FILED

SEP 16 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By

No. 311635

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

WILLIAM HOUK, et ux.,

Respondents.

v.

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

Petitioners,

REPLY BRIEF OF PETITIONERS NICHOLS & SHAHAN DEVELOPMENTS, LLC and JOSEPH K. NICHOLS

ROSS P. WHITE, WSBA # 12136
MICHAEL J. KAPAUN, WSBA # 36864
WITHERSPOON, KELLEY, DAVENPORT& TOOLE, P.S.
422 West Riverside Avenue, Suite 1100
Spokane, Washington 99201
Counsel for Petitioners

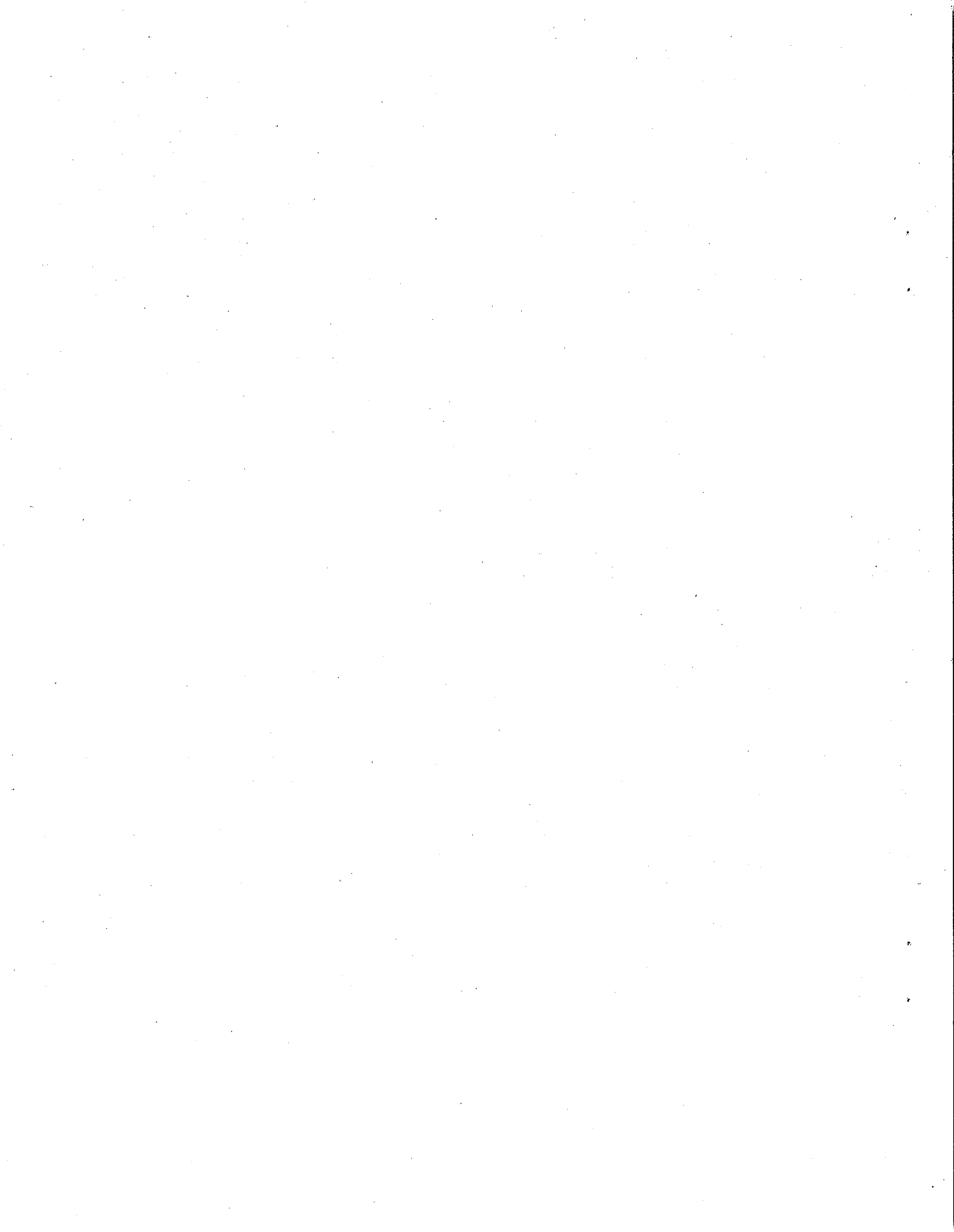


TABLE OF CONTENTS

I. REPLY 1

A. Clarification regarding the standard of review 3

B. RCW 25.15.303 is undoubtedly a statute of limitations 6

1. The Washington State Supreme Court unanimously agreed that RCW 25.15.303 is a statute of limitations 7

2. Division I of the Court of Appeals applied RCW 25.15.303 as a statute of limitations 8

3. The Plaintiffs consistently argued that RCW 25.15.303 is a statute of limitations and cannot take a contrary position on appeal 9

C. The Plaintiffs cannot deny their prior admissions That NSD dissolved on October 2, 2006 9

D. There is no basis in the Record for concluding that NSD was "cancelled" by the Secretary of State 11

E. Even if permitted to argue that NSD was cancelled, the Plaintiffs have failed to demonstrate that the 2010 amendments to the LLC Act brought cancelled LLCs back into existence or tolled any limitations period 13

