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ORIGINAL

NO. 71500-3-1

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

INNERSPACE FLOOR COVERINGS, INC., a corporation,

Appellant,

vs.

JANET HILL et al,

Respondents.

APPELLANT'S BRIEF

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INTRODUCTION

Rarely does a case arise to this Court of Appeals where the legal errors in dismissing claims on summary judgment are more patently erroneous. This is such a case. While litigation at the trial level is often a scorched-earth endeavor where governing law might be lost in the system, and while admittedly this process filters out many cases before resolution on the merits, when a party appeals its legal rights to the Court of Appeals it does so with the expectation that the law still matters and will eventually be enforced by our courts. Appellant respectfully requests that this Court of Appeals adhere to the rules of law and restore Appellant's legal rights to pursue claims to trial.

After prolonged, extensive litigation, on the eve of trial the trial court below dismissed a lawsuit that the trial court had previously ruled was duly and timely commenced. The trial court reached this conclusion by relying upon foreign authorities propounding a common law from the 1800s on an issue that has been addressed through multiple generations and multiple times by the Washington legislature, all of which was ignored by the trial court. Instead, the trial court cited to foreign authorities in the 1800s in foreign jurisdictions and buttressed in more modern terms only by stating that it was following a court of appeals ruling that interpreted a separate and different statute.

Although the rights at issue here are pursued by a corporation governed by a Washington statute that enacted no limitation period on when a duly commenced action must conclude, the trial court ignored those differences and followed a court of appeals decision interpreting the different LLC statute where the legislature did in fact establish a limitation period by which time lawsuits for dissolved corporations must conclude. The trial court's errors are diametrically contrary to established Washington law for statutory construction.

Also subject to this appeal is an earlier summary judgment dismissal of portions of Appellant's civil conspiracy claim. When the trial court waded into factual matters and dismissed a portion of that civil conspiracy claim, the trial court violated plainly established Washington law. While the trial court required direct evidence as proof of a civil conspiracy, our controlling authorities leave no doubt that due to the nature of a civil conspiracy claim, circumstantial evidence is always an appropriate basis for the factual determination of whether a civil conspiracy existed. In adherence to controlling, well-established law, the trial court's disposition of this matter must be reversed. The Appellant is entitled to its day in court to prove the claims plead and pursued. A grave injustice has occurred that can only be remedied if the law is enforced and reversal ordered by this Court of Appeals.

ASSIGNMENTS OF ERROR AND ISSUES

1. The trial court's summary judgment dismissal violated Washington law and constitutes reversible error in dismissing a duly commenced lawsuit filed by a dissolved corporation.

   (a) The trial court erred by relying upon foreign authorities about "common law" from the 1800s despite the existence of Washington statute and caselaw.

   (b) The trial court erred by failing to properly construe the controlling corporations statute which contains no limitation period on when a legal action must conclude, only a limitation period on when a legal action must commence.

   (c) The trial court failed to properly conclude that common law about dissolved corporations being "dead" had been abrogated by the Washington legislature.

   (d) The trial court erred by following a court of appeals case interpreting a separate and different LLC statute despite the undisputed fact that this matter is governed by the corporations statute.

2. The trial court erred by dismissing part of a civil conspiracy claim on summary judgment.

   (a) The trial court erred by making factual determinations and dismissing the Finishing Touch portion of Appellant's civil conspiracy claim.

   (b) The trial court erred by requiring direct evidence for a civil conspiracy claim when Washington law clearly anticipates that circumstantial evidence is the only evidence that might be available for this factual question.

