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80450-8

No. ~~77881-7~~

SUPREME COURT OF THE STATE OF WASHINGTON

CHADWICK FARMS OWNERS ASSOCIATION, a Washington
nonprofit corporation
Appellant

v.

FHC, LLC, a Washington limited liability company,
Respondent/Defendant/ Third Party Plaintiff/Cross-Appellant

v.

AMERICA 1ST 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, Third Party Defendants.

RESPONDENT/DEFENDANT/THIRD-PARTY
PLAINTIFF/CROSS-APPELLANT FHC, LLC'S REPLY BRIEF

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Original

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I. PURSUANT TO THE EXPRESS STATUTORY LANGUAGE, THERE IS NO DISTINCTION BETWEEN CLAIMS BY OR AGAINST FHC, LLC

At issue in this appeal is whether FHC, LLC has the capacity to sue or be sued pursuant to the Limited Liability Act. FHC, LLC argues that the HOA cannot maintain its claims against FHC, LLC because FHC, LLC is a cancelled LLC and no longer exists. The HOA argues that FHC, LLC still exists and its claims against FHC, LLC must be allowed to continue. The legal status of FHC, LLC essentially turns on the interpretation of RCW 25.15.295(2). It 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(2). It is undisputed that FHC, LLC was administratively dissolved on March 24, 2003. It is further undisputed that the Secretary of State cancelled FHC, LLC's Certificate of Formation on March 24, 2005 by operation of law as referenced in RCW 25.15.080. The sole issue is whether the Secretary of State's cancellation of FHC, LLC terminates FHC,

LLC's winding up period and thereby extinguishes all claims against FHC, LLC. For all the reasons cited in FHC, LLC's response brief, FHC, LLC urges the Court to find that FHC, LLC ceased to exist for all purposes as of March 24, 2005 thereby extinguishing the claims against it by the HOA. If however, the Court finds that the Secretary of State's cancellation of FHC, LLC on March 24, 2005 did not terminate the winding up period of FHC, LLC, then all the rights and obligations set forth in RCW 25.15.295 must equally apply to FHC, LLC's ability to prosecute its claims against all cross-respondents.

In their response briefs, cross-respondents argue that the Court is permitted to make inconsistent rulings with regards to claims against and by FHC, LLC. This argument is simply not supported by the express statutory provisions of the Limited Liability Act. If the Court finds that FHC, LLC still exists for purposes of winding up as set forth in RCW 25.15.295, then FHC, LLC exists for ALL purposes set forth in RCW 25.15.295.

First, the express terms of RCW 25.15.295 make no distinction as to claims brought by or against a limited liability company. RCW 25.15.295 specifically permits claims against a winding up limited liability company and claims by a winding up limited liability company. RCW 25.15.295 specifically permits FHC, LLC to prosecute claims, including the claims

against cross-respondents. To find otherwise would require adding words or ignoring provisions of the statute, which is violative of the rules of statutory interpretation. "When statutory language is unambiguous, the court will look only to that language to determine legislative intent. The court cannot add words or clauses to an unambiguous statute when the Legislature has chosen not to include that language. The court should assume that the Legislature means exactly what it says." *State v. Freeman*, 124 Wash. App. 413, 415, 101 P.3d 878, 879 (2004).

Second, RCW 25.15.295 makes no distinction as to when claims were initiated. If FHC, LLC exists for the purposes outlined in RCW 25.15.295, then all claims, even if they were initiated after the Secretary of State cancelled FHC, LLC, are permitted pursuant to RCW 25.15.295. It makes no difference whether FHC, LLC's claims against the cross-respondents were filed before or after the Secretary of State cancelled FHC, LLC. This is simply not a question of survival of claims following cancellation of FHC, LLC. There is nothing in RCW 25.15.295, or any other provision in the Limited Liability Act that allows claims brought prior to cancellation to survive post cancellation. If the issue were simply one of whether claims survive cancellation, the answer would be simply, no claims survive cancellation. But that is not the issue. The issue is whether FHC, LLC is a cancelled entity for purposes of RCW 25.15.295. If it is a

cancelled entity, then all claims by or against FHC, LLC are extinguished. If it is not a cancelled entity for purposes of RCW 25.15.295, then all claims by or against FHC, LLC are expressly permitted by RCW 25.15.295. There is no set time limit for winding up.¹ The only termination of the

¹ Cross-respondent Cascade Utilities incorrectly rely on RCW 25.15.270 concerning an artificial date by which winding up must be completed. Its argument ignores the plain language of the statute and would undermine the entire statutory scheme regarding obligations of dissolved LLC as outlined in RCW 25.15.295. RCW 25.15.270 provides, in its entirety:

25.15.270 Dissolution

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

- (1) 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;
- (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 25.25.130 (1) have by the ninetieth

winding up period is when an LLC is cancelled. Again, if the Court finds that FHC, LLC is not a cancelled entity for purposes outlined in RCW 25.15.295, then FHC, LLC is expressly permitted to prosecute its claims against the cross-respondents.