F. There is no support for the Plaintiffs' new argument that NSD continued to operate as a *de facto* LLC post-dissolution 16

G. The Plaintiffs should not be permitted to amend their Complaint to assert new claims against Mr. Nichols that do not conform to the evidence and were not timely raised 17

1. The Record demonstrates that Mr. Nichols was not the "Seller" and he cannot be held liable as such 17

2. There is no basis for winding up liability, which would be time-barred in any event 19

3. The Plaintiffs cannot prevail against Mr. Nichols on an action for "piercing the veil" of NSD 20

4. The Plaintiffs failed to timely amend their claims 21

H. NSD is entitled to an award of their reasonable costs and attorneys' fees 22

II. CONCLUSION 24

TABLE OF AUTHORITIES

Cases

Almquist v. Finley School Dist. No. 53,
114 Wn.App. 395 (Div. III 2002)..5

Arkison v. Ethan Allen, Inc., 160 Wn.2d 535 (2007)....................................11

Ballard Square Condo. Owners Ass'n v. Dynasty Const. Co.,
158 Wn.2d. 603 (2006)..7, 14

Chadwick Farms Owners Ass'n v. FCH, LLC,
166 Wn.2d 178 (2009)...7, 8, 9, 13, 15, 21

City of W. Richland v. Dep't of Ecology,
124 Wn.App. 683 (Div III 2004)...8

Johnson v. Reehorn, 56 Wn.App. 692 (Div. I 1990)......................................5

Lindblad v. Boeing Co., 108 Wn.App. 198 (Div. I 2001).................................5

Matthias v. Lehn & Fink Products Corp.,
70 Wn.2d 541 (1967)..5

Otis House. Ass'n v. Ha, 165 Wn.2d 582 (2009)..5

Quality Food Centers v. Mary Jewell T, LLC,
134 Wn. App. 814 (Div. I 2006)..23

Quintana v. Los Alamos Medical Ctr.,
119 N.M. 312 (N.M. Ct. App. 1994)...14

Ross v. Kirner, 162 Wn.2d 493 (2007)...18

Serrano on Cal. Condo. Homeowners Ass'n v. First Pac. Dev., Ltd.,
143 Wn.App. 521 (Div. I 2008)...8, 9

Singleton v. Frost, 108 Wn.2d 723 (1987)..23

Snyder v. Roberts, 45 Wn.2d 865 (1955)..18

Sorrel v. Eagle Healthcare, Inc.,
110 Wn.App. 290 (Div. I 2002) 5

Walden Home Builders v. Schmit,
326 Ill. App. 386 (Ill. App. Ct. 1945)...14

Zeleck v. Everett Clinic, 60 Wn.App. 107 (Div. I 1991)....................................4

Statutes

RCW 4.84.330 23

RCW 23B.14.340 7

RCW 25.15.290 ....12, 20

RCW 25.15.303 ....passim

Rules

RAP 2.5(a)...4, 5

RAP 10.3(c)...3

RAP 18.1 23

RAP 9.12 ....4, 5, 12

I. REPLY

The Spokane County Superior Court committed clear error by denying Nichols & Shahan Developments, LLC's ("NSD") and Joseph K. Nichols' [1] motions for summary judgment. Judge Tompkins' order, reviving previously time-barred claims against the Defendants, is so patently erroneous that the Plaintiffs now hardly bother to mention or defend it in their 50-page response brief.

The misguided theory that the 2010 amendments to RCW 25.15.303 revived the Plaintiffs' time-barred claims was created and forcefully advanced by the Plaintiffs at every stage of this litigation - on summary judgment and in response to the Defendants' Motion for Discretionary Review. Finding that the Superior Court committed "probable error that substantially alters the status quo", a commissioner of this Court granted the Defendants' request for discretionary review of Judge Tompkins Order, which "held that the amendment to RCW 25.15.303 applied retroactively to revive the Houks' cause of action, which was time-barred before the Legislature amended the statute." (Commissioner's Ruling at 1-2).

[1] As in their Motion for Discretionary Review and Opening Brief, Petitioners NSD and Mr. Nichols are collectively referred to herein as the "Defendants". The Respondents, William and Janice Houk, are collectively referred to herein as the "Plaintiffs".

After inviting the Superior Court to commit error on this issue, the Plaintiffs now seek to further alter the status quo by abandoning and contradicting arguments they advanced below. In this way, the Plaintiffs hope to advance an even more strained reading of the statutory scheme by arguing, for the first time on appeal, that: (1) RCW 25.15.303 is not a statute of limitations; (2) NSD never dissolved; (3) NSD was "cancelled" and ceased to exist in 2008; (4) NSD's "cancellation" tolled the statute of limitations for twenty months; and (5) the Legislature brought NSD back into existence with enough time for the Plaintiffs to file suit.

Over and over again - including before this Court - the Plaintiffs have conceded that RCW 25.15.303 is a three-year statute of limitations and that NSD was administratively dissolved on October 2, 2006. No party to this lawsuit has ever contended that NSD was "cancelled" and no evidence of cancellation by the Secretary of State is known to exist. Stated differently, the Plaintiffs' new legal arguments and factual contentions are completely devoid of articulation or support in the Record.

