

64535-8

64535-8

NO. ~~82058-0~~

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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.

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

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I. ASSIGNMENTS OF ERROR

The trial court erred in entering its Orders of July 31, 2008, September 3, 2008, and October 2, 2008 granting Defendant N.P.R. Construction, Inc., Nathan R. Andrews and Jennifer Andrews 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. and N.P.R. Fencing, Inc.'s (hereinafter collectively referred to as "NPR") motion for summary judgment dismissal of Metco Homes, LLC's ("Metco") claims, ruling that Metco could not maintain its suit against NPR because Metco is an administratively dissolved and cancelled limited liability company and did not seek reinstatement within two years after being administratively dissolved.

If the trial court's dismissal of Metco's claims against NPR is upheld, the trial court erred in entering its September 3, 2008 Order granting NPR's motion for calculation of attorney's fees and costs and entering judgment awarding NPR \$52,374.08 for attorney fees and costs against Metco, a legal non-entity.

The trial court erred in entering its October 2, 2008 Order denying Metco's Amended Motion to Vacate the Court's July 31, 2008 Order granting NPR's Motion for Summary Judgment based upon NPR's counsel's delays and misleading conduct.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether an administratively dissolved and cancelled limited liability company has the capacity to continue prosecuting claims initiated prior to administrative dissolution and cancellation as part of its “winding-up?”
2. Whether there is a basis for a recovery of attorney fees and costs from an administratively dissolved and cancelled limited liability company, a legal non-entity?
3. Whether the trial court abused its discretion in not vacating its Order granting summary judgment where NPR’s actions, unavailability, and misconduct caused repeated delays in Metco’s diligent prosecution of its claims?

III. STATEMENT OF FACTS

This matter arises out of the construction of the Garden Grove II Condominium project (“Project”) located in Everett, Washington.¹ Metco Homes, LLC (“Metco”) was the developer of the Project.² N.P.R. Construction (“NPR”) contracted with Metco to install vinyl siding and fencing at the Project.³

¹ CP 138-199 and 205-211.

² CP 67-137 and 205 -211.

³ CP 67-137.

On March 11, 2004, Metco and its insurer filed their complaint naming NPR, among others, and alleging causes of action for breach of contract, contractual indemnity, and equitable indemnity and seeking recovery of settlement monies paid to the Garden Grove II Homeowners Association to resolve claims for construction defect damages related primarily to siding-related defects arising from NPR's work.⁴ Metco filed a second amended complaint naming newly discovered NPR entities on November 29, 2005.⁵

On or about September 7, 2005, NPR filed a motion for summary judgment dismissal of Metco's claims arguing that there was no written contract between Metco and NPR and, thus, Metco's claims were barred by the three year statute of limitations for oral contracts.⁶ On October 25, 2005, the trial court denied NPR's motion for summary judgment.⁷ On November 4, 2005, NPR filed a motion for reconsideration, which was denied on December 12, 2005.⁸

On January 11, 2006, NPR filed a motion for discretionary review of the trial court's ruling on its motion for summary judgment to the Court

⁴ CP 138-204.

⁵ Id.

⁶ CP 67-137.

⁷ Id.

⁸ Id.

of Appeals for the State of Washington, Division I. On May 3, 2006, the Court of Appeals denied NPR's motion for discretionary review and affirmed the trial court's ruling denying NPR's motion for summary judgment.⁹

Before the Court of Appeal's Certificate of Finality was issued on June 16, 2006, counsel for NPR issued a "Notice of Unavailability," indicating that she would be "unavailable" from July 21, 2006 to August 4, 2006.¹⁰ Another "Notice of Unavailability" was issued by NPR's counsel on July 5, 2007 requesting no action be taken on the case from July 20, 2007 to July 27, 2007.¹¹ A final "Notice of Unavailability" was issued by NPR's counsel on August 10, 2007 requesting no action be taken on the case from September 13, 2007 to September 24, 2007.¹² In between these "Notices of Unavailability" Metco pursued third party discovery.

On July 11, 2007, Metco noted the case for trial and trial was set for May 5, 2008.¹³ On February 6, 2008, NPR's attorney requested a 30-60 day continuance of the trial date because of an unavoidable "trial

⁹ Id.

¹⁰ Id.

¹¹ Id.

¹² Id.

