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DIVISION II

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STATE OF WASHINGTON
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DODSON

THE POINTE AT WESTPORT HARBOR HOMEOWNERS
ASSOCIATION, a Washington non-profit corporation,
Respondent,

v.

DODSON-DUUS, LLC, et al,

Defendants,

and

ENGINEERS NORTHWEST, INC., P.S., a Washington professional
services corporation; and THEODORE D. McDONALD and JANE DOE
McDONALD, husband and wife, and their marital community,
Appellants.

BRIEF OF RESPONDENT

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ORIGINAL

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APPENDIX A

Transcript of House Judiciary Committee Hearing on SB 6531,
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APPENDIX B

SHB 2657, as enrolled

APPENDIX C

House Bill Report on SHB 2657

APPENDIX D

Senate Bill Report on SHB 2657

APPENDIX E

Transcript of House Judiciary Committee Hearing on SHB 2657,
January 20, 2010

I. INTRODUCTION

Respondent's ("the Association's") members bought a condominium building ("the Project") that is dangerously under strength because of Appellants' (collectively, "ENW's") negligent structural engineering design work. The Association was outside the chain of construction contracts for the Project, and their agreed allocations of risk. Thus while among themselves, the developer, contractors, and design professionals must resolve claims for economic loss by contract, that rule does not apply to the Association's professional negligence claim here.

ENW breached its independent duty of care at common law as an engineer, and thereby caused the Association's injury: a key structural system is dangerously weak, and structural steel is rapidly corroding away. ENW's negligence creates serious risks of *further* injuries, including collapse in a seismic event that a properly-designed building should withstand without serious damage. The Association's injury is thus within the scope of ENW's duty to avoid "risks of physical harm," and actionable in tort. The severity of the risks goes also to the reasonableness and necessity of the claimed damages for repair costs.

ENW's insistence on *more* resulting "physical damage" has no support in law. Rather, even purely economic losses created by "*risks* of physical harm" to property owners resulting from engineering negligence

are compensable in tort under recent Supreme Court authority. ENW's summary judgment motion and proposed jury instructions based on its erroneous legal theory were therefore all properly denied.

ENW claims that it was entitled to allocate negligence for structural repairs to the architect Elkins Architects, PS ("Elkins) and/or the general contractor Integrity Structures, LLC ("Integrity"). But ENW was limited to contract-based remedies for economic loss against Elkins and Integrity. It chose not to assert them. Moreover, allocation under the Tort Reform Act does not include contract-based claims *among defendants*.

And regardless of the availability of allocation in this setting, ENW presented no competent evidence (a) that either Elkins or Integrity breached an applicable duty, or (b) that any claimed breach actually caused the structural deficiencies and damage at issue. Without such evidence of duty, breach, and causation, ENW was not entitled to allocation instructions.

II. COUNTER STATEMENT OF THE CASE

A. Building Envelope and Engineering Negligence Suits

The Pointe at Westport is a three-story, 26-unit, residential, ocean-front condominium. The Association's members are unit purchasers. The Association sued the Project declarant ("Dodson") for defects in the Project's weatherproofing and mechanical systems. (CP 1-27, 111-279)

During litigation, the Association discovered that serious errors and omissions in the structural engineering design were incorporated in the Project, making it a threat to the safety of the Project and its occupants. (CP 483-509, 1207-1215) The Association brought design negligence claims against ENW, and claims against both Integrity and its framing subcontractor, Corson Swift Builders, LLC (“Corson”), alleging negligence in constructing the framing. (CP 28-60) Corson defaulted. (Docket 563; CP 2616-2618) ENW answered. (CP 94-105)

B. ENW’s Summary Judgment Motion on Economic Loss

ENW argued on summary judgment that it could not be sued for negligence under economic loss rule precedent, at least in the absence of additional “physical damage” like a collapse. (CP 280-297) The Association responded that engineers owe a duty of reasonable care to avoid creating safety risks of physical harm, breach of which is actionable in tort by property owners, independent of any contract or consequential physical damage; it submitted an engineering expert’s declaration showing that the Project is at unreasonable risk of serious damage because of ENW’s design errors. (CP 462-482) ENW’s motion, request for “clarification,” (CP 528, 534), and for Discretionary Review were denied.

C. Partial Settlements, Assignment of Contract Claims

The Association and Dodson settled. Dodson assigned the Association any rights it had against Integrity, Elkins, and ENW. (CP 535-547; RP 77, 620) The Association amended its suit to state Dodson's claims (1) against Elkins for breach of contract by failing to provide a complete structural engineering design, and (2) against ENW as a third party beneficiary for breach of its contract with Elkins. (CP 535-547) ENW amended its Answer to seek an allocation of fault to other defendants under RCW 4.22.070. (CP 548-556)

Integrity later settled by entering into a consent judgment with covenant not to execute. It paid no money, but assigned rights against insurers. (CP 2331-2336)

D. Claims at Trial

The Association proceeded to trial (1) against ENW on claims of professional negligence, and on its assigned third party beneficiary breach of contract claim; (2) against Elkins on its assigned breach of contract claim; and (3) against Corson (which was in default) for a determination of damages attributable to its negligence.¹

E. Evidence at Trial

1. Location of Project & Overview of Structural Design Errors

¹ ENW secured dismissal of the assigned third party beneficiary claim for lack of evidence of an intent to create third party beneficiary status in Dodson. (RP 666)

The Project sits 80-90 unobstructed feet from the ocean on one side, and 20-30 feet from a saltwater marina on the other. (RP 59, Tr. Exs. 1, 2, & 5) It is an open quadrangle with a central courtyard surrounded by elevated walkways that are supported on steel columns. (CP 60, 63) At the north half, an open air parking garage occupies the ground floor, with second and third floor units above. (CP 62, Tr. Exs. 3 & 4)

The structural design defects at the Project involve the “Lateral Force Resisting System” (“LFRS”). The LFRS consists of components which, when connected in a sufficiently strong chain from roof to foundation, resist sideways “shear forces” from earthquakes or windstorms. (RP 114, 138-139, 848) Shear forces accumulate as they progress through the LFRS down to the foundation, so LFRS components and connections at lower floors must be stronger than those nearer the top. (RP 139-140, 142-148) All engineers agreed that an LFRS is only as strong as the weakest component or connection in the chain, as measured by applicable International Building Code (“IBC”) directives. (RP 153-154, 305, 781, 838, 848)

ENW’s design errors, as identified by the Association’s engineering expert Mr. Paustian, generally included: (1) inadequate strength of the wood-framed “shear walls” (both exterior and interior), (RP 167-169); (2) inadequate connections of shear walls to joists and

trusses immediately above (the “through-floor” “shear wall top” connection) (RP 115-117); (3) inadequate connections of shear walls to joists below (the “through floor” “shear wall bottom” connection) (RP 115-117); (5) inadequate holdown anchors at the concrete foundation in the south half of the building (RP 117); (6) omission of details for connecting a single line of holdown anchors to a steel beam (RP 117); (7) failure to specify a “blocked” second floor diaphragm (“SFD”) above the parking garage, (RP 115) (8) omission of high strength “collectors” or “drag struts” from the SFD design, rendering that key assembly 800% under required strength (RP 115-116); and (9) omission of specification for corrosion inhibiting paint on structural steel members and connectors, leading to rapid and unacceptable corrosion. (RP 121-124)

2. ENW’s Breach of the Standard of Care of a Structural Engineer in Designing the LFRS

It was undisputed that: (1) due care requires that a structural engineer design an LFRS with sufficient strength to meet IBC minimums, (RP 153-154, 305, 428-429, 827-835); (2) the IBC sets minimum strength requirements for LFRS components based on “maximum considered earthquake” forces, which are in turn based on analysis of forces the building is likely to face in its lifetime, (RP 150-151); (3) the IBC imposes these requirements to prevent serious damage to a building in an

anticipated seismic or windstorm event and hence promote the safety of occupants, (RP 127, 137, 838-839); (4) these requirements are based on the considered judgment of structural engineers, seismologists, and other professionals after consultation, (RP 839-840), as well as on load-testing of assemblies, (RP 847); and (5) the IBC minimum standards are adopted into Washington law. (RP 840)²

It was undisputed that the exercise of due care requires a structural engineer first to perform a calculation of shear force loading for each floor of a building; these “lateral analysis” “calculations” are then applied to the design to ensure that the LFRS has adequate strength. (RP 128, 436-437, 828-829) Mr. McDonald and his expert conceded that: (1) he improperly prepared key lateral calculations *after* promulgating his “for construction” plans; and (2) he did not correct his plans when his calculations showed that the LFRS’ strength as designed is dramatically below Code minimums. (RP 438-440, 829-835)³ Mr. McDonald and his engineering

² It was also undisputed that the IBC classifies the site as seismic risk “D,” moderate to severe. (RP 432-433, 863-864) Massive earthquakes from the well-known Cascadia Subduction Zone recur in the area every 100 to 500 years (the last being 300 years ago). (RP 266-267) The IBC also anticipates wind loading events equivalent to a 115 mile per hour wind during the building’s lifetime; winds of 90-100 mph have been clocked in the area repeatedly. (RP 415-416)

³ The cited testimony from the defense engineering expert, Mr. Trochalakis, demonstrates that he was unaware before trial that ENW had performed its LFRS calculations *after* promulgating its “for construction” plan set. (RP 828-835)

expert both agreed with plaintiff's engineer that this, too, was a breach of the applicable standard of care. (*Id.*)

3. Evidence of Resulting LFRS Defects

Shear Wall Panel Nailing: Horizontal floor and roof diaphragms, along with vertical internal and external "shear walls" are the principal wood-framed components of the LFRS. It was undisputed that many shear walls are understrength by design, and require repair to the panel nailing. (RP 167-169, 790-791, 837, 865-866)

Shear Wall Top Connections: Shear walls transfer forces to the foundation by a vertical chain of connections to one another using nails or hardware "clips" attached to floor joists. (RP 174-175) It was undisputed that top connection clips at 22 "lines" of shear walls are deficient by design and would be overloaded by 200%-400% in an expected seismic event. (RP 212-220, 783, 799, 836-837, 866)

Shear Wall Bottom Connections: The engineers agreed that four types of shear wall bottom connection deficiencies require repair. ENW's liability for only one type was contested.⁴ This last deficiency arose because during construction, floor sheathing of $1\frac{1}{8}$ " thickness was

⁴ The undisputed cases involve: (1) foundation anchor bolts for shear walls, (RP 221, 809, 837, 864); (2) nailing of shear wall bottoms to concrete shear walls below, (RP 182-198, 801-802, 868); and (3) inadequate nail penetration at eight "lines" of shear wall bottom plates (even assuming plywood floor sheathing $\frac{3}{4}$ " thick). (RP 175-181, 189-193, 783, 801-802)

substituted for ¾” sheathing, but ENW did not correct the nail size for through-floor connections to account for the additional plywood thickness. This makes substantially all the remaining through-floor shear wall bottom connections at the Project deficient to the point of having no Code-recognized lateral capacity at all. (RP 183, 199-212, 868)

The issue at trial was ENW’s approval and awareness of the change, such that it was negligent in advising the architect and joist manufacturer that the change was “structurally acceptable,” without also alerting them that it would require a redesign of the bottom connections to use larger nails. (RP 302-305, 374, 408-410, 445-449, 463, 465, 709, 711-712, 609-614, 872-878)

Second Floor Diaphragm (“SFD”) Strength: The parking garage lacks internal shear walls, and severs the chain of internal shear walls from the two floors above. Accumulated shear forces from the discontinuous shear walls above the garage must transfer laterally *through the SFD* to the perimeter, and then down into a few concrete shear walls at the garage perimeter below. As a result, the SFD must be designed to have considerable strength. (RP 124, 159-160, 221-224, 823)⁵

⁵ ENW was asked by a peer reviewer for the City to revise its design and address how shear forces from discontinuous shear walls would be handled. (RP 433-436) Mr. McDonald conceded that he negligently did not do so. (RP 439-445)

It was undisputed that ENW's SFD design was deficient because: (1) it is a simple, relatively weak "unblocked diaphragm," when the lateral analysis demanded a "blocked diaphragm"; and (2) it omits high strength "drag struts" needed to carry compression-tension forces.⁶ (RP 115-116, 224-231, 236-246, 254-259, 308, 438-445, 783, 793, 797, 829-836, 852-853, 860-861) It was undisputed that the SFD would be 800% overstressed in a code level seismic event, and could fail catastrophically in *any* serious quake. (RP 236-242, 251, 264-265, 863)

Holdown Attachments to Steel Beam: It was undisputed that ENW's plans negligently omitted details describing how the framer should attach "holdowns" from one line of exterior shear walls to a steel beam above the garage. (RP 117, 268-272, 274-275, 450-452, 783, 811) It was also undisputed that while a reasonable engineer could not rely on a framer to bring up ENW's omission of the detail, it was still improper for Corson to omit the holdowns altogether when it presumably could not figure out how to install them. (RP 274-275, 413, 450-452, 882)

⁶ As explained in the cited testimony, an "unblocked diaphragm" is one in which the plywood floor sheathing's panel edges are nailed to floor joists only along two opposite ends each. This is a common but relatively weak floor diaphragm. Anticipated stresses on the SFD at the Project required a "blocked diaphragm" under the IBC, that is, a diaphragm with sheathing panel edges nailed around their entire perimeters to joists along two opposite panel edges, and also to 2x4 "blocking" lumber installed perpendicular to and between the joists at the other two panel edges.

The key "drag strut" that ENW omitted would be a 5" wide and 24" deep beam spanning the length of the building, attached to concrete shear walls at the ends and nailed to SFD along its length. It would be called upon to carry over 100,000 pounds of force in a code level seismic event. It is a key structural member.

4. Evidence of Breach of Engineering Duty as to Corrosion Protection Deficiencies

The experts agreed that saltwater-laden air at the Project makes it a highly corrosive environment for structural steel, (RP 122, 282, 883), and that ENW was responsible to evaluate whether finishes shown in the architect's plans would protect the structural steel ENW was including in its engineering plans from that environment. (RP 399-400, 885-886)

The Association's expert testified that a reasonable engineer would, under applicable steel engineering standards, specify rust inhibiting paint to protect against the corrosive environment, and that ENW negligently failed to do so. (RP 282-292) A reasonable engineer would not assume that vapor-permeable, unsealed gypsum sheathing, riddled with holes as shown in the original architectural plans for the garage ceiling, and shown as wraps at exterior columns for fire protection, would protect the steel at all. (RP 290-292, 398-404, 407, 1007-1010)

ENW's engineer initially opined that ENW could rely on the architectural gypsum sheathing details for steel protection. (RP 807-808) But he then conceded that the gypsum would have to be sealed to protect the steel, and was not shown to be so in the plans. (RP 884-888, 893) He also acknowledged that the architectural plans when ENW decided not to specify paint were materially identical to the current acoustical tile ceiling:

both provide only an unheated and unsealed airspace with no vapor barrier that cannot meet applicable steel engineering standards. (*Id.*) Critically, ENW's expert could not even say that the architectural gypsum finishes ENW supposedly relied on would likely, or even could have prevented the corrosion. (RP 913-914)⁷

No witness testified that Elkins breached an architect's standard of care by approving the change in the unsealed garage ceiling to unsealed acoustical tile without consulting ENW about it.⁸ Moreover, no witness testified that Integrity, the general contractor, breached a standard of care in favor of the Association by omitting gypsum sheathing.⁹

5. Safety Risks Created by ENW's Breaches

⁷ Similarly, Mr. McDonald testified that he thought during the design process that the steel in the open-air garage ceiling and exterior columns would be adequately protected by being behind a layer of gypsum sheathing as shown in the architectural plans, but now concedes that the result would not be a controlled environment as contemplated by industry standards for omitting steel-protection in corrosive environments. (RP 456-457) At deposition, Mr. McDonald also conceded that he had no familiarity with any of the steel engineering standards that call for corrosion protection in marine environments, and that he gave the question of protecting the steel from the marine environment no consideration during his design work. (CP 2453-2454, 2461)

The project architect and general contractor's president also testified that the details and sealants needed to make the gypsum an effective barrier were never specified in the architectural drawings. (RP 617, 739, 744-745)

⁸ That testimony would not have been admissible had it been sought from the defense engineering expert, because he conceded that he was not qualified to opine on the subject of an architect's duties. (CP 2101-2102, 2114-2116)

⁹ In following the architect's direction regarding the ceiling change, Integrity was not negligent as a matter of law. *Clark v. Fowler*, 58 Wn.2d 435, 439, 363 P.2d 812 (1961).

Mr. Paustian testified that ENW's LFRS design errors make the building unsafe in an anticipated seismic event. (RP 119, 383-384) The second floor is a "soft story": the SFD would break apart, shear walls fail in sequence, and the corroded steel connections would then have to take *lateral* strains they were not designed to withstand; the result would likely be severe damage, unreasonable and imminent risk to lives and property, and possible catastrophic collapse of the north half of the Project. (RP 246, 264-265, 276, 294-298, 361-362, 1002-1004) No defense witness offered any rebuttal to the safety risks created by ENW's errors.¹⁰

Risks created by the lack of corrosion protection, irrespective of the LFRS, were also undisputed. Rapid, extensive damage has occurred on the steel beams, columns, and connectors. (RP 401-407, 883-885) The corrosion does not now pose a threat of collapse from gravity loads, (RP 277-278), but will continue to worsen until the steel is properly protected. (*Id.* and RP 883-884)

ENW's engineers were unwilling to deny the reality of these risks, so its attorneys now suggest that the Project "must" be safe because no

¹⁰ As noted in the colloquy at RP 818-820, the defense had not disclosed any expert opinion on the safety of the building, and a motion *in limine* seeking to exclude such an opinion was granted prior to trial. (CP 2121-2127, 1086) In any case, it appears that the defense engineering expert had no such opinions to offer, at least as to the safety of the SFD in a code level seismic event. (RP 863)

one has been “required” to move out, and plaintiff’s engineer has not reported it to building authorities yet.¹¹ (RP 388-395)

6. Testimony Regarding Contributory Fault

ENW sought to allocate fault (1) to the contractor defendants (Integrity and Corson) for omission of holdowns; (2) to the same contractor defendants for nail spacing of the second floor “unblocked” diaphragm; (3) to Integrity and/or Elkins for structural steel corrosion problems; and (4) to Integrity and/or Elkins for the change in the floor sheathing thickness. The evidence bearing on these was as follows:

Holdown Connection Detail: All experts agreed that a reasonable framer would not omit holdowns simply because it did not understand how to install them from the plans.¹² (RP 274, 307-308, 614-616, 882) But no evidence was adduced that Integrity should have discovered ENW’s omission of holdown details, or Corson’s failure to install them. The only evidence was to the contrary. (RP 307-308, 603)

¹¹ There was no evidence that homeowners have continued to use their units (largely vacation homes). Such testimony was barred by Motion in Limine because that fact has no probative value on the question of engineering negligence or the degree of risk created thereby. (CP 1008-1009, 1084) No error is assigned to the decision to bar such evidence.

ENW’s work-around is to argue that the Project is safe because legal occupancy has not been revoked. But that is merely a product of the fact that building department has not been notified of the problems! (RP 79-80) With respect to reporting the deficiencies, Mr. Paustian testified (without rebuttal) that his professional obligation to advise the building department only arises when he has reason to think the Association will not follow his advice to make repairs. (RP 392-393)

¹² The jury awarded a very small percentage of fault against Corson. (CP 1445).

