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No. 58825-7

COURT OF APPEALS  
DIVISION I  
OF THE STATE OF WASHINGTON

EMILY LANE HOMEOWNERS ASSOCIATION,  
a Washington nonprofit corporation,

*Respondent/Cross-Appellant,*

v.

COLONIAL DEVELOPMENT, LLC,  
a Washington limited liability company,

*Appellant/Cross-Respondent,*

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,

*Cross-Respondents.*

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COURT OF APPEALS  
DIVISION I  
SEATTLE, WA

**BRIEF OF APPELLANT COLONIAL DEVELOPMENT, LLC**

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**ORIGINAL**

**TABLE OF CONTENTS**

	<u>Page</u>
I. ASSIGNMENTS OF ERROR.....	1
II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....	1
III. STATEMENT OF THE CASE .....	3
IV. SUMMARY OF ARGUMENT .....	10
V. ARGUMENT .....	12
A. WASHINGTON'S LIMITED LIABILITY COMPANIES ACT HAS NO PROVISION FOR THE PRESERVATION OF ANY CLAIMS AGAINST A LIMITED LIABILITY COMPANY AFTER ITS CERTIFICATE OF FORMATION HAS BEEN CANCELLED.....	12
B. RCW 25.15.303 IS NOT RETROACTIVE AND DOES NOT REVIVE THE EMILY LANE HOA'S BARRED CLAIMS.....	15
1. The Legislature Never Expressed an Intent That RCW 25.15.303 Be Applied Retroactively.....	17
2. RCW 25.15.303 Is Not Curative or Remedial. ....	22
3. RCW 25.15.303 Would Create New Obligations and New Liabilities On Past Conduct. ....	26
C. THERE IS NO BASIS IN FACT OR LAW TO SUPPORT THE EMILY LANE HOA'S CLAIMS AGAINST COLONIAL DEVELOPMENT, LLC.....	30
1. The HOA Failed to Present Any Evidence To Support its Breach of Contract Claim. ....	31
2. The HOA Failed to Present Any Evidence To Support its Breach of Express Warranty Claim. ....	31

3.	The HOA's Breach of Implied Warranty of Habitability Claim is Barred.....	32
4.	There HOA Failed to Present Any Evidence to Support its Breach of Fiduciary Duty Claim. ....	33
5.	The HOA Failed to Present Any Evidence To Support its Claim Under the Uniform Fraudulent Transfers Act. ....	34
6.	The HOA Failed to Present Any Evidence to Support its Claims Under RCW 64.34.405, 64.34.410 and 64.34.415.....	36
7.	The HOA's Claims for Fraudulent Concealment, Negligent Misrepresentation, and Fraudulent Misrepresentation are Barred by the Economic Loss Rule and There is No Evidence to Support Any of These Claims.....	37
8.	There is No Evidence to Support a Breach of the Consumer Protection Act.....	38
D.	COLONIAL DEVELOPMENT, LLC IS ENTITLED TO ITS ATTORNEY'S FEES AND COSTS.....	41
1.	Colonial Development, LLC is a Prevailing Party Under the Condominium Act. ....	41
2.	Colonial Development, LLC is a Prevailing Party Under the Purchase and Sale Agreements. ....	43
3.	Colonial Development, LLC is a Prevailing Party Under the Consumer Protection Act.....	43
VI.	CONCLUSION.....	44

## TABLE OF AUTHORITIES

	<u>Page</u>
 <b><u>Federal Cases</u></b>	
<i>Landgraf v. USI Film Products</i> , 511 U.S. 244, 114 S. Ct. 1483 (1994).....	16, 27
 <b><u>State Cases</u></b>	
<i>Ballard Square Condominium Owners Ass'n v. Dynasty Constr. Co.</i> , --- P.3d ---, 2006 WL 3233892 (Wash. Nov. 09, 2006) (No. 76938-9) .....	17, 18
<i>Ballard Square Condominium Owners Ass'n v. Dynasty Construction Co.</i> , 126 Wn. App. 285, 108 P.3d 818 (2005).....	21
<i>Bayless v. Community College Dist No. XIX</i> , 84 Wn. App. 309, 927 P.2d 254 (1996).....	20, 23, 26
<i>Berschauer/Phillips Constr. Co. v. Seattle School District No. 1</i> , 124 Wn.2d 816, 881 P.2d 986 (1994).....	38
<i>Clearwater v. Skyline Constr. Co., Inc.</i> , 67 Wn. App. 305, 835 P.2d 257 (1992).....	35
<i>Department of Retirement Systems v. Kralman</i> , 73 Wn. App. 25, 867 P.2d 643 (1994) .....	24
<i>DGHI Enterprizes v. Pacific Cities, Inc.</i> , 91 Wn. App. 109, 956 P.2d 324 (1998).....	42
<i>Eagle Point Condominium Owners Ass'n v. Coy</i> , 102 Wn. App. 697, 9 P.3d 898 (2000) .....	42
<i>Everett v. State</i> , 99 Wn.2d 264, 661 P.2d 588 (1983).....	17
<i>Globe Const. Co. v. Yost</i> , 173 Wash. 522, 23 P.2d 892 (1933).....	21

<i>Granite Equip. Leasing Corp. v. Hutton,</i> 84 Wn.2d 320, 525 P.2d 223 (1974).....	43
<i>Griffith v. Centex Real Estate Corp.,</i> 93 Wn. App. 202, 969 P.2d 486 (1998).....	37, 38
<i>Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.,</i> 105 Wn.2d 778, 719 P.2d 531 (1986).....	39, 40
<i>Herzog Aluminum, Inc., v. General America Window Corporation,</i> 39 Wn. App. 188, 692 P.2d 867 (1984).....	41
<i>Howell v. Spokane &amp; Inland Empire Blood Bank,</i> 114 Wn.2d 42, 785 P.2d 815 (1990).....	24
<i>In re F.D. Processing, Inc.,</i> 119 Wn.2d 452, 832 P.2d 1303 (1992).....	16, 23, 24, 25
<i>In Re Personal Restraint of Stewart,</i> 115 Wn. App. 319, 75 P.3d 521 (2003).....	16
<i>Johnston v. Beneficial Management Corp.,</i> 85 Wn.2d 637, 538 P.2d 510 (1975).....	25, 27, 28
<i>Lightfoot v. MacDonald,</i> 86 Wn.2d 331, 544 P.2d 88 (1976).....	39
<i>Marine Power &amp; Equip. Co. v. Human Rights Comm'n Hearing Tribunal,</i> 39 Wn. App. 609, 694 P.2d 697 (1985).....	23
<i>McGee Guest Homes, Inc. v. Dep't of Soc. &amp; Health Servs.,</i> 142 Wn.2d 316, 12 P.3d 144 (2000).....	22
<i>Mt. Hood Beverage Co. v. Constellation Brands, Inc.,</i> 149 Wn.2d 98, 63 P.3d 779 (2003).....	41
<i>National Grocery Co. v. Kotzebue Fur &amp; Trading Co.,</i> 3 Wn.2d 288, 100 P.2d 408 (1940).....	21

<i>One Pacific Tower Homeowners' Ass'n v. Hal Real Estate Investments, Inc.,</i> 108 Wn. App. 330, 30 P.3d 504 (2001).....	42
<i>Packscher v. Fuller,</i> 6 Wash. 534, 33 P. 875 (1893).....	28
<i>Pickett v. Holland America Line-Westours, Inc.,</i> 101 Wn. App. 901, 6 P.3d 63 (2000) .....	39
<i>Sedwick v. Gwinn,</i> 73 Wn. App. 879, 873 P.2d 528 (1994).....	35
<i>State v. Ralph Williams' North West Chrysler Plymouth, Inc.,</i> 87 Wn.2d 298, 553 P.2d 423 (1976).....	44
<i>Stuart v. Coldwell Banker Commercial Group,</i> 109 Wn.2d 406, 745 P.2d 1284 (1987).....	32, 33
<i>Washington State Physicians Ins. Exch. &amp; Ass'n. v. Fisons Corp.,</i> 122 Wn.2d 299, 858 P.2d 1054 (1993).....	39

