

64535-8

64535-8

NO. ~~82058-9~~

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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METCO HOMES, LLC, a Washington limited liability company,

Plaintiff/Petitioner

v.

N.P.R. CONSTRUCTION, INC., a Washington corporation; NATHAN R.  
ANDREWS AND JENNIFER ANDREWS, on behalf of their marital  
community, d/b/a N.P.R., d/b/a N.P.R. FENCE, d/b/a N.P.R. FENCING,  
N.P.R. FENCE, INC.; N.P.R. FENCING, INC., a Washington corporation,

Defendants/Respondents.

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**PETITIONER/APPELLANT METCO HOMES, LLC'S REPLY  
BRIEF**

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**I. Metco's Standing to Prosecute Claims Against NPR.**

NPR argues that Metco seeks *perpetual* existence<sup>1</sup> to wind up its affairs because of its belief that the law strictly limits Metco to winding up its affairs within two years regardless of circumstances or inherent confusion in the statutory scheme. NPR engages in this hyperbole without addressing the facts that Metco was attempting to wind up its affairs but was prevented from doing so by NPR's stall tactics. NPR also refuses to acknowledge the difficulty in reconciling the dissolution statutes applicable to winding up and canceling administratively dissolved LLCs.

As Metco argued in its Opening Brief, it was in the process of winding up its affairs at the time the two year period expired and could not file a certificate of cancellation without violating the Act. Requiring Metco to file for reinstatement would force it to re-start the whole process of winding up simply for the purpose of continuing litigation that had begun years before, but had not been completed due to roadblocks put in its way by NPR.

The trial court erroneously ruled that Metco had to reinstate itself to pursue its claims against NPR. A cancelled LLC, however, has no means to reinstate its certificate of formation. The LLC framework

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<sup>1</sup> NPR writes "It then contends that although it was administratively dissolved on June 1, 2006, it could continue to wind up its affairs *forever* because it never filed a certificate of cancellation." Reply Brief, p. 11 (emphasis added).

arguably allows for a winding up process notwithstanding the administrative dissolution or cancellation. Though administratively dissolved, Metco does not lack standing to prosecute its claims against NPR because its claims are part of its winding up activities, especially where Metco filed its claims with the Snohomish County Court before Metco's corporate status was ever an issue. Metco agrees that cancellation of its Certificate means the LLC can no longer actively perform its regular business, but does not preclude it from winding up which, in this case, includes prosecution of Metco's already pending and outstanding claims against NPR.

**II. RCW 25.15.303 Is Applicable.**

**A. Narrowly Interpreting RCW 25.15.303 Creates Absurd Results.**

The trial court interpreted RCW 25.15.303 to only allow claims *against* a dissolved LLC and not to action *by* a dissolved LLC. Even though the text of RCW 25.15.303 refers only to claims *against* a LLC and not to claims *by* a LLC, courts must avoid readings of statutes that result in unlikely, absurd, or strained consequences.<sup>2</sup>

To enforce RCW 25.15.303 as applying only *against* a dissolved LLC creates an aberrant result. It unfairly punishes a dissolved LLC

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<sup>2</sup> See *1000 Virginia Ltd. Partnership v. Vertecs. Corp.*, 158 Wn.2d 566, 146 P.3d 423 (2006).

attempting to wind-up its affairs, but at the same time allows it to be the target of litigation for another year.

The facts of this case point to the absurdity of the result. Here, a contractor pursues recovery for damages caused by a subcontractor, but because of road blocks thrown up by the subcontractor cannot complete the litigation within two years. Yet, even though it is “cancelled” and cannot complete the prosecution of its claims, it can, for at least another year, have an enforceable judgment for fees and costs taken against it.

RCW 25.15.303’s evident purpose is to create a three year survival status for claims *against*, but not *by* a dissolved LLC. There is no rational reason the Legislature would choose to punish a dissolved LLC by allow them to be sued, but not sue to protect themselves from claims arising out of the same facts and circumstances. This Court should interpret the statute consistent with the Legislative purpose, i.e., to provide a three year period for claims *by* or *against* a dissolved LLC. Disallowing Metco to prosecute its claims initiated before dissolution and which arise out of damages caused by NPR’s work yields unfair and absurd results.