Second Floor Diaphragm Nail Spacing: ENW's counsel wished to argue that Corson's decision to nail SFD sheathing at about 3" on center (typical for an unblocked diaphragm) was improper and contributory fault. (RP 644-645) But all of the testimony was that in the exercise of reasonable care, a framer would build a typical unblocked diaphragm as shown on ENW's plans by installing nails just as Corson did. (RP 230-231, 378-379, 412, 835)

The court understood that the problem with the SFD is not Corson's selection of the nail spacing, which was proper for an unblocked diaphragm as shown, but that ENW designed the SFD without blocking. (RP 647) The court ruled that in general, it would allow testimony about how a contractor responds to omitted details, but not about a contractor's duty to second guess explicit plan details. (RP 646) Because nail spacing was not a deficiency, the court concluded that it would not allow testimony suggesting that Corson or Integrity should have asked how to space nails for a typical unblocked diaphragm. (RP 647) Ultimately, the only evidence was that a reasonable engineer should have expected the framer to build an unblocked diaphragm with nails spaced 6" on center or less, just as Corson did, (RP 378-379), and both experts agreed that the current nail spacing at the SFD is irrelevant to the extent that ENW's negligence resulted in an unblocked diaphragm. (RP 411, 852-853)

Gypsum Steel Wraps: ENW tried to claim that structural steel corrosion was caused by use of an acoustical tile garage ceiling in lieu of gypsum sheathing shown in the original architectural plans, and by someone's omission of gypsum sheathing around certain columns. That effort failed. All of the testimony agreed that because it is unsealed, gypsum sheathing could not have prevented corrosion on the structural steel in the absence of rust inhibiting paint. (RP 291-292, 399, 401-407, 1007-1010, 617, 744-745, 748-749, 883-886, 888-893, 896) The defense engineer could not even say the original gypsum finish details probably would or even could have done so. (RP 913-914) Thus there was no evidence beyond speculation that omission of gypsum caused injury, and from all that appeared, ENW could not under applicable standards have properly relied on unsealed gypsum finishes to prevent corrosion, and therefore was obligated to specify paint or equivalent protection for the steel, given the highly corrosive environment.

The evidence was undisputed that the change in the garage ceiling to acoustical tile was specifically approved by the architect. (RP 608-609, 738, 750) No testimony suggested that Elkins was negligent to approve

the ceiling finish change or not advise ENW of it¹³, or that Integrity was negligent to implement the ceiling change after the architect approved it.

Floor Sheathing Thickness Change: ENW did not redesign shear wall bottom connections in response to the substitution of thicker plywood subfloor. ENW would blame Integrity for its own failure to correct its design or warn of the need to do so, contending that it should have received a submittal and shop drawings from someone reflecting the change. ENW's contention is not supported by the evidence.

First, it was undisputed that during construction ENW received an email from a floor joist manufacturer ("iLevel") suggesting a "value engineering" change, supported by product specifications and calculations, that would involve using thicker plywood subflooring. (RP 563-574, CP 1229-1242) Mr. McDonald testified that (1) **in response he told iLevel and Elkins that the change was "structurally acceptable,"** (374, 408-410, 447-448); (2) he expressed **no reservations** regarding any need to perform additional engineering work, (RP 447-449, 463); (3) he never asked for a formal submittal (which were not regularly used on the

¹³ Plaintiff's Motion in Limine No. 2 was granted with an order that plaintiff's structural engineering experts, who conceded lack of qualification to do so, would be prohibited from testifying to an architect's standard of care, and they did not do so. (CP 1084, 2086-2090, 2091-2097) No error is assigned to that ruling. No testimony on the duty of care of an architect was elicited from the Project architect. Accordingly, there is a complete absence of testimony suggesting that any professional negligence by Elkins contributed to the injury resulting from ENW's engineering errors.

Project), and the proposal from iLevel already contained the product specifications anyway. (RP 449-450, 466, 711)

Second, all witnesses agreed that submittals, changes, and substitutions were regularly effectuated with little or no formal written paperwork. (RP 302-305, 370, 446, 593-594, 630, 735, 737)

Third, Integrity's owner confirmed that ENW approved the floor sheathing change as "structurally acceptable" without warning that structural modifications would be required. (RP 609-614, 631-632)

Fourth, the iLevel employees and the Association's engineering expert testified that it was virtually impossible that the alternate floor system would have been sold by iLevel for use at the Project without approval from ENW. (RP 208, 567-568, 570, 574)

Fifth, all experts agreed that when iLevel's proposal and associated structural calculations were delivered to Mr. McDonald, he had all of the information he needed to conclude that a redesign of shear wall connectors was required, and to issue a warning to that effect. (RP 876-878, 1013)

Sixth, there was no testimony that a reasonable architect or general contractor would have insisted, under the circumstances, on yet another submittal going to ENW when it had already communicated that the change was "structurally acceptable" without any material reservation, and had requested no further information or follow up. On the contrary, the

Association's expert testified that it was incumbent upon Mr. McDonald to advise the architect, when he conveyed his approval of the floor change proposal, that structural design changes would be required. (RP 408-410).

ENW's expert initially testified that Mr. McDonald was entitled to await further written notice before advising anyone that engineering changes would be required. (RP 870, 872-878) Under the undisputed circumstances and testimony presented, the Association suggests that no reasonable juror could agree. But regardless, even ENW's expert then agreed that when ENW became aware that the floor sheathing would be or was in fact changed, then ENW definitely had a duty to warn the owner, architect and contractor that revisions were required. (RP 881)

It is indisputable that ENW knew of the change during construction: (1) Integrity's president told ENW the change was being made (RP 611-613); (2) Mr. McDonald later calculated the height of the building when approving an order for steel columns, and in doing so *he assumed the floor sheathing thickness would be $1\frac{1}{8}$ " instead of $\frac{3}{4}$ "* (RP 1015, 1018-1025, CP Exhibits 76 & 77); (3) finally, ENW's files contain *pictures that only Mr. McDonald could have taken, of the sheathing stamp showing its thickness as $1\frac{1}{8}$ " and of the greater joist spacing associated with that change.* (RP 1013-1017, Tr. Exs. 74 & 75)

Mere Allegations: In lieu of a negligence case, the defense attempted to cast the general contractor in an unfavorable light, but presented no actual evidence that Integrity caused any structural deficiencies, or that it breached the standard of care a reasonably prudent general contractor would follow under the circumstances.¹⁴

7. Issues Presented at Close of Trial

Claims the parties wished to present to the jury at the close of evidence were: (1) the Association's claims against ENW for professional negligence; (2) Dodson's claim against Elkins for breach of contract, which the Association took by assignment; (3) valuation of the Association's negligence claim against Corson; and (4) ENW's claim for an allocation of fault to Elkins, Integrity, and Corson.

8. Jury Verdict

ENW's recitation of the verdict (Appellants' Brief at 24) is substantially correct.

9. Judgments and Post-Judgment Motions

¹⁴ Specifically, defense counsel asked Integrity's president whether he recalled "that the Association's expert [stated in his report] that Integrity Structures fell below the standard of care for the construction industry when implementing and constructing elements of the Pointe at Westport?" (RP 623- 624) The question was deliberately deceptive and intended to mislead the jury. Mr. Paustian's reports were not of record at trial, and the only testimony about his report was that *it does not discuss the LFRS defects at issue here.* (RP 299-300)

In a similar vein, defense counsel elicited testimony that Integrity fired two project managers over performance issues, (RP 627), but there was no evidence linking those issues or the firings to any defect, and no evidence it was negligent to hire them.

Aside from a key factual error (discussed *infra* in argument) regarding ENW's allegation of "clerical error," and several erroneous legal conclusions, ENW's factual recitation regarding judgments and post-judgment motions (Appellants' Brief at 25-27) is substantially accurate.

III. Argument

A. ENW's Dismissal Motion Based on the Former Economic Loss Rule Were Properly Denied.

At Summary Judgment, ENW sought to deny its duty to the Association based on the former economic loss rule. But our Supreme Court has recently explained that even if an injury is economic loss, and even if the parties have a contractual relationship, a plaintiff is not limited to contractual remedies as long as the injury "traces back to a breach of tort duty arising independently of the terms of the contract." *Eastwood v. Horse Harbor Found., Inc.*, 170 Wn.2d 380, 386, 241 P.3d 1256 (2010). Under the *Eastwood* independent duty analysis, "the court defines the duty of care and the risks of harm falling within the duty's scope" while "the jury decides whether the plaintiff's injury was within the scope of the risks of harm..." *Id.* at 395.

Washington law holds that engineers owe a common law duty, independent of contract, to use reasonable skill to avoid risks of harm to property, property interests, and persons working on the property

regardless of the form that damages happen to take. *Affiliated FM Ins. Co. v. LTK Consulting Servs., Inc.*, 170 Wn.2d 442, 461, 243 P.3d 521 (2010) (**Lost revenue**); *Michaels v. CH2M Hill, Inc.*, 171 Wn.2d 587, 608-609, 257 P.3d 532 (2011) (**Personal injury**).¹⁵ This should end the discussion.

But citing *Berschauer/Phillips Const. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 881 P.2d 986 (1994), ENW claims that engineers owe no tort duty of care to anyone because risks of economic loss are normally allocated by contract in the construction industry. The *Eastwood* Court rejected ENW's interpretation and explained that in *Berschauer/Phillips*:

We held that the general contractor could not sue [the architect, structural engineer, or construction inspector] in tort to recover damages for lost profits. . . . We reasoned, as a policy matter, that if design professionals were under a tort duty to avoid a risk of increased business costs, the construction industry could not rely on the risk allocations in their contracts and would have an insufficient incentive to negotiate risk. The case might have been different if a structure had collapsed.

Eastwood, 170 Wn.2d at 390 (Emphasis added.) The *Affiliated FM* Court also cautioned that “Although *Berschauer/Phillips* makes engineers not liable in tort for some classes of harm,

¹⁵ Note that beyond established common law tort duties, when there is a contract between the parties that could define an asserted duty, the court's evaluation of whether the tort duty is independent of the contract *must* be informed by considering the contractual terms as well. *Donatelli v. D.R. Strong Consulting Engineers, Inc.*, 179 Wn.2d 84, 92, 312 P.3d 620 (2013).

extending that case to all classes of harm and all classes of people would be unjust.” 170 Wn.2d at 454.

The Association had no part in contracting for ENW’s engineering services, and could not protect itself by “negotiating” “risk allocation” with ENW. Thus the Association is not among the “classes of people” governed by the *Berschauer/Phillips* rule. More, ENW’s negligence has resulted in a defective building in danger of collapse, a “class of harm” which *Berschauer/Phillips* indicates calls for a tort remedy.

ENW also argues that “there was no physical harm or property damage flowing from ENW’s actions.” (Appellants’ Brief at 33) But the defects and corrosion *are* physical harm: they render the Project weak, in violation of code, and dangerous to occupy. ENW cites no law making recovery in tort from an engineer depend on the occurrence of more threatened or catastrophic injury. Rather, *Affiliated FM*’s holding is couched in terms of “risks of harm,” not the occurrence of consequential physical damage. 170 Wn.2d at 457.¹⁶ See also *Touchet Valley Grain Growers, Inc. v. Opp & Seibold Gen. Const., Inc.*, 119 Wn.2d 334, 351,

¹⁶ In *Donatelli*, the defendant, like ENW, argued that an engineer only owes a duty of care when property damage results from negligence. The Court of Appeals rejected that argument. 163 Wn.App at 446(“[W]e do not read the opinion to, necessarily, limit the scope of the duty to property damage...It said nothing about limiting the duty to property damage.”) The Supreme Court did not reach the issue.

831 P.2d 724 (1992) (A claimant should not have to suffer collapse or “calamitous event before earning his remedy in tort.”)

The Association in responding to summary judgment provided the undisputed declaration of its expert witness that the Project suffers from structural deficiencies because of ENW’s negligence, has far less than the minimum strength it should, and will suffer extensive damage and possible collapse in an anticipated seismic event that it should be able withstand if properly designed. (CP 485) The Association thus established its claim for purposes of summary judgment.

B. Mr. Paustian’s Testimony Was Non-Speculative and Addressed Core Matters at Issue.

ENW contends “that Paustian’s testimony about potential damages” was “speculative” so that “the jury was left with the impression that potential damage, not actual damage, was sufficient to conclude that ENW had a duty of care which had been breached...” (Appellants’ Brief at 36-37). ENW argues from false premises to an erroneous conclusion.

First, ENW’s characterization of the Association’s injury as “potential damages” is misguided and factually inaccurate. The Project is missing key structural components and dangerous. This injury could be *measured* to include many economic components: damages for lost value, uninsurability or other stigma, the costs of administrative action, loss of

use, cost of repair, and so on. But even completely non-physical injuries are compensable in tort, so long as they were caused by breach of a tort duty of care. *Eastwood*, 170 Wn.2d at 388 (Listing non-physical injuries compensable in tort). The injury was *measured* here strictly in terms of economic repair costs, but availability of a tort remedy does not depend on how the injury is measured. *Id.* at 393-394.

Second, ENW's insistence on sagging, collapse or the like is contrary to law. Following *Eastwood*, the court defined ENW's duty in Instruction 14 as "the degree of care, skill, and learning expected of a reasonably prudent engineer in the state of Washington acting in the same or similar circumstances." 170 Wn.2d at 455; (CP 1434) The court defined the "risks of harm" falling within the "scope" of that duty in Instruction No. 18 which, following *Affiliated FM*, allows recovery only for those deficiencies that create "safety risks of physical harm." (CP 1435); 170 Wn.2d 456 & 458. This left the jury question: whether the design defects created "safety risks of physical damage" that ENW was duty-bound to avoid by exercising reasonable engineering skill, irrespective of other consequential damage. Mr. Paustian's testimony was properly directed to that issue, and indeed was the only actual evidence presented on the subject.

ENW's third false premise is that Mr. Paustian's testimony was "speculative" because he did not calculate the "actual strength" of the LRFS "as a whole." (Appellants' Brief at 36) But no authority, opinion, or reasoned argument shows such a step to be necessary.¹⁷ Precision in estimating the danger posed by the LRFS defects is not required to establish that ENW's negligence created serious risks of harm that it was duty-bound to avoid in its design work.

Mr. Paustian's opinion testimony was not "speculative": he performed three intrusive investigations and a plan review, (RP 109-111); performed a lateral analysis for each floor and compared it to two others, (RP 112-113, 152); calculated the degree to which the LRFS components fail to meet minimum capacities, (RP 154-155); considered windstorm and earthquake history and expert predictions, (RP 266-267); and applied his experience in earthquake damage assessment at some fifty buildings to conclude that ENW's errors create a substantial risk of "soft story" collapse in an expected seismic event. (RP 100-101, 246, 295-298)

¹⁷ The "actual strength" of the "system as a whole" is meaningless and irrelevant to how the LRFS will perform anyway: all experts agreed the lateral force resisting *system* is only as strong as its *weakest link*. (RP 153-154, 305, 781) The "weak links" were measured against code minimums. There was no evidence that some "system strength" analysis is needed to form a valid expert opinion that the Project is suffering such a cavalcade of severe structural design deficiencies in the LRFS that it is likely to be positively dangerous in an earthquake it should otherwise be able to resist safely.

The trial court had wide discretion to admit Mr. Paustian's well-founded testimony regarding the risk created by ENW's engineering errors. Its decision would not be subject to reversal, even if ENW had presented a "fairly debatable" argument for exclusion, which it has not. *Myers v. Harter*, 76 Wn.2d 772, 781, 459 P.2d 25 (1969).

C. ENW Could Not Allocate Negligence to Elkins or Integrity.

ENW sought a negligence allocation to Elkins and Integrity, but (1) ENW was limited to contract-based claims against other construction participants in cases of economic loss, which it did not assert; and (2) ENW failed to present substantial evidence of duty, breach and causation to warrant submission of comparative negligence to the jury.

1. ENW Was Limited to Contract Based Claims Against Elkins and Integrity

Among construction industry participants, risks of economic loss are negotiated, such that under *Berschauer/Phillips*, claims for such losses sound only in contract. *Eastwood*, 170 Wn.2d at 390. Allowing ENW to make negligence allocation and contribution claims against Elkins and/or Integrity for economic loss would interfere with contractual risk allocations in the construction industry. ENW knew this, (see, e.g. CP 2066), yet chose to make no contract-based claims against Elkins or

Integrity, and has not appealed the dismissal of its one contract-based claim against Dodson. (CP 2130-2133)

The issue appears to be one of first impression, but *Central Washington Refrigeration, Inc. v. Barbee*, 81 Wn.App. 212, 221, 913 P.2d 836 (1996), *reversed on other grounds*, 133 Wn.2d 509, 946 P.2d 760 (1997), for example, holds that “fault” under the Tort Reform Act for contribution purposes is limited to tort-based claims.

2. Required Showings to Take Allocation Defense to the Jury

Setting aside the question above, in order to take allocation of comparative negligence to the jury, ENW had to present substantial evidence that another actor with a duty to the Association breached it, and proximately caused the injury. *Adcox v. Children's Orthopedic Hosp. & Med. Ctr.*, 123 Wn.2d 15, 25, 864 P.2d 921 (1993). ENW hardly tried and ultimately failed to meet its burdens.

3. There Was No Evidence of Elkins' Standard of Care as Architect, or Breach Thereof.

The defense engineers were barred *in limine* from testifying to the standard of care for an architect. (CP 1008-1009, 1084) No appeal is taken from that order. No testimony established Elkins' standard of care with respect to any of the issues. That fact is fatal to ENW's allocation claim to Elkins, because qualified expert testimony on the applicable

standard of care is *required* in allocating negligence to design professionals. *Michaels*, 171 Wn.2d at 609; *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 228, 770 P.2d 182 (1989). Since expert testimony is required to establish the standard of care, it was also required to present a defense of allocation under RCW 4.22.070. *Joyce v. State Dept. of Corrections*, 116 Wn.App. 569, 595, 75 P.3d 548 (2003).

The only potential negligence for which ENW might have claimed an allocation to Elkins were: (1) approval of the change to the garage ceiling's finish without notifying ENW; (2) failure to identify ENW's engineering errors in its structural plans; and/or (3) not insisting on another submittal for the floor sheathing change after ENW had approved the original proposal as "structurally acceptable." But *nothing* in the record or common sense supports the suggestion that Elkins had a professional duty to do any of these things.¹⁸ The ceiling finish was immaterial to ENW's obligation to protect against steel corrosion because it could not work in the first place. Architects are not qualified to evaluate structural engineering work. No evidence suggests a duty in Elkins to issue a submittal on the floor sheathing to ENW, especially after ENW had already approved it as "structurally acceptable." Thus ENW failed to

¹⁸ Elkins' contracts with Dodson (Tr. Ex. 37) and ENW (Tr. Ex. 38) contain nothing to suggest Elkins had such duties. The only expert competent to provide testimony that an architect might have such duties of care, Mr. Kaul, was never asked.

present substantial evidence of a duty supporting a negligence allocation to Elkins, and it would have been improper for the court to instruct the jury on the question.¹⁹

4. There Was No Evidence of a Duty In Integrity to Act as ENW Claims, And No Substantial Evidence That a Negligent Act or Omission by Either Integrity or Elkins Proximately Caused the Claimed Injury.

To allocate negligence to Integrity, ENW was required to show that Integrity as a general contractor had a duty to the Association's members, as future purchasers of the Project, (1) to monitor Corson's work so closely as to observe that it had omitted holdowns along one wall; and/or (2) to insist that another submittal be presented to ENW on floor system changes, when ENW had expressly approved the change as "structurally acceptable" and submittal procedures were regularly ignored at the Project; and/or (3) to notify ENW that the architect had approved a change in garage ceiling finish to a suspended acoustical tile system.

