

No. 58825-7-I

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION 1**

COLONIAL DEVELOPMENT, LLC, a Washington limited liability
company,

Defendant// Appellant.

v.

EMILY LANE TOWNHOMES CONDOMINIUM OWNERS'
ASSOCIATION, a Washington nonprofit corporation,

Plaintiff// Respondent/Cross-Appellant.

**BRIEF OF RESPONDENT/CROSS-APPELLANT EMILY LANE
TOWNHOMES CONDOMINIUM OWNERS' ASSOCIATION**

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- Appendix B House Bill Report and House Bill Analysis
- Appendix C Declaration of L. Flanagan in Support of Motion for
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1. Introduction

Colonial Development, LLC (“the LLC”) constructed and sold the Emily Lane Townhomes Condominiums. The project is riddled with latent defects and building code violations, which should have been clear during construction and during the course of warranty repairs by the LLC. Yet before the LLC’s four year statutory warranty of quality expired (RCW 64.34.445) the LLC’s members took all of its cash assets, and dissolved and cancelled the LLC.

The Emily Lane Townhomes Owner’s Association (“the Association”) filed suit against the LLC over the defects. After nearly a year of aggressive litigation, the LLC moved to dismiss, arguing that it did not exist. In the interim, however, the Legislature passed SB 6531 (codified as RCW 25.15.303), a new survival statute for claims against dissolved LLCs. In committee, the bill’s sponsor explained that one purpose for SB 6531 was to permit construction defect claims against undistributed LLC insurance policies. At summary judgment, the trial court recognized the retroactive and remedial purpose of SB 6531, and applied it retroactively to ensure preservation of the Association’s claims against the LLC.

Two recent decisions of the Supreme Court –*Ballard Square*¹ and *1000 Virginia*² confirm that the trial court’s decision was correct. This court should now affirm the trial court’s application of SB 6531 to preserve the Association’s claims, and reverse the dismissal of its claims against the LLC’s members.

2. Assignment of Error on Cross-Review

The trial court erred in entering its July 28, 3006 summary judgment Order dismissing Plaintiff Association’s (“the Association”) claims against the members of Colonial Development, LLC (“the LLC”), and in denying Plaintiff’s Motion for Reconsideration.

3. Issues Pertaining to Assignment of Error on Cross-Review

Do issues of fact preclude summary judgment as to potential liability of the LLC’s members?

4. Restatement of Issues Pertaining to Appellant’s Assignment of Error

¹ *Ballard Sq. Condo. v. Dynasty Constr.*, 126 Wn.2d 285, 2006 Wash. LEXIS 875 (companion bill to SB 6531 preserving claims against dissolved corporations applied retroactively because: (1) the legislature expressly intended retroactive application, (2) the new statute was remedial and curative, and (3) the new statute did not interfere with any vested common-law rights).

² *1000 Va. Ltd. P’ship v. Vertecs Corp.*, 127 Wn.App. 899, 2006 Wash. LEXIS 873 (RCW 4.16.326(1)(g) which created a firm 6-year statute-of-limitations defense for breach of construction contracts (regardless of the date the breach was discovered) did not apply retroactively because: (1) it was neither remedial nor curative, (2) it would violate separation-of-powers principals by “undo[ing] judicial adoption of a discovery rule for construction contracts, not to clarify and ambiguous statute,” and (3) retroactive application would have impaired plaintiff’s vested right to a cause of action springing from the common law.

-Under the LLC Act, do claims against an LLC abate where it deliberately dissolved itself during its ongoing statutory warranty obligations, despite failing to complete outstanding warranty work?

-Assuming claims against the cancelled LLC would abate, did SB 6531 preserve the claims because it was intended to remediate and cure the injustice the LLC and its members now seek to perpetrate?

-Is the trial court's refusal to dismiss non-Condominium Act claims against the LLC properly before this court when none of those issues were certified or accepted for review?

-Should the court decline to consider the LLC's arguments, raised only on appeal, challenging the sufficiency of evidence supporting the Association's claims for breach of contract and express warranty?

-In light of the LLC having constructed condominium buildings containing numerous construction defects, and then having intentionally dissolved itself during its four-year warranty period, is this an "appropriate case" to require the aggrieved unit owners to pay the LLC's attorney fees?

5. Statement of the Case

a. Overview

Appellant LLC was created by a consortium of professional developers and builders solely to build and sell the Emily Lane Townhomes. (CP 150, 1643, 1649). The LLC acted not only as the

developer and declarant, but also as general contractor. (CP 1647). It hired a supervisor who reviewed the construction and reported regularly to the LLC members. (CP 1647-51). The members were frequently on site examining the construction and directing changes. (*Id.*)

During the course of sales, the LLC controlled the Association's Board of Directors. The LLC appointed its members' employees and assistants to act as Association Board members: member Fred Mus' assistant Theresa May, and member Contempra Homes' principal Dan Mus. (CP 461, 2023-25). During this time, the LLC was faced with numerous warranty claims for construction defects, many of which were either ignored or not fully addressed. (CP 1203-1235).³ In fact, the declarant-appointed Board never met, and never made any decisions. (CP 2030).

After paying off its construction loan, the LLC distributed all remaining money to its members, leaving it with no assets to address its ongoing statutory warranty obligations to its customers. (CP 1638). In December, 2004, seven months before the statutory warranty of quality

³ The LLC asserts that it "fixed" all of these complaints. That assertion, however, is based entirely on hearsay or speculation on the part of Theresa May, who repeatedly testified that she had no system to ensure that work was performed, no personal knowledge of what happened to repair complaints, and based her conclusion that the work was completed because eventually the owners stopped calling her. (CP 2140, 2144, 2150, 2156-58, 2161). In fact, many of the homeowners' concerns were *never* addressed despite repeated demands. (CP 1203-25). At a minimum, the issue is one of fact which must be resolved in favor of the Association for this purpose.

expired, the members voted to dissolve the LLC. (CP 1040). Two weeks later, they filed a two page document canceling the LLC's certificate of registration. (CP 1042). Because the members took all the cash, today the LLC's only remaining assets are its liability insurance policies.

Neither the declarant LLC nor the Directors appointed by its members advised the Association of their plan to dissolve and cancel the LLC. (CP 1204, 1210, 1215, 1221, 2023). When, a few months later, the Association made a formal claim for construction defects, the LLC members replied with letters in which they pretended that the LLC was a going concern, willing and capable of responding to the Association's defect claims. (CP 1357-62). The LLC members did this despite knowing that the LLC had a defense based on its dissolution. (CP 1351-55).

After the Association filed suit, the LLC and its members aggressively litigated this matter for nearly a year before filing a motion for dismissal based on the LLC's dissolution.

b. Nature of Defects at Emily Lane

There are numerous latent Building Code violations and unworkmanlike conditions at Emily Lane including inadequately attached and flimsy second story guardrails, improper flashing at penetrations through exterior walls resulting in water intrusion, concrete poured against siding causing rot damage to the building, reverse-lapped building paper

causing water intrusion and damage, missing and improperly installed flashings at balconies and walkways causing damage to the underlying framing, broken window flanges, improperly installed windows, missing roof components, and more. (CP 1236-37).

c. The Trial Court Should Have Reasonably Inferred That the LLC and its Members Knew of Defects Based on Their Construction Activities.

The LLC acted as its own general contractor, and retained a site superintendent to supervise the construction. (CP 1647). The superintendent reported regularly to the LLC members. (CP 1647-50). The members were all professional builders, well-versed in construction, (CP 1643-44, 1648), and visited the site frequently to review the progress and quality of the work. (CP 1649). Assuming the LLC members and/or their superintendent observed the construction with due care, they must have known that windows were improperly installed, that flashings were improperly installed, that railings were weak, and so on. (1239, 1647-51).

d. Warranties in Purchase and Sale Agreements

The LLC and its selling agent (who was also an LLC member) (CP 1519) assured buyers that the LLC had no tolerance for defective construction, and that they would have an express warranty from the builder. (CP 1204, 1210, 1215, 1221). In fact, that express warranty was

just a thinly-disguised attempt to disclaim the statutory warranties of quality under the Condominium Act.⁴

The LLC sold units before completing construction at Emily Lane. (Brief of App. At 3, CP 193-95). The purchase and sale agreements contained NWMLS Form 29, which: “If the Unit is in a condominium project for which renovation or construction work remains uncompleted, the Unit and the entire project shall be completed in accordance with the plans and specifications. . .” (CP 1254, 1819-45, 2058).

e. The Trial Court Should Have Reasonably Inferred That the LLC and Its Members Knew of Defects Based on Unresolved Warranty Claims and Repair Efforts

Shortly after sales began, multiple unit owners asked the LLC to repair leaking windows; those leaks sometimes even recurred after the LLC had made “repairs.” (CP 1224-35, 1654-58, 2150). LLC member Fred Mus’ assistant, Theresa May, was responsible for handling warranty claims; she reported to the members on a regular basis regarding the nature of warranty claims and work. (CP 918, 921, 924, 927, 930, 2139, 2151-52). Had the LLC and its members exercised diligence in

⁴ The warranty disclaimers were buried deep an “express warranty.” (CP 697-710, esp. 701). LLC’s disclaimer is the same one that *Park Ave. Condo. v. Buchan Dev. ’s*, 117 Wn.App. 369, 71 P.3d 692 (2003) rejected as an improper attempt to disclaim warranties through a “laundry list” approach. (CP 2093-2120). Defendants have now apparently abandoned their argument that this waiver was effective.

determining the causes of the leaks, they would have realized that problems with window installation were widespread. (CP 1239).

Failure of the LLC, its members, and their agents on the Association's Board to disclose these facts prevented the Association from discovering the latent defects until after the LLC had dissolved, by which time more damage had occurred. (CP 1204, 1210, 1221, 1240, 2031).

During 2003, the LLC spent several thousand dollars on some of the warranty claims it felt were covered, but ignored others. (CP 1515, 1632.)⁵ Unit owners also complained of some of the more obvious conditions, such as deck soffits falling apart from water intrusion, inadequate dryer ventilation, and so forth; these issues were not addressed by the LLC at all. (CP 1204, 1210, 1215, 1224-35). Given the LLC's ignoring of many warranty requests and not following up on others, owners eventually stopped asking for the developer's help. (CP 1204).

**f. Fraudulent Asset Transfers to Members and LLC
Dissolution**

Despite the ongoing warranty claims, during 2003 the members took \$165,000 out of their LLC. (CP 1515, 1639).⁶ This left a mere

⁵ The LLC denied some warranty requests on the mistaken assumption that its ineffective limited warranty document precluded claims of various sorts. (CP 1659).

⁶ It is undisputed that the money distributed to LLC members was a return of their capital investment. (CP 155-56, 310-13).

\$12,800 as the LLC's sole remaining cash asset to cover warranty expenses on three buildings over the next two years. (*Id.* and 1521).

In December, 2004, seven months before its four-year warranty obligations expired, without notice to the Association, without following up on outstanding warranty claims, without inquiring of the Association whether it had warranty claims, without investigating the quality of the construction, the LLC members took the last remaining cash assets from the LLC and filed paperwork with the state canceling its certificate of registration. (CP 1042, 1204, 1210, 1215, 1221, 1523, 1638, 2023, 2034). The LLC made no attempt to "reasonably provide" for its remaining four-year warranty obligation. It set up no reserve fund for the outstanding and contingent claims against it. (CP 1517.)

g. Current Procedural Posture

The LLC filed its motion to dismiss, claiming it did not exist, only after a year of intense litigation during which it pretended to be a going concern, engaged in extensive discovery and motions practice, performed a week-long intrusive building investigation, and proposed mediation of the claims. (*See* pages 29 to 32, *infra*). After requesting supplemental briefing on the impact of the new survival statute at SB 6531 (codified at RCW 25.15.303) (CP 1006-35, 1055-74), the trial court entered an Order

denying the LLC's Motion in its entirety, but also dismissing claims against the moving member defendants. (CP 1178-80).

At Appellant's request, the trial court entered an order certifying the matter for review, reciting the language of RAP 2.3(b)(4) that this case involves a "controlling question of law" undecided in Washington state, namely, whether SB 6531 applies to allow the Association's claims against the dissolved LLC to proceed. (CP 1105, 1159-60).

The Court of Appeals questioned the appealability of the summary judgment Order *sua sponte*, but after a hearing the Commissioner granted discretionary review on the basis of RAP 2.3(b)(4) as to the narrow issue of applicability of SB 6531. For the sake of judicial economy, the Commissioner also ordered cross-review of the dismissal of the Association's claims against the members. (Appendix A).

On appeal, the LLC assigns error – for the first time – to the trial court's refusal to dismiss claims against it for breach of implied warranty of habitability, breach of fiduciary duty, violation of RCW 19.40, breach of the Condominium Act's warranties of quality, misrepresentations in Public Offering Statement, Consumer Protection Act violations, fraudulent concealment, and negligent and fraudulent misrepresentation. However, no party sought review of the trial court's refusal to dismiss claims against

the LLC on any basis other than its dissolution, and this court has not granted discretionary review on those issues.

6. Argument

A. Allowing Developer LLCs to Cancel Themselves During the Four-Year Warranty Period Would Destroy the Most Important Consumer Right in the Condominium Act.

The Supreme Court acknowledges the Legislature's commitment to strong consumer protection policies in the Condominium Act.

The Act as a whole contains a strong consumer protection flavor, including an entire section, Article 4, entitled "Protection of Condominium Purchasers." One of the reasons the Uniform Act was created was that there was a perceived need for additional consumer protection. The desire to provide more protection to condominium purchasers may have been a major factor in the legislature's decision to adopt the Act.

One Pac. Towers Homeowners' Ass'n v. HAL Real Estate Invs., 148 Wn.2d 319, 331, 61 P.3d 1094 (2002) (citations omitted). Those protections include a warranty of quality, with a four-year statute of limitations period. RCW 64.34.445.

New condominium associations usually do not investigate to determine whether they have concealed building defects until the four-year limitation period has nearly expired. (CP 1240). At the same time, single-project LLCs like Appellant have become the preferred mechanism of condominium developers in the Puget Sound area. (CP 1037-38).

If the law in Washington is that a declarant LLC can extinguish its warranty obligations merely by filing a sheet of paper at some point when its members can credibly claim they were not aware of defects, then that is exactly what will happen at every project. Appellant's position is no less than an invitation to eviscerate the Legislature's intended consumer protections for condominium-buyers through implied warranties.

B. Even If Claims Against the LLC Would Otherwise Abate, The New LLC Survival Statute Preserves Them.

1. Appellant's Argument on Appeal is Limited to Retroactivity of SB 6531.

Below, Appellant argued that SB 6531 only applies to dissolved LLCs, but not to dissolved LLCs that are also cancelled. Appellant now abandons this distinction (which leads to absurd results) and limits its argument to attacking the retroactive application of RCW 25.15.303. Appellant argues that (1) there is no express legislative intent in SB 6531 to apply it retroactively; (2) the LLC statute is unambiguous about abatement of claims, and therefore SB 6531 is not curative and retroactive; (3) SB 6531 "creates new rights" and affects the vested "rights" of LLC owners to get their money out of a defunct LLC, and is thus not remedial and retroactive; and (4) as a general matter the court should apply the law in effect when the lawsuit was commenced. For reasons explained below, each of Appellant's arguments fails.

2. **SB 6531 Was Part of a Legislative Effort Retroactively to Correct the Decision of this Court in *Ballard Square*, And Preserve Claims Against Undistributed Assets of Dissolved LLCs.**

In *Ballard Square*, this court held that Washington's Business Corporations Act only preserved claims existing before corporate dissolution, but not claims that accrued after. *Ballard Sq. Condo. v. Dynasty Constr.*, 126 Wn. App. 285, 291, 108 P.3d 818 (2005), *aff'd on other grounds*, ___ Wn.2d ___, 2006 Wash LEXIS 875. In the aftermath of this court's *Ballard Square* decision, the Legislature took up two measures. First was a comprehensive reform of the Business Corporations Act, SB 6596, containing a number of provisions to correct *Ballard Square* by, among other things, expressly preserving claims arising after dissolution for a specified period. See Appendix B: House Bill Report, p. 7 (Testimony of WSBA representative John Steel: "[I]n the late 1990's there were some court decisions, including *Ballard Square* last year, which was very well reasoned but which reached a nonsensical result..."); See also Appendix B: House Bill Analysis, p. 2, ¶3; Appendix D: SB 6531, esp. §17.

The second measure taken up was a new survival provision for the LLC Act, sponsored by two of the same lawmakers as SB 6596.

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 with 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.

SB 6531 (codified at RCW 25.15.303). Both bills went through the Senate and House Judiciary Committees together as a pair. Both bills passed the Senate on the same day, were signed into law on the same day, and both became effective on the same day: June 7, 2006.