The Plaintiffs' desire to change the conversation and the undisputed facts is understandable, but impermissible. In reviewing a trial court's grant or denial of a motion for summary judgment, the Rules of Appellate Procedure clearly limit the appellate court's review to evidence and issues brought to the trial court's attention. Moreover, the Plaintiffs

are estopped from contradicting positions that they advanced in the Superior Court; particularly where those positions invited the lower court to commit the error presently under review.

Despite the Plaintiffs' creative attempt to reverse course and present new issues for review, the issue actually before the Court is quite simple; *i.e.*, whether the Superior Court erred in holding that the 2010 amendments to RCW 25.15.303 revived previously time-barred causes of action against the Defendants.

As detailed in the Defendants' Opening Brief, courts in Washington and across the United States have long-refused to construe subsequent legislation to revive time-barred claims.[2] The Superior Court's revival of time-barred claims without any direction from the Legislature to do so, constitutes clear error. The Defendants respectfully ask the Court of Appeals to reverse the Superior Court's Order and dismiss this action.

A. Clarification regarding the standard of review.

Although the parties agree that the standard of review for this appeal is *de novo*, the Plaintiffs now attempt to expand the Court's inquiry with a thinly-veiled sleight of hand. In order to prepare the Court for the litany of new issues raised for the first time in their brief, the Plaintiffs cite

---

[2] Due to the fact that the Plaintiff's brief does not make any effort to respond to the issue upon which discretionary review was granted (*i.e.*, the revival of time-barred claims), the Defendants will not repeat uncontested arguments contained in their Opening Brief, which are sufficient to reverse the Superior Court's order. RAP 10.3(c).

Rule of Appellate Procedure ("RAP") 2.5(a), which states that "[a] party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground." *Id.* (emphasis added).

As an initial matter, it should be noted that the Plaintiffs are remiss in failing to show how the issues they raise for the first time on appeal were "sufficiently developed" in the lower court. In fact, the record needed to support the Plaintiffs' new legal theories simply does not exist.

Equally important is the Plaintiff's complete disregard of RAP 9.12, the "Special Rule for Order on Summary Judgment", which provides that: "On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court." *Id.* (emphasis added).

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

700 (Div. I 1990) ("This issue [privity of contract] was not presented to the trial court and may not be raised in the Court of Appeals").

Although RAP 9.12 is the applicable rule, courts citing RAP 2.5(a) in the context of summary judgment have held that "[w]here the trial court had no opportunity to address the issue, we decline to consider it." *Sorrel v. Eagle Healthcare, Inc.*, 110 Wn.App. 290, 299, n. 25 (Div. I 2002). *See also*, *Almquist v. Finley School Dist. No. 53*, 114 Wn.App. 395, 401-02 (Div. III 2002) ("Simply put, these substantial legal theories advanced on appeal were not urged upon the trial judge in the first instance. We need not entertain them for the first time here."); *Lindblad v. Boeing Co.*, 108 Wn.App. 198, 207 (Div. I 2001) ("We will not review an issue, theory, argument, or claim of error not presented at the trial court level.").[3]

In addition, a party cannot take a position on appeal that is inconsistent with their position before the trial court. *Matthias v. Lehn & Fink Products Corp.*, 70 Wn.2d 541, 543 (1967) ("[T]he rule is well established that this court will not consider matters not presented to the trial court, nor will this court review a case on a theory different from that in which it was presented at the trial level.").

---

[3] Notably, the only case cited in support of the Plaintiffs' attempt to introduce entirely new issues on appeal, *Otis House. Ass'n v. Ha*, 165 Wn.2d 582 (2009), does not even concern a motion for summary judgment. (Respondent's Brief at 14). Rather, that case dealt with a trial court's denial of a motion to compel arbitration and is completely inapposite to the case at bar. *Id.* at 586.

The single issue presented for review in this case – whether time-barred causes of action were revived by subsequent amendment to the statute of limitations - is the product of the Plaintiffs' vigorous arguments in opposition to the Defendants' motions for summary judgment. On appeal, the Plaintiffs seek to run from the issues they raised below by introducing entirely new issues that were never presented on summary judgment and for which the Record was never developed. The Court of Appeals should decline to consider the multitude of new and inconsistent issues and claims raised by the Plaintiffs for the first time on appeal, many of which would be issues of first impression in Washington.

B. RCW 25.15.303 is undoubtedly a statute of limitations.

Perhaps the most curious new argument articulated throughout the Plaintiffs' brief is the contention that RCW 25.15.303 is not a statute of limitations. (Respondent's Brief at 2-5, 14-16). As detailed in Section I (A), *supra*, this argument should be summarily rejected because it was not raised by the Plaintiffs on summary judgment. Even if considered, the argument should not be well-taken given that the Washington State Supreme Court; the Court of Appeals; and even the Plaintiffs have consistently applied RCW 25.15.303 as a statute of limitations.

