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NO. ~~77881~~

SUPREME COURT OF THE STATE OF WASHINGTON

CHADWICK FARMS OWNERS ASSOCIATION, a Washington  
nonprofit corporation,

Plaintiff/Appellant,

v.

FHC LLC, a Washington limited liability company,

Defendant/Third Party Plaintiff/Respondent/Cross-Appellant,

v.

AMERICA 1<sup>ST</sup> ROOFING & BUILDERS, INC., a Washington  
corporation; CASCADE UTILITIES, INC., a Washington corporation;  
MILBRANDT ARCHITECTS, INC., P.S., a Washington corporation;  
PIERONI ENTERPRISE, INC., d/b/a PIERONI'S LANDSCAPE  
CONSTRUCTION, a Washington corporation; TIGHT IS RIGHT  
CONSTRUCTION, INC., a Washington corporation; GUTTER KING,  
INC., a Washington corporation,

Third Party Defendants/Cross-Respondents.

REPLY BRIEF OF APPELLANT CHADWICK FARMS  
OWNERS ASSOCIATION

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## I. REPLY ARGUMENT

- A. Contrary to FHC LLC's Assertions, Under the Washington Limited Liability Company Act, Once Two Years Had Passed After FHC LLC's Administrative Dissolution, FHC LLC Did Not Cease to Exist for All Purposes, Such that Chadwick Farms' Pending Claims Against It Could No Longer Be Pursued.

Chadwick Farms' construction defect claims against FHC LLC were brought more than seven months before the expiration of the two-year reinstatement period following FHC LLC's administrative dissolution. FHC LLC erroneously asserts that, once two years had passed after its administrative dissolution without it applying for reinstatement, FHC LLC's winding up period was terminated, its certificate of formation was cancelled, and it ceased to exist as a separate legal entity such that Chadwick Farms' pending suit against it abated and could no longer be pursued. In making that assertion, FHC LLC misreads the statutory provisions upon which it relies, ignores other statutory provisions, and urges a construction of the Washington Limited Liability Company Act that would render several of its provisions meaningless or superfluous and lead to absurd, unjust, and unnecessarily harsh results.

Although FHC LLC correctly acknowledges, Resp. Br. at 4, that an administratively dissolved limited liability company continues to exist for

purposes of winding up,<sup>1</sup> it misreads RCW 25.15.295(2) when it asserts that the winding up period of an administratively dissolved limited liability company automatically terminates two years after administrative dissolution if an application for reinstatement is not made. See Resp. Br. at 4-5. FHC LLC glosses over, and fails to give effect to, the language that follows the conjunctive word “and” in RCW 25.15.295(2) which indicates that a limited liability company may conduct winding up activities, including prosecuting and defending suits, upon dissolution “and until the filing of a certificate of cancellation . . . .” RCW 25.15.295(2) provides:

Upon dissolution of a limited liability company *and until the filing of a certificate of cancellation* as provided in RCW 25.15.080, the persons winding up the limited liability company’s affairs may, in the name of, and for and on behalf of, the limited liability company, prosecute and defend suits, whether civil, criminal, or administrative, gradually settle and close the limited liability company’s business, dispose of and convey the limited liability company’s property, discharge or make reasonable provision for the limited liability company’s liabilities, and distribute to the members any remaining assets of the limited liability company. [Emphasis added.]

Contrary to FHC LLC’s assertions, neither RCW 25.15.295(2), nor any other statutory provision in RCW Ch. 25.15, specifies a finite period.

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<sup>1</sup> See RCW 25.15.285(3), which provides: “A limited liability company administratively dissolved continues its existence but may not carry on any business except as necessary to wind up and liquidate its business and affairs.”

within which a limited liability company must complete its winding up after dissolution, whether its dissolution is administrative or otherwise. What RCW 25.15.295(2) does specify is that a limited liability company may engage in winding up activities, including prosecuting and defending suits, “[u]pon dissolution” and “until the filing of a certificate of cancellation as provided in RCW 25.15.080.”

