the issuance of a  
3 certificate of cancellation with respect to a foreign limited liability  
4 company's registration in this state impairs:

5           (a) The validity of any contract or act of the foreign limited  
6 liability company;

7           (b) The right of any other party to the contract to maintain any  
8 action, suit, or proceeding on the contract; or

9           (c) ~~((Prevent))~~ The foreign limited liability company from  
10 defending any action, suit, or proceeding in any court of this state.

11           (3) A member or a manager of a foreign limited liability company is  
12 not liable for the obligations of the foreign limited liability company  
13 solely by reason of the limited liability company's having done  
14 business in this state without registration.

15           **Sec. 13.** RCW 25.15.805 and 1994 c 211 s 1302 are each amended to  
16 read as follows:

17           (1) The secretary of state shall adopt rules establishing fees  
18 which shall be charged and collected for:

19           (a) Filing of a certificate of formation for a domestic limited  
20 liability company or an application for registration of a foreign  
21 limited liability company;

22           (b) Filing of a certificate of ~~((cancellation))~~ dissolution for a  
23 domestic ~~((or foreign))~~ limited liability company;

24           (c) Filing a certificate of cancellation for a foreign limited  
25 liability company;

26           (d) Filing of a certificate of amendment or restatement for a  
27 domestic or foreign limited liability company;

28           ~~((d))~~ (e) Filing an application to reserve, register, or transfer  
29 a limited liability company name;

30           ~~((e))~~ (f) Filing any other certificate, statement, or report  
31 authorized or permitted to be filed;

32           ~~((f))~~ (g) Copies, certified copies, certificates, service of  
33 process filings, and expedited filings or other special services.

34           (2) In the establishment of a fee schedule, the secretary of state  
35 shall, insofar as is possible and reasonable, be guided by the fee  
36 schedule provided for corporations governed by Title 23B RCW. Fees for

1 copies, certified copies, certificates of record, and service of  
2 process filings shall be as provided for in RCW 23B.01.220.

3 (3) All fees collected by the secretary of state shall be deposited  
4 with the state treasurer pursuant to law.

5 NEW SECTION. **Sec. 14.** RCW 25.15.080 (Cancellation of certificate)  
6 and 1994 c 211 s 203 are each repealed.

--- END ---

# APPENDIX D

# HOUSE BILL REPORT

## HB 2657

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As Reported by House Committee On:  
Judiciary

**Title:** An act relating to the dissolution of limited liability companies.

**Brief Description:** Addressing the dissolution of limited liability companies.

**Sponsors:** Representative Pedersen.

**Brief History:**

**Committee Activity:**

Judiciary: 1/20/10, 2/1/10 [DPS].

**Brief Summary of Substitute Bill**

- Creates a certificate of dissolution for limited liability companies to provide notice of dissolution.
- Establishes procedures to allow a dissolved limited liability company to dispose of known claims.
- Removes all references to a "certificate of cancellation" for domestic limited liability companies.

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### HOUSE COMMITTEE ON JUDICIARY

**Majority Report:** The substitute bill be substituted therefor and the substitute bill do pass. Signed by 9 members: Representatives Pedersen, Chair; Goodman, Vice Chair; Rodne, Ranking Minority Member; Shea, Assistant Ranking Minority Member; Kelley, Kirby, Ormsby, Roberts and Ross.

**Staff:** Courtney Barnes (786-7194).

**Background:**

A limited liability company (LLC) is a business entity that possesses some of the attributes of a corporation and some of the attributes of a partnership. The LLCs were authorized by the Legislature in 1994. A properly constructed LLC can be a business entity in which the

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*This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.*

ownership enjoys limited liability like a corporation's shareholders, but the entity itself is not taxed as a corporation. Domestic LLCs are entities formed under the Washington LLC Act. Foreign LLCs are entities formed under the laws of a state other than Washington or a foreign country.

#### Dissolution of an LLC.

An LLC may be dissolved voluntarily, administratively, or judicially. Dissolution does not terminate the existence of the LLC. Instead, it begins a period in which the affairs of the LLC must be wound up. Dissolution of an LLC does not eliminate any cause of action against the LLC that was incurred prior to or after the dissolution if an action on the claim is filed within three years after the effective date of dissolution.