**Cases**

<i>1000 Virginia Ltd. P'ship v. Vertecs Corp.,</i> No. 77362-9, slip op. at 23.....	23
<i>Chase v. Sabin,</i> 445 Mich. 190, 516 N.W.2d 60 (1994).....	28
<i>Dobson v. Larkin Homes, Inc.,</i> 251 Kan. 50, 832 P.2d 345 (1992).....	28
<i>Matter of Estate of Weldman,</i> 476 N.W.2d 357 (Iowa 1991).....	28
<i>Quintana v. Los Alamos Medical Ctr.,</i> 119 N.M. 312 (N.M. Ct. App. 1994) .....	28, 29
<i>Roberts v. Caton,</i> 224 Conn. 483, 619 A.2d 844 (1993).....	28

<i>Schendt v. Dewey</i> , 246 Neb. 573, 520 N.W.2d 541 (1994).....	28
<i>Sievers v. Espy</i> , 264 Ga. 118, 442 S.E.2d 232 (1994).....	28
<i>Walden Home Builders, Inc. v. Schmit</i> , 62 N.E.2d 11, 326 Ill. App. 386 (1945).....	28, 29, 30

**State Statutes**

RCW 19.40.....	34
RCW 19.40.041.....	2, 8, 34, 35
RCW 19.40.051.....	36
RCW 19.86.090.....	9, 27, 43, 44
RCW 19.86.920.....	44
RCW 23B.14.060.....	21
RCW 23B.14.340.....	passim
RCW 25.15.....	10, 12
RCW 25.15.070.....	12, 14
RCW 25.15.080.....	12, 13, 21
RCW 25.15.290.....	13
RCW 25.15.295.....	13, 14
RCW 25.15.300.....	24
RCW 25.15.303.....	passim
RCW 4.84.330.....	41
RCW 64.34.405.....	2, 8, 36, 37
RCW 64.34.410.....	2, 8, 36, 37

RCW 64.34.415.....2, 8, 36, 37

RCW 64.34.455.....9, 42

**State Rules**

RAP 18.1(a).....41

**Other Authorities**

Cal. Civ. Code § 1717 .....41

## **I. ASSIGNMENTS OF ERROR**

The trial court erred in entering its July 28, 2006 Order Denying Colonial Development, LLC's Motion for Summary Judgment and its August 17, 2006 Order Denying Colonial Development, LLC's Motion for Reconsideration.

## **II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Colonial Development, LLC's certificate of formation was cancelled on December 31, 2004. Washington's Limited Liability Companies Act has no provision for the preservation of any claims against a limited liability company after its certificate of formation has been cancelled. Does a claimant have any right under Washington's Limited Liability Companies Act to sue a limited liability company for claims that were discovered and filed months after its certificate of formation was cancelled?

2. RCW 25.15.303 became effective on June 7, 2006, more than a year after the Emily Lane HOA filed its lawsuit against Colonial Development, LLC. Unlike the amendment to Washington's corporate survival statute, RCW 23B.14.340, the Legislature did not include any language in RCW 25.15.303 expressly providing for retroactive application. Moreover, RCW 25.15.303 is not curative or remedial. Should this court apply RCW

25.15.303 retroactively to Emily Lane HOA's barred claims when the Legislature never intended the statute to apply retroactively and it is not curative or remedial?

3. The Emily Lane HOA's filed a myriad of claims against Colonial Development, LLC, including breach of implied warranty of habitability, breach of contract and express warranty, breach of fiduciary duty, violation of RCW 19.40.041, breach of RCW 64.34.405, 64.34.410 and 64.34.415, Consumer Protection Act, fraudulent concealment, and negligent and fraudulent misrepresentation. Even assuming the Emily Lane HOA's claims are not barred under Washington's Limited Liability Companies Act, should this court dismiss these claims because there is no factual or legal basis to support the claims?

4. The Condominium Act provides for an award of attorney's fees and costs to the prevailing party. The Purchase and Sale Agreements contain a prevailing attorney's fee provision. The Consumer Protection Act provides for an award of attorney's fees and costs to the prevailing party. Should this Court award Colonial Development, LLC its attorney's fees and costs incurred in the defense of the Emily Lane HOA's claims if it prevails on this appeal?

### III. STATEMENT OF THE CASE

On January 22, 1998, Colonial Development was formed as a limited liability company in Washington. (CP 185). The five members of Colonial Development, LLC are Contempra Homes, Inc.; Critchlow Homes, Inc.; The Almark Corp.; Richard E. Wagner and Esther Wagner d/b/a Woodhaven Homes; and Fred Mus. (CP 198-188 and CP 190-191). Colonial Development, LLC was formed for the sole purpose of developing and selling the Emily Lane Condominiums. The property was constructed in 2001 and a temporary certificate of occupancy was issued for the project on July 31, 2001. (CP 193 and CP 318-455 and CP 153-154).

The first unit was sold on July 20, 2001 and the last unit was sold on January 3, 2003. (CP 153; CP 298-309; CP 318-455). The following is a summary of the closing dates for each of the units:

Unit No.	Original Purchaser	Closing Date	Subsequent Purchaser	Closing Date
C101	Gerald Privette	07/20/01		
A201	Cooke & Johnson	07/31/01	Phillip Boeder	06/29/04
C201	Hopkins & Ellis	07/31/01	Matthew Donegan-Ryan	09/07/04
C206	John Mills	08/10/01	Osusky Marie Fulgham	11/10/03 06/17/05

Unit No.	Original Purchaser	Closing Date	Subsequent Purchaser	Closing Date
B206	Steffany Ross	08/15/01	Sidney & Emily Wray	08/18/05
B204	Diana Brooking & Gary Campbell	08/27/01		
A101	Carlos Correa	08/31/01		
B101	Jill Hilgendorf	09/14/01		
B102	Arias & Quintero	09/21/01		
C103	Leslie Johnson	10/05/01	Angelica Ferrer	04/27/05
C102	Allan Crouch	10/09/01		
B201	Jay Forkan	10/19/01		
A204	Molly Burdina	11/09/01	Joshua Purden	06/28/04
A102	Sharon Musselwhite	02/26/02		
B203	Samer Koutoubi	02/28/02		
B103	Jack Womack	04/25/02	Bruce & Joyce Tanner	07/22/03
C204	Cheryl Lynch	05/17/02		
C205	Michael Taylor	05/21/02		
B202	Chun Yip Lau	06/26/02		
C203	Jolene Hufty	07/12/02		
C202	Will Poirot	08/30/02		
A203	Kirsten Campbell	10/31/02		
A202	Nathan & Andrea Harrison	12/04/02		
B205	Joshua Brittingham & Sarah Cameron	01/03/03	Susan Frisbee	06/13/05

(CP 153-154).

The Purchase and Sale Agreements for the condominiums contain a prevailing attorney fee clause which states as follows:

- q. Attorney's Fees.** If Buyer or Seller institutes suit against the other concerning this Agreement, the prevailing party is entitled to reasonable attorneys' fees and expenses.

(CP to be supplemented as soon as designed by Court Clerk).

In addition to the construction loan, the five members of Colonial Development, LLC contributed a total of \$652,943.47 of their personal capital to build this project. (CP 299-304; CP 310; CP 299, CP 315-317). Due to cost overruns and the change from vinyl siding to cedar siding, the members lost over \$400,000 on this project. (CP 299-304; CP 310-311; CP 315-317). The first disbursement to the members of any paid-in capital was made on December 4, 2002, after the construction loan had been completely paid off, all of Colonial Developments, LLC's debts had been paid, and twenty three of the twenty-four units had been sold. (CP 310-311 and CP 315-317). The amount of the distribution was \$12,000 to each of the five members for a total of \$60,700. After the last unit was sold on January 3, 2003, a second distribution of paid-in capital was made to the members on January 6, 2003. (CP 299-

304; CP 312; CP 315-317). The amount of the distribution to each of the five members was \$33,000 for a total of \$165,000. (CP 312 and CP 315-317). After the second distribution was made, Colonial Development, LLC kept a reserve fund of \$12,818.90 for any remaining warranty work. (CP 312). Almost four years after the project was complete and a year after the last unit was sold, on December 31, 2004, Colonial Development made its final distribution to its members of the remaining funds in its capital account, which was only \$9,126.54. (CP 313-314 and CP 315-317). It is undisputed that at the time the last distribution was made, neither Colonial Development, LLC or its members was aware of any claims by the Emily Lane HOA. (CP 313-314). Instead of making a profit on the sale of the units, the members actually lost a total of \$418,116.93 of their personal capital on this project. (CP 310 and CP 317).