II. SENATE BILL 6531 HAS NO APPLICATION TO THIS MATTER

Both the HOA and cross-respondents rely on Senate Bill 6531 in support of their arguments that the HOA's claims may be maintained against FHC, LLC but FHC, LLC's claims against cross-respondents are

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 reinstatement of the limited liability company.

RCW 25.15.270. RCW 25.15.270 merely defines events upon which an LLC is dissolved and can no longer carry on its normal business operations. It further provides that once an event of dissolution occurs, the LLC's sole activities must be to wind up the affairs of the LLC. Each of subsections 1-6 define events that operate to dissolve an LLC. The two year reference in subsection 6 merely recognizes that prior to the expiration of two years; an administratively dissolved LLC may seek reinstatement and continue its business as if there was no dissolution. Only after the expiration of two years is an administratively dissolved LLC forever a dissolved LLC in that it can no longer seek reinstatement and therefore must wind up its affairs pursuant to RCW 25.15.295.

extinguished. Senate Bill 6531 has no application to the present matter. As discussed in FHC, LLC's response brief to the HOA's opening brief, Senate Bill 6531 only applies to claims against dissolved LLCs. Senate Bill 6531 has no application to claims against cancelled LLCs. There is no dispute that FHC, LLC is a cancelled LLC, as it was automatically cancelled by the Secretary of State on March 24, 2005. The only issue is whether the cancellation of FHC, LLC by the Secretary of State terminates the winding up period as defined by RCW 25.15.295 thereby extinguishing claims by and against FHC, LLC. Senate Bill 6531 has nothing to do with the permitted winding up activities as defined in RCW 25.15.295. Rather Senate Bill 6531 permits claims against dissolved LLCs that are separate and apart from winding up activities. It further only permits said claims while the LLC is in a dissolved state. Once it is cancelled, Senate Bill 6531 has no application.

In addition, Senate Bill 6531 further has no application to the ~~pending matter because it is not retroactive. There is nothing in Senate~~ Bill 6531 that expresses the Legislature's intent that the provision apply retroactively. "Statutes are presumed to apply prospectively unless they contain express language indicating that the Legislature clearly intends to apply the law retroactively." *Hatley v. City of Union Gap*, 106 Wash.App. 302, 308, 24 P.3d 444, 447 (2001). The HOA incorrectly relies on *McGee*

Guest Home, Inc. v. Department of Social and Health Services of State of Wash., 142 Wash.2d 316, 12 P.3d 144 (2000) in support of its argument that Senate Bill 6531 is retroactive. First, there is no dispute that the Legislature did not express an intention for Senate Bill 6531 to apply retroactively. Second, Senate Bill 6531 is not curative or remedial. “An amendment is curative only if it clarifies or technically corrects an ambiguous statute.” *Id.* at 325, 149. Here, Senate Bill 6531 does not clarify or technically correct an ambiguous statute. Senate Bill 6531 is not an amendment to an existing statute. It does not seek to clarify an ambiguous statute. Rather Senate Bill 6531 is a new statute that allows certain claims to survive dissolution of an LLC. Prior to Senate Bill 6531 there was no survival of claims provision in the Limited Liability Act. The only activities that were permitted following dissolution of an LLC were those winding up activities expressly permitted by RCW 25.15.295. Senate Bill 6531 has nothing to do with winding up activities. Rather it ~~expresses a new right for claims to be brought against dissolved LLCs~~ separate and apart from winding up. Because it does not “cure” an ambiguity it is not curative in nature nor is it remedial and is not the basis for retroactive application. Therefore, because Senate Bill 6531 is substantively irrelevant to the present issue and is also not applicable because it is not retroactive. Cross-respondents’ reliance on Senate Bill

6531 is misplaced and cannot serve as the basis for inconsistent rulings on the claims by and against FHC, LLC.

III. PURSUANT TO RAP FHC, LLC'S NOTICE OF APPEAL WAS TIMELY FILED

Cross-respondents argue that FHC, LLC's Notice of Appeal was untimely. This argument simply has no support in the Rules of Appellate Procedure. The present matter is a multi-party action involving claims by and against FHC, LLC. Although the claims against FHC, LLC were extinguished on September 30, 2005, all claims by FHC, LLC were not. FHC, LLC still had active claims against America 1st Roofing & Builders, Inc. and Gutter King, Inc. following the Order entered on September 30, 2005. All claims by and against FHC, LLC were not extinguished until December 14, 2005 when the trial court entered an order dismissing Gutter King, Inc. Within 30 days of the dismissal of Gutter King, Inc., FHC, LLC filed its Notice of Appeal on January 12, 2006.