¹³ Id.

conflict.”¹⁴ Specifically, NPR’s counsel advised that “Judge McCarthy just rescheduled a two week jury trial in another King County Superior Court case in which I represent the Defendant and Counterclaimant on April 28, 2008.”¹⁵ Believing NPR’s counsel had a true trial conflict, Metco’s attorney accommodated the request and re-noted the case for trial on December 8, 2008.¹⁶

On June 1, 2006, Metco was administratively dissolved by the Secretary of State for not filing an annual report/license renewal.¹⁷ On or about June 1, 2008, Metco’s certificate of formation was automatically cancelled pursuant to the Limited Liability Companies Act.¹⁸ There is no evidence that a certificate of cancellation was filed with respect to Metco with the Secretary of State.

Unfortunately, NPR’s counsel misrepresented the absolute necessity of a trial continuance to Metco’s counsel.¹⁹ It is evident that the request for a trial continuance was made solely for the purpose of continuing the trial date to allow NPR to file its summary judgment

¹⁴ Id.

¹⁵ CP 344-403 and 404-420.

¹⁶ CP 67-137, 344-403, and 404-420.

¹⁷ CP 138-199 and 200-204.

¹⁸ Id.

¹⁹ CP 344-403 and 404-420.

motion after the clock had run out for Metco to administratively reinstate itself. The proof for this proposition is in NPR's counsel's time records and in representations made to the Court in Opposition to Metco's Motion to Vacate and in Support of NPR's Motion for Attorneys' Fees and Costs.²⁰

On July 31, 2008, the trial court granted NPR's motion for summary judgment and dismissed Metco's claims against NPR with prejudice.²¹ The trial court also granted NPR's motion for attorney's fees and costs.²² The basis for the trial court's order was that Metco did not have the capacity to prosecute its claims as of June 1, 2008 because it was a dissolved and cancelled LLC and Metco did not seek reinstatement within two years after being administratively dissolved.²³

On August 12, 2008, NPR filed its motion for calculation of attorney fees and costs as the prevailing party requesting attorney fees and costs totaling \$70,807.08.²⁴ NPR submitted the Declaration of its counsel and accompanying exhibits in support of its motion for calculation of attorney's fees and costs, including invoices for alleged attorneys'

²⁰ CP 344-403; 433-470; and 482-614.

²¹ CP 10-12.

²² Id.

²³ Id.

²⁴ CP 615-622.

fees.²⁵ The invoices submitted in support of NPR's motion provide the following pertinent descriptions of attorney work²⁶:

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.
2/14/09	EIM	Draft stipulation and order continuing trial date (.6); draft cover letter to James Meade regarding the same (.1).
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.

The relevant time-line of events discussed above is summarized as follows²⁷:

July 11, 2007	Case set for trial on May 5, 2008 (<i>Prior to administrative dissolution of Metco Homes</i>)
January 29, 2008	NPR's counsel analyzes the corporate documents on Metco Homes, LLC and the case schedule to determine the dealings for filing motion to continue trial date.
February 6, 2008	NPR's counsel requests Metco's counsel to stipulate to trial continuance (<i>alleged conflict with a trial before Judge Armstrong</i>).
February 21,	NPR's counsel drafts motion for summary judgment dismissal of Metco's claims based upon dissolution.

²⁵ CP 482-614.

²⁶ CP 482-614.

²⁷ CP 344-403 and 433-470.

2008	
June 1, 2008	Metco Homes, LLC administratively dissolved.
July 2, 2008	NPR files a motion for summary judgment dismissal of Metco's claims and request for attorney's fees and costs based upon dissolution of Metco Homes.

Metco opposed NPR's motion and, on September 3, 2008, the trial court entered an order/judgment awarding NPR \$52,374.08 for attorney fees and costs.

NPR requested a trial continuance contemporaneously with receiving Metco's corporate documents.²⁸ Immediately after Metco's counsel agreed to a trial continuance, NPR prepared its motion for summary judgment based upon Metco's dissolution.²⁹ The motion was drafted almost four months prior to the actual dissolution of Metco.³⁰ The time-line of events suggest that NPR misrepresented the need to continue the May 5, 2008 trial date for the sole purpose of filing its motion for summary judgment based upon the June 1, 2008 administrative dissolution of NPR.³¹

On September 12, 2008, Metco filed its Amended Motion to Vacate the Court's July 31, 2008 Order granting NPR's Motion for

²⁸ CP 344-403 and 404-420.

