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Court of Appeals No. 58825-7-1 RONALD R. CARPENTER

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**SUPREME COURT OF THE STATE OF WASHINGTON**

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

*Respondent*

v.

COLONIAL DEVELOPMENT, LLC, a Washington limited liability  
company, THE ALMARK CORPORATION, a Washington corporation,  
CRITCHLOW HOMES, Inc., a Washington corporation, MARK B.  
SCHMITZ, an individual, RICHARD E. WAGNER and ESTHER  
WAGNER d/b/a Woodhaven Homes, individuals, ALFRED J. MUS, an  
individual; and JEFFREY CRITCHLOW, an individual,

*Petitioners*

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**ANSWER TO PETITION FOR REVIEW**

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- APPENDIX A: House Bill Report and House Bill Analysis
- APPENDIX B: SB 6531
- APPENDIX C: Transcript of House Judiciary Committee Hearing
- APPENDIX D: Complaint for Damages in *Colonial Development, LLC v. Aspen Siding, LLC, et al.*; King County Cause No. 07-2-23366-1 SEA

**I. IDENTITY OF RESPONDENT**

Respondent Emily Lane Townhomes Condominium Association (“the Association”) asks the Court to deny Petitioner’s request for review.

**II. ISSUES PRESENTED, AND ISSUES NOT DECIDED BY THE COURT OF APPEALS**

(1) Does the new LLC survival statute at RCW 25.15.303 apply “retroactively” to save claims against Petitioner Colonial Development, LLC, which was dissolved when the law became effective?

(2) Should RCW 25.15.303 be read to be a meaningless law that only saves claims against LLCs that are “dissolved” (even though claims against dissolved LLCs do not abate), but does not save claims against dissolved LLCs that are later “cancelled”?

(3) Petitioner seeks to raise an issue not presented in this case, but presented in a linked case (*Chadwick Farms Owners Ass’n v. FHC, LLC*, No. 58796-0-1). Does an LLC lose its right to prosecute claims against subcontractors and insurers by virtue of its canceled status?

(4) Do issues of fact remain for adjudication as to liability of the Petitioner LLC’s members?

(5) If accepted for review, the Association will raise an issue left undecided by the Court of Appeals: did the LLC waive its defense by failing to move in a timely fashion for dismissal under CR 12(b)(6)?

**III. COUNTER-STATEMENT OF THE CASE**

**A. The Petition Does Not Contain a Fair Statement of the Case.**

Because the Association disputes many statements of fact in Petitioners' brief, it offers the following counter-statement of the case.

**B. Factual Background**

Colonial Development, LLC ("the LLC") is a consortium of professional developers ("the members"), formed for the sole purpose of building and selling the Emily Lane condominiums. (CP 150, 1643, 1649). The LLC acted as both declarant and general contractor. (CP 1647). The LLC had no other business, and has no assets other than insurance and claims against its subcontractors, insurers, and attorneys.

The members are experienced builders who frequently reviewed the project during construction for quality. (CP 1643-44, 1648-49). Virtually all the defects at issue should have been apparent to a builder who monitored the construction, such as the members. (CP 1239). The members were kept apprised of the many warranty requests by unit owners. (CP 918, 921, 924, 927, 930, 2139, 2151-52).

During sales, the LLC demanded that unit purchasers waive their statutory warranties of quality under the Washington Condominium Act ("WCA") by signing a so-called "one year limited warranty" agreement. This also purported to waive the Association's statutory warranty rights

under the WCA. (CP 2093-2120). The so-called “limited warranty” / waiver was illegal and void.<sup>1</sup>

The members appointed their employees to serve as the Board of Directors for the Association while the declarant LLC controlled the Association. (CP 461, 2023-25). These declarant-appointed members owed the Association a fiduciary duty of care. RCW 64.34.308(1). However, the appointed Board never met, never made any decisions, and never took any action to protect the Association’s interests. (CP 2030).

The new unit owners complained repeatedly to the LLC about construction quality and water intrusion, often receiving no meaningful or timely response. (CP 1203-1235). Many of the unresolved warranty complaints were generally the same type as the defects now at issue in the litigation. For example, unit owners complained of unresolved window leaks (CP 1210), deck soffit deterioration caused by water intrusion (CP 1215), inadequate repairs following leaks (CP 1228), lack of response to window leaks (CP 1230), recurring window leaks (CP 1231), and failure to follow up on window leaks and water damage (CP 1233-34).<sup>2</sup>

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<sup>1</sup> The so-called “limited warranty” is the same disclaimer form the Court of Appeals declared ineffective in *Park Ave. Condo. v. Buchan Devs.*, 117 Wn. App. 369, 375, 71 P.3d 692 (2003). (CP 2093-2120). The trial court rejected the LLC’s attempt to enforce it at summary judgment. (CP 1075-77).

<sup>2</sup> At times, the LLC has asserted that it “fixed” all these complaints. That assertion, however, is based entirely on hearsay or speculation on the part of the LLC’s warranty manager Theresa May, who repeatedly testified that she had no system to

Frustrated, thinking their “one year limited warranty” had expired, unit owners stopped contacting the LLC. (CP 1204). The Board began looking into asserting a warranty claim through legal action.