The House Judiciary Committee held a hearing on SB 6531 on February 20, 2006. Testimony from the bill's sponsor Senator Brian Weinstein was taken, in which he explained that the purpose of SB 6531 was to correct the *Ballard Square* problem in the case of LLCs :

Sen. Weinstein: "[T]he reason I'm here is that I heard this *Ballard Square* decision that the last witness, John Steel talked about, from the Bar. . . . I knew that that was a problem for both corporations and LLCs
"So what happened was that I spoke to John and 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. . .

(Appendix E, Transcript of House Judiciary Committee Hearing).

The following exchange occurred in Committee about retroactive application of the new survival statute to persons who may have relied on the absence of a survival provision in the LLC Act:

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.

(*Id.*) (Emphasis added).

The Judiciary Committee even addressed applying the new survival statute to single-asset developer LLCs with insurance assets:

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."

(*Id.*)

As it did in committee, in its Final Legislative Report the House Judiciary Committee recognized that the LLC statute is silent about what happens to claims against dissolved LLCs: "The law governing LLCs has no express provision regarding the preservation of remedies or causes of action following dissolution of the business entity."

3. SB 6531 Is Retroactive Because It Is Curative and Remedial; No Express Statutory Statement of Retroactivity Is Required.

A statute applies "retroactively" when it (1) is intended by the Legislature to apply retroactively, or (2) is curative in that it clarifies or technically corrects ambiguous statutory language, or (3) is remedial in nature. *Barstad v. Stewart Title Guar. Co.*, 145 Wn.2d 528, 536-537, 39 P.3d 984 (2002). An "amendment is **curative and remedial** if it clarifies or technically corrects an ambiguous statute **without changing prior case**

law constructions of the statute.”⁷ *Id.* (Emphasis added.) “Ambiguity” exists when the statute can be reasonably interpreted in more than one way. *McGee v. DSHS*, 142 Wn.2d 316, 325, 12 P.3d 144 (2000).

The new survival provision clarified an ambiguity in the LLC statute without changing established case law, and is therefore curative and retroactive. The LLC statute was silent about abatement or preservation of claims, and thus entirely ambiguous in that regard. Ambiguity exists because many reasonable constructions are possible. It could be that all claims abate because an LLC’s “separate existence” ends on cancellation. It could be that by analogy to corporations, claims abate on dissolution. It could be that by analogy to partnership law, where the statute is found, claims do not abate at all.

Faced with this ambiguity and what it perceived as the unjust outcome of *Ballard Square*, the Legislature acted swiftly to clarify the ambiguity; and, as the House Judiciary Committee testimony makes clear, it did so precisely in order to preserve a remedy against LLC insurance assets, even if some developers may have hoped to get a free pass on warranty obligations by canceling their LLCs.

⁷ The courts decline to give retroactive effect to statutory amendments that would reverse existing case law interpreting the statute because doing so would effectively give the Legislature license to overrule the Court, raising separation of powers problems. *Magula v. Benton Franklin Title Co.*, 131 Wn.2d 171, 182, 930 P.2d 307 (1997).

Senate Bill 6531 is also remedial, providing new procedures to preserve unequivocally the rights of those with claims against dissolved LLCs. As explained in more detail below, a new corporate survival period is by its nature remedial, and does not change the scope of the substantive rights existing at the time the claims against the dissolved entity accrued.⁸

The LLC insists on words like “this statute is retroactive” before acknowledging that the new survival statute was intended to apply to recently dissolved LLCs like itself. But no case has ever held or suggested that an express statement of retroactivity is required; if that were the law, the retroactivity analysis described above would be unnecessary. There is ample authority that the nature or context of the legislative action alone is sufficient to infer retroactive intent.⁹ Thus, “**curative amendments are**

⁸ *Quintana v. Los Alamos Medical Ctr.*, 119 N.M. 312, 889 P.2d 1234, 1236 (N.M. Ct. App. 1994): “As a **remedial or procedural matter**, the survival period adopted after dissolution may apply to corporations dissolved before the effective date of the new survival statute.”

Walden Home Builders v. Schmit, 326 Ill. App. 386, 62 N.E.2d 11, 13 (1945): “[T]he statute is one which merely provides a different method of winding up and administering the affairs of dissolved corporations. . . [and] **creates no causes of action** and deprives no one of property.”

United States v. Village Corp., 298 F.2d 816, 819 (1962): “[C]omplete reversal[s] of the common law rule of abatement of actions upon dissolution are **remedial measures** entitled to a liberal construction to effectuate their purposes.”

⁹ Washington cases discuss curative or remedial retroactive statutes on the one hand (i.e., those that are impliedly retroactive) and statutes which are retroactive by virtue of express legislative intent on the other hand, **in the disjunctive**; that is, a statute may be retroactive because it is (1) expressly intended to be so, **or** (2) curative, **or** (3) remedial, or any combination thereof. See, e.g., *State v. McClendon*, 131 Wn.2d 853, 861, 935

presumed to apply retroactively even if the statute does not so specify . . .
Caritas Servs. v. Dep't of Soc. & Health Servs., 123 Wn.2d 391, 412,
869 P.2d 28 (1994) (Emphasis added.)

The remedial and curative nature of SB 6531 shows an implicit intent to apply it retroactively. Moreover, the bill's sponsor pointed out that members of dissolved LLCs should not presume to rely on the former lack of clarity in the LLC statute in order to essentially defraud LLC creditors.

The Supreme Court of Washington has already ruled that SB 6596 – the corrective changes to the Business Corporations Act – likewise applies retroactively. *Ballard Square*, ___ Wn.2d. ___, 2006 Wash. LEXIS 875. This helps divine the intent behind SB 6531 as well:

We often apply amendments retroactively "where an amendment is enacted during a controversy regarding the meaning of the law." . . . Curative amendments adopted in response to lower court decisions have been applied retroactively. . . . **The Legislature's intent to clarify a statute is manifested by its adoption of the amendment "soon after controversies arose as to the interpretation of the original act[.]"**

McGee, 142 Wn.2d at 325 (citations omitted) (Emphasis added.)

P.2d 1334 (1997); *Howell v. Spokane & Inland Empire Blood Bank*, 114 Wn.2d 42, 47, 785 P.2d 815 (1990); *State v. Smith*, 144 Wn.2d 665, 674-675, 30 P.3d 1245 (2001).

Again, SB 6531 was adopted at the same time, through the same committee path, under the same sponsors, on the same days, and with the same effective date as SB 6596. Accordingly, it is “curative” in nature.

Indeed, the very fact that the LLC statute is ambiguous is evidence of intent to clarify the law, making it retroactive. In *Marine Power & Equip. Co. v. Wash. State Human Rights Com. Hearing Tribunal*, 39 Wn.App. 609, 615, 694 P.2d 697 (1985) the court noted that “One well recognized indication of legislative intent to either clarify or amend is the existence or nonexistence of ambiguities in the original act.” Here, as explained above, the LLC Act is ambiguous because credible (if not ultimately persuasive) arguments can be advanced that claims against an LLC terminate along with the LLC itself.

All elements of the implied retroactivity tests are met. Senate Bill 6531 is remedial, because it changes the procedures by which rights are enforced, without changing any prior case law, without altering the scope of rights and remedies at the time of accrual, and without affecting any vested rights. It is also curative, because it supplies an answer to a question that could not otherwise be answered without a court decision (to wit, when do claims abate against a dissolved LLC, if ever?), and because reasonable arguments could have been made on all sides of that question. Further, the remarks of the bill’s sponsor and the fact that it was enacted

as part of the Legislature's response to *Ballard Square* demonstrate that the Legislature intended SB 6531 to apply retroactively.

Appellant's few arguments against retroactive application of SB 6531 have no substantive merit.

4. SB 6531 Is Procedural and Creates No "New Rights."

Appellant asserts that SB 6531 is not remedial because it "creates new rights" and is therefore substantive in nature. But that is simply not so. First, the LLC Act never says that cancellation terminated any rights to begin with. Moreover, *every court that has ever addressed the question* has retroactively applied new corporate survival periods.

In *Ballard Square*, the Supreme Court applied a new corporate survival statute retroactively. While the Court noted that retroactive intent was expressly set forth in the statute, it also noted that "A statute will also be retroactively applied if it is curative or remedial." *Ballard Square*, 2006 Wash. LEXIS 875, slip op. at 21, *citing* 1000 *Va. Ltd. P'ship v. Vertecs Corp.*, 2006 Wash. LEXIS 873; slip op. at 31. The Court explained that the length of time in which claims may be prosecuted against entities that exist purely by Legislative grace may be changed without impacting any vested rights. *Id.*, slip op. at 25-26.

The rest of the country agrees. In *Quintana v. Los Alamos Medical Ctr.*, 119 N.M. 312, 889 P.2d 1234 (N.M. Ct. App. 1994) Plaintiff filed

suit against a medical center alleging malpractice committed on his son, who died in 1959 during a procedure to have cavities filled. The medical center was dissolved in 1963, and Plaintiff did not file suit until 1990. The court assumed the statute of limitations was tolled by concealment of the son's cause of death, so the suit was timely. Under the law in effect at the time the medical center dissolved, claims against a dissolved corporation never abated; in the intervening years, however, a new statute set up a two-year survival period. Thus, the question was did the open-ended survival period in force on dissolution apply, or the short survival period that was later enacted? The court held the new survival period governed because it merely changed procedures, impacting no vested interests:

Statutes concerning the survival period of a corporation after dissolution are generally construed as procedural rather than substantive. . . . **As a remedial or procedural matter, the survival period adopted after dissolution may apply to corporations dissolved before the effective date of the new survival statute.**

119 N.M. at 314 (citations omitted).

In *Walden Home Builders v. Schmit*, 326 Ill. App. 386, 62 N.E.2d 11 (1945), the plaintiff dissolved corporation had its claim for breach of contract dismissed for want of capacity to sue. The breach had occurred in 1937. The plaintiff dissolved in 1940. Under the common law at the time of dissolution, the corporation's claims did not survive dissolution. In

1941, however, a survival period for claims by the corporation was enacted, allowing suit to be brought by a dissolved corporation within two years after dissolution. The court held that the newly enacted survival period governed, again because it altered no vested interests:

To my mind, **the statute is one which merely provides a different method of winding up and administering the affairs of dissolved corporations. It creates no causes of action and deprives no one of property.** . . . [I]t appears to be well settled that when a corporation is dissolved, its assets do not vanish and its debtors are not absolved or released.

No valid reason has been suggested why the amendment should not apply to corporations previously dissolved.

62 N.E.2d at 13.

Finally, in *United States v. Village Corp.*, 298 F.2d 816, 816-17

(4th Cir. 1962), the court posed the issue as follows:

The District Court held that a Virginia statute permitting the institution at any time of suits against Virginia corporations in the process of liquidation does not apply to suits against corporations the charters of which have been revoked prior to the enactment of the statute. We think it does.

The court explained that the new survival statute and its

complete reversal of the common law rule of abatement of actions upon dissolution are remedial measures entitled to a liberal construction to effectuate their purposes.

298 F.2d at 819 (citations omitted.) Thus the new survival statute applied retroactively to a corporation dissolved at the time of enactment.

Including *Ballard Square*, this court has before it four cases involving the enactment of a survival statute for claims involving a dissolved corporate entity. In every case, the court applied the new survival statute retroactively as a remedial measure impacting no vested interests, because the law of survival of corporate claims can be altered at will by the Legislature. In one case, the claim was asserted during the new survival period, and thus allowed to proceed. In the other three, the claims were not asserted within the survival period, and were therefore dismissed.

Applying these rules to the case at bar, the new survival period of SB 6531 applies to the Appellant LLC. The Association filed its claim against the LLC seven months after its dissolution, well within the 3-year survival period of SB 6531.

Appellant argues that the three foreign cases were all filed after the effective date of the survival statutes, but the date of filing is irrelevant. The Supreme Court in *Ballard Square* held that a survival statute for claims against a corporate entity may be changed by the Legislature and shall be applied “**even if the lawsuit is pending.**” Slip Op. at 23.

5. Vested Rights of LLC Members Are Not Affected By Retroactive Application of SB 6531.

Appellant contends its members had a “vested right” to draw their money out of the cancelled LLC. That is an inaccurate statement of the law, and it does not implicate any interest impacted by the new survival statute. The survival statute only preserves claims against the LLC, and does not require disgorgement of assets distributed to LLC members.

Assuming proper winding up of the LLC, and assuming no other actionable wrong by the members, the members have no individual liability for the LLC’s obligations, even if claims against the LLC are retroactively preserved. RCW 25.15.125. As Senator Weinstein put it:

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.

(Appendix E). Moreover, the members only have the “right” to keep LLC assets held in trust after dissolution if and only if they make “reasonable provision to pay all [LLC] claims and obligations, including contingent, conditional, or unmatured claims and obligations” RCW 25.15.300(2). But here, the LLC made **no provisions** for its known ongoing warranty obligations, so no vested right is implicated.

C. Even Before SB 6531, Claims Against an LLC Did Not Abate Upon Its Dissolution or Cancellation.

LLCs are of recent statutory origin, completely unknown to the common law. In fundamental ways, an LLC is analogous to a general partnership: it consists of an association of co-owners acting under an agreement for business ends,¹⁰ it may terminate by dissociation of its members (through such things as an agreed event, judicial decree, or proper expulsion, death, withdrawal, or insolvency),¹¹ and it is not treated as a separate entity for tax purposes. 1A William Meade Fletcher, et al., Cyclopedia of the Law of Private Corporations §70.50 (perm. Ed. 2002). The LLC also has features in common with corporations, however, notably by providing members a limited shield against personal liability for LLC obligations, except in cases of piercing the veil and/or improper winding up. RCW 25.15.125.

At oral argument below (and somewhat abstrusely in briefing), the LLC analogized to the common law of corporations whereby dissolution, in the absence of a survival statute, abates claims against a corporation. (SJ Motion at 15). On appeal, the LLC abandons all reliance on the common law (probably recognizing that the LLC had no right to rely on a

¹⁰ Compare RCW 25.05.005(6) (definition of “partnership”) and RCW 25.15.005(4), (5), (8).

¹¹ Compare RCW 25.05.225 (Events causing dissociation of partners) and RCW 25.15.130 (events of dissociation of members).

mere common law rule of abatement, and that the rule was subject to retroactive alteration at the will of the Legislature.) (CP 1022-25). The LLC now says the common law of abatement does not govern, and that only the LLC statute governs. (Brief of App. At 10, 12).

But the LLC Act **never** says that claims against an LLC abate by virtue of its termination. Not one of the statutes the LLC identifies as supporting its claim of abatement says what Appellant claims, either.

First, RCW 25:15.070(2)(c) does not say that all claims against an LLC abate on cancellation, or even that a cancelled LLC ceases to exist. Appearing in the portion of the LLC statute that deals with the *creation* of LLCs, not their termination, this section says that an LLC “shall be a **separate legal entity**” and that its “existence . . . *as a separate legal entity* shall continue until cancellation of the limited liability company’s certificate of formation.” (Emphasis added.) The logical conclusion is that the LLC’s existence after cancellation is no longer “separate” from the members, but becomes *merged* with the interests of its members, *exactly like a partnership at common law. Yarbough v. Pugh*, 63 Wash. 140, 145, 114 P. 918 (1911).¹² The actions against the LLC do not cease

¹² Appellant claims the Secretary of State endorses its theory of LLC “death.” (Brief of App. at 7). Appellant’s counsel wrote a declaration which a clerk in the Secretary of State’s office signed, saying the LLC “died” on cancellation. But the clerk has testified that she has no authority to express opinions on matters of law for the Secretary of State’s office, and that she never would have signed had she understood the

to exist, rather, they must be enforced against the members, if possible.

Under Appellant's reading, however, the word "separate" is mere surplusage, which is improper because all words in the statute must be given meaning, if possible. *State v. Roggenkamp*, 153 Wn.2d 614, 624, 106 P.3d 196 (2005).

Second, RCW 25.15.295(2) says that upon cancellation, the persons winding up the LLC may no longer prosecute and defend suits in the LLC's name or on its behalf. This does not mean that claims evaporate. It means only that following cancellation the defense of such suits is not in the hands of those persons designated by the LLC or who undertook to wind up its affairs. Presumably, that authority after cancellation is vested in all the members (or possibly the court if there are none.) RCW 25.15.150.

