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CLERK OF SUPREME COURT  
STATE OF WASHINGTON

**SUPREME COURT OF THE STATE OF WASHINGTON**

CHADWICK FARMS OWNERS ASSOCIATION,  
a Washington nonprofit corporation,

Respondent,

v.

FHC, LLC, a Washington limited liability company,

Petitioner,

v.

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

Respondents.

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COURT OF APPEALS  
STATE OF WASHINGTON  
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**FHC, LLC'S PETITION FOR REVIEW**

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**ORIGINAL**

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**I. IDENTITY OF PETITIONER**

The Petitioner is FHC, LLC, a cancelled LLC, and Defendant and Respondent/Cross-Appellant below.

**II. DECISION**

On June 18, 2007 the Washington State Court of Appeals issued its decision, affirming in part and reversing in part, the September 30, 2005 summary judgment dismissal of all claims by the trial court. *Chadwick Farms Owners Assn. v. FHC, LLC*, \_\_\_ P.3d \_\_\_, 2007 WL 1733253, Wash. App. Div. 1 (No. 58796-0-1). The Court of Appeals reversed the dismissal of Respondent Chadwick Farms Homeowners Association's claims against FHC, LLC and affirmed the dismissal of FHC, LLC's third-party claims against Respondent subcontractors.

**III. ISSUES PRESENTED FOR REVIEW**

1. Did the Court of Appeals err in failing to affirm dismissal of suit against FHC, LLC, a cancelled LLC, pursuant to RCW.25.15.070 and RCW 25.15.080?
2. Did the Court of Appeals err when it chose to rewrite RCW 25.15.303 because of what it characterized as an "inartful" word choice by the Legislature?

3. Did the Court of Appeals err when it restricted the RCW 25.15.270 winding up period to two years following administrative dissolution?
4. Did the Court of Appeals err when it held that RCW 25.15.303, a June 2006 LLC Act statutory amendment, applied retroactively?
5. Did the Court of Appeals err in affirming the dismissal of FHC, LLC's third party claims against its subcontractors?

#### **IV. STATEMENT OF THE CASE**

##### **A. Factual Background.**

FHC, LLC was formed on December 23, 1999 as a limited liability company ("LLC") for the purpose of constructing the Chadwick Farms project. CP 76. Following construction of the project, FHC, LLC ceased active operations. CP 76. On March 24, 2003, FHC, LLC was administratively dissolved by the Secretary of State. CP 13. On March 24, 2005, FHC, LLC's Certificate of Formation was cancelled pursuant to RCW 25.15.290(4), and FHC, LLC ceased existence as a legal entity.

##### **B. Procedural Background.**

On August 18, 2004, Chadwick Farms Homeowners Association ("HOA") brought a claim for construction defects against FHC, LLC

arising from the construction of the Chadwick Farms project ("Project"). CP 15-19. On May 11, 2005, after completing its forensic investigation, FHC, LLC filed a third-party complaint against the subcontractors and design professionals whose work was implicated by the allegations in Plaintiff's complaint. CP 139-152. On August 24, 2005, FHC, LLC moved for summary judgment dismissal of the HOA's claims on the ground that FHC, LLC ceased to exist because of the March 24, 2005 cancellation and that all claims against it abated. CP 1-19. The subcontractor third-party defendants also moved for summary judgment dismissal of FHC, LLC's third-party claim arguing that FHC, LLC, a cancelled LLC, as a legal non-entity, could not pursue claims. CP 20-51. On September 30, 2005, the trial court entered an order dismissing with prejudice the HOA's complaint against FHC, LLC and also dismissing FHC, LLC's third-party complaint against subcontractors. CP 98-101; 102-112.

**C. Decision by the Court of Appeals.**

The Court of Appeals held that RCW 25.15.303, a 2006 amendment to the LLC Act, providing a three-year survival period to commence actions against a dissolved LLC, applied retroactively, and reinstated the suit by HOA against FHC, LLC. The Court further held that the 2006 statutory survival amendment only preserved actions against an

LLC and not actions brought by an LLC. The Court ruled that FHC, LLC, a cancelled LLC, notwithstanding it was a legal non-entity, lacked standing to prosecute its claims against subcontractors, although it could be prosecuted as a legal non-entity.

The Court of Appeals interpreted RCW 25.15.285 to mean that an administratively cancelled limited liability company has only two years to complete winding up activities after dissolution, including active litigation. Notwithstanding there is no provision to reinstate a cancelled LLC, it ruled that FHC, LLC had to reinstate itself in order to continue its third-party claims.

The Court of Appeals reversed the trial court's dismissal of claims against FHC, LLC, retroactively applying RCW 25.15.303. On June 7, 2006, while the appeal was pending, RCW 25.15.303 was added to the Washington Limited Liability Company Act. RCW 25.15.303 creates a three-year survival of claims period after an LLC is dissolved. It makes no reference to and takes no account of LLC statutory cancellation provisions. Despite the express amendment language limiting the application of RCW 25.15.303 to dissolved LLCs, the Court of Appeals chose to "rewrite" the statute because of what it characterized as an "inartful" word choice by the legislature, i.e., selecting dissolution rather than cancellation as the commencement of the 3 year survival period. It

ruled that the three-year survival period applied even after an LLC has been cancelled.

**V. ARGUMENTS WHY REVIEW SHOULD BE ACCEPTED**

Review should be accepted because the issues presented are of public interest to all who deal with the LLC form to conduct business within the State of Washington.

