NO. 91039-1

SUPREME COURT OF
THE STATE OF WASHINGTON

Court of Appeals, Division III, Cause No. 31163-5-III

WILLIAM HOUK, et ux.,

Petitioners,

v.

BEST DEVELOPMENT & CONSTRUCTION COMPANY, INC., et al.,

Defendants.

NICHOLS & SHAHAN DEVELOPMENTS, LLC, a Washington Limited Liability Company and JOSEPH K. NICHOLS, individually,

Respondents,

DECLARATION OF LEONARD FLANAGAN IN SUPPORT OF PETITIONER'S MOTION FOR EXTENSION OF TIME TO FILE PETITION FOR REVIEW

Leonard D. Flanagan, WSBA # 20966
Justin D. Sudweeks, WSBA # 28755
Daniel S. Houser, WSBA # 32327
Attorneys for Petitioner

STEIN, FLANAGAN, SUDWEEKS & HOUSER, PLLC
901 Fifth Ave, Suite 3000
Seattle, WA 98146
(206) 388-0660

Leonard Flanagan, on oath, deposes and states:

1. I am appellate counsel for the petitioner (respondent and plaintiff below), Janice Houk. I am competent to testify, and do so herein of my own personal knowledge.

2. I have practiced law in Washington for 23 years. My practice is currently largely limited to representing homeowners in construction defect and insurance coverage disputes. Construction defect and insurance coverage litigation have been a mainstay of my practice since approximately 1998. Appellate practice is a small but not insignificant portion of my practice. I would estimate that I have handled approximately 12-15 matters in the Courts of Appeal during my career, and have either been the primary attorney or intimately involved in five matters before the Supreme Court. Accordingly, my familiarity with both written and unwritten procedures and practices on appeal does not rise to the level of great expertise, but by the same token is not completely unfamiliar territory.

3. My client Mrs. Houk is a widow of advancing years, and retired. In late 2004, Mrs. Houk and her late husband purchased a new home from the defendant Joe Nichols, who was identified as the "seller" in the Real Estate Purchase and Sale Agreement ("REPSA"). Though not identified on the REPSA, the property was apparently developed and

owned at the time of sale by a Washington limited liability company in which Mr. Nichols was a member, Nichols Shahan Development, LLC ("NSD, LLC"). With the assistance of different trial counsel, after serving a pre-claim notice of suit pursuant to RCW 64.50.020, on December 16, 2010 Mrs. Houk commenced a suit in Spokane County Superior Court against NSD, LLC, its owners (including Mr. Nichols), the general contractor and several subcontractors, alleging serious defects in the construction of the residence. The alleged cost of repairing those defects as stated in the verified Complaint was $167,781.03.

4. Mrs. Houk's suit was litigated for approximately 18 months in the trial court prior to this appeal. During that time, NSD, LLC filed no Answer and raised no affirmative defenses. At some point apparently late in this process, defense counsel learned that NSD, LLC had been administratively dissolved on or about October 2, 2006 for failure to file its annual renewal with Washington's Secretary of State. NSD, LLC brought a motion for summary judgment contending that an alleged three year "limitations" period for claims against dissolved limited liability companies under RCW 25.15.303. The trial court denied that motion, apparently concluding that retroactive amendments to the Limited Liability Company Act in the summer of 2010 established a requirement

that NSD, LLC filed a "certificate of dissolution" before claiming the benefit of RCW 25.15.303's "limitations" period.

5. NSD, LLC and Mr. Nichols sought and were granted discretionary review of the denial of their summary judgment motion by Division III of the Court of Appeals, on the grounds that a "statute of limitations" cannot be retroactively changed by amendatory litigation after it has expired.

6. I was retained by Mrs. Houk to represent her in that interlocutory appeal. I agreed to take the case because, having extensively briefed and argued similar and related issues as lead counsel on behalf of the Emily Lane Homeowners Association in the *Chadwick Farms v. FHC, LLC* matter, and on subsequent remand, I believed that I could provide good value in representing Mrs. Houk in the appeal. 166 Wn.2d 178, 207 P.3d 1251 (2009).

7. Following submission of briefs and argument, on March 13, 2014 the Court of Appeals' issued its opinion reversing the trial court and granting NSD, LLC's and Mr. Nichols' motion for summary judgment. The Court of Appeals' opinion did not address a number of substantive arguments made by Mrs. Houk on appeal. In addition, the Court of Appeals granted NSD, LLC its attorney fees pursuant to a REPSA even though NSD, LLC was not a signatory to the REPSA, even

though the Court's opinion implicitly acknowledged that NSD, LLC likely has no "continuing legal existence" such that it could not be awarded fees, and even though Mr. Nichols was sued, among other things, as the "seller" under the REPSA irrespective of his status as a member of NSD, LLC such that any "limitations" period based on the date of NSD, LLC's dissolution should have no application to the causes of action against him.