¹⁹ The issue at trial with respect to Elkins' liability was strictly whether Elkins breached its contract with Dodson, and whether any of the damages at issue were solely the result of Elkins' own breach of contract, over and above injury caused by the negligence of ENW. (CP 1436-1437)

The jury in fact found that Elkins' breach of contract caused damage "over and above" that caused by ENW's negligence, which confirms that ENW and the evidence persuaded the jury that ENW did not cause some of the damages at issue. Thus while ENW failed to put on a negligence case, the verdict is probably more favorable to ENW than a negligence allocation would have been, because the Association cannot collect from ENW the additional \$100,000 in damage caused by Elkins' contractual breach, in excess of the cost to remedy damages from ENW's negligence. As a fault-free plaintiff, the Association might have been able to recover that additional \$100,000 from ENW on a joint and several liability basis, had it been determined merely as a setoff or allocation.

What due care for a general contractor includes when responding to changes or monitoring subcontracted work on a large construction project is not within the common experience of average jurors, and depends in large measure on what the general contractor engaged to do. To demonstrate Integrity's alleged tort duties, ENW could have argued from applicable law or regulations, qualified testimony concerning industry customs and practice, or the like, but instead it presented no evidence on the topic establishing a duty at all. More, ENW was *required* under *Donatelli* to demonstrate that Integrity's alleged tort duty is independent of its contract by reference to the general contract itself. *But ENW did not even put Integrity's general contract in the record*, and thus substantial evidence was not presented that Integrity had any of the duties ENW contends, whether in contract or tort, nor was there substantial evidence that any breach proximately caused injury.

Gypsum / Structural Steel Corrosion: There was no evidence that Integrity had a duty to refrain from placing the revised ceiling in the garage when that change was specifically approved by the architect.²⁰

²⁰ The defense expert engineer falsely suggested that the ceiling in the architectural plans "appears to have been substituted without approval." (RP 809) That claim was without factual basis: the architect and general contractor, who have personal knowledge, had already confirmed that the change was approved by the architect. (RP 608-609, 738, 750) An expert's opinion cannot be "based on assumptions for which there was no factual basis." *Riccobono v. Pierce County*, 92 Wn.App. 254, 268, 966 P.2d 327 (1998).

There was no evidence that Integrity had a duty to tell ENW about Elkins' change to the architectural finish detail.

There was also no evidence that either Integrity or Elkins proximately caused corrosion by omitting the unsealed gypsum sheathing at the garage ceiling or the steel columns; rather, all the evidence was that unsealed gypsum sheathing as specified could not have protected the steel from the corrosive environment. (RP 290-292, 401-407, 1007-1010, 884-888, 913-914) Thus, there is no evidence that either Integrity's or Elkins' omission of gypsum sheathing breached a duty, or that this proximately caused the corrosion at issue.

Holdowns on Structural Steel: There was no evidence that Integrity had a duty to discover ENW's failure to fully detail the line of holdowns at the steel beam in its plans, or discover Corson's failure to install them. The only evidence was that *none* of the engineering defects are of the sort that Integrity had a duty, based on expectations in the industry, to find and bring to ENW's attention. (RP 307-308) Integrity's contract, again, is not of record (as required to show either an independent tort duty or a contractual duty), and the company president categorically denied any obligation to review the structural plans for compliance with code, or do more than "spot check" the work of its framers for general compliance with design documents. (RP 600-603)

Floor Sheathing Change: There was no evidence that Integrity had an independent or contractual duty to refrain from installing the thicker floor plywood, or a duty to seek further approval from ENW, given (1) that ENW had specifically approved the change proposal as “structurally acceptable” without voicing any reservations, (2) that ENW knew during construction that the thicker floor sheathing was in fact installed, and (3) that change approvals at the Project were often informally approved, and formal submittals uncommon. While Integrity’s contract might have barred it from executing any changes without following a formal submittal process, thereby establishing at least some source for a duty, Integrity’s contract terms were not put into evidence, and it was undisputed that formal change procedures, if they were ever required, were in practice waived. See, e.g., *Crowley v. United States Fidelity & Guaranty Co.*, 29 Wash. 268, 274, 69 P. 784 (1902). After ENW approved the floor change proposal as “structurally acceptable,” and given ENW’s silence when it knew from further work that thicker sheathing had been used, there was no evidence that Integrity had a duty to seek further approvals from ENW.

Thus ENW failed to establish the existence of a duty on the part of Integrity or Elkins to the Association to do or refrain from any of the conduct ENW claims was negligence, and at trial made at most a desultory effort to do so. ENW failed to establish that any breach of duty by

Integrity or Elkins in substituting or omitting gypsum sheathing, or in not demanding another submittal regarding the floor sheathing change, was a proximate cause of injury. On the record at trial, it would have been error for the court to instruct the jury on ENW's allocation theories.

5. There Was No Evidence That Corson Breached a Duty of Care Beyond Omitting Holdowns.

It was undisputed that Corson as a reasonable framer would not have omitted the line of holdowns atop a structural steel beam simply because there was no detail describing how to attach them. (RP 308, 882, 614-616). This kind of negligence is well within a jury's understanding, and the court properly instructed the jury to allocate negligence to Corson, which was liable by reason of default. The jury did so.

ENW wished to argue that Corson also had a further duty not to select a 3.5" nail spacing for the unblocked SFD. But ENW failed to put Corson's contract into evidence, too, so whether Corson had a contractual or independent tort duty in that regard, and its scope, are unknowable.

ENW's entire argument about nail spacing in the unblocked SFD is just sophistry anyway. The Association's engineer testified that Corson built the SFD shown in the plans as a standard unblocked diaphragm; as would be expected of it, Corson selected a nail spacing entirely appropriate for a standard unblocked diaphragm as shown (though that

spacing would be inadequate for the blocked diaphragm which ENW *should have* designed.) (RP 230-231, 308, 375, 379, 411-412). The defense engineering expert *agreed* that Corson built a standard unblocked diaphragm as shown on ENW's plans, and that the nail spacing is basically irrelevant in the absence of blocking. (RP 835) ENW made no offer of proof that a reasonable framer would question ENW's unblocked diaphragm design, or do anything but to select a 3" nail spacing for the unblocked diaphragm shown on ENW's plans. Since nail spacing at the unblocked diaphragm was not in issue, and since no evidence suggested duty or breach in selecting a typical and appropriate nail spacing for ENW's unblocked SFD design, ENW failed to present adequate evidentiary grounds for further allocation to Corson.

D. Jury Instructions

1. Standard of Review

A court should instruct on a theory only when substantial evidence supports it, *Stiley v. Block*, 130 Wn.2d 486, 498, 925 P.2d 194 (1996), and its determination that there was insufficient evidence to support instruction on an affirmative defense is reviewed for abuse of discretion only. *Id.* and *State v. Walker*, 136 Wn.2d 767, 771, 966 P.2d 883 (1998).

Instructions, as given, are reviewed *de novo* for errors of law, and are sufficient if they allow counsel to argue their theories of the case

(consistent with substantial evidence requirements), are not misleading, and properly inform the trier of fact of the applicable law. *Bodin v. City of Stanwood*, 130 Wn.2d 726, 732, 927 P.2d 240 (1996). An erroneous instruction is reversible error only if it prejudices a party. *Joyce v. Dep't of Corrections*, 155 Wn.2d 306, 323, 119 P.3d 825 (2005). Prejudice is presumed if the instruction contains a clear misstatement of law, but must be demonstrated if the instruction is merely misleading. *Keller v. City of Spokane*, 146 Wn.2d 237, 249-50, 44 P.3d 845 (2002).

The jury instructions were correct, and allowed ENW to argue all its theories for limiting liability that were supported by substantial evidence. For example, while ENW failed to present substantial evidence that Elkins or Integrity *negligently* caused the Association's injury, ENW nonetheless successfully contended that some defects were *not caused* by ENW's conduct. Given that the jury awarded only \$1.14M when they were asked to award \$1.7M, it is possible the jury concluded that there were significant defects not *caused* by ENW's negligence, such as missing steel protection or the results of the floor sheathing change.

2. ENW Instructions 10, 12, 13, 16 and 18 Were Properly Refused.

ENW's proposed Instruction 13 attempts to outline claims and defenses after WPI 20.1. (CP 1394-1396) The court did not use a

“claims” summary instruction. The Note on Use for WPI 20.1 indicates that such an instruction is not necessary where the issues are known from presentations of the lawyers, and the duties of the parties are correctly set forth in the substantive instructions. Here, the claims and defenses were fully explained, the issues known from the presentation of the lawyers, and the duties of the parties were correctly set forth. Accordingly, the court’s decision to refuse the instruction was not an abuse of discretion.

Proposed Instruction 13 was also properly refused because: (1) ENW did not present substantial evidence to support an allocation of negligence to Elkins or Integrity (see above); (2) it suggested without evidence or authority that Corson had a duty to install “all structural components” in conformance with plans and specifications; (3) it erroneously suggested that the Project must sustain consequential damage to state a claim; and (4) it over-emphasized ENW’s unsupported allocation defense by repeating it three times. Because the proposed instruction was erroneous, misleading, and unsupported by substantial evidence, the court’s refusal to give it was not an abuse of discretion.

ENW’s proposed Instruction 16 purports to set forth ENW’s burden of proof on affirmative defenses of allocation of fault to an undefined group of persons, improper service of process, and intervening cause. (CP 1396-1397) As to the first two issues, the instruction was

properly refused because: (1) ENW had only contract claims against the other defendants; (2) there was not substantial evidence of duty or causation to support an allocation of fault to Elkins and Integrity; and (3) there was no evidence of improper service of process.

As to the last issue, the evidence at trial did not support an intervening / superseding cause instruction. *Herberg v. Swartz*, 89 Wn.2d 916, 578 P.2d 17 (1978) is instructive. There, an owner operated a hotel knowing of multiple fire code violations; an arson fire destroyed the hotel, and plaintiff's neighboring building was damaged during fire suppression efforts. The neighbor sued the hotel owner, who sought to introduce evidence that the city's and contractor's fire suppression actions were an intervening cause of the injury. The trial court determined that the hotel operator should have foreseen these as a consequence of its negligence as a matter of law, and refused to allow evidence and argument of intervening cause at trial. The Supreme Court agreed, noting that:

Negligence, if any, of either the City or [the contractor] was activated by appellant's own negligence in failing to correct the many code deficiencies which caused the fire to spread. . . . Since the trial court correctly determined that appellant could reasonably have foreseen the need for assistance by both the City and a demolition team, the proffered evidence was irrelevant and properly excluded. Finding no error in excluding such evidence there was no error in the trial court's refusal to instruct the jury on the issue.

Id. at 928.

Similarly here, on the undisputed facts ENW “could reasonably have foreseen” that Integrity, Elkins, iLevel and others would rely on ENW’s express approvals and designs. The undisputed evidence that change procedures at the Project were informal means that ENW should have foreseen reliance on its unreserved approval of the floor sheathing change as “structurally acceptable.” (RP 408-410) Moreover, the undisputed evidence was that gypsum sheathing would not have protected steel, so changing or omitting it was not a cause of damage. As a result, the acts of others in installing the new floor sheathing ENW approved, or in changing gypsum sheathing specifications that have no impact on corrosion, cannot be intervening causes as a matter of law. *Id.*

Normal reliance by Integrity, Elkins and others on ENW’s negligent designs and approvals (which is all that is shown in this case) cannot amount to an intervening cause. See *Campbell v. ITE Imperial Corp.*, 107 Wn.2d 807, 812-813, 733 P.2d 969 (1987). In short, ENW cannot claim the natural consequences of its own malpractice as an intervening cause, and it was proper not to instruct on the issue.²¹

²¹ None of the qualifications in *Campbell* for an intervening or superseding cause are met. (1) Any failure to issue a second change submittal for the floor did not create a different type of harm from ENW’s original approval. Similarly, the substitution of one gypsum ceiling that could not protect the steel for a different one that also could not protect the steel did not cause any new type of harm different from ENW’s failure to

ENW also failed to present a proper instruction on intervening cause, and omitted the factors listed in WPI 15.05.

Thus, ENW's Instruction 16 incorrectly stated the law, was unsupported by substantial evidence, and would have confused the jury. Accordingly, the court's refusal to give Instruction 16 was not an abuse of discretion or error of law, and was at most harmless error.

ENW's proposed Instruction 10 purports to set forth the burden of proving "professional negligence," without reference to the type of professional at issue. (CP 1393) The instruction was properly refused: ENW's instruction suggested that breach of duty by any number of unspecified "professionals" was at issue, even though no competent evidence of professional negligence on the part of the architect Elkins or any other professional but ENW was presented. Not specifying which defendant it could be applied to would have been improper and misleading, given the absence of evidence as to Elkins and others. By including a *separate* statement of the engineer's duty (e.g., ENW's proposed Instruction 18), the jury would think that professional negligence

protect the steel in the first instance. (2) It was not extraordinary, given the informality of design changes at the Project, that ENW's unreserved structural approval of the floor sheathing change would be acted upon, or that an architectural detail which could do nothing to protect the steel might be changed without ENW's approval. And, (3) any failure to notify ENW of the ceiling or floor change did not operate independently of ENW's negligence to create damage. Rather, ENW's negligence is *the* necessary and initiating factor of the damages occurring in all cases. Thus the evidence simply cannot demonstrate an intervening cause.

by Elkins or others was at issue on the evidence, when it was not. Even if a definition of negligence that included the elements of duty, breach, and proximate cause in one place might have been helpful, the jury was required to find all three before awarding damages under the instructions as given. (See Instructions 11, 14, 17, 18, and Special Verdict Form, CP 1433-1435, 1443-1446) Accordingly, there was no prejudice to ENW because the substance of its instruction, to the extent it was not erroneous, was given.

ENW's proposed Instruction 12 would instruct that when defects are caused by a “contractor’s” noncompliance with approved structural plans, the defects are not proximately caused by the structural plans. (CP 1394) The only evidence of non-compliance with structural plans was the (1) omission of a line of holdowns at one steel beam, and (2) the change in floor sheathing thickness.²²

As to holdowns, ENW cannot show prejudicial error because Corson was found negligent for omitting them, and there was no evidence

²² If ENW wanted to argue that a deviation from *architectural* plans for the gypsum at garage ceiling and columns interrupted the causal chain, its instruction regarding *structural* plans would not serve, and in any event ENW failed to present evidence that a deviation from architectural finish details caused corrosion.

to suggest that Integrity was responsible in tort or contract for not discovering Corson's or ENW's omission.²³

As to the floor sheathing thickness, ENW's proposed instruction would have unduly emphasized boilerplate in the structural plans, when every witness testified that changes were agreed upon informally, and neither Corson's nor Integrity's contract was in evidence. ENW's proposed Instruction 12 would have caused the jury to ignore ENW's conceded oral approval of the floor sheathing change as "structurally acceptable" and placed undue emphasis on written plan requirements that no longer governed. The instruction would have misled the jury into thinking that ENW had no duty to advise of the need to redesign shear wall connections once it learned of the use of thicker plywood, when all the experts agreed that ENW had that duty. Such misleading instructions are properly refused.

ENW's proposed Instruction 18 states the standard of care for an engineer in Washington. While the statement is correct, it was given in the court's Instruction No. 14, along with the instruction that a design in violation of building codes can be considered as evidence of negligence.

²³ Integrity's contract and its terms are not in the record, as required to establish an independent duty on Integrity's part under *Donatelli*, 179 Wn.2d at 92, and no other witness suggested that in the industry Integrity would be expected to have monitored the work of a licensed, independent subcontractor so closely.

(CP 1434) Accordingly, ENW fails to show abuse of discretion, error of law, or prejudice when the instructions are considered as a whole.

3. Instructions 11, 18, 15 & 16 Were Proper

The court's Instruction 11 tracks the proximate cause instruction in WPI 15.02 and 15.04; the court chose the word "injury" instead of "event." ENW claims that "damages from an event" rather than an "injury" were at issue. (Appellants' Brief at 40) But that is simply untrue. The Association was "injured" because its building is weak and dangerous, and freely conceded that the LFRS has not *yet* been tested to failure in an "event." (RP 386-388) ENW fails to explain how in this setting using the word "injury" instead of "event" could mislead the jury.

The court's Instruction 18 directed the jury, if it found negligence, to award the amount of money that reasonably and fairly compensates the Association for necessary costs to repair structural defects creating a safety risk of physical harm, and for (in effect) the cost to determine what needs to be repaired and how to do it (both of which are necessary components of the repair process.) (CP 1435-1436) ENW contends, without authority, that the court should have instructed that the measure of damages for personal property under WPI 20.13 applies. But personal property is not at issue, and consequential damage is not a prerequisite for liability. Instruction 18 is a correct statement of law.

Affiliated FM, supra, and *Thompson v. King Feed & Nutrition*, 117 Wn. App. 260, 267, 70 P.3d 972 (2003).²⁴

ENW also calls Instruction 18 a judicial comment on the evidence for supposedly treating repair costs as undisputed, despite supposedly “substantial dispute about whether there was any safety risk” and whether “the costs to identify any structural defects were recoverable.” (Appellants’ Brief at 41). While ENW may have *wanted* to dispute the risk, it presented not a scintilla of competent evidence to rebut the Association’s showing of the safety risk and its degree.²⁵ More, ENW did

²⁴ Under *Thompson*, cost of repairs is a proper measure of damage for tortious injury to the Project. It was undisputed that to effectuate the complex repairs at issue, a structural engineer must know what is wrong with the building and develop a repair plan for the contractor to fix the defects. (RP 343-344, 346-347) Damages from such reasonable and necessary expenses in repairing an injury are commonplace, and no different from the cost of an x-ray image following a car accident. The cost of diagnosing the extent of the defects and developing a repair plan is thus compensable. *General Ins. Co. v. Dyer*, 7 Wn. App. 411, 412, 499 P.2d 910 (1972).

²⁵ The degree of risk from design deficiencies in this case is a matter beyond the ken of laymen, and must be established by expert testimony. *Seybold v. Neu*, 105 Wn.App. 666, 676 (2001) citing *Harris v. Robert C. Groth, M.D., Inc.*, 99 Wn.2d 438, 449, 663 P.2d 113 (1983) (“Expert testimony is required when an essential element in the case is best established by an opinion that is beyond the expertise of a layperson.”) ENW offered none.

The only other matters touching on the degree of risk that ENW thinks created a dispute of any sort are, again, the fact that legal occupancy has not yet been taken away, and Mr. Paustian’s decision not to advise the building department (at that time) of the structural deficiencies. But again, whether unit owners have “moved out” or not is irrelevant and prejudicial, and the building department does not know of the problems, so its inaction is meaningless. Similarly, Mr. Paustian’s interpretation of his ethical obligations does not change the reality of the defects or their impact on safety.

The inferences on which defense counsel now tries belatedly to dispute the safety risks are without evidentiary basis, and would be both prejudicial and misleading to suggest to the jury, given the expert testimony from all sides conceding the extent and severity of the design defects. In short, the inferences defense counsel relies on here are both *unreasonable and illegitimate*, and as such could not create an issue for submission

not except to Instruction 18 on this basis, so this objection is waived. (RP 1051). *Olson v. Seattle*, 54 Wn.2d 387, 387, 341 P.2d 153 (1959); *Alway v. Carson Lumber Co.*, 57 Wn.2d 900, 902, 355 P.2d 339, 341 (1960). Even if ENW had so objected, at no point does Instruction 18 remotely state or suggest that any of the claimed damages were “undisputed.”

ENW asserts that including a recitation of the types of damages that the jury *may* award in Instruction 18 was also a comment on the evidence. But *all* instructions under WPI 30 include a recitation of contended damage elements, including necessary treatment and mitigation expenses already incurred by the claimant. WPI 30.07.01. Without them, the jury could easily miss a required component of damages.

The court’s Instruction 15 advised the jury that the City of Westport had no duty to ensure compliance with code. **Instruction 16** told the jury that the City’s issuance of a permit or approval was not a validation of code violations. ENW does not dispute that the instructions are legally correct; rather, it asserts that they were somehow prejudicial and “extraneous to the case.” But ENW took no exception to the court’s

to the jury. See, e.g., *Snohomish County v. Rugg*, 115 Wn.App. 218, 229, 61 P.3d 1184 (2002) (“**Unreasonable inferences that would contradict those raised by evidence of undisputed accuracy**” do not raise an issue of fact for the jury); *Landstar Inway, Inc. v. Samrow*, 181 Wn.App. 109, 132, 325 P.3d 327 (2014) (“[W]here a party asks us to draw an unreasonable inference, the inference does not create a material issue of fact...”)