²⁹ Id.

³⁰ Id.

³¹ Id.

Summary Judgment based upon NPR's counsel's alleged misrepresentations and misleading conduct.³² On October 2, 2008, the trial court denied Metco's Motion to Vacate.³³

IV. ARGUMENT

A. Standard of Review

The trial court's grant of summary judgment to Respondent is reviewed *de novo*. *Hogan v. Sacred Heart Medical Center*, 101 Wash. App. 43, 2 P.3d 968 (2000). The appellate court should review any findings of fact *de novo* because the evidence submitted to the lower court was comprised entirely of written submissions, affidavits, declarations and deposition transcripts. *Id.* Where the record consists entirely of written and graphic material, the appellate court should give an independent review of the record. *In re Marriage of Flynn*, 94 Wash. App. 185, 190, 972 P.2d 500 (1999) (holding that *de novo* review is appropriate where the trial court's decision is based on affidavits of the parties).

B. Metco has standing to prosecute its claims against NPR.

1. Metco was entitled to continue prosecuting its claims against NPR initiated prior to its administrative dissolution and cancellation as part of its "winding-up."

³² CP 404-420.

³³ CP 290-291.

The question before this Court is whether Limited Liability Company, after its certificate of formation is cancelled, can continue to prosecute claims initiated prior to administrative dissolution and administrative cancellation as part of its continuing to winding-up activities, especially where the defendant has engaged in dilatory tactics. RCW 25.15.295(2).

The statutes applicable to dissolution, winding up and cancellation are difficult to reconcile, especially in the context of administratively dissolved LLCs. However, each provision must be given weight. RCW 25.15.295 permits a dissolved LLC to wind up, including prosecuting and defending claims, until a Certificate of Cancellation is filed. An LLC itself can only file a Certificate of Cancellation once it completes winding up, including making provisions for known or contingent claims. RCW 25.15.300. An administratively dissolved LLC continues its existence as a legal entity even as it winds up. RCW 25.15.285.

RCW 25.15.270 entitled “Dissolution” lists six events that affect LLC dissolution and provides that the only activities an LLC can perform are those necessary to “winding-up.” However, because of a poor word phrasing in the statute, the statute can be read that upon an event of dissolution, winding up is also complete. The statute provides:

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

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

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

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

(3) The written consent of all members;

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

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

(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.

RCW 25.15.270 (emphasis added).

The prefatory language of RCW 25.15.270 uses the phrase "shall be wound up". A reasonable interpretation of the statute is that the happening of one of the six events is solely meant to *trigger* winding up, not terminate winding up. Any other reading essentially renders meaningless the other winding up provisions in the LLC Act.

Prior to, and during the period of administrative dissolution, Metco was actively prosecuting claims against NPR to recover monies it paid as a result of construction defects arising out of NPR's work at the Garden Grove II Condominium Project. Metco's claims were initiated well before it was administratively dissolved and administratively cancelled. The trial court improperly limited the winding up period to two years finding that Metco could only pursue its claims if it reinstated itself. Though administratively dissolved, Metco does not lack standing to prosecute its claims against NPR because the claims are part of Metco's winding up activities.

The trial court's ruling is contrary to the language of the Limited Liability Company Act. If Metco was in the process of winding up, it could not itself file a certificate of cancellation without violating the Act. The trial court erroneously ruled that Metco had to reinstate itself to pursue its claims against NPR. A cancelled LLC has no means to reinstate its certificate of formation. The LLC framework arguably allows for a winding up process notwithstanding the administrative dissolution or cancellation. Cancellation of the Certificate means the LLC can no longer actively perform its regular business, but does not preclude winding up which, in this case, includes prosecution of Metco's claims against NPR to the end.

2. **Interpreting RCW 25.15.303 to only allow claims against a dissolved LLC is absurd and a strained consequence.**

Prior to, and during the period of administrative dissolution, Metco was actively prosecuting claims against NPR and others to recover monies it paid to settle claims arising out of subcontractors' work at the Garden Groves II Condominium project. Metco's claims were initiated well before it was administratively dissolved and administratively cancelled. The trial court improperly limited the winding up period to two years finding the Metco could only pursue its claims against NPR if it reinstated itself. RCW 25.15.303 provides:

The dissolution of a limited liability company does not take away or impair any remedy available *against* that limited liability company, its managers, or its members for any right or claim existing, or any liability incurred at any time, whether prior to or after dissolution, unless an action or other proceeding thereon is not commenced within *three years* after the effective date of dissolution. Such an action or proceeding *against* the limited liability company may be defended by the limited liability company in its own name. (Emphasis added).