At this point, the LLC members decided to dissolve their company in secret, seven months before the statutory warranty of quality obligation expired, despite the numerous owner complaints, and despite the LLC’s continuing obligation under the four year warranty of quality in the WCA.<sup>3</sup> (CP 1040, 1204, 1210, 1215, 1221, 2023). By this time, the members had taken all of the cash assets out of the LLC, including about \$177,000 in capitalization.<sup>4</sup>

Two weeks later, the members “cancelled” the LLC. (CP 1042). Under RCW 25.15.300(2), the members were obliged first to “**make reasonable provision to pay all claims and obligations**, including all

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ensure that warranty work was performed, no personal knowledge of what happened to repair any given complaint, and is 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).

<sup>3</sup> The members voting for dissolution, as the Court of Appeals noted, include Alfred J. Mus, Member and Chairman; Daniel J. Mus, Member and Secretary; Richard Wagner, Member; “Mark Schmitz, Member”; and “Jeffrey Critchlow, Member.” (CP 1040). Petitioner claims that Schmitz and Critchlow were not members of the LLC, though there are clearly issues of fact on this point. (Petition at 19).

<sup>4</sup> The members preferred themselves to the LLC’s creditors by taking for themselves at least \$177,000 in LLC capitalization, yet making no reasonable provision for the LLC’s warranty obligation under the Washington Condominium Act. (CP 155-56, 310-13, 1515, 1639, 1521). Whether members earned a profit or not, they financed their return of capital by draining the LLC of assets it owned and needed to respond to its legitimate creditors, such as the Association.

contingent, conditional, or unmatured claims and obligations which are known to the limited liability company...” But the members made **no** provision at all to satisfy either the known and asserted warranty claims, or the LLC’s ongoing warranty obligations under the WCA. (CP 1517).

A few months later, the Association served the LLC with a Notice of Construction Defects under RCW 64.50. The members responded in letters to the Association on “Colonial Development, LLC” letterhead in which they represented the LLC as a going concern, sought to conduct an investigation of the defects, and intimated that the LLC would make an offer to repair the defects and settle the claims. (CP 1357-62). Their attorney also wrote letters to subcontractors and their insurers, demanding a defense and indemnity of the LLC. (CP 1357-62).

Even while pretending the LLC was an existing, responsible corporate citizen, the members knew full well that their company potentially had no liability. (CP 1354-55).<sup>5</sup>

### **C. Procedural Background**

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<sup>5</sup> The LLC’s bookkeeper wrote to its insurance broker (who was also the insurance broker for the Association) that:

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). The LLC then ordered a copy of its Certificate of Cancellation. (*Id.*)

Unaware their developer had flown off in the night, the Association filed suit. Buried in the LLC's eventual Answer was an affirmative defense (number 27 of 35 total) in which the LLC alleged it was "a dissolved limited liability company" and not subject to suit. (CP 60). When the Association discovered the deception by the LLC members, it amended its Complaint to assert claims against the members personally for, among other things, improperly winding up the LLC, fraudulent concealment, negligent and fraudulent misrepresentation, and to pierce the corporate veil. (CP 603-21).

The LLC chose not to move for immediate dismissal under CR 12(b)(6), but elected to follow a costly "scorched-earth" litigation strategy instead. It engaged in extensive discovery and depositions, covering every issue in the case, not just dissolution.<sup>6</sup> At the same time, the LLC concealed the facts supporting its affirmative defenses, claiming the

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<sup>6</sup> The LLC deposed the President of the Association's Board on matters unrelated to dissolution, (CP 1442-76), noted records depositions of Association experts, (CP 1437-40), demanded the Association's reserve study and Board's meeting minutes, and demanded two discovery conferences. (CP 1250-51, 1478-79). 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 2394-2426, 1530-31).

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).

defenses were asserted merely as “preservation against waiver,” and refused to answer simple questions about those defenses.<sup>7</sup> The LLC also filed numerous lengthy motions.<sup>8</sup> After ten months of this, the LLC proposed its own intrusive building investigation and to mediate the case based on the results.<sup>9</sup> (CP 1252, 1697).

After nearly a year of this “aggressive pursuit of litigation” (as the Court of Appeals put it), the LLC finally moved to dismiss based on its supposed “non-existence.” (CP 146). By then, a new survival statute applicable to LLCs had come into effect. RCW 25.15.303. The trial court held that the new survival statute applies retroactively to the LLC. For unstated reasons, however, the trial court dismissed the claims against the

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<sup>7</sup> The LLC failed to answer virtually every question 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 immune to suit.

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.)

<sup>8</sup> 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 2372-83, 2356-60, 2532-36, 2353-55, 2394-2408).

<sup>9</sup> The defense intrusive investigation cost the Association a week of expert time, and required extensive efforts by the Association’s counsel to coordinate. (CP 1253).

members individually, while leaving identical claims in place against the LLC itself. (CP 1075-77).<sup>10</sup>

The Court of Appeals granted discretionary review of the denial of summary judgment to the LLC. For judicial economy, it also granted the Association's cross-petition for discretionary review of the dismissal of its claims against the LLC's members.<sup>11</sup>

The Court of Appeals held that (1) the new survival statute is retroactive and preserved the Association's claims against the LLC, and (2) the evidence of wrongdoing on the part of the LLC members was such that dismissal for lack of evidence would be error, and dismissal based on the immunity under the LLC Act would also be error.<sup>12</sup>

In "linked" cases, the Court of Appeals concluded (1) that the new survival statute applies both to dissolved LLCs, and to dissolved LLCs which are later cancelled; and (2) that a cancelled developer LLC lacks the capacity to sue its subcontractors.<sup>13</sup> Those issues were not presented to the court in the *Emily Lane* matter, however.