**B. RCW 25.15.303 applies retroactively based upon the current state of the law.**

NPR erroneously asserts that RCW 25.15.303 cannot be applied retroactively. In *Chadwick Farms Owners Association v. FHC, LLC*, 139

Wn.App. 300, 160 P.3d 1061 (2007), the Court of Appeals, Division 1, held that RCW 25.15.303 is remedial and curative and, thus applies retroactively<sup>3</sup>. *Chadwick Farms* at 308-309. Based upon the current state of the law, RCW 25.15.303 applies retroactively to Metco.

**III. It would be inequitable and manifestly unjust to uphold the Court's order granting NPR's Motion for Summary Judgment and for attorney's fees and costs.**

NPR's assertion in its Response that it did not obtain Metco's corporate documents until June 9, 2008 and did not begin drafting its motion for summary judgment until after is contradicted by NPR's counsel billing invoices submitted in support of NPR's motion for calculation of fees and costs. The invoices submitted in support of NPR's motion provide the following pertinent descriptions of attorney work<sup>4</sup>:

1/29/08	EIM	<i>Analyze the corporate documents on Metco Homes, LLC and the case schedule to determine the dealings for filing motion to continue trial date (.3); telephone call to Steve Harrison regarding the same (.1).</i>
2/6/08	EIM	Draft letter to James Meade requesting that he stipulate to a trial continuance.
2/21/08	EIM	Draft motion for summary judgment based on the Chadwick Farms, Maple Court, and Emily Lane ruling on dissolved LLC's inability to prosecute claims.

<sup>3</sup> Review was granted by the Supreme Court of Washington and oral argument was heard on November 18, 2009. To date, a decision has not been issued.

<sup>4</sup> CP 482-614.

As discussed in detail in Metco's opening brief, NPR's actions and unavailability caused repeated delays in Metco's diligent prosecution of its claims against NPR. In an attempt to finally resolve this matter, on July 11, 2007, Metco noted the case for trial and it was set by the court for trial on May 5, 2008. NPR's counsel requested a 30-60 day continuance of the trial date because of an unavoidable "trial conflict." In the spirit of cooperation, Metco's attorneys accommodated this request and the case was set for trial in on December 8, 2008. Thereafter, NPR filed its motion for summary judgment to dismiss Metco's claims based upon the only recent administrative dissolution of Metco.

CR 60(b)(4) provides for relief from a judgment if there is fraud or misrepresentation by an adverse party. Vacating an order of judgment for misrepresentation is appropriate under CR 60(b)(4) where a party is prevented from fairly presenting its case or defense. *Lingren v. Lingren*, 58 Wn.App. 588, 596, 794 P.2d 526 (1990). CR 60(b)(4) is aimed at judgments that were unfairly obtained. *People's State Bank v. Hickey*, 55 Wn.App. 367, 372, 777 P.2d 1036 (1989).

NPR requested a trial continuance contemporaneously with receiving Metco's corporate documents. Immediately after Metco's counsel agreed to a trial continuance, NPR prepared its motion for summary judgment based upon Metco's dissolution. The motion was

drafted almost four months prior to the actual dissolution of Metco. NPR's billing records and the ultimate absence of a true trial conflict reveal that NPR misrepresented the need to continue the May 5, 2008 trial date so that it could file its Motion for Summary Judgment. NPR's misconduct in obtaining the trial continuance warrants vacating the summary judgment order. The summary judgment order was unfairly obtained and NPR's conduct prevented Metco from fairly prosecuting its claims against Metco based upon the fact that trial (May 5, 2008) would have been completed within two years of Metco's administrative dissolution and prior to administrative cancellation (June 1, 2008).