**A. The New Survival of Claims Amendment Was Wrongly Applied to FHC, LLC, a cancelled LLC.**

The legal status of LLCs in Washington is governed by the Limited Liability Company Act. Formation of an LLC occurs when a Certificate of Formation is executed and filed with the Secretary of State. RCW 25.15.070. Termination of an LLC most often is a two-step process. The first step is dissolution of an LLC. The second step is cancellation of the Certificate of Formation. At the same time, an LLC may cancel without being dissolved. Once the LLC's Certificate is cancelled, the LLC ceases to exist for all purposes. RCW 25.15.270(2)(c). Dissolution of FHC, LLC was by Secretary of State administrative action. Pursuant to RCW 25.15.280, administrative dissolution occurs when an LLC fails to file its annual report. FHC, LLC was administratively dissolved on March 24, 2003 pursuant to RCW 25.15.080.

A dissolved LLC continues to exist, for purposes of winding up.

See RCW 25.15.285(3) and RCW 25.15.290. RCW 25.15.295(2) reads:

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

RCW 25.15.295. RCW 25.15.080 reads:

**A certificate of formation shall be canceled** upon the effective date of the Certificate of Cancellation, **or as provided in RCW 25.15.290**, or upon the filing of articles of merger if the limited liability company is not the surviving or resulting entity in a merger . . .

RCW 25.15.080 (*emphasis added*). RCW 25.15.290(4) reads:

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

RCW 25.15.290(4) (*emphasis added*).

Pursuant to the statutory framework, as of March 24, 2005, FHC, LLC's Certificate of Formation was cancelled and FHC, LLC ceased to exist as a separate legal entity:

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 of the limited liability company's Certificate of Formation.**

RCW 25.15.070(2)(c) (*emphasis added*). Once FHC, LLC's Certificate of Formation was cancelled, the HOA's suit against FHC, LLC abated as there is no statutory provision or other basis in law permitting claims to continue against a cancelled LLC, a legal non-entity. There is also no statutory basis to extend the life of an LLC once its Certificate of Formation is cancelled. The Court of Appeals, in effect extended the life of FHC, LLC after cancellation to answer to the HOA claims.

It is the golden rule of statutory interpretation that unreasonable results be rejected. *See Cooper's Mobile Homes, Inc. v. Simmons*, 94 Wash.2d 321, 333, 617 P.2d 415, 422 (1980)<sup>1</sup>. The express provision of RCW 25.15.295(2) states that suit can be maintained against a limited liability company only until it is cancelled pursuant to RCW 25.15.080. Therefore, once FHC, LLC, was cancelled, it ceased to exist as a separate legal entity for all purposes. Permitting suit against a cancelled LLC is an unreasonable result. Cancellation of the Certificate of Formation of the LLC is the death of the LLC entity for all purposes.

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<sup>1</sup> The "golden rule" of statutory interpretation mandates - "(The) unreasonableness of the result produced by one among alternative possible interpretations of a statute is a reason for rejecting that interpretation in favor of another which would produce a reasonable result." *Id.*

Pursuant to RCW 25.15.070(2)(c), once an LLC's Certificate of Formation is cancelled, it no longer exists for any purpose. Because it ceased to exist, the HOA's claims against FFC, LLC should be dismissed. There is no statutory provision that saves claims against a cancelled LLC. The survival amendment keyed to dissolution does not apply to a cancelled LLC.

What the Legislature chose not to do in June 2006, is to create a survival of claims provision that would apply to cancelled LLCs. Because the Legislature has chosen to terminate the life of an LLC upon cancellation of its Certificate of Formation, the Court of Appeals had no statutory basis to resurrect its status as a legal entity. Disregarding the plain meaning and legal effect of RCW 25.15.070(2)(c), the Court of Appeals rendered that statutory provision meaningless in contravention of the principle that a court may not construe a statute in a way that renders statutory language meaningless or superfluous. *Lakemont Ridge Homeowners Association v. Lakemont Ridge Limited P'ship*, 156 Wn.2d 696, 698-99, 131 P.3d 905 (2006). The Court of Appeals cited to this axiom in its decision construing the Model Business Act, Title 23B RCW. *Ballard Square Condominium Owners Assn. v. Dynasty Construction Co.*, 126 Wn. App. 285, 291-92 n.22, 108 P.3d 818 (2005). The Court of Appeals simply refused to follow its own precedent, disregarding the

cancellation provision in the LLC Act. This Court also applied the principle of avoiding the rendering of statutory language meaningless or superfluous in its *Ballard Square* decision. *Ballard Square Condominium Owners Assn. v. Dynasty Construction Co.*, 158 Wn.2d 603, 610, 146 P.3d 914 (2006). It is of no consequence that the HOA filed its complaint against FHC, LLC prior to cancellation on March 24, 2005. The LLC Act terminates the existence of a limited liability company upon cancellation and does not distinguish between claims that were brought prior to cancellation or those brought after cancellation.

It is also a basic principle of statutory interpretation that a Court cannot add words to a statutory provision that are not there. See *Restaurant Development, Inc. v. Cananwill, Inc.*, 150 Wash.2d 674, 681, 80 P.3d 598, 601-02 (2003) (“Further, a court must not add words where the legislature has chosen not to include them.”) RCW 25.15.295 is clear. Once a limited liability company is cancelled, it is no longer a legal entity. To find an exception for claims preserved for three years following dissolution would be to add words to the statute that do not exist. The Court of Appeals effectively substituted the word “cancellation” for “dissolution” in violation of this principle.

While the appeal was pending, the Legislature, in June 2006, passed RCW 25.15.303, which creates a three year survival of claims after

date of LLC dissolution. The Court of Appeals held that the new statute applied retroactively and to cancelled LLCs. It added “cancellation” to the amendment. RCW 25.15.303 provides for a survival of claims period, however, only against dissolved LLCs similar to survival periods contemporaneously created by the 2006 Legislature for dissolved corporations under the Business Corporation Act. *See* RCW 23B.14.340.

The relevant language of RCW 25.15.303 reads:

The dissolution of a limited liability company does not take away or impair any remedy available against that limited liability company.... (emphasis added).