1. **The Washington State Supreme Court unanimously agreed that RCW 25.15.303 is a statute of limitations.**

In support of their new argument that RCW 25.15.303 is not a statute of limitations, the Plaintiffs claim that a narrow 5-4 majority of the Supreme Court "was simply wrong" in characterizing it as such.[4] (Respondent's Brief at 4, n. 3, citing *Chadwick Farms Owners Ass'n v. FCH, LLC,* 166 Wn.2d 178 (2009)). The Plaintiffs fail to acknowledge that, in addition to the majority, the four dissenting justices agreed that:

> The language of the amendment evidences that the legislature intended for the statute of limitations on a claim against an LLC to run for three years following dissolution and that such claims survive cancellation of the LLC within that three-year period. See RCW 25.15.303 . . . This language expressly provides a limitations period of three years that is triggered upon an LLC's dissolution.

166 Wn.2d at 207 (C. Johnson, dissenting). In other words, the Supreme Court unanimously agreed that RCW 25.15.303 is a statute of limitations.

This was not mere *obiter dicta* as the Plaintiffs suggest. (Respondent's Brief at 4, n. 3). Indeed, one of the principal issues decided in *Chadwick Farms* was whether RCW 25.15.303 would allow the plaintiffs to maintain causes of action against dissolved limited liability

---

[4] The Plaintiffs state that, "[t]o the best of counsel's knowledge, no Washington statute of limitations articulates an intent to bar actions in such a patently ambiguous manner – by mere plausible negative implication." (Respondent's Brief at 15). But RCW 23B.14.340 is almost identical in construction to RCW 25.15.303 and the Supreme Court characterized it as a "statute of limitations" in *Ballard Square Condo. Owners Ass'n v. Dynasty Const. Co.*, 158 Wn.2d. 603, 615-16 (2006).

companies that were cancelled prior to the expiration of the three-year limitations period. *Chadwick Farms*, 166 Wn.2d at 193-198. In order to decide whether RCW 25.15.303 altered the result of cancellation (abatement of claims), the Supreme Court was required to examine and apply the statute of limitations. That analysis is not mere *dicta*.[5]

However, even if the Court should entertain this new argument and find that the unanimous conclusion of Supreme Court regarding RCW 25.15.303 is *dicta*, the Court's conclusion is still persuasive authority. *City of W. Richland v. Dep't of Ecology*, 124 Wn.App. 683, 693 (Div III 2004).

2. <u>Division I of the Court of Appeals applied RCW 25.15.303 as a statute of limitations.</u>

Buried in a lengthy footnote, the Plaintiffs concede that Division I of the Court of Appeals applied RCW 25.15.303 as a statute of limitations. (Respondent's Brief at 5, n. 3, *citing Serrano on Cal. Condo. Homeowners Ass'n v. First Pac. Dev., Ltd.*, 143 Wn.App. 521, 524 (Div. I 2008)). The Plaintiffs do not – and cannot – contend that the Court of Appeals' application of RCW 25.15.303 as a statute of limitations was mere *obiter dicta*. Although not articulated in their brief, the Plaintiffs would presumably ask the Court to also disregard this persuasive authority on the basis that the Court of Appeals "was simply wrong".

---

[5] If the Plaintiffs are correct that RCW 25.15.303 was not intended to be a statute of limitations, one might wonder why the Legislature, amending the statute in 2010, did not react to *Chadwick Farms* by clarifying their supposed intent.

3. <u>The Plaintiffs consistently argued that RCW 25.15.303 is a statute of limitations and cannot take a contrary position on appeal</u>.

The Plaintiffs' new argument that RCW 25.15.303 is not a statute of limitations is particularly puzzling, given that the Plaintiffs have consistently taken a contrary position in accordance with *Chadwick* and *Serrano*. On summary judgment and in response to the Motion for Discretionary Review before this Court, the Plaintiffs referred to RCW 25.15.303 as a statute of limitations approximately 30 times. (CP 194-197, 200, 202-204; RP 22, 23, 27, 33, 42; Janice Houk's Reply [sic] Brief [to Defendants' Motion for Discretionary Review] at 1, 10, 12, 13).

As detailed in Section I (a), *supra*, the Plaintiffs cannot raise new issues for the first time on appeal; particularly where those issues are inconsistent with the Plaintiffs' prior arguments.

C. The Plaintiffs cannot deny their prior admissions that NSD dissolved on October 2, 2006.

As with their contention that RCW 25.15.303 is not a statute of limitations, the Plaintiffs now attempt to perform an about-face on the simple issue of whether NSD was administratively dissolved on October 2, 2006. (Respondent's Brief at 9-11, 16-17). In summary, the Plaintiffs now argue that there is insufficient evidence to establish that NSD was dissolved and that, as a result, RCW 25.15.303 does not apply.

On numerous occasions, before both the Superior Court and the Court of Appeals, the Plaintiffs repeatedly conceded that NSD was administratively dissolved on October 2, 2006 by the Secretary of State's filing of a Certificate of Administrative Dissolution.

Specifically, in responding to the Defendants' motions for summary judgment, the Plaintiffs referenced the Certificate of Administrative Dissolution at CP 174 and stated: "On October 2, 2006, the LLC was administratively dissolved by the Washington Secretary of State. . . The administrative dissolution was caused by the LLC's failure to file its annual list of officers and for not renewing its license." (CP 192).

Likewise, in responding to the Defendants' Motion for Discretionary Review, the Plaintiffs represented to this Court, as a fact, that "[t]he administrative dissolution was caused by NSD's failure to take action including the failure to file its annual list of officers and not renewing its license. . . The LLC was administratively dissolved by the State on October 2, 2006." (Janice Houk's Reply [sic] Brief [to Defendants' Motion for Discretionary Review] at 1-2).

