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No. 70322-6

King County Superior Court No. 12-2-07660-0

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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ADAM ZACKS and LYNN RESNICK-ZACKS, husband and wife, and the  
marital community thereof composed,  
Appellants,

v.

RAINIER ROOFING & REMODELING, LLC, a Washington limited  
liability company; OSSES CONTRACTORS INC., a Washington  
corporation; and PANELMASTERS, LLC, a Washington limited liability  
company,  
Defendants

ARDEN DRYWALL & TEXTURE, LLC, a Washington Limited  
Liability company.  
Appellees/Respondents

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REVIEW FROM THE SUPERIOR COURT  
FOR KING COUNTY THE HONORABLE KEN SCHUBERT

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APPELLANTS ADAM ZACKS AND LYNN RESNICK-ZACKS'  
APPELLATE REPLY BRIEF

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**A. ARGUMENT WHY THE ORDER DISMISSING ARDEN SHOULD BE REVERSED.**

Arden spends much of its response to this appeal arguing against the retroactive application of the 2009 and 2010 amendments to the Limited Liability Act (Act) to Arden. The Zacks do not argue that the amendments should apply retroactively in this appeal, as the Court rejected that argument in its Order Granting Discretionary Review. Indeed, as Arden was a valid LLC at the time of the amendments, retroactive application of the amendments is unnecessary with regard to the timely filing of this lawsuit against Arden.

The issue before this Court is whether the 2009 and 2010 amendments to the Act apply to Arden, which was in administrative dissolution at the time the amendments became effective. This Court stated in its Order Granting Discretionary Review: “In order for the amendments to apply to Arden, it must have been a legal entity on which the statute could operate prospectively.” *Exhibit 1* Order Granting Discretionary Review.

The plain language of the case law and statutes make clear that Arden was a legal entity at the time the amendments to the Act were made. In *Chadwick Farms Owners Ass'n v. FHC, LLC*, 166 Wn.2d 178, 189, 207 P.3d 1251 (2009), the Supreme Court held that it is the date of

cancellation, and not the date of dissolution, on which an LLC ceases to exist as a legal entity.

The express language of the Act is consistent with the distinction drawn by the Court in *Chadwick*. Washington Revised Code Section 25.15.285, which has not been amended since 1994, expressly states that an administratively dissolved LLC “carries on its existence.” Specifically, dissolved LLCs remain able to prosecute and defend suits after dissolution. RCW 25.15.295(2). The Act explicitly states that “dissolution of a limited liability company does not take away or impair any remedy available to or against that limited liability company.” RCW 25.15.303. This is because a dissolved LLC can seek reinstatement *at any time* prior to its cancellation, and *carry on business as though it had never been dissolved*. Former RCW 25.15.290 (2006), amended by LAWS of 2009, ch. 437, § 2 (the amendment did not change this portion of the statute).

Under the statutes in place at the time of Arden’s dissolution, Arden would have remained subject to suit for three years from the date of its dissolution on September 8, 2008. RCW 25.15.303(2006), amended by LAWS of 2010, ch. 196, § 11. The amendments were made *before* Arden’s cancellation, which would have occurred on September 8, 2011, absent amendments to the Act. Pursuant to the Supreme Court’s holding in

*Chadwick*, and the plain language of the Act, Arden remained a legal entity at the time of the 2009 and 2010 amendments to the Act. The amendments to the Act therefore applied to Arden prospectively.

Because the amendments applied to Arden, they changed the period of time in which Arden would remain in dissolution, and subject to suit. The changes to the Act required Arden to file a certificate of dissolution in order to commence a three-year limitation of liability. RCW 25.15.303. In the absence of a certificate of dissolution, the Act specified that Arden would be automatically cancelled five-years after its dissolution, or September 8, 2013, when its ability to seek reinstatement expired. RCW 25.15.290.

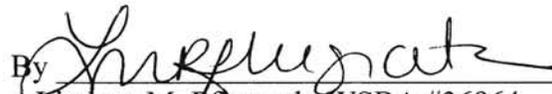
Arden did not file a certificate of dissolution with the Secretary of State at any time. Arden therefore remained in dissolution until September 8, 2013, when the reinstatement period expired. This lawsuit was filed in March, 2012, prior to the expiration of the reinstatement period and Arden's cancellation. Because Arden remained a valid legal entity in March, 2012, subject to the amendments to the Act and to suit, the lawsuit commenced by the Zacks was timely and properly filed against Arden. The Superior Court erred in dismissing the claims against Arden.

**B. CONCLUSION.**

For all of the foregoing reasons, the Zacks respectfully ask this Court to reverse the Superior Court's Order dismissing Arden.

DATED this 6<sup>th</sup> day of January, 2014.

SKELLENGER BENDER, P.S.

By   
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Resnick-Zacks

# EXHIBIT 1



or probable error, because it failed to apply the 2009 and 2010 amendments of the Washington Limited Liability Company Act.<sup>1</sup> Discretionary review is granted.