Instruction 16, (RP 1047-1051), and ENW's objection to it is thus waived. *Estate of Ryder*, 91 Wn.2d 111, 114, 587 P.2d 160 (1978).

The jury heard much testimony on the building department's role. (RP 109, 125, 126, 313, 392-394, 400, 420, 436-427, 429-426, 452-453, 539, 598, 603, 609, 617, 632-636, 700, 704, 731, 736, 745-747, 801-802, 830, 841) Jurors unfamiliar with construction law could readily assume that the government's issuance of a permit, conduct of inspections, and issuance of certificates of occupancy amount to legal assurance that a building conforms to code or is safe. Accordingly, it was important to instruct the jurors not to waste time weighing what seems a reasonable question – the City's responsibility – which is legally irrelevant. Such instructions are commonplace.²⁶ No error is shown.

4. The Instructions Did Not Improperly Emphasize the Association's Case.

To establish error by undue emphasis, a party must show that instructions on a point were so repetitious as to create "extreme emphasis" that "grossly" favored the other party. *Adcox*, 123 Wn.2d at 38. That burden is heavy because "Most jury instructions will naturally tend to support one party's theory over the other's. As long as the instructions

²⁶ The one case cited by ENW for the proposition that an instruction to disregard an extraneous issue is reversible error, *Munson v. Gunder*, does not support ENW's argument. 70 Wash. 629, 631-32, 127 P. 193 (1912). The found error in setting up an extraneous issue in instructions "as potentially determinative of the case." That is not what happened here.

allowed each party to argue its theory of the case, without undue emphasis or repetition, no error is committed.” *Id.*

In *Samuelson v. Freeman*, the only reported decision reversing under the standard, a series of six instructions described a medical practitioner’s standard of care along with every possible limit on malpractice liability, until the list “became argumentative in character and in sum overemphasized the physician’s immunities and markedly diminished his responsibilities.” 75 Wn.2d 894, 897, 454 P.2d 406 (1969).

No such overemphasis appears here. The instructions allowed ENW to argue every defense theory actually supported by substantial evidence: that ENW did not cause some defects, that the cost of repairing the defects ENW caused is less than the Association claims, that ENW did not breach its duty of care as to steel corrosion defects, and even the dubious defense expert proposition that a structural engineer’s work fulfills the standard of care if he merely *intends* to meet Code.²⁷

E. The Court’s Evidentiary Rulings and Demands For Decorum When Questioning Witnesses Did Not Constitute “Interjections” Into Witness Testimony That Improperly Commented on the Evidence.

A prohibited comment on the evidence is one which “allows the jury to infer from what the judge said or did not say that he personally

²⁷ See RP 842. But of course, “[n]egligence is conduct, and not a state of mind.” *Lewis v. Scott*, 54 Wn.2d 851, 858-860, 341 P.2d 488 (1959) quoting Prosser on Torts (2d ed.) 119, § 30.

believed or disbelieved the testimony in question.” *Hizey v. Carpenter*, 119 Wn.2d 251, 271, 830 P.2d 646 (1992). Even if a court’s comments are improper, an instruction to disregard them will ordinarily cure any error. *Id.* and *Brown v. Spokane County Fire Prot. Dist. No. 1*, 100 Wn.2d 188, 201, 668 P.2d 571 (1983).

ENW argues first that “the court’s uneven rulings on objections showed bias for the HOA’s case...” (Appellants’ Brief at 49), apparently because the court, during examination of engineer experts, overruled 8 objections and denied 4 motions to strike by ENW’s counsel, while sustaining 2 objections and granting 1 motion to strike by the Association’s (this is not a complete summary of the objections and motions during that testimony).

It was incumbent upon ENW to demonstrate how mere rulings on evidentiary objections and “run of the mill colloquies between court and counsel, which occur in every trial” amount to improper comments on the evidence, and show that they resulted in prejudice. *State v. Williams*, 68 Wn.2d 946, 952, 416 P.2d 350 (1966). ENW fails to do so. Nor does ENW even argue that any of the evidentiary rulings were incorrect, or made in a prejudicial tone or manner. *State v. Richard*, 4 Wn.App. 415,

427, 482 P.2d 343 (1971). In fact, the rulings were all either indisputably correct, or well within the court's discretion.²⁸

²⁸ ENW's objection based on foundation to the question whether framers are, in Mr. Paustian's experience, qualified to evaluate whether a shear wall connection in structural plans is adequate was properly overruled. (RP 198) Mr. Paustian is a structural engineer of 21 years' experience and testified that he has substantial experience implementing structural repairs.

ENW's objected that Mr. Paustian's recitation of Mr. McDonald's deposition testimony (that "when he reviewed the substitution [with thicker plywood], he found it to be structurally acceptable") was a mischaracterization of his words; that objection was properly overruled. (RP 203) Mr. McDonald's deposition testimony had been submitted to the court in prior submissions (CP [TPD] Deposition Designations, McDonald, pp. 100-101); in it, Mr. McDonald testified in exactly the fashion Mr. Paustian described on the stand. Insofar as this was an admission of a party opponent, ER 801, and the type of information a structural engineer would rely on in forming an opinion on professional negligence, ER 703, it was proper to overrule ENW's objection. Soon after, Mr. McDonald testified on the subject in detail. (RP 446-450)

Notably, it was the *defense expert* who attempted to distort Mr. McDonald's deposition testimony by (1) falsely suggesting that he told the architect that the change "structurally could work, but would have to use longer fasteners," and by (2) failing to explain that Mr. McDonald's only reservations in his approval of the floor change were as to architectural impact on building height, and any cost changes, both of which are immaterial to his structural approval. (RP 872-873)

ENW's objections to Mr. Paustian testifying to the geological record of frequent massive quakes, as an issue outside the scope of his expertise, were properly overruled. (RP 266 & 267) Geological assessment of anticipated earthquake forces and frequencies is the type of information structural engineers rely on in setting standards and designing a building to resist lateral forces, and therefore admissible under ER 703. *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 682, 15 P.3d 115 (2000).

Mr. Paustian was asked his opinion of the nature and severity of risks to the building as a result of the design defects in a less than code-level earthquake. He began to answer based on his extensive experience reviewing earthquake-damaged buildings, when an objection was interposed based on foundation. That was properly overruled. (RP 296) Mr. Paustian started again to testify that in his experience, buildings missing key components of the LFRS and with soft stories, like the Project, are the ones showing the most extensive damage in earthquakes. ENW objected that it did not know what buildings Mr. Paustian was using for comparison. The Court allowed Mr. Paustian to give an answer limited to his expectations for this building based on actual experiences he has had with other buildings, such that defense counsel could follow up on that experience in cross examination and impeach. (RP 297) This was a proper ruling, because the validity of Mr. Paustian's comparisons goes to the weight of his opinion, not its admissibility. *Johnston-Forbes v. Matsunaga*, 177 Wn.App. 402, 412, 311 P.3d 1260 (2013).

The court overruled a relevance objection to Mr. Paustian's testimony that certain of his bills reflect reasonable and necessary diagnostic and scope of repair development work, explaining that he would allow the bills as relevant to investigation

(diagnosis) and repair (cure) planning which he correctly accepted as a legitimate form of damages. (RP 346-348) The court's truncated explanation of its reasoning and invitation for cross examination is not a comment on the evidence. (RP 348)

ENW complains that four motions to strike lengthy responses to questions with supposedly "one word answers" were denied by the court. (RP 359, 361, 374 & 376) The four motions to strike were efforts by defense counsel to distort witness testimony by asking leading "yes or no" questions and then trying to cut off witness testimony without adequate explanation. They were properly denied. Where a "yes" or "no" answer to a question might lead the jury to an erroneous inference, it is error to refuse to allow a witness to explain his answer. *Webber v. Park Auto Transp. Co.*, 138 Wash. 325, 329, 244 P. 718 (1926) ("A witness is ordinarily permitted to explain his answers, where the question calls for an answer either "yes" or "no" . . ."); Underhill on Evidence, 4th Ed., p.766. Here, simple "yes" or "no" answers would have been misleading: (1) as to the first question by suggesting that a meaningful test of the cause of corrosion had been omitted, when in fact there was no disagreement among the experts regarding the cause; (2) as to the second question by creating an inference that the steel does not present a real safety risk because it does not yet need to be replaced, only cleaned and protected; (3) as to the third question by focusing only on part of Mr. McDonald's relevant testimony; and (4) as to the fourth, by creating the false inference that Corson did something wrong by installing typical unblocked floor diaphragm nailing.

ENW complains that the court sustained two objections during its defense expert's testimony. In the first, the defense expert engineer Mr. Trochalakis testified that "it appears ... a different ceiling was substituted without any approval..." (RP 808). Mr. Trochalakis was plainly speculating about the approval process. Testimony from the architect and the general contractor had established that the ceiling change was fully approved by the architect. (RP 608-609, 738, 750) Accordingly, the objection was properly sustained. In the second, defense counsel attempted elicit Mr. Trochalakis' opinion as to whether the building presents an imminent risk of harm; the Association objected that no such opinion had been disclosed in discovery, and a motion *in limine* had been granted to bar undisclosed expert opinions. (RP 817-818, CP 1086) ENW does not contend that the *in limine* order was error, or that Mr. Trochalakis' opinion was admissible given that it had not been disclosed in discovery. Accordingly, the second objection was properly sustained as well.

Finally, ENW complains that a non-responsive answer by its own expert was struck during cross examination on the Association's motion. (RP 891-892) The Association's counsel had asked whether in Mr. Trochalakis' opinion, a reasonable engineer would expect that an exterior gypsum ceiling in an open air garage next to the ocean, with an unheated space behind it, would be vapor and water-tight such that he did not have to consider protecting steel within. Mr. Trochalakis had already expressed that opinion (RP 886), and reiterated that he "would argue, yes" in response; however, he then launched into a disjointed discussion suggesting that the garage ceiling assembly might have been subject to review by a building envelope specialist so as to ensure weather-tightness. (RP 891-892). But Mr. Trochalakis is not a building envelope specialist, did not know what the specialist's recommendations in fact included for the Project, (CP 2101, 2113-2114), and was manifestly speculating in his response. (RP 892) He was unqualified to say whether an envelope specialist should have reviewed the weatherproofing of a ceiling in a covered, open air garage. The only testimony from a qualified building envelope specialist was that assessment of gypsum assemblies for

The court in one instance explained to counsel its reasoning for an evidentiary ruling based on testimony up to that point (RP 348), but the prohibition against judicial comment on the evidence does not “prevent the judges from giving counsel the reasons for their rulings upon questions presented during the progress of a trial, or...prohibit them, in all cases, from stating, when necessary, the facts upon which they base their conclusions.” *Heitfeld v. Benevolent & Protective Order of Keglers*, 36 Wn.2d 685, 701, 220 P.2d 655 (1950).

ENW argues second that the court commented on the evidence by insisting that defense counsel respect its demand for decorum in questioning witnesses. After cutting off a witness’ answer, defense counsel was neutrally instructed by the court to allow a witness to give his complete answer, and move to strike if the answer was not responsive. (RP 358-359) When defense counsel later disregarded that instruction, he was admonished *outside the presence of the jury*. (RP 368-369) The record gives no indication that the jury knew why the court briefly suspended proceedings, and ENW cannot explain why insistence on simple decorum amounts to a comment on the evidence.

protection of structural steel is outside an envelope specialist’s area of expertise. (RP 306). Thus, lack of foundation and expert qualification were the bases for the Association’s motion to strike. The court granted it on the basis of responsiveness, which was generally correct. Even to the extent that the “yes” part of Mr. Trochalakis’ answer was responsive, granting the motion was not prejudicial because the same “yes” had already been given previously, and the remaining stricken material was all inadmissible.

The trial court was required to rule on objections. ENW points to nothing about the rulings that would cause the jury to infer that the court held any particular views about the evidence. If this danger was even present at all, it was cured by the court's instruction to disregard any comments he may have made on the evidence. (CP 1429); *Hizey*, 119 Wn.2d at 271. The record demonstrates merely that the objections by ENW's counsel were frequently untenable, and that ENW's counsel was *privately* admonished for violating the court's rules of decorum. Neither amounts to a comment on the evidence.

F. ENW Was Jointly Liable with Corson

ENW claims it is not jointly and severally liable with Corson because the latter ceased to exist as a legal entity following its alleged administrative dissolution in 2007. (CP 1457-1462)²⁹

²⁹ In briefing, ENW also asserted a closely-associated "limitations period" argument based on RCW 25.15.303, but that argument was expressly abandoned by counsel at oral argument below, (12/2/13 Hearing, RP 9), and is not argued on appeal. Cf. *Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d 192, 205, 943 P.2d 286 (1997); *Presidential Estates v. Barrett*, 129 Wn.2d 320, 324, 917 P.2d 100 (1996). See also CP 1464-1482, 1483-1500.

If the court concludes that the limitations period issue has somehow been preserved, it should note that former RCW 25.15.303, even if it is a limitations period, would not apply here because it was tolled during the period that Corson was immune from suit as a dissolved and cancelled LLC under *Chadwick Farms Owners Ass'n v. FHC, LLC*, 166 Wn.2d 178, 207 P.3d 1251 (2009), and until the law changed retroactively in 2010 to allow suit against it. *Duke v. Boyd*, 133 Wn.2d 80, 94, 942 P.2d 351 (1997); *Stephens v. Stephens*, 85 Wn.2d 290, 293, 534 P.2d 571 (1975); *Seamans v. Walgren*, 82 Wn.2d 771, 774-775, 514 P.2d 166 (1973). Once the legal significance of "cancellation" of an LLC's "certificate of formation" in ending an LLC's "existence" was removed by the 2010 amendments, the newly-amended "limitations period" of RCW

ENW and Corson failed to raise the issue of abatement in a timely pleading or motion. (CP 1466) Civil Rule 8(c) required the abatement defense to be pled, and dispositive motions (which is what ENW's "objection" to judgment really was) were by scheduling order to be heard no later than August 19, 2013. (CP 2619-2620) ENW's objection to entry of judgment against Corson was properly overruled on these timeliness and CR 8(c) grounds. (CP 1937) ENW offers no reason to show that the court's ruling was error in that regard.

Moreover, ENW asserted its own claims against Corson. (CP 555) ENW's failure to raise abatement in a pleading or timely motion, and its assertion of claims against Corson through trial, are inconsistent with ENW's post-trial claim that Corson is not extant, and amount to a waiver. *Otis Housing Ass'n v. Ha*, 165 Wn.2d 582, 201 P.3d 309 (2009).

Given ENW's untimely interposition and waiver, the court need not address ENW's objection to joint and several liability. But even on the merits, ENW misunderstands *Chadwick Farms* and the LLC Act, and its argument would lead to error if accepted. Some history is required.

In 2005, Division I's *Ballard Square* decision held that the Business Corporations Act preserved from abatement only those claims existing before dissolution of a corporation, but not claims accruing after

25.15.303 (which requires a certificate of dissolution) would apply and begin to run. *Unruh v. Cacchiotti*, 172 Wn.2d 98, 109, 257 P.3d 631 (2011).

dissolution. *Ballard Sq. Condo. v. Dynasty Constr.*, 126 Wn.App. 285, 291, 108 P.3d 818 (2005), *aff'd on other grounds*, 58 Wn.2d 603, 146 P.3d 914 (2006). Following *Ballard Square*, the Legislature first took up SB 6596, which amended the Act to preserve claims arising after dissolution for a specified period. It then took up SB 6531, later codified as RCW 25.15.303, which was intended to create a similar new survival statute for claims against dissolved LLCs.

The dissolution of a limited liability company does not take away or impair any remedy available against that limited liability company. . .for any right or claim. . . unless an action or other proceeding thereon is not commenced within three years after the effective date of dissolution.

SB 6531 provided that claims commenced within three years of an LLC's dissolution would *not* be impaired. The bill said nothing about what would happen to claims not commenced within the three year period, but left the question of abatement open and dependent on other law.

Legislative history is consistent with the view that former RCW 25.15.303 was purely a survival statute.³⁰

³⁰ In committee the bill's sponsor testified that the purpose was to create a *survival statute* for claims against dissolved LLCs, with no hint of any intent to define when they are no longer extant, or to create a limitations period:

Staff Report: "Senate Bill 6531 deals with the dissolution of limited liability corporations and the **survival of claims** . . . following its dissolution. . . . **There's no express provision in the LLC law dealing with the survival of claims after dissolution.** . . . What the bill does is provide [one for three years]."

Former RCW 25.15.303 has never been held to cause claims to abate because an LLC no longer exists following dissolution and cancellation, as ENW contends. Rather, in *Chadwick Farms*, the Supreme Court held that under the LLC Act at the time, an LLC’s “existence as a separate legal entity” was extinguished not by “dissolution” (as with corporations) as the Legislature had supposed, but instead by automatic “cancellation” of the LLC’s certificate of formation two years after administrative dissolution under former **RCW 25.15.070(2)(c)**. The Court declined to apply RCW 25.15.303 to “save” claims from abatement caused by former RCW 25.15.070(2)(c). 166 Wn.2d at 188, 198.³¹

In response to *Chadwick Farms*, the Legislature quickly enacted SHB 2657, effective June 10, 2010. (“The 2010 amendments”). The 2010 amendments deleted former RCW 25.15.070(2)(c), and removed all

Sen. Weinstein: “. . . [T]he reason I’m here is that . . . [under] this *Ballard Square* decision . . . involving a corporation that dissolved and there were claims against it, . . . [it] dissolve[d] it no longer exist[ed], so you couldn’t sue it. And **there was no survival period. I knew that that was a problem for both corporations and LLCs** . . .

(Appendix A, Transcript of House Judiciary Committee Hearing on SB 6531, http://www.tvw.org/index.php?option=com_tvwplayer&eventID=2006021130; Beginning at time stamp 28:30). Both the House and Senate Bill Reports also speak of the measure as a “survival” statute.

³¹ In the course of its opinion, the *Chadwick Farms* court in *obiter dicta* comments, mischaracterized RCW 25.15.303 as a period of *limitations* on claims that runs from the effective date of dissolution of an LLC. 166 Wn.2d at 182, 193, 196, 202. Concededly, subsequent case law has all but established section .303 as a kind of special limitations period for dissolved LLCs.

suggestion that a “cancelled” LLC no longer exists or is incapable of being sued. Instead, an LLC that dissolves, without more, remains subject to suit indefinitely. The 2010 amendments also changed RCW 25.15.303 by providing that its three year survival or limitations period only comes into effect if a dissolved LLC files a “certificate of cancellation.” (See Appendix B, SHB 2657, as enrolled, esp. §§ 2(2)(c), 7(4), 9 & 11.)³²

The 2010 amendments were adopted because “under the *Chadwick Farms* decision . . . a certificate of cancellation abates all legal claims. This decision leaves creditors in an untenable situation.” Appendix C, House Bill Report for SB 2657, p. 4.³³ The chair of the WSBA subcommittee that drafted the 2010 amendments (and a primary drafter of the original LLC Act), explained to the House Judiciary Committee that

I don't think we intended that cancellation of the certificate would result in the inability to bring actions against the LLC or the inability of the LLC to take actions. That was the extra step that the *Chadwick Farms* court took last year that produced the anxiety among those of us who are familiar with LLC practice.

³² The 2010 amendments also established a new procedure whereby a dissolved LLC may notify known claimants of its dissolution, state a deadline for assertion of claims, and receive a bar to claims not timely asserted. RCW 25.15.298.