STATEMENT OF THE CASE

Appellant Innerspace Floor Coverings, Inc. is a dissolved Washington corporation ("Innerspace") formerly in the business of providing professional flooring services.[1] In January 2012, Appellant commenced a lawsuit against its former attorney Janet Hill, Respondent.[2]

The record shows prolonged litigation by Respondent,[3] including two trial continuances initiated by Respondent and multiple rounds of summary judgment briefing. Among other rulings, Respondent's motion to dismiss the Complaint as not timely commenced was denied by the trial court.[4]

On the eve of trial, the trial court dismissed Appellant's claims.[5] The trial court based this ruling on a purely legal issue—whether a dissolved corporation becomes dead under old common law rules and a lawsuit abates unless the corporation achieves reinstatement.[6]

Because this summary judgment dismissal is purely a legal issue, Appellant presents this abbreviated statement of the case. Prior to dismissing the entire Complaint on summary judgment, the trial court had

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[1] CP 1-5
[2] CP 6-11
[3] CP 1-933
[4] CP 542
[5] CP 897-899
[6] CP 910-915

also dismissed a factual portion of Appellant's civil conspiracy claim,[7] which claim otherwise survived Respondent's motion for summary judgment. The partial dismissal that is appealed is the dismissal that pertained to transactions identified as Finishing Touch, a competitor to Appellant called Finishing Touch Floors.

For civil conspiracy, the Complaint alleged:

> 12. Janet Hill assisted Allen Loun in obtaining a dissolution, redemption, or otherwise termination of his ownership interests in Innerspace, LLC.
> 15. Janet Hill was instrumental in obtaining the release or termination agreement for Allen Loun.
> 19. Allen Loun and Janet Hill exposed Innespace, LLC to liability for damages.
> 20. Allen Loun and Janet Hill subjected Innerspace, LLC to liability for damages.
> 22. Defendants Allen Loun and Janet Hill acted in concert and/or as co-conspirators.[8]

The *Finishing Touch* portion of the civil conspiracy claim alleges that Janet Hill and Allen Loun acted in concert to damage Innerspace. Evidence shows that Janet Hill assisted Allen Loun in collecting Innerspace financial information under pretense, which information Allen Loun utilized for the purpose of informing the competitor *Finishing Touch* about Innerspace's customer base and vulnerability to a lawsuit, which lawsuit by Finishing Touch resulted in Appellant being prohibited from continuing business.

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[7] CP 832-835
[8] CP 2-3

A Declaration from Dave Gillette states:

> 12. ...I can see now, from what we learned in 2009 and have seen in document discovery, that Janet Hill was ignoring me and working with Allen Loun, and against me and Innerspace, from that point forward.
>
> 13. Allen Loun had obtained Innerspace financial records in early 2007 under the pretense of wanting to help me pay off the debts; however he actually just used that information to list the debts for discharge in bankruptcy and likely to share customer lists with Finishing Touch Floors...
>
> 15. As soon as Allen Loun started working at Finishing Touch Floors, Innerspace was sued by Finishing Touch Floors. At that point in time I believed Janet Hill was still counsel to Innerspace and still owed attorney-client obligations to Innerspace. I was shocked to learn later in 2009 that Janet Hill was actually cooperating with Allen Loun at Finishing Touch Floors ...[9]

The trial court ruled on the character of the evidence with regard to the portion of the civil conspiracy claim that pertained to Finishing Touch and dismissed that part of the civil conspiracy claim.[10]

Appellant timely appealed these dismissals.[11]

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[9] CP 180-181
[10] CP 832-835
[11] CP 919-931

ARGUMENT & AUTHORITY

The trial court summarily dismissed a duly commenced lawsuit by fashioning from old common law notions a deadline to conclude a lawsuit, which deadline does not exist within the controlling statute. The trial court failed to properly apply the law, failed to acknowledge that dissolution has a special statutory meaning, and instead resurrected antiquated notions about corporate "death" from the 1800s. The trial court based its ruling on its stated premise: "Under the common law, a corporation was effectively dead at dissolution and lost the power to, among other things, affirmatively maintain actions."[12]

Last year, this Court of Appeals rebuked that legal error.