CR 60(b)(6) allows for vacation of a judgment where it "is no longer equitable that the judgment should have prospective application." *Gustafson v. Gustafson*, 54 Wn.App. 66, 74, 772 P.2d 1031, 1036 (1989). Moreover, under CR 60(b)(11), the court may relieve a party from a final judgment or order for any reason justifying relief from the operation of the judgment. *Treadwell v. Wright*, 115 Wn.App. 238, 251, 61 P.3d 1214, 1220 (2003). There is no question that equity has the right to step in and prevent the enforcement of a legal right whenever such enforcement would be inequitable. *Port of Walla Walla v. Sun-Glo*, 8 Wn.App. 51, 56, 504 P.2d 324 (1972). Equity will not interfere on behalf of a party whose conduct in connection with the subject matter or transaction in litigation

has been unconscientiously, unjust, or marked by want of good faith and will not afford any remedy. *Id.* (citing *Income Investors, Inc. v. Shelton*, 3 Wn.2d 599, 101 P.2d 973 (1940)).

It would be inequitable and manifestly unjust to uphold the Court's order granting NPR's Motion for Summary Judgment and for attorney's fees and costs. NPR's pre-meditated manufacture of the need for a trial continuance to take advantage of the technical and administrative dissolution of Metco lacked good faith and, as such, the order granting NPR's Motion for Summary Judgment should be vacated. At a minimum, NPR should be precluded from recovering attorney's fees and costs. It would be inequitable to allow NPR to profit from its bad faith actions.

**IV. NPR is not entitled to recover attorney's fees and costs.**

There is no basis for awarding NPR attorney's fees and costs. If Metco is deemed to be a properly cancelled LLC, it ceased to exist as a legal entity. NPR should not be allowed to have its cake and eat it too. RCW 25.15.070(2)(c) states:

A limited liability company formed under this chapter shall be a separate legal entity, *the existence of which as a separate legal entity shall continue until the cancellation of the limited liability company's Certificate of Formation.* (Emphasis added).

The basic rule of statutory interpretation is that a Court must not add words or clauses to statutes that do not exist. “When statutory language is unambiguous, the court will look only to that language to determine legislative intent. The court cannot add words or clauses to an unambiguous statute when the Legislature has chosen not to include that language. The court should assume that the Legislature means exactly what it says.” *State v. Freeman*, 124 Wn.App. 413, 415, 101 P.3d 878, 879 (2004). RCW 25.15.070(2)(c) unambiguously provides that an LLC ceases to exist as a legal entity upon cancellation of its Certificate of Formation. There is no basis for NPR to recover fees and costs from a legal non-entity.

NPR concedes that there is no case law awarding attorney’s fees and costs against a cancelled LLC. In an effort to avoid Washington’s clear statutory provision that a cancelled LLC ceases to exist as a legal entity, NPR cites two un-controlling and unpersuasive California cases; *Westoil Terminals Co. v. Harbor Ins. Co.*, 73 Cal.App. 4<sup>th</sup> 634 (1999) and *Catalina Investments, Inc. v. Jones*, 98 Cal.App. 4<sup>th</sup> 1 (2002).

*Westoil* involved a dispute between a limited partnership against two insurers for breach of contract, tortious breach of implied warranty of good faith and fair dealing, and declaratory relief. *Westoil* at 638. *Westoil* in no way addressed the issue of whether attorney’s fees and costs may be

recovered from a cancelled LLC, a legal non-entity. The only reference to costs (not attorney's fees) in *Westoil* is the last sentence of the opinion which states that "Appellant is awarded costs on appeal." *Id.* at 643. NPR fails to mention that Appellant Westoil was an active limited partnership, not a cancelled LLC.

In *Catalina*, plaintiff/appellant Catalina Investments, Inc. sought to overturn a decision by the Secretary of State of California rejecting Catalina's attempt to file a certificate of revocation of corporate dissolution. *Catalina* at 2-3. *Catalina* dealt with a dissolved corporation, not a cancelled LLC. Again, *Catalina* in no way addressed the issue of whether attorney's fees and costs may be recovered from a cancelled LLC, a legal non-entity. The only reference costs (not attorney's fees and costs incurred in the underlying litigation) in *Catalina* is the last sentence of the opinion which states that "Catalina shall bear costs on appeal." *Id.* at 10.