None of the members of Colonial Development, LLC served as a board member for the Association during the period of Declarant control. (CP 155). The initial board members were Daniel Mus, Sharon McKinney, Theresa May and Maureen Callaghaer. (CP 155). In the Summer of 2002, the control of the Association was turned over to the Owners. (CP 155 and CP 309).

Prior to the transition date, none of the defendants had any knowledge of any defects concerning the common elements or the individual units.

On December 31, 2004, Colonial Development, LLC filed a Certificate of Cancellation of Limited Liability Company with the Washington State Secretary of State. (CP 577). As of December 31, 2004, Colonial Development, LLC ceased to exist and the Secretary of State cancelled Colonial Development, LLC's certificate of formation. (CP 581). According to the Washington State Secretary of State, Colonial Development, LLC was dissolved and ceased to exist upon the filing of the certificate of cancellation. (CP 177-180).

On May 31, 2005, five months after its certificate of formation was cancelled, the Emily Lane HOA first put Colonial Development, LLC on notice of alleged construction defects relating to the Project. (CP 1344-1355 and CP 583). On July 19, 2005, almost seven months after Colonial Development, LLC's certificate of cancellation had been cancelled, the Emily Lane HOA filed a Complaint against Colonial Development, LLC, Almark Corporation (member), Daniel Mus (non-member), Mark Schmitz (non-member), Richard Wagner (member as d/b/a Woodhaven Homes),

and Alfred Mus (member). (CP 591-601). The HOA's original complaint alleged causes of action against all of the Defendants for breach of implied warranty under Washington's Condominium Act, breach of implied warranty of habitability, breach of contract and express warranty, breach of fiduciary duty, violation of RCW 19.40.041, and breach of RCW 64.34.405, 64.34.410 and 64.34.415.

On October 27, 2005, the Emily Lane HOA filed an Amended Complaint which added four additional defendants - Contempra Homes, Inc.; Critchlow Homes, Inc; and Esther Wagner d/b/a Woodhaven Homes, and Jeffrey Critchlow, and added nine additional causes of action against all of the Defendants, including Consumer Protection Act, LLC member liability (piercing the veil), corporate disregard, successor liability, promoter liability, alter ego/agency liability, fraudulent concealment, and negligent and fraudulent misrepresentation. (CP 603-621).

On June 7, 2006, Colonial Development, LLC and the other defendants filed a motion for summary judgment of the HOA's claims. (CP 146-176; CP 181-631; CP 177-180). The central issue with respect to Colonial Development, LLC is whether Washington's Limited Liability Companies Act bars the Emily Lane

HOA's claims which were filed months after its certificate of formation was cancelled. In opposition to the motion, the Emily Lane HOA argued that under Washington's Limited Liability Companies Act, claims against a dissolved or cancelled limited liability company never abate at all. The Emily Lane HOA also argued that RCW 25.15.303, which was effective on June 7, 2006, applies retroactively to revive its barred claims.

With respect to the other Defendants, the trial court ruled that the HOA had no basis in fact or law to support any of its claims against the other Defendants and granted summary judgment of the Emily Lane HOA's claims. (CP 1178-1180). The Defendants subsequently filed a motion for attorney's fees and costs under RCW 64.34.455, the prevailing attorney fee clause under the Purchase and Sale Agreements, and RCW 19.86.090. (CP to be supplemented as soon as designed by Court Clerk). On November 13, 2006, the trial court denied the Defendants' motion for attorney's fees without prejudice to renew the motion pending the outcome of this appeal. (CP to be supplemented as soon as designed by Court Clerk).

#### IV. SUMMARY OF ARGUMENT

The legal status of limited liability companies in Washington is governed by the Washington Limited Liability Companies Act, Chapter 25.15 RCW, and not the common law. Washington's Limited Liability Companies Act provides that a limited liability company ceases to exist as a legal entity upon the cancellation of its certificate of formation and can not sue or be sued. Unlike Washington's Corporate Business Act, the Limited Liability Companies Act has no provision for the preservation of any claims or causes of action following the cancellation of the limited liability company's certificate of formation.

On December 31, 2004, Colonial Development, LLC filed a Certificate of Cancellation of Limited Liability Company with the Washington State Secretary of State. As of December 31, 2004, Colonial Development, LLC ceased to exist and the Secretary of State cancelled Colonial Development, LLC's certificate of formation. Almost seven months later, the Emily Lane HOA filed a Complaint against Colonial Development, LLC, its members, and several other individuals. Because Chapter 25.15 RCW has no provision for the preservation of any claims against a limited liability company after its certificate of formation has been cancelled, the

Emily Lane HOA's claims against Colonial Development, LLC and its members are barred.

The Emily Lane HOA contends that the Limited Liability Companies Act does not say whether or when claims against an LLC abate after its certificate of formation has been cancelled. It also claims that the Legislature's recent amendment to the Limited Liability Companies Act, RCW 25.15.303, is retroactive and revives its claims against Colonial Development, LLC and its members. RCW 25.15.303 became effective on June 7, 2006, and provides a new survival period of three years for causes of action against a dissolved limited liability company. RCW 25.15.303 does not apply retroactively because there is nothing in RCW 25.15.303 that indicates the Legislature intended RCW 25.15.303 to be applied retroactively to limited liability companies that dissolved prior to its effective date. Unlike the amendment to RCW 23B.14.340, the statute does not include any language indicating it applies to limited liability companies that were dissolved prior to June 7, 2006. Moreover, the amendment is not curative or remedial. RCW 25.15.303 neither clarifies nor corrects an ambiguous statute – it creates an entirely new category of rights for post-dissolution claims against limited liability companies. Further, the amendment

is not remedial because retroactive application will not supplement an existing right or remedy. The Emily Lane HOA had no right or remedy against Colonial Development, LLC after its certificate of formation was cancelled on December 31, 2004. Thus, RCW 25.15.303 does not apply retroactively and the Emily Lane HOA's suit against Colonial Development, LLC and its members is barred.

## V. ARGUMENT

### A. **WASHINGTON'S LIMITED LIABILITY COMPANIES ACT HAS NO PROVISION FOR THE PRESERVATION OF ANY CLAIMS AGAINST A LIMITED LIABILITY COMPANY AFTER ITS CERTIFICATE OF FORMATION HAS BEEN CANCELLED.**

In 1994, Washington passed Chapter 25.15 RCW, known as the Washington Limited Liability Companies Act, authorizing the use of this new form of business entity. The legal status of limited liability companies in Washington is governed by statute, not the common law. Under RCW 25.15.070(2)(c), a limited liability company formed under this chapter shall be a separate legal entity, the existence of which shall continue until cancellation of the limited liability company's certificate of formation. RCW 25.15.080 provides that a limited liability company may voluntarily cancel its certificate of formation by filing a certificate of cancellation. RCW 25.15.080 provides as follows:

Cancellation of Certificate. **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. A certificate of cancellation shall be filed in the office of the secretary of state to accomplish the cancellation of a certificate of formation upon the dissolution and the completion of winding up of a limited liability company . . . .

RCW 25.15.295 eliminates the authority of any person to act on behalf of the limited liability company upon the cancellation of the certificate of formation. Upon the effective date of the certificate of cancellation, a limited liability company no longer exists for any purpose and can not sue or be sued. Thus, after a certificate of cancellation is filed pursuant to RCW 25.15.080, no action by or against a limited liability company is permitted:

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

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<sup>1</sup> RCW 25.15.080 (emphasis added).

the members any remaining assets of the limited liability company.<sup>2</sup>

Furthermore, under RCW 25.15.070(2), a limited liability company ceases to exist as a legal entity for all purposes upon the cancellation of its Certificate of Formation:

A limited liability company formed under this chapter **shall be a separate legal entity**, the existence of which as a separate entity shall continue **until cancellation of the limited liability company's certificate of formation**.<sup>3</sup>

The House of Representatives recognized that Washington's Limited Liability Companies Act has no express provision regarding the preservation of remedies or causes of action following cancellation of a limited liability company's certificate of formation:

**The law governing LLC's 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 suit against the LLC. **However, there is no provision regarding the preservation of claims following the cancellation of the Certificate of Formation.**<sup>4</sup>

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<sup>2</sup> RCW 25.15.295 (emphasis added).