The only practical effect of the provisions identified by the LLC is that, in our case, after cancellation the LLC arguably was not subject to suit directly, but had to be sued through its members. Assuming the members properly wound up the LLC, they would be personally insulated against liability for LLC debts. RCW 25.15.125. However, the LLC itself

arguments Appellant intended to advance using the words ascribed to her. (CP 1195 and Appendix C, Declaration of L. Flanagan in Support of Motion for Leave to File Brief of Amicus Curiae in *Roosevelt, LLC v. Grateful Siding, Inc.*, Case No. 56879-5-I).

would still be subject to suit and its undistributed assets (most notably the LLC's liability insurance) remain subject to execution.¹³

D. The LLC Waived Its Dissolution Defense

The LLC could have sought dismissal based on its dissolution even before answering. CR 12(b)(6). It is improper for a litigant to increase expenses by delaying resolution of a threshold defense while actively litigating the claims. Washington law deems such conduct a waiver of threshold defenses that are not timely prosecuted. Specifically, prior behavior inconsistent with assertion of the defense, or delay by defense counsel in asserting a defense, may each constitute a waiver. *Lybbert v. Grant County*, 141 Wn.2d 29, 39, 1 P.3d 1124 (2000) (CR 12(b)(6) defense for insufficient service of process waived by counsel's delay); *King v. Snohomish County*, 146 Wn.2d 420, 47 P.3d 563 (2002) (Defense based on failure to file pre-suit claim notice waived because defendant engaged in litigation and discovery unrelated to the defense prior to filing its motion to dismiss). Asserting of an "exhaustive list" of defenses in an Answer is no a safe harbor from waiver, *King* at 426, because the fundamental concern is the Civil Rules' purpose of promoting efficient and cost-effective litigation by avoiding delaying tactics. *Lybbert* at 39.

¹³ Any other assets returned to the LLC as fraudulent conveyances would also be subject to execution.

Here, the LLC knew of its defense even before suit was filed.¹⁴ Beginning two weeks after receiving the pre-suit Notice of Claim, the LLC's members, pretending that the LLC was a going concern, sent the Association a series of letters in which they offered to retain an expert, investigate the defects, prepare a scope of repairs, and possibly repair all the defects, while not mentioning that the company had been dissolved. (CP 1357, 1362). The LLC even tried to compel subcontractors and their insurers to defend and indemnify it, without mentioning that there was arguably nothing to defend or indemnify. (CP 1364, 1405). Such behavior is all clearly inconsistent with a known dissolution defense.

As in *King*, the LLC alleged an "exhaustive list" of thirty-five separate affirmative defenses, with dissolution being number 27. (CP 1226-1229). And similar to *King*, the LLC engaged in extensive discovery and depositions, covering every issue in the case, not just dissolution.¹⁵ At the same time, the LLC concealed the facts supporting

¹⁴ Before suit, the LLC's bookkeeper contacted the agent that sold the LLC its insurance to notify its carrier of the Association's claim. The bookkeeper then wrote "The Notice of Claim to the insurance company may be a moot point. **The LLC was dissolved effective 1/21/05 and therefore there is nothing to sue!** We did not receive the Notice of Claim prior to the dissolution so we should be clear according to our attorney. Rejoice!" (CP 1354-55)(Emphasis added.) The LLC also immediately ordered a copy of its Certificate of Cancellation. (*Id.*).

¹⁵ During ten months of litigation, the LLC deposed the President of the Association's Board on matters unrelated to dissolution. (CP 1442-76.) It noted records depositions of Association experts. (CP 1437-40). It demanded the Association's reserve study and Board's meeting minutes, and two discovery conferences. (CP 1250-51, 1478-

its affirmative defenses, describing the defenses as merely preservation against waiver, and refusing without legitimate basis to answer simple questions about the LLC's affirmative defenses.¹⁶

The LLC also filed numerous lengthy motions.¹⁷ After ten months of intense and expensive litigation, the LLC proposed to conduct its own investigation of the Emily Lane buildings and thereafter to mediate the case based on the results. (CP 1252, 1697). The defense intrusive

79). It then noted more expert records depositions. (CP 1481-90). At the end of May, 2006, the LLC filed an extensive and needless Motion to Compel. (CP [to be designated]).

In written discovery, the LLC's asked about the Association's insurance, repair and maintenance, costs of repair, identities of unit owners, dates of purchase, identities of consulting and testifying experts and their reports, every applicable warranty and how each was breached, how each defendant exercised special declarant rights, facts supporting claims of breach of the implied warranty of habitability, facts constituting breach of the LLC's fiduciary duty, fraudulent transfers, consequential "physical damage" to building components (an issue solely of interest to the LLC's insurance carriers), reports of defects to persons other than the LLC, and for production of all documents related to the above, as well as plans, specifications, photos, logs, expert witness files, Board minutes, and surveys. (CP 1407-32).

¹⁶ The LLC objected to virtually every interrogatory about its capitalization, how much it earned on unit sales, and what happened to that money - even though the LLC bookkeeper could easily have answered all of those questions. (CP 1492-97, 1504). These questions go to potential personal liability of the members if the LLC really is dissolved. When asked who the LLC's accountant, bookkeeper or financial officer was (so she could be deposed on capitalization and asset transfer issues), the LLC responded "Unknown." In fact the LLC's bookkeeper, Pat McKillop, was one of only perhaps five employees who worked for the LLC, and is defense counsel's sister-in-law. (CP 1500, 1514, 1521, 1643).

When the Association asked the LLC to state the facts, if any, behind its 35 affirmative defenses, the LLC refused, objecting that the defenses merely "were raised to avoid waiver," were subject to withdrawal, and that discovery of the factual bases for the defenses was "premature." (CP 1338.)

¹⁷ The LLC opposed the Association's motion for leave to amend its Complaints, sought an order to strike or delay the Association's motion for relief, requested an order compelling discovery, and so on. (CP [to be designated]).

investigation cost the Association a week of expert time, and required extensive efforts by the Association's counsel to coordinate. (CP 1253).

In our case, the LLC's litigation activities have been vastly more extensive and burdensome than those in *Lybbert* and *King*, in virtually every way. The client pretended to be an ongoing LLC, while defense counsel followed on with a "laundry list" of defenses, refused to answer interrogatories regarding the defenses, engaged in expensive discovery and discovery motions practice unrelated to the defense, and held out the prospect of mediation until finally seeking dismissal nearly a year later. Such tactics are not justified, serve only to increase expenses, and should result in a waiver of threshold affirmative defenses.

E. The Trial Court's Refusal to Dismiss Other Issues Regarding LLC Liability Are Not Properly Before the Court.

1. The Trial Court's Refusal to Dismiss Non-Condominium Act Claims Against the LLC Is Not On Appeal.

Appellant has raised the trial court's refusal to dismiss claims against the LLC based on theories other than the Condominium Act's implied warranties of quality. But discretionary review in this case involves only the applicability of SB 6531 considered as a "controlling question of law" under RAP 2.3(b)(4). (Appendix A).¹⁸ Because no other

¹⁸ The LLC sought certification reasoning that "[t]he Court's Order involves a controlling question of law [regarding the retroactivity of SB 6531] which is currently

issues have been certified or accepted for review, the court should decline to consider the arguments.¹⁹

2. Appellant's Breach of Contract and Express Warranty Issues Were Not Raised Below, And Lack Merit.

The court should likewise decline to hear Appellant's argument regarding the sufficiency of evidence to support breach of contract and express warranty claims, because those issues were never raised by Appellant to the trial court. (CP 148-76).²⁰

3. Appellant's Implied Warranty of Habitability Challenge is Not Before the Court.

being considered by the Washington State Supreme Court, and an immediate review of the Order may materially advance the ultimate termination of the litigation." (CP 1105). The trial court's order states that the issues of dissolution and retroactive application of SB 6531 involve controlling questions of law which are undecided in Washington State. (CP 1159-60). Likewise, in support of discretionary review, the LLC's brief focused entirely on application of SB 6531, and did not contain a single sentence hinting at a request for discretionary review of any other issue. Commissioner Susan J. Craighead then issued a notation ruling that approved the trial court's certification based on a "controlling question of law." Appendix A. Thus the sole issue is application of SB 6531.

Should the court decide to review of the sufficiency of the Association's evidence supporting claims against the LLC, the arguments and facts advanced below regarding member liability for the claims applies with equal force to the LLC.

¹⁹ See *Zuver v. Airtouch Communications*, 153 Wn.2d 293, 321, 103 P.3d 753 (2004); *In re Personal Restraint of Breedlove*, 138 Wn.2d 298, 313, 979 P.2d 417 (1999); *Dickens v. Alliance Analytical Labs*, 127 Wn. App. 433, 442, 111 P.3d 889 (2005).

²⁰ Had the LLC raised the issue below, summary judgment would have been improper. In NWMLS Form 29, the LLC expressly warranted and agreed with buyers before completion of the project that it would build the condominium in compliance with building code. (CP 1254, 1819-45, 2058). It breached that agreement and warranty because there are code violations, many of them serious safety concerns, incorporated in the project. (CP 1236-37).

Appellant's challenge to the trial court's refusal to dismiss the implied warranty of habitability claims is not properly before this court either, for the same reasons.²¹

F. The Court Should Decline to Award Attorney Fees to The LLC.

The question of the LLC's attorney fees as a prevailing party under the Purchase and Sale Agreements was not certified or accepted for review by this court either. On the merits however, if the LLC prevails on its

²¹ That challenge, too, would fail on the merits. The second-story guardrails on exterior decks and entries at Emily Lane lack code required-strength, and are rotting away; these pose a serious threat to health and safety of the occupants. (CP 1238). That violates the warranty of habitability. It is not necessary that the buildings be so bad as to be unlivable or dangerous before the warranty is violated. Under *Burbo v. Harley C. Douglass, Inc.*, the rule is that "building code violations that are not merely trivial or aesthetic concerns," that "show visible, if not dire" consequences, and/or which involve deviation from "fundamental aspects of the applicable building code" and "unworkmanlike" construction may violate the warranty. 125 Wn.App. 684, 696-97, 106 P.3d 258, *rev. denied* 155 Wn.2d 1026, 126 P.3d 820 (2005). Accordingly, "Resolution of the dispositive element in such cases is frequently so highly fact-dependent that it is essentially a question of fact..." *Id.* at 694.

The LLC's suggests that because eight unit owners are not original owners the claims "with respect to these eight units" should be dismissed. But the claims are not about the separate units. They are about common areas. As a matter of damages, if even one unit owner continues to have warranty rights, that owner may recover the *full amount of damages attributable to any defective common element*. Otherwise, the remedy would not provide the unit owner with an adequate remedy because he or she could still be responsible for assessments by virtue of his undivided ownership in the common elements. See, RCW 64.34.360(2), RCW 64.34.020(7 & 8), RCW 64.34.020(2 & 9). Only an award of all cost of repair damages for all common elements that breach the warranty will make the owners who still have implied warranty rights whole, and ensure that they are not forced to pay assessments for breaches of that warranty. **Every court that has addressed this question in a serious fashion agrees.** See: *Glickman v. Brown*, 21 Mass. App. Ct. 229, 238, 486 N.E.2d 737 (1985); *Starfish Condo. Ass'n v. Yorkridge Serv. Corp.*, 295 Md. 693, 707, 458 A.2d 805 (1983); *Stony Ridge Hill Condo. Owners Ass'n v. Auerbach*, 64 Ohio App.2d 40, 410 N.E. 2d 782 (1979); *Drexel Properties, Inc. v. Bay Colony Club Condo., Inc.*, 406 So.2d 515 (Fla. App. 1981); *Council of Unit Owners of Sea Colony East*, 1989 Del. Super. LEXIS 183 (1987); *Tassan v. United Dev. Co.*, 88 Ill.App.3d 581, 410 NE.2d 902, 913 (1980) (dicta).

claim that it lacks the capacity to be sued, it necessarily follows that the LLC also lacks the capacity to prosecute a claim for such fees, because it does not exist. Should Appellant prevail on its dissolution argument, then there is no LLC to “prevail,” and no entity entitled to an award of fees.

To the extent that the LLC seeks fees under the Condominium Act, such an award would be grossly improper. The Condominium Act provides that fees are awardable “in an appropriate case” to a prevailing party. RCW 64.34.455. It is not appropriate to award fees to a defendant who has deliberately strung out the litigation before making an offer of judgment, *Eagle Point Condo. Owners v. Coy*, 102 Wn. App. 697, 709, 9 P.3d 898 (2000), or by analogy before bringing the dispositive legal issue to a head. Furthermore, awarding a non-existent LLC fees when the members terminated its existence during the statutory warranty period; tried to mislead the Association into thinking they had not done so, and then litigated the case for nearly a year before bringing the issue of the LLC’s existence to a head would contradict the recognized consumer-protection purpose of the Condominium Act’s attorney-fee provisions.

In the unlikely event that this court does award fees, the fees must be limited to those incurred on appeal. RAP 18.1.²² The trial court has

²² The LLC has misunderstood RAP 18.1, which allows an award of attorney fees incurred on appeal, not fees incurred at the trial court level. That is why the rule refers to “the right to recover reasonable attorney fees or expenses on review.” Moreover, such

expressly reserved ruling on the issue of fees incurred below. (CP [designated but not transmitted yet]).

G. Issues of Fact Remain Regarding Member Liability

1. The LLC Members Are Liable As Trustees of Undistributed LLC Assets

The LLC's insurance policies are remaining assets of the LLC.

Washington has always permitted claims to proceed against the corporate assets that remain in the hands of shareholders after dissolution. Thus, for example, in *Lonsdale v. Chesterfield*, the Supreme Court noted:

It is well settled that a creditor of a corporation can satisfy his claim against the corporation out of the assets distributed to shareholders upon dissolution. And in *Taylor v. Interstate Inv. Co.*, 75 Wash. 490, 496 (1913) the court explained that **“The dissolution of these corporations is immaterial, since whatever property rights they had would pass on such dissolution to their stockholders, subject to corporation liabilities.”** 3 Purdy's Beach, Private Corporations, § 1323. **The appellant would have the right to treat them as still existent as to matters relating to this antecedent contract and enforce her claim against the corporate property by an action in equity.**

99 Wn.2d 353, 360, 662 P.2d 385 (1983) (citations omitted).

Case law treats insurance as an asset held in trust for corporate creditors, despite dissolution. *Gossman v. Greatland Directional Drilling, Inc.*, 973 P.2d 93 (Alaska 1999) and *Penasquitos, Inc. v. Superior Court*,

fees must be limited to those incurred with respect to the LLC, given that counsel for the LLC also represents the LLC member defendants on cross-review. That fact finding exercise is better suited to the trial court.

812 P.2d 154 (Calif. 1991) both conclude that shareholder interests in finality has no application to insurance proceeds because:

Plaintiffs will be likely to assert post dissolution causes of action only if there is a prospect of recovery from a dissolved corporation's liability insurance, from undistributed assets, or from assets of the corporation discovered after dissolution. . . . Similarly, if the corporation has liability insurance coverage, its dissolution provides no reason to excuse the insurer from defending the action and indemnifying those insured by the predissolution activities of its insured, just as a corporation's insolvency or bankruptcy does not release its insurer from payment for damages the corporation has caused.

Penasquitos, supra at 160-161 (Emphasis added.)

Even assuming proper winding up and personal immunity of the members for LLC debts, enforcement of the claims against undistributed LLC assets—i.e., insurance—is completely proper because the LLC's assets are held by its members in trust for creditors, and the members have no personal stake in those assets. At a minimum, the trial court erred by prohibiting the Association from collecting on the LLC's debt directly from the members, to the extent of undistributed LLC insurance assets.

As a matter of sound policy and logic, it is difficult to see why the Association should be denied access to the LLC's liability insurance, or why the LLC should be permitted to squander its other assets (i.e., the LLC's additional assured status under subcontractors' policies and its direct claims against the subcontractors.) The LLC purchased insurance,

and was named an additional insured by subcontractors, for precisely the purpose of indemnifying against liability to third parties such as the Association. Protection of third parties is precisely why such insurance is *required* of contractors. RCW 18.27.050. If Appellant's argument succeeds, the primary beneficiaries will be the LLC's liability insurers, who by mere fortuity find themselves having insured a cancelled LLC.

2. The LLC Members are Liable As Declarants.

Declarants impliedly warrant the quality of the condominiums they sell. RCW 64.34.445. The members of the LLC were "declarants" because at all material times, the applicable statute defined "Declarant" as "any person or group of persons acting in concert who (a) executes as declarant a declaration as defined in subsection (15) of this section, or (b) reserves or succeeds to any special declarant right under this declaration." Prior RCW 64.34.020.²³ Special declarant rights include completing the improvements, maintaining a sales office and advertising signs, and appointing Board members to the Association. RCW 64.34.020(29).

²³ The version of RCW 64.24.020 defendants rely on is a later enactment that does not apply retroactively, because this provision was construed by the Supreme Court prior to the amendment in *One Pacific Towers HOA v. HAL Real Estate Invs.*, 148 Wn.2d 319, 326, 61 P.3d 1094 (2002). The Legislature cannot retroactively reverse the Supreme Court's decision in violation of separation of powers issues. *1000 Va. Ltd. P'ship v. Vertecs Corp.*, 2006 Wash. LEXIS 873, slip op. at 26 (2006).

“Acting in concert” refers to consciously acting together with a common design, sometimes in an agency relationship, and does not require unlawful conduct of any sort. *One Pacific Towers HOA*, 148 Wn.2d at 336; *Getzendaner v. United Pac. Ins. Co.*, 52 Wn.2d 61, 67, 322 P.2d 1089 (1958); *State v. Austin*, 65 Wn.2d 916, 400 P.2d 603 (1965).