Until now, the Defendants have never contested the sufficiency of evidence regarding NSD's date of dissolution or expressed any confusion with what the Certificate of Administrative Dissolution represents. Indeed, the parties have heretofore been in such complete agreement on

this issue that the "Agreed Order on Motions for Summary Judgment Brought by Defendants Joseph Nichols and Nichols & Shahan Developments, LLC" – presented by the Plaintiffs' attorney – states:

> 1. There are no questions of material fact as to certain activities that took place:
>
> . . .
>
> g. 10/2/2006: Nichols & Shahan Developments, LLC was administratively dissolved by the Secretary of State and a Certificate of Administrative Dissolution was filed by the Secretary of State.

(CP 307-308). The doctrine of judicial estoppel prevents the Plaintiffs from contradicting factual assertions that they advanced and relied upon in fashioning their arguments below and before this Court. *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538 (2007). Moreover, the Rules of Appellate Procedure prevent the Plaintiffs from raising this issue for the first time on appeal; particularly where the Plaintiffs agreed on summary judgment that the evidence was so strong it did not raise any issues of material fact. The claim that NSD was not dissolved is disingenuous and contradicted by the Plaintiffs' own concessions.

D. There is no basis in the Record for concluding that NSD was "cancelled" by the Secretary of State.

After taking issue with the sufficiency of evidence in the Record to establish the undisputed fact of NSD's administrative dissolution, the

Plaintiffs abandon their concern over sufficiency of evidence by claiming, for the first time on appeal, that NSD was "cancelled" and ceased to exist on October 2, 2008. (Respondent's Brief at 12).

Until now, no party has ever argued or even suggested that NSD was cancelled. As a result, there is absolutely no argument or evidence in the Record to support meaningful "review" of this entirely new issue. RAP 9.12 clearly states that the appellate court will not review evidence and issues that a party fails to bring to the attention of the trial court on a motion for summary judgment and there is no reason to grant the Plaintiffs a dispensation from the Court's rules in this instance.

Even if the Court were to consider this issue for the first time on appeal, it would find that the Record is conspicuously lacking any argument or evidence that the Secretary of State actually cancelled NSD's certificate of formation pursuant to RCW 25.15.290. The Plaintiffs not only failed to raise this issue, but also failed to carry their burden on summary judgment by coming forward with some evidence, none of which is known to exist, that cancellation of NSD actually occurred.

On summary judgment, the Plaintiffs presumably chose not to argue that NSD was cancelled because there was no known evidence to support that contention and because it would have resulted in the dismissal of their claims. Under the prior statutory scheme, the cancellation of a

limited liability company did not merely end the company's existence, but also caused all claims against the company to abate. *Chadwick Farms*, 166 Wn.2d at 189, 192. The Plaintiffs therefore had good reason to forego raising the issue of cancellation on summary judgment and they are precluded from introducing it for the first time on appeal.

E. Even if permitted to argue that NSD was cancelled, the Plaintiffs have failed to demonstrate that the 2010 amendments to the LLC Act brought cancelled LLCs back into existence or tolled any limitations period.

Whereas the Plaintiffs previously sought the revival of only time-barred claims, they now ask the Court (for the first time on appeal) to resurrect every LLC that was properly cancelled under the Washington LLC Act. What is more, the Plaintiffs also ask the Court (again, for the first time on appeal) to create a very convenient tolling period during the time period in which an untold number of LLCs did not exist. Although these new arguments are a creative attempt to bypass the statute of limitations, they are devoid of merit and cannot, in any event, be raised for the first time on appeal. *See* Section I (A), *supra*.

Even if the Court could entertain these new issues, the Plaintiffs fail to demonstrate that the Legislature had any intention of bringing non-existent LLCs back into existence. There is no language in the legislative history stating that this dramatic result was ever intended and the LLC Act

is entirely silent on the subject. Moreover, the Plaintiffs are unable to cite any relevant Washington cases to support their theory of spontaneous rebirth for entities that did not exist at the time of the 2010 Amendments.

Instead, the Plaintiffs principally rely upon a few out of state cases, such as *Walden Home Builders v. Schmit*, 326 Ill. App. 386 (Ill. App. Ct. 1945) and *Quintana v. Los Alamos Medical Ctr.*, 119 N.M. 312 (N.M. Ct. App. 1994), to build up a case for retroactivity of the amended provisions of the LLC Act. With respect to the one Washington case cited in the Respondent's Brief, *Ballard Square Condo. Owners Ass'n v. Dynasty Constr. Co.*, 158 Wn.2d 603 (2006), the Plaintiffs concede "the Court noted that retroactive intent was expressly set forth in the statute at issue". (Respondent's Brief at 30)(emphasis added). Indeed, in each of the cases cited by the Plaintiffs, there was some indication that the Legislature intended for the statute to be retroactive or the language providing for retroactivity was built into the statute.

That is not the case here. Neither the statute nor the legislative history state that, by no longer allowing LLCs to be cancelled after June 10, 2010, the Legislature somehow intended to revive those that had been properly cancelled in accordance with the LLC Act. The Plaintiffs' *ipse dixit* argument is simply not credible. Moreover, having never been raised

on summary judgment, the Court should decline to "review" this issue of first impression in Washington for the first time on appeal.