<sup>3</sup> RCW 25.15.070(2) (emphasis added).

<sup>4</sup> House Bill Report, SB 6531, P. 2-3, Preservation of Remedies (emphasis added).

Colonial Development, LLC filed a certificate of cancellation with the Secretary of State which cancelled its certificate of formation as of December 31, 2004. Per the express language of the Limited Liability Companies Act, Colonial Development, LLC ceased to exist as of December 31, 2004. The cancellation of the certificate of formation terminated Colonial Development, LLC's winding up period, including the right to sue or be sued. Where the Legislature has chosen to terminate the life of a limited liability company upon the filing of a certificate of cancellation, the Court has no statutory basis to do otherwise.<sup>5</sup> Thus, the Limited Liability Companies Act bars the Emily Lane HOA's suit against Colonial Development, LLC and its members.

**B. RCW 25.15.303 IS NOT RETROACTIVE AND DOES NOT REVIVE THE EMILY LANE HOA'S BARRED CLAIMS.**

RCW 25.15.303 recently became effective on June 7, 2006, more than a year after the Emily Lane HOA filed its original complaint against Colonial Development, LLC. RCW 25.15.303 provides a new survival period of three years for causes of action against a dissolved limited liability company. As a general rule, a statutory amendment is like any other statute and applies

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<sup>5</sup> See *Ballard Square Condominium Owners Assn. v. Dynasty Construction Co.*, 126 Wn. App. 285, 298, 108 P.3d 818 (2005).

prospectively only.<sup>6</sup> The principal function against retroactivity has been to impose rules of strict construction upon retrospective legislation. Retrospective operation is not favored by the courts, and a statute should not be construed as retroactive unless the statute clearly, by express language, indicates that the legislature intended a retroactive application.<sup>7</sup> The strength and continued vitality of the rule favoring exclusively prospective interpretation exists as a matter of fairness, so that people have opportunities to know what the law is and to conform their conduct accordingly.<sup>8</sup>

The strong presumption that an amendment is prospective can be overcome only if it is shown that the legislature intended the statute to apply retroactively or if the amendment is "clearly curative".<sup>9</sup> These exceptions to the general rule of prospective application apply only if such retroactive application does not violate any constitutional prohibition.<sup>10</sup> Where a retroactive

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<sup>6</sup> *In Re Personal Restraint of Stewart*, 115 Wn. App. 319, 332, 75 P.3d 521 (2003).

<sup>7</sup> *Landgraf v. USI Film Products*, 511 U.S. 244, 264, 280, 114 S. Ct. 1483 (1994).

<sup>8</sup> *Landgraf*, 511 U.S. at 265, 114 S. Ct. 1483 (1994).

<sup>9</sup> *In re F.D. Processing, Inc.*, 119 Wn.2d 452, 460, 832 P.2d 1303 (1992).

<sup>10</sup> *In re Personal Restraint of Stewart*, 115 Wn. App. at 332, 75 P.3d 521 (2003).

application is not expressly provided for in a statute, as here, it can not be judicially implied.<sup>11</sup>

**1. The Legislature Never Expressed an Intent That RCW 25.15.303 Be Applied Retroactively.**

Here, there is no evidence that the Legislature expressed any intent that RCW 25.15.303 be applied retroactively. Unlike the amendment to RCW 23B.14.340, the statute does not include any language indicating it applies to limited liability companies that were dissolved prior to June 7, 2006. In *Ballard Square*, the Supreme Court ruled that the amendment to RCW 23B.14.340 was retroactive stating:

***On its face*** the amended statute required that a post-dissolution cause of action be commenced within two years of dissolution ***if dissolution occurred prior to the June 7, 2006 effective date of the amendments.***<sup>12</sup>

With RCW 23B.14.340, the Legislature specifically provided a two year survival period for dissolutions that occurred prior to the June 7, 2006 effective date of the amendment. The Supreme Court in *Ballard Square* found that this language clearly shows legislative

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<sup>11</sup> *Everett v. State*, 99 Wn.2d 264, 270, 661 P.2d 588 (1983).

<sup>12</sup> *Ballard Square Condominium Owners Ass'n v. Dynasty Constr. Co.*, --- P.3d ---, 2006 WL 3233892 (Wash. Nov. 09, 2006) (No. 76938-9).

intent that it applies to corporations that were dissolved prior to June 7, 2006:

Here, the statute as amended provides that with regard to actions against corporations that dissolved before the amendment's effective date, a two year limitations period applies. The statute thus clearly shows legislative intent that it applies to actions arising before its effective date.<sup>13</sup>

By contrast, the Legislature intentionally omitted any language in RCW 25.15.303 stating that it applies to limited liability companies that dissolve prior to its effective date. A comparison of the language of the two statutes supports this position:

RCW 23B.14.340 provides as follows:

The dissolution of a corporation either (1) by filing with the secretary of state of its articles of dissolution, (2) by administrative dissolution by the secretary of state, (3) by a decree of court, or (4) by expiration of its period of duration shall not take away or impair any remedy available against such corporation, its directors, officers, or shareholders, for any right or claim existing, or any liability incurred, prior to such dissolution or arising thereafter, unless action or other proceeding thereon is not commenced within two years after the effective date of **any dissolution that was effective prior to June 7, 2006**, or within three years after the effective date of any dissolution that is effective on or after June 7, 2006. Any such action or

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<sup>13</sup> *Ballard Square Condominium Owners Ass'n v. Dynasty Constr. Co.*, --- P.3d ---, 2006 WL 3233892 (Wash. Nov. 09, 2006) (No. 76938-9).

proceeding against the corporation may be defended by the corporation in its corporate name.<sup>14</sup>

RCW 25.15.303 provides as follows:

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

The Legislature omitted the phrase "**any dissolution that was effective prior to June 7, 2006**" from the language of RCW 25.15.303. The fact that the Legislature did not include this same express language regarding retroactivity in RCW 25.15.303 suggests its intent to not make RCW 25.15.303 apply retroactively.

It is a basic principle of statutory construction that courts "cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language."<sup>15</sup> The court should assume that the Legislature means exactly what it says.<sup>16</sup> The Legislature could have adopted the same language it used in the amendment to RCW 23B.14.340 and made RCW 25.15.303

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<sup>14</sup> RCW 23B.14.340 (emphasis added).

<sup>15</sup> *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003).

<sup>16</sup> *State v. Freeman*, 124 Wn. App. 413, 415, 101 P.3d 878 (2004).

apply to limited liability companies that were dissolved prior to June 7, 2006. Instead, the Legislature did not enact the language “**any dissolution that was effective prior to June 7, 2006**” in RCW 25.15.303 as it did in the amendment to RCW 23B.14.340.

It can only be concluded that the Legislature’s restriction on the applicability of the amendment to limited liability companies that were dissolved after its effective date was deliberate. Unlike the Washington Business Corporate Act, the Limited Liability Companies Act has no survival statute for *any* claims against a cancelled limited liability company. A retroapplication of RCW 25.15.303 would impose new liabilities on dissolved limited liability companies for both pre-dissolution and post-dissolution claims. Washington Courts consistently refuse to apply a statute retroactively if it imposes “new liability” on defendants.<sup>17</sup>

The legislative history of RCW 25.15.303 does not indicate any intent as to retroactivity. It indicates that the Legislature is correcting what was previously missing, but it does not state that the Legislature specifically intended the amendment to be retroactive. In light of the Legislature’s refusal to include language

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<sup>17</sup> See, *Bayless v. Community College Dist No. XIX*, 84 Wn. App. 309, 312, 927 P.2d 254 (1996).

indicating that the amendment applies to LLC's that were dissolved prior to June 7, 2006, this court cannot interpret RCW 25.15.303 as retroactive.<sup>18</sup>

The Emily HOA relied on *National Grocery Co. v. Kotzebue Fur & Trading Co.*, 3 Wn.2d 288, 100 P.2d 408 (1940) and *Globe Const. Co. v. Yost*, 173 Wash. 522, 23 P.2d 892 (1933), for the proposition that claims against a dissolved LLC never abate at all after dissolution. However, both these cases dealt with *corporations* and were decided before the Model Business Corporation Act was published in 1946, and prior to Washington's adoption of Chapter 23B RCW, including RCW 23B.14.340 and RCW 23B.14.060, in 1989. Moreover, the legal status of limited liability companies in Washington is governed by the Washington's Limited Liability Companies Act. Under RCW 25.15.080, a limited liability company may not sue or be sued after its certificate of formation has been cancelled. Thus, none of these cases are relevant.