> The WBCA's legislative history reinforces the conclusion that "dissolution" has a special statutory meaning. Under the statute, "corporate dissolution" should not be equated with "corporate death."[13]

In the same decision, this Court explained, under the new statutory regime for dissolution, "that *suits by or against the* [dissolved] *corporation are not affected in any way* [by dissolution]."[14] The trial court's error is obvious and requires reversal and remand.

The trial court also erred by making factual questions and entering summary judgment dismissal of part of a civil conspiracy claim. The

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[12] CP 911

[13] *Donlin v. Murphy*, 174 Wn. App. 288, 299, 300 P.3d 424, 429 (2013).

[14] *Id.* (emphasis in original quotation).

standard on review for summary judgment dismissals is well established: "A summary judgment order is reviewed by the appellate court de novo, engaging in the same inquiry as the trial court."[15] Further: "There is a strong preference for resolution of disputes on the merits."[16]

A. The legislature did <u>not</u> limit when a lawsuit must conclude and the trial court erred by fashioning the reinstatement period into a limitation because nothing in the statute requires reinstatement. On the contrary, reinstatement is no longer necessary because dissolution is no longer equated with "death."

After previously ruling that the lawsuit was timely commenced, on the eve of trial, the trial court held:

> This court will follow *Pacesetter* in applying the common law rule that a dissolved business corporation cannot affirmatively maintain an action once the reinstatement period has passed.[17]

Going outside the statute—relying instead on foreign jurisdiction citations of common law[18] that predated the enactment of survivorship rights for dissolved corporations—the trial court erroneously declared that the reinstatement period constitutes a deadline for conclusion of a pending lawsuit that was timely commenced.[19]

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[15] *Highline Sch. Dist. No. 401 v. Port of Seattle,* 87 Wn.2d 6, 15, 548 P.2d 1085 (1976); *Mahoney v. Shinpoch,* 107 Wn.2d 679, 683, 732 P.2d 510 (1987).
[16] *Griffith v. City of Bellevue*, 130 Wn.2d 189, 192, 922 P.2d 83 (1996).
[17] CP 915.
[18] *See infra* fn21.
[19] CP 911 (Memorandum Opinion), stating: "Under the common law, a corporation was effectively dead at dissolution and lost the power to, among other things, affirmatively maintain actions....In the mid-to late 19th century, many jurisdictions began relaxing the common law rule by enacting statutes that permitted corporations to "wind up" their

The trial court's duty was to base its ruling on the statute, especially given that our legislature has given "dissolution" special statutory meaning that remedied defects in the common law.

> Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances.[20]

Like other jurisdictions, Washington has enacted statutes to remedy the harsh results of the old common law on dissolved corporations.[21] It is the

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activities—including commencing and maintaining actions—during a specified period after the date of dissolution. *See e.g., Dundee Mortgage & Trust Inv. Co. v. Hughes*, 77 F. 855, 856 (C.C.D. Or. 1896); *Franklin Bank v. Cooper*, 36 Me. 179, 183 (1853).

[19] *Overlake Homes, Inc. v. Seattle-First Nat. Bank*, 57 Wn.2d 881, 885, 360 P.2d 570 (1961), quoting *Munn v. State of Illinois*, 94 U.S. 113, 24 L.Ed. 77 (1876).

[20] *Overlake Homes, Inc. v. Seattle-First Nat. Bank*, 57 Wn.2d 881, 885, 360 P.2d 570 (1961), quoting *Munn v. State of Illinois*, 94 U.S. 113, 24 L.Ed. 77 (1876).

[21] Fletcher Cyclopedia of the Law of Corporations chronicles modern developments and through footnotes in Chapter 65, §8147 demonstrates that, under new statutes, courts across the country are consistently allowing lawsuits to continue to conclusion when timely commenced. For disputes when the same question presented here has arisen, Fletcher identifies "cases holding that pending suits may be continued to conclusion despite expiration of the survival period." The examples contained in footnote 14 thereto show:

> Statute gave two years to commence suits in corporate name and as much time as was necessary to prosecute them to judgment. Franklin Bank v. Cooper, 36 Me 179.
>
> The action if commenced within the three years can be concluded thereafter. Bewick v. Alpena Harbor Improvement Co., 39 Mich 700.
>
> A corporation dissolved under special act providing that pending suits shall not be affected, may prosecute such a suit to judgment though more than the three-year period for which the existence of corporations dissolved under general statutes is continued for purpose of litigation has expired. New England Auto Inv. Co. v. Andrews, 47 RI 108, 130 A 863.