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<sup>10</sup> The Association posits that the trial court saw factual merit in the claims, and so retained them as to the LLC, but dismissed the claims against the individuals, thinking the members immune to suit under the LLC Act.

<sup>11</sup> *Emily Lane Homeowners Ass'n v. Colonial Dev., L.L.C.*, \_\_\_ Wn.App. \_\_\_, 160 P.3d 1073 (2007).

<sup>12</sup> 160 P.3d 1073 (Slip op. at 4-7).

<sup>13</sup> E.g., *Chadwick Farms Owners Ass'n v. FHC, L.L.C.*, 160 P.3d 1061 (Wash. Ct. App. 2007) (Slip op. at 15, 16).

#### **IV. ARGUMENT**

##### **A. Why Supreme Court Review is Not Appropriate.**

The Association agrees there is a substantial public interest in protecting homebuyers against fly-by-night developers like Colonial Development, LLC, just as the Legislature intended with the new survival statute. However, the issues presented here do not warrant Supreme Court review because the answers are so obvious, and recent applicable authority provides ample guidance. Denial of review would accomplish as much as a fourth or fifth opinion on these subjects. And, while this matter is pending for further unnecessary review, the homeowners' buildings will continue to deteriorate.

##### **B. Under the Court's Recent Opinion in *Ballard Square*, the New Survival Statute is Plainly Retroactive.**

In *Ballard Square*, the Court retroactively applied a new corporate survival statute.<sup>14</sup> Legislative intent for retroactive application was expressly set forth in that statute, but the Court also noted that "A statute will also apply retroactively if it is curative or remedial."<sup>15</sup>

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<sup>14</sup> *Condo. Owners Ass'n v. Dynasty Constr. Co.*, 158 Wn.2d 603, 146 P.3d 914 (2006).

<sup>15</sup> 158 Wn.2d at 617, citing *1000 Va. Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 584, 146 P.3d 423 (2006).

Stated more completely, a statute is retroactive 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.<sup>16</sup> An “amendment is curative and remedial if it clarifies or technically corrects an ambiguous statute without changing prior case law constructions of the statute.”<sup>17</sup> “Ambiguity” exists when the statute can be reasonably interpreted in more than one way.<sup>18</sup>

The new LLC survival statute was a corrective legislative response to the Court of Appeals’ decision in *Ballard Square*, which held that the Business Corporations Act only preserved claims existing before corporate dissolution, but not claims that accrued after.<sup>19</sup> In response to *Ballard Square*, the Legislature took up two measures. First was a comprehensive reform of the Business Corporations Act, SB 6596, containing provisions to correct *Ballard Square* by expressly preserving claims arising against a corporation after dissolution for a specified period.<sup>20</sup>

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<sup>16</sup> *Barstad v. Stewart Title Guar. Co.*, 145 Wn.2d 528, 536-537, 39 P.3d 984 (2002).

<sup>17</sup> *Id.*

<sup>18</sup> *McGee v. DSHS*, 142 Wn.2d 316, 325, 12 P.3d 144 (2000).

<sup>19</sup> *Ballard Sq. Condo. v. Dynasty Constr.*, 126 Wn. App. 285, 291, 108 P.3d 818 (2005), *aff’d on other grounds*, 158 Wn.2d 603, 146 P.3d 914 (2006).

<sup>20</sup> See House Bill Report, attached in Appendix A, p. 7 (Testimony of WSBA representative John Steel: “[I]n the late 1990’s there were some court decisions, including [the Court of Appeals decision in] *Ballard Square* last year, which was

The second measure was SB 6531 (RCW 25.15.303), a new survival provision for the LLC Act, sponsored by two of the same lawmakers who sponsored SB 6596. 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 became effective on the same day: June 7, 2006.

The Legislature's enacting the LLC survival statute in response to the injustice of the first *Ballard Square* decision shows that RCW 25.15.303 was intended to apply retroactively.<sup>21</sup> Moreover, testimony before the House Judiciary Committee from the bill's sponsor explained that its purpose was to correct the problem for LLCs:

Sen. Weinstein: "[T]he reason I'm here is that I heard this *Ballard Square* decision . . . from the Bar. . . . I knew that that was a problem for both corporations and LLCs . . . . So I thought . . . 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. . .

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

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very well reasoned but which reached a nonsensical result..."); *See also* House Bill Analysis, (Appendix A ) p. 2, ¶3; and SB 6531, esp. §17, as enrolled (Appendix B.)

<sup>21</sup> *McGee*, 142 Wn.2d at 325 ("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[.]'" (citations omitted.)

Exchanges in the same Committee hearing also disclose a clear intent and expectation that the law be retroactively applied:

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 members even foresaw applying the new survival statute to single-asset developer LLCs with insurance assets, just like Colonial Development:

Representative Jay Rodne: “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? . . . .