Equally without merit or precedent is the Plaintiffs' follow-on argument, not raised on summary judgment, that NSD's supposed cancellation tolled the three-year limitations period in RCW 25.15.303 for 20 months; conveniently giving the Plaintiffs enough time to file this lawsuit against NSD and Mr. Nichols. Cancellation, if it had occurred, would have caused the Plaintiffs' claims against NSD to immediately abate, *Chadwick Farms*, 166 Wn.2d at 189, 192, and there is no language in the amended LLC Act or its legislative history stating that the Legislature intended to revive abated claims against LLCs that had ceased to exist for several years.

Moreover, the Plaintiffs' new argument for tolling would apply only to their claims against NSD and fails to provide any basis for tolling the limitations period with respect to Mr. Nichols. In summary, the Plaintiffs argue that the limitations period for their claims against NSD was tolled for 20 months because the company did not exist and could not be sued for that period of time. Although the Plaintiffs' brief makes many new allegations that are unsupported by the Record, they do not go so far as to allege that Mr. Nichols "ceased to exist" and they do not allege that NSD's supposed cancellation impaired their ability to file suit against him.

Even if the Plaintiffs' creative new arguments are entertained for the first time on appeal, the statute of limitations contained in RCW 25.15.303 could not have tolled with respect to any claims against Mr. Nichols.

F. There is no support for the Plaintiffs' new argument that NSD continued to operate as a *de facto* LLC post-dissolution.

On summary judgment, the Plaintiffs failed to advance their new argument that NSD operated as a *de facto* LLC post-dissolution and the Plaintiffs may not raise this issue of first impression in Washington for the first time on appeal. *See* Section I (A), *supra*. Even if entertained, the argument is based on the false premise that NSD continued operations post-dissolution.

As purported evidence of post-dissolution operations, the Plaintiffs rely upon a contract for insurance that NSD entered into on August 4, 2005, which was more than a year prior to NSD's administrative dissolution on October 2, 2006. (CP 212). Moreover, the subsequent construction project discussed in the Plaintiffs' brief was built and funded by a separate entity called Overlook, LLC beginning in 2005. (CP 289). Simply stated, the Plaintiffs cannot prove that NSD continued operations after its date of dissolution and, having never raised the issue below, they are precluded from introducing for the first time on appeal.

G. The Plaintiffs should not be permitted to amend their Complaint to assert new claims against Mr. Nichols that do not conform to the evidence and were not timely raised.

This case has been pending since December 16, 2010 and, until now, the claims and issues in dispute have been crystal clear. The Plaintiffs' only factual basis for suing Mr. Nichols was that he was thought to be a "principal" of NSD and/or Best Development, the general contractor that built the house in question.[6] (CP 46, 282-285). Now, in an effort to further prolong a case that should have been dismissed on summary judgment, the Plaintiffs ask the Court to direct the filing of more untimely, meritless claims that do not conform to the evidence.[7]

1. <u>The Record demonstrates that Mr. Nichols was not the "Seller" and he cannot be held liable as such.</u>

The Plaintiffs' argument that Mr. Nichols might be held liable as the "Seller" of the Plaintiffs' home is easily dismissed by the undisputed facts in the Record. There is no dispute that NSD owned the Property at issue. (CP 112-113, 152). The Plaintiffs' offer to purchase the property, which was not prepared by Mr. Nichols, erroneously placed Mr. Nichols' name in the "Seller" line. (CP 154). However, Mr. Nichols signed each

---

[6] It is undisputed that Mr. Nichols was never a principal or employee of Best Development, as the Plaintiffs appear to concede. (CP 113, 299-302).

[7] Although the Plaintiffs argue that they should be allowed to amend their Complaint to "conform to the evidence", the entire section of their brief devoted to this argument does not contain any citations to evidence in the Record. (Respondent's Brief at pp. 36-43).

portion of the REPSA by disclosing, directly beneath his signature, that he was executing the agreement as the manager of an LLC. (CP 158, 159, 162). Prior to closing on the sale, the Plaintiffs received a HUD Settlement Statement disclosing the "Name of Seller" as "Nichols & Shahan Development, L.L.C." (CP 164). At closing, the Plaintiffs signed a Real Estate Tax Affidavit that also identified NSD as the seller. (CP 172). Despite the obvious error at the top of the Plaintiffs' offer, there can be no dispute that the Plaintiffs were informed that NSD was the seller.

In any event, the issue of who sold the property to the Plaintiffs is definitively resolved by the Statutory Warranty Deed, which clearly identifies NSD as the seller. (CP 168-170). By accepting this deed, the Plaintiffs lost any chance of arguing that Mr. Nichols was the seller.

The doctrine of merger is founded on the parties' privilege to change the terms of their contract at any time prior to performance. Execution, delivery, and acceptance of the deed becomes the final expression of the parties' contract and therefore subsumes all prior agreements. *Snyder v. Roberts,* 45 Wn.2d 865, 871 (1955). Execution and acceptance of a deed varying from the terms of the underlying purchase and sale agreement amends the contract so that the provisions of the deed generally fixes the parties' rights. *Ross v. Kirner*, 162 Wn.2d 493, 498 (2007), *citing Snyder* at 871.