Even though RCW 25.15.295(2) specifies that winding up activities may continue “until the filing of a certificate of cancellation as provided in RCW 25.15.080,” FHC LLC ignores the statutorily specified procedure for canceling a certificate of formation set forth in RCW 25.15.080, and omits any reference at all to the second sentence of RCW 25.15.080 when it quotes from that statute. Although FHC LLC quotes the first sentence of RCW 25.15.080, *see* Resp. Br. at 5, which specifies *when* a certificate of formation shall be cancelled, it fails to quote the second sentence of RCW 25.15.080, which specifies *how* the cancellation of the certificate of formation shall be accomplished. Read in its entirety, RCW 25.15.080 provides:

*A certificate of formation shall be cancelled upon the effective date of the certificate of cancellation, or as provided in RCW 25.15.290, or upon the filing of articles of merger if the limited liability company is not the surviving or resulting entity in a merger. A certificate of cancellation shall be filed in the office of the secretary of state to accomplish the cancellation of a certificate of formation upon the*

*dissolution and the completion of winding up of a limited liability company . . . .* [Emphasis added.]

As the court explained in Kilian v. Atkinson, 147 Wn.2d 16, 21, 50

P.3d 638 (2002) (footnotes omitted):

In construing a statute, courts should read it in its entirety, instead of reading only a single sentence or a single phrase. “Each provision must be viewed in relation to the other provisions and harmonized, if at all possible . . . .” Statutes must be construed so that all the language is given effect and no portion is rendered meaningless or superfluous. The court must also avoid constructions that yield unlikely, absurd or strained consequences.

See also State v. Thorne, 129 Wn.2d 736, 761, 921 P.2d 514 (1996)

(“Each provision must be viewed in relation to other provisions and harmonized. . . .”); Flanigan v. Department of Labor & Indus., 123 Wn.2d 418, 426, 869 P.2d 14 (1994) (Courts “do not interpret statutes to reach absurd and fundamentally unjust results”). Reading RCW 25.15.080 in its entirety, and in relation to RCW 25.15.295(2) and the other provisions of RCW Ch. 25.15, a dissolved LLC may defend and prosecute suits, and engage in other winding up activities, “until the filing of a certificate of cancellation,” which, according to RCW 25.15.080 shall be filed “to accomplish the cancellation of a certificate of formation upon the

dissolution and the completion of winding up of a limited liability company.”<sup>2</sup>

Here, there is no evidence that a certificate of cancellation for FHC LLC has ever been filed pursuant to RCW 25.15.080 to accomplish the cancellation of its certificate of formation. Thus, under RCW 25.15.295(2), FHC LLC may still engage in winding up activities, including defending and prosecuting suits, and Chadwick Farms’ suit against it was improperly dismissed.

Contrary to FHC LLC’s assertion, Resp. Br. at 5, 8, it is disputed that FHC LLC’s certificate of formation was cancelled by operation of law on March 24, 2005, two years after its administrative dissolution, such that pending suits against it could no longer be pursued. Although FHC LLC cites RCW 25.15.290(4) for that proposition, Resp. Br. at 5, RCW 25.15.290(4) does not so state. RCW 25.15.290(4) provides:

If an application for reinstatement is not made within the two-year period set forth in subsection (1) of this section, or if the application made within this period is not granted, the Secretary of State shall cancel the limited liability company’s Certificate of Formation.

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<sup>2</sup> “The express provision of RCW 25.15.295(2)” does not, as FHC LLC contends, Resp. Br. at 7, clearly state “that suit can be maintained against a limited liability company only until it is cancelled pursuant to RCW 25.15.080.” What RCW 25.15.295(2) expressly states is that a limited liability company may continue to defend suits “until the filing of a certificate of cancellation as provided in RCW 25.15.080.”