Even the case that cited as contrary in footnote 13 is actually consistent because it allows maintenance of a lawsuit through judgment and execution on the judgment:

> [S]ince Delaware statute provides that with respect to any suit commenced against a corporation prior to the expiration of three years, the corporation shall, for purposes of such suit, be continued as a body corporate beyond the three-year period and until any judgment therein shall be fully executed. Louisville Trust Co. v. Glenn, 66 F Supp 872.

statute that must be followed and enforced, and not common law notions which have been dead for almost fifty years when the survivorship statutes began to be enacted in Washington.[22]

RCW 23B.14.050(2)(e) provides that dissolution does not "[p]revent commencement of a proceeding *by or against the corporation.*" (emphasis added). The Washington legislature established no deadline for the conclusion of lawsuits by dissolved corporations. This Court has already established that "that *suits by or against the* [dissolved] *corporation are not affected in any way* [by dissolution]."[23]

Nothing in chapter 23B requires reinstatement as a condition of

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Across the nation there is only one outlier authority, and it is Oregon:

> Oregon law giving five years to prosecute or defend actions after dissolution, abates pending ones not brought to conclusion within that time. Dundee Mortgage & Trust Inv. Co. v. Hughes, 77 F 855.

Review of the Oregon statutes identifies grounds to distinguish the harsh Oregon outcome primarily because Washington chose to not establish a wind up duration. Nonetheless, even in general principle the Oregon authority is an outlier and not a split in authority. Rather, it is the exception that proves the new rule, which rule is that, when a dissolved corporation is authorized to commence proceedings, part and parcel to that right is the ability to continue the proceedings to their conclusion.

[22] Despite erroneous dicta in *Maple Court Seattle Condominium Assn v. Roosevelt, LLC*, 139 Wn. App. 257, 160 P.3d 1068 (2007), there is no way to accurately suggest that "dissolved corporations are prohibited from affirmatively maintaining an action." This Court's decision in *Donlin*, *supra*, should finally put to rest such misstatements. The *Maple Court* assertion that "corporations are prohibited from affirmatively maintaining an action" had been false since 1965 when the Washington legislature enacted its first survival of remedy after dissolution statute in c53 §108, which was amended in 1980, 1982, 1983, and repealed effective 1989 when it was replaced by the 1989 enactment of RCW 23B.14.050 for the affirmative rights of a corporation and 1990 c178 enactment of RCW 23B.14.340 to separately define rights of those claiming against the corporation. Ever since 1965, dissolved corporations in Washington have been authorized to affirmatively maintain an action. Since 1965, they have not been accurately deemed "dead" because our legislature has expressly created a survival of rights that did not exist under the old laws.

[23] *Id.* (emphasis in original quotation).

maintaining a lawsuit. And nothing in chapter 23B establishes a deadline when lawsuits must conclude. Under well-established law, the trial court did not have authority to add those provisions to the statute: "We will not read into the statute a limitation that the legislature did not establish and does not exist."[24] Moreover: "Courts will not read into a statute that which the legislature left out."[25] The trial court erred by violating these principles.

B. The trial court failed to follow the fundamental rule of statutory construction by not enforcing the language of the statute itself and adopted an interpretation that renders statutory language meaningless or superfluous by eviscerating the established wind-up right to a lawsuit.

> Where statutory language is plain and unambiguous, a statute's meaning must be derived from the wording of the statute itself.[26]

There is no ambiguity in the language used the legislature. The trial court identified no ambiguity. Instead, the trial court superimposed old common law notions and added something to the statute that the legislature left out.