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.**”

*(Id.)*

Petitioner would ignore this history and resort to the “plain meaning” rule. But the LLC Act and the survival provision are both ambiguous, so it is fitting to consider legislative intent. The survival provision is ambiguous because it does not state whether it is intended to be retroactive, does not state whether it applies to cancelled LLCs, and could be construed in different fashions. The LLC Act prior to RCW 25.15.303 was also ambiguous. The entire Act says *nothing* about whether claims against LLCs ever abate, or when. In the absence of evidence of legislative intent, this silence is ambiguous.<sup>22</sup>

Indeed, Petitioner’s entire claim that cancellation terminates an LLC’s liability under RCW 25.15.070(2)(c) is at best a skewed interpretation of profoundly ambiguous language. The section states that “A limited liability company formed under this chapter shall be a separate legal entity, the existence of which **as a separate legal entity** shall continue until cancellation . . .” (emphasis added). The LLC pretends the statute instead reads: “an LLC’s existence shall continue until cancellation.”<sup>23</sup> But if the actual words of the statute have meaning,

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<sup>22</sup> *State v. Jacobs*, 154 Wn.2d 596, 603-04, 115 P.3d 281 (2005) (Statute that is silent as to whether sentence enhancements apply consecutively or concurrently is ambiguous).

<sup>23</sup> See Petition at 11 (“an LLC ceases to exist as a legal entity when its certificate of formation is canceled”); and Brief of Appellant at 12.

cancellation only means the end of an LLC's "separate existence," not the end of its existence altogether.<sup>24</sup>

RCW 25.15.303 is also remedial, providing new procedures to preserve claims against dissolved LLCs. 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.<sup>25</sup>

Petitioner's final contention that the new survival provision impairs an LLC's "vested right" to cancel itself, and creates a new substantive cause of action has no merit, either. A survival statute only preserves claims, it does not create new ones. The Court in *Ballard Square* explained that the period in which claims may be prosecuted against entities existing by Legislative grace may be changed without

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<sup>24</sup> The Association proposes that the hybrid nature of LLCs as a mixture of partnership and corporation supplies an answer to this perplexing language. At common law, partnerships existed even though they did "not exist in law apart from the individuals composing [them]." *Yarbrough v. Pugh*, 63 Wash. 140, 145, 114 P. 918 (1911). Like a partnership at common law, a cancelled LLC may have no "separate" existence apart from its members, but still have existence and be subject to suit.

The Court of Appeals appears to have accepted the Association's general proposition: "While cancellation marks the end of a LLC as a separate legal entity, it does not necessarily follow that claims against the LLC or its managers or members also abate." *Chadwick Farms*, Slip op. at 19-20.

<sup>25</sup> *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."

impacting any vested rights.<sup>26</sup> There is thus no “vested right” to a statutory defense, which is what the LLC insists is at issue.<sup>27</sup> And even if abatement here were the result of a common law rule, the Legislature is free to change such common law rules retroactively as well.<sup>28</sup>

**1. Petitioner’s Attempt To Carve Out An Exception To The Survival Statute For Cancelled LLCs Leads to Absurd Results.**

The LLC argues that the survival statute does not apply because it is a “cancelled” LLC, not just a “dissolved” one. But all cancelled LLCs are also first dissolved LLCs, so logically the survival statute applies to dissolved LLCs that later “cancel” themselves, too.<sup>29</sup> The Association has also observed that the LLC’s reading leads to absurd and unjust results.<sup>30</sup>

Ultimately, the LLC’s argument seeks to elevate form over substance. If the LLC is correct that it is cancellation which abates claims

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<sup>26</sup> *Ballard Square*, 158 Wn.2d at 619.

<sup>27</sup> *Ballard Square*, at 617-18, citing *Sparkman & McLean Co. v. Govnan Inv. Trust*, 78 Wn.2d 584, 586-87, 478 P.2d 232 (1970) (Usury defense not a vested right.).

<sup>28</sup> *Overlake Homes v. Seattle-First Nat’l Bank*, 57 Wn.2d 881, 884-885, 360 P.2d 570 (1961); *Condominium Ass’n v. Apartment Sales Corp.*, 101 Wn.App. 923, 936, 6 P.3d 74 (2000).

<sup>29</sup> A time-honored syllogism is apropos: “All men are mortal. Socrates is a man. Therefore, Socrates is mortal.” Likewise, all cancelled corporations are dissolved corporations. The statute applies to all dissolved corporations. Therefore, the statute applies to all cancelled corporations.

<sup>30</sup> See, e.g., CP 1011-1017, and Brief of Amicus Curiae Emily Lane Townhome Condominium Owners’ Association in *Roosevelt LLC et al. v. Grateful Siding, Inc. et al.*, No. 56879-5-I, pp. 29-34.

against an LLC, then mere dissolution of an LLC will never abate claims.<sup>31</sup> Petitioner is necessarily arguing, then, that RCW 25.15.303 is a completely meaningless law having no effect at all, because claims against a dissolved LLC never abate merely by dissolution anyway.

The Legislature is presumed not to have intended to enact an unnecessary or meaningless law, and constructions rendering their enactments meaningless are to be avoided.<sup>32</sup> More to the point, statutory construction must “**avoid unlikely, strained or absurd consequences which could result from a literal reading.**”<sup>33</sup> An absurd, literalist reading of perhaps inartful statutory language is precisely what the LLC advocates. The far better interpretation is that the Legislature views dissolution of an LLC as the abatement event (just as it is for corporations), and that it meant with RCW 25.15.303 to preserve all claims against dissolved LLCs, regardless of whether they are also

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<sup>31</sup> A “dissolved” LLC can always reinstate. RCW 25.15.290, RCW 25.15.270(1)(a). Claims never abate against a corporate entity capable of reinstatement. *Nat'l Grocery Co. v. Kotzebue Fur & Trading Co.*, 3 Wn.2d 288, 296, 100 P.2d 408 (1940) (“So long as a corporation may reinstate itself, it is not dead, and is, therefore, subject to process and suit.”)