Neither *Westoil* nor *Catalina* address the issue of awarding attorney's fees and costs incurred by a party in an underlying litigation against a cancelled LLC.

NPR further attempts to avoid the unambiguous language of RCW 25.15.070(2)(c) by arguing that it is entitled to recover its attorney's fees and costs from Metco's insurer, Maryland Casualty Company

(“Maryland”). First, Maryland did not specifically request attorney’s fees and costs. Metco and Maryland’s second amended complaint alleges:

Pursuant to the express terms of the contracts between Metco Homes, L.L.C. and defendant, and to the maximum extent allowable by Washington law, including principles of equity, Metco Homes, L.L.C. is entitled to recovery of its settlement plus attorney’s fees and costs incurred by in the underlying matter. Metco Homes, L.L.C. is further entitled to recovery of its attorney’s fees and costs in this matter pursuant to express contractual agreement with defendants.<sup>5</sup>

Only Metco claimed attorney’s fees and costs pursuant to the express contractual agreement with NPR.

Second, Maryland is not a “contractor” or a party to the subcontract agreement between Metco and NPR which provides in pertinent part:

In any dispute between Contractor and Subcontractor, the prevailing party shall be awarded its reasonable attorney’s fees and costs.<sup>6</sup>

It is undisputable that Maryland was not a “Contractor” as required under the subcontract’s prevailing party fee provision. Further, Maryland was not a party to the subcontract such as to be entitled to fees under RCW 4.84.330. RCW 4.84.330 provides in pertinent part:

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<sup>5</sup> CP 138-199; 200-204; and 27-55.

<sup>6</sup> CP 181.

In any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorney's 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, whether he is the party specified in the contract or lease, or not, shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements.

\* \* \* \*

As used in this section "prevailing party" means the party in whose favor a final judgment is rendered.

The contract expressly provides that that prevailing party in a dispute between Contractor and Subcontract shall recover reasonable attorney's fees and costs. Metco, not Maryland, was the Contractor and the contract was between Metco and NPR.<sup>7</sup> Maryland was not a party to the contract and, thus, is not subject to the prevailing party provision.

There is no legal basis for recovering attorney's fees and costs allegedly incurred in an underlying litigation from a cancelled LLC, a legal non-entity. Once Metco was cancelled, it ceased to exist as a legal entity for all purposes. Awarding attorney's fees against a legal non-entity is an unreasonable result.

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<sup>7</sup> CP 181.

V. Conclusion.

This Court should interpret the LLC Act and RCW 25.15.303 to provide a three year period for claims *by* or *against* a dissolved LLC and allow Metco to continue prosecution of claims against NPR which were initiated before dissolution and arise out of damages caused by NPR's work. Any other result yields unfair and absurd results.

Metco was actively prosecuting its claims against NPR and others to recover monies it paid as a result of construction defects arising out of subcontractors' work at the Garden Grove II Condominium Project prior to administrative dissolution and cancellation. The trial court improperly delimited the winding up period to two years finding that Metco could only pursue its claims if it reinstated itself. The prosecution of its claims against NPR filed prior to administrative dissolution and cancellation was part of Metco's winding-up activities.

If it is determined that Metco's certificate of formation was properly cancelled, there is no basis for a recovery of fees and costs from Metco as a legal non-entity.

Respectfully submitted this 8 day of February, 2009.

  
FORSBERG & UMLAUF, P.S.

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**CERTIFICATE OF SERVICE**

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served the foregoing

**PETITIONER/APPELLANT METCO HOMES, LLC'S REPLY**

**BRIEF** on the following individuals in the manner indicated:

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**SIGNED** this 9<sup>th</sup> day of February, 2009, at Tacoma,

Washington.

  
Myia O. McMichael