The trial court erred in denying Colonial Development, LLC's motion for summary judgment of the Emily Lane HOA's claims

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<sup>18</sup> *Ballard Square Condominium Owners Ass'n v. Dynasty Construction Co.*, 126 Wn. App. 285, 296, 108 P.3d 818 (2005).

because there is no statutory basis to permit any suit against Colonial Development, LLC or its members after its certificate of formation was cancelled on December 31, 2004 and RCW 25.15.303 is not retroactive.

**2. RCW 25.15.303 Is Not Curative or Remedial.**

A statute or amendment to a statute may be retroactively applied if the legislature so intended, if it is clearly curative, or if it is remedial, provided that retroactive application does not run afoul of any constitution prohibition.<sup>19</sup> An enactment is curative only if it clarifies or technically corrects an ambiguous statute.<sup>20</sup> RCW 25.15.303 does not clarify any statute. Prior to the enactment of RCW 25.15.303, the Limited Liability Companies Act did not provide for the preservation of any claims against a dissolved LLC. The fact that the Limited Liability Companies Act did not provide for the survival of any claims against a limited liability company after its certificate of formation had been cancelled does not render the statute ambiguous. Where ambiguity is lacking in statutory language, the court should presume an amendment to the statute constitutes a substantive change in the law, and the amendment

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<sup>19</sup> *McGee Guest Homes, Inc. v. Dep't of Soc. & Health Servs.*, 142 Wn.2d 316, 324, 12 P.3d 144 (2000).

<sup>20</sup> *McGee Guest Homes*, 142 Wn.2d at 325, 12 P.3d 144 (2000).

presumptively is not retroactively applied.<sup>21</sup> Because there was no prior ambiguous statute for which RCW 25.15.303 could be “curing”, this exception does not apply. RCW 25.15.303 merely creates new law preserving post-dissolution claims against a dissolved LLC.

Moreover, RCW 25.15.303 is not remedial. A statute is remedial if it relates to practice, procedure, or remedies and does not affect a substantive or vested right.<sup>22</sup> In *Bayless*, the Court of Appeals provided a clear articulation that remedial statutes must provide a supplemental remedy for enforcement of a preexisting right.<sup>23</sup> The Court held that the amendment was remedial and applied retroactively since “it created a supplemental remedy for enforcement of a preexisting right.”<sup>24</sup> In this case, retroactive application will not supplement an existing right or remedy. Under the Limited Liability Companies Act, the Emily Lane HOA had no right or remedy against Colonial Development, LLC after its certificate of formation was cancelled on December 31, 2004. A

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<sup>21</sup> *In re F.D. Processing, Inc.*, 119 Wn.2d at 462, 832 P.2d 1303 (1992).

<sup>22</sup> *1000 Virginia Ltd. P'ship v. Vertecs Corp.*, No. 77362-9, slip op. at 23.

<sup>23</sup> *Bayless*, 84 Wn. App. at 313, 927 P.2d 254 (1996).

<sup>24</sup> *Bayless*, 84 Wn. App. at 313, 927 P.2d 254 (1996) (citing *Marine Power & Equip. Co. v. Human Rights Comm'n Hearing Tribunal*, 39 Wn. App. 609, 617, 694 P.2d 697 (1985)).

statute which provides a claimant with a right to proceed against persons previously outside the scope of the statute deals with a substantive right, and therefore applies prospectively only.<sup>25</sup>

Where ambiguity is lacking in statutory language, this court presumes an amendment to the statute constitutes a substantive change in the law, and the amendment presumptively is not retroactively applied.<sup>26</sup>

The purpose of the new survival statute is to provide claimants new rights and remedies against a dissolved limited liability company. This purpose cannot be achieved when applied retroactively to LLC's which have already dissolved, because these LLC's have already distributed all their remaining assets, as mandated by statute.<sup>27</sup> Thus, even if RCW 25.15.303 is considered remedial, it should not be applied retroactively because it fails to provide any recovery against dissolved LLCs, which is the purpose of the statute.

Finally, no remedial statute can be applied retroactively if it affects a vested right.<sup>28</sup> A vested right is one which involves more

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<sup>25</sup> *Department of Retirement Systems v. Kralman*, 73 Wn. App. 25, 33, 867 P.2d 643 (1994).

<sup>26</sup> *In re F.D. Processing, Inc.*, 119 Wn.2d at 462, 832 P.2d 1303 (1992).

<sup>27</sup> RCW 25.15.300.

<sup>28</sup> *Howell v. Spokane & Inland Empire Blood Bank*, 114 Wn.2d 42, 47, 785 P.2d 815 (1990).

than a mere expectation, the right must have become "a title, legal or equitable, to the present or future enjoyment of property."<sup>29</sup> The members of Colonial Development, LLC obtained a vested right in their distributions of their paid in capital when its Certificate of Formation was cancelled. RCW 25.15.303 mandates that after provisions have been made for all debts, liabilities and known claims, any remaining assets *shall* be distributed to LLC members. The members' right to be reimbursed their paid in capital vested as soon as its Certificate of Formation was cancelled, and all claims for debts and liabilities against Colonial Development, LLC were barred.

Moreover, the presumption in favor of prospectivity is strengthened when the Legislature, as here, uses only present and future tenses in drafting the statute.<sup>30</sup> Both the Senate Bill Report and the House Bill Report indicate that RCW 25.15.303 applies to LLCs that dissolve after its effective date:

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 any

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<sup>29</sup> *In re F.D. Processing, Inc.*, 119 Wn.2d at 463, 832 P.2d 1303 (1992).

<sup>30</sup> *Johnston v. Beneficial Management Corp.*, 85 Wn.2d 637, 641, 538 P.2d 510 (1975).

action on the claim is filed within three years ***after the effective date of the dissolution.***<sup>31</sup>

The fact that the Legislature provided a prospective effective date for RCW 25.15.303, used language within the House Bill implying a future application, and chose to omit any language requiring that RCW 25.15.303 apply retroactively to LLC's dissolved prior to June 7, 2006, strongly suggests its intent that RCW 25.15.303 not be applied retroactively.

**3. RCW 25.15.303 Would Create New Obligations and New Liabilities On Past Conduct.**

As previously explained, Washington Courts refuse to apply a statute retroactively if it imposes "new liability" on defendants.<sup>32</sup> With the enactment of RCW 25.15.303, dissolved LLCs now face new obligations for possible pre-dissolution and post-dissolution liabilities for a period of three years. It would be entirely unjust and inequitable to impose these new liabilities on LLCs which have already properly dissolved pursuant to the law at that time. The presumption against statutory retroactivity has consistently been

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<sup>31</sup> House Bill Report, SB 6531, P.3, ¶ 3.

<sup>32</sup> *Bayless*, 84 Wn. App. at 315-317, 927 P.2d 254 (1996).

explained by reference to the unfairness of imposing new burdens on persons after the fact.<sup>33</sup>

In *Johnston v. Beneficial Management Corp.*, 85 Wn.2d 637, 641, 538 P.2d 510 (1975), the court dismissed the Plaintiffs' claim for violation of the Consumer Protection Act ruling that at the time the alleged malfeasance took place, the Consumer Protection Act did not impose civil liability on the plaintiffs. Only after the Consumer Protection Act was amended in 1970 did the Act create a private cause of action for deceptive acts. The trial court refused to retroactively apply the amendment to hold the defendant liable for their actions in 1968 and dismissed the claims.<sup>34</sup> The Supreme Court of Washington affirmed stating:

RCW 19.86.090 is not merely remedial. It creates a new cause of action. It must therefore be presumed that the legislature intended it to apply to future transactions only. Furthermore, it is couched in the language expressed in the present and future tenses rather than the past tenses and we have said that the use of the present and future tense manifests an intent that the act should apply only prospectively.<sup>35</sup>

Like *Johnston*, RCW 25.15.303 is not retroactive because it creates a new cause of action for claims against dissolved LLC's.