In our case the LLC is a consortium of professional builders associated for the single purpose of building one condominium project, Emily Lane. The LLC members’ employees were appointed to act as the Association’s directors during declarant control. (CP 461, 2023-25). Other members supplied sales staff and an on-site sales office, construction superintendents, and warranty workers. (CP 1519, 2031, 2135, 2166-67). All of these qualify as exercises of “special declarant rights” under RCW 64.34.020(29) In short, the LLC members pooled their skills and assets to accomplish the Emily Lane project as a joint venture, for which they are all responsible.

3. The LLC Members Improperly Preferred Themselves to LLC Creditors Under RCW 19.40.

Under the Uniform Fraudulent Transfers Act (“UFTA”), when a company’s owners prefer themselves to the company’s creditors (even unknown creditors) when distributing company assets, the asset transfers may be set aside as *constructively fraudulent*. RCW 19.40.041-.051. The

remedy is analogous to a “voidable preference” under the Bankruptcy Code. *Cf.* 11 USCS §§547-548. No fraudulent intent need be present.

a. Transfers Rendering the LLC Insolvent

Under RCW 19.40.051(a), a creditor may avoid a debtor company’s transfer as fraudulent if (1) the creditor’s claim arose before the transfer, (2) the transfer was “not for value” and (3) the transfer rendered the company insolvent.²⁴ This provision *does not* say that it only applies to “a creditor whose claim was *known or discovered* before the transfer was made,” though the LLC members persistently pretend it does. The LLC and members fail to cite one case where a “known claims” requirement has ever been imposed under the UFTA in any state.²⁵

i. The Association’s Claim Arose Prior to the LLC’s Fraudulent Transfers.

²⁴ Disregarding both the factual record and the applicable law, the LLC asserts that the Association’s claim under RCW 19.40.051 was not brought within one year of the asset transfers. (App. Brief at 36). But claims under RCW 19.40.051(a) (transfers not for value when debtor is insolvent) are subject to a *four year* limitations period running from the transfer. RCW 19.40.091(b). And even if a one year period applied, the claim is *still* timely. The LLC and members concede that the last asset distribution to members was on December 31, 2004. (*Id.*) The Association’s Complaint was filed on July 19, 2005, just seven months later. (CP 3).

²⁵ A requirement of knowledge would convert the “constructive fraud” provision, having no knowledge requirement, into an “actual fraud” provision. See, e.g., *Morris v. Nance*, 132 Ore. App. 216, 220, 888 P.2d 571 (1994) (“Much of the UFTA is a codification of the principles recognized by the courts; it expressly authorizes the use of factual inferences as proof of actual fraud, see ORS 95.230(2) [same as RCW 19.40.041], and specifies those circumstances that give rise to constructive fraud, see ORS 95.230(1)(b) [same], ORS 95.240 [same as RCW 19.40.051].”)

The claims at issue here arose when the sales transactions were consummated,²⁶ and when the members breached their fiduciary duties by failing to disclose defects and plans to dissolve their LLC. These events occurred long before the final fraudulent transfer of capital investment assets at issue in December, 2004:

ii. The LLC's Distributions Were Not "For Value."

A return of capital investment to a member is "not for value" as a matter of law. *Hullett v. Cousin*, 204 Ariz.292, 298-99, 63 P.3d 1029 (2003) (Under the UFTA, "distribution of . . . capital contributions . . . is not a transfer for value.") Invested capital is "risk capital." Members may not prefer themselves to LLC creditors:

iii. The Transfers Rendered the LLC Insolvent.

It is undisputed that by removing all cash assets from the LLC, its members rendered the LLC insolvent. Accordingly, the summary judgment dismissing the RCW 19.40.051(a) claim was clear error.

The defense arguments confuse the issue by focusing on whether the members made a "profit" on sales at Emily Lane. Profits are irrelevant. The issue is simply, who should first bear the loss from failure of the enterprise, the creditors of the failed business, or those who entered

²⁶ A claim for breach of contract accrues and is actionable upon breach, which is when the aggrieved party has a right to apply to the court for relief. *Bush v. Safeco Ins. Co.*, 23 Wn.App. 327, 329, 596 P.2d 1357 (1979), citing *Hashund v. Seattle*, 86 Wn.2d 607 (1976); *Eckert v. Skagit Corp.*, 20 Wn.App. 849, 583 P.2d 1239 (1978).

into the venture knowing its risks? The law says the venture capitalists bear the risk of losing their capital investment to legitimate creditors, such as the Association members here who bought the LLC's shoddy work.

b. Transfers Causing Gross Undercapitalization

The UFTA also allows recapture of assets transferred to LLC members where after the transfer, the remaining capitalization level of the enterprise is unreasonably small in relation to the LLC's business. RCW 19.40.041. Such a transfer may also be set aside if it is not for value and the debtor knew or should have known it would incur debts beyond its ability to pay.

Again, these are *constructive* fraud standards – the question is not whether the members actually intended to defraud anyone, *Morris v. Nance*, 132 Ore. App. 216, 220, 888 P.2d 571 (1994), but only whether they should have realized the money left in the LLC was not enough for it to respond to its warranty obligations.

The record shows that capital asset transfers removed all but \$12,500 from the LLC by December 2004. The sales price of each one of the 24 units exceeded that amount by a factor of 10. The damages for defective construction in this case will mount into the millions.

The LLC members went to extraordinary lengths to try to disclaim their company's warranty responsibilities (CP 697-710, 294-95), which

suggests that they understood that the company had potentially very expensive warranty obligations far in excess of \$12,500. The LLC members dissolved their company as soon as they were told (incorrectly) that there were no more pending claims, before the warranty period expired. This too demonstrates the members' understanding that the LLC was at significant risk of liability for defective construction during the 4 year limitations period under the Washington Condominium Act.

On hearing all evidence at trial, a reasonable person could conclude that leaving \$12,500 in the company for less than a year, and then removing it all without doing any type of investigation into the condition of the building envelope in light of known warranty complaints was completely unreasonable. Accordingly, the trial court's dismissal of the second UFTA claim was also error.

4. The LLC Members, Acting Through Their Agents Controlling the Association's Board, Breached a Fiduciary Duty To Disclose Defects, Disclose the LLC's Planned Dissolution, and to Investigate Defective Construction:

The LLC members appointed their employees, Theresa May and Dan Mus, to the Association's board of directors. (CP 641, 2024). Ms. May worked for LLC member Fred Mus. (CP 2023, 2025). Dan Mus was the President of LLC member Contempra Homes. (CP 1504). RCW 64.34.308 provides that "members of the board of directors [who are]

appointed by the declarant [must exercise] the care required of fiduciaries of the unit owners.” Both Ms. May and Dan Mus had independent duties to disclose all facts that would aid the Association in protecting the interests of itself and the unit owners. *Esmieu v. Schrag*, 88 Wn.2d 490, 563 P.2d 203 (1977); *Senn v. Northwest Underwriters, Inc.*, 74 Wn. App. 408, 416, 875 P.2d 637 (1994) (“Ignorance . . . does not excuse a director from liability for his or her colleagues' fraud or malfeasance”).

Neither Ms. May nor Dan Mus ever disclosed their knowledge regarding the construction defects at Emily Lane, or their employers' intention to dissolve the LLC to prevent the unit owners from enforcing their statutory warranty rights. (CP 579, 918, 1647, 1649, 1651, 2023).

Tellingly, the trial court refused to dismiss the fiduciary-duty claims against the LLC. The LLC was never a member of the Association's Board of Directors. It can only be vicariously liable for the actions of the individual board members (Ms. May and Dan Mus) who breached their fiduciary duties. But the LLC did not directly employ Ms. May or Dan Mus. Instead LLC members Fred Mus and Contempra Homes employed them. Employers are vicariously liable for employee torts committed within the scope of their employment. DeWolf & Allen, 16 *Washington Practice*, § 3.2. Here, Fred Mus and Contempra Homes specifically asked Ms. May and Dan Mus to serve as directors on the

Association's board. Thus, Fred Mus and Contempra Homes are vicariously liable for Ms. May and Dan Mus' breaches of fiduciary duties in their roles as directors. *Bannistor v. Ullman*, 287 F.3d 394, 408 (5th Cir. 2002).

5. The LLC Members Are Liable for Fraudulent Concealment and/or Negligent Misrepresentation

The trial court declined to dismiss negligent misrepresentation²⁷ and fraudulent concealment²⁸ causes of action against the LLC. The trial court thereby acknowledged that there are issues of fact on these claims, at least to the extent they arise out of the LLC's conduct. The court also necessarily acknowledged that defendants' motion to dismiss based on the "economic loss rule" is not appropriate in this setting, because this case is distinct from *Kelsey Lane Homeowners Ass'n v. Kelsey Lane Co.*, 125

²⁷ Liability for negligent misrepresentation arises from supplying false information or failing to disclose material facts in the course of a business transaction. Where one having a pecuniary interest in a transaction provides false information for the guidance of another is subject to liability for pecuniary loss cause by the justifiable reliance of another on the information if he fails to exercise reasonable care or competence in obtaining or communicating the information. Restatement (Second) of Torts § 552. Failure to disclose a fact that may justifiably induce another to act or refrain from acting in a business transaction will result in the same type of liability, where there is duty to speak.

²⁸ Liability for fraudulent concealment of defects in residential dwellings applies when a builder-vendor knows of the defects at sale, the defects are dangerous to life, health or property, the defects are unknown to the buyer and not apparent on reasonable inspection, and the defects substantially and adversely affect the value of the property, or materially impair the purpose of the transaction. *Norris v. Church*, 115 Wn.App. 511, 63 P.3d 153 (2002); *Atherton Condo. Apt. Owners' Ass'n B'd v. Blume Dev. Co.*, 115 Wn.2d 506, 799 P.2d 250 (1990).

Wn.App. 227, 103 P.3d 1256 (2005) in that the LLC hired its own site superintendent who says he closely monitored the construction.

Accordingly, the trial court must have dismissed the misrepresentation and concealment claims against the LLC members because it concluded that the members are not personally liable for their actions, and only the LLC is liable. But Washington law is the opposite: “A member or manager of a limited liability company is personally liable for his or her own torts.” RCW 25.15.125. See also, *Johnson*, 79 Wn.2d at 752 (“Incorporation does not in law shield the actor from the legal consequences of his own tort.”)

Emily Lane purchasers were assured by the LLC and its agent seller (who was also a member of the LLC) that the builder had no tolerance for defective construction, and that they would have a warranty from the builder. This was false information. Assuming the LLC’s superintendent and/or the members of the LLC (who were on site frequently and who are professional developers well-versed in construction) observed the construction with due care, they must have known that windows were improperly installed, that flashings were improperly installed, that railings were weak, and so forth. (CP 1236-47, 1647-51). Thus, the trier of fact could find a concealment of defects as well.

Who was it that failed in these duties? The LLC certainly did, but so also did the individual members. Again, by virtue of involvement in the construction, the members must be assumed for summary judgment purposes to have known of the defects, and to have failed to reveal them to buyers, either individually or through their LLC and its subagents.

Accordingly, the jury could conclude defendants knew or should have known of improper construction, and deliberately or negligently misrepresented the quality of the construction, which induced reliance on the part of unit purchasers, to their damage.

The breaches of duty do not end there. The LLC was later called upon to repair leaking windows; those leaks sometimes even recurred after the "repairs." During the latter stages, employees of various LLC members were sent to the project to perform warranty work. Had the builder exercised diligence in determining the causes, it would have realized that problems with window installation were widespread at the project. (CP 1236-47) Defendants' failure to disclose this led to the Association not investigating or filing suit until after the LLC had dissolved, by which time more damage had occurred. The jury could thus conclude that defendants knew or should have known that there were serious defects at the project during the period defendants had warranty

obligations, and that in reliance on their silence the Association's rights were impaired and its damages worsened.

Finally, the jury could find the members planned to dissolve the LLC well in advance of the event, and knew or should have known of unresolved warranty issues and defects at dissolution. The jury may also conclude that the defendants acted with reckless disregard to potential defects by not investigating the construction prior to dissolution, or by not waiting until the Association investigated the issues. Accordingly, the jury could conclude the Association has incurred legal expense to fight the issue of LLC dissolution that it would not otherwise have incurred, and/or that more damage has occurred by virtue of delay because of the negligent misrepresentations and omissions of the LLC and its members.

6. The LLC Members Are Liable For Violation of the Consumer Protection Act.

Violation of the Consumer Protection Act at RCW 19.86 involves an unfair or deceptive act or practice in trade or commerce impacting the public interest which causes injury to the plaintiff. What constitutes an unfair or deceptive act or practice is a question of fact for the jury. *Burbo*, 125 Wn.App. at 699. It can consist of failure to disclose a known defective condition in a building. *Burbo*, 125 Wn.App. at 700; *Griffith v. Centex Real Estate Corp.*, 93 Wn.App. 202, 214, 969 P.2d 486 (1998).

Unfair and deceptive acts or practices by the LLC members include: (1) failing to disclose defects that by inference were known to the members because they personally monitored construction; (2) failing to disclose to the unit owners and the Association that defects in windows had been discovered during the limited warranty period; (3) failing to disclose plans of the LLC and the members to dissolve the company prior to expiration of its four-year warranty obligation (4) distributing assets to LLC members so as to leave the LLC an empty shell; (5) employing deceptive warranty forms that serve as a front for waiver of implied warranty rights (ineffective under *Park Ave. Condo. v. Buchan Devs.*, 117 Wn.App. 369, 375-78, 71 P.3d 692 (2003)) (CP 2093-2120); and (6) misrepresenting the corporate status of the LLC to the Association.

A series of private homes sales satisfies the public interest requirement. *MacRae v. Bolstad*, 101 Wn.2d 161, 166, 676 P.2d 496 (1984). Here there were 24 sales. Even marketing a single home with known defects can be a CPA violation because the act can deceive many people, even if only one buyer is eventually harmed. *Luxon v. Caviezel*, 42 Wn.App. 261, 268, 710 P.2d 809 (1985). Accordingly, a *prima facie* case of violation of RCW 19.86.020 and RCW 19.86.090 was presented.

The members say they did not know about the defects, and so cannot be liable for deceptively failing to disclose them. But the jury

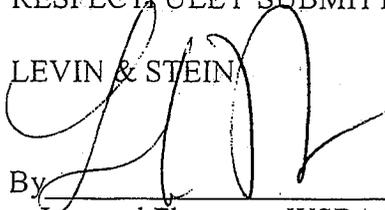
could easily disagree on this record. The members reviewed the construction going up, and presumably saw the poor quality. They were informed of defects when warranty requests were made, but did not investigate more widely. Further, even if they lacked knowledge, that does not excuse their decision to bury broad warranty disclaimers in an “express warranty” of quality, does not excuse concealing their plan to dissolve the LLC, and does not excuse their acting as though the dissolved LLC was a responsible “going concern” prepared to address the Association’s concerns, when it was not.

7. Conclusion

The court should decline the LLC’s invitation to vitiate the main consumer protection provisions of the Condominium Act which would allow LLCs to escape liabilities for their ongoing warranty obligations by dissolving and canceling. The LLC Act provides no such relief, especially when it comes to undistributed insurance assets. Even if it did, SB 6531 retroactively closed that gap in the law. Accordingly, denial of the LLC’s summary judgment motion should be affirmed. Moreover, because each member had direct knowledge of the construction defects, but failed to disclose them, each member—especially those whose employees served as Association directors—should face individual liability under the tort theories described above.

RESPECTFULLY SUBMITTED this 18th day of December, 2006.

LEVIN & STEIN

By 
Leonard Flanagan, WSBA 20966
Daniel S. Houser, WSBA 32327
Attorneys for Respondent Emily Lane
Townhomes Condominium Owners Ass'n

APPENDIX A

RICHARD D. JOHNSON,
Court Administrator/Clerk

October 26, 2006

Leonard D. Flanagan
Levin & Stein
201 Queen Anne Ave N Ste 400
Seattle, WA, 98109-4824

Justin D Sudweeks
Levin & Stein
201 Queen Anne Ave N Ste. 400
Seattle, WA, 98109-4824

CASE #: 58825-7-1

Colonial Development L.L.C., et al, App/Cross Resp v. Emily Lane Homeowners, Resp/Cross App

Counsel:

The following notation ruling by Commissioner Susan Craighead of the Court was entered on October 24, 2006:

*The Court of Appeals
of the
State of Washington
Seattle
98101-4170*

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NOTATION RULING

Emily Lane Homeowners Association v. Colonial Development, LLC, No. 58825-7

October 24, 2006

This matter was set on my October 20th calendar for a court's motion to determine appealability. However, as the parties are aware, I also discussed with them the relationships among this case and several other cases pending in this court and at the Supreme Court to determine how this matter should proceed, or whether it should be stayed. To address appealability first, Colonial Development appeals from the order allowing the claims against it to go forward even though it is a dissolved limited liability company (technically, one that has been administratively cancelled). The trial court signed a certification, denominated as a CR 54(b) certification, urging this court to take review of this issue and staying the proceedings in the trial court. On closer examination, however, it appears that the certification recites the language of RAP 2.3(b)(4), which allows the trial court to certify an issue to this court for discretionary review. The trial court indicated that this case involves a controlling question of law which is undecided in Washington State, namely whether recent legislation (SB 6531) applies retroactively to allow the homeowners' claims to proceed. The court also noted a pending case in the Supreme Court addressing this issue, Chadwick Farms Owners Ass'n v. FHC LLC. Chadwick Farms has been transferred by the Supreme Court to this court. In the event that this court determines that SB 6531 is not retroactive, this litigation will terminate. After hearing from the parties about the importance of this issue not only in this case, but in many other pending construction defect cases, it appears reasonable to accept the trial court's certification pursuant to RAP 2.3(b)(4).