Even if the REPSA was ambiguous with respect to whom the seller was, the Plaintiffs' acceptance of the Statutory Warranty Deed amended the REPSA to clearly identify NSD as the seller. As a matter of law, the doctrine of merger makes it impossible for the Plaintiffs to prevail against Mr. Nichols on the basis that he was the seller. Moreover, the numerous documents accepted by the Plaintiffs prior to and at closing demonstrate that they were informed of Mr. Nichols' actions on behalf of the LLC.

2. <u>There is no basis for winding up liability, which would be time-barred in any event.</u>

The Plaintiffs' proposed new claim against Mr. Nichols for failing to properly wind up NSD should also not be permitted for numerous reasons. The Plaintiffs presume, but cannot establish, that Mr. Nichols was the member of NSD responsible for winding up the LLC after its administrative dissolution. There are simply no facts in the Record or in existence to establish this threshold question.

Even if winding up had been Mr. Nichols' responsibility, there is no evidence that the Plaintiffs' existing claims were "known" to Mr. Nichols. Mr. Nichols testified that NSD's only known creditor was INB Bank, for a construction loan that was paid off at closing, and that NSD had no other assets besides the residence sold to the Plaintiffs. (CP 293).

By the time the Plaintiffs filed this lawsuit in 2010, Mr. Nichols could not have reinstated NSD, even if he wanted to. That is because the version of RCW 25.15.290 in effect when NSD dissolved provided a two-year limit on an LLC's ability to seek reinstatement.[8]

Finally, there can be no dispute that the Plaintiffs' proposed claims for failure to wind up would be time-barred by RCW 25.15.303 (2006). By its plain terms, that three-year limitations period begins to run on the date of dissolution and applies to "any right or claim existing, or any liability incurred at any time, whether prior to or after dissolution", including claims against managers or members of the LLC. (Emphasis added). Even if a member of NSD had a responsibility to wind up NSD and failed to do so within the two-year period provided for in the LLC Act (October 2, 2008), claims for failure to wind up would still be time-barred one year later, on October 2, 2009, under the plain language of the statute.

3. The Plaintiffs cannot prevail against Mr. Nichols on an action for "piercing the veil" of NSD.

Finally, the Plaintiffs attempt to introduce a new cause of action for piercing the veil of NSD on the basis that Mr. Nichols somehow abused the form of the LLC to escape liability. In addition to being

[8] The Respondent's Brief, citing a version of the statute that went into effect in 2010, erroneously states that NSD had 5 years to seek reinstatement. (Respondent's Brief at 38).

untimely, this proposed cause of action is also unsupported by facts in the Record.

First, there is no evidence that Mr. Nichols "stripped" or "gutted" assets from the NSD. As detailed above, NSD's only asset was the Houk residence and its only known creditor, INB Bank, was repaid at closing. As the Plaintiffs are fully aware, there is no insurance policy that could have been "maintained" or used to pay claims.

Of particular importance with regard to the proposed claim of piercing the LLC's veil is the complete lack of evidence that Mr. Nichols knew of NSD's dissolution in 2006 or had any intention of letting the LLC lapse to avoid liability.[9] Indeed, all the evidence is to the contrary and the Plaintiffs' cannot contradict their arguments on summary judgment, wherein they consistently averred that Mr. Nichols did not know about the dissolution until this lawsuit commenced. The proposed cause of action is not based in fact and is, in any event, time-barred by RCW 25.15.303.

4. The Plaintiffs failed to timely amend their claims.

This action had been pending for almost two years when the Court granted discretionary review on November 12, 2012. (CP 1-3). Prior to that, the Superior Court issued several scheduling orders that contained

[9] If Mr. Nichols was attempting to avoid liability by abusing the corporate form, he would have dissolved and cancelled NSD right after the Plaintiffs purchased their home, as was the case with one contractor in *Chadwick Farms*.

deadlines for amending claims and defenses. The Plaintiffs amended their Complaint once, on July 1, 2011. (CP 45-56). Even though this case was two weeks from trial when discretionary review was granted, the Plaintiffs have never asked the Superior Court for leave to assert additional claims against the Defendants – even after they moved for summary judgment on the statute of limitations contained in RCW 25.15.303.

Now, the Plaintiffs ask the Court to "direct" the Superior Court to permit untimely amendments that would be in violation of the Superior Court's scheduling orders. Given that the Plaintiffs' newly-proposed claims are unsupported by evidence in the Record and destined to fail as a matter of law, the Court of Appeals should decline the Plaintiffs' request to assert these untimely causes of action.

H. NSD is entitled to an award of their reasonable costs and attorneys' fees.

On the issue of attorneys' fees, the Plaintiffs' response begins on Page 43 by misstating the precise terms of the attorneys' fee provision in the REPSA, which provides, in its entirety:

> If Buyer, Seller, or any real estate licensee or broker involved in this transaction is involved in any dispute relating to <u>any aspect</u> of this transaction or this Agreement, each prevailing party shall recover their reasonable attorneys' fees. This provision shall survive Closing.

(CP 97)(emphasis added). Notably, the Plaintiffs excised the words "any aspect", underlined above, from this broad fees provision.