No amendment was made to affect the cancellation sections of the LLC statute. The amendment does not abrogate RCW 25.15.070(2)(c) and in fact left it fully intact. The Court of Appeals exceeded its authority by effectively rewriting the statute because of what it perceived to be “inartful” word choice by the Legislature. It substituted “cancelled” for “dissolved” because the Legislature was “inartful” in its reference point for the survival of claims.<sup>2</sup>

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<sup>2</sup> The Court’s ruling that suit may be brought within three years of dissolution albeit after an LLC cancellation begs the question of how a successful plaintiff might collect a judgment against a legal non-entity. A judgment can only be entered against a legal person or a legal entity.

**B. The Court of Appeals Erred When it Held that RCW 25.15.303, Applied Retroactively to Cancelled LLCs.**

The Court of Appeals decision correctly construed the LLC Act prior to the 2006 amendment as not providing for survival of claims against a LLC after a certificate of cancellation has been filed. This was the proper interpretation of the statute as intended by the Legislature when the LLC framework was first constructed. The LLC Act states that an LLC that is cancelled is no longer a legal entity. Consequently there could never be a survival of claims against a cancelled LLC, a legal non-entity.

Putting aside the fact that the Court of Appeals applied the new survival statute to cancelled LLCs, notwithstanding the statutory wording tying survival to dissolution, and notwithstanding that a cancelled LLC is a non-entity, the court erred when it found the survival statute applied retroactively. Statutory amendments are generally prospective but can act retroactively if the legislation so reflects that intention or if the amendment is curative or remedial. *1000 Virginia Ltd. Partnership v. Vertecs*, 158 Wn.2d 566, 584, 146 P.3d 423 (2006). The Court of Appeals analogized to the retroactivity analysis of this Court in *Ballard Square Condominium Owners Association v. Dynasty Construction Co.*, 158 Wn.2d 603, 146 P.3d 914 (2006). Its retroactivity analysis was misplaced. In this Court's *Ballard Square* decision, the Court set forth the general rule

that, as to pre-existing actions, a new limitations period runs from the date of its enactment. *Ballard Square*, 158 Wn.2d at 616. If this rule is applied, there is no survival action available to the HOA for its claims against FHC, LCC because they were brought before June 6, 2006, the date of the amendment. Moreover the LLC cancellation provisions would fully operate to preclude a suit against FHC, LLC. There is a qualifier to the rule:

“[T]he limitation of the new statute, as applied to pre-existing causes of action, commences when the action is first subjected to the operation of the statute, *unless the Legislature has otherwise provided.*” (Internal citations omitted.)

*Id.* In *Ballard Square*, the Court found clear evidence that a survival of claims amendment, also added to the Model Business Act in June 2006 at RCW 23B.14.340, “otherwise provided”. Therein, the Legislature expressed its clear intention to apply the survival of claim amendment retroactively. It did so by creating two periods for survival of claims. For corporations that dissolved before the amendment’s effective date, a two year limitation period applies. *Id.* at 616. For corporate dissolutions after the date of amendment, a three-year survival period applied. *Id.* The statute showed clear legislative intent that it applied to actions arising before its effective date. *Id.*

Here, the Legislature created the survival action against dissolved LLCs with no bifurcated provisions for a survival prior and after the effective date of enactment. Instead it created a single 3-year survival period

which coincidentally is the same survival period for claims created after the effect of the amendment in the Model Business Act. Both the survival amendments to the Model Business Act and the amendments to the LLC Act were enacted by the same Legislature in the same session by the same legislators. Had the Legislature intended a retroactive effect of the LLC survival statute, it certainly knew how to make its intentions plain as it did when it amended the Corporate Business Act. The Court of Appeals failed to appreciate this compelling distinction when it found that the LLC survival provision was retroactive. The general rule is that lacking clear legislative intent, there is no retroactivity. The Court of Appeals failed to appreciate that the Legislature clearly did not express an intention to make the LLC amendment retroactive.

In *1000 Virginia Limited Partnership v. Vertecs Corporation*, 158 Wn.2d 566, 584, 146 P.3d 423 (2006), this Court made its most recent pronouncement concerning retroactive application of statutory amendments. The Court reiterated the axiom that a statute may be retroactively applied if the Legislature so intends, and where retroactive application does not impair a constitutional right. *Id.* A statute may also apply retroactively if it is curative or remedial. *Id.* A statute is remedial when it relates to practice, procedure, or remedies and does not affect a substantive or vested right. *Id.* at 586-87. A cause of action that exists only by virtue of a statute is not a

vested right and it can be retroactively abolished by the Legislature. *Ballard Square*, 158 Wn.2d at 617. However, the Legislature, in creating the three-year LLC survival of claims following date of dissolution, did not abolish or amend in any way the cancellation provisions of the LLC Act and the rights flowing to a cancelled LLC under those provisions. These were left intact and must be given full force and effect.

The Court is urged to follow its result in *1000 Virginia*, where it held that RCW 4.16.326(1)(g), a statutory amendment, did not apply retroactively. *1000 Virginia*, 158 Wn.2d at 587. In *1000 Virginia*, the Court found no basis for departing from the general rule that newly-enacted statutes and amendments to statutes apply prospectively. *See Ballard Square*, 158 Wn.2d at 618. In its *Ballard Square* analysis, the Court distinguished the statutory amendment in *1000 Virginia* from the statutory amendment in *Ballard Square* by looking at the face of the amendments themselves. *Id.* The Court found that RCW 23B.14.340, the survival of action amendment to the corporate statute, on its face showed clear legislative intent that the statute apply retroactively. The language of the amendment in *1000 Virginia* did not have any indication on its face that it was to be retroactive. Here there is no basis to depart from the general rule that newly-enacted statutes and amendments apply prospectively. Had the Legislature intended to apply RCW 25.15.303 retroactively, it knew how to

do so. On the face of the amendment, there is no indication the Legislature intended retroactivity. The fact that it failed to enact a bifurcated survival of claims scheme as it did with the corporation amendment answers the question of intention. Although the Legislature is well within its powers to create the post-dissolution survival period for claims against an LLC, its act is prospective because it did not “otherwise indicate.”