The homeowners have filed a cross-appeal, challenging the dismissal on summary judgment of their claims against the entities that formed the now-dissolved limited liability company. Although this issue is not covered by the RAP 2.3(b)(4) certification, in the interests of judicial economy I will allow this appeal to proceed to avoid the specter of two successive appeals involving the same underlying litigation.

Now that I have had an opportunity to consider all of the pending, interrelated litigation on the issue of the liability of dissolved limited liability companies, it appears that this case should be set for argument along with Chadwick Farms, No. 58796-0. This will require a somewhat accelerated briefing schedule. The two cases will be set for argument in late January. The briefing schedule set forth below assumes that there is no need for a verbatim report of proceedings to be prepared. I recognize that the briefing schedule spans the holidays, but even so there is little room for extensions of time.

Now, therefore, it is hereby

ORDERED that this appeal and cross-appeal may proceed; it is further

ORDERED that the designation of clerk's papers shall be filed by November 3, 2006; the brief of appellant is due November 27; the response brief of respondent/cross-appellant is due December 18; the reply brief of appellant/cross-respondent is due January 5, 2007; the reply brief of cross-appellant is due January 12, 2007; it is further

ORDERED that this case is linked with Chadwick Farms Homeowners Association v. FHC LLC, No. 58796-0; it is further

ORDERED that these cases shall be set for argument during the last week of the January 2007 term.

Susan J. Craighead
Court Commissioner

"

Sincerely,



Richard D. Johnson
Court Administrator/Clerk

ssd

APPENDIX B

The following information is provided for your reference. It is intended to be a general overview of the project and is not intended to be a substitute for the detailed information provided in the main body of the report. The information is provided in the form of a summary of the key findings and conclusions of the project. The information is provided in the form of a summary of the key findings and conclusions of the project.

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Judiciary Committee

SB 6531

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

Brief Description: Preserving remedies when limited liability companies dissolve.

Sponsors: Senators Weinstein, Fraser and Kline.

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.

Hearing Date: 2/20/06

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 at common law that require no formal creation, 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.

LLCs were authorized by the legislature in this state 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 LLC 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.

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 C

No. 56879-5-I

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION 1**

ROOSEVELT, LLC, a Washington limited liability company AND
STEINVALL CONSTRUCTION, INC., a Washington Corporation,

Third-Party Plaintiff and Third Party Defendant// Appellants,

v.

GRATEFUL SIDING, INC., a Washington Corporation, TILE
TECHNOLOGY ROOFING, INC., a Washington Corporation,
MAURICE HOLE D/B/A QUALITY SURFACING, TRULSON WALL
SYSTEMS, a Washington Corporation d/b/a WALL FINISHES, INC.,
M.A.P. CONSTRUCTION, INC., a Washington Corporation, ORLIN
JOHNSON D/B/A STAR SERVICES, GASLINE MECHANICAL, INC,
a Washington Corporation,

Third Party Defendant/Respondents.

**DECLARATION OF LEONARD FLANAGAN IN SUPPORT OF
MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE**

Submitted by:
LEVIN & STEIN
Leonard D. Flanagan, WSBA 20966
210 Queen Anne Avenue, Suite 400
Seattle, WA 98109
Tel. (206) 388-0660
Fax (206) 286-2660
Attorney for Amicus Curiae
Emily Lane Townhomes
Condominium Owners Ass'n

 **COPY**

Leonard Flanagan, on oath, deposes and states:

1. I am one of the attorneys with the law firm of Levin & Stein, representing Emily Lane Townhomes Condominium Owners Association. I am competent to testify, and make this declaration on the basis of my own personal knowledge.

2. For the past ten years of my career, I have regularly and predominantly represented litigants in matters related to condominium construction defects and resulting damage, including developers/declarants, general contractors, subcontractors, insurance carriers, and condominium owners associations. My current practice and that of Levin & Stein is substantially limited to the representation of homeowners having claims for defective construction and property damage against their developers.

3. My experience, and that of Levin & Stein in general, is that condominium developers in Washington frequently, and with increasing frequency, create single-asset limited liability companies for the sole purpose of building just one project. Once that project is complete, the LLC is frequently terminated or allowed to dissolve by administrative action.

4. The Emily Lane owners asserted claims for defective construction and resulting property damage against the limited liability

company that developed, declared, and sold them three condominium buildings under King County Cause No. 05-2-23589-6SEA. It is undisputed that the declarant limited liability company in that matter was a consortium of members who are professional builders. (See, e.g., Exhibit 1 hereto, true and correct copies of excerpts from the Deposition of Site Superintendent James Palmer, pp. 31 and 40.) Well before the statutory warranty of quality on the Emily Lane project expired, the members of the declarant LLC for Emily Lane voted to dissolve their LLC on December 22, 2004. (See Clerk's Papers in Case No. 58825-7-I: CP 579 [Exhibit 15 to McKillop Declaration].) Just nine days later, with no notice to the Emily Lane owners of the dissolution, the developers filed two pages of pre-printed paperwork and procured a "certificate of cancellation" of the LLC from the Secretary of State. Please see Clerk's Papers in Case No. 58825-7-I: CP 156 [Defs' Motion for S.J., p. 9].)

5. I have reviewed the briefing before the Court of Appeals in the above-captioned case, as well as relevant portions of the court file in the trial court.

6. I have communicated with counsel for several parties in the case at bar, and believe based on those communications that there is significant danger that no party before this court will strongly advocate in favor of retroactive application of the new survival statute for claims

against LLCs. A decision that the survival statute does not apply retroactively, and/or that it does not apply to cancelled LLCs, will as a general matter greatly benefit all members of the construction industry, and do great harm to homeowners with claims against their dissolved developers.

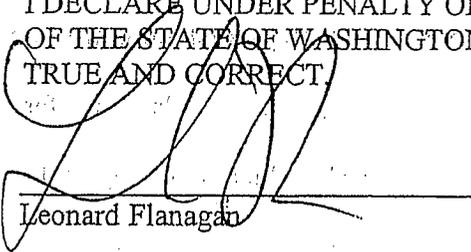
7. Although the record below was not fully developed, it appears that Roosevelt, LLC was formed and/or managed by the owner of general contractor Steinvall Construction for the purpose of developing the Maple Court Condominiums at 9222 Roosevelt Way, NE. (See generally CP 1737-1887, records of Steinvall Construction acting for Roosevelt, LLC and addressing warranty issues.) I know Steinvall Construction to have been substantially involved in condominium construction in the greater Seattle area.

8. The construction industry as a general matter has gone to great lengths to use dissolution and cancellation as a shield to avoiding responsibility for the statutory warranty of quality under the Condominium Act. For example, industry attorneys, including firms on both sides of the issues in the case at bar, have prepared declarations for staff workers at the Secretary of State's office by which they suggest that the Secretary of State's office places its imprimatur on the notion that cancellation of an LLC is equivalent to its "death" and causes abatement.

An example prepared by the law firm of Scheer & Zhender is attached as Exhibit A to Brief of Respondent Grateful Siding, Inc., herein; true and correct copies of more examples, including ones prepared by the law firms of Forsberg & Umlauf and Oles Morrison and Rinker, are attached as Exhibit 2 to this declaration. See also Clerk's Papers in Case No. 58825-7-I: CP 156-157 ("According to Washington State Secretary of State, Colonial Development, LLC was dissolved and ceased to exist upon the filing of the certification of cancellation. (See Declaration of Chris Johnson).")

9. In this connection, it is clear that the defense bar has been putting words into the mouth of a state clerical worker, who had no idea that the declarations were being used to argue that cancelled LLCs have no liability for their warranty obligations. In this regard, true and correct copies of excerpts of the deposition transcript of Secretary of State employee Chris Johnson is attached as Exhibit 3 to this declaration.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.


Leonard Flanagan

10/30/06
Date

Exhibit 1

Transcript of the Testimony
of
James D. Palmer

Emily Lane v. Colonial Development, et al.

Date: January 7, 2006

Buell Realtime Reporting
Phone: 206.287.9066
Fax: 206.287.9832
Email: lisabuell@buellrealtime.com
Internet: buellrealtime.com

1 Q. And just in general, do you have any
2 recollection of any problems with any subcontractors?

3 MS. MCKILLOP: Object to form.

4 A. I don't -- nothing is jumping out at me. Nope,
5 nothing.

6 Q. Earlier you had said that you thought you had
7 weekly meetings --

8 A. Mm-hmm.

9 Q. -- with the principals?

10 A. Yeah.

11 Q. What would you discuss in these meetings?

12 A. Basically we would discuss progress. It would
13 be, What is the schedule? Who is coming up next? They
14 may have looked at a particular invoice that they
15 thought might have been being overcharged for or might
16 be unreasonable. Because all the principals, like I
17 said, shared most of the subcontractors that we were
18 using on other ventures.

19 Q. Is it fair to say they were pretty
20 knowledgeable about construction?

21 A. Oh, yes.

22 Q. How long would these meetings usually last as a
23 rule?

24 A. It would be a lunch meeting, maybe, 11:00 to
25 1:00.

1 discussions with the members?

2 A. Only -- no.

3 Q. As far as the corporation Colonial, what type
4 of quality control procedures were in place to ensure
5 that work was being done?

6 A. Well, when you're working for four builders,
7 there's a lot of quality control going on.

8 Q. Okay. Can you describe that?

9 A. Well, it's not just my eyes as the
10 superintendent; all of these guys are experienced,
11 long-term builders, and they would come to me often.
12 They would walk the houses, come back, make suggestions,
13 ask me to walk with them, you know, make lists, that
14 sort of thing.

15 Q. Do you have a memory of all of those -- all of
16 them doing that?

17 A. Oh, yes.

18 Q. What kinds of suggestions would they make?

19 A. Oh, let's see, I don't remember any
20 specifically, but it might be -- it might be, Wouldn't
21 it be nicer if there was a switch on the wall over here
22 or a can light here, or something, you know, of that
23 sort of a thing basically.

24 Q. Did you ever have any type of spot checks or
25 investigations or anything for subcontractors?

Exhibit 2

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IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

SOHO CONDOMINIUM ASSOCIATION, a
Washington non-profit corporation,

Plaintiff,

vs.

SEVENTH AVENUE, LLC, a Washington
limited liability company, RED SAMM
CONSTRUCTION, INC., a Washington
corporation; RED SAMM CONSTRUCTION,
INC., d/b/a SKILLINGSTAD
CONSTRUCTION (JV), a Washington general
partnership; SKILLINGSTAD
CONSTRUCTION (JV), a Washington general
partnership; SKILLINGSTAD
CONSTRUCTION COMPANY, INC., a
Washington corporation; SKILLINGSTAD
CONSTRUCTION COMPANY, INC., d/b/a
SKILLINGSTAD CONSTRUCTION (JV), a
Washington general partnership; EMERALD
DEVELOPMENT, INC., a Washington
corporation,

Defendants.

Hon. Richard A. Jones

No. 04-2-09191-8 SEA

DECLARATION OF CHRIS JOHNSON
(WASHINGTON SECRETARY OF
STATE)

1 SEVENTH AVENUE, LLC, a Washington
limited liability company,

2
3 Third-Party Plaintiff,

4 vs.

5 EMERALD DEVELOPMENT, INC., a
Washington corp.; TIGHT IS RIGHT
6 CONSTRUCTION, INC., a Washington corp.;
JANES BROS. WATERPROOFING, INC., a
Washington corp.; KRESS, INC., a Washington
7 corporation; JJ PLUMBING, INC., a
Washington corp.; ADVANCED CONCRETE
8 SPECIALISTS, INC., a/k/a ADVANCED
CONCRETE SPECIALIST, a/k/a ADVANCED
9 CONCRETE SPECIALIST, INC., a
Washington corp.; AMERICAN FIRST
10 ROOFING & BUILDERS, INC., a Washington
corp.; ASPEN SIDING, LLC, a Washington
11 limited liability company; RODOLFO
SOLORIO and JANE DOE, and the marital
12 community comprised thereof d/b/a
CONCRETE PAVER CONSTRUCTION, a
13 Washington entity; EAST SIDE GLASS &
PAINT CO., d/b/a EASTSIDE GLASS &
14 SEALANTS, a Washington corporation,
EVERGREEN SIDING COMPANY, a
15 Washington corporation, KEVIN CROSS,
individually, STEVEN CROSS, individually,

16 Third-Party Defendants.
17

18 I, Chris Johnson, declare and state as follows:

19 1. I am an authorized representative of the Washington Secretary of State with
20 respect to the matters stated herein. I am above the age of 18, am competent to testify and
21 have personal knowledge of all matters attested to in this Declaration.
22
23

1 2. Aspen Siding, LLC (with the corresponding UBI Number 602 002 733) was a
2 Washington limited liability company formed on January 4, 2000.

3 3. On April 23, 2001, Aspen Siding, LLC was administratively dissolved
4 pursuant to RCW 25.15.280. This action was taken due to the failure of Aspen Siding, LLC
5 to file an annual list of officers/license renewal within the time set forth by law.

6 4. Attached hereto as Exhibit A is a true and correct copy of the Certificate of
7 Administrative Dissolution confirming that Aspen Siding, LLC was administratively
8 dissolved on April 23, 2001.

9 5. Pursuant to RCW 25.15.290, Aspen Siding, LLC had two years from the date
10 of administrative dissolution within which to apply for reinstatement.

11 6. Aspen Siding, LLC did not apply for reinstatement following the filing of the
12 Certificate of Administrative Dissolution

13 7. Pursuant to RCW 25.15.290(4) and because no application for reinstatement
14 was received by the secretary of state from Aspen Siding, LLC within two years of the date of
15 administrative dissolution, the secretary of state cancelled Aspen Siding, LLC's certificate of
16 formation on April 23, 2001.

17 8. The cancellation of the certificate of formation terminated Aspen Siding,
18 LLC's winding up period pursuant to RCW 25.15.295(2) and Aspen Siding, LLC is
19 considered to have "died" on April 23, 2001.

20 ///

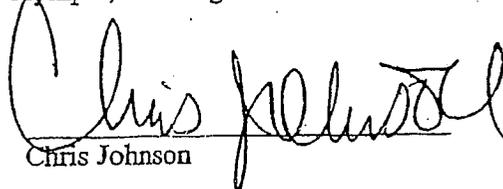
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I declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

DATED this 15th day of August, 2005 at Olympia, Washington.


Chris Johnson

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR SNOHOMISH COUNTY

RED OAKS CONDOMINIUM OWNERS
ASSOCIATION, a Washington nonprofit
corporation,

Plaintiff,

v.

CORREA CONSTRUCTION, INC., a
Washington corporation, TOBYN LEE
MEWHARTER d/b/a M & M
CONSTRUCTION, ROBIN L. MAJOR d/b/a
M & M FOUNDATIONS, a sole
proprietorship, PACIFIC STAR ROOFING,
INC., a Washington corporation,
PROFESSIONAL HOME BUILDERS, LLC,
a Washington limited liability company, f/k/a
PROFESSIONAL HOME BUILDERS,
RIGHTWOOD CONSTRUCTION, LLC, a
Washington limited liability company, and
NORMAN D. KLOSSER d/b/a STORMIN
WATERPROOFING, a sole proprietorship,

Defendant.

NO. 05-2-08445-4

DECLARATION OF CHRIS JOHNSON
(WASHINGTON SECRETARY OF
STATE)

I, Chris Johnson, declare and state as follows:

1. I am an authorized representative of the Washington Secretary of State with respect to the matters stated herein. I am above the age of 18, am competent to testify and have personal knowledge of all matters attested to in this Declaration.

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

EMILY LANE HOMEOWNERS
ASSOCIATION, a Washington nonprofit
corporation,

Plaintiff,

No. 05-2-23589-6 SEA

DECLARATION OF CHRIS
JOHNSON

v.
COLONIAL DEVELOPMENT L.L.C., a
Washington limited liability company; THE
ALMARK CORPORATION, a Washington
corporation; DANIEL J. MUS, an individual;
MARK B. SCHMITZ, an individual; RICHARD
E. WAGNER, an individual; ALFRED J. MUS,
an individual; and DOES 1 through 25,

Defendants.