The trial court erroneously interpreted RCW 25.15.303 to only allow claims *against* a dissolved LLC and not to action *by* a dissolved LLC. Admittedly, the text of RCW 25.15.303 refers only to claims *against* a LLC and not to claims *by* a LLC. However, courts must avoid

readings of statutes that results in unlikely, absurd, or strained consequences.³⁴

To enforce RCW 25.15.303 as applying only *against* a dissolved LLC unfairly punishes a dissolved LLC attempting to wind-up its affairs. This facts of this case, i.e., a contractor pursuing recovery for damages caused by a subcontractor, exemplifies the situation where literal application of the statute thwarts its obvious purpose. 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 clams *by* or *against* a dissolved LLC. Disallowing Metco to continue prosecution of claims against NPR initiated before dissolution and which arise out of damages caused by NPR's work yields unfair and absurd results.

3. **There was no evidence that Metco's certificate of cancellation was actually filed with the Secretary of State.**

³⁴ See *1000 Virginia Ltd. Partnership v. Vertecs. Corp.*, 158 Wn.2d 566, 146 P.3d 423 (2006).

The trial court dismissed Metco's claims against NPR finding that Metco lacks standing to pursue claims against NPR based upon the administrative cancellation of Metco's certificate of formation. The trial court ignored the express provisions of the LLC Act which provides that an LLC is not cancelled until the certificate of cancellation is **filed** with the Secretary of State. RCW 25.15.280. There was no evidence presented to the trial court establishing that a certificate of cancellation was ever formally filed with respect to Metco.

The legal status of limited liability companies in Washington is governed by the Washington Limited Liability Companies Act, Chapter 25.15 et seq. ("LLC Act"). Under RCW 25.15.285(3), "a limited liability company administratively dissolved continues its existence but may not carry on any business except as necessary to wind up and liquidate its affairs." Under RCW 25.15.295(2) and 25.15.300(2), winding up includes prosecuting and defending suits. The LLC Act does not set forth a specific time limit on the length of time a dissolved LLC is afforded to complete the winding up of its affairs. NPR's motion for summary judgment was based upon RCW 25.15.290(4), which provides:

If an application for reinstatement is not made within the two-year [reinstatement] period set forth in subsection (1) of this section, or if the application made within this period is not granted,

the secretary of state shall cancel the limited liability company's certificate of formation.

That RCW 25.15.290(4) provides that the secretary of state "shall cancel" an LLC's certificate of formation if a LLC does not seek reinstatement within two years after its administrative dissolution does not mean that an LLC cannot continue winding up its affairs, including prosecuting claims brought before the expiration of the two year mark. The LLC Act does not specify how, when, or in what form the secretary of state is ultimately to accomplish the cancellation of a certificate of formation of an administratively dissolved LLC that does not seek reinstatement within two years. The "shall cancel" language in RCW 25.15.290(4) means that an LLC can no longer be reinstated, not that it cannot continue winding up its affairs, including prosecution of claims initiated prior to the date of administrative dissolution and cancellation.

RCW 25.15.280 sets forth the procedure for canceling a certificate of formation and RCW 25.15.295(2) addresses when the persons winding up an LLC can no longer prosecute or defend suits in the company's name. Specifically, RCW 25.15.280 provides in pertinent part:

A certificate of formation shall be cancelled upon the effective date of the certificate of cancellation, ... A certificate of cancellation *shall be filed* in the office of the secretary of state to accomplish the cancellation of a certificate of formation upon the dissolution and the completion of the winding up of a limited liability company. ... (Emphasis added).

Further, RCW 25.15.295(2) provides in pertinent part:

Upon dissolution of a limited liability company *and until the filing of a certificate of cancellation* as provided in RCW 25.15.080, the person winding up the limited liability's affairs may, in the name of, and for and on behalf of, the limited liability company, prosecute and defend suits, ... (Emphasis added).

Under RCW 25.15.295(2), a dissolved LLC may defend and prosecute suits until the **filing** of a certificate of cancellation, which, pursuant to RCW 25.15.080, shall be filed "to accomplish the cancellation of a certificate of formation upon the dissolution and completion of winding up of a limited liability company." There was no evidence before the trial court whatsoever establishing that a certificate of cancellation has been filed with respect to Metco.