### FACTS

Arden Drywell and Texture LLC (Arden) was a subcontractor on a private Seattle residence, responsible for hanging, taping, and priming the drywall of the residence's interior walls and ceilings. Arden completed its work in 2006. On September 2, 2008, the Washington Secretary of State administratively dissolved Arden.

Adam Zacks and Lynn Resnick-Zacks (the Zackses) purchased the residence in 2010. Soon after purchase, signs of water damage appeared on the ceiling of the upper floor. Further investigation revealed significant damage to the roof and third floor walls.

The Zackses filed suit in March 2012, alleging negligence against the designer and its managing member, the general contractor, and a roofing subcontractor. In response, the designer and the contractor (the primary parties) brought claims against several subcontractors. The primary parties agreed to assign all relevant contracts and claims to the Zackses, including the contract with Arden. Arden was added to the suit and in September 2012, the Zackses amended their complaint, dismissing the primary parties and leaving only the subcontractors.

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<sup>1</sup> Chapter 25.15 RCW.

Arden moved for summary judgment seeking dismissal of all claims against it, alleging in part that the statute governing remedies for dissolved LLCs (limited liability companies) (RCW 25.15.303) time barred the Zackses' suit.<sup>2</sup> The superior court granted the motion in April 2013. The superior court entered a stay of trial pending the result of the Zackses' appeal for discretionary review.

#### CRITERIA FOR DISCRETIONARY REVIEW

Discretionary review of a decision of a superior court is available when:

- (1) The superior court has committed an obvious error which would render further proceedings useless;
- (2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act;
- (3) The superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative agency, as to call for review by the appellate court; or
- (4) The superior court has certified, or all the parties to the litigation have stipulated, that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.

RAP 2.3(b).

#### DECISION

The Zackses seek discretionary review under RAP 2.3(b)(1) and (2), and argue that the superior court's failure to apply the 2009 and 2010 amendments of the Washington Limited Liability Company Act, chapter 25.15 RCW was an

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<sup>2</sup> Arden's motion for summary judgment was based on four claims. However, the superior court only addressed the issue of RCW 25.15.303.

obvious or probable error.<sup>3</sup> They argue that Arden is a necessary party, without whom it would be useless to proceed and whose absence substantially alters the status quo.

An LLC can be dissolved in several ways, including administrative dissolution by the Office of the Secretary of State. RCW 25.15.270; RCW 25.15.280. Once an LLC is dissolved, it continues only for the purpose of winding up its activities. RCW 25.15.295. However, a dissolved LLC can still sue or be sued. RCW 25.15.303; Chadwick Farms Owners Ass'n v. FHC, LLC, 166 Wn.2d 178, 189, 207 P.3d 1251 (2009). When Arden was administratively dissolved on September 2, 2008, the statute stated that there was a three year statutory limit on liability for dissolved LLCs, which ran from the effective date of dissolution. Former RCW 25.15.303 (2006), amended by LAWS OF 2010, ch. 196, § 11. For Arden, the statutory limitation period would have expired September 2, 2011, prior to the filing of this suit. We assume this is the version of the law the trial court applied. However, effective in June 2010, the legislature changed the method by which dissolved LLCs can invoke the statutory limitation. LAWS OF 2010, ch. 196, § 11. The legislature now requires dissolved LLCs, including those administratively dissolved, to file a certificate of dissolution. RCW 25.15.303. The three year limit on liability now runs from the date of the filing of the certificate of dissolution instead of the effective date of dissolution. Id. Aside from the filing of a certificate of dissolution, the statute does not have a

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<sup>3</sup> The Zackses also challenge Arden's answer as untimely. We deny the motion to strike.

method by which an administratively dissolved LLC can limit its exposure to suit. See RCW 25.15.290. Arden has not filed a certificate of dissolution. If the 2010 amendment applies to Arden, the Zackses can bring this claim. If the 2006 version of the law applies, this suit is time barred.

RCW 25.15.303 is in effect a statute of limitations. It operates to allow dissolved LLCs a chance to place a time limit on claims against them. Id. Limitation laws pertain only to the remedy and may be changed at the pleasure of the legislature. 1000 Virginia Ltd. P'ship v. Vertecs Corp., 127 Wn. App. 899, 912, 112 P.3d 1276 (2005), aff'd, 158 Wn.2d 566, 146 P.3d 423 (2006). The general rule is that new statutes of limitations are given prospective effect only, unless retroactive effect was clearly the legislative intention. Id. Here, there is no explicit mention of retroactivity in the statutory language and there is no indication of retroactive intent in the legislative history. RCW 25.15.303; see, e.g., Chadwick Farms, 166 Wn. 2d at 196 n.8. Therefore, the amendment runs prospectively from its effective date. In order for the amendment to apply to Arden, the LLC must have been a legal entity on which the statute could operate prospectively.