**C. Alternatively, The Court of Appeals Erred When It Determined the LLC Act Has A Two-Year Time Limit to Complete Winding Up.**

Another legal question before the Court of Appeals was whether FHC, LLC had the capacity to sue or be sued after it was administratively cancelled in March 2005 as part of ongoing winding up activities. The legal issue is whether an LLC after its Certificate of Formation is cancelled can continue to wind up. RCW 25.15.295(2).

The statutes applicable to dissolution, winding up and cancellation are difficult to reconcile, especially in the context of administratively dissolved LLCs. However, by rule of statutory construction, each provision must be given weight. RCW 25.15.295 permits a dissolved LLC to wind up, including prosecuting and defending claims, until a Certificate of Cancellation is filed, presumably by the LLC. An LLC can only file a Certificate of Cancellation once it completes winding up, including making provisions for known or contingent claims. RCW 25.15.300. An

administratively dissolved LLC continues its existence as a legal entity even as it winds up. RCW 25.15.285.

However, a Certificate of LLC Formation is automatically cancelled by the Secretary of State after two years of dissolution. One issue on appeal was whether an administratively dissolved and cancelled LLC in the midst of ongoing litigation continues to exist solely for purposes of winding up that litigation. The court incongruently both allowed and refused a cancelled LLC to continue litigation once cancellation occurred.

RCW 25.15.270 entitled "Dissolution" lists six events that affect an LLC dissolution. RCW 25.15.270 contains the general rule that once dissolved, the only activities an LLC can perform are those necessary to winding up. However, because of a poor word phrasing in the statute, the statute can be read that upon an event of dissolution, winding up is also complete. The Court of Appeals made that unreasonable interpretation.

The statute provides:

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

(1)(a) The dissolution date, if any, specified in the certificate of formation. If a dissolution date is not specified in the certificate of formation, the limited liability company's existence will continue until the first to occur of the events described in subsections (2) through (6) of this section. If a dissolution date is specified in the certificate of formation, the certificate of formation may be amended and

the existence of the limited liability company may be extended by vote of all the members;

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

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

(3) The written consent of all members;

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

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

**(6) The expiration of two years after the effective date of dissolution under RCW 25.15.285 without the reinstatement of the limited liability company.**

RCW 25.15.270 (emphasis added).

The prefatory language of RCW 25.15.270 uses the phrase “shall be wound up”. According to the Court of Appeals, any of one of the six events terminates winding up, presumably in the middle of an ongoing litigation, as here. When the statute is given a more reasonable interpretation the happening of one of the six events was solely meant to *trigger* winding up, not terminate winding up. By limiting its focus, the Court of Appeals found that there was an arbitrary two-year time limitation to complete winding up for administratively cancelled LLCs.

This ruling essentially renders meaningless the other winding up provisions in the LLC Act. As interpreted by the Court of Appeals, the Act now arbitrarily terminates the winding up period upon dissolution regardless of whether winding up is actually completed.

Because more than two years passed since FHC, LLC was administratively dissolved, its winding up period according to the Court of Appeals terminated. It could not pursue third-party claims. As such, FHC, LLC did not have standing to prosecute claims against the subcontractors. Prior to enactment of the new 2006 amendment discussed below, the winding up provision of RCW 25.15.270 was the only provision within the Act that permitted a dissolved LLC to sue or be sued.

**D. The LLC Statute Is Not Analogous To the Business Corporation Act, Chapter 23B-14 RCW.**

When the Legislature amended the Business Corporation Act to provide survival periods for claims against dissolved business corporations, the reference to date of dissolution as the key event was clear and unambiguous. A corporation was amenable to suit as a legal entity for three or two years following dissolution. The Business Corporation Act, however, has no provision for canceling a corporation with its consequential creation of a non-legal entity. A corporation does not become a non-legal entity after

a two-year dissolution period like an LLC. The LLC Act, in contrast, set forth at RCW 25.15.070(2)(c), provides:

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 of the limited liability company certificate of formation.**

(Emphasis added.)

The Court of Appeals failed to reconcile and give meaning and weight to the cancellation section in the LLC statute. It is a rule of statutory construction that all statutory provisions must be given equal weight. The underlying trial court recognized and properly gave weight to the cancellation statute. Even the Court of Appeals agreed that prior to the 2006 amendment there was no survival of an action or claim against a cancelled LLC. It believed the amendment somehow preserved a claim against a cancelled LLC. The 2006 amendment, however, made no changes to the LLC's status as a legal non-entity upon cancellation pursuant to RCW 25.15.070. As inartful as the Legislature may have been in amending the LLC statute in 2006, all statutory provisions must be reconciled.

The only reasonable interpretation of the LLC statute, as amended in 2006, is that there is a three-year survival claim following date of dissolution but only if the LLC has not been canceled. The Court of Appeals decision gave effect to the three-year survival of claims provision based on date of

dissolution but eviscerated the cancellation (and winding up) statutory provisions.

The Court of Appeals ruled that the survival provision at issue applies to dissolved LLCs whether or not a certificate of cancellation was issued pursuant to RCW 25.15.080. The Court of Appeals so held because it believed it would render the 2006 amendments inoperative as it “would link the survival of claims not to a specific survival period, but rather to the actions or, as in this case, non-action of a company.” The Court of Appeals failed to realize that the 2006 amendment is not inoperative in all circumstances. In the absence of a cancellation, the three-year survival statute would operate to create a survival of claims period tied to dissolution.