RCW 25.15.290(4) does not specify when the winding up of an administratively dissolved limited liability company must be completed, or how, when, or in what form the Secretary of State is to accomplish the cancellation of a certificate of formation once the two-year reinstatement period following administrative dissolution expires. Ultimately, under RCW 25.15.080, a certificate of cancellation must be filed to accomplish the cancellation of a limited liability company's certificate of formation upon the dissolution and completion of the winding up of the limited liability company and, under RCW 25.15.295(2), "until the filing of the certificate of cancellation," the limited liability company may still continue winding up its affairs, including prosecuting and defending suits.

FHC LLC's reliance on RCW 25.15.070(2)(c), Resp. Br. at 4,<sup>3</sup> 5, 7-8, does not alter that conclusion. RCW 25.15.070(2)(c) provides that:

A limited liability company formed under this chapter shall be a separate legal entity, the existence of which as a separate legal entity shall continue until the cancellation of the limited liability company's certificate of formation.

It does not negate the requirement of RCW 25.15.080, with which it must be read in *pari materia*, see e.g., State v. Chapman, 140 Wn.2d 436, 448, 998 P.2d 282, cert. denied, 531 U.S. 984 (2000), that "[a] certificate of cancellation shall be filed in the office of the secretary of state to

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<sup>3</sup>At page 4, FHC LLC's citation to RCW 25.15.270(2)(c) appears to be a typographical error, which if corrected would have been a citation to RCW 25.15.070(2)(c).

accomplish the cancellation of a certificate of formation upon the dissolution and the completion of winding up . . . .”

B. Contrary to FHC LLC's Assertions, Chadwick Farms Is Not Asking the Court to Ignore the Full Language of RCW 25.15.080 or Any Other Provision of the Washington Limited Liability Company Act, or to Engage in Any Tortured Interpretation of the Act, or to Add Any Words or Provisions to the Act.

After itself ignoring and failing to quote the second sentence of RCW 25.15.080, FHC LLC inexplicably and unjustifiably accuses Chadwick Farms, Resp. Br. at 6, of suggesting “that the Court ignore the full language of RCW 25.15.080, cited and incorporated in its entirety in RCW 25.15.295(2) . . . .” Chadwick Farms is not the one asking the Court to ignore any portion of RCW 25.15.080. It is FHC LLC that wants the Court to ignore the second sentence of RCW 25.15.080, which provides that “A certificate of cancellation shall be filed in the office of the secretary of state to accomplish the cancellation of a certificate of formation upon the dissolution and the completion of winding up of a limited liability company.”

FHC LLC also erroneously asserts, Resp. Br. at 7, that “[t]he express provision of RCW 25.15.295(2) clearly states that suit can be maintained against a limited liability company only until it is cancelled pursuant to RCW 25.15.080.” That is not what RCW 25.15.295(2) states. What RCW 25.15.295(2) states is that a dissolved limited liability

company may continue winding up activities, including the defense of suits, “until the filing of a certificate of cancellation as provided in RCW 25.15.080.”

Reading all of the key provisions of the Washington Limited Liability Company Act in their entirety and in *pari materia*, as they should be read, see State v. Chapman, 140 Wn.2d at 448, rather than selectively reading some of the provisions in a piecemeal fashion while ignoring others, as FHC LLC wants the Court to do, a limited liability company may be administratively dissolved, but can still wind up its affairs (including defending and prosecuting suits) during and after the two-year reinstatement period, until the winding up (including making reasonable provision for payment of known claims, see RCW 25.15.300(2)), is complete and a certificate of cancellation is filed.

“The primary goal of statutory interpretation is to ascertain and give effect to the legislature’s intent and purpose.” In re Parentage of J.M.K., 155 Wn.2d 374, 387, 119 P.3d 840 (2005); HTK Mgmt. L.L.C. v. Seattle Popular Monorail Auth., 155 Wn.2d 612, 627, 121 P.3d 1166 (2005). “This is done by considering the statute as a whole, giving effect to all that the legislature has said, and by using related statutes to help identify the legislative intent embodied in the provision in question.” In re Parentage of J.M.K., 155 Wn.2d at 387. After this inquiry, if the language