³³ Ironically, the entire concept of “cancellation” was included in the original LLC Act not for the purposes of protecting investors or bringing about an abatement of claims, but merely to keep an aging computer system in the Secretary of State’s office functioning! Appendix D, Senate Bill Report for SB 2657, p. 3.

(Appendix E, Transcript of House Judiciary Committee Hearing on SHB 2657.)³⁴ (Emphasis added.) He also testified that the bill “can fairly be described as technical corrections. . .” and would correct the procedural deficiencies in the statute in order to provide a remedy to creditors:

[T]he bill does away with the statement . . . that the separate existence of the LLC as an entity continues until cancellation of the Certificate of Formation [It] eliminates the statement that suggests, by negative inference, that if a Certificate of Cancellation is filed the LLC goes, "poof," goes away and that was the basis for the *Chadwick Farms* decision.

Id. Thus, the 2010 amendments make *remedies* available to LLC creditors despite the *procedural* obstacle formerly presented by a bureaucratic act, to wit, automatic “cancellation” of an LLC’s “certificate of formation” when it fails to renew. By *technical correction* to the legal significance of such “cancellation” and requiring a certificate of dissolution, the Legislature simply changed procedures governing the period of existence for LLCs. As explained below, this remedial measure did not change any vested rights, and is presumed to be retroactive as such.

When it comes to retroactively altering the period of an LLC’s corporate existence for survival-of-claims purposes, there is no concern about restoring “expired” or “stale” claims in violation of an LLC’s vested rights, as is the case when a limitations period expires. Rather, the period

³⁴ http://www.tvw.org/index.php?option=com_tvwplayer&eventID=2010011211
Beginning at time stamp 12:30.

of existence of a corporate-type entity is purely an administrative and procedural determination, and it is subject to retroactive Legislative change at will. In *Ballard Square*, for example, the Supreme Court applied the new corporate survival statute retroactively, ***even when it was enacted while the litigation was pending***. *Ballard Square Condo. Owners Ass'n v. Dynasty Constr. Co.*, 158 Wn.2d 603, 617, 146 P.3d 914 (2006), *citing 1000 Va. Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 146 P.3d 423 (2006). The Court explained that the length of time in which claims may be prosecuted against entities that exist purely by Legislative grace (i.e., the survival period) may be changed without impacting any vested rights. 158 Wn.2d at 617-618.

As far as counsel is aware, every court that has ever considered the matter has held that a new corporate survival period is ***remedial***, retroactive by definition as such, and that such new procedures do not change the scope of any substantive rights. *Quintana v. Los Alamos Medical Ctr.*, 119 N.M. 312, 889 P.2d 1234 (N.M. Ct. App. 1994); *Walden Home Builders v. Schmit*, 326 Ill. App. 386, 62 N.E.2d 11 (1945); *United States v. Village Corp.*, 298 F.2d 816, 816-17 (4th Cir. 1962). Washington law confirms that “[R]emedial statutes are generally enforced as soon as they are effective, even if they relate to transactions predating their enactment.” *State v. Pillatos*, 159 Wn.2d 459, 473, 150 P.3d 1130

(2007). See also *Marine Power & Equip. Co. v. Wash. State Human Rights Com. Hearing Tribunal*, 39 Wn. App. 609, 694 P.2d 697 (1985); *In re Marriage of Flannagan*, 42 Wn. App. 214, 222, 709 P.2d 1247 (1985); and *Ballard Square Condo. Owners Ass'n v. Dynasty Constr. Co.*, 158 Wn.2d 603, 617-618, 146 P.3d 914 (2006) (change to survival period for corporate entities do not effect vested rights).

Corson has not filed a “certificate of dissolution” as required to end its existence. Under the LLC Act’s 2010 amendments, which apply retroactively to Corson as remedial measures, Corson has continuing legal existence until it files that certificate.

G. The Elkins Judgment Amount Was Not a Clerical Error.

ENW argues that the judgment against Elkins reflects an “obvious clerical error.” (Appellants’ Brief at 52). In support, ENW falsely claims that the court “confirmed that the judgment against Elkins was \$100,000 plus costs and fees” in an email, citing to CP 1869. (*Id.*) In fact, the court’s email says that there should be *two* judgments against Elkins – one for \$1,149,322, plus *another* for \$100,000, totaling \$1,249,322.³⁵

³⁵ In other words, as the verdict form was drafted, if ENW made negligent errors or omission in its structural design that caused injury requiring repairs, then under the evidence presented at trial this *ipso facto* amounted to a showing of breach of contract by Elkins to supply a complete structural engineering design and associated damages. (Tr. Ex. 37, p. 3; RP 741-743) **ENW does not contest the substantive logic of the verdict form on this issue, nor does ENW claim error in determining the final amount of the**

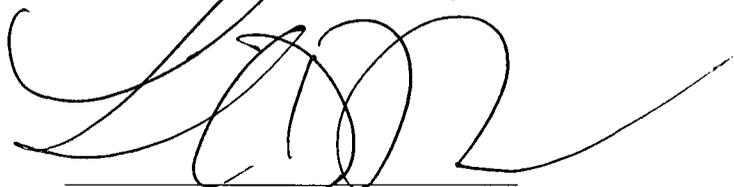
The Association pointed out below that *on at least five occasions* the court rejected ENW's claim that the judgment against Elkins should be only \$100,000. (CP 1884-1885, 1889-1893) At hearing, the court confirmed that its execution of the judgment against Elkins in the full amount of the repair cost damages was not a mistake. (RP 1159)

Clerical errors occur when a judgment does not reflect the intent of the court as demonstrated by the record. *In re Pers. Restraint of Clark*, 168 Wn.2d 581, 588, 230 P.3d 156 (2010). The record demonstrates that the judgment against Elkins reflects the intent of the trial court. Thus, no factual basis for relief under CR 60 was or is demonstrated.

IV. CONCLUSION

For the reasons stated above, the court should reject all of ENW's assignments of error, and affirm the verdict and judgments.

DATED this 12th of March, 2015, at Seattle Washington.



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Attorneys for Respondent

judgment. *White Pass Co. v. St. John*, 71 Wn.2d 156, 427 P.2d 398 (1967) (Negligent damage to project by subcontractor was, at the same time, breach of the general contract as matter of law, with identical damages.) ENW merely claims that the judgment amount against Elkins is a "scrivener's error," an assertion which has no factual support at all.

CERTIFICATE OF SERVICE

This is to certify that on this date I did cause to be served ~~the~~ and correct copies of the foregoing to be delivered to the persons listed below by the method(s) as indicated:

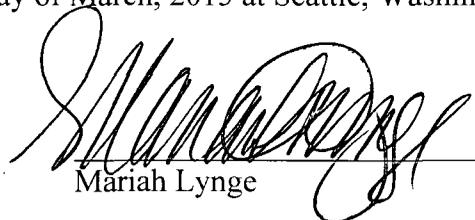
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COURT OF APPEALS
DIVISION II
2015 MAR 13 PM 3:43
STATE OF WASHINGTON
BY ~~DEPUTY~~

<p><u>Attorneys for Defendant Dodson-Duus, LLC</u> Barnett N. Kalikow Kalikow Law Office 1405 Harrison Avenue NW, Suite 202 Olympia, WA 98502</p>	<p>X via US Mail, first class <input type="checkbox"/> via Hand Delivery <input type="checkbox"/> via Facsimile X via E-Mail <input type="checkbox"/> via overnight delivery</p>
<p><u>Attorneys for Defendants Dodson-Duus, LLC; Harbor Resort Holdings, LLC; Harbor Resort Properties, Inc.</u> A. Grant Lingg Christopher Matheson Forsberg & Umlauf, P.S. 901 Fifth Avenue, Suite 1400 Seattle, WA 98164</p>	<p>X via US Mail, first class <input type="checkbox"/> via Hand Delivery <input type="checkbox"/> via Facsimile X via E-Mail <input type="checkbox"/> via overnight delivery</p>
<p><u>Attorneys for Engineers Northwest, Inc., PS; Theodore D McDonald and Jane Doe McDonald</u> Steven G. Wraith Aaron Gilligan Lee Smart, P.S. 1800 One Convention Place 701 Pike Street Seattle, WA 98101-3929</p>	<p>X via US Mail, first class <input type="checkbox"/> via Hand Delivery <input type="checkbox"/> via Facsimile X via E-Mail <input type="checkbox"/> via overnight delivery</p>
<p><u>Attorneys for Engineers Northwest, Inc., PS; Theodore D McDonald and Jane Doe McDonald</u> Marilee C. Erickson Reed McClure 1215 4th Avenue, Suite 1700 Seattle, WA 98161</p>	<p>X via US Mail, first class <input type="checkbox"/> via Hand Delivery <input type="checkbox"/> via Facsimile X via E-Mail <input type="checkbox"/> via overnight delivery</p>

<u>Attorneys for Integrity Structures, LLC</u> Robert C. Muth Kilmer Vorhees & Laurick, P.C. 732 NW 19 th Avenue Portland, OR 97209	<input type="checkbox"/> via US Mail, first class <input type="checkbox"/> via Hand Delivery <input type="checkbox"/> via Facsimile <input checked="" type="checkbox"/> via E-Mail <input type="checkbox"/> via overnight delivery
<u>Attorneys for Steven P. Elkins Architects, Inc., PS</u> Michael J. Bond Schedler Bond PLLC 2448 -76th Avenue SE, Suite 202 Mercer Island, WA 98040	<input checked="" type="checkbox"/> via US Mail, first class <input type="checkbox"/> via Hand Delivery <input type="checkbox"/> via Facsimile <input checked="" type="checkbox"/> via E-Mail <input type="checkbox"/> via overnight delivery

I certify under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

Dated this 13th day of March, 2015 at Seattle, Washington.



 Mariah Lynge

Appendix A

House Judiciary Committee hearings, 2/20/06

Staff Report:

“Senate Bill 6531 deals with the dissolution of limited liability corporations and the survival of claims against an LLC following its dissolution. LLCs are something of a hybrid between corporations and general partnerships. It’s possible to create an LLC in which, unlike the partners of a general partnership, the members of an LLC are insulated from liability in much the same way as shareholders of a corporation are insulated from liability beyond the amount of their own shares in the corporation. And at the same time, unlike a corporation, the LLC is a pass-through entity for tax purposes, and in that regard is treated like a general partnership. Like a corporation, an LLC is strictly a creature of statute, and it’s created and dissolved in accordance with prescribed methods in the RCWs.

“This bill deals with the dissolution of an LLC, and that can occur in any number of ways, including reaching the dissolution date that’s been set in the certificate of formation of an LLC, or the happening of some events that are listed in the certificate of formation that would cause the dissolution, or by the mutual consent of all the members of the LLC, or by the dissociation of all the members through death or bankruptcy or some other disability, by judicial action, or by administrative action.

“There’s no express provision in the LLC law dealing with the survival of claims after dissolution. So this is one of the issues that was dealt with with regard to corporations that you just heard about, and what the bill does is provide a three year period during which the dissolution of an LLC does not in any way diminish a remedy for a claim that was filed before or after the dissolution.

“And I’d be glad to answer any questions.”

....

Senator Brian Weinstein:

“The reason I’m here, I guess I’ll do what Senator Brandland did, the reason I’m here is that I heard this *Ballard Square* decision that the last witness, John Steel talked about, from the Bar, this was a decision involving a corporation that dissolved and there were claims against it, and once a corporation dissolves it no longer exists, so you couldn’t sue it. And there was no survival period. I knew that that was a problem for both corporations and LLCs, and as a matter of fact I contacted Gale Stone from the Bar and she put me in touch with John Steel and it turned out that the Bar was working on the Bill that you just heard previous to this. Now I thought, “That’s great, we need that.”

“And I talked to John Steel a little bit and gave him my input on that bill, and when you asked if there was any controversy in the Senate, I think what he was alluding to was that

he worked the entire issue before he brought the bill, because there was no controversy in the Senate on that bill or this bill.

“So what happened was that I spoke to John and Gale Stone and found out that the Bar did put together this comprehensive bill that had to do with corporations. When I asked him, well why don’t you just do it for LLCs as well, he said “Well, that’s a whole different department; we are working on that, but that’s going to be a couple of years.” So I thought well in the meantime, we should take care of this little problem of allowing a three year window in order to sue an LLC that if they dissolved. So I ran the language by the Bar Association, I worked with them, they said this is fine for the meantime, we have no problem with it, it’s well-worded, and they put their blessing on it, and so I ran the bill, and here’s where we are, it passed the Senate unanimously, and I guess I can answer any questions, too.

....

Chairwoman Pat Lance:

“But I imagine it does have some interesting consequences for those who might have relied on there not being this three year window, which is the reason why you’re here with the Bill...So um...

Senator Brian Weinstein:

“Well, it doesn’t make sense to me that an LLC could dissolve and just have its claims go into Never-Never Land, and so if people were relying on it, they shouldn’t have been relying upon it because it’s almost fraudulent in my opinion. And that’s what the Bar saw fit to do, at least with the Corporations statute.

Representative Jay Rodne:

“Thank you Madame Chair, and thank you, Senator for coming before the Committee. I applaud what you’re trying to do in this bill, and you know a lot of these particular LLC cases involve the construction industry, where an entity will form, for one project, and then quickly wind down after the project is – is concluded, but, you know, what requirement does that winding down LLC have to maintain any kind of insurable interest or bond for the three year duration? I mean, are we creating a right without any means of a realistic remedy?

Senator Brian Weinstein:

“Well, this is not a perfect bill, and it certainly doesn’t afford a claimant a great remedy, but if the LLC actually had a bond, or actually was insured, without this bill that insurance is worthless to the claimant, the bond is worthless to the claimant. If you pass this bill, at least the claimant can go after the bond or the insurance. That’s all they can do at this point. I mean, that’s all they will be able to do after this bill passes, if it does

pass of course. But, right now, the claimant could be left with a situation where they could, let's say an LLC could have done faulty work on their home or something, and dissolved, and they could be an insured LLC, they could have a bond, but since they dissolved, they are no longer recognized as a legal entity, so you can't sue and go after the bond or the insurance. I know certain states, I practiced a little bit in Louisiana, Louisiana did have a direct action statute where you can go against an insurance company, but Washington doesn't, so..."

HOUSE BILL REPORT

SB 6531

As Passed House:
February 28, 2006

Title: An act relating to preserving remedies when limited liability companies dissolve.

Brief Description: Preserving remedies when limited liability companies dissolve.

Sponsors: By Senators Weinstein, Fraser and Kline.

Brief History:

Committee Activity:

Judiciary: 2/20/06 [DP].

Floor Activity:

Passed House: 2/28/06, 97-0.

Brief Summary of Bill

- Provides a three year period following dissolution of a limited liability company during which the dissolution of the company does not extinguish any cause of action against the company.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: Do pass. Signed by 9 members: Representatives Lantz, Chair; Flannigan, Vice Chair; Williams, Vice Chair; Priest, Ranking Minority Member; Rodne, Assistant Ranking Minority Member; Campbell, Kirby, Springer and Wood.

Staff: Bill Perry (786-7123).

Background:

A limited liability company (LLC) is a business entity that possesses some of the attributes of a corporation and some of the attributes of a partnership.

Attributes of Corporations and LLCs

Corporations are creatures of statutory law and are created only by compliance with prescribed formal procedures. A corporation is managed by directors and officers, but is owned by shareholders who may have very little direct role in management. Generally, ownership shares are transferable, and each shareholder is liable for corporate debts only to the extent of his or her own investment in the corporation. A corporation is treated as a taxable entity.

General partnerships, on the other hand, are business entities recognized as common law that require no formal creation, and are owned and managed by the same individuals who are each liable for the debts of the partnership. A general partnership is not a taxable entity.

The LLCs were authorized by the Legislature in 1994. An LLC is a noncorporate entity that allows the owners to participate actively in management, but at the same time provides them with limited liability. The Internal Revenue Service has ruled that an LLC with attributes that make it more like a partnership than a corporation may be treated as a non-taxable entity.

A properly constructed LLC, then, can be a business entity in which the ownership enjoys the limited liability of a corporation's shareholders, but the entity itself is not taxed as a corporation.

Dissolution of an LLC

An LLCs may be dissolved in a number of ways, including:

- reaching a dissolution date set at the time the LLC was created;
- the occurrence of events specified in the LLC agreement as causing dissolution;
- by mutual consent of all members of the LLC;
- the dissociation of all members through death, removal or other event;
- judicial action to dissolve the LLC; or
- administrative action by the Secretary of State for failure of the LLC to pay fees or to complete required reports.

Certificate of Cancellation

After an LLC is dissolved, or if an LLC has been merged with another entity and the new entity is not the LLC, the certificate of formation that created the LLC is cancelled.

Cancellation may occur in a number of ways:

- The certificate of formation may authorize a member or members to file the certificate of cancellation upon dissolution, or after a period of winding up the business of the LLC.
- A court may order the filing of a certificate of cancellation.
- In the case of a merger that results in a new entity that is not the LLC, the filing of merger documents must include the filing of a certificate of cancellation.
- In the case of an administrative dissolution of an LLC, there is a two year period during which the LLC may be reinstated before the secretary of state files the certificate of cancellation.

After dissolution of an LLC, but before cancellation of the certificate of formation, members of the LLC or a court appointed receiver may wind up the business of the LLC. A person winding up the affairs of an LLC may prosecute or defend legal actions in the name of the LLC.

Preservation of Remedies

The law governing LLCs has no express provision regarding the preservation of remedies or causes of actions following dissolution of the business entity. There is an implicit recognition of the preservation of at least an already filed claim during the wind up period following dissolution, since the person winding up the affairs is authorized to defend suits against the

LLC. However, there is no provision regarding the preservation of claims following cancellation of the certificate of formation.

The current Business Corporation Act provides that dissolution of a corporation does not eliminate any claim against the corporation that was incurred prior to dissolution if an action on the claim is filed within two years after dissolution. There is no "certificate of cancellation" necessary to end a corporation. *(Note: Another currently pending bill, SSB 6596, would increase this two year period to three years, and would make the provision apply to claims incurred before or after dissolution.)*

Summary of Bill:

Dissolution of a limited liability company will not eliminate any cause of action against the company that was incurred prior to or after the dissolution if an action on the claim is filed within three years after the effective date of the dissolution.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date: The bill takes effect 90 days after adjournment of session in which bill is passed.

Testimony For: A recent court decision has left many homeowners without a remedy for claims against a dissolved corporation. The same problem exists with respect to claims against LLCs. The Bar Association is working on a comprehensive review of the LLC law, but it is not done yet. This bill addresses only the problem of survival of claims following dissolution.

The bill is a step in the right direction. It affirmatively states that claims, such as homeowners' warranty claims, will survive the dissolution of an LLC. Whether or not there are any assets left to satisfy a claim is a separate problem that will have to be addressed later.

Testimony Against: None.

Persons Testifying: Senator Weinstein, prime sponsor; Alfred Donohue, Forsberg Umlauf, P.S.; and Sandi Swarthout and Michelle Ein, Washington Homeowners Coalition.

Persons Signed In To Testify But Not Testifying: None.

Appendix B

CERTIFICATION OF ENROLLMENT

SUBSTITUTE HOUSE BILL 2657

61st Legislature
2010 Regular Session

Passed by the House March 6, 2010
Yeas 95 Nays 0

Speaker of the House of Representatives

Passed by the Senate March 2, 2010
Yeas 46 Nays 0

President of the Senate

Approved

Governor of the State of Washington

CERTIFICATE

I, Barbara Baker, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that the attached is **SUBSTITUTE HOUSE BILL 2657** as passed by the House of Representatives and the Senate on the dates hereon set forth.