#### Revocation of Dissolution.

A voluntarily-dissolved LLC may file for reinstatement by filing an application with the Office of the Secretary of State (OSOS). Current law requires the OSOS to cancel a voluntarily-dissolved LLC's certificate of formation if the dissolved LLC fails to file for reinstatement within 120 days after the effective date of dissolution.

#### Winding Up the Affairs of a Dissolved LLC.

After dissolution of an LLC, but before cancellation of the certificate of formation, a manager or member of the LLC or a court-appointed receiver may wind up the business of the LLC. Winding up involves liquidating assets, paying creditors, and distributing proceeds from the liquidation of assets to the members of the LLC.

#### Cancellation of Certificate.

After an LLC is dissolved, the certificate of formation that created the LLC is canceled. Recently, the Washington Supreme Court held that cancellation of an LLC's certificate of formation bars the LLC from filing or continuing a lawsuit and bars a claimant from filing or continuing a lawsuit against the LLC. Under this decision, an LLC ceases to exist as a legal entity and cannot be sued once its certificate of formation is canceled.

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### **Summary of Substitute Bill:**

#### Certificate of Dissolution.

A new document, a certificate of dissolution, is created for LLCs. A dissolved LLC may file a certificate of dissolution with the OSOS to provide notice that the LLC is dissolved. The certificate of dissolution must be signed by the person who is authorized to wind up the LLC's affairs.

The dissolution of an LLC does not eliminate any cause of action by or against the LLC that was incurred prior to or after the dissolution if an action is filed within three years after the



filing of the certificate of dissolution. This provision does not apply if the dissolved LLC has disposed of known claims.

#### Revocation of Dissolution.

The procedures for how a voluntarily-dissolved LLC may revoke its dissolution are modified. An LLC that has dissolved and filed a certificate of dissolution with the OSOS may revoke its dissolution within 120 days of filing its certificate of dissolution. This provision applies to LLCs dissolved due to the happening of events specified in the LLCs agreement or by written consent of all the LLC's members. To revoke its voluntary dissolution, an LLC must file a certificate of revocation of dissolution with the OSOS. Procedures are created to address how a revocation of dissolution must be approved by the LLC's managers or members.

#### Winding Up the Affairs of a Dissolved LLC.

The provisions addressing who may wind up a LLC's affairs are revised. The persons responsible for managing the business and affairs of the LLC are responsible for winding up the activities of the dissolved LLC. Upon certain conditions, a superior court may order judicial supervision of the winding up of a dissolved LLC, including the appointment of a person to wind up the LLC's activities. For the purposes of winding up, a dissolved LLC may:

- preserve the LLC's activities and property as a going concern for a reasonable time;
- prosecute and defend actions and proceedings, whether civil, criminal, or administrative;
- transfer the LLC's property;
- settle disputes; and
- perform other acts necessary or appropriate to the winding up.

#### Disposing of Known Claims.

A dissolved LLC that has filed a certificate of dissolution with the OSOS may dispose of the known claims against it by providing notice to known claimants. Procedures are created to address what the notice to known claimants must contain and how claimants must notify a dissolved LLC of a claim. A known claim against an LLC is barred and the claim is not the liability of the LLC if the holder of the known claim was given written notice of dissolution and:

- the known claim was not received by a specified deadline; or
- the holder of a known claim that is rejected by the dissolved LLC does not commence a proceeding to enforce the claim within 90 days after the receipt of the notice of rejection.

#### Certificate of Cancellation.

All references to a "certificate of cancellation" for domestic LLCs are removed. The issuance of a certificate of cancellation of a foreign LLC's registration does not impair the ability of a party to maintain an action, suit, or proceeding against the foreign LLC.

**Substitute Bill Compared to Original Bill:**

The substitute bill removes all references to a "certificate of cancellation" both in the original bill and under current law for domestic LLCs. The substitute bill specifies that the issuance of a certificate of cancellation of a foreign LLC's registration does not impair the ability of a party to maintain an action against the foreign LLC. The substitute bill modifies the provisions in the original bill for filing a certificate of dissolution, revoking a certificate of dissolution, winding up the affairs of a dissolved LLC, and disposing of known claims.

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**Appropriation:** None.