of a statute is susceptible to more than one reasonable interpretation, the statute is ambiguous and it is appropriate to resort to the tools of statutory construction. Advanced Silicon v. Grant County, 156 Wn.2d 84, 90, 124 P.3d 294 (2005); Harmon v. Department of Social & Health Servs., 134 Wn.2d 523, 530, 951 P.2d 770 (1998); State v. Jacobs, 154 Wn.2d 596, 600-01, 115 P.3d 281 (2005). In engaging in statutory construction, courts “avoid readings of statutes that result in unlikely, absurd, or strained consequences.” Glaubach v. Regence Blueshield, 149 Wn.2d 827, 833, 74 P.3d 115 (2003). Instead, “[t]he spirit or purpose of an enactment should prevail . . . .” Id. (quoting State v. Day, 96 Wn.2d 646, 648, 638 P.2d 546 (1981)).

Here, FHC LLC’s proffered construction of the Washington Limited Liability Company Act does not consider the statute as whole or give effect to all that the Legislature has said. FHC LLC’s proffered construction is not a reasonable one and leads to absurd consequences. Indeed, FHC LLC would have this Court construe the Act’s provisions in a way that would treat the winding up and cancellation of limited liability companies following administrative dissolution differently from the winding up and cancellation of limited liability companies following other forms of dissolution, even though RCW 25.15.080 and RCW 25.15.295(2) draw no such distinction. FHC LLC would have this Court construe the

Act's provisions in a way that would give preferential treatment to administratively dissolved limited liability companies, by enabling them to escape pending lawsuits, defeat potential creditors' claims, and default on and evade liabilities, simply by failing to pay license fees or annual reports and thereby sending themselves into administrative dissolution, failing to seek reinstatement, and allowing two years to pass without winding up their affairs and without paying or making reasonable provision to pay all known or asserted claims and obligations against them.

Nothing in the Washington Limited Liability Company Act supports or mandates such an absurd and fundamentally unfair and unjust result. Nor does anything in the Washington Limited Liability Company Act suggest that the Legislature intended to allow administratively dissolved limited liability companies to so manipulate the system to avoid their debts and liabilities and creditors' claims. To the contrary, RCW 25.15.300(2) makes clear a legislative intent to mandate that:

A limited liability company which has dissolved shall pay or make reasonable provision to pay all claims and obligations, including all contingent, conditional, or unmatured claims and obligations, known to the limited liability company and all claims and obligations which are known to the limited liability company but for which the identity of the claimant is unknown. . . .

The Legislature's enactment of RCW 25.15.300(2) provides no exception for administratively dissolved limited liability companies, but applies to

any limited liability company which has dissolved, regardless of how it dissolved.

Contrary to FHC LLC's assertions, Resp. Br. at 8-9, Chadwick Farms is not asking this Court to add words to any statute or to create an otherwise nonexistent survival-of-claims provision for limited liability companies. Rather, Chadwick Farms asks the Court to read all of the statutory provisions in the Washington Limited Liability Company Act together and construe them in a way that gives effect to all of them, renders none of them (or the language used in them) superfluous or meaningless, and avoids absurd, unjust, and harsh consequences. When the statutory provisions in the Washington Limited Liability Company Act are read that way, the logical conclusion is that expiration of the two-year period for reinstatement following a limited liability company's administrative dissolution does not, in itself, correspondingly extinguish pending claims that were brought against the limited liability company during that two-year period.

C. The Recent Enactment of Senate Bill 6531 Removes Any Possible Doubt that Chadwick Farms' Claims Against FHC LLC Were Not Extinguished with the Passage of the Two-Year Reinstatement Period Following FHC LLC's Administrative Dissolution.