Leaving something out is not the same thing as an ambiguity. While ambiguities might be interpreted, our appellate courts have prohibited the act taken by the trial court: "Courts will not read into a

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[24] *State v. Jacob*, 176 Wn. App. 351, 362, 308 P.3d 800 (2013), citing *Seattle Ass'n of Credit Men v. Gen. Motors Acceptance Corp.*, 188 Wn. 635, 639, 63 P.2d 359 (1936).
[25] *Jacob*, 176 Wn. App. at 361, citing *Seattle Ass'n of Credit Men,* 188 Wn. at 639.
[26] *In re Matter of Swanson*, 115 Wn.2d 21, 27, 804 P.2d 1 (1990), quoting *Human Rights Comm'n v. Cheney Sch. Dist. 30,* 97 Wn.2d 118, 121, 641 P.2d 163 (1982).

statute that which the legislature left out."[27] If the legislature had wanted to require re-instatement for the continued maintenance of a lawsuit, or if the legislature wanted to establish a deadline when a lawsuit must conclude, the legislature could have done so. It did not.

Although Appellant's lawsuit was authorized under Washington law, the trial court rendered that a meaningless and superfluous right by denying Appellant the ability to take the lawsuit to resolution on the merits. That too violated a well-established rule of statutory construction: "[A] court may not construe a statute in a way that renders statutory language meaningless or superfluous."[28]

1. The old common law of corporate "death" has been superseded, abrogated, or modified by the Washington legislature with this Court of Appeals clarifying that the antiquated notion of a corporation being "dead" cannot be equated with corporate dissolution in this century.

It is beyond question: "The legislature has the power to supersede, abrogate, or modify the common law."[29] In *Donlin*, this Court of Appeals explained:

> Proposed subsection 14.05(a) [now codified at RCW 23B.14.050(1)] provides that dissolution does not terminate

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[27] *State v. Jacob*, 176 Wn. App. 351, 361, 308 P.3d 800 (2013), citing *Seattle Ass'n of Credit Men v. Gen Motors Acceptance Corp.*, 188 Wn. 635, 639, 63 P.2d 359 (1936).
[28] *Ballard Square Condominium Owners Ass'n v. Dynasty Const. Co.*, 158 Wn.2d 603, 610, 146 P.3d 914 (2006).
[29] *Potter v. Wash. State Patrol*, 165 Wn.2d 67, 76 (2008), see also *State v. Estill,* 50 wn.2d 331, 334–35, 311 P.2d 667 (1957); *State v. Mays,* 57 Wn. 540, 542, 107 P. 363 (1910).

> the corporate existence but simply requires the corporation thereafter to devote itself to winding up its affairs and liquidating its assets; after dissolution, the corporation may not carry on its business except as may be appropriate for winding-up.
> The proposed Act uses the term "dissolution" in the specialized sense described above and not to describe the final step in the liquidation of the corporate business. This is made clear by Proposed subsection 14.05(b) [now codified at RCW 23B.14.050(2)], which provides that chapter 14 dissolution does not have any of the characteristics of common law dissolution, which treated corporate dissolution as analogous to the death of a natural person and abated lawsuits, vested equitable title to corporate property in the shareholders, imposed the fiduciary duty of trustees on directors who had custody of corporate assets, and revoked the authority of the registered agent. Proposed subsection 14.05(b) expressly reserves all of these common law attributes and makes clear that the rights, powers, and duties of shareholders, the directors, and the registered agent are not affected by dissolution and that *suits by or against the corporation are not affected in any way.*[30]

The fact that Washington has enacted survivorship statutes for dissolved corporations is repugnant and antithetical to the old notion that corporations were dead upon dissolution.