Chief Clerk

FILED

**Secretary of State
State of Washington**

SUBSTITUTE HOUSE BILL 2657

AS AMENDED BY THE SENATE

Passed Legislature - 2010 Regular Session

State of Washington 61st Legislature 2010 Regular Session

By House Judiciary (originally sponsored by Representative Pedersen)

READ FIRST TIME 02/03/10.

1 AN ACT Relating to the dissolution of limited liability companies;
2 amending RCW 25.15.005, 25.15.070, 25.15.085, 25.15.095, 25.15.270,
3 25.15.290, 25.15.293, 25.15.295, 25.15.303, 25.15.340, and 25.15.805;
4 adding new sections to chapter 25.15 RCW; and repealing RCW 25.15.080.

5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

6 **Sec. 1.** RCW 25.15.005 and 2008 c 198 s 4 are each amended to read
7 as follows:

8 The definitions in this section apply throughout this chapter
9 unless the context clearly requires otherwise.

10 (1) "Certificate of formation" means the certificate referred to in
11 RCW 25.15.070, and the certificate as amended.

12 (2) "Event of dissociation" means an event that causes a person to
13 cease to be a member as provided in RCW 25.15.130.

14 (3) "Foreign limited liability company" means an entity that is
15 formed under:

16 (a) The limited liability company laws of any state other than this
17 state; or

18 (b) The laws of any foreign country that is: (i) An unincorporated
19 association, (ii) formed under a statute pursuant to which an

1 association may be formed that affords to each of its members limited
2 liability with respect to the liabilities of the entity, and (iii) not
3 required, in order to transact business or conduct affairs in this
4 state, to be registered or qualified under Title 23B or 24 RCW, or any
5 other chapter of the Revised Code of Washington authorizing the
6 formation of a domestic entity and the registration or qualification in
7 this state of similar entities formed under the laws of a jurisdiction
8 other than this state.

9 (4) "Limited liability company" and "domestic limited liability
10 company" means a limited liability company having one or more members
11 that is organized and existing under this chapter.

12 (5) "Limited liability company agreement" means any written
13 agreement of the members, or any written statement of the sole member,
14 as to the affairs of a limited liability company and the conduct of its
15 business which is binding upon the member or members.

16 (6) "Limited liability company interest" means a member's share of
17 the profits and losses of a limited liability company and a member's
18 right to receive distributions of the limited liability company's
19 assets.

20 (7) "Manager" or "managers" means, with respect to a limited
21 liability company that has set forth in its certificate of formation
22 that it is to be managed by managers, the person, or persons designated
23 in accordance with RCW 25.15.150(2).

24 (8) "Member" means a person who has been admitted to a limited
25 liability company as a member as provided in RCW 25.15.115 and who has
26 not been dissociated from the limited liability company.

27 (9) "Person" means an individual, corporation, business trust,
28 estate, trust, partnership, limited liability company, association,
29 joint venture, government, governmental subdivision, agency, or
30 instrumentality, or a separate legal entity comprised of two or more of
31 these entities, or any other legal or commercial entity.

32 (10) "Professional limited liability company" means a limited
33 liability company which is organized for the purpose of rendering
34 professional service and whose certificate of formation sets forth that
35 it is a professional limited liability company subject to RCW
36 25.15.045.

37 (11) "Professional service" means the same as defined under RCW
38 18.100.030.

1 (12) "Record" means information that is inscribed on a tangible
2 medium or that is stored in an electronic or other medium and is
3 retrievable in perceivable form.

4 (13) "State" means the District of Columbia or the Commonwealth of
5 Puerto Rico or any state, territory, possession, or other jurisdiction
6 of the United States other than the state of Washington.

7 **Sec. 2.** RCW 25.15.070 and 1994 c 211 s 201 are each amended to
8 read as follows:

9 (1) In order to form a limited liability company, one or more
10 persons must execute a certificate of formation. The certificate of
11 formation shall be filed in the office of the secretary of state and
12 set forth:

13 (a) The name of the limited liability company;

14 (b) The address of the registered office and the name and address
15 of the registered agent for service of process required to be
16 maintained by RCW 25.15.020;

17 (c) The address of the principal place of business of the limited
18 liability company;

19 (d) If the limited liability company is to have a specific date of
20 dissolution, the latest date on which the limited liability company is
21 to dissolve;

22 (e) If management of the limited liability company is vested in a
23 manager or managers, a statement to that effect;

24 (f) Any other matters the members decide to include therein; and

25 (g) The name and address of each person executing the certificate
26 of formation.

27 (2) Effect of filing:

28 (a) Unless a delayed effective date is specified, a limited
29 liability company is formed when its certificate of formation is filed
30 by the secretary of state. A delayed effective date for a certificate
31 of formation may be no later than the ninetieth day after the date it
32 is filed.

33 (b) The secretary of state's filing of the certificate of formation
34 is conclusive proof that the persons executing the certificate
35 satisfied all conditions precedent to the formation (~~except in a~~
36 ~~proceeding by the state to cancel the certificate~~).

1 (c) A limited liability company formed under this chapter shall be
2 a separate legal entity(~~(, the existence of which as a separate legal~~
3 ~~entity shall continue until cancellation of the limited liability~~
4 ~~company's certificate of formation)~~).

5 **Sec. 3.** RCW 25.15.085 and 2002 c 74 s 17 are each amended to read
6 as follows:

7 (1) Each document required by this chapter to be filed in the
8 office of the secretary of state shall be executed in the following
9 manner, or in compliance with the rules established to facilitate
10 electronic filing under RCW 25.15.007, except as set forth in RCW
11 25.15.105(4) (b):

12 (a) Each original certificate of formation must be signed by the
13 person or persons forming the limited liability company;

14 (b) A reservation of name may be signed by any person;

15 (c) A transfer of reservation of name must be signed by, or on
16 behalf of, the applicant for the reserved name;

17 (d) A registration of name must be signed by any member or manager
18 of the foreign limited liability company;

19 (e) A certificate of amendment or restatement must be signed by at
20 least one manager, or by a member if management of the limited
21 liability company is reserved to the members;

22 (f) A certificate of (~~cancellation~~) dissolution must be signed by
23 the person or persons authorized to wind up the limited liability
24 company's affairs pursuant to RCW 25.15.295(~~(+1)~~) (3);

25 (g) If a surviving domestic limited liability company is filing
26 articles of merger, the articles of merger must be signed by at least
27 one manager, or by a member if management of the limited liability
28 company is reserved to the members, or if the articles of merger are
29 being filed by a surviving foreign limited liability company, limited
30 partnership, or corporation, the articles of merger must be signed by
31 a person authorized by such foreign limited liability company, limited
32 partnership, or corporation; and

33 (h) A foreign limited liability company's application for
34 registration as a foreign limited liability company doing business
35 within the state must be signed by any member or manager of the foreign
36 limited liability company.

1 (2) Any person may sign a certificate, articles of merger, limited
2 liability company agreement, or other document by an attorney-in-fact
3 or other person acting in a valid representative capacity, so long as
4 each document signed in such manner identifies the capacity in which
5 the signator signed.

6 (3) The person executing the document shall sign it and state
7 beneath or opposite the signature the name of the person and capacity
8 in which the person signs. The document must be typewritten or
9 printed, and must meet such legibility or other standards as may be
10 prescribed by the secretary of state.

11 (4) The execution of a certificate or articles of merger by any
12 person constitutes an affirmation under the penalties of perjury that
13 the facts stated therein are true.

14 **Sec. 4.** RCW 25.15.095 and 2002 c 74 s 18 are each amended to read
15 as follows:

16 (1) The original signed copy, together with a duplicate copy that
17 may be either a signed, photocopied, or conformed copy, of the
18 certificate of formation or any other document required to be filed
19 pursuant to this chapter, except as set forth under RCW 25.15.105 or
20 unless a duplicate is not required under rules adopted under RCW
21 25.15.007, shall be delivered to the secretary of state. If the
22 secretary of state determines that the documents conform to the filing
23 provisions of this chapter, he or she shall, when all required filing
24 fees have been paid:

25 (a) Endorse on each signed original and duplicate copy the word
26 "filed" and the date of its acceptance for filing;

27 (b) Retain the signed original in the secretary of state's files;
28 and

29 (c) Return the duplicate copy to the person who filed it or the
30 person's representative.

31 (2) If the secretary of state is unable to make the determination
32 required for filing by subsection (1) of this section at the time any
33 documents are delivered for filing, the documents are deemed to have
34 been filed at the time of delivery if the secretary of state
35 subsequently determines that:

36 (a) The documents as delivered conform to the filing provisions of
37 this chapter; or

1 (b) Within twenty days after notification of nonconformance is
2 given by the secretary of state to the person who delivered the
3 documents for filing or the person's representative, the documents are
4 brought into conformance.

5 (3) If the filing and determination requirements of this chapter
6 are not satisfied completely within the time prescribed in subsection
7 (2)(b) of this section, the documents shall not be filed.

8 (4) Upon the filing of a certificate of amendment (or judicial
9 decree of amendment) or restated certificate in the office of the
10 secretary of state, or upon the future effective date or time of a
11 certificate of amendment (or judicial decree thereof) or restated
12 certificate, as provided for therein, the certificate of formation
13 shall be amended or restated as set forth therein. (~~Upon the filing
14 of a certificate of cancellation (or a judicial decree thereof), or
15 articles of merger which act as a certificate of cancellation, or upon
16 the future effective date or time of a certificate of cancellation (or
17 a judicial decree thereof) or of articles of merger which act as a
18 certificate of cancellation, as provided for therein, or as specified
19 in RCW 25.15.290, the certificate of formation is canceled.~~)

20 **Sec. 5.** RCW 25.15.270 and 2009 c 437 s 1 are each amended to read
21 as follows:

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

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

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

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

36 (3) The written consent of all members;

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

7 (5) The entry of a decree of judicial dissolution under RCW
8 25.15.275; or

9 (6) The ~~((expiration of five years after the effective date of
10 dissolution under RCW 25.15.285 without the reinstatement))~~
11 administrative dissolution of the limited liability company by the
12 secretary of state under RCW 25.15.285(2), unless the limited liability
13 company is reinstated by the secretary of state under RCW 25.15.290.

14 NEW SECTION. Sec. 6. A new section is added to chapter 25.15 RCW
15 to read as follows:

16 (1) After dissolution occurs under RCW 25.15.270, the limited
17 liability company may deliver to the secretary of state for filing a
18 certificate of dissolution signed in accordance with RCW 25.15.085.

19 (2) A certificate of dissolution filed under subsection (1) of this
20 section must set forth:

21 (a) The name of the limited liability company; and

22 (b) A statement that the limited liability company is dissolved
23 under RCW 25.15.270.

24 Sec. 7. RCW 25.15.290 and 2009 c 437 s 2 are each amended to read
25 as follows:

26 (1) A limited liability company that has been administratively
27 dissolved under RCW 25.15.285 may apply to the secretary of state for
28 reinstatement within five years after the effective date of
29 dissolution. The application must be delivered to the secretary of
30 state for filing and state:

31 (a) ~~((Recite))~~ The name of the limited liability company and the
32 effective date of its administrative dissolution;

33 (b) ~~((State))~~ That the ground or grounds for dissolution either did
34 not exist or have been eliminated; and

35 (c) ~~((State))~~ That the limited liability company's name satisfies
36 the requirements of RCW 25.15.010.

1 (2) If the secretary of state determines that ~~((the))~~ an
2 application contains the information required by subsection (1) of this
3 section and that the name is available, the secretary of state shall
4 reinstate the limited liability company and give the limited liability
5 company written notice, as provided in RCW 25.15.285(1), of the
6 reinstatement that recites the effective date of reinstatement. If the
7 name is not available, the limited liability company must file with its
8 application for reinstatement an amendment to its certificate of
9 formation reflecting a change of name.

10 (3) When ~~((the))~~ reinstatement ~~((is))~~ becomes effective, it relates
11 back to and takes effect as of the effective date of the administrative
12 dissolution and the limited liability company may resume carrying on
13 its ~~((business))~~ activities as if the administrative dissolution had
14 never occurred.

15 ~~((4) If an application for reinstatement is not made within the
16 five-year period set forth in subsection (1) of this section, or if the
17 application made within this period is not granted, the limited
18 liability company's certificate of formation is deemed canceled.))~~

19 **Sec. 8.** RCW 25.15.293 and 2009 c 437 s 3 are each amended to read
20 as follows:

21 (1) A limited liability company ~~((voluntarily))~~ dissolved under RCW
22 25.15.270 (2) or (3) that has filed a certificate of dissolution under
23 section 6 of this act may ~~((apply to the secretary of state for~~
24 ~~reinstatement))~~ revoke its dissolution within one hundred twenty days
25 ~~((after the effective date))~~ of filing its certificate of dissolution.
26 ~~((The application must:~~

27 ~~(a) Recite the name of the limited liability company and the~~
28 ~~effective date of its voluntary dissolution;~~

29 ~~(b) State that the ground or grounds for voluntary dissolution have~~
30 ~~been eliminated; and~~

31 ~~(c) State that the limited liability company's name satisfies the~~
32 ~~requirements of RCW 25.15.010.~~

33 ~~(2) If the secretary of state determines that the application~~
34 ~~contains the information required by subsection (1) of this section and~~
35 ~~that the name is available, the secretary of state shall reinstate the~~
36 ~~limited liability company and give the limited liability company~~
37 ~~written notice of the reinstatement that recites the effective date of~~

1 ~~reinstatement. If the name is not available, the limited liability~~
2 ~~company must file with its application for reinstatement an amendment~~
3 ~~to its certificate of formation reflecting a change of name.~~

4 ~~(3) When the reinstatement is effective, it relates back to and~~
5 ~~takes effect as of the effective date of the voluntary dissolution and~~
6 ~~the limited liability company may resume carrying on its business as if~~
7 ~~the voluntary dissolution had never occurred.~~

8 ~~(4) If an application for reinstatement is not made within the one~~
9 ~~hundred twenty day period set forth in subsection (1) of this section,~~
10 ~~or if the application made within this period is not granted, the~~
11 ~~secretary of state shall cancel the limited liability company's~~
12 ~~certificate of formation.)~~

13 (2)(a) Except as provided in (b) of this subsection, revocation of
14 dissolution must be approved in the same manner as the dissolution was
15 approved unless that approval permitted revocation in some other
16 manner, in which event the dissolution may be revoked in the manner
17 permitted.

18 (b) If dissolution occurred upon the happening of events specified
19 in the limited liability company agreement, revocation of dissolution
20 must be approved in the manner necessary to amend the provisions of the
21 limited liability company agreement specifying the events of
22 dissolution.

23 (3) After the revocation of dissolution is approved, the limited
24 liability company may revoke the dissolution and the certificate of
25 dissolution by delivering to the secretary of state for filing a
26 certificate of revocation of dissolution that sets forth:

27 (a) The name of the limited liability company and a statement that
28 the name satisfies the requirements of RCW 25.15.010; if the name is
29 not available, the limited liability company must file a certificate of
30 amendment changing its name with the certificate of revocation of
31 dissolution;

32 (b) The effective date of the dissolution that was revoked;

33 (c) The date that the revocation of dissolution was approved;

34 (d) If the limited liability company's managers revoked the
35 dissolution, a statement to that effect;

36 (e) If the limited liability company's managers revoked a
37 dissolution approved by the company's members, a statement that

1 revocation was permitted by action by the managers alone pursuant to
2 that approval; and

3 (f) If member approval was required to revoke the dissolution, a
4 statement that revocation of the dissolution was duly approved by the
5 members in accordance with subsection (2) of this section.

6 (4) Revocation of dissolution and revocation of the certificate of
7 dissolution are effective upon the filing of the certificate of
8 revocation of dissolution.

9 (5) When the revocation of dissolution and revocation of the
10 certificate of dissolution are effective, they relate back to and take
11 effect as of the effective date of the dissolution and the limited
12 liability company resumes carrying on its activities as if the
13 dissolution had never occurred.

14 **Sec. 9.** RCW 25.15.295 and 1994 c 211 s 806 are each amended to
15 read as follows:

16 ~~((1) Unless otherwise provided in a limited liability company~~
17 ~~agreement, a manager who has not wrongfully dissolved a limited~~
18 ~~liability company or, if none, the members or a person approved by the~~
19 ~~members or, if there is more than one class or group of members, then~~
20 ~~by each class or group of members, in either case, by members~~
21 ~~contributing, or required to contribute, more than fifty percent of the~~
22 ~~agreed value (as stated in the records of the limited liability company~~
23 ~~required to be kept pursuant to RCW 25.15.135) of the contributions~~
24 ~~made, or required to be made, by all members, or by the members in each~~
25 ~~class or group, as appropriate, may wind up the limited liability~~
26 ~~company's affairs. The superior courts, upon cause shown, may wind up~~
27 ~~the limited liability company's affairs upon application of any member~~
28 ~~or manager, his or her legal representative or assignee, and in~~
29 ~~connection therewith, may appoint a receiver.~~

30 ~~(2) Upon dissolution of a limited liability company and until the~~
31 ~~filing of a certificate of cancellation as provided in RCW 25.15.080,~~
32 ~~the persons winding up the limited liability company's affairs may, in~~
33 ~~the name of, and for and on behalf of, the limited liability company,~~
34 ~~prosecute and defend suits, whether civil, criminal, or administrative,~~
35 ~~gradually settle and close the limited liability company's business,~~
36 ~~dispose of and convey the limited liability company's property,~~

1 ~~discharge or make reasonable provision for the limited liability~~
2 ~~company's liabilities, and distribute to the members any remaining~~
3 ~~assets of the limited liability company.)~~)

4 (1) A limited liability company continues after dissolution only
5 for the purpose of winding up its activities.

6 (2) In winding up its activities, the limited liability company:

7 (a) May file a certificate of dissolution with the secretary of
8 state to provide notice that the limited liability company is
9 dissolved, preserve the limited liability company's business or
10 property as a going concern for a reasonable time, prosecute and defend
11 actions and proceedings, whether civil, criminal, or administrative,
12 transfer the limited liability company's property, settle disputes, and
13 perform other necessary acts; and

14 (b) Shall discharge the limited liability company's liabilities,
15 settle and close the limited liability company's activities, and
16 marshal and distribute the assets of the company.

17 (3) Unless otherwise provided in a limited liability company
18 agreement, the persons responsible for managing the business and
19 affairs of a limited liability company under RCW 25.15.150 are
20 responsible for winding up the activities of a dissolved limited
21 liability company. If a dissolved limited liability company does not
22 have any managers or members, the legal representative of the last
23 person to have been a member may wind up the activities of the
24 dissolved limited liability company, in which event the legal
25 representative is a manager for the purposes of RCW 25.15.155.

26 (4) If the persons responsible for winding up the activities of a
27 dissolved limited liability company under subsection (3) of this
28 section decline or fail to wind up the limited liability company's
29 activities, a person to wind up the dissolved limited liability
30 company's activities may be appointed by the consent of the transferees
31 owning a majority of the rights to receive distributions as transferees
32 at the time consent is to be effective. A person appointed under this
33 subsection:

34 (a) Is a manager for the purposes of RCW 25.15.155; and

35 (b) Shall promptly amend the certificate of formation to state:

36 (i) The name of the person who has been appointed to wind up the
37 limited liability company; and

38 (ii) The street and mailing address of the person.

1 (5) The superior court may order judicial supervision of the
2 winding up, including the appointment of a person to wind up the
3 dissolved limited liability company's activities, if:

4 (a) On application of a member, the applicant establishes good
5 cause; or

6 (b) On application of a transferee, a limited liability company
7 does not have any managers or members and within a reasonable time
8 following the dissolution no person has been appointed pursuant to
9 subsection (3) or (4) of this section.

10 NEW SECTION. Sec. 10. A new section is added to chapter 25.15 RCW
11 to read as follows:

12 (1) A dissolved limited liability company that has filed a
13 certificate of dissolution with the secretary of state may dispose of
14 the known claims against it by following the procedure described in
15 subsection (2) of this section.