FILED
SECRETARY OF STATE
NOV 07 2005
STATE OF WASHINGTON

1. I am over eighteen years of age, competent to testify and make this
declaration based upon personal knowledge.

2. I am an authorized representative of the Washington Secretary of State with
respect to the matters stated herein.

3. Colonial Development, L.L.C. (with the corresponding UBI Number 601 847
449) was a Washington limited liability company formed on January 22, 1998.

Declaration of Chris Johnson
(Washington Secretary of State) - 1

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OLES MORRISON RINKER & BAKER LLP
700 PINE STREET, SUITE 1700
SEATTLE, WA 98101-3930
PHONE: (206) 623-3427
FAX: (206) 682-6234

1 4. On January 21, 2005, Colonial Development L.L.C. effectively filed its
2 certificate of cancellation.

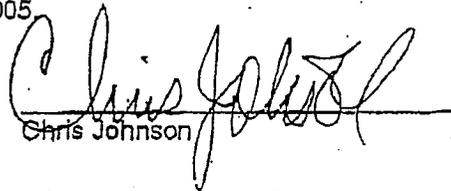
3 5. Attached hereto as Exhibit A is a true and correct copy of the certificate of
4 cancellation of Colonial Development, L.L.C..

5 6. By filing the certificate of cancellation, Colonial Development, L.L.C.
6 cancelled its certificate of formation pursuant to RCW 25.15.080.

7 7. By filing the certificate of cancellation, Colonial Development, L.L.C.
8 terminated its winding up period.

9 8. On January 21, 2005, Colonial Developments ceased to exist and is
10 considered to have "died" pursuant to RCW 25.15.295.

11
12 DATED this 7 day of November 2005

13
14 
15 Chris Johnson

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26 Declaration of Chris Johnson
(Washington Secretary of State) - 2

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112240902.doc
OLES MORRISON RINKER & BAKER LLP
SEATTLE, WA 98101-3930
PHONE: (206) 623-3427
FAX: (206) 682-6234

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THE HONORABLE MICHAEL HAYDEN
Hearing Date: July 1, 2005 at 9:00 a.m.
With Oral Argument

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

MAPLE COURT SEATTLE CONDOMINIUM)
ASSOCIATION, a Washington non-profit)
corporation,)

Plaintiff,

v.

ROOSEVELT, LLC, a Washington Limited)
liability company; and JOHN and MARY)
DOES, one through two-hundred,)

Defendants.

NO. 03-2-11800-1 SEA

DECLARATION OF CHRIS
JOHNSON (WASHINGTON
SECRETARY OF STATE)

ROOSEVELT, LLC, a Washington Limited
Liability Company,

Third-Party Plaintiff,

v.

STEINVALL CONSTRUCTION, INC., a
Washington Corporation; ALL METALS
FABRICATORS, INC., a Washington
Corporation; ARTEC GLAZING SYSTEMS,
INC., a Washington Corporation; GRATEFUL
SIDING, INC., a Washington Corporation;
M.A.P. CONSTRUCTION, INC., a Washington
Corporation; TILE TECHNOLOGY ROOFING
CO., INC., a Washington Corporation;
MAURICE and "JANE DOE" HOLE, a
Washington marital community, d/b/a,
"QUALITY SURFACING"; RIMBEY
METALS, INC., a Washington Corporation;
ORLIN and "JANE DOE" JOHNSON d/b/a,
"STAR SERVICES, INC.", a Washington

DECLARATION OF CHRIS JOHNSON
(WASHINGTON SECRETARY OF STATE)- 1

SCHERER & ZEINER LLP
SUITE 1605
720 OLIVE WAY
SEATTLE, WA 98101
(206) 263-1200

1 Corporation d/b/a WALL FINISHES, INC.,

2 Third-Party Defendants.

3 I, Chris Johnson, declare and state as follows:

4 1. I am an authorized representative of the Washington Secretary of State with
5 respect to the matters stated herein. I am above the age of 18, am competent to testify and
6 have personal knowledge of all matters attested to in this Declaration.

7
8 2. Roosevelt, LLC (with the corresponding UBI Number 601 882 760) was a
9 Washington limited liability company formed on June 16, 1998.

10 3. On September 23, 2002, Roosevelt, LLC was administratively dissolved
11 pursuant to RCW 25.15.280. This action was taken due to the failure of Roosevelt, LLC to
12 file an annual list of officers/license renewal within the time set forth by law.

13 4. Attached hereto as Exhibit A is a true and correct copy of the Certificate of
14 Administrative Dissolution confirming that Roosevelt, LLC was administratively dissolved
15 on September 23, 2002.

16
17 5. Pursuant to RCW 25.15.290, Roosevelt, LLC had two years from the date of
18 administrative dissolution within which to apply for reinstatement.

19 6. Roosevelt, LLC did not apply for reinstatement following the filing of the
20 Certificate of Administrative Dissolution.

21 7. Pursuant to RCW 25.15.290(4) and because no application for reinstatement
22 was received by the secretary of state from Roosevelt, LLC within two years of the date of
23 administrative dissolution, the secretary of state cancelled Roosevelt, LLC's certificate of
24 formation on September 23, 2004.
25

26
DECLARATION OF CHRIS JOHNSON
(WASHINGTON SECRETARY OF STATE)-2

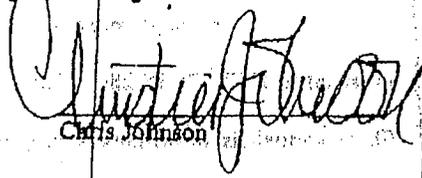
SCHER & ZANDER LLP
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SEATTLE, WA 98101
(206) 263-1200

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8. The cancellation of the certificate of formation terminated Roosevelt, LLC's winding up period pursuant to RCW 25.15.295(2) and Roosevelt, LLC is considered to have "died" on September 23, 2004.

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

DATED this 26 day of May, 2005 at Olympia, Washington.



Chris Johnson

DECLARATION OF CHRIS JOHNSON
(WASHINGTON SECRETARY OF STATE)-3

SCHER & ZEMMER LLP
SUITE 1605
720 OLIVE WAY
SEATTLE, WA 98101
(206) 362-1200

Exhibit 3

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

EMILY LANE HOMEOWNERS ASSOCIATION, a)
Washington nonprofit corporation,)

Plaintiff,)

vs.)

NO. 05-2-23589-6 SEA

COLONIAL DEVELOPMENT L.L.C., a)
Washington limited liability company;)
THE ALMARK CORPORATION, a Washington)
corporation; CONTEMPRA HOMES, INC., a)
Washington corporation; CRITCHLOW)
HOMES, INC., a Washington corporation;)
DANIEL J. MUS, an individual; MARK B.)
SCHMITZ, an individual; RICHARD E.)
WAGNER and ESTHER WAGNER, individually)
and their marital community d/b/a)
WOODHAVEN HOMES; ALFRED J. MUS, an)
individual; JEFFREY CRITCHLOW, an)
individual; and DOES 1 through 25,)

Defendants.)

DEPOSITION UPON ORAL EXAMINATION OF CHRISTINA JOHNSON

June 23, 2006
Olympia, Washington

DIXIE CATTELL & ASSOCIATES
COURT REPORTERS & VIDEOCONFERENCING
OLYMPIA, WA * (360) 352-2506

1 APPEARANCES:
 2 FOR THE PLAINTIFF: MR. LEONARD FLANAGAN
 LEVIN & STEIN
 3 201 Queen Anne Avenue North
 Suite 400
 4 Seattle, WA 98109
 5 FOR ALL THE DEFENDANTS
 EXCEPT CONTEMPRA HOMES
 6 AND DANIEL MUS: MS. EILEEN McKILLOP
 OLES MORRISON RINKER & BAKER
 7 701 Pike Street, Suite 1700
 Seattle, WA 98101
 8
 9 FOR THE DEPONENT: MS. SUSAN THOMSEN
 ASSISTANT ATTORNEY GENERAL
 P.O. Box 40108
 10 Olympia, WA 98504-0108
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1 BE IT REMEMBERED that on Friday, June 23, 2006, at
 2 9:57 a.m., at 2639 Parkmont Lane SW, Suite C-2, Olympia,
 3 Washington, before REBECCA S. LINDAUER, Notary Public in and
 4 for the State of Washington, appeared CHRISTINA JOHNSON, the
 5 witness herein:
 6 WHEREUPON, the following proceedings were had, to
 7 wit:
 8
 9 CHRISTINA JOHNSON, having been first duly sworn by
 10 the Notary, testified as follows:
 11
 12 EXAMINATION
 13 BY MR. FLANAGAN:
 14 Q Good morning, Ms. Johnson. My name is Leonard Flanagan.
 15 I represent the Emily Lane Condominium Homeowners
 16 Association.
 17 Have you ever been deposed before?
 18 A Yes.
 19 Q Generally the ground rules are pretty familiar to you then?
 20 A Yes.
 21 Q Okay. Could you state your name for the record?
 22 A Christina Johnson.
 23 Q And what's your address, please?
 24 A 2734 Trevue, T-r-e-v-u-e, Avenue Southwest, Olympia, 98512.
 25 Q What's your job title?
 26 A Licensing manager.

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1 Q And who is that with?
 2 A That's with the Office of Secretary of State.
 3 Q Any particular division of the Secretary of State's office?
 4 A Corporations Division.
 5 Q What are your job duties?
 6 A I supervise the Licensing Section and the phone team for all
 7 of the incoming phone calls and act as liaison between our
 8 office and Department of Licensing, Business License
 9 Services.
 10 Q What is the business of the Licensing Section that you
 11 supervise?
 12 A The filing of annual reports for profit corporations,
 13 nonprofit corporations, limited liability companies, as well
 14 as any type of certification for dissolutions or corporate
 15 status.
 16 Q Does your office have a part in the initial licensing of
 17 corporate entities?
 18 A Yes.
 19 Q And so what do you do with respect to that?
 20 A The filings come in to our office. We make sure they meet
 21 statutory requirements and then record them.
 22 Q Does your office issue certificates of formation and
 23 cancellation, dissolution, that sort of thing?
 24 A Yes.
 25 Q With respect to -- pardon me. With respect to requests for

1 dissolution, cancellation, and that sort of thing, do you
 2 also check to determine whether those requests meet the
 3 statutory requirements before you issue those
 4 certifications?
 5 A Yes.
 6 Q What do you rely on to determine whether the statutory
 7 requirements are met in any given case?
 8 A For dissolutions or cancellations?
 9 Q Let's start with dissolutions.
 10 A It would be the hard file or computer database that would
 11 show the status of the entity.
 12 Q And what's contained in the hard file or computer database?
 13 A The hard file would contain any charter documents, the
 14 original filing, any amendments, mergers, dissolutions,
 15 voluntary dissolutions.
 16 Q I take it you also examine the requests for dissolution as
 17 well?
 18 A Yes.
 19 Q What do you measure the request and the hard file documents
 20 against to determine whether the request is proper?
 21 A As far as the dissolution goes?
 22 Q Sure.
 23 A That it met statutory requirements for voluntary
 24 dissolution, it would require the name of the corporation --
 25 the name of the entity, I believe the reason for dissolving.

1 What are the required showings or statements from an
 2 LLC that's requesting dissolution before your office will
 3 issue a dissolution?
 4 A I don't know right off the top of my head. I could pull out
 5 the cancellation that was filed in our office and everything
 6 on there is what was required for it to be dissolved.
 7 Q Okay. So you --
 8 A Cancelled.
 9 Q Pardon me. You would look at the form that your office uses
 10 in a request for dissolution?
 11 A We would look at the form that they provide. If they
 12 created their own form, make sure that all the requirements
 13 are there within statute.
 14 Q If it's an LLC, what's the difference between a cancellation
 15 and dissolution, to your understanding?
 16 A I guess the terminology. It's still a dissolution, but an
 17 LLC cancels and a corporation files articles of dissolution.
 18 Q How many people do you supervise?
 19 A Currently eight.
 20 Q And is it part of your job on a day-to-day basis to review
 21 filings to determine whether they meet statutory
 22 requirements?
 23 A Yes.
 24 Q And do any of the people that you supervise do that as well?
 25 A Yes.

1 And if it's an LLC, there wouldn't be a revenue clearance.
 2 It's a one-page form that we either supply or they create
 3 going by the statute.
 4 Q Do you have a checklist?
 5 A Yes. There's requirements by statute.
 6 Q I understand there are requirements by statute, but I'm
 7 wondering on a day-to-day basis do you look at copies of the
 8 statute or do you look at some sort of checklist that
 9 summarizes the requirements?
 10 A We would look at the form. And if the requirements are
 11 there, statutory requirements, that creates -- I guess you
 12 file enough of them you don't need to look at the state.
 13 Q Sure. So do you rely essentially then on whether the
 14 form -- pardon me. You rely on the form to set forth all
 15 the statutory requirements for dissolution?
 16 A Correct, um-hmm.
 17 Q You said that there's no revenue clearance in the case of a
 18 dissolution of an LLC. What did you mean by that?
 19 A Profit corporations are required to obtain a certificate of
 20 clearance from the Department of Revenue. LLC's are exempt
 21 from that.
 22 Q What is the certificate of clearance?
 23 A That shows that all their excise taxes have been paid under
 24 the UBI number.
 25 Q Are there any -- scratch that.

1 Q How many of them?
 2 A All of them.
 3 Q Okay. So you're all basically doing the same type of work
 4 on a day-to-day basis?
 5 A It varies, but they're all customer service specialist 2s
 6 that do the same type of work.
 7 Q So when I call and ask for a corporate status, am I likely
 8 to get you as well as the people you supervise?
 9 A You're likely to get the people I supervise on the phones.
 10 Q So generally speaking then, part of your office's role is to
 11 answer requests that people might have and tell them whether
 12 paperwork of the Corporations Division has been filed, and
 13 if so, when it was filed?
 14 A Correct.
 15 Q And part of your job would also be to tell someone, if they
 16 asked, that a given request has been processed or not?
 17 A Um-hmm, correct.
 18 Q Let's go through that list of requirements that you would
 19 check before issuing a dissolution or cancellation of an
 20 LLC. You indicated you could do that by looking at some of
 21 the paperwork you brought with you today. First of all,
 22 what did you bring with you today?
 23 A Let's see. I brought the information that was requested in
 24 the subpoena duces tecum, a copy of my job description, I
 25 believe two other declarations that I signed, e-mail that I

1 had, and the copy of the entire file for the LLC Colonial
 2 Development.
 3 Q Are these extra copies that you brought today?
 4 A Yes.
 5 Q What I would like to do then is take a look at them briefly
 6 and I may make some of them a part of the record.
 7 (Exhibit No. 1 marked.)
 8 Q Could you take a look at what's been marked as Exhibit 1
 9 by the court reporter and identify it?
 10 A It is my position description.
 11 Q And does your position description, the document Exhibit 1
 12 contain a summary of your job duties?
 13 A Yes.

14 (Exhibit No. 2 marked.)
 15 Q Would you identify Exhibit 2 for me, please.
 16 A This was declaration that I was -- that I signed regarding
 17 an LLC and the status of it.
 18 Q That was back in August 2005?
 19 A That's correct.
 20 Q It looks like you signed that at the request of the law
 21 offices of Scheer and Zehnder?
 22 A Correct.
 23 Q Did you draft Exhibit 2, the declaration that's attached to
 24 the letter?
 25 A No, I did not.

1 Q Who did?
 2 A I believe the law firm drafted it, and I reviewed it for
 3 accuracy of information.
 4 Q Did you consult with anyone else about whether you should or
 5 shouldn't sign Exhibit 2?
 6 A No, I did not.
 7 Q Let me see it for a second.
 8 A (Document passed.)
 9 Q Do you remember who it was that you dealt with in agreeing
 10 to sign Exhibit 2?
 11 A I believe it was Scott Stewart.
 12 Q Did you have any idea of what Mr. Stewart planned to do with
 13 the declaration?
 14 A No.
 15 Q Did you ask him?
 16 A No.
 17 Q Did you make any changes to Exhibit 2 before you signed it?
 18 A I don't remember.

19 (Exhibit No. 3 marked.)
 20 Q Could you identify Exhibit 3 for me, please?
 21 A Exhibit 3 is a declaration that I signed.
 22 Q And did you draft the declaration in Exhibit 3?
 23 A No, I did not.

24 Q Who did?
 25 A Christopher Borgman.

1 Q And is Mr. Borgman with the law firm of Forsberg and Umlauf?
 2 A Yes.
 3 Q Did you make any changes to Exhibit 3 before you signed it?
 4 A I believe there were changes made to this document.
 5 Q Can you tell me what changes you remember making?
 6 A I don't remember.
 7 Q If you look it over, do you think that would refresh your
 8 recollection?
 9 A I believe maybe the date of dissolution or cancellation was
 10 wrong in it. There might be an e-mail attached.