**Fiscal Note:** Not requested.

**Effective Date of Substitute Bill:** The bill takes effect 90 days after adjournment of the session in which the bill is passed.

**Staff Summary of Public Testimony:**

(In support) The bill will address and resolve two issues that need immediate attention. First, under the *Chadwick Farms* decision issued by the Washington Supreme Court, a certificate of cancellation abates all legal claims. This decision leaves creditors in an untenable situation. The second issue relates to voluntary dissolution of an LLC. The law requires the OSOS to cancel a voluntarily-dissolved LLC's certificate of formation within 120 days of its dissolution. Many LLCs require more than 120 days to dissolve, and this requirement creates unintended problems. The bill is a simple bill and the intent is to make technical corrections. A certificate of cancellation is an old concept. The Washington State Bar Association intends on significantly revising the LLC Act in the future and will likely remove certificates of cancellation from the LLC Act.

(With concerns) There may be an issue with the provisions allowing a dissolved LLC to dispose of known claims. This provision may establish a 90-day statute of limitations for known claims. This limitation may have serious consequences in circumstances where a claim is known to the LLC, but the elements are not known to the potential claimant. The bill should be amended to address these types of claims. The bill amends the claims survival statute and only references a certificate of dissolution. This provision needs to be amended to address situations where an LLC does not file a certificate of dissolution but files a certificate of cancellation.

(Opposed) None.

**Persons Testifying:** (In support) Brian Todd and Don Percival, Washington State Bar Association; and Larry Shannon, Washington State Association for Justice.

(With concerns) Jeremy Stillwell, Washington State Community Associations Institute.

**Persons Signed In To Testify But Not Testifying:** None.

# APPENDIX E

# SENATE BILL REPORT

## SHB 2657

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As of February 18, 2010

**Title:** An act relating to the dissolution of limited liability companies.

**Brief Description:** Addressing the dissolution of limited liability companies.

**Sponsors:** House Committee on Judiciary (originally sponsored by Representative Pedersen).

**Brief History:** Passed House: 2/10/10, 96-0.

**Committee Activity:** Judiciary: 2/17/10.

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### SENATE COMMITTEE ON JUDICIARY

**Staff:** Kim Johnson (786-7472)

**Background:** A limited liability company (LLC) is a business entity that possesses some of the attributes of a corporation and some of the attributes of a partnership.

An LLC may be dissolved voluntarily, administratively, or judicially. After dissolution of an LLC, but before cancellation of the certificate of formation, a manager or member of the LLC or a court-appointed receiver may wind up the business of the LLC. Winding up involves liquidating assets, paying creditors, and distributing proceeds from the liquidation of assets to the members of the LLC. After an LLC is dissolved, the certificate of formation that created the LLC is canceled.

Dissolution of an LLC does not eliminate any cause of action against the LLC that was incurred prior to or after the dissolution if an action on the claim is filed within three years after the effective date of dissolution. A voluntarily-dissolved LLC may file for reinstatement by filing an application with the Office of the Secretary of State (OSOS). Current law requires the OSOS to cancel a voluntarily-dissolved LLC's certificate of formation if the dissolved LLC fails to file for reinstatement within 120 days after the effective date of dissolution.

Recently, the Washington Supreme Court held that cancellation of an LLC's certificate of formation bars the LLC from filing or continuing a lawsuit and bars a claimant from filing or continuing a lawsuit against the LLC. Under this decision, an LLC ceases to exist as a legal entity and cannot be sued once its certificate of formation is canceled.

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*This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.*

**Summary of Bill:** The bill as referred to committee not considered.

**Summary of Bill (Proposed Amendments): Certificate of Dissolution.** A new document, a certificate of dissolution, is created for LLCs. A dissolved LLC may file a certificate of dissolution with the OSOS to provide notice that the LLC is dissolved. The dissolution of an LLC does not eliminate any cause of action by or against the LLC that was incurred prior to or after the dissolution if an action is filed within three years after the filing of the certificate of dissolution. This provision does not apply if the dissolved LLC has disposed of known claims.