8. Mrs. Houk timely moved for reconsideration of the March 13, 2014 opinion of the Court of Appeals.

9. On April 17, 2014, I received an email attaching a cover letter and an Order denying Mrs. Houk's Motion for Reconsideration. A true and correct copy of the email and cover letter are attached hereto as Exhibit A.

10. The standard practice in my office is that physical or hard copies of correspondence or pleadings are, immediately upon receipt, routed through my long-term legal assistant for review, calendaring of applicable deadlines on our central calendar (both electronic and physical), circulation to all other attorneys in my office, scanning, and filing. Accordingly, when hard copies of documents are delivered to this office, any resulting action dates are calendared as a matter of course. My assistant who performs these calendaring tasks has extensive experience, is a trained and certified paralegal, has worked with me for at least 10

years, and recently became licensed as an attorney in the State of California.

11. If, on the other hand, a document is transmitted electronically only to me or another attorney, the attorney will need to forward the document on to staff for calendaring. My standard practice, when I am aware that a document is being sent only electronically, is to forward it on to my legal assistant for calendaring, circulation, and filing.

12. The cover letter in Exhibit A is addressed to my physical mailing address, and the physical addresses of all counsel. There is no indication in the letter, or in the accompanying email, that it was being sent only by email transmission. I therefore believe that I assumed that a hard copy of Exhibit A would be transmitted by mail to my office and calendared as a matter of course.

13. After researching the issue, I have determined that I did not forward the email at Exhibit A on to my assistant for calendaring the deadline for the Petition for Review, as I would ordinarily do when such emails state that they are the only copies that will be transmitted.

14. My experience has been that the Courts of Appeal will explicitly notify recipients of email correspondence when the court does not intend to send a hard copy of correspondence. Typical notices state, in effect, that "This is the only notice you will receive" or "By Email Only."

For example, the email transmission of the hearing notice from Division III in this matter, a true and correct copy of which is attached as Exhibit B, states that it is the only copy of the notice that will transmitted. It is my practice therefore, to immediately forward such emails to my assistant, who is responsible for calendaring deadlines and circulating such materials to other attorneys in my office.

15. Assuming that the deadline for a Petition for Review was May 17, 2014 (that is, 30 days after denial of Mrs. Houk's Motion for Reconsideration of the March 13, 2014 opinion), it is likely that I would have missed that deadline because I did not forward the court's notice on for calendaring as described above.

16. Delay in addressing the missed deadline was exacerbated, however, by a misunderstanding on my part of RAP 13.4. Specifically, RAP 13.4 dates the period for seeking review from the time of a "decision terminating review." However, I was laboring under the mistaken belief that because the initial review was interlocutory in nature in the Court of Appeals, a request for review by the Supreme Court would not be required until a final order terminating the case was entered in the trial court. See generally RAP 5.1. And, while the clerk's letter identified the period as 30 days following the Order denying reconsideration, I believed that the clerk had not taken into account the fact that other defendants remained in

the action, such that the Order was not adequately finalized to seek Supreme Court review.

17. My misunderstanding of RAP 13.4 is confirmed by an email I sent to opposing counsel suggesting that I intended to dismiss the remaining defendants at the trial court level, and pursue further review with the Supreme Court. A true and correct copy of that correspondence is attached as Exhibit C.

18. Several subcontractor defendants remained in the case, though it was unlikely that the case could proceed against them because all other similarly-situated subcontractor defendants had procured dismissals on summary judgment based on lack of privity and the economic loss rule / independent duty doctrine.

19. On July 25, 2014, the Court of Appeals commissioner issued her opinion regarding the amount of defense attorney fees. The Court of Appeals commissioner's opinion on attorney fees awarded fees to Best Development, LLC, which was not a party to the appeal and which did not appear or defend at the trial court level. It was therefore clear to all the litigants that the opinion was in error, and would have to be withdrawn and corrected.

20. On August 15, 2014, defendants filed a Motion to Modify, based on the erroneous award to Best Development, and seeking additional fees that were not awarded by the commissioner.

21. On November 4, 2014, the Court of Appeals issued an order withdrawing the mandate. A true and correct copy is attached as Exhibit D. Mrs. Houk should have had until December 4, 2014, to file her petition for review of that order.

22. On or about November 4, 2014 (following the decision on the defense attorney fee award by Division III's commissioner, and issuance of the mandate), I entered orders of voluntary dismissal as to all remaining parties defendant based on my misunderstanding of applicable procedures as described above. A true and correct copy of that Order is attached as Exhibit E. It was thus my belief at this time that the Petition for Review would have to be filed by December 4, 2014 – which just so happens to coincide with a period of 30 days from issuance of the Order Granting Reconsideration.