RAP 2.2 defines what Orders are appealable as a matter of right.

RAP 2.2(d) provides that there is no appeal as a matter of right unless all claims against all parties are resolved. Where one or more parties remain following a dismissal of other parties, there is no right to appeal. RAP 2.2 (d) only grants the right to appeal when the entirety of an action is resolved. Not until December 14, 2005 were all claims against all parties

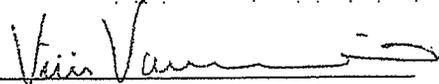
resolved in the present matter. That is, prior to December 14, 2005, FHC, LLC could not have filed a Notice of Appeal as a matter of right. Therefore, pursuant to RAP 2.2 and RAP 5.2, the 30 days within which to file an appeal of any order of the trial did not begin until December 14, 2005. FHC, LLC's appeal was filed on January 12, 2005, in accordance with RAP 2.2 and RAP 5.2. As such, FHC, LLC's appeal was timely filed.

IV. CONCLUSION

Although FHC, LLC maintains that it is a cancelled LLC and all claims against it are extinguished, if the Court finds that FHC, LLC is not a cancelled LLC for purposes of RCW 25.15.295, then it must also permit FHC, LLC's claims against cross-respondents. Therefore, for all the foregoing reasons, if the Court finds in favor of the HOA then FHC, LLC respectfully requests the Court find in favor of FHC, LLC on its cross-appeal.

-----Dated this 5TH day of July, 2006.-----

FORSBERG & UMLAUF, P.S.

By: 

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CERTIFICATE OF SERVICE

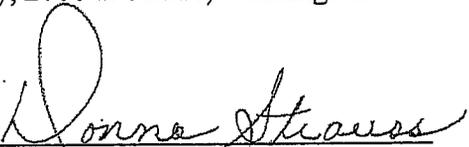
The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action,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

On the date given below I caused to be served **RESPONDENT/ DEFENDANT/ THIRD PARTY PLAINTIFF FHC, LLC'S REPLY BRIEF** on the following individuals in the manner indicated:

Clerk Washington State Supreme Court 415 12th Ave. SW P.O. Box 40929 Olympia, WA 98504 <input type="checkbox"/> Via Facsimile <input checked="" type="checkbox"/> Via Hand Delivery <input type="checkbox"/> Via Mail	Mr. David J. Bierman Alexander & Bierman, P.S. 4800 Aurora Ave. N. Seattle, WA 98103-6518 <input type="checkbox"/> Via Facsimile <input checked="" type="checkbox"/> Via Hand Delivery <input type="checkbox"/> Via Mail
Mr. John P. Evans Williams Kastner & Gibbs, PLLC 601 Union St., Suite 4100 Seattle, WA 98111-3926 <input type="checkbox"/> Via Facsimile <input checked="" type="checkbox"/> Via Hand Delivery <input type="checkbox"/> Via Mail	Ms. Vicky Strada Scheer & Zehnder, LLP 720 Olive Way, Suite 1605 Seattle, WA 98101 <input type="checkbox"/> Via Facsimile <input checked="" type="checkbox"/> Via Hand Delivery <input type="checkbox"/> Via Mail

<p>Mr. Martin T. Crowder Karr Tuttle Campbell 1201 Third Ave., Suite 2900 Seattle, WA 98101 <input type="checkbox"/> Via Facsimile <input checked="" type="checkbox"/> Via Hand Delivery <input type="checkbox"/> Via Mail</p>	<p>Mr. W. Scott Clement Gardner Bond Trabolsi St. Louis & Clement 2200 Sixth Avenue, Suite 600 Seattle, WA 98121 <input type="checkbox"/> Via Facsimile <input checked="" type="checkbox"/> Via Hand Delivery <input type="checkbox"/> Via Mail</p>
<p>Mr. R. Scott Fallon Fallon & McKinley, PLLC 1111 Third Ave., Suite 2400 Seattle, WA 98101 <input type="checkbox"/> Via Facsimile <input checked="" type="checkbox"/> Via Hand Delivery <input type="checkbox"/> Via Mail</p>	

Dated this 5th day of July, 2006 at Seattle, Washington.


Donna Strauss
Donna Strauss
Legal Secretary to Viivi M. Vanderslice

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