<sup>32</sup> *W. Farm Serv., Inc. v. Olsen*, 151 Wn.2d 645, 661 (2004).

<sup>33</sup> *Sheehan v. Transit Auth.*, 155 Wn.2d 790, 803 (2005), quoting *Alderwood Water Dist. V. Pope & Talbot, Inc.*, 62 Wn.2d 319, 321 (1962).

subsequently “cancelled” or not.<sup>34</sup> That Legislative understanding of the law is entitled to great deference.<sup>35</sup>

**2. The Issue of Whether a Cancelled LLC Can Prosecute Claims is Not Before the Court in this Case.**

Without a hint of irony, the LLC argues it was “unduly harsh” for the court in *Chadwick Farms* to hold that cancelled LLCs can be sued, but cannot sue others. Perhaps, but the LLC’s capacity to sue is not at issue in this appeal: the LLC never tried to sue anyone in this case. It would be inappropriate to grant review on the basis of an issue that is not presented.<sup>36</sup> Moreover, the LLC has already *conceded* in briefing that it cannot sue others by virtue of its termination. (Brief of Appellant at 15.)

The “parade of horrors” postulated by the LLC is wholly imaginary anyway. The assets of the LLC have not disappeared. The LLC has merely lost its “separate existence” and separate capacity to sue. Its members are now trustees of the LLC’s assets, including its claims

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<sup>34</sup> Even the LLC’s own Answer says that it is immune from suit because it is “dissolved,” and never uses the word “cancelled.” (CP 60).

<sup>35</sup> All the more deference is appropriate given the importance of the Legislature’s public policy concerns, and astoundingly bad public policy being advocated by the LLC.

<sup>36</sup> *US W. Communs., Inc. v. Utils & Transp. Comm’n*, 134 Wn.2d 74, 112, 949 P.2d 1337 (1997)(“Only issues raised in the assignments of error, or related issues, and argued to the appellate court are considered on appeal.”) See also Brief of Appellant, pp. 1-4.

Petitioner LLC has recently filed a lawsuit against the subcontractors at Emily Lane. Appendix D. The issue may be properly presented and appealed when and if that suit is dismissed for lack of capacity to sue.

against subcontractors, insurers, and others.<sup>37</sup> When judgment is taken against the LLC, the Association will execute upon, acquire, and prosecute those claims. Moreover, as insureds under the LLC's policies and trustees of the LLC assets, the members of the LLC could act in their own names to prosecute the LLC's insurance bad faith claims.

### **3. Member Liability Issues Remain Unsettled, and Do Not Warrant Supreme Court Review at this Time.**

The Court of Appeals noted “a litany of questionable activity on the part of members” of the LLC which could result in their personal liability.<sup>38</sup> The record shows deceptive conduct which could justify piercing the corporate veil because the members acted as though the LLC continued to exist even while “rejoicing” over their decision to cancel it. The unresolved warranty claims also create an inference that their decision to secretly dissolve the LLC was an improper winding up under RCW 25.15.300, which could result in member liability. The failure of the members' agents serving on the Association's Board to take action in response to construction quality issues is a source of potential liability. The members' presence on the jobsite during construction leads to a

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<sup>37</sup> *Lonsdale v. Chesterfield*, 99 Wn.2d 353, 360, 662 P.2d 385 (1983) (“The dissolution...is immaterial, since whatever property rights they had would pass...to their stockholders...”) See also, *Penasquitos, Inc. v Superior Court*, 812 P.2d 154 (Calif. 1991) and *Gossman v. Greatland Directional Drilling, Inc.*, 973 P.2d 93 (Alaska 1999).

<sup>38</sup> *Emily Lane*, Slip op. at 6; see also *Chadwick Farms*, Slip op. at 18.

reasonable inference that they saw the obvious construction defects, and did not disclose them.

The trial court ruled that these claims – violation of the Consumer Protection Act, fraudulent concealment, breach of fiduciary duty – remain viable against the LLC, but not against the members. The only logical explanation is that the trial court concluded that the claims had factual merit, but that the members were immune under the LLC Act. The Court of Appeals simply and correctly advised the trial court that a dismissal based on member immunity was error given the issues of fact regarding member misconduct and failure properly to wind up.<sup>39</sup>

These issues have not been fully fleshed-out at the trial court level, and do not merit immediate discretionary review by this Court. Questions of member liability, if any remain, would be better addressed after trial.

**4. If the Court Accepts Review, It Should Address the Issue of Waiver of the Affirmative Defense.**

If the Court accepts review, it should decide whether the LLC's "aggressive pursuit of litigation" before bringing the question of its capacity to be sued to a head resulted in a waiver of the defense.

The LLC could have moved to dismiss even before answering.<sup>40</sup> It is improper for a litigant to increase expenses by delaying resolution of a

---

<sup>39</sup> *Emily Lane*, Slip op. at FN 6, and pp. 6-7.