> "A statute abrogates the common law when 'the provisions of a ... statute are so inconsistent with and repugnant to the prior common law that both cannot simultaneously be in force.' " *State v. Ortega*, 177 Wn.2d 116, 125, 297 P.3d 57 (2013), citing *Potter v. Wash. State Patrol,* 165 Wn.2d 67, 77, 196 P.3d 691 (2008) (alteration in original) (quoting *State ex rel. Madden v. Pub. Util. Dist. No. 1 of Douglas County,* 83 Wn.2d 219, 222, 517 P.2d 585 (1973)). "Furthermore, although the state of the law prior to the adoption of a statute

[30] *Donlin v. Murphy*, 174 Wn. App. 288, 299, 300 P.3d 424, 429 (2013), citing SENATE JOURNAL, 51st Legis., Reg. Sess., at 3095 (1989) (Wash. 1989) (emphasis in original quotation).

> must be considered when construing the legislative intent, 'where, as here, a statute is plain and unambiguous, it must be construed in conformity to its obvious meaning without regard to the previous state of the common law.'" *Ortega*, 177 Wn.2d at 125, quoting *Pub. Util. Dist. No. 1,* 83 Wn.2d at 222, 517 P.2d 585.

As this Court already instructed in *Donlin*, it is no longer appropriate to equate dissolution with death. That is true because the legislature has superseded, abrogated, or modified the old common law notion that a dissolved corporation was "dead."

2. The trial court erred by following a court of appeals case that interpreted a separate and different statute (RCW chapter 25, a statute which contrary to chapter 23 actually includes a limitation on when claims must be resolved.

While the trial court's decision was based primarily on old common law, the court erred again each time it purported to follow Washington appellate authorities. The trial court held:

> This court will follow *Pacesetter* in applying the common law rule that a dissolved business corporation cannot affirmatively maintain an action once the reinstatement period has passed.[31]

However, *Pacesetter* involved a dissolved corporation that had not timely commenced an action. As such, the case is not on point here where the dispute is not over the commencement of a lawsuit, but whether there is time period established by which time the lawsuit must conclude.

The trial court also based its ruling on *Maple Court Seattle*

[31] CP 915.

Condominium Assc. v. Roosevelt, LLC, 139 Wn.2d 257, 160 P.3d 1068 (2007).[32] In 2007, the Washington Court of Appeals upheld dismissal of an LLC that attempted to continue pursuing claims to wind up affairs beyond two years after the effective date of dissolution. The Court relied on the following statute, RCW 25.15.270(6):

> A limited liability company is dissolved and its affairs shall be wound up upon the first to occur of the following:
> ...
> (6) The expiration of two years after the effective date of dissolution under RCW 25.15.285 without the reinstatement of the limited liability company.

There is no similar termination date in the statutes controlling corporations. In contrast, for corporations our legislature left open the wind up period except as governed only by applicable commencement date requirements. Nonetheless, the Court of Appeals strayed off subject and added the following dicta:

> Limited liability companies are hybrids of both business corporations and partnerships. Dissolved corporations are prohibited from affirmatively maintaining an action.[33]

For that dicta, the Court of Appeals recited a footnote, n10, that cited *Follet v. Clark,* 19 Wn.2d 518, 521, 143 P.2d 536 (1943) and another vintage case *Gamble v. Alder Group Mining & Smelting Co.*, 5 Wn.2d 578, 582, 105 P.2d 811 (1940). Those cases relied on the old rule that

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[32] CP 913
[33] *Maple Court,* 139 Wn. App. at 262.

"while such corporation would not be permitted to maintain an action, it could, nevertheless, be sued and defend."[34] That is the reason for the use of the word "affirmatively" because back then a dissolved corporation could be sued but could not affirmatively sue. While the statement in *Maple Court* was true under Remington's Revised Statutes and interpreting caselaw from the 30s and 40s, that same statement was false when made in 2007.