Senate Bill 6531, "an act [r]elating to preserving remedies when limited liability companies dissolve . . .," which became effective on May 6, 2006, provides:

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

FHC LLC does not dispute that Senate Bill 6531, being curative and remedial in nature, should apply retroactively. See e.g., McGee Guest Home, Inc. v. Department of Social & Health Servs., 142 Wn.2d 316, 324-25, 12 P.3d 144 (2000) (A statutory amendment will be applied retroactively if (1) the legislature so intended, or (2) the amendment is curative, or (3) the amendment is remedial).<sup>4</sup> Instead, FHC LLC asserts, Resp. Br. at 11, that "[w]hether Senate Bill should be applied retroactively to the present matter is irrelevant," and, Resp. Br. at 12, that "Senate Bill 6531 only applies to dissolved limited liability companies and has

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<sup>4</sup> Accord, In re Personal Restraint of Matteson, 142 Wn.2d 298, 308, 12 P.3d 585 (2000); Robin L. Miller Constr. Co. v. Coltran, 110 Wn. App. 883, 890, 43 P.3d 67 (2002).

absolutely no application to a cancelled limited liability company.” FHC LLC’s assertions are incorrect.

Senate Bill 6531 provides that the dissolution of a limited liability company does not take away or impair any remedy available against it for any right or claim, so long as the action or proceeding thereon is brought within three years after the effective date of the dissolution. Senate Bill 6531 provides no exception to that three-year survival-of-claims provision for dissolved limited liability companies that manage to file a certificate of cancellation before the expiration of the three-year period, or for administratively dissolved limited liability companies, like FHC LLC, that fail to seek reinstatement within two years of their administrative dissolution. To read such exceptions into Senate Bill 6531 would effectively eviscerate, and render meaningless, the three-year survival-of-claims provision enacted by the Legislature in Senate Bill 6531.

Courts “cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language.” State v. Delgado, 148 Wn.2d 723, 727, 63 P.3d 792 (2003). Courts “assume the legislature ‘means exactly what it says.’” Id. (quoting Davis v. Department of Licensing, 137 Wn.2d 957, 964, 977 P.2d 554 (1999)).

According to FHC LLC’s tortured construction of the Washington Limited Liability Act and Senate Bill 6531, the certificate of formation of

an administratively dissolved limited liability company that fails to reinstate after the two-year reinstatement period would be automatically and immediately "cancelled," and any claim against that limited liability company would abate, even though the claim was brought within Senate Bill 6531's three-year survival of claims period. Nothing in Senate Bill 6531 reflects a legislative intent to so carve out an exception to the three-year survival-of-claims period for administratively dissolved limited liability companies, or to treat them differently from voluntarily or judicially dissolved LLCs for purposes of survival of claims.

Under Senate Bill 6531, claims can proceed against a dissolved limited liability company – whether dissolved voluntarily, judicially, or administratively – as long as the action or proceeding on those claims is brought within three years after the effective date of the dissolution. Because Senate Bill 6531 is curative and remedial, and because its retroactive application will serve its remedial purpose, Senate Bill 6531 should be applied retroactively<sup>5</sup> to preserve Chadwick Farms' claims against FHC LLC, claims that were brought more than seven months before the expiration of the two-year reinstatement period, and well within three years of FHC LLC's administrative dissolution.

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<sup>5</sup> See footnote 4, *supra*, and accompanying text.

D. After Erroneously Deciding to Dismiss Chadwick Farms' Claims Against FHC LLC, the Trial Court Abused Its Discretion in Not Allowing Chadwick Farms to Amend Its Complaint to Assert Personal Liability Claims Against Mr. Godfrey and Mr. Morrison.

FHC LLC asserts, Resp. Br. at 13-15, that once the trial court dismissed Chadwick Farms' complaint against FHC LLC on September 30, 2005, there was no complaint that the trial court could have allowed Chadwick Farms to amend. That assertion is incorrect. Once the trial court decided, albeit erroneously, that it had to dismiss Chadwick Farms' claims against FHC LLC on the grounds that FHC LLC could no longer continue to be sued once the two-year reinstatement period had passed following FHC LLC's administrative dissolution, the trial court was not precluded by law from considering and granting Chadwick Farms' motion to amend, which was noted for consideration that same day and to which no party, including FHC LLC had filed any opposition. Nor was the trial court precluded by law from considering and granting Chadwick Farms' motion to amend when Chadwick Farms made its subsequent request for a ruling on the motion to amend.