<sup>40</sup> CR 12(b)(6).

threshold defense while actively litigating the claims. Prior behavior inconsistent with a defense, or delay by defense counsel in asserting a threshold defense may each constitute a waiver.<sup>41</sup> Asserting an “exhaustive list” of defenses in an Answer is no a safe harbor from waiver, because the fundamental concern is the Civil Rules’ purpose of promoting efficient and cost-effective litigation by avoiding delay tactics.<sup>42</sup>

The LLC’s deceptions and costly litigation tactics have been vastly more extensive and burdensome than any in the comparable relevant case law such as *Lybbert* and *King*. Such tactics are inexcusable, serve only to increase expenses, and should result in waiver.

## V. CONCLUSION

The issues actually on appeal on this case are so readily resolved by resort to well-established and recent case law that there is no need for further review and delay. The petition should be denied.

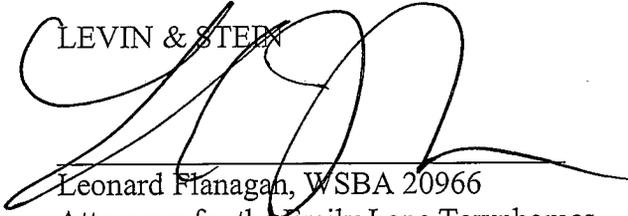
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<sup>41</sup> *Lybbert v. Grant County*, 141 Wn.2d 29, 39, 1 P.3d 1124 (2000) (CR 12(b)(6) defense for insufficient service of process waived by counsel’s delay); *King v. Snohomish County*, 146 Wn.2d 420, 47 P.3d 563 (2002) (Defense of failure to file pre-suit claim notice waived by litigation and discovery unrelated to the defense prior to filing motion to dismiss).

<sup>42</sup> *King* at 426; *Lybbert* at 39.

RESPECTFULLY SUBMITTED this 15<sup>th</sup> day of August, 2007.

LEVIN & STEIN

A large, stylized handwritten signature in black ink, appearing to read 'L Flanagan', is written over the printed name 'Leonard Flanagan'.

Leonard Flanagan, WSBA 20966  
Attorneys for the Emily Lane Townhomes  
Condominium Owners' Association

# APPENDIX A

# 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.

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### 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.)*

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**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.

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**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.

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**Judiciary Committee**

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**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.

# APPENDIX B

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**

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**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 C

No. 58825-7-I

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**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.**

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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 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.

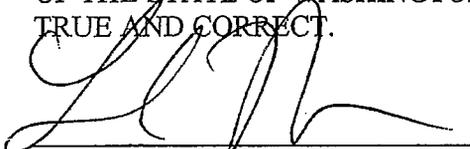
Chairwoman Pat Lance: “Representative Rodne.”

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

# APPENDIX D

Supreme Court No. 80459-1

Court of Appeals No. 58825-7-I

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**SUPREME COURT OF THE STATE OF WASHINGTON**

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

*Respondent*

v.

COLONIAL DEVELOPMENT, LLC, a Washington limited liability  
company, THE ALMARK CORPORATION, a Washington corporation,  
CRITCHLOW HOMES, Inc., a Washington corporation, MARK B.  
SCHMITZ, an individual, RICHARD E. WAGNER and ESTHER  
WAGNER d/b/a Woodhaven Homes, individuals, ALFRED J. MUS, an  
individual; and JEFFREY CRITCHLOW, an individual,

*Petitioners*

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**DECLARATION OF LEONARD FLANAGAN CERTIFYING  
COLONIAL DEVELOPMENT, LLC'S COMPLAINT FILED IN  
KING COUNTY SUPERIOR COURT ON JULY 17, 2007**

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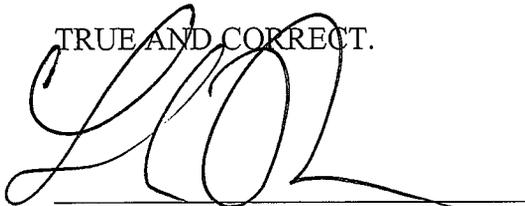
Submitted by:  
LEVIN & STEIN  
Leonard D. Flanagan, WSBA 20966  
210 Queen Anne Avenue, Suite 400  
Seattle, WA 98109  
Tel. (206) 388-0660  
Fax (206) 286-2660  
Attorney for Emily Lane  
Townhomes Condominium Owners  
Association

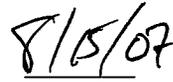
Leonard Flanagan, on oath, deposes and states:

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

2. Attached as Exhibit 1 is a true and correct copy of Colonial Development, LLC's Complaint against the subcontractors who constructed the Emily Lane Townhomes Condominiums, which was filed in King County Superior Court on or about July 17, 2007.

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

  
Leonard Flanagan

  
Date

# Exhibit 1

FILED

ORIGINAL

07 JUL 17 PM 4:09

KING COUNTY  
SUPERIOR COURT CLERK  
SEATTLE, WA

MICHAEL C. HAYDEN

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

COLONIAL DEVELOPMENT L.L.C., a  
Washington limited liability company,

Plaintiff,

v.