**Disposing of Known Claims.** A dissolved LLC that has filed a certificate of dissolution with the OSOS may dispose of the known claims against it by providing notice to known claimants. Procedures are created to address what the notice to known claimants must contain and how claimants must notify a dissolved LLC of a claim. A known claim against an LLC is barred and the claim is not the liability of the LLC if the holder of the known claim was given written notice of dissolution and:

- the known claim was not received by a specified deadline; or
- the holder of a known claim that is rejected by the dissolved LLC does not commence a proceeding to enforce the claim within 90 days after the receipt of the notice of rejection.

**Revocation of Dissolution.** The procedures for how a voluntarily-dissolved LLC may revoke its dissolution are modified. An LLC that has dissolved and filed a certificate of dissolution with the OSOS may revoke its dissolution within 120 days of filing its certificate of dissolution. This provision applies to LLC's dissolved due to the happening of events specified in the LLC's agreement or by written consent of all the LLC's members.

**Winding Up the Affairs of a Dissolved LLC.** The provisions addressing who may wind up an LLC's affairs are revised. The persons responsible for managing the business and affairs of the LLC are responsible for winding up the activities of the dissolved LLC. Upon certain conditions, a superior court may order judicial supervision of the winding up of a dissolved LLC, including the appointment of a person to wind up the LLC's activities. For the purposes of winding up, a dissolved LLC may:

- preserve the LLC's activities and property as a going concern for a reasonable time;
- prosecute and defend actions and proceedings, whether civil, criminal, or administrative;
- transfer the LLC's property;
- settle disputes; and
- perform other acts necessary or appropriate to the winding up.

**Certificate of Cancellation.** All references to a certificate of cancellation for domestic LLCs are removed. The issuance of a certificate of cancellation of a foreign LLC's registration does not impair the ability of a party to maintain an action, suit, or proceeding against the foreign LLC.

**Appropriation:** None.

**Fiscal Note:** Not requested.

**Committee/Commission/Task Force Created:** No.

**Effective Date:** Ninety days after adjournment of session in which bill is passed.

**Staff Summary of Public Testimony:** PRO: This bill seeks to address a latent defect in the LLC Act that has been present since it was adopted in Washington. The statute as it was proposed to us originally did not include a process of cancellation. The concept of cancellation stemmed from a concern expressed by the OSSO with their computer system and a perceived need to have a clear end to an LLC so it may be wiped off the books. I would also like to point out that I agree with the Supreme Court's interpretation of the statute in Chadwick. There is no need for the cancellation process. The bill before you lines up the dissolution process for LLCs with Limited Liability Partnerships and the Business Corporation Act.

As the Chair of the Partnership and LLC Committee of the Business Law Section of the Washington State Bar Association (WSBA), we take responsibility for drafting the bill. It is important to note that it has also worked its way through various other committees of the WSBA and has been well worked. We have received some comments regarding section 10, and I think that everyone agrees what needs to happen and we just need to hone the language to meet everyone's needs. We need to deal with the issues raised by the Chadwick case regarding the difference between dissolution and cancellation. It is important to think about this in the context of the other business entities. All we should worry about regarding LLC dissolution is when a claim may be brought by or against the LLC after dissolution has begun. What the bill does is make the LLC statutes related to dissolution, consistent with the other business entity statutes. All that is relevant is whether the entity has dissolved and if you have dissolved have you given notice to the world that you are dissolved. This bill provides clarity on these important questions. We support the bill we just seek very clear language on what claims survive, and feel we have reached agreement with the WSBA on this issue.

**Persons Testifying:** PRO: Representative Pedersen, prime sponsor; Brian Todd, Don Percival, WSBA Business Law Section; Marlyn Hawkins, Washington State Community Association Institute.

# HOUSE BILL REPORT

## SHB 2657

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### As Passed Legislature

**Title:** An act relating to the dissolution of limited liability companies.

**Brief Description:** Addressing the dissolution of limited liability companies.

**Sponsors:** House Committee on Judiciary (originally sponsored by Representative Pedersen).

**Brief History:**

**Committee Activity:**

Judiciary: 1/20/10, 2/1/10 [DPS].

**Floor Activity:**

Passed House: 2/10/10, 96-0.

Senate Amended.

Passed Senate: 3/2/10, 46-0.

House Concurred.

Passed House: 3/6/10, 95-0.

Passed Legislature.