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<sup>33</sup> *Landgraf*, 511 U.S. at 270, 114 S. Ct. 1483 (1994).

<sup>34</sup> *Johnston v. Beneficial Management Corp.*, 85 Wn.2d 637, 640, 538 P.2d 510 (1975).

<sup>35</sup> *Id.* at 642-643.

Moreover, the new statute was enacted **after** the Emily Lane HOA filed its original complaint. The general rule is that the timeliness of a lawsuit is governed by the statute in effect when the lawsuit was filed.<sup>36</sup> This general rule has been accepted across the nation.<sup>37</sup> In *Johnston*, the amendment was effective **before** the plaintiff filed its Complaint. Nevertheless, the Supreme Court still refused to retroactively apply a new statute to pre-amendment conduct.<sup>38</sup>

The Emily Lane HOA relies on out of state cases such as *Quintana v. Los Alamos Medical Ctr.* and *Walden Home Builders, Inc. v. Schmit* to support their arguments of retroactivity. In each of these cases, the lawsuits were filed **after** the effective date of the amendment to the statute. In *Quintana v. Los Alamos Medical Ctr.*,

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<sup>36</sup> *Packscher v. Fuller*, 6 Wash. 534, 33 P. 875 (1893).

<sup>37</sup> (E.g., *Schendt v. Dewey*, 246 Neb. 573, 577, 520 N.W.2d 541 (1994) ("the limitation period in effect at the time an action is filed governs the action"); *Chase v. Sabin*, 445 Mich. 190, 192 n.4, 516 N.W.2d 60 (1994) ("The pertinent statute of limitations is the one in effect when the plaintiff's cause of action arose."); *Roberts v. Caton*, 224 Conn. 483, 489, 619 A.2d 844 (1993) ("the statute of limitations in effect at the time an action is filed governs the timeliness of the claim"); *Matter of Estate of Weldman*, 476 N.W.2d 357, 363-64 (Iowa 1991) ("A general rule with respect to statutes of limitations is that the period of limitation in effect at the time suit is brought governs"); *Dobson v. Larkin Homes, Inc.*, 251 Kan. 50, 53, 832 P.2d 345 (1992) ("The statute of limitations in effect at the time an action is filed applies.")). And it applies to both statutes of limitations and statutes of repose. See, e.g., *Sievers v. Espy*, 264 Ga. 118, 119, 442 S.E.2d 232 (1994) (holding statute of repose in effect when lawsuit was filed governs).

<sup>38</sup> *Johnston v. Beneficial Management Corp.*, 85 Wn.2d 637, 641, 538 P.2d 510 (1975).

the Plaintiff's lawsuit was filed years after the effective date of the amendment to the general corporation act governing nonprofit corporations, which provided a survival statute for claims against a dissolved nonprofit corporation for two years from the date of dissolution.<sup>39</sup> Thus, the court held that both Plaintiff and LMAC were subject to the 1975 amendment in the non-profit corporation act and affirmed dismissal of Plaintiff's complaint.<sup>40</sup> The court did not address the issue of whether amendments to the statute apply retroactively to a lawsuit that was filed **prior** to the effective date of the amendment.

In *Walden Home Builders, Inc. v. Schmit*, Walden Homes instituted an action on May 22, 1942 for breach of contract.<sup>41</sup> At the time the Complaint was filed, Plaintiff was a dissolved corporation as of May 24, 1940. At the time of Plaintiff's dissolution, there was no statute preserving any remedies on behalf of a dissolved corporation. However, subsequent to the dissolution of Plaintiff and **prior** to the institution of the suit, the Illinois Corporation Act was amended to preserve a corporation's rights of action in its name if

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<sup>39</sup> *Quintana v. Los Alamos Medical Ctr.*, 119 N.M. 312 (N.M. Ct. App. 1994).

<sup>40</sup> *Id.* at 313.

<sup>41</sup> *Walden Home Builders, Inc. v. Schmit*, 62 N.E.2d 11, 326 Ill. App. 386 (1945).

commenced within two years from its dissolution.<sup>42</sup> Since the Plaintiff's action was filed after the effective date of the amendment, the Court held that the amendment applied and the Corporation had a right to pursue its action. Again, the court did not address the issue of whether the amendment to the statute applied retroactively to a lawsuit that was filed prior to the amendment.

Here, there is nothing in RCW 25.15.303 or its legislative history that indicates the Legislature intended it to be retroactive. The HOA filed this lawsuit on July 19, 2005. RCW 25.15.303 became effective on June 7, 2006, approximately 11 months *after* the Emily Lane HOA filed this action. RCW 25.15.303 is not retroactive and the Emily Lane HOA's lawsuit against Colonial Development, LLC and its members is barred.

**C. THERE IS NO BASIS IN FACT OR LAW TO SUPPORT THE EMILY LANE HOA'S CLAIMS AGAINST COLONIAL DEVELOPMENT, LLC.**

Even assuming the Emily Lane HOA's claims against Colonial Development, LLC and its members are not barred under the Limited Liability Companies Act, the claims lack factual and legal support and must be dismissed.

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<sup>42</sup> *Id.* at 389.

**1. The HOA Failed to Present Any Evidence To Support its Breach of Contract Claim.**

The Emily Lane HOA failed to identify any specific clause in the Purchase and Sale Agreement which Colonial Development, LLC allegedly breached or any factual bases upon which its breach of contract claim is based. At the very most, the HOA has raised an issue of fact concerning its claim for breach of *implied* warranties under the Condominium Act. Thus, the HOA's claim for breach of contract should be dismissed.

**2. The HOA Failed to Present Any Evidence To Support its Breach of Express Warranty Claim.**

The Condominium Declaration contained a Limited Home Warranty, which commenced upon the first date of occupancy of the home. With respect to common elements, the Limited Warranty commenced on the date the common element was substantially completed. The Limited Home Warranty with respect to both the common elements and the individual units was limited to a period of one year. The Limited Home Warranty specifically required a written notice to Colonial Development, LLC of any warranty claims.

All breach of warranty claims relating to the individual units are barred by the one year warranty. Thirteen of the units were closed in 2001. The HOA failed to present any evidence that

Colonial Development, LLC breached any warranty claim with respect to these Owners within the one year warranty. Ten of the units were closed in 2002. Again, the HOA failed to present any evidence that Colonial Development, LLC breached any warranty claim with respect to these Owners within the one year warranty. Lastly, only one unit was closed in 2003, which was Unit B205 on January 3, 2003. No warranty claims were made within the one year with respect to this Unit. The temporary certificate of occupancy was issued for the project on July 31, 2001. There is no evidence that the HOA or the unit owners notified Colonial Development, LLC of a warranty claim within the one year period. Thus, the HOA's claim for breach of express warranty is barred and should be dismissed.

**3. The HOA's Breach of Implied Warranty of Habitability Claim is Barred.**

The doctrine of implied warranty of habitability arises out of the sale transaction and imposes liability upon builder-vendors in favor of the original purchasers of residential property for egregious defects in the fundamental structure of the home.<sup>43</sup> The court in *Stuart v. Coldwell Banker Comm'l Group* rejected the HOA's

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<sup>43</sup> *Stuart v. Coldwell Banker Commercial Group*, 109 Wn.2d 406, 416-17, 745 P.2d 1284 (1987).

contention that the rule does not relate to the common elements of the condominiums.<sup>44</sup> Eight of the unit owners are not the original purchasers. At the very least, the Emily Lane HOA's claim with respect to these eight units should be dismissed.

The Emily Lane HOA failed to present any evidence that the alleged defects present serious questions of the safety of the Emily Lane condominiums. In fact, the HOA admits that no unit owner has been prevented from using his or her unit because of the alleged defects. None of the alleged defects profoundly compromise the essential nature of the property and make it unfit for habitation within the meaning of *Stuart*.