ASPEN SIDING, LLC, a Washington limited  
liability company; FIRST CLASS CONCRETE,  
INC., a Washington corporation; HODGE &  
PALMER, INC., a Washington corporation;  
NORKRI CORPORATION, a Washington  
corporation; BRIAN WHITE d/b/a SUPERIOR  
SPRINKLER SYSTEMS & LANDSCAPING, a  
sole proprietorship; LR DRYWALL SYSTEMS,  
INC., a Washington corporation; and  
ADVANCED PLUMBING & HEATING, INC., a  
Washington corporation, JOHN DOE  
SUBCONTRACTORS 1-20.

Defendants.

**07-2-23366-1 SEA**  
COMPLAINT FOR DAMAGES

COME NOW COLONIAL DEVELOPMENT, LLC, a Washington limited liability  
company, alleges and pleads the following Complaint against the defendants.

**I. PARTIES**

1.1 Colonial Development, LLC is a Washington limited liability company  
authorized to do business in the State of Washington, and was the Developer and general  
contractor of the Emily Lane Townhome condominiums located in Kenmore, Washington.

1           1.2. The following subcontracting entities provided work and/or materials pursuant  
2 to a contract with Colonial Development, LLC, whose work is, in whole or in part, implicated  
3 by the claims of the Emily Lane Homeowners Association against Colonial Development,  
4 LLC:

5           A. Aspen Siding, LLC is a Washington limited liability company and provided all  
6 siding, bellybands, soffits, trims, and flashings around windows, doors and bellybands, to  
7 the project.

8           B. First Class Concrete, Inc. is a Washington corporation who provided all  
9 exterior flatwork, steps, patios, and entryways to the project.

10          C. Hodge & Palmer, Inc. is a Washington corporation who provided all roofing to  
11 the project.

12          D. Norkri Corporation is a Washington corporation who provided all  
13 waterproofing and flashing of the decks on the project.

14          E. Brian White d/b/a Superior Sprinkler Systems & Landscaping is a sole  
15 proprietorship and provided all of the grading, landscaping, and drainage for the project.

16          F. LR Drywall Systems, Inc. is a Washington corporation and installed the  
17 drywall and PVC paint on the project.

18          G. Advanced Plumbing & Heating, Inc. is a Washington corporation and installed  
19 the plumbing and heating systems on the project, including the exhaust vents, laundry  
20 hoses, exhaust fans, and radiant heating system, for the project.

21          J. John Doe Subcontractors 1-20, are subcontractors whose work may be now  
22 or hereinafter implicated by claims made by the Emily Lane Homeowners Association or  
23 other parties over whom the Plaintiff has no control.

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**II. JURISDICTION AND VENUE**

2.1 This court has jurisdiction over the parties to this action, as well as the subject matter thereof, as the Emily Lane Townhome Condominium project, which is the subject of this lawsuit, was built in King County, Washington

2.2 Venue is proper in King County.

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**III. FACTS COMMON TO ALL CLAIMS**

3.1 Plaintiff was the developer and general contractor of a condominium project called the Emily Lane townhome condominiums (hereinafter "Emily Lane project"). The Emily Lane project is comprised of 24 condominium units in Kenmore, Washington.

3.2 Pursuant to the Washington Condominium Act, an Association was formed at the Emily Lane project called the Emily Lane Homeowners Association (the "HOA").

3.3 After completion of the project, in May 2005, the HOA sent Colonial Development a letter notifying it of alleged construction defects relating to the Emily Lane Project. The HOA's experts alleged various problems with the construction of the Emily Lane project, including systemic defects in the materials, design, installation and/or construction of the Project's exterior siding, trim and other cladding materials, sealant, and other building envelope components, underlying weather resistive and vapor/moisture barriers, defectively installed or omitted flashing and building paper, defective roof, deck and railing design and/or construction, defective and/or defectively installed and/or detailed windows, doors, and other penetrations, waterproofing defects, resultant water intrusion, venting defects, fire-proofing defects, site grading defects, concrete defects, structural defects, lack of PVA primer and/or defective installation of the PVA primer, and plumbing and other mechanical system defects.

3.4 On July 19, 2005, the Emily Lane Homeowners Association filed a Complaint against Colonial Development, LLC, and its five members alleging causes of action for breach of implied warranty under Washington's Condominium Act, breach of implied

1 warranty of habitability, breach of contract and express warranty, breach of fiduciary duty,  
2 violation of RCW 19.40.041, and breach of RCW 64.34.405, 64.34.410 and 64.34.415.

3 3.5 Colonial Development, LLC tendered the defense and indemnity of the Emily  
4 Lane Homeowners Association's claims to each of the Defendant subcontractors pursuant  
5 to their contracts, and their insurance carriers based on Colonial Development, LLC's status  
6 as an additional insured under the subcontractors' liability insurance policies. Those tenders  
7 of defense and indemnity were accepted by some of the defendants' insurance carriers, but  
8 most of the defendants and their insurance carriers either did not respond or denied Colonial  
9 Development, LLC's tender.

10 3.6 Since then, Colonial Development, LLC has continued to keep the  
11 Subcontractor defendants and their insurers informed as to the status of the Emily Lane  
12 Homeowners Association's lawsuit, including providing each of the subcontractor  
13 defendants with copies of all expert reports and cost estimates relating to the alleged  
14 construction defects, and requesting that they participate in a mediation.