FHC, LLC was cancelled by the Secretary of State. It became a legal non-entity. The claims against it then lost legal force, regardless of the 2006 amendment. If the claims against it can legally continue, so also should its third-party claims. FHC, LLC had the right to wind up including prosecution and defense of suits including civil suits as part of the closure of the LLC. This is a statutory mandate. The Court of Appeals believed it was the non-action of FHC, LLC that resulted in cancellation. The facts, however, showed that FHC, LLC was vigorously defending itself and was investigating and pursuing third-party action to recover any liabilities it may have had to the HOA.

**E. The Court of Appeals Erred in Dismissing FHC, LLC's Claims Against Subcontractors.**

FHC, LLC during the period of administrative dissolution was defending itself against the HOA's claims and investigating whether it had third-party claims against subcontractors. Ultimately out of prudence it chose to state those third-party claims albeit after cancellation, but arguably in the course of a winding up the litigation that commenced prior to cancellation. It either was or was not a legal entity for the purpose of being a party to the litigation. The Court of Appeals improperly delimited the winding up period to two years, holding that FHC, LLC could only pursue third-party claims if it reinstated itself. Its interpretation is contrary to the language of the LLC Act which was not affected by the 2006 amendment. If FHC, LLC was properly in the process of winding up, it could not itself file a certificate of cancellation without violating the Act. The Court erroneously ruled that FHC, LLC had to reinstate itself as an active corporation to pursue third-party claims following administrative cancellation, but was open to HOA litigation even if it failed to reinstate. On the one hand the Court of Appeals erroneously disregarded FHC, LLC's cancellation making it a non-entity subject to suit. On the other hand, it ruled it had no standing as a legal entity to pursue third-party claims. Either FHC, LLC is shielded from and cannot pursue claims upon cancellation or has the right to pursue claims after

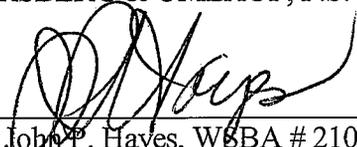
cancellation as a continuation of winding up. The LLC framework allows for a winding up process notwithstanding dissolution or cancellation administratively. Cancellation of the certificate of formation means the LLC can no longer actively perform its regular business, but it does not preclude winding up.

#### **F. Conclusion**

The Legislature perhaps could have made the statutory framework a more cohesive and integrated law. Notwithstanding the creation of a survival of claims provision, the Legislature left intact the LLC cancellation provisions. The legal effect of cancellation cannot be ignored. The LLC survival amendment is prospective in application under well established law and precedent. The Legislature in 2006 enacted a survival of claims provision for both the corporate and LLC statutes. The corporation statutory amendment clearly had a retroactive intention; the LLC amendment did not. Alternatively, the proper way to view the legislative intent is to allow a cancelled LLC to defend and bring claims as part of a winding up process.

Respectfully submitted this 16th day of July, 2007.

FORSBERG & UMLAUF, P.S.

By 

John P. Hayes, WBBA # 21009  
Attorneys for Petitioner FHC,  
LLC

**CERTIFICATE OF SERVICE**

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served the foregoing FHC, LLC'S PETITION FOR REVIEW on the following individuals in the manner indicated:

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Supreme Court Clerk  
Washington State Supreme Court  
415 12th Ave. SW  
P.O. Box 40929  
Olympia, WA 98504  
Facsimile: 360-357-2102  
 Via U.S. Mail  
 Via Facsimile  
 Via Hand Delivery

**SIGNED** this \_\_\_\_\_ day of July, 2007, at Seattle, Washington.

\_\_\_\_\_  
Carol M. Simpson

**CERTIFICATE OF SERVICE**

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

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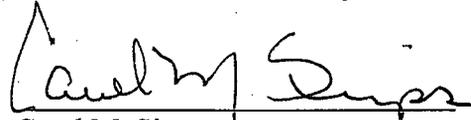
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One Union Square  
600 University  
Seattle, WA. 98101

(X) Via Hand Delivery

**SIGNED** this 16<sup>th</sup> day of July, 2007, at Seattle, Washington.

  
Carol M. Simpson

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CHADWICK FARMS OWNERS )  
ASSOCIATION, a Washington ) No. 58796-0-1  
nonprofit corporation, )  
 ) DIVISION ONE  
Appellant, )  
 ) PUBLISHED OPINION  
v. )  
FHC, LLC, a Washington limited liability )  
company, )  
 )  
Respondent/Cross-Appellant, )  
v. )  
 )  
AMERICA 1<sup>ST</sup> ROOFING & BUILDERS, )  
INC., a Washington corporation; )  
CASCADE UTILITIES, INC., a )  
Washington corporation; MILBRANDT )  
ARCHITECTS, INC., P.S., a )  
Washington corporation; PIERONI )  
ENTERPRISE, INC., d/b/a PIERONI'S )  
LANDSCAPE CONSTRUCTION, a )  
Washington corporation; TIGHT IS )  
RIGHT CONSTRUCTION, a )  
Washington corporation; GUTTERKING, )  
INC., a Washington corporation, ) FILED: June 18, 2007  
 )  
Third Party Defendants/Cross-Respondents. )

**GROSSE, J** – A 2006 amendment to the statutory framework to limited liability companies providing a three-year survival period within which to commence actions against a dissolved limited liability company (LLC), applies retroactively and permits actions against an LLC even when that company’s certificate of formation has been cancelled. The amendment only applies to actions against the company and not to

actions brought by a company. Thus, FHC, a dissolved and cancelled LLC, lacks standing to prosecute a claim for its own benefit.<sup>1</sup>

### FACTS

FHC was formed as a limited liability company on December 23, 1999. Its purpose was to construct the Chadwick Farms condominiums. Once the project was completed, FHC ceased operations. The company did not submit the required annual report and renewal fee to the secretary of state. After providing the required notice to the company, the secretary issued a Certificate of Administrative Dissolution on March 24, 2003.