#### Brief Summary of Substitute Bill

- Creates a certificate of dissolution for limited liability companies to provide notice of dissolution.
- Establishes procedures to allow a dissolved limited liability company to dispose of known claims.
- Removes all references to a "certificate of cancellation" for domestic limited liability companies.

---

### HOUSE COMMITTEE ON JUDICIARY

**Majority Report:** The substitute bill be substituted therefor and the substitute bill do pass.  
Signed by 9 members: Representatives Pedersen, Chair; Goodman, Vice Chair; Rodne, Ranking Minority Member; Shea, Assistant Ranking Minority Member; Kelley, Kirby, Ormsby, Roberts and Ross.

**Staff:** Courtney Barnes (786-7194).

---

*This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.*

**Background:**

A limited liability company (LLC) is a business entity that possesses some of the attributes of a corporation and some of the attributes of a partnership. The LLCs were authorized by the Legislature in 1994. A properly constructed LLC can be a business entity in which the ownership enjoys limited liability like a corporation's shareholders, but the entity itself is not taxed as a corporation. Domestic LLCs are entities formed under the Washington LLC Act. Foreign LLCs are entities formed under the laws of a state other than Washington or a foreign country.

**Dissolution of an LLC.**

An LLC may be dissolved voluntarily, administratively, or judicially. Dissolution does not terminate the existence of the LLC. Instead, it begins a period in which the affairs of the LLC must be wound up. Dissolution of an LLC does not eliminate any cause of action against the LLC that was incurred prior to or after the dissolution if an action on the claim is filed within three years after the effective date of dissolution.

**Revocation of Dissolution.**

A voluntarily-dissolved LLC may file for reinstatement by filing an application with the Office of the Secretary of State (OSOS). Current law requires the OSOS to cancel a voluntarily-dissolved LLC's certificate of formation if the dissolved LLC fails to file for reinstatement within 120 days after the effective date of dissolution.

**Winding Up the Affairs of a Dissolved LLC.**

After dissolution of an LLC, but before cancellation of the certificate of formation, a manager or member of the LLC or a court-appointed receiver may wind up the business of the LLC. Winding up involves liquidating assets, paying creditors, and distributing proceeds from the liquidation of assets to the members of the LLC.

**Cancellation of Certificate.**

After an LLC is dissolved, the certificate of formation that created the LLC is canceled. Recently, the Washington Supreme Court held that cancellation of an LLC's certificate of formation bars the LLC from filing or continuing a lawsuit and bars a claimant from filing or continuing a lawsuit against the LLC. Under this decision, an LLC ceases to exist as a legal entity and cannot be sued once its certificate of formation is canceled.

**Summary of Substitute Bill:****Certificate of Dissolution.**

A new document, a certificate of dissolution, is created for LLCs. A dissolved LLC may file a certificate of dissolution with the OSOS to provide notice that the LLC is dissolved. The certificate of dissolution must be signed by the person who is authorized to wind up the LLC's affairs.



The dissolution of an LLC does not eliminate any cause of action by or against the LLC that was incurred prior to or after the dissolution, unless the LLC has filed a certificate of dissolution that has not been revoked, and an action is not filed within three years after the filing of the certificate of dissolution. This provision does not apply if the dissolved LLC has disposed of known claims.

#### Revocation of Dissolution.

The procedures for how a voluntarily-dissolved LLC may revoke its dissolution are modified. An LLC that has dissolved and filed a certificate of dissolution with the OSOS may revoke its dissolution within 120 days of filing its certificate of dissolution. This provision applies to LLCs dissolved due to the happening of events specified in the LLCs agreement or by written consent of all the LLC's members. To revoke its voluntary dissolution, an LLC must file a certificate of revocation of dissolution with the OSOS. Procedures are created to address how a revocation of dissolution must be approved by the LLC's managers or members.

#### Winding Up the Affairs of a Dissolved LLC.

The provisions addressing who may wind up a LLC's affairs are revised. The persons responsible for managing the business and affairs of the LLC are responsible for winding up the activities of the dissolved LLC. Upon certain conditions, a superior court may order judicial supervision of the winding up of a dissolved LLC, including the appointment of a person to wind up the LLC's activities. For the purposes of winding up, a dissolved LLC may:

- preserve the LLC's activities and property as a going concern for a reasonable time;
- prosecute and defend actions and proceedings, whether civil, criminal, or administrative;
- transfer the LLC's property;
- settle disputes; and
- perform other acts necessary or appropriate to the winding up.