16 (2) A dissolved limited liability company may notify its known
17 claimants of the dissolution in a record. The notice must:

18 (a) Specify the information required to be included in a known
19 claim;

20 (b) Provide a mailing address to which the known claim must be
21 sent;

22 (c) State the deadline for receipt of the known claim, which may
23 not be fewer than one hundred twenty days after the date the notice is
24 received by the claimant; and

25 (d) State that the known claim will be barred if not received by
26 the deadline.

27 (3) A known claim against a dissolved limited liability company is
28 barred if the requirements of subsection (2) of this section are met
29 and:

30 (a) The known claim is not received by the specified deadline; or

31 (b) In the case of a known claim that is timely received but
32 rejected by the dissolved limited liability company, the claimant does
33 not commence an action to enforce the known claim against the limited
34 liability company within ninety days after the receipt of the notice of
35 rejection.

36 (4) For purposes of this section, "known claim" means any claim or
37 liability that either:

1 (a) (i) Has matured sufficiently, before or after the effective date
2 of the dissolution, to be legally capable of assertion against the
3 dissolved limited liability company, whether or not the amount of the
4 claim or liability is known or determinable; or (ii) is unmatured,
5 conditional, or otherwise contingent but may subsequently arise under
6 any executory contract to which the dissolved limited liability company
7 is a party, other than under an implied or statutory warranty as to any
8 product manufactured, sold, distributed, or handled by the dissolved
9 limited liability company; and

10 (b) As to which the dissolved limited liability company has
11 knowledge of the identity and the mailing address of the holder of the
12 claim or liability and, in the case of a matured and legally assertable
13 claim or liability, actual knowledge of existing facts that either (i)
14 could be asserted to give rise to, or (ii) indicate an intention by the
15 holder to assert, such a matured claim or liability.

16 **Sec. 11.** RCW 25.15.303 and 2006 c 325 s 1 are each amended to read
17 as follows:

18 Except as provided in section 10 of this act, the dissolution of a
19 limited liability company does not take away or impair any remedy
20 available to or against that limited liability company, its managers,
21 or its members for any right or claim existing, or any liability
22 incurred at any time, whether prior to or after dissolution, unless the
23 limited liability company has filed a certificate of dissolution under
24 section 6 of this act, that has not been revoked under RCW 25.15.293,
25 and an action or other proceeding thereon is not commenced within three
26 years after the ((effective date)) filing of the certificate of
27 dissolution. Such an action or proceeding by or against the limited
28 liability company may be prosecuted or defended by the limited
29 liability company in its own name.

30 **Sec. 12.** RCW 25.15.340 and 1994 c 211 s 907 are each amended to
31 read as follows:

32 (1) A foreign limited liability company doing business in this
33 state may not maintain any action, suit, or proceeding in this state
34 until it has registered in this state, and has paid to this state all
35 fees and penalties for the years or parts thereof, during which it did
36 business in this state without having registered.

1 (2) Neither the failure of a foreign limited liability company to
2 register in this state ((does not impair)) nor the issuance of a
3 certificate of cancellation with respect to a foreign limited liability
4 company's registration in this state impairs:

5 (a) The validity of any contract or act of the foreign limited
6 liability company;

7 (b) The right of any other party to the contract to maintain any
8 action, suit, or proceeding on the contract; or

9 (c) ~~((Prevent))~~ The foreign limited liability company from
10 defending any action, suit, or proceeding in any court of this state.

11 (3) A member or a manager of a foreign limited liability company is
12 not liable for the obligations of the foreign limited liability company
13 solely by reason of the limited liability company's having done
14 business in this state without registration.

15 **Sec. 13.** RCW 25.15.805 and 1994 c 211 s 1302 are each amended to
16 read as follows:

17 (1) The secretary of state shall adopt rules establishing fees
18 which shall be charged and collected for:

19 (a) Filing of a certificate of formation for a domestic limited
20 liability company or an application for registration of a foreign
21 limited liability company;

22 (b) Filing of a certificate of ~~((cancellation))~~ dissolution for a
23 domestic ~~((or foreign))~~ limited liability company;

24 (c) Filing a certificate of cancellation for a foreign limited
25 liability company;

26 (d) Filing of a certificate of amendment or restatement for a
27 domestic or foreign limited liability company;

28 ~~((d))~~ (e) Filing an application to reserve, register, or transfer
29 a limited liability company name;

30 ~~((e))~~ (f) Filing any other certificate, statement, or report
31 authorized or permitted to be filed;

32 ~~((f))~~ (g) Copies, certified copies, certificates, service of
33 process filings, and expedited filings or other special services.

34 (2) In the establishment of a fee schedule, the secretary of state
35 shall, insofar as is possible and reasonable, be guided by the fee
36 schedule provided for corporations governed by Title 23B RCW. Fees for

1 copies, certified copies, certificates of record, and service of
2 process filings shall be as provided for in RCW 23B.01.220.

3 (3) All fees collected by the secretary of state shall be deposited
4 with the state treasurer pursuant to law.

5 NEW SECTION. **Sec. 14.** RCW 25.15.080 (Cancellation of certificate)
6 and 1994 c 211 s 203 are each repealed.

--- END ---

Appendix C

HOUSE BILL REPORT

SHB 2657

As Passed Legislature

Title: An act relating to the dissolution of limited liability companies.

Brief Description: Addressing the dissolution of limited liability companies.

Sponsors: House Committee on Judiciary (originally sponsored by Representative Pedersen).

Brief History:

Committee Activity:

Judiciary: 1/20/10, 2/1/10 [DPS].

Floor Activity:

Passed House: 2/10/10, 96-0.

Senate Amended.

Passed Senate: 3/2/10, 46-0.

House Concurred.

Passed House: 3/6/10, 95-0.

Passed Legislature.

Brief Summary of Substitute Bill

- Creates a certificate of dissolution for limited liability companies to provide notice of dissolution.
- Establishes procedures to allow a dissolved limited liability company to dispose of known claims.
- Removes all references to a "certificate of cancellation" for domestic limited liability companies.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 9 members: Representatives Pedersen, Chair; Goodman, Vice Chair; Rodne, Ranking Minority Member; Shea, Assistant Ranking Minority Member; Kelley, Kirby, Ormsby, Roberts and Ross.

Staff: Courtney Barnes (786-7194).

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Background:

A limited liability company (LLC) is a business entity that possesses some of the attributes of a corporation and some of the attributes of a partnership. The LLCs were authorized by the Legislature in 1994. A properly constructed LLC can be a business entity in which the ownership enjoys limited liability like a corporation's shareholders, but the entity itself is not taxed as a corporation. Domestic LLCs are entities formed under the Washington LLC Act. Foreign LLCs are entities formed under the laws of a state other than Washington or a foreign country.

Dissolution of an LLC.

An LLC may be dissolved voluntarily, administratively, or judicially. Dissolution does not terminate the existence of the LLC. Instead, it begins a period in which the affairs of the LLC must be wound up. Dissolution of an LLC does not eliminate any cause of action against the LLC that was incurred prior to or after the dissolution if an action on the claim is filed within three years after the effective date of dissolution.

Revocation of Dissolution.

A voluntarily-dissolved LLC may file for reinstatement by filing an application with the Office of the Secretary of State (OSOS). Current law requires the OSOS to cancel a voluntarily-dissolved LLC's certificate of formation if the dissolved LLC fails to file for reinstatement within 120 days after the effective date of dissolution.

Winding Up the Affairs of a Dissolved LLC.

After dissolution of an LLC, but before cancellation of the certificate of formation, a manager or member of the LLC or a court-appointed receiver may wind up the business of the LLC. Winding up involves liquidating assets, paying creditors, and distributing proceeds from the liquidation of assets to the members of the LLC.

Cancellation of Certificate.

After an LLC is dissolved, the certificate of formation that created the LLC is canceled. Recently, the Washington Supreme Court held that cancellation of an LLC's certificate of formation bars the LLC from filing or continuing a lawsuit and bars a claimant from filing or continuing a lawsuit against the LLC. Under this decision, an LLC ceases to exist as a legal entity and cannot be sued once its certificate of formation is canceled.

Summary of Substitute Bill:**Certificate of Dissolution.**

A new document, a certificate of dissolution, is created for LLCs. A dissolved LLC may file a certificate of dissolution with the OSOS to provide notice that the LLC is dissolved. The certificate of dissolution must be signed by the person who is authorized to wind up the LLC's affairs.

The dissolution of an LLC does not eliminate any cause of action by or against the LLC that was incurred prior to or after the dissolution, unless the LLC has filed a certificate of dissolution that has not been revoked, and an action is not filed within three years after the filing of the certificate of dissolution. This provision does not apply if the dissolved LLC has disposed of known claims.

Revocation of Dissolution.

The procedures for how a voluntarily-dissolved LLC may revoke its dissolution are modified. An LLC that has dissolved and filed a certificate of dissolution with the OSOS may revoke its dissolution within 120 days of filing its certificate of dissolution. This provision applies to LLCs dissolved due to the happening of events specified in the LLCs agreement or by written consent of all the LLC's members. To revoke its voluntary dissolution, an LLC must file a certificate of revocation of dissolution with the OSOS. Procedures are created to address how a revocation of dissolution must be approved by the LLC's managers or members.

Winding Up the Affairs of a Dissolved LLC.

The provisions addressing who may wind up a LLC's affairs are revised. The persons responsible for managing the business and affairs of the LLC are responsible for winding up the activities of the dissolved LLC. Upon certain conditions, a superior court may order judicial supervision of the winding up of a dissolved LLC, including the appointment of a person to wind up the LLC's activities. For the purposes of winding up, a dissolved LLC may:

- preserve the LLC's activities and property as a going concern for a reasonable time;
- prosecute and defend actions and proceedings, whether civil, criminal, or administrative;
- transfer the LLC's property;
- settle disputes; and
- perform other acts necessary or appropriate to the winding up.

Disposing of Known Claims.

A dissolved LLC that has filed a certificate of dissolution with the OSOS may dispose of the known claims against it by providing notice to known claimants. Procedures are created to address what the notice to known claimants must contain and how claimants must notify a dissolved LLC of a claim. A known claim against an LLC is barred and the claim is not the liability of the LLC if the holder of the known claim was given written notice of dissolution and:

- the known claim was not received by a specified deadline; or
- the holder of a known claim that is rejected by the dissolved LLC does not commence a proceeding to enforce the claim within 90 days after the receipt of the notice of rejection.

Certificate of Cancellation.

All references to a "certificate of cancellation" for domestic LLCs are removed. The issuance of a certificate of cancellation of a foreign LLC's registration does not impair the ability of a party to maintain an action, suit, or proceeding against the foreign LLC.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) The bill will address and resolve two issues that need immediate attention. First, under the *Chadwick Farms* decision issued by the Washington Supreme Court, a certificate of cancellation abates all legal claims. This decision leaves creditors in an untenable situation. The second issue relates to voluntary dissolution of an LLC. The law requires the OSOS to cancel a voluntarily-dissolved LLC's certificate of formation within 120 days of its dissolution. Many LLCs require more than 120 days to dissolve, and this requirement creates unintended problems. The bill is a simple bill and the intent is to make technical corrections. A certificate of cancellation is an old concept. The Washington State Bar Association intends on significantly revising the LLC Act in the future and will likely remove certificates of cancellation from the LLC Act.

(With concerns) There may be an issue with the provisions allowing a dissolved LLC to dispose of known claims. This provision may establish a 90-day statute of limitations for known claims. This limitation may have serious consequences in circumstances where a claim is known to the LLC, but the elements are not known to the potential claimant. The bill should be amended to address these types of claims. The bill amends the claims survival statute and only references a certificate of dissolution. This provision needs to be amended to address situations where an LLC does not file a certificate of dissolution but files a certificate of cancellation.

(Opposed) None.

Persons Testifying: (In support) Brian Todd and Don Percival, Washington State Bar Association; and Larry Shannon, Washington State Association for Justice.

(With concerns) Jeremy Stillwell, Washington State Community Associations Institute.

Persons Signed In To Testify But Not Testifying: None.

Appendix D

SENATE BILL REPORT

SHB 2657

As of February 18, 2010

Title: An act relating to the dissolution of limited liability companies.

Brief Description: Addressing the dissolution of limited liability companies.

Sponsors: House Committee on Judiciary (originally sponsored by Representative Pedersen).

Brief History: Passed House: 2/10/10, 96-0.

Committee Activity: Judiciary: 2/17/10.

SENATE COMMITTEE ON JUDICIARY

Staff: Kim Johnson (786-7472)

Background: A limited liability company (LLC) is a business entity that possesses some of the attributes of a corporation and some of the attributes of a partnership.

An LLC may be dissolved voluntarily, administratively, or judicially. After dissolution of an LLC, but before cancellation of the certificate of formation, a manager or member of the LLC or a court-appointed receiver may wind up the business of the LLC. Winding up involves liquidating assets, paying creditors, and distributing proceeds from the liquidation of assets to the members of the LLC. After an LLC is dissolved, the certificate of formation that created the LLC is canceled.

Dissolution of an LLC does not eliminate any cause of action against the LLC that was incurred prior to or after the dissolution if an action on the claim is filed within three years after the effective date of dissolution. A voluntarily-dissolved LLC may file for reinstatement by filing an application with the Office of the Secretary of State (OSOS). Current law requires the OSOS to cancel a voluntarily-dissolved LLC's certificate of formation if the dissolved LLC fails to file for reinstatement within 120 days after the effective date of dissolution.

Recently, the Washington Supreme Court held that cancellation of an LLC's certificate of formation bars the LLC from filing or continuing a lawsuit and bars a claimant from filing or continuing a lawsuit against the LLC. Under this decision, an LLC ceases to exist as a legal entity and cannot be sued once its certificate of formation is canceled.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Summary of Bill: The bill as referred to committee not considered.

Summary of Bill (Proposed Amendments): Certificate of Dissolution. A new document, a certificate of dissolution, is created for LLCs. A dissolved LLC may file a certificate of dissolution with the OSOS to provide notice that the LLC is dissolved. The dissolution of an LLC does not eliminate any cause of action by or against the LLC that was incurred prior to or after the dissolution if an action is filed within three years after the filing of the certificate of dissolution. This provision does not apply if the dissolved LLC has disposed of known claims.

Disposing of Known Claims. A dissolved LLC that has filed a certificate of dissolution with the OSOS may dispose of the known claims against it by providing notice to known claimants. Procedures are created to address what the notice to known claimants must contain and how claimants must notify a dissolved LLC of a claim. A known claim against an LLC is barred and the claim is not the liability of the LLC if the holder of the known claim was given written notice of dissolution and:

- the known claim was not received by a specified deadline; or
- the holder of a known claim that is rejected by the dissolved LLC does not commence a proceeding to enforce the claim within 90 days after the receipt of the notice of rejection.

Revocation of Dissolution. The procedures for how a voluntarily-dissolved LLC may revoke its dissolution are modified. An LLC that has dissolved and filed a certificate of dissolution with the OSOS may revoke its dissolution within 120 days of filing its certificate of dissolution. This provision applies to LLC's dissolved due to the happening of events specified in the LLCs agreement or by written consent of all the LLC's members.

Winding Up the Affairs of a Dissolved LLC. The provisions addressing who may wind up an LLC's affairs are revised. The persons responsible for managing the business and affairs of the LLC are responsible for winding up the activities of the dissolved LLC. Upon certain conditions, a superior court may order judicial supervision of the winding up of a dissolved LLC, including the appointment of a person to wind up the LLC's activities. For the purposes of winding up, a dissolved LLC may:

- preserve the LLC's activities and property as a going concern for a reasonable time;
- prosecute and defend actions and proceedings, whether civil, criminal, or administrative;
- transfer the LLC's property;
- settle disputes; and
- perform other acts necessary or appropriate to the winding up.

Certificate of Cancellation. All references to a certificate of cancellation for domestic LLCs are removed. The issuance of a certificate of cancellation of a foreign LLC's registration does not impair the ability of a party to maintain an action, suit, or proceeding against the foreign LLC.

Appropriation: None.

Fiscal Note: Not requested.

Committee/Commission/Task Force Created: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony: PRO: This bill seeks to address a latent defect in the LLC Act that has been present since it was adopted in Washington. The statute as it was proposed to us originally did not include a process of cancellation. The concept of cancellation stemmed from a concern expressed by the OSSO with their computer system and a perceived need to have a clear end to an LLC so it may be wiped off the books. I would also like to point out that I agree with the Supreme Court's interpretation of the statute in Chadwick. There is no need for the cancellation process. The bill before you lines up the dissolution process for LLCs with Limited Liability Partnerships and the Business Corporation Act.

As the Chair of the Partnership and LLC Committee of the Business Law Section of the Washington State Bar Association (WSBA), we take responsibility for drafting the bill. It is important to note that it has also worked its way through various other committees of the WSBA and has been well worked. We have received some comments regarding section 10, and I think that everyone agrees what needs to happen and we just need to hone the language to meet everyone's needs. We need to deal with the issues raised by the Chadwick case regarding the difference between dissolution and cancellation. It is important to think about this in the context of the other business entities. All we should worry about regarding LLC dissolution is when a claim may be brought by or against the LLC after dissolution has begun. What the bill does is make the LLC statutes related to dissolution, consistent with the other business entity statutes. All that is relevant is whether the entity has dissolved and if you have dissolved have you given notice to the world that you are dissolved. This bill provides clarity on these important questions. We support the bill we just seek very clear language on what claims survive, and feel we have reached agreement with the WSBA on this issue.

Persons Testifying: PRO: Representative Pedersen, prime sponsor; Brian Todd, Don Percival, WSBA Business Law Section; Marlyn Hawkins, Washington State Community Association Institute.

Appendix E

Transcript of House Judiciary Committee Hearing Held 1/20/2010 on House Bill 2657

<http://podcasts.tvw.org/201001/2010011211.mp3>

Chairman We'll move directly to - dyslexic challenge - House Bill 2657 and Courtney, if you could give us the staff report.

Courtney Barnes: House Bill 2657 relates to the dissolution of Limited Liability Companies. A Limited Liability Company is a type of business entity that provides owners with limited personal liability for the company's debts and actions. LLC's were authorized by the legislature in 1994.

LLC's are created by filing a Certificate of Formation with the office of the Secretary of State. They can be dissolved in a number of ways such as reaching a dissolution date set at the time the LLC was created or by mutual consent of all the members in the company. Administrative dissolution by the Secretary of State may occur if the LLC fails to pay fees or complete reports required by the Secretary of State.

Dissolution begins a period in which the affairs of the LLC must be wound up. Winding up involves liquidating assets and paying creditors and distributing proceeds from the liquidation of assets.

After an LLC is dissolved the company's Certificate of Formation is cancelled. Cancellation may occur in a number of ways. For example, a Certificate of Cancellation may be filed by the person authorized to wind up the affairs of the LLC.

In a recent decision "Chadwick Farms Owners Association versus FHC, LLC," the Washington Supreme Court held that the cancellation of an LLC's Certificate of Formation bars the LLC from filing or continuing a lawsuit, and it also bars a claimant from filing or continuing a lawsuit against the LLC.

House Bill 2657 makes a number of changes to the laws governing LLCs. Under the bill a new document, a Certificate of Dissolution is created for LLCs. A dissolved LLC may file a Certificate of Dissolution with the Secretary of State to provide notice that the company is dissolved. Procedures are created to address how a Certificate of Dissolution may be revoked if the revocation is approved by the company's managers or members. Under current law, the Secretary of State is required to cancel a voluntarily dissolved LLC's Certificate of Formation if the LLC does not file an application for reinstatement within 120 days of its dissolution. House Bill 2657 removes this requirement.