On August 18, 2004, Chadwick Farms Homeowners Association (Chadwick) brought suit against FHC alleging that it was responsible for a number of construction defects. Seven months later, on March 24, 2005, the secretary cancelled FHC's certificate of formation because two years had passed since the secretary issued the notice of dissolution to FHC.

In May 2005, FHC filed third party claims against several subcontractors. Yet, on August 24, 2005, FHC moved for summary judgment to dismiss Chadwick's claims on the grounds that FHC was no longer a legal entity. Chadwick moved to amend the complaint to include specific members of the LLC. The trial court granted summary

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<sup>1</sup> This court has before it three cases dealing with limited liability companies and their capacity to sue or be sued under chapter 25.15 RCW. While this case was pending, and after oral argument in Roosevelt v. Grateful Siding, No. 56879-5-1, the Supreme Court issued its decision in Ballard Square Condo. Owners Ass'n v. Dynasty Constr. Co., 158 Wn.2d 603, 146 P.3d 914 (2006). This court stayed its decision in Roosevelt and linked this case with Colonial Development v. Emily Lane, No. 58825-7-1 for purposes of oral argument and decision. The decisions in Roosevelt and Emily Lane will be filed contemporaneously with this decision.

judgment to FHC. For the same reasons, the trial court dismissed FHC's third party claims against the subcontractors. The trial court did not specifically address Chadwick's motion to amend the complaint.

### ANALYSIS

The Washington Limited Liability Companies Act (LLCA)<sup>2</sup> governs the formation, operation, and dissolution of limited liability companies. Unlike the statutes governing business corporations, the LLCA did not provide for survival of a claim after the company's affairs wound up and a certificate of cancellation had been filed. The legislature recently amended the Act to provide for a three-year period after dissolution within which to commence actions against a dissolved limited liability company.<sup>3</sup>

In its amicus brief, the Washington State Bar Association (WSBA) summarizes the genesis of LLCs ably and succinctly as follows:

LLCs are recent legal constructs, with a majority of states having only enacted LLC legislation in the 1990s. Washington's Act took effect on October 1, 1994, and Washington case law construing the Act is sparse. "Since limited liability companies have only recently become popular, the law is still evolving." Unhelpfully, courts and scholars routinely comment that LLCs share some qualities of corporations and other qualities of partnerships; they cite by analogy to state corporation acts, to state partnership acts, or to the common law, often without meaningful explanation. From the WSBA's perspective, the only relatively sure footing here is the language of the Act itself. The LLC is a creature of statute, not of common law, and our courts of appeals are expert at construing statutes. That is the only way to unravel this puzzle, even if the solution is not fully satisfying.<sup>4</sup>

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<sup>2</sup> Ch. 25.15 RCW; Laws of 1994, ch. 211, § 101.

<sup>3</sup> RCW 25.15.303.

<sup>4</sup> Washington State Bar Association Amicus Brief at 6-7 (citations omitted) (emphasis in original).

Although an LLC can be dissolved in several ways, only administrative dissolution is relevant here.<sup>5</sup> The secretary of state can administratively dissolve a limited liability company if the company fails to pay its license fees or fails to file its required annual reports.<sup>6</sup> Once the secretary gives notice that administrative dissolution is pending, the company has 60 days to correct the grounds for dissolution, and, if it fails to do so, the company is dissolved.<sup>7</sup> Then, if the company does not apply for reinstatement within two years of the administrative dissolution, the secretary of state “shall” cancel the certificate of formation.<sup>8</sup> Once cancelled, an LLC is no longer a separate legal entity.<sup>9</sup> That is what occurred here.

2006 Amendment of RCW 25.15.303

Effective May 6, 2006, the legislature amended the Act<sup>10</sup> by adding the following section:

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

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<sup>5</sup> RCW 25.15.270.

<sup>6</sup> RCW 25.15.280.

<sup>7</sup> RCW 25.15.285(2).

<sup>8</sup> RCW 25.15.290(4) provides:

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

(Emphasis added).

<sup>9</sup> RCW 25.15.070(2)(c) provides:

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 of the limited liability company’s certificate of formation.

<sup>10</sup> RCW 25.15.303 (amended by Laws of 2006, ch. 325, § 1) (emphasis added).

limited liability company may be defended by the limited liability company in its own name.

Statutory amendments are generally prospective, but can act retroactively if the legislature so intended or the amendment is remedial or curative.<sup>11</sup> This provision was enacted at the same time as a similar amendment to the Business Corporation Act (BCA).<sup>12</sup> That amendatory Act provides a maximum three-year survival period for claims against business corporations.<sup>13</sup> The legislative histories of both survival statutes indicate that these amendments were passed to address the result of this court's opinion in Ballard Square Condo. Owners Ass'n v. Dynasty Constr. Co.<sup>14</sup> In Ballard Square, this court held that absent a survival statute claims against a corporation arising after the dissolution of the corporation abate.<sup>15</sup>

In its decision in Ballard Square, the Supreme Court affirmed this court's ruling, but on different grounds.<sup>16</sup> The court held that at the time the homeowners commenced their suit, claims brought after dissolution could be brought against a dissolved corporation, subject to the time limitations contained in any applicable statute of limitations. However, the legislature amended the BCA in 2006 requiring that actions be

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<sup>11</sup> 1000 Virginia Ltd. P'ship v. Vertects, 158 Wn.2d 566, 584, 146 P.3d 423 (2006) (citing McGee Guest Home, Inc. v. Department of Soc. & Health Servs., 142 Wn.2d 316, 324-25, 12 P.3d 144 (2000)).

<sup>12</sup> Ch. 23B.14 RCW; S.B. 6596, 59th Leg., Reg. Sess. (Wash. 2006).