The Court deciding *Maple Court* should have looked closer at the authority it cited in the immediately preceding footnote, n9, *Pacesetter Real Estate, Inc. v. Fasules*, 53 Wn. App. 463, 767 P.2d 961 (1989). There is no way to accurately suggest that "dissolved corporations are prohibited from affirmatively maintaining an action" in the face of the then current survival statute recited (RCW 23A.28.250) in *Pacesetter*:

> Survival of remedy after dissolution. The dissolution of a corporation either: (1) By the issuance of a certificate of dissolution by the secretary of state, or (2) by a decree of court, or (3) by expiration of its period of duration *shall not take away* or impair any *remedy available* to or *against such* corporation, its directors, officers, or shareholders, for any right or claim existing, or any liability incurred, *prior to such dissolution if* action or other proceeding thereon is commenced *within two years after the date of such dissolution.*[35]

While the two year limitation quoted in *Pacesetter* is no longer

[34] *Globe Constr. Co. v. Yost*, 173 Wash 522, 527, 23 P.2d 892 (1933).
[35] 53 Wn. App. at 467, n2 (italics in original).

part of the statutory scheme, the survival of rights continues to be true in 2013 where RCW 23B.14.050 establishes that a "dissolved corporation continues its corporate existence" and may wind up business and affairs by "[c]ollecting its assets" (1)(a) or "[d]oing every other act necessary to wind up and liquidate its business and affairs" (1)(e) with the assurance that the dissolution does not "[p]revent commencement of a proceeding by or against the corporation" (2)(e). While the legislature knows how to limit time periods as it did in the LLC statute, there is no such limitation for corporations and none can be imputed unless the legislature acts. Our Supreme Court mandates: "We cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language." *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003).

The fact that the legislature elected to establish a limitation period for winding-up in the context of an LLC is itself evidence that the legislature did not intend any such limitation for the winding-up of corporations..

> [W]here the Legislature uses certain statutory language in one instance, and different language in another, there is a difference in legislative intent.[36]

The trial court erred by assuming that a limitation period in the LLC statute supported his conclusion that there should also be a limitation

[36] *In re Matter of Swanson*, 115 Wn.2d 21, 27, quoting *United Parcel Serv., Inc. v. Department of Rev.*, 102 Wn.2d 355, 362, 687 P.2d 186 (1984).

period in the corporation statute. The legislature elected to not establish a limitation period, meaning the presumed intent was that there was no required date by which time a lawsuit must conclude.

C. The trial court erred by requiring direct evidence for the Finishing Touch portion of a civil conspiracy claim when Washington law establishes that conspiracy is a factual question for which circumstantial evidence is often all that is available and is competent.

The trial court parsed out a factual part of Appellant's civil conspiracy claim and dismissed claims related to Finishing Touch finding a lack of direct evidence to be insufficient. Our Washington Supreme Court has established that is not a valid ground for dismissal of a conspiracy claim:

> In 15 C.J.S., Conspiracy, § 26, p. 1043, the rule is stated as follows: 'The fact of the conspiracy may, of course, be shown by direct evidence, and should be so proved if this character of evidence is available; but since direct evidence is ordinarily in the possession and control of the alleged conspirators and seldom can be obtained, a conspiracy usually is susceptible of no other proof than that of circumstantial evidence, and therefore it is a well-settled rule that proof by direct and positive evidence is not necessary, and that circumstantial evidence, that is, evidence of the acts of the alleged conspirators and of the circumstance surrounding the transaction which is the basis of the charge, is admissible to prove the conspiracy charged.'[37]

In *Lyle v. Haskins*, our Washington Supreme Court recognized the character of evidence necessary for conspiracy claims is not direct evidence; instead, it is necessarily often the case that:

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[37] *Lyle v. Haskins*, 24 Wn.2d 883, 889-900, 168 P.2d 797 (1946) (emphasis added).

> [A] conspiracy must be inferred from "other facts and circumstances from which the natural inference arises that the unlawful overt act was committed in furtherance of a common design, intention, and purpose of the alleged conspirators. In other words, circumstantial evidence is competent to prove conspiracy."[38]

"Inferences" drawn from "facts and circumstances," after assessing the credibility of testifying witnesses, is squarely within the fact-finding province of the jury, not a judge ruling on summary judgment. As the Washington Supreme Court has stated, "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict."[39] It is reversible error for the trial court to have made a factual determination about the extent and reach of the civil conspiracy that the trial court otherwise correctly ruled to be established by prima facie evidence.