Under the bill, a dissolved LLC that has filed a Certificate of Dissolution with the Secretary of State may dispose of all or any of the known claims against it by giving written notice of its dissolution to the holders of known claims after the effective date of dissolution. A known claim against an LLC is barred, and the claim is not the liability of the LLC if the holder of the known claim was given written notice of dissolution and did not deliver written notice of the claim to the dissolved LLC, or the holder of the known claim that is rejected by the dissolution, by the dissolved LLC, does not commence a proceeding to enforce the known claim within 90 days of the effective date of the rejection notice.

The provisions addressing who may wind up the LLC's affairs are revised and for the purposes of winding up, a dissolved LLC may preserve the LLC's activities and properties as a going concern for a reasonable period of time, prosecute and defend actions and proceedings, transfer the LLC's property, settle disputes, and perform other acts necessary and appropriate to winding up.

Statutory language that states that an LLC will be a separate entity until cancellation of the Certificate of Formation is removed. Neither the dissolution of an LLC nor the filing of a Certificate of Dissolution or Certificate of Cancellation eliminates any cause of action by or against an LLC if an action on the claim is filed within three years after filing the Certificate of Dissolution.

I'm happy to answer any questions.

Chairman: Do you have any questions for Courtney? Ok, Mr. Vice Chair.

Vice-chairman: Mr. Chair, there are four who wish to testify. We'll call them all up together: Brian Todd and Don Percival, Jeremy Stillwell and Larry Shannon.

Vice-chairman: Just introduce yourselves for the record please.

Chairman: Larry, you might have to find your own chair but I think there are some available.

Brian Todd: I guess I'll lead off.

Thank you Mr. Chair. My name's Brian Todd. I am the Chair of the Partnership and LLC Law Committee, the Business Law Section of the Washington Bar Association. To my immediate right is Don Percival who is the chair of the sub-committee that drafted this bill. Don also has the distinction of being the chair of the committee and the primary draftsman of the original LLC Act when it was enacted back in the, in the 1990s.

We're here in support of House Bill 2657. The bill will address and resolve two targeted issues that the committee has identified as needing current attention. We're undertaking an overall review of our LLC Act with the intent of updating it, bringing it into more current practice consistent with acts across the country.

That process will probably take another couple of years before it's done but we felt that these two particular issues needed addressing right away. The first is the circumstance that exists following the Chadwick Farms decision that Washington Supreme Court handed down in mid-2009 which holds, as Ms. Barnes pointed out, that an LLC, the Certificate of Formation of which has been cancelled, ceases to exist as an entity and consequently cannot participate in litigation. So, it cannot sue, it cannot be sued, and any litigation pending at the time the Certificate of Formation is cancelled must abate. That, I think, is an untenable situation for creditors of the LLC, and we felt we needed to address a mechanism, put forth a mechanism in the statute for resolving claims against LLC's in the process of winding up.

The second issue that we identified as needing attention has to do with what was intended to be a remedial provision, but unintentionally creates an obligation on the part of the Secretary of State's Office to cancel the Certificate of Formation of any voluntarily

dissolved LLC 120 days after the effective date of dissolution. LLC's frequently take longer than 120 days to complete their winding up process. That's, I think, an unintended glitch in the statute which this bill would resolve.

I'd like to turn the microphone over to Don Percival now who can talk about the substantive provisions of the bill and the purposes for those provisions.

20:09

Don Percival: Good Morning and thanks for the opportunity to testify.

I think that Courtney Barnes actually did a very nice job of summarizing, not only the current LLC Act, to the extent it relates to this bill but also what this bill does. It's really a very simple bill, I think it can be fairly described as technical corrections and that's certainly sort of the mindset we had going into the process of drafting this version of the bill. I'm not sure it is necessary to walk you through section by section, but I'll give you the highlights just to remind you of some of the things that Courtney already told you.

First, it's important, in Section One the bill does away with the statement that the cancellation of the LLC's Certificate of Formation, that the separate existence of the LLC as an entity continues until cancellation of the Certificate of Formation. This is one of the provisions in the existing act that the Supreme Court looked at when it rendered its decision in the Chadwick Farms case last year and I don't think there is much disagreement that the appropriate focus should not be on whether the entity exists or not, that's kind of a concept that has no independent significance. The real key issues are: has it dissolved, meaning have circumstances occurred that trigger a process for winding up the affairs of the LLC, and then what is the process for identifying and resolving any claims by or against the LLC? If you answer those questions, you don't really have to answer the question: does the thing still exist or exactly when does it cease to exist? And that is why the current regime, we want to migrate from the current regime to a regime in which the focus is no longer on the cancellation of the certificate but rather on the giving of public notice of the occurrence of a dissolution and then a systematic way to identify and resolve claims. So, Section One eliminates the statement that suggests, by negative inference, that if a Certificate of Cancellation is filed the LLC goes, "poof," goes away and that was the basis for the Chadwick Farms decision.

Chairman: I'm going to interrupt you because I think that probably one question that might be important for you to comment on is why we have a concept in the LLC Act of a Certificate of Cancellation at all.

Don Percival: Well, I think the reason is historical and that is if you go back to the original creation of the LLC Act, this was a common way of approaching the subject, at the time, in fact the Delaware statute still contains a provision similar to this, sort of to our amazement, we've learned over time...I don't think we intended that cancellation of the certificate would result in the inability to bring actions against the LLC or the inability of the LLC to take actions. That was the extra step that the Chadwick Farms court took last year that produced the anxiety among those of us who are familiar with LLC practice. So, as I think we've shared with you in separate correspondence the, we

would have no problem with eliminating the concept of the Certificate of Cancellation. We did not propose to do that in the state bar sponsored legislation just because we wanted, our philosophy in drafting this was to do the minimum possible to affect the fix of the two issues that Brian identified. You don't have to eliminate Certificates of Cancellation to do that as long as long as you make clear that there isn't really any independent significance, but if we want to go ahead and do that, and I think when we do the entire LLC Act revision in the next couple of years, that's a feature that you would see in those proposals.

Chairman: Ok, and can you comment for practitioners, is there...it strikes me that it may create, if we have multiple steps on the way to eliminating Certificates of Cancellation than that may create a certain amount of confusion about how LLC agreements ought to be drafted between now and then.

Don Percival: I'm very sympathetic with that comment, there is a potential for some confusion. I think that the important thing is that we introduce the notion of Certificates of Dissolution, which I know is a concept that the Secretary of State supports. Make that the trigger point for the taking of the other necessary steps to resolve claims by or against the LLC, and then whether or not you ultimately cancel the Certificate of Formation doesn't really matter.

Chairman: Ok. We're going to need to move on but obviously we'll be working with you over the next week or so on trying to get a substitute together.

Don Percival: Thanks very much.

Larry Shannon: Thank you Mr. Chair and members of the committee. For the record, my name is Larry Shannon and I'm representing the Washington State Association for Justice. And I'm here to speak in support of 2657 but with one question and possibly a proposed amendment to what is before you. I've been here long enough to have actually been involved, in 1993 and '94, in the formation process of establishing this as a business model that can be used in Washington State, I can say with some confidence that even in discussions that we had with the chair of this committee at the time, now Judge Applewick, that the specific issue in Chadwick Farms was discussed and it never really occurred to us that the court would rule in that fashion and, none-the-less, they did. So here we are today, and I believe...

Chairman: That's the first time that that's ever happened.

Larry Shannon: First time ever Mr. Chair. And this is a good fix for that. I do want to ask a question on the record about the last two sections and raise a potential issue about this question of a known claim. Under the draft before you, a notice that goes out on a

known claim effectively establishes a 90 day statute of limitations, statute of repose. As a read it that's an absolute time frame under which that claim has to then be filed. Now, let's translate that into where my question would go as to what that means in the real world and perhaps use an example that this committee may be familiar with. Think about it as a development that was put together with homes where there are questions about, perhaps, the quality of the construction. If that LLC notifies the home owners that they are dissolving and that there are potential claims that exist, but that are unknown to the homeowner at that point in time, does this now establish a 90 day statute of limitations and statute of repose? And that is how I would read it. I believe when you go to your last section where you talk about unknown claims this could be a fairly easy fix by just putting in, and I'd have to check the words and I apologize to the gentleman with me I have not had a chance to talk with him about that but possibly just using the word contingent claims, would cover that gamete of claims where the claim may possibly be known to the LLC but the elements of the claim are not known to the potential claimant. And that would clarify the fact that merely receiving this letter on something, the elements of which are not known to them at the time, does not then extinguish their rights in 90 days. With that, Mr. Chair, I do want to say that I believe this is a needed fix and correction to the statute and I hope we can work this out and move this ahead. I'll be happy to answer any questions.

Chairman: Thanks, and Larry, I think it's likely that this is a moving target for the next bit but we'll keep you in the loop on that. My, I'd be interested to hear the perspective of the bar on this if the bar has a perspective, I think part of what we're going to be aiming for is consistency among the different kinds of business entities about the disposition of claims at dissolution. So, it might be interesting to think about whether this provision is different from what would apply, for example, to a Corporation or a Limited Partnership, and I don't know, Don or Brian, if you want to comment.

Don Percival: Well, I'll take a shot at this. I think you put your finger on the concept here. As you know, we lifted the description, the definition of Known Claims, out of the Business Corporation Act and the comparable procedure for resolution of claims there. It may be that that can be improved and if it is I think we'd probably ought to do all the various enabling statutes at the same time. You will see in Section Five, Three-A, the definition of Known Claims. It does refer to matured claims or un-matured, conditional, or otherwise contingent claims...

Chairman: (interrupts and conversation is briefly unintelligible)

Ron Percival: So there was an attempt address the issue, so I think that's the perspective of the Business Law section and he's presented the perspective of the Trial Lawyers. We're happy to work to...but I think you're right that whatever we do we ought to do the same in all the statutes and not just the LLC Act. So, I guess my preference at this point

would be to take what we've got in the other act and employ that, at least for now, in the LLC Act as we do in this bill.

Chairman: And just to finish up that thought before we go to Representative Flanagan, I think Larry, on the homeowner issue, for example the, right now the theory would be either a warranty that would be in a contract with the builder or it would be an implied warranty of habitability, as weak as that is in our current law. So, you might take a look at that language. It strikes me that there might already be a basis for considering that unknown claim that could not be disposed of by the Notice Procedure, but...

Larry Shannon: I appreciate and I do agree that we had some disagreement as to exactly how and where this would apply but I'd be happy to continue those discussions, I appreciate the comment on the moving target Mr. Chair, and we'll be happy to work on that.

Chair: Super, and Courtney, we'll just keep Larry, and, ok, Representative Flanagan.

Representative Flanagan: Thank you Mr. Chair. I guess I'm a little concerned, if this is a significant issue, that we wait until some other laws are passed, seems sometimes those things go on much longer than even members of the bar imagine, when we're up here. And, if we are going to violate some people's opportunities when they really would have no other redress then I would like, at least, consideration of why we wouldn't do it at this time.

Chairman: Don't you agree? Ok. Mr. Stillwell.

Jeremy Stillwell: Thank you Mr. Chairman and members of the committee, and thank you for hearing House Bill 2657. My name is Jeremy Stillwell. I'm here today testifying on behalf of Community Association's Institute, I am an attorney member of their Legislative Action Committee. I wanted to take a moment and just highlight the Chadwick Farms decision and how that actually gets applied. The filing of a Certificate of Cancellation can occur, currently, by an LLC at any given time. You can have an on-going lawsuit against an LLC, two weeks before trial, they walk in and file a Certificate of Cancellation and "poof", it is gone and you are left holding the bag. I also want to highlight that this is not just... while I'm testifying here on behalf Community Association's Institute; this is not just a homeowner issue. It's a not just a Community Association issue. This case just happened to be a condo case. This case applies to all LLC's within the State of Washington. We do support this bill. I have one concern with Section Six, whether it actually gets us out of the problem that raised the issue. If you look at Section Six, the very last phrase, or the last half of that section, refers to where it

starts to speak, "unless an action, or other proceeding thereon, is not commenced within three years after filing the Certificate of Dissolution". Now, our association would hope that a court would interpret Section Six as a whole and say that a claimant is not barred from pursuing that claim unless someone has taken the affirmative step of filing a Certificate of Dissolution. However, as we saw in the Chadwick Farms case, a Certificate of Dissolution doesn't always get filed. It can be administratively dissolved; there is not Certificate of Dissolution. You skip that step and go straight to the cancellation. Our concern is that someone could file...skip the process of Dissolution completely, file a certificate to cancel the LLC and the issue would then be: does the Survival Statute apply? Because...

Chairman: I think that, I'm sorry to cut you off, but I think that is one of the key concerns that is leading us to a broader approach to resolving this problem. So, we will stay in touch as we continue to work on this and appreciate your sharing that concern, we will work to address it.

Jeremy Stillwell: Thank you.

Chairman: Ok, any other questions for the panel? Ok. Thank you all very much. That will conclude out public hearing on House Bill 2657.

HOUSE BILL REPORT

HB 2657

As Reported by House Committee On:
Judiciary

Title: An act relating to the dissolution of limited liability companies.

Brief Description: Addressing the dissolution of limited liability companies.

Sponsors: Representative Pedersen.

Brief History:

Committee Activity:

Judiciary: 1/20/10, 2/1/10 [DPS].

Brief Summary of Substitute Bill

- Creates a certificate of dissolution for limited liability companies to provide notice of dissolution.
- Establishes procedures to allow a dissolved limited liability company to dispose of known claims.
- Removes all references to a "certificate of cancellation" for domestic limited liability companies.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 9 members: Representatives Pedersen, Chair; Goodman, Vice Chair; Rodne, Ranking Minority Member; Shea, Assistant Ranking Minority Member; Kelley, Kirby, Ormsby, Roberts and Ross.

Staff: Courtney Barnes (786-7194).

Background:

A limited liability company (LLC) is a business entity that possesses some of the attributes of a corporation and some of the attributes of a partnership. The LLCs were authorized by the Legislature in 1994. A properly constructed LLC can be a business entity in which the

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ownership enjoys limited liability like a corporation's shareholders, but the entity itself is not taxed as a corporation. Domestic LLCs are entities formed under the Washington LLC Act. Foreign LLCs are entities formed under the laws of a state other than Washington or a foreign country.

Dissolution of an LLC.

An LLC may be dissolved voluntarily, administratively, or judicially. Dissolution does not terminate the existence of the LLC. Instead, it begins a period in which the affairs of the LLC must be wound up. Dissolution of an LLC does not eliminate any cause of action against the LLC that was incurred prior to or after the dissolution if an action on the claim is filed within three years after the effective date of dissolution.

Revocation of Dissolution.

A voluntarily-dissolved LLC may file for reinstatement by filing an application with the Office of the Secretary of State (OSOS). Current law requires the OSOS to cancel a voluntarily-dissolved LLC's certificate of formation if the dissolved LLC fails to file for reinstatement within 120 days after the effective date of dissolution.

Winding Up the Affairs of a Dissolved LLC.

After dissolution of an LLC, but before cancellation of the certificate of formation, a manager or member of the LLC or a court-appointed receiver may wind up the business of the LLC. Winding up involves liquidating assets, paying creditors, and distributing proceeds from the liquidation of assets to the members of the LLC.

Cancellation of Certificate.

After an LLC is dissolved, the certificate of formation that created the LLC is canceled. Recently, the Washington Supreme Court held that cancellation of an LLC's certificate of formation bars the LLC from filing or continuing a lawsuit and bars a claimant from filing or continuing a lawsuit against the LLC. Under this decision, an LLC ceases to exist as a legal entity and cannot be sued once its certificate of formation is canceled.

Summary of Substitute Bill:

Certificate of Dissolution.

A new document, a certificate of dissolution, is created for LLCs. A dissolved LLC may file a certificate of dissolution with the OSOS to provide notice that the LLC is dissolved. The certificate of dissolution must be signed by the person who is authorized to wind up the LLC's affairs.

The dissolution of an LLC does not eliminate any cause of action by or against the LLC that was incurred prior to or after the dissolution if an action is filed within three years after the

filing of the certificate of dissolution. This provision does not apply if the dissolved LLC has disposed of known claims.

Revocation of Dissolution.

The procedures for how a voluntarily-dissolved LLC may revoke its dissolution are modified. An LLC that has dissolved and filed a certificate of dissolution with the OSOS may revoke its dissolution within 120 days of filing its certificate of dissolution. This provision applies to LLCs dissolved due to the happening of events specified in the LLCs agreement or by written consent of all the LLC's members. To revoke its voluntary dissolution, an LLC must file a certificate of revocation of dissolution with the OSOS. Procedures are created to address how a revocation of dissolution must be approved by the LLC's managers or members.

Winding Up the Affairs of a Dissolved LLC.

The provisions addressing who may wind up a LLC's affairs are revised. The persons responsible for managing the business and affairs of the LLC are responsible for winding up the activities of the dissolved LLC. Upon certain conditions, a superior court may order judicial supervision of the winding up of a dissolved LLC, including the appointment of a person to wind up the LLC's activities. For the purposes of winding up, a dissolved LLC may:

- preserve the LLC's activities and property as a going concern for a reasonable time;
- prosecute and defend actions and proceedings, whether civil, criminal, or administrative;
- transfer the LLC's property;
- settle disputes; and
- perform other acts necessary or appropriate to the winding up.

Disposing of Known Claims.

A dissolved LLC that has filed a certificate of dissolution with the OSOS may dispose of the known claims against it by providing notice to known claimants. Procedures are created to address what the notice to known claimants must contain and how claimants must notify a dissolved LLC of a claim. A known claim against an LLC is barred and the claim is not the liability of the LLC if the holder of the known claim was given written notice of dissolution and:

- the known claim was not received by a specified deadline; or
- the holder of a known claim that is rejected by the dissolved LLC does not commence a proceeding to enforce the claim within 90 days after the receipt of the notice of rejection.

Certificate of Cancellation.

All references to a "certificate of cancellation" for domestic LLCs are removed. The issuance of a certificate of cancellation of a foreign LLC's registration does not impair the ability of a party to maintain an action, suit, or proceeding against the foreign LLC.

Substitute Bill Compared to Original Bill:

The substitute bill removes all references to a "certificate of cancellation" both in the original bill and under current law for domestic LLCs. The substitute bill specifies that the issuance of a certificate of cancellation of a foreign LLC's registration does not impair the ability of a party to maintain an action against the foreign LLC. The substitute bill modifies the provisions in the original bill for filing a certificate of dissolution, revoking a certificate of dissolution, winding up the affairs of a dissolved LLC, and disposing of known claims.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date of Substitute Bill: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) The bill will address and resolve two issues that need immediate attention. First, under the *Chadwick Farms* decision issued by the Washington Supreme Court, a certificate of cancellation abates all legal claims. This decision leaves creditors in an untenable situation. The second issue relates to voluntary dissolution of an LLC. The law requires the OSOS to cancel a voluntarily-dissolved LLC's certificate of formation within 120 days of its dissolution. Many LLCs require more than 120 days to dissolve, and this requirement creates unintended problems. The bill is a simple bill and the intent is to make technical corrections. A certificate of cancellation is an old concept. The Washington State Bar Association intends on significantly revising the LLC Act in the future and will likely remove certificates of cancellation from the LLC Act.

(With concerns) There may be an issue with the provisions allowing a dissolved LLC to dispose of known claims. This provision may establish a 90-day statute of limitations for known claims. This limitation may have serious consequences in circumstances where a claim is known to the LLC, but the elements are not known to the potential claimant. The bill should be amended to address these types of claims. The bill amends the claims survival statute and only references a certificate of dissolution. This provision needs to be amended to address situations where an LLC does not file a certificate of dissolution but files a certificate of cancellation.

(Opposed) None.

Persons Testifying: (In support) Brian Todd and Don Percival, Washington State Bar Association; and Larry Shannon, Washington State Association for Justice.

(With concerns) Jeremy Stillwell, Washington State Community Associations Institute.

Persons Signed In To Testify But Not Testifying: None.