#### Disposing of Known Claims.

A dissolved LLC that has filed a certificate of dissolution with the OSOS may dispose of the known claims against it by providing notice to known claimants. Procedures are created to address what the notice to known claimants must contain and how claimants must notify a dissolved LLC of a claim. A known claim against an LLC is barred and the claim is not the liability of the LLC if the holder of the known claim was given written notice of dissolution and:

- the known claim was not received by a specified deadline; or
- the holder of a known claim that is rejected by the dissolved LLC does not commence a proceeding to enforce the claim within 90 days after the receipt of the notice of rejection.

#### Certificate of Cancellation.

All references to a "certificate of cancellation" for domestic LLCs are removed. The issuance of a certificate of cancellation of a foreign LLC's registration does not impair the ability of a party to maintain an action, suit, or proceeding against the foreign LLC.

**Appropriation:** None.

**Fiscal Note:** Not requested.

**Effective Date:** The bill takes effect 90 days after adjournment of the session in which the bill is passed.

**Staff Summary of Public Testimony:**

(In support) The bill will address and resolve two issues that need immediate attention. First, under the *Chadwick Farms* decision issued by the Washington Supreme Court, a certificate of cancellation abates all legal claims. This decision leaves creditors in an untenable situation. The second issue relates to voluntary dissolution of an LLC. The law requires the OSOS to cancel a voluntarily-dissolved LLC's certificate of formation within 120 days of its dissolution. Many LLCs require more than 120 days to dissolve, and this requirement creates unintended problems. The bill is a simple bill and the intent is to make technical corrections. A certificate of cancellation is an old concept. The Washington State Bar Association intends on significantly revising the LLC Act in the future and will likely remove certificates of cancellation from the LLC Act.

(With concerns) There may be an issue with the provisions allowing a dissolved LLC to dispose of known claims. This provision may establish a 90-day statute of limitations for known claims. This limitation may have serious consequences in circumstances where a claim is known to the LLC, but the elements are not known to the potential claimant. The bill should be amended to address these types of claims. The bill amends the claims survival statute and only references a certificate of dissolution. This provision needs to be amended to address situations where an LLC does not file a certificate of dissolution but files a certificate of cancellation.

(Opposed) None.

**Persons Testifying:** (In support) Brian Todd and Don Percival, Washington State Bar Association; and Larry Shannon, Washington State Association for Justice.

(With concerns) Jeremy Stillwell, Washington State Community Associations Institute.

**Persons Signed In To Testify But Not Testifying:** None.

## OFFICE RECEPTIONIST, CLERK

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**To:** Mariah A. Lyng  
**Cc:** rpw@witherspoonkelley.com; mjk@witherspoonkelley.com; aliciaa@witherspoonkelley.com; Daniel S. Houser; Ian McDonald; Jerry H. Stein; Justin D. Sudweeks; Ken Strauss; Leonard D. Flanagan  
**Subject:** RE: 91039-1 - William Houk, et ux. v. Nichols & Shahan Development, LLC, et al.

Received 12-22-2014

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

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**Sent:** Monday, December 22, 2014 4:20 PM  
**To:** OFFICE RECEPTIONIST, CLERK  
**Cc:** rpw@witherspoonkelley.com; mjk@witherspoonkelley.com; aliciaa@witherspoonkelley.com; Daniel S. Houser; Ian McDonald; Jerry H. Stein; Justin D. Sudweeks; Ken Strauss; Leonard D. Flanagan; Mariah A. Lyng  
**Subject:** 91039-1 - William Houk, et ux. v. Nichols & Shahan Development, LLC, et al.

Dear Clerk of the Supreme Court,

Attached for filing is the Petitioners' Motion to for Extension of Time to File Petition for Review, Declaration of Leonard Flanagan, and [proposed] Petition for Review with subjoined Certificates of Service.

Thank you.

Mariah Lyng  
Office Manager/ Paralegal

Stein, Flanagan, Sudweeks & Houser, PLLC  
901 Fifth Avenue, Suite 3000  
Seattle, WA 98164

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