11 Q Did you consult with anyone else about whether you should
 12 sign Exhibit 3?
 13 A No.

14 Q Have you had any part in drafting the forms that are used
 15 for requesting dissolution?
 16 MS. McKILLOP: You're talking about a corporation?
 17 MR. FLANAGAN: I'm talking about any of them.
 18 A What was that?
 19 Q (By Mr. Flanagan) Have you had any part in drafting the
 20 forms that the Secretary of State offers to the public for
 21 use in filing for dissolution of a corporation or LLC?
 22 A I've been part of drafting many forms, but the LLC
 23 specifically, I don't recall, no.
 24 Q Did you have any part in drafting forms used to request
 25 dissolution of a corporation?

1 A The administrative forms that are filed.
 2 Q The forms that are offered to the public to fill out and
 3 submit when a company is requesting -- a corporation is
 4 requesting to be dissolved?
 5 A Specifically, I don't recall.
 6 Q Do you know who is involved in creating those forms?
 7 A Well, there is a committee, a forms committee, years ago
 8 that worked on forms, but currently I believe it's our
 9 management team that decides what changes would be made to
 10 the forms.
 11 Q Do you know who is on the management team?
 12 A I do.
 13 Q Who is that?
 14 A Mike Ricchio.
 15 Q How do you spell it?
 16 A R-i-c-c-h-i-o.
 17 Q Okay.
 18 A William Kellington.
 19 Q K-e-l-l-i-n-g-t-o-n?
 20 A Correct. Robert Thompson.
 21 Q With a P?
 22 A Yes. Rebecca Sherrell, S-h-e-r-r-e-l-l, and Christina
 23 Johnson.
 24 Q Any of them attorneys?
 25 A Yes.

1 Q Which?

2 A Mike Ricchio, Bill -- William Kellington.

3 Q I said that we were going to take a look at the types of

4 things that you look at to determine whether to issue a

5 cancellation for an LLC. Can you take a look at either

6 Exhibit 1 or Exhibit 2 or any of the paperwork that you

7 brought with you today?

8 A I need that right there.

9 Q Go through that.

10 A Okay.

11 Q Is that the one document that you're going to rely on for

12 this purpose?

13 A Yes.

14 Q Let's go ahead and have the court reporter mark it.

15 (Exhibit No. 4 marked.)

16 Q Can you identify Exhibit 4 for me?

17 A Yes. It's a certificate of cancellation or withdrawal of a

18 limited liability company.

19 Q And that one is for Colonial Development, LLC?

20 A That's correct.

21 Q And go ahead and tell me the things that you examined to

22 make the decision whether to issue a cancellation.

23 A Let's see. The name of the limited liability company.

24 Q Okay.

25 A Whether it's a domestic or a foreign entity, the date of

1 not accept?

2 A If they state they're no longer in business and voting to

3 cancel, that tells us that they're no longer -- their desire

4 is to withdraw or cancel their status with our office.

5 Q What other issues do you look at to determine whether to

6 issue a cancellation?

7 A They would need to list a service address where service of

8 process can be forwarded to.

9 Q Why?

10 A Should the public require an address for service of process,

11 we have something on record to give them and then there

12 would be a signature of a member or manager.

13 Q And is that everything that you look at in determining

14 whether to issue a cancellation for an LLC?

15 A Yes.

16 Q May I look at Exhibit 4 for a moment?

17 A (Document passed.)

18 Q Thank you. Does the office of Secretary of State make any

19 attempt to evaluate whether an LLC that is requesting to be

20 dissolved has made reasonable provision to pay off its debts

21 or obligations?

22 A No.

23 Q Does the Secretary of State make any attempt to determine

24 whether the dissolution would qualify as a wrongful

25 dissolution under the LLC statute?

1 original formation or registration, the date of withdrawal.

2 Q What's that mean?

3 A It would be the effective date of cancellation/withdrawal,

4 the effective date that the limited liability company is no

5 longer conducting business; the reason for withdrawal or

6 cancellation.

7 Q Does the statute, to your understanding, specify acceptable

8 reasons for cancellation?

9 A Not that I recall.

10 Q So when you look at a reason for cancellation, what

11 assessment do you make?

12 A If they state that they're no longer in business or, in this

13 case, the members voted to cancel.

14 Q What if it said nothing?

15 A It would be returned for a reason.

16 Q Okay. What if it said because we want to avoid liability?

17 Would you accept it in that case?

18 A I don't believe so.

19 Q Why not?

20 A To me, that wouldn't be a specific reason for dissolving. I

21 don't know what you're looking for.

22 Q No. I just want to know what sorts of reasons you would

23 accept and why you accept them or why you reject them.

24 A I've never seen that reason, so I don't know.

25 Q How do you make the decision what reasons you'll accept or

1 A No.

2 Q Do you ever contact the people who are requesting

3 dissolution directly to get more information from them?

4 MS. McKILLOP: Object to form.

5 A Yes.

6 Q (By Mr. Flanagan) When do you do that?

7 A If the reason for cancellation -- cancellation/withdrawal is

8 missing, that maybe the date of cancellation/withdrawal is

9 not there, we would return it for the information.

10 Q Any other circumstances where you would contact the

11 individuals to get more information?

12 A If the form was not signed, if the LLC name was listed

13 incorrectly and we weren't able to determine who they were

14 trying to dissolve or cancel.

15 Q I'm sorry. Any other reasons?

16 A It would be if the entity was already dissolved voluntarily,

17 we might send it back to say it's already -- or

18 administratively we might send it back to say it's already

19 dissolved.

20 Q Any other reasons?

21 A Not that I'm aware of.

22 Q Okay. Did Mr. Borgman, when he asked you to sign Exhibit 3,

23 tell you what the purpose of the declaration that they were

24 requesting was?

25 A He didn't tell me what he would use it for, but I remember

1 it might have been to certify that the reinstatement rights
 2 for the LLC had ceased and that they would not be able to
 3 reinstate.
 4 Q Does the document mention anything about reinstatement
 5 rights?
 6 A The one --
 7 Q Exhibit 3.
 8 A Yes.
 9 Q Where does it say that? I didn't catch that.
 10 A (Pointing to document.)
 11 Q So on paragraph 5 you explain how many years the company had
 12 in which to apply for a reinstatement after administrative
 13 dissolution; is that right?
 14 A Correct, yeah.
 15 Q Did you have any understanding of why that issue was
 16 important to Mr. Borgman or the Forsberg and Umlauf law
 17 firm?
 18 A No.

19 Q In Exhibit 2 -- scratch that.
 20 Is Exhibit 2 the first declaration of this type
 21 regarding the dissolution of an LLC that you have signed for
 22 civil litigants?
 23 A I was looking to see the one that I signed for Colonial, the
 24 date on that.
 25 Q (Document passed.)

1 A Yes. I think that is the first one I've signed.
 2 Q Okay. When you say "that," you're referring to Exhibit 2?
 3 A Yes.
 4 Q Okay. The last paragraph of Exhibit 2, paragraph 8, says,
 5 "The cancellation of the certificate of formation terminated
 6 Rightwood Construction, LLC's, winding up period pursuant to
 7 RCW 25.15.295(2)."
 8 Do you see that?
 9 A Yes, I do.
 10 Q Are you familiar with the winding up requirements of the LLC
 11 statute in Washington?
 12 A Yes.
 13 Q Okay. And what part of your job requires you to be familiar
 14 with the winding up provisions of the LLC statute?
 15 A No part.
 16 Q That's just something that you have read?
 17 A Um-hmm -- yes.
 18 Q Are you an attorney?
 19 A No, I'm not.
 20 Q Does any part of your job require inquiry into whether an
 21 LLC has wound up or what's involved in its winding up?
 22 A No, it doesn't. Maybe -- unless it's the date they say
 23 they're dissolved on a voluntary cancellation.
 24 Q Is there a difference, in your understanding, between the
 25 dissolution and a winding up?

1 A Yes.
 2 Q What's the difference?
 3 A The winding up would be the period in which they have to get
 4 their affairs in order.

5 Q Okay. In the last part of paragraph 8, you finished it by
 6 saying, "And Rightwood Construction, LLC, is considered to
 7 have died, closed quote, on June 19, 2002."
 8 Do you see that?
 9 A Yes, I do.
 10 Q What did you understand that clause to have meant, that the
 11 company had died?
 12 A That the winding up period was finished.
 13 Q Explain to me again what you understand winding up to
 14 entail.
 15 A When all the business is completed.
 16 Q When you signed the declaration in Exhibit 2 which says that
 17 Rightwood Construction is considered to have died, did you
 18 mean to say that it was no longer subject to being sued?
 19 A No. I didn't mean that to say that.
 20 Q Okay. On Exhibit 3, paragraph 8 is quite similar. Simply
 21 we've substituted Aspen Siding, LLC, is the name and the
 22 last clause says, "Aspen Siding, LLC, is considered to have,
 23 quote, died on April 23, 2001."
 24 Do you see that?
 25 A Yes, I do.

1 Q In the case of Exhibit 3, did you intend, when you signed
 2 the declaration saying that the company had died, to say
 3 that it was no longer subject to being sued?
 4 A No.
 5 Q Do you have any understanding for yourself of what the
 6 LLC statute in Washington says about whether an LLC that is
 7 dissolved or been canceled can be sued?
 8 A No.
 9 Q Do you know what a survival of actions law is?
 10 A No.

11 Q Has anyone ever told you -- scratch that.
 12 Have any of your superiors at the Secretary of State's
 13 office or the Corporations Division ever told you that you
 14 have the right or permission to state on behalf of the
 15 Secretary of State what its position is on the meaning of a
 16 statute?
 17 A I would say yes.
 18 Q And what have you been told in that regard?
 19 A That I am able to certify, by certified copy or certificate
 20 form, the status of an entity.

21 Q Do you have any authority to state the meaning of a statute
 22 as opposed to the status of one of the corporations that
 23 is -- whose paperwork goes through your office?
 24 A Do I interpret statutes?
 25 Q Yes.

1 A No.

2 Q Other than your authority to certify the status of a

3 corporate entity to someone that requests that information,

4 have you been told by any of your superiors that you have

5 authority to speak on behalf of the Secretary of State for

6 any other matters?

7 A I would say yes.

8 Q And what other matters do you have authority to speak for

9 the Secretary of State on?

10 A Could you repeat the question?

11 Q What other matters do you have authority of the Secretary

12 scratch that.

13 What other matters do you have authority to speak for

14 the Secretary of State about?

15 A I would say just about any type of filing that comes in or

16 maybe a policy or procedure with the working knowledge of

17 the statutes of what would be required.

18 Q So you have authority to tell the public what the Secretary

19 of State's policies and procedures with respect to the

20 filings that are handled by your office are?

21 A Correct.

22 Q Is that a fair statement?

23 A That's a fair statement.

24 MR. FLANAGAN: Okay. Off the record.

25 (Discussion off the record.)

1 service, LLC service.

2 Q Okay. And in that case, it's authority to tell the public

3 whether a complaint has been served through your office?

4 A That's correct.

5 Q And what the procedures are for that?

6 A Yes.

7 Q Anything else about those issues?

8 A Not that I can think of.

9 Q Okay.

10 A It's pretty wide.

11 Q Yes, I understand. Is there anything else that you believe

12 you have authority to speak for the Secretary of State

13 about?

14 A Nothing comes to mind. There's just so much that's required

15 within the type of information we provide to the general

16 public it's hard to . . .

17 Q Generally speaking, is it fair to say though that with

18 respect to all of those duties that you have, your authority

19 is to tell the general public what your procedures are, tell

20 the general public whether something is properly filed, and

21 tell the general public what the status of any particular

22 filing or entity is?

23 A Correct.

24 (Exhibit No. 5 marked.)

25 Q Could you tell me what Exhibit 5 is?

1 Q (By Mr. Flanagan) All right. And we've already talked

2 about your authority to tell the public about what filings

3 have come in and what their status is, right?

4 A Right.

5 Q Any other matters that you believe you have authority to

6 speak on behalf of the Secretary of State about?

7 A I think I have quite a bit of authority to speak on behalf

8 of the Secretary of State working with other agencies with

9 licenses or the general public for any type of questions for

10 the programs that we have within the office of Secretary of

11 State.

12 Q Okay. I need to have a clear understanding of what you mean

13 by that when you say "other programs."

14 A It would be international -- International Student Exchange

15 Agency programs, Immigrations Assistance Act, Trademark

16 Registration.

17 Q With respect to these other programs, is your authority

18 similar to what it is for the Corporations Division, that

19 is, explain the status of filings, explain procedures, and

20 explain the status of matters that are handled by your

21 office?

22 A Yes.

23 Q Okay. Any other subjects on which you have the authority to

24 speak for the Secretary of State?

25 A Summons and complaints for nonresident motorist, corporation

1 A Exhibit 5 is the declaration for Colonial Development, LLC

2 Q Did you draft Exhibit 5?

3 A No.

4 Q Who drafted it?

5 A I believe it was Colm Nelson.

6 Q Who is Colm Nelson?

7 A I believe he's maybe a legal assistant with Oles Morrison or

8 possibly an attorney. I believe a legal assistant.

9 Q Oles Morrison is a law firm?

10 A Yes.

11 Q Did you have any understanding of what the purpose of

12 Exhibit 5 is or what it would be used for?

13 A I believe -- I understood it to be used for like a

14 certification to be used with the certified copy of the

15 certificate of cancellation showing that there was a

16 voluntary cancellation done.

17 Q Okay. So in the case of Exhibit 5, this was similar to your

18 other duties of explaining to the public what the status of

19 a company that was handled through your office is, correct?

20 A Yes.

21 Q Did you make any changes to Exhibit 5 before you signed it?

22 A I don't have the initial drafts.

23 Q Do you recall if you made any changes to Exhibit 5 before

24 you signed it?

25 A I may have to the date that it was canceled.

1 Q Okay. Do you have any recollection of making any changes?
 2 A Yeah. I think maybe there was a change.
 3 Q And you think it was the date? Your counsel is handing you
 4 a document that hasn't been made an exhibit. Go ahead and
 5 read it over. I don't have any objection to that, but I
 6 think you need to read the accompanying e-mail before you
 7 make any decisions about it.
 8 A Yes.
 9 Q Pardon me? You think that's an original draft?
 10 A Why don't you have a look at that.
 11 Q No. That's okay. Go ahead and tell me if you think from
 12 your file you have a draft that precedes Exhibit 5.
 13 A She's got copies of what I have, so that should be located
 14 in here.
 15 Q Go ahead and look at the document in your hand, read it,
 16 tell me whether you think it's a draft that went before
 17 Exhibit 5.
 18 A Yes.
 19 MR. FLANAGAN: Okay. Let's go ahead and mark this
 20 then.
 21 (Exhibit No. 6 marked.)
 22 Q (By Mr. Flanagan) You've been handed Exhibit 6. Can you
 23 identify it for me?
 24 A Yes. It looks like a declaration with an e-mail attached to
 25 it.

1 explained exactly what your job authority is?
 2 A Yes.
 3 Q And is that paragraph 2 and 3?
 4 A That's correct.
 5 Q Okay. Is it also paragraph 4?
 6 A That's correct.
 7 Q I notice there's a new paragraph 5. It says, "When I say a
 8 corporation has, quote, died, closed quote, I mean the
 9 corporation no longer exists in the eyes of the Secretary of
 10 State and has completed its winding up period."
 11 Do you see that?
 12 A Yes, I do.
 13 Q Who wrote that?
 14 A I believe the law firm -
 15 Q Okay.
 16 A -- had me review it.
 17 Q Did you write it?
 18 A No.
 19 Q Did you sign Exhibit 6?
 20 A Yes, I did.
 21 Q Okay. How come you don't have a signed copy in your file?
 22 A There should have been two copies, one for the file I
 23 brought you and one for the file for Susan.
 24 Q Do you believe there's a signed copy of Exhibit 6 in your
 25 file?

1 Q What's the date of the e-mail?
 2 A November 15th.
 3 Q There's actually two e-mails on there, aren't there?
 4 A It's the e-mail to me and my response back.
 5 Q And they're both November 15th?
 6 A Correct.
 7 Q And is the declaration signed?
 8 A No.
 9 Q Okay. Take a look at Exhibit 5, if you would, please.
 10 A (Witness complies.)
 11 Q What's the date that you signed Exhibit 5?
 12 A November 7th.
 13 Q Okay. Does that suggest to you that Exhibit 5 was done
 14 before the declaration in Exhibit 6?
 15 A Yes.
 16 Q Okay. So is it your belief then that Exhibit 6 is not an
 17 initial draft of Exhibit 5?
 18 A Yes.
 19 Q And it followed Exhibit 5, correct?
 20 A Correct.
 21 Q Let's talk a little bit more about that. You got a request
 22 from Colm Nelson to explain exactly who you were and what
 23 your authority was; is that right?
 24 A Yes.
 25 Q And did you insert some language into the declaration that

1 A Not the exact signed copy.
 2 Q The only signed declaration you have from Oles Morrison is
 3 Exhibit 5, right?
 4 A That's correct.
 5 Q But you believe you signed Exhibit 6?
 6 A Yes.
 7 Q Do you know why you don't have a copy?
 8 A I wasn't able to locate one in my office when I was getting
 9 your information.
 10 Q Okay.
 11 A Okay. This is what I got off the e-mail.
 12 Q Other than Exhibit 2, 3, and 5, have you signed any other
 13 declarations regarding the dissolution of LLC's for civil
 14 litigants, to your knowledge?
 15 A Not that I'm aware of.
 16 Q Have you signed any similar declarations for civil litigants
 17 for any dissolution of corporations?
 18 A Not that I'm aware of.
 19 Q Okay. In Exhibit 5 on paragraph 2, it says, "I'm an
 20 authorized representative of the Washington Secretary of
 21 State with respect to matters stated herein."
 22 Again, did you understand that to mean that you're
 23 authorized to tell the public what paperwork has come in and
 24 what the corporate status is of the company based on the
 25 processing of that paperwork in your office?