An administratively dissolved LLC continues existence for the purpose of winding up and liquidating its business and affairs. RCW 25.15.285(3) (in effect in 2006). After dissolution, an LLC may prosecute and defend suits, dispose and convey the LLC's property, make reasonable provision for the LLC's liabilities, and distribute remaining assets. Former RCW 25.15.295(2) (2006), amended by

LAWS OF 2010, ch. 196, § 9 (the amended statute still allows for these actions). Furthermore, after dissolution, Arden could apply for reinstatement and, if accepted, conduct business as if the dissolution never occurred. Former RCW 25.15.290 (2006), amended by LAWS OF 2009, ch. 437, § 2 (the amendment did not change this portion of the statute). Moreover, the Supreme Court has said that it is the date of cancellation, and not the date of dissolution, on which an LLC ceases to exist as a legal entity.<sup>4</sup> Chadwick Farms, 166 Wn.2d at 191. There is no evidence that Arden's certificate of formation has ever been cancelled.<sup>5</sup> Arden could still be reinstated at the time of the 2010 amendments, and the 2010 amendment applied to it as to any other legally recognized LLC. After the 2010 amendment, Arden did not file a certificate of dissolution, and this suit was timely filed. Therefore, it was a probable error for the trial court to dismiss Arden from the suit based on the 2006 version of the statute.

Furthermore, the summary judgment order removed Arden as a party to the suit, potentially leading to an unjust assessment of liability among the remaining defendants. See Minehart v. Morning Star Boys Ranch, Inc., 156 Wn. App. 457, 462, 232 P.3d 591 (2010) (interlocutory review is available where the

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<sup>4</sup> Administratively dissolved LLCs no longer have a date of cancellation provision which is different from other LLCs. LAWS OF 2010, ch. 196, § 7

<sup>5</sup>The 2009 amendments extended the period of reinstatement and made cancellation automatic at the end of the period, relieving the secretary of state from taking action to cancel a certificate of formation. LAWS OF 2009, ch. 437, § 2. If the 2009 and 2010 amendments did not apply to Arden, then the secretary of state was required to cancel Arden's certificate of formation on September 2, 2010. Former RCW 25.15.290(4) (1994). There is no evidence the secretary of state cancelled the certificate. Had it been cancelled, the 2006 limitation would have expired before the suit was filed.

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alleged error has a manifest impact on trial). The trial court's probable error in failing to apply the amended statute substantially changed the status quo.

Now, therefore, it is hereby

ORDERED that the motion for discretionary review is granted; it is further

ORDERED that the clerk shall set a perfection schedule.

Done this 27<sup>th</sup> day of August, 2013.

*Appelwhite J*

WE CONCUR:

*Vendler J*

COX, J.

2013 AUG 27 PM 3:40  
COURT OF APPEALS  
STATE OF WASHINGTON

RICHARD D. JOHNSON,  
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August 27, 2013

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CASE # 70322-6

Adam & Lynn Resnick-Zacks, Pets v. Rainier Roofing & Remodeling, Resps  
KING COUNTY SUPERIOR COURT No. 12-2-07660-0 SEA

**This may be the only notice you will receive concerning due dates. A document filed prior to or after its due date may affect all subsequent due dates. The parties are responsible for determining adjusted due dates by reviewing the appropriate rules of appellate procedure. Failure to comply with the provision of the rules may result in the imposition of sanctions pursuant to RAP 18.9.**

Dear Counsel/Others:

A notice of appeal, filed in the KING COUNTY SUPERIOR COURT on May 6, 2013 was received in this court on May 10, 2013 and was assigned case number 70322-6. **Use this appellate court case number on all correspondence and filings.**

The time periods for compliance with the Rules of Appellate Procedure are as follows:

1. The **designation of clerk's papers** is due to be filed and served with the trial court, with a copy filed in this court, by September 27, 2013. RAP 9.6(a).
2. The party seeking review must timely arrange for transcription of the report of proceedings and must file a **statement of arrangements** in this court by September 27, 2013. To comply with RAP 9.2(a), the statement should include the name of each court reporter, the hearing dates, and the trial court judge. Serve each court reporter and all counsel of record with a copy of the statement of arrangements, and provide this court with proof of service.

If the party seeking review arranges for less than all of the report of proceedings, all parties must comply with RAP 9.2(c).

If a verbatim report of proceedings will not be filed, you must notify this court, in writing, by September 27, 2013. RAP 9.2(a).

3. The **verbatim report of proceedings** must be filed with the clerk of the trial court no later than 60 days after service of the statement of arrangements. The court reporter's notice of filing and proof of service must be filed in this court the same day. RAP 9.5(a).

4. **Appellant's brief** is due in this court 45 days after the report of proceedings is filed in the trial court. RAP 10.2(a).

Appellant should serve one copy of the brief on every other party and on any amicus curiae and should file proof of service with this court. RAP 10.2(h).

If the record on review does not include a report of proceedings, the appellant's brief is due 45 days after the designation of clerk's papers has been filed. RAP 10.2(a).

5. **Respondent's brief** is due in this court 30 days after service of the appellant's brief. RAP 10.2(c).

Respondent should serve one copy of the brief on every other party and on any amicus curiae and should file proof of service with this court. RAP 10.2(h).

6. A **reply brief**, if any, is due 30 days after service of respondent's brief. RAP 10.2(d).

Sincerely,



Richard D. Johnson  
Court Administrator/Clerk

ssd