C. NPR's actions and unavailability caused repeated delays in Metco's diligent prosecution of its claims.

NPR's actions and unavailability caused repeated delays in Metco's diligent prosecution of its claims against NPR. Metco's diligent prosecution of its claims was originally delayed by NPR's attempts to dismiss Metco's claims based upon the unsuccessful argument that there was no written contract between Metco and NRP. The Superior Court denied NPR's motion for summary judgment on October 25, 2005. NPR

filed a motion for reconsideration (which was denied) and, thereafter, filed a motion for discretionary review of the Superior Court's ruling on its motion for summary judgment to the Court of Appeals for the State of Washington, Division I. The Court of Appeals affirmed the trial Court's ruling denying NPR's motion for summary judgment on May 3, 2006 and the Court of Appeal's Certificate of Finality was issued on June 16, 2006

Further delays were caused by NPR's counsel's unavailability. NPR issued three notices of unavailability for July 21 - August 4, 2006, July 20 - 27, 2007, and September 13 - 24, 2007. 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. However, NPR's counsel was again unavailable and 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, despite NPR's repeated and unilateral delays, NPR filed its motion for summary judgment to dismiss Metco's claims based upon the only recent administrative dissolution of Metco.

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. The time-line of events set forth above demonstrates that NPR misrepresented the need to continue the May 5, 2008 trial date for the sole purpose of filing its motion for summary judgment based upon the June 1, 2008 administrative dissolution of NPR.

CR 60(b)(4), (6), and (11) sets forth the following pertinent grounds for relief from Judgment or Order:

- (b) **Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence, Fraud; etc.** On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
- (4) Fraud, misrepresentation, or other misconduct of an adverse party;
 - (6) The judgment ... *is no longer equitable that the judgment should have prospective application*;
 - (11) Any other reason justifying relief from the operation of the judgment

(Emphasis added).

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'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 Wash.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 Wash.App. 238, 251, 61 P.3d 1214, 1220 (2003). The granting of a motion to vacate a

judgment is defected to the discretion of the Court and will not be reversed in the absence of manifest abuse of that discretion. *Gustafson* at 70. Discretion is abused if it is exercised on untenable grounds for untenable reasons. *Treadwell* at 249.

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 unconscientious, 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.

Metco diligently pursued its claims against NPR both before and after the period of administrative dissolution. The delays caused by NPR's actions, unavailability, and misleading conduct were beyond Metco's control. It would be manifestly unjust to punish Metco for a series of NPR's unilateral delays and intentional misconduct.

D. 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 ceases to exist as a legal entity. 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).

It is the basic rule of statutory interpretation 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 Wash. 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 to recover attorney's fees and costs from a legal non-entity.

It is the golden rule of statutory interpretation that unreasonable results be rejected. *See Cooper's Mobile Homes, Inc. v. Simmons*, 94 Wash.2d 321, 333, 617 P.2d 415, 422 (1980)³⁵. The express provision of RCW 25.15.295(2) states that suit can be maintained against an LLC only until it is cancelled pursuant to RCW 25.15.080. 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.

If it is determined that Metco's certificate of formation was properly cancelled by the **filing** of certificate of cancellation with the Secretary of State, there is no basis for a recovery of fees and costs from Metco as a legal non-entity.

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

³⁵ The "golden rule" of statutory interpretation mandates - "(The) unreasonableness of the result produced by one among alternative possible interpretations of a statute is a reason for rejecting that interpretation in favor of another which would produce a reasonable result." *Id.*

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 _____ day of December, 2008.

FORSBERG & UMLAUF, P.S.

James B. Meade, WSBA #22852
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Attorneys for Plaintiff/Petitioner

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

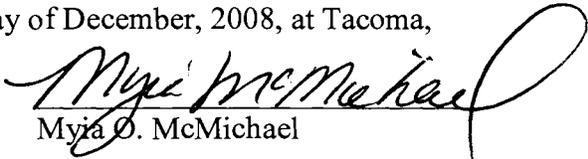
PETITIONER/APPELLANT METCO HOMES, LLC'S OPENING

BRIEF on the following individuals in the manner indicated:

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SIGNED this 8th day of December, 2008, at Tacoma,
Washington.


Myia O. McMichael