FHC LLC also asserts, Resp. Br. at 15, n. 2, that the claims and parties Chadwick Farms sought to add were "entirely separate from the construction defect claims" asserted against FHC LLC, such that the trial court had substantive reasons for not granting the motion to amend. That

assertion is also incorrect. The personal liability claims Chadwick Farms sought to add against Mr. Godfrey and Mr. Morrison were not separate and distinct from the construction defect claims Chadwick Farms made against FHC LLC. All Chadwick Farms sought to do, was make sure, consistent with RCW 25.15.300(2), that, if FHC LLC could no longer be held to answer on the construction defect claims because it had ceased to exist as a separate legal entity during the pendency of those claims, the persons who were responsible for winding up FHC LLC's affairs, and who were statutorily required to make reasonable provision to pay all claims, but who failed to do so with respect to Chadwick Farms' claims, could be held liable on those claims.

RCW 25.15.300(2) provides in pertinent part that:

A limited liability company which has dissolved shall pay or make reasonable provision to pay all claims and obligations, including all contingent, conditional, or unmatured claims and obligations, known to the limited liability company. . . . Any person winding up a limited liability company's affairs who has complied with this section is not personally liable to the claimants of the dissolved limited liability company by reason of such person's actions in winding up the limited liability company.

Implicit in that statutory provision is the converse proposition – that any person winding up a limited liability company's affairs who has not

complied with this section *is* personally liable to the affected claimants of the limited liability company.

The claims Chadwick Farms sought to assert against Mr. Godfrey and Mr. Morrison were merely claims that they had become personally liable on Chadwick Farms' construction defect claims when they failed to comply with the provisions of RCW 25.15.300(2) in winding up FHC LLC's affairs. Thus, the claims Chadwick Farms sought to assert against Mr. Godfrey and Mr. Morrison in the amended complaint were not claims that were separate and distinct from the construction defect claims brought against FHC LLC in the original complaint.

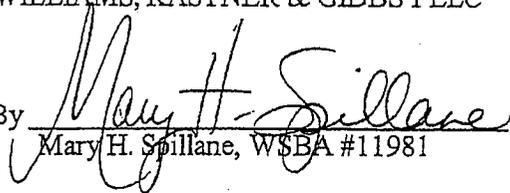
## II. CONCLUSION.

For the reasons set forth in this reply brief and in Chadwick Farms' opening brief, the trial court's order granting FHC LLC's motion for summary judgment dismissing Chadwick Farms' claims against FHC LLC should be reversed and the case remanded for resolution of those claims. Alternatively, this Court should find that the trial court abused its discretion in failing to rule upon Chadwick Farms' motion to amend its complaint and remand the case with instructions that Chadwick Farms be granted leave to amend to pursue personal liability claims against Mr. Godfrey and Mr. Morrison.

RESPECTFULLY SUBMITTED this 23rd day of June, 2006.

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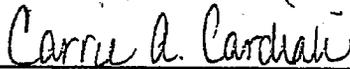
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\_\_\_\_\_  
Carrie A. Cardiali

SUPREME COURT OF THE STATE OF WASHINGTON  
CHADWICK FARMS OWNERS ASSOCIATION  
Plaintiff/Petitioner

vs  
FHC LLC

No. 77881-7

DECLARATION OF  
FAXED DOCUMENT  
(DCLR)

Defendant/Respondent

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Pursuant to the provisions of GR 17, I declare as follows:

1. I am the party who received the foregoing facsimile transmission for filing.
2. My address is: 119 W. Legion Way, Olympia, WA 98501
3. My phone number is (360) 754-6595
4. The facsimile number where I received the document is (360) 357-3302
5. I have examined the foregoing document, determined that it consists of 25 pages, including this Declaration page, and that it is complete and legible.

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

Dated: 6/23/06, at Olympia, Washington.

Signature: \_\_\_\_\_

Print Name: Ingrid Y. Elsinga