**4. There HOA Failed to Present Any Evidence to Support its Breach of Fiduciary Duty Claim.**

The HOA argued that Colonial, when it managed the homeowners association for approximately one year, had the duty to disclose information that it knew or ***should have known***, and because it should have known of the construction defects, it breached its duty. However, during the approximate one year that Colonial managed the homeowners association until June 27, 2002, Colonial was not aware of any of the defects the HOA is now

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<sup>44</sup> *Stuart v. Coldwell Banker Comm'l Group, Inc.*, 109 Wn.2d 406, 417, 745 P.2d 1284 (1987).

being asserted against it. The HOA presented no evidence to refute this fact. The HOA contended that because Colonial was the Builder it "should have known" of the alleged defects during the period of declarant control. The HOA failed to present any evidence that Colonial or its members had actual knowledge of any of the defects during the period of declarant control. Thus, this court should dismiss the HOA's claim for breach of fiduciary duty.

**5. The HOA Failed to Present Any Evidence To Support its Claim Under the Uniform Fraudulent Transfers Act.**

The HOA asserts that Colonial Development, LLC has violated RCW 19.40 et seq, the Uniform Fraudulent Transfer Act ("UFTA"), by transferring assets to its members with actual intent to hinder, delay or defraud the Association. The principle of fraudulent conveyances prohibits any disposition of property that infringers upon the right of another person and accomplishes a fraudulent result. Specifically, pursuant to RCW 19.40.041(a):

A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

- (1) With actual intent to hinder, delay, or defraud any creditor of the debtor; or

(2) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

(i) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

(ii) Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.

Under RCW 19.40.041(a)(1), a fraudulent transfer is established upon "clear and satisfactory evidence" of an actual intent to defraud. Any party making a claim under the UFTA carries the burden of proving that the transfer in question was fraudulent.<sup>45</sup> Proof of actual intent to defraud must be clear and satisfactory.<sup>46</sup> In determining whether there was actual intent to defraud, the trial court may consider eleven factors in determining whether the requisite intent was present.<sup>47</sup>

Here, there are no factors which support the HOA's claim that Colonial Development, LLC made transfers to its members with actual intent to hinder, delay or defraud the Association. At the

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<sup>45</sup> *Sedwick v. Gwinn*, 73 Wn. App. 879, 885, 873 P.2d 528 (1994).

<sup>46</sup> *Clearwater v. Skyline Constr. Co., Inc.*, 67 Wn. App. 305, 321, 835 P.2d 257 (1992), *review denied*, 121 Wn.2d 1005 (1993).

<sup>47</sup> RCW 19.40.041(b).

time the last distribution was made on December 31, 2004, (which was only approximately \$1,956.00 to each member), neither Colonial Development, LLC nor any of its members had any knowledge of the defects being alleged in this case. There is no evidence that any distributions of paid in capital was made with any intent to defraud the HOA.

The HOA's Complaint specifically alleges a cause of action for violation of RCW 19.40.051. The HOA's cause of action under RCW 19.40.051 is barred because it was not brought within one year after the transfer was made. Thus, the court should have dismissed these claims as well.

**6. The HOA Failed to Present Any Evidence to Support its Claims Under RCW 64.34.405, 64.34.410 and 64.34.415.**

The HOA did not refute Colonial Development, LLC's contention that there was no evidence to support a breach of RCW 64.34.405, 64.34.410 or 64.34.415, which relates to the public offering statement. RCW 64.34.405 concerns transferring responsibility for preparing a Public Offering Statement to a successor declarant or dealer, which is not even applicable here. Thus, the court should have dismissed this cause of action as a matter of law. RCW 64.34.410(1)(y) requires the Public Offering

Statement to list physical hazards **known to the declarant at the time of drafting** which are not readily apparent to a purchaser. RCW 64.34.405(3). The requirement of actual knowledge does not encompass facts which the builder should have known.<sup>48</sup> Here, Colonial Development, LLC had no knowledge of any of the alleged defects at the time of drafting the Public Offering Statement. RCW 64.34.415 concerns conversion buildings, which is also not applicable here.

Thus, there is no reasonable basis for the trial court's denial of Colonial Development, LLC's motion for summary judgment of the HOA's claims under RCW 64.34.405, 64.34.410 or 64.34.415.

**7. The HOA's Claims for Fraudulent Concealment, Negligent Misrepresentation, and Fraudulent Misrepresentation are Barred by the Economic Loss Rule and There is No Evidence to Support Any of These Claims.**

Under Washington law, the HOA's claims for fraudulent concealment, and negligent/fraudulent misrepresentation are barred by the economic loss rule. The HOA seeks only to recover the cost of repair, which is a purely economic loss. In *Griffith v. Centex Real Estate Corp.*, 93 Wn. App. 202, 969 P.2d 486 (1998),

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<sup>48</sup> *Atherton Condominium Apartment-Owners Ass'n Bd. Of Dirs. V. Blume Devel. Co.*, 115 Wn.2d 506, 532-33, 799 P.2d 250 (1990).

a Class of Homeowners sued Centex for the fraudulent misrepresentation of its promise to provide a quality home. The court held that their claims were barred by the economic loss rule.<sup>49</sup> Purely economic damages are not recoverable in tort.<sup>50</sup>

Even if the HOA's claims were not barred by the economic loss rule, the HOA failed to present any evidence to support these claims. Colonial Development, LLC was not aware of the alleged defects until the HOA served it with notice of claim on May 31, 2005. Thus, the trial court should have dismissed these claims.

**8. There is No Evidence to Support a Breach of the Consumer Protection Act.**

The HOA's Complaint alleges that Colonial Development, LLC violated the Consumer Protection Act by making distributions to its members to the detriment of the HOA and the individual unit owners, failing to disclose such distributions to the HOA and the individual unit owners, failing to disclose the existence of defects within the Project at the time the units were being marketed and sold, during the period of Declarant control, and failed to disclose

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<sup>49</sup> *Griffith v. Centex Real Estate Corp.*, 93 Wn. App. 202, 213, 969 P.2d 486 (1998).

<sup>50</sup> *Berschauer/Phillips Constr. Co. v. Seattle School District No. 1*, 124 Wn.2d 816, 828, 881 P.2d 986 (1994); accord *Griffith v. Centex Real Estate Corp.*, 93 Wn. App. 202, 212, 969 P.2d 486 (1998) (applying the economic loss rule to a negligent misrepresentation claim).

its intent to dissolve when it still had warranty obligations. The HOA failed to establish all five elements to support its CPA claim. In order to prevail in a private Consumer Protection Act action, the HOA was required to establish all five of the following elements:

1. An unfair or deceptive act or practice;
2. Occurring in the conduct of trade or commerce;
3. Which affects the public interest;
4. Injury to plaintiff's business or property; and
5. Causation.<sup>51</sup>

As to elements (1) and (4); a causal link is required between the unfair or deceptive acts and the injury suffered by plaintiff.<sup>52</sup> A

plaintiff establishes causation if he [or she] shows the trier of fact that he [or she] relied upon a misrepresentation of fact.<sup>53</sup>

Washington courts have long held that in a private transaction, a breach of contract affecting no one else but the contracting parties does not affect the public interests.<sup>54</sup> If a transaction is essentially a private dispute, five factors are applied to assess an impact on the public interest. These factors are: (1) Were the alleged acts committed in the course of defendant's business? (2) Were the acts

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<sup>51</sup> *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986).

<sup>52</sup> *Washington State Physicians Ins. Exch. & Ass'n. v. Fisons Corp.*, 122 Wn.2d 299, 314, 858 P.2d 1054 (1993).

<sup>53</sup> *Pickett v. Holland America Line-Westours, Inc.*, 101 Wn. App. 901, 916, 6 P.3d 63 (2000).

<sup>54</sup> *Lightfoot v. MacDonald*, 86 Wn.2d 331, 334, 544 P.2d 88 (1976).

part of a pattern or generalized course of conduct? (3) Were repeated acts committed before the act involving plaintiff? (4) Was there a real and substantial potential for the defendant to repeat its conduct after the act involving plaintiff? (5) If the act complained of involved a single transaction, were many consumers affected or likely to be affected by it?<sup>55</sup>

The HOA contend that the alleged act supporting its CPA claim was Colonial Development, LLC's distributions of the capital contributions to its members. It is difficult to understand how capital contributions to its members had the "capacity to deceive a substantial portion of the public." The reimbursement of capital contributions did not affect the public interests. The HOA failed to identify any deceptive or misrepresentation by Colonial Development, LLC that was relied upon by the individual owners in their purchase of the units. It is clear that the HOA failed to establish all of the elements of its CPA claim. Thus, the trial court should have dismissed this claim.