The evidence presented created a genuine issue of material fact with regard to whether the civil conspiracy, which the trial court allowed to go forward with regard to Timberline and Borgmann matters, also reached the Finishing Touch matter. The jury will hear evidence that Allen Loun and Janet Hill maintained secret communications and took actions adverse to Innerspace and Dave Gillette. Much of that direct

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[38] *Id.* at 899.

[39] *Herron v. KING Broadcasting Co.*, 112 Wn.2d 762, 768, 776 P.2d 98 (1989).

evidence comes in the form of emails and communications between those two while Allen Loun is at Finishing Touch Floors and using his Finishing Touch Floors emails. That evidence will include testimony about why it was inappropriate for Janet Hill to be taking instructions from the hostile competitor Finishing Touch Floors who was suing Innerspace at the time the communications took place. That evidence includes documents showing Allen Loun to be receiving a payoff from Finishing Touch Floors and only working there for the exact duration of the lawsuit against Innerspace. Because the other *Finishing Touch* claims, including the damage that resulted from the attorney's fees incurred, the payoff to Finishing Touch Floors, and the non-compete prohibition, will also be included in trial, the jury will have heard evidence regarding a series of three separate matters where direct evidence establishes an ongoing conspiracy spanning multiple matters.

A jury would be well within its rights, especially after assessing witness credibility and motivations, to draw a natural inference that the extent of this ongoing conspiracy included the Finishing Touch matter. Under controlling law, the jury is entitled to make that conclusion with or without direct evidence, and the evidence is sufficient for a jury to factually determine that acts and damages related to Finishing Touch were also in "furtherance of a common design, intention, and purpose of the

alleged conspirators." *Lyle v. Haskins*, 24 Wn.2d at 899. The trial judge committed reversible error when making those factual determinations and dismissing a part of the claim.

CONCLUSION

The trial court's errors are obvious and egregious. Regardless of whether there is a natural proclivity to remove claims from the docket, in the end controlling Washington law must be enforced and dismissals made on summary judgment are reviewed *de novo* with no deference for decisions made in the trenches below. The trial court's cited reliance on foreign authorities from the 1800s about an old "common law" is inexcusable given the extensive legislative actions that have been subsequently enacted in Washington.

This Court of Appeals recently acknowledged the abrogation of the antiquated notion that a corporation becomes "dead" for purposes of pursuing an action. Under the statutes enacted by the Washington legislature, Appellant here, a dissolved corporation, duly commenced the immediate legal action. In an environment where the length of a lawsuit is indeterminate and subject to being prolonged by a litigious Defendant, the legislature decided to not establish a limitation period for when a lawsuit must be concluded. The trial court had no authority to impose on the statute what the legislature did not itself enact. The trial court violated

established Washington law by rendering the statute superfluous and open to be defeated and rendered meaningless by litigious defendants who may successfully postpone and prolong the length of the lawsuit.

The error in dismissing the duly commenced lawsuit entirely on the eve of trial was not the trial court's first reversible error. Prior to that, the trial court had violated Washington law by wading into factual considerations, parsing out factual portions of the civil conspiracy claim, and dismissing portions of the civil conspiracy claims based on the absence of direct evidence. This was contrary to the standards plainly established by our appellate courts for civil conspiracy claims.

Injustice has occurred. Appellant respectfully requests this Court of Appeals enforce Washington law, reverse the trial court's dismissal, and remand the matter for trial.

DATED this 1st day of August 2014.

The Collins Law Group PLLC

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PROOF OF SERVICE

I certify under penalty of perjury that on the 1st day of August, 2014, I served a copy Appellant's Brief via email, per agreement of the parties, and U.S. Mail, postage prepaid on the following:

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