1 A Yes.
 2 Q And on paragraph 4, somewhat different from Exhibits 2 and
 3 3, it says, "On January 21, 2005, Colonial Development, LLC,
 4 effectively filed its certificate of cancellation."
 5 The word "effectively" is used and it doesn't appear,
 6 I'll represent to you, in the other two declarations. What
 7 did you think was meant by the term "effectively"?
 8 A That the documents met statutory requirement.
 9 Q In other words, all of the parts of the form that you
 10 checked were filed out, right?
 11 A Correct.
 12 Q And on paragraph 7 it says, "By filing the certificate of
 13 cancellation, Colonial Development, LLC, terminated its
 14 winding up period."
 15 Did you mean anything different in paragraph 7 from
 16 what you told me you meant in the similar paragraphs in
 17 Exhibits 2 and 3?
 18 MS. McKILLOP: Objection, lack of foundation.
 19 Q (By Mr. Flanagan) Did you understand?
 20 A Do I still answer that?
 21 Q Yes, you still answer.
 22 A Could you ask that again?
 23 Q Sure. When you wrote -- scratch that.
 24 When you signed the declaration --
 25 A Right.

1 A Correct.
 2 Q You interpret those statutes in your position with respect
 3 to the Secretary of State?
 4 MR. FLANAGAN: Object to form, asked and answered.
 5 A I have a working knowledge, but it's not probably my
 6 position to interpret statutes.
 7 Q (By Ms. McKillop) Okay. With respect to the formation and
 8 cancellation -- and I'm going to just stick with limited
 9 liability companies because they're different than
 10 corporations, correct?
 11 A Correct.
 12 Q With respect to the formation and cancellation of a limited
 13 liability company, is it your position to interpret
 14 certificates of formations and certificates of
 15 cancellations/withdrawals of limited liability companies to
 16 determine whether or not they comply with the statutes?
 17 MR. FLANAGAN: Object to form, object to the
 18 extent it calls for a legal conclusion, also vague and
 19 ambiguous.
 20 Q (By Ms. McKillop) You can answer.
 21 MR. FLANAGAN: If you know what it means.
 22 MS. McKILLOP: Knock it off.
 23 Q (By Ms. McKillop) You can answer.
 24 A I think I kind of got lost in what the question was.
 25 Q Sure. With respect to formations of limited liability

1 Q -- that says, "By filing the certificate of cancellation,
 2 Colonial Development, LLC, terminated its winding up
 3 period," did you mean anything different from what you told
 4 me you meant in the first part of paragraph 8 in Exhibit 2
 5 and 3?
 6 A No. I didn't mean anything different.
 7 Q All right. And on paragraph 8 when you say that it ceased
 8 to exist and the corporation died, did you mean anything
 9 different from what you meant in using the similar
 10 terminology in paragraph 8 of Exhibit 2 and 3?
 11 A No. I didn't mean anything different.
 12 Q Okay. If you had known that your declaration, and in
 13 particular, the use of the term "died" would become part of
 14 a legal argument to the effect that a limited liability
 15 company which has died is no longer subject to being sued
 16 for its debts and obligations, would you have signed it?
 17 MS. McKILLOP: Objection, calls for a legal
 18 conclusion.
 19 A No.
 20 MR. FLANAGAN: Okay. That's all I've got.
 21 EXAMINATION
 22 BY MS. McKILLOP:
 23 Q Ms. Johnson, as part of your position with the Secretary
 24 of State, you do have a working knowledge of the statutes
 25 that's related to limited liability companies, correct?

1 companies and their certificates of withdrawal --
 2 A Right.
 3 Q -- of limited liability companies --
 4 A Um-hmm.
 5 Q -- do you have authority within the Secretary of State to
 6 determine whether or not those forms comply with the
 7 statutes?
 8 A Yes.
 9 Q Okay. And with respect to Colonial Development, LLC, you
 10 received a certificate of cancellation/withdrawal of that
 11 limited liability company, which is Exhibit 4, correct?
 12 A That's correct.
 13 Q And you determined that that certificate of cancellation
 14 complied with the statute, correct?
 15 A I myself didn't file it, but our office determined that it
 16 met requirements.
 17 Q Okay.
 18 A Yes.
 19 Q And with respect to the reason for cancellation, is it true
 20 that the Secretary of State really does not require any
 21 specific reason in order to cancel? What I'm saying is,
 22 they require a reason, but they don't require specific
 23 reasons?
 24 A That's correct.
 25 MR. FLANAGAN: Object to the extent it's been

No. 56879-5-I

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION 1**

ROOSEVELT, LLC, a Washington limited liability company AND
STEINVALL CONSTRUCTION, INC., a Washington Corporation,

Third-Party Plaintiff and Third Party Defendant// Appellants,

v.

GRATEFUL SIDING, INC., a Washington Corporation, TILE
TECHNOLOGY ROOFING, INC., a Washington Corporation,
MAURICE HOLE D/B/A QUALITY SURFACING, TRULSON WALL
SYSTEMS, a Washington Corporation d/b/a WALL FINISHES, INC.,
M.A.P. CONSTRUCTION, INC., a Washington Corporation, ORLIN
JOHNSON D/B/A STAR SERVICES, GASLINE MECHANICAL, INC,
a Washington Corporation,

Third Party Defendant/Respondents.

CERTIFICATE OF SERVICE

Submitted by:
LEVIN & STEIN
Leonard D. Flanagan, WSBA 20966
210 Queen Anne Avenue, Suite 400
Seattle, WA 98109
Tel. (206) 388-0660
Fax (206) 286-2660
Attorney for Amicus Curiae
Emily Lane Townhomes
Condominium Owners Ass'n

I hereby certify that on the 30th day of October 2006, I did cause to be served true and correct copies, via the indicated method of delivery, of:

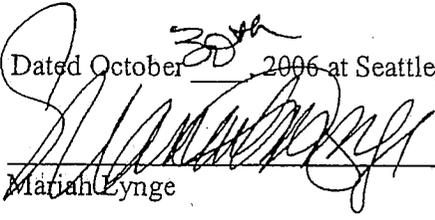
1. MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE;
2. BRIEF OF AMICUS CURIAE EMILY LANE TOWNHOME CONDOMINIUM OWNERS' ASSOCIATION; and
3. DECLARATION OF LEONARD FLANGAN IN SUPPORT OF BRIEF OF AMICUS CURIAE AND EXHIBITS ATTACHED THERETO.

<p><u>Counsel for Appellants Roosevelt, LLC and Steinvall Construction, Inc.</u> John P. Hayes, WSBA #21009 Viivi M. Vanderslice, WSBA #34990 FORSBERG & UMLAUF, P.S. 900 Fourth Avenue, Suite 1700 Seattle, WA 98164-1039</p>	<p><input type="checkbox"/> U.S. Mail, <input type="checkbox"/> postage prepaid <input checked="" type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail</p>
<p><u>Counsel for Third Party Plaintiff Tile Technology Roofing Co., Inc.</u> Eileen McKillop, WSBA #21602 OLES MORRISON RINKER & BAKER LLC 701 Pike Street, Suite 1700 Seattle, WA 98101</p>	<p><input type="checkbox"/> U.S. Mail, <input type="checkbox"/> postage prepaid <input checked="" type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail</p>
<p><u>Counsel for Third Party Defendant Gasline Mechanical, Inc.</u> R. Scott Fallon FALLON & MCKINLEY 1111 Third Avenue, Suite 2400 Seattle, WA 98101</p>	<p><input type="checkbox"/> U.S. Mail, <input type="checkbox"/> postage prepaid <input checked="" type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail</p>
<p><u>Counsel for Third Party Defendant Grateful Siding, Inc.</u> John E. Zehnder, Jr., WSBA #29440 SCHEER & ZEHNDER LLP 720 Olive Way, Suite 1605 Seattle, WA 98101</p>	<p><input type="checkbox"/> U.S. Mail, <input type="checkbox"/> postage prepaid <input checked="" type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail</p>
<p><u>Counsel for Third Party Defendant Orin Johnson</u></p>	

<p><u>d/b/a Star Services</u> W. Scott Clement, WSBA #16243 Clement & Drotz 2801 Alaskan Way, Suite 300 Pier 70 Seattle, WA 98121</p>	<p><input type="checkbox"/> U.S. Mail, <input type="checkbox"/> postage prepaid <input checked="" type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail</p>
<p><u>Counsel for Third Party Defendant M.A.P. Construction, Inc.</u> David B. Jensen, WSBA #21284 GORDON, THOMAS, HONEYWELL, MALANCA, PETERSON & DAHEIM, LLP 600 University Street, Suite 210 Seattle, WA 98101-4185</p>	<p><input type="checkbox"/> U.S. Mail, <input type="checkbox"/> postage prepaid <input checked="" type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail</p>
<p><u>Counsel for Third Party Defendant Maurice Hole d/b/a Quality Surfacing</u> Susan Fuller, WSBA #22895 Mark E. Mills, WSBA #16383 LAW OFFICES OF WILLIAM G. GARCIA, MANAGING ATTORNEY 1601 Fifth Avenue, Suite 1210 Seattle, WA 98101</p>	<p><input type="checkbox"/> U.S. Mail, <input type="checkbox"/> postage prepaid <input checked="" type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail</p>
<p><u>Counsel for Third Party Defendant Trulson Wall Systems, Inc. d/b/a Wall Finishes, Inc.</u> Douglas Hofmann, WSBA#6393 WILLIAMS, KASTNER & GIBBS PLLC Two Union Square 601 Union Street, Suite 4100 Seattle, WA 98111-3926</p>	<p><input type="checkbox"/> U.S. Mail, <input type="checkbox"/> postage prepaid <input checked="" type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail</p>
<p><u>Counsel for Third-Party Defendant Quality Surfacing</u> Christopher Anderson, WSBA LAW OFFICES OF SHARON J. BITCON 200 West Mercer Street, Suite 111 Seattle, WA 98119</p>	<p><input type="checkbox"/> U.S. Mail, <input type="checkbox"/> postage prepaid <input checked="" type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail</p>

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 October ^{30th} 2006 at Seattle, Washington.



Mariah Lynge

APPENDIX D

CERTIFICATION OF ENROLLMENT

SENATE BILL 6531

Chapter 325, Laws of 2006

59th Legislature
2006 Regular Session

LIMITED LIABILITY COMPANIES--DISSOLUTION--REMEDIES PRESERVED

EFFECTIVE DATE: 6/7/06

Passed by the Senate February 11, 2006
YEAS 41 NAYS 0

BRAD OWEN

President of the Senate

Passed by the House February 28, 2006
YEAS 97 NAYS 0

FRANK CHOPP

Speaker of the House of Representatives

Approved March 29, 2006.

CHRISTINE GREGOIRE

Governor of the State of Washington

CERTIFICATE

I, Thomas Hoemann, Secretary of the Senate of the State of Washington, do hereby certify that the attached is SENATE BILL 6531 as passed by the Senate and the House of Representatives on the dates hereon set forth.

THOMAS HOEMANN

Secretary

FILED

March 29, 2006 - 4:37 p.m.

Secretary of State
State of Washington

SENATE BILL 6531

Passed Legislature - 2006 Regular Session

State of Washington 59th Legislature 2006 Regular Session

By Senators Weinstein, Fraser and Kline

Read first time 01/13/2006. Referred to Committee on Judiciary.

1 AN ACT Relating to preserving remedies when limited liability
2 companies dissolve; and adding a new section to chapter 25.15 RCW.

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

4 NEW SECTION. Sec. 1. A new section is added to chapter 25.15 RCW
5 under Article VIII to read as follows:

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

Passed by the Senate February 11, 2006.

Passed by the House February 28, 2006.

Approved by the Governor March 29, 2006.

Filed in Office of Secretary of State March 29, 2006.

APPENDIX E

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION 1**

COLONIAL DEVELOPMENT, LLC, a Washington limited liability
company,

Defendant// Appellant,

v.

EMILY LANE TOWNHOMES CONDOMINIUM OWNERS'
ASSOCIATION, a Washington nonprofit corporation,

Plaintiff// Respondent/Cross-Appellant.

**DECLARATION OF LEONARD FLANAGAN CERTIFYING
TRANSCRIPT OF PORTIONS OF THE WASHINGTON STATE
HOUSE JUDICIARY COMMITTEE HEARING OF FEBRUARY
20, 2006 REGARDING SB 6531.**

Submitted by:
LEVIN & STEIN
Leonard D. Flanagan, WSBA 20966
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Seattle, WA 98109
Tel. (206) 388-0660
Fax (206) 286-2660
Attorney for Emily Lane
Townhomes Condominium Owners
Association

Leonard Flanagan, on oath, deposes and states:

1. I am one of the attorneys herein for the Appellant Emily Lane Townhomes Condominium Owners' Association. I am competent to testify, and do so of my own personal knowledge.

2. I have listened to the publicly available recordings of the Washington State House Judiciary Committee's public hearing of February 20, 2006 regarding SB 6531. The following is a true and accurate transcription of the comments of the bill's sponsor, Senator Weinstein, as well as Senator Weinstein's responses to questions regarding the bill.

Sen. Weinstein: "[T]he 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."

....
"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: "It certainly is nice to have a bill you can sit here and read in its entirety."

Sen. Weinstein: "About 25 words, yeah."

Chairwoman Pat Lance: "Two sentences..."

Sen. Weinstein: "This is a good little bill."

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, with at least the Corporations statute."

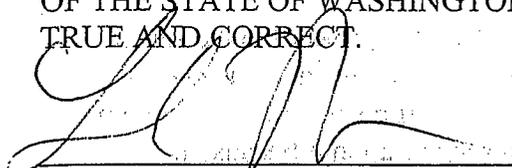
Chairwoman Pat Lance: "Representative Rodne."

Representative Jay Rodne: "Thank you Madame Chair, and thanks, 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 in 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..."

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.



Leonard Flanagan

12/18/06

Date

No. 58825-7-I

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION 1**

COLONIAL DEVELOPMENT, LLC, a Washington limited liability
company,

Defendant// Appellant,

v.

EMILY LANE TOWNHOMES CONDOMINIUM OWNERS'
ASSOCIATION, a Washington nonprofit corporation,

Plaintiff// Respondent/Cross-Appellant.

CERTIFICATE OF SERVICE

Submitted by:
LEVIN & STEIN
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Attorney for Emily Lane
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Association

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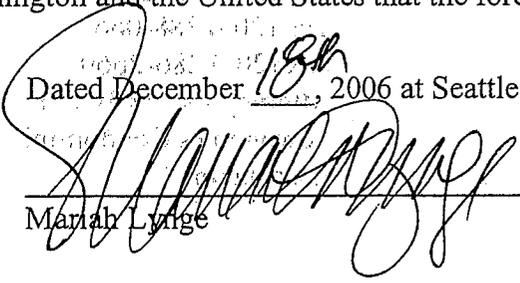
I hereby certify that on the 18th day of December 2006, I did cause to be served true and correct copies, via the indicated method of delivery, of:

BRIEF OF RESPONDENT/CROSS-APPELLANT EMILY LANE TOWNHOMES CONDOMINIUM OWNERS' ASSOCIATION

<p><u>Counsel for Appellants</u> Eileen I. McKillop, WSBA #21602 Oles Morrison Rinker & Baker 701 Pike Street, #1700 Seattle, WA 98101</p>	<p><input type="checkbox"/> U.S. Mail, <input checked="" type="checkbox"/> postage prepaid <input checked="" type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail</p>
<p><u>Counsel for Defendant Contempra Homes, Inc. and Daniel J. Mus</u> David M. Soderland, WSBA #6927 Dunlap & Soderland 900 Fourth Avenue, #3003 Seattle, WA 98164</p>	<p><input type="checkbox"/> U.S. Mail, <input checked="" type="checkbox"/> postage prepaid <input checked="" type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail</p>
<p><u>Counsel for Defendant Contempra Homes, Inc.</u> Ray P. Cox, WSBA #16250 Forsberg & Umlauf 900 Fourth Avenue, #1700 Seattle, WA 98164</p>	<p><input type="checkbox"/> U.S. Mail, <input checked="" type="checkbox"/> postage prepaid <input checked="" type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail</p>

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 December 18th, 2006 at Seattle, Washington.



 Mariah Lytge