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<sup>55</sup> *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 719 P.2d 531 (1986).

**D. COLONIAL DEVELOPMENT, LLC IS ENTITLED TO ITS ATTORNEY'S FEES AND COSTS.**

Under RAP 18.1(a), if Colonial Development, LLC prevails on appeal, it is entitled to an award of its attorney's fees and costs in defending the Emily Lane HOA's claims in the trial court and on appeal. A court may award attorney's fees and costs to a prevailing party pursuant to a contractual provision, statutory provision, or a well recognized principle of equity.<sup>56</sup> A "prevailing party" is the party in whose favor final judgment is rendered.<sup>57</sup>

**1. Colonial Development, LLC is a Prevailing Party Under the Condominium Act.**

Colonial Development, LLC is a prevailing party under RCW 4.84.330. RCW 4.84.330 was modeled after California's Cal. Civ. Code § 1717. Both statutes were "enacted to establish mutuality of remedy where contractual provision makes recovery of attorney's fees available for only one party, and to prevent oppressive use of one-sided attorney's fees provisions."<sup>58</sup> In doing so, Washington applies a "reciprocal policy" whereby if one party asserts a claim for attorney's fees pursuant to a contractual clause

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<sup>56</sup> *Mt. Hood Beverage Co. v. Constellation Brands, Inc.*, 149 Wn.2d 98, 121-122, 63 P.3d 779 (2003).

<sup>57</sup> *Herzog Aluminum, Inc., v. General America Window Corporation*, 39 Wn. App. 188, 192, 692 P.2d 867 (1984).

<sup>58</sup> *Herzog Aluminum, Inc.*, 39 Wn. App. at 196.

or statute, then *by law* the opposing party is also entitled to attorney's fees if it prevails.<sup>59</sup>

Here, the HOA's Complaint and Amended Complaint assert causes of action against Colonial Development, LLC under Washington's Condominium Act and prayed for an award of attorney's fees and costs under the Act. The Washington Condominium Act, RCW 64.34.455, authorizes an award of reasonable attorney fees to the prevailing party:

If a declarant or any other person subject to this chapter fails to comply with any provision hereof or any provision of the declaration or bylaws, any person or class of persons adversely affected by the failure to comply has a claim for appropriate relief. The court, in an appropriate case, may award reasonable attorney's fees to the prevailing party.

Washington courts have declared that "the purpose of the fee shifting provision in RCW 64.34.455 'is to punish frivolous litigation and to encourage meritorious litigation.'"<sup>60</sup> The HOA has wrongfully sought to assert liability under the Condominium Act against Colonial Development, LLC. Thus, pursuant to the attorney's fee provision under the Condominium Act, Colonial

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<sup>59</sup> *DGHI Enterprizes v. Pacific Cities, Inc.*, 91 Wn. App. 109, 956 P.2d 324 (1998) (overruled on other grounds).

<sup>60</sup> *One Pacific Tower Homeowners' Ass'n v. Hal Real Estate Investments, Inc.*, 108 Wn. App. 330, 353-54, 30 P.3d 504, 515-16 (2001), quoting *Eagle Point Condominium Owners Ass'n v. Coy*, 102 Wn. App. 697, 713, 9 P.3d 898 (2000).

Development, LLC is entitled to an award of its attorney's fees and costs incurred in defense of the HOA's Condominium Act claims.

**2. Colonial Development, LLC is a Prevailing Party Under the Purchase and Sale Agreements.**

The Purchase and Sale Agreements for the condominiums contain a prevailing attorney fee clause which states as follows:

- q. **Attorney's Fees.** If Buyer or Seller institutes suit against the other concerning this Agreement, the prevailing party is entitled to reasonable attorneys' fees and expenses.

A provision in a contract providing for the payment of attorneys' fees in an action to collect any payment due under the contract includes both fees necessary for trial and those incurred on appeal as well.<sup>61</sup> The prevailing attorney fee provision in enforceable and Colonial Development, LLC is entitled to its attorney's fees and costs as a prevailing party.

**3. Colonial Development, LLC is a Prevailing Party Under the Consumer Protection Act.**

The Consumer Protection Act provides for an award of attorney's fees and costs to the prevailing party.<sup>62</sup> An award of attorney's fees and costs under the Consumer Protection Act is

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<sup>61</sup> *Granite Equip. Leasing Corp. v. Hutton*, 84 Wn.2d 320, 327, 525 P.2d 223 (1974).

<sup>62</sup> RCW 19.86.090.

consistent with the statutory directive of the act: "the prevailing party, may at the discretion of the court, recover the costs of said action including a reasonable attorney's fee."<sup>63</sup> Colonial Development, LLC is the prevailing party under the Consumer Protection Act and is entitled to its reasonable attorney's fees and costs.

## VI. CONCLUSION

The trial court error in denying Colonial Development, LLC's motion for summary judgment. Washington's Limited Liability Companies Act has no provision for the preservation of any claims against an LLC after its certificate of formation has been cancelled. Moreover, RCW 25.15.303 does not apply retroactively because the Legislature did not express any intent that it be applied retroactively and it is not curative or remedial. Lastly, even assuming the Emily Lane HOA's lawsuit was not barred by the Limited Liability Companies Act, there is no factual or legal basis to support any of the HOA's claims against Colonial Development, LLC. Thus, this court should grant Colonial Development, LLC's

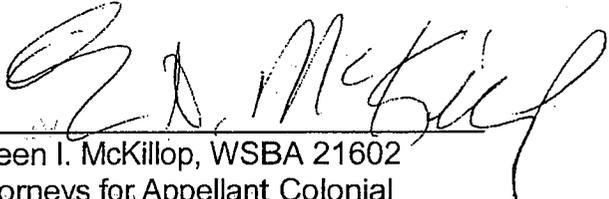
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<sup>63</sup> RCW 19.86.090, See also *State v. Ralph Williams' North West Chrysler Plymouth, Inc.*, 87 Wn.2d 298, 314, 553 P.2d 423 (1976), RCW 19.86.920.

motion for summary judgment and award it its attorney's fees and costs incurred at the trial court level and on appeal.

DATED this 22 day of November, 2006.

OLES MORRISON RINKER & BAKER  
LLP

By 

Eileen I. McKillop, WSBA 21602  
Attorneys for Appellant Colonial  
Development, LLC

P-COLONIAL'S APPELLATE BRIEF 113240002

No. 58825-7

COURT OF APPEALS  
DIVISION I  
OF THE STATE OF WASHINGTON

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DIVISION I  
STATE OF WASHINGTON

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EMILY LANE HOMEOWNERS ASSOCIATION,  
a Washington nonprofit corporation,

*Respondent/Cross-Appellant,*

v.

COLONIAL DEVELOPMENT, LLC,  
a Washington limited liability company,

*Appellant/Cross-Respondent,*

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,

*Cross-Respondents.*

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**DECLARATION OF SERVICE**

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**ORIGINAL**

I, April Barza, hereby declare under penalty of perjury and in accordance with the laws of the State of Washington as follows:

1. I am a citizen of the United States and over the age of 18 years and am not a party to the within cause;
2. I am employed by the law firm of Oles Morrison Rinker & Baker LLP. My business and mailing address is 701 Pike Street, Suite 1700, Seattle, WA, 98101-3930.
3. On this date, I had served via ABC Legal Messenger service, a copy of the following document(s) on the following

parties:

**COUNSEL FOR CROSS-RESPONDENT EMILY LANE  
HOMEOWNERS ASSOCIATION:**

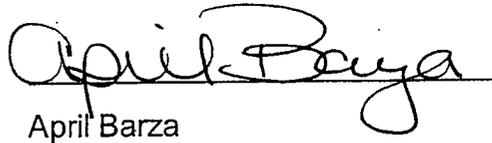
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Entitled:

1. Brief of Appellant Colonial Development, LLC, and
2. Declaration of Service.

DATED this 22<sup>nd</sup> day of November 2006 at Seattle,  
Washington.

  
April Barza