Contrary to the Plaintiffs' protestations, the Defendants' Opening Brief did cite relevant and published authority supporting their contractual entitlement to attorney fees under the REPSA. Indeed, the Defendants cited RCW 4.84.330 and *Singleton v. Frost*, 108 Wn.2d 723, 727-8 (1987) with respect to fees and costs at the trial court level. (Petitioners' Opening Brief at 23). In addition, the Defendants cited RAP 18.1 and *Quality Food Centers v. Mary Jewell T, LLC*, 134 Wn. App. 814 (Div. I 2006) in support of their request for fees on appeal. (Petitioners' Opening Brief at 23).[10] The Plaintiffs do not appear to take issue with these authorities.

Instead, the Plaintiffs' primary objections to an award of fees appear to be: (1) that Mr. Nichols is estopped from saying that he is a party entitled to an award of fees under the REPSA; (2) that the REPSA is ambiguous as to whether Mr. Nichols or NSD is the "Seller"; and (3) NSD is not entitled to fees if it was cancelled and ceases to exist.

If the Court were to entertain and adopt the Plaintiffs' new argument that NSD was cancelled, but find that NSD was not brought

[10] As the Plaintiffs point out in a footnote beginning on Page 45 of their brief, the Defendants' counsel mistakenly cited a recent unpublished decision of this Court, *Davey v. Windermere Services Co.*, in support of the Defendants' request for fees. That unreported decision has no precedential value and should be stricken from the Opening Brief. Even without that citation, the Defendants' Opening Brief still cited sufficient precedent to support an award of fees.

back in to existence, then NSD would have to acknowledge its inability to defend this suit and recoup attorney fees under the REPSA. However, the Plaintiffs consistently admitted that NSD is a dissolved LLC, not cancelled, and the last sentence of RCW 25.15.303 provides that actions such as this "may be prosecuted or defended by the limited liability company in its own name." As detailed in Section I(G)(1), *supra*, there can be no dispute that NSD and the Plaintiffs are parties to the REPSA. The Plaintiffs' action against NSD includes a cause of action for breach of contract and the other claims arise from the Plaintiffs' purchase of the home pursuant to the contract. If NSD should prevail, it is entitled to an award of its costs and fees under the contract.

If the arguments advanced by the Plaintiffs on appeal are entertained, Mr. Nichols should also be awarded fees under the contract. The Plaintiffs are now judicially estopped from denying that Mr. Nichols is a party or third-party beneficiary to the REPSA for the sole purpose of avoiding an award of fees.

II. CONCLUSION

The Superior Court committed clear error by reviving time-barred claims against the Defendants without any direction from the Legislature to do so. Apparently conceding this error, the Plaintiffs now raise

numerous new issues that were not presented on summary judgment, lack any support in the Record, and are devoid of merit.

Permitting the Plaintiffs to present these new issues and arguments for the first time on appeal would be contrary to the letter and spirit of the Court's rules. Moreover, it places the Defendants at a manifestly unfair position of having to respond, in an appellate reply brief, to numerous issues of first impression without the benefit of a proper Record.

The Defendants respectfully ask the Court to reverse the Superior Court's Order and dismiss the Plaintiff's time-barred claims against them. The Defendants further request that their reasonable attorney fees be awarded.

DATED this 16th day of September, 2013.

WITHERSPOON · KELLEY

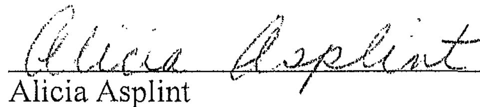
ROSS P. WHITE, WSBA No. 12136
MICHAEL J. KAPAUN, WSBA No. 36864

Counsel for Defendants / Petitioners

PROOF OF SERVICE

Pursuant to RCW 9A.72.085, the undersigned hereby certifies under penalty of perjury under the laws of the state of Washington, that on the September 16, 2013, the foregoing was filed with the Court of Appeals, Division III, and delivered to the following persons in manner indicated:

Leonard D. Flanagan Stein, Flanagan, Sudweeks & Houser 901 Fifth Avenue, Suite 3000 Seattle, WA 98146 **ATTORNEY FOR PLAINTIFFS**	☐ Hand Delivery ☒ U.S. Mail, postage prepaid ☐ Overnight Mail ☐ Facsimile Transmission ☐ Via Electronic Mail
Greg Jones Fallon & McKinley, PLLC 1111 Third Avenue, Suite 2400 Seattle, WA 98101 **ATTORNEY FOR DEFENDANT LANCE POUNDER EXCAVATING, INC.**	☐ Hand Delivery ☒ U.S. Mail, postage prepaid ☐ Overnight Mail ☐ Facsimile Transmission ☐ Via Electronic Mail
Burt Shahan d/b/a Best Development & Construction 1870 Corwin Road Bullhead City, AZ 86442-8774	☐ Hand Delivery ☒ U.S. Mail, postage prepaid ☐ Overnight Mail ☐ Facsimile Transmission ☐ Via Electronic Mail
Randy and Naomi Lee Stark R.K. Stark Construction Co. 15519 E. Kahlua Lane Mica, WA 99023-9649	☐ Hand Delivery ☒ U.S. Mail, postage prepaid ☐ Overnight Mail ☐ Facsimile Transmission ☐ Via Electronic Mail



Alicia Asplint