<sup>13</sup> RCW 23B.14.340 provides a two-year survival period for claims against a corporation dissolved prior to June 7, 2006, and a three-year period for claims against corporations dissolved on or after June 7, 2006.

<sup>14</sup> Ballard Square, 126 Wn. App. 285, 195, 196, 108 P.3d 818, review granted, 155 Wn.2d 1024 (2005).

<sup>15</sup> See H.B. \*Rep.\* on S.B. 6531, at 3, 59th Leg., Reg. Sess. (Wash. 2006); H.B. \*Rep.\* on S.B. 6596, at 7, 59th Leg., Reg. Sess. (Wash. 2006).

<sup>16</sup> Ballard Square Condo. Owners Ass'n v. Dynasty Constr. Co., 158 Wn.2d 603, 146 P.3d 914 (2006).

brought against the corporation within two years of its dissolution. That amendment was found to be retroactive, precluding the Ballard Square Homeowners Association from bringing an action.

The amendment in Ballard Square is analogous to the statutory amendment to the LLCA. The statutes were sponsored by the same legislators and were enacted in tandem. Indeed, the statutes were signed into law and became effective on the same day.<sup>17</sup> Additionally, the legislature enacted both statutes in reaction to the Court of Appeals decision in Ballard Square.<sup>18</sup>

The provision here is remedial and curative. There is no basis to distinguish the remedial and curative nature of this provision from the similar provision in the BCA. Like the BCA amendment, the purpose of the LLCA amendment was to provide for survival of claims after a company dissolves. The House Bill Report shows that the legislature identified the problem:

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.<sup>[19]</sup>

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<sup>17</sup> H.B. \*Rep.\* on S.B. 6531, at 3, 59th Leg., Reg. Sess. (Wash. 2006); H.B. \*Rep.\* on S.B. 6596, at 7, 59th Leg., Reg. Sess. (Wash. 2006).

<sup>18</sup>The presumption that a statute applies prospectively is overcome when it is remedial in nature or the legislature provides for retroactive application. A remedial statute is one which relates to practice, procedures and remedies and can be applied retroactively if it does not affect a substantive or vested right. American Discount Corp. v. Shepherd, No. 77974-1, 2007 Wash. LEXIS 292, at \*8 (Apr. 19, 2007) (citing State v. McClendon, 131 Wn.2d 853, 861, 935 P.2d 1334 (1997)).

<sup>19</sup> H.B. \*Rep.\* on S.B. 6531, at 2, 59th Leg., Reg. Sess. (Wash. 2006).

The testimony adduced in support of the bill indicated that its *raison d'être* was to address the result reached in this court's Ballard Square decision that left homeowners without a remedy for claims against a dissolved corporation. In the plain language of the statute, the amendment was passed to address the survival of claims following dissolution.<sup>20</sup> As seen in the legislative history, the amendment was also crafted to remove any incentive for LLCs to dissolve immediately after a project simply to cut off claims prematurely. And finally, the bill relates to remedies by reviewing the brief description contained in SB 6531—" [p]reserving remedies when limited liability companies dissolve."<sup>21</sup> As noted in In re Personal Restraint of Matteson:<sup>22</sup>

"When an amendment clarifies existing law and where that amendment does not contravene previous constructions of the law, the amendment may be deemed curative, remedial and retroactive. This is particularly so where an amendment is enacted during a controversy regarding the meaning of the law."

The Supreme Court's analysis is directly applicable. The 2006 amendment is retroactive.

FHC argues that even if the 2006 amendment is retroactive, it is irrelevant as the provision does not deal with claims against a cancelled company. FHC argues that its certificate was cancelled by operation of law and at that point the company ceased to exist as a separate legal entity. Thus, FHC contends, Chadwick's claims against it abated as there is no provision to continue an action against a cancelled limited liability company.

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<sup>20</sup> S.B. 6531, at 3, 59th Leg., Reg. Sess. (Wash. 2006).

<sup>21</sup> S.B. 6531, 59th Leg. Reg. Sess. (Wash. 2006).

<sup>22</sup> Matteson, 142 Wn.2d 298, 308, 12 P.3d 585 (2000) (quoting Tomlinson v. Clarke, 118 Wn.2d 498, 510-11, 825 P.2d 706 (1992)).

FHC relies upon RCW 25.15.070(2)(c).<sup>23</sup>

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 of the limited liability company's certificate of formation.

And to further support its argument, FHC relies upon the winding up provisions in the Act.<sup>24</sup>

A company that has been dissolved and is winding up is required to make reasonable provision to pay all known claims and obligations.<sup>25</sup> Upon dissolution of an LLC and until the filing of a certificate of cancellation as provided in RCW 25.15.080, the persons winding up an LLC may, in the name of, and for and on behalf of, the limited liability company, prosecute and defend suits.<sup>26</sup> And, until a certificate of cancellation has been filed, the persons winding up the company's business may "make reasonable provision for the limited liability company's liabilities."<sup>27</sup>

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<sup>23</sup> (Emphasis added).

<sup>24</sup> See discussion contained in Roosevelt v. Grateful Siding, No. 56879-5-1 (June 18, 2007) regarding the statute's winding up process.

<sup>25</sup> RCW 25.15.300(2)

<sup>26</sup> RCW 25.15.295(2).

<sup>27</sup> RCW 25.15.295 provides:

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

FHC's argument continues. RCW 25.15.300(2) provides that claims accruing after a limited liability company dissolves and begins to wind up its affairs must be provided for if known by the company. But, once the certificate of formation has been cancelled, the company is no longer a legal entity. Generally then, persons winding up a company's affairs would not file a certificate of cancellation until the company's affairs were provided for, since persons winding up a company's affairs are not personally liable to claimants if they make provisions for the company's known liabilities during dissolution. See RCW 25.15.300(2) (members are not personally liable for any unresolved claims if they've complied with the directives contained there). While we can agree with this to some extent, it certainly does not encompass what transpired here or in similar cases now pending in this court. Here, there was no winding up. The cancellation was administrative.