15 **IV. TENDER OF DEFENSE AND INDEMNITY**  
16 **TO**  
17 **ALL DEFENDANTS**

18 4.1 Plaintiff herein re-tenders the defense and indemnity of this matter to all of  
19 the Defendants and, to the extent such tender has not been previously accepted, demands  
20 that each of the Defendants fully defend, indemnify and hold harmless the Plaintiff from any  
21 claims, demands, damages, losses and liabilities (whether economic loss or property  
22 damage) which it may be found liable to the Emily Lane Homeowners Association which are  
23 connected with the Defendants' work on the Emily Lane project.  
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1 The Plaintiff is entitled to all remedies afforded to it under the law based on indemnity  
2 theories, including expressed, implied, written, oral or equitable.

3 6.3 By reason of the above-referenced Defendants' breaches, the Plaintiff has  
4 been damaged in an amount to be proven at trial. Said damages include any and all  
5 liabilities the Plaintiff may be found owing to the Emily Lane HOA and all costs and  
6 disbursements incurred in defending the Emily Lane HOA's claims, such as reasonable  
7 attorney's fees and costs, and all reasonable attorney's fees incurred in establishing its  
8 rights to a defense and indemnity against the Defendants.

9 **VII. THIRD CAUSE OF ACTION – NEGLIGENCE**  
10 **AGAINST ALL DEFENDANTS**

11 7.1 The Plaintiff realleges and incorporates paragraphs 1.1 through 6.3 herein.

12 7.2 Each of the Defendants performed their work in a negligent manner and are  
13 liable to the Plaintiff for all damages caused by their negligence, including any and all  
14 damages the Plaintiff may be found due and owing to the Emily Lane HOA caused by the  
15 negligence of the subcontractor defendants. The Plaintiff is entitled to all remedies afforded  
16 to it under the law based on negligence theories.

17 **VIII. PRAYER FOR RELIEF**

18 WHEREFORE, Plaintiff prays that judgment be entered against the Defendants as  
19 follows:

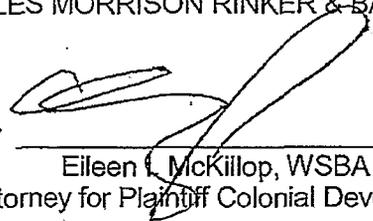
20 A. Awarding Plaintiff damages in an amount to be proven at trial, including any and  
21 all liabilities the Plaintiff may be found owing to the Emily Lane HOA and all costs or any  
22 amounts paid to the Emily Lane HOA in settlement, all reasonable attorney's fees and costs  
23 incurred in defending the Emily Lane HOA's claims, and all reasonable attorney's fees  
24 incurred in establishing its rights to a defense and indemnity against the Defendants  
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B. Such other and further relief as the Court deems fair, just and equitable.

DATED this 16 day of July, 2006.

OLES MORRISON RINKER & BAKER LLP

By   
Eileen McKillop, WSBA 21602  
Attorney for Plaintiff Colonial Development, LLC

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON

Supreme Court No. 80459-12007 AUG 16 P 4: 22

Court of Appeals No. 58825-7 BY RONALD R. CARPENTER

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CLERK

**SUPREME COURT OF THE STATE OF WASHINGTON**

---

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

*Respondent*

v.

COLONIAL DEVELOPMENT, LLC, a Washington limited liability  
company, THE ALMARK CORPORATION, a Washington corporation,  
CRITCHLOW HOMES, Inc., a Washington corporation, MARK B.  
SCHMITZ, an individual, RICHARD E. WAGNER and ESTHER  
WAGNER d/b/a Woodhaven Homes, individuals, ALFRED J. MUS, an  
individual; and JEFFREY CRITCHLOW, an individual,

*Petitioners*

**F I L E D**  
AUG 16 2007  
CLERK OF SUPREME COURT  
STATE OF WASHINGTON

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**CERTIFICATE OF SERVICE**

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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 Emily Lane  
Townhomes Condominium Owners  
Association

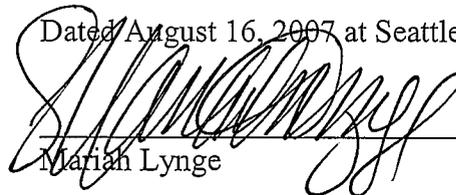
I hereby certify that on the 16<sup>th</sup> day of August 2007, I did cause to be served true and correct copies, via the indicated method of delivery, of:

**ANSWER TO PETITION FOR REVIEW**

<p><u>Counsel for Appellants</u>  Eileen I. McKillop, WSBA #21602  Oles Morrison Rinker &amp; Baker  701 Pike Street, #1700  Seattle, WA 98101</p>	<p><input type="checkbox"/> U.S. Mail,  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 &amp; Soderland  900 Fourth Avenue, #3003  Seattle, WA 98164</p>	<p><input type="checkbox"/> U.S. Mail,  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 &amp; Umlauf  900 Fourth Avenue, #1700  Seattle, WA 98164</p>	<p><input type="checkbox"/> U.S. Mail,  postage prepaid  <input checked="" type="checkbox"/> Hand Delivery  <input type="checkbox"/> Overnight Mail</p>
<p><u>Supreme Court</u>  415-12<sup>th</sup> Ave SW  PO Box 40929  Olympia, WA 98504</p>	<p><input type="checkbox"/> U.S. Mail,  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 August 16, 2007 at Seattle, Washington.

  
\_\_\_\_\_  
Mariah Lyng