We do, however, believe that the survival provision at issue applies to dissolved LLCs whether or not a certificate of cancellation was issued pursuant to RCW 25.15.080. To hold otherwise would render the 2006 amendment inoperative as it would link the survival of claims not to a specific survival period, but rather to the actions

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

or, as in this case, non-action of a company.<sup>28</sup> The legislature's purpose in enacting the survival provision was to provide remedies for parties injured by acts of a limited liability company and to provide an incentive for the limited liability company to act in good faith. The plain language of the statute provides that an action may lie for three years after a company is dissolved. Here, it was non-action by the LLC that resulted in cancellation. Addressing similar arguments in Ballard Square, the Supreme Court found that the survival statute existed "apart from the winding up process."<sup>29</sup>

And, while we are mindful of the differences between relevant provisions of the BCA and the LLCA, particularly the two-step process of dissolution followed by cancellation in the latter, we cannot think the legislature was anything more than inartful in choosing the term dissolution as the reference for its remedial measure in 2006. To construe the 2006 amendment otherwise would nullify its stated purpose and put the legislature in the position of having enacted a largely useless statute since a dissolved LLC could in the process of winding up, sue and defend before the amendment.

Thus, we hold that Chadwick had three years within which to bring its cause of action.

#### FHC Claims Against its Subcontractors

FHC filed third party complaints against its subcontractors after it was administratively dissolved and cancelled. The 2006 amendment for survival of claims only applies to actions which are brought against a company. FHC's failure to reinstate itself is fatal to its pursuit of any claim against the subcontractors. Once the secretary of

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<sup>28</sup> See Colonial Development v. Emily Lane, No. 58825-7-1 (June 18, 2007) (where similar result was reached by this court where the members dissolve and cancel the LLC).

<sup>29</sup> Ballard Square, 158 Wn.2d at 609.

state cancelled FHC's certificate of formation, FHC lacks standing to prosecute claims against the subcontractors. The Act mandates an administratively dissolved corporation to wind up its affairs by "[t]he expiration of two years after the effective date of dissolution under RCW 25.15.285 without the reinstatement of the limited liability company."<sup>30</sup>

Chadwick filed its claim against FHC some seven months before the secretary of state cancelled FHC's certificate of formation. FHC could have at any time during those seven months reinstated itself to permit it to properly pursue the winding up process. It failed to do so.

#### Amended Complaint

The trial court did not rule on Chadwick's motion to amend its complaint to include a company member and manager as defendants for their failure to properly wind up FHC's affairs. Leave to amend a pleading should be "freely given when justice so requires."<sup>31</sup> This rule serves to "facilitate proper decisions on the merits, to provide parties with adequate notice of the basis for claims and defenses asserted against them, and to allow amendment of the pleadings except where amendment would result in prejudice to the opposing party."<sup>32</sup> Chadwick alleges that the duty to properly wind up the company's affairs is required by statute:

#### **[RCW] 25.15.300 Distribution of assets**

(1) Upon the winding up of a limited liability company, the assets shall be distributed as follows:

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<sup>30</sup> RCW 25.15.270(6).

<sup>31</sup> CR 15(a).

<sup>32</sup> Wilson v. Horsley, 137 Wn.2d 500, 505, 974 P.2d 316 (1999).

(a) To creditors, including members and managers who are creditors, to the extent otherwise permitted by law, in satisfaction of liabilities of the limited liability company (whether by payment or the making of reasonable provision for payment thereof) other than liabilities for which reasonable provision for payment has been made and liabilities for distributions to members under RCW 25.15.215 or 25.15.230;

(b) Unless otherwise provided in a limited liability company agreement, to members and former members in satisfaction of liabilities for distributions under RCW 25.15.215 or 25.15.230; and

(c) Unless otherwise provided in a limited liability company agreement, to members first for the return of their contributions and second respecting their limited liability company interests, in the proportions in which the members share in distributions.

(2) A limited liability company which has dissolved shall pay or make reasonable provision to pay all claims and obligations, including all contingent, conditional, or unmatured claims and obligations, known to the limited liability company and all claims and obligations which are known to the limited liability company but for which the identity of the claimant is unknown. If there are sufficient assets, such claims and obligations shall be paid in full and any such provision for payment made shall be made in full. If there are insufficient assets, such claims and obligations shall be paid or provided for according to their priority and, among claims and obligations of equal priority, ratably to the extent of assets available therefor. Unless otherwise provided in a limited liability company agreement, any remaining assets shall be distributed as provided in this chapter. Any person winding up a limited liability company's affairs who has complied with this section is not personally liable to the claimants of the dissolved limited liability company by reason of such person's actions in winding up the limited liability company.

Chadwick argues that implicit in this proviso is the converse proposition. That is, any person winding up a limited liability company's affairs who has not complied with RCW 25.15.300 is personally liable to the claimants. We agree that this could be the case, depending on a full examination of the facts.

While cancellation marks the end of a limited liability company as a separate legal entity, it does not necessarily follow that claims against the LLC or its managers or

members also abate.<sup>33</sup> Chadwick should have been permitted to amend its complaint.

Thus, the trial court's failure to do so was an abuse of its discretion.

The trial court is reversed in part and affirmed in part. We remand for further proceedings in accord with this decision.

Grosse, J

WE CONCUR:

Elemyon, J

Baker, J

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<sup>33</sup> For example, when a merger involving a limited liability company occurs, RCW 15.15.410(1)(a)(d) provides that any pending action against the merged entity may be "continued as if the merger did not occur . . . ." This is true even though the "separate existence of [a merged LLC] ceases." RCW 25.15.410(1)(a). Such provisions would be meaningless if cancellation abated pending claims.