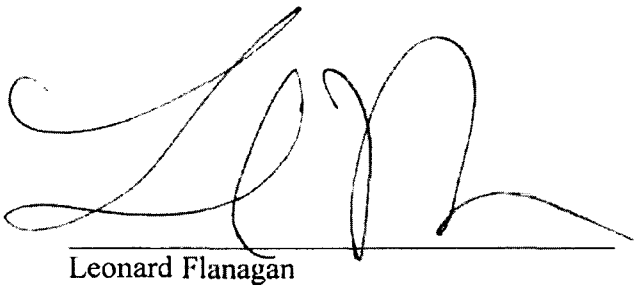
23. Given my belief that the Petition for Review would be due no later than December 4, 2014, my plan was to file the Petition by the end of November, 2014. By mid-November, the Petition for Review was complete and ready for filing. A true and correct copy is attached as Exhibit F.

24. On the morning of November 26, 2014, however, I received notice from the Supreme Court that the deadline for filing the petition for review had passed on or about May 19, 2014, and setting December 29, 2014 as the last day to seek an extension of time for filing the petition. (Of note, the Supreme Court Deputy Clerk's letter states: "**LETTER SENT BY EMAIL ONLY**." The cover email from the Supreme Court Deputy Clerk further states "*Please consider this as the original for your files, a copy will not be sent by regular mail.*" A true and correct copy of the letter correspondence and email is attached as Exhibit G.)

25. After receiving the Deputy Clerk's letter, I determined that I could not take action by filing a Petition for Review or a Motion for Extension of Time without discussing issues from the potentially missed deadline with my client and obtaining her informed consent to proceed, after consultation with independent counsel. That process was complete by December 17, 2014.

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

RESPECTFULLY SUBMITTED this 22nd day of December, 2014.



Leonard Flanagan

CERTIFICATE OF SERVICE

This is to certify that on the 22nd day of December, 2014, I did serve true and correct copy of the foregoing document with all attachments to be delivered to the following recipient(s) by the method(s) as indicated:

Counsel for Petitioners Nichols & Shahan Developments, LLC and Joseph K. Nichols Ross P. White Michael J. Kapaun WITHERSPOON, KELLEY, DAVENPORT & TOOLE, P.S. 422 West Riverside Avenue, Suite 1100 Spokane, Washington 99201	☐ US Mail X FedEx overnight delivery ☐ Hand Delivery X E-Mail

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

Dated this 22nd day of December, 2014 at Seattle, Washington.

Mariah Lynge

EXHIBIT A

Leonard D. Flanagan

From: DECISIONS, DIV3 <DIV3.DECISIONS@courts.wa.gov>
Sent: Thursday, April 17, 2014 9:18 AM
To: mjk@witherspoonkelley.com; Ken Strauss; rpw@witherspoonkelley.com; Leonard D. Flanagan
Subject: No. 31163-5-III - Order
Attachments: 311635.Houk.Ltr.Order.pdf

Importance: High

Please see the attached decision entered by the court.

Courts of Appeals, Division III
500 N. Cedar St.
Spokane, WA 99201-1905
(509)456-3082

Renee S. Townsley
Clerk/Administrator

(509) 456-3082
TDD #1-800-833-6388

The Court of Appeals
of the
State of Washington
Division III

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April 17, 2014

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leonard@condodefects.com

CASE # 31163-5-III
William Houk, et ux v. Best Development & Construction Co., Inc. et al
SPOKANE COUNTY SUPERIOR COURT No. 102052393

Dear Counsel:

Attached is a copy of the Order Denying Motion to for Reconsideration of this Court's opinion under date of March 13, 2014.

A party may seek discretionary review by the Supreme Court of the Court of Appeals' decision. RAP 13.3(a). A party seeking discretionary review must file a Petition for Review, an original and a copy of the Petition for Review in this Court within 30 days after the Order Denying Motion for Reconsideration is filed (may be filed by electronic facsimile transmission). RAP 13.4(a). The Petition for Review will then be forwarded to the Supreme Court.

If the party opposing the petition wishes to file an answer, that answer should be filed in the Supreme Court within 30 days of the service.

Sincerely,

Renee S Townsley

Renee S. Townsley
Clerk/Administrator

RST:mk
Attach.

FILED
April 17, 2014
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, STATE OF WASHINGTON, DIVISION III

WILLIAM HOUK and JANICE HOUK, husband and wife,

Respondent,

v.

BEST DEVELOPMENT & CONSTRUCTION COMPANY, INC., a Washington Corporation, DAVE WINLOW dba SUNDANCE EXCAVATING, BURT SHAHAN, an individual, LANCE POUNDER EXCAVATION, INC., a Washington Corporation, JOHN AKINS MASONRY, INC., a Washington Corporation, R.K. STARK CONSTRUCTION CO., CHARLES MAYFIELD, an individual dba CM SIDING, TIM VIGIL, an individual dba TJ VIGIL CONSTRUCTION, APOLLO ELECTRIC, INC., a Washington Corporation, GALE INSULATION, WALKER ROOFING, LLC, a Washington Limited Liability Company, REED CONCRETE COMPANY, INC., a Washington Corporation, STI NORTHWEST, INC., a Washington Corporation,

Defendants.

No. 31163-5-III

ORDER DENYING MOTION FOR RECONSIDERATION

NICHOLS & SHAHAN DEVELOPMENT, LLC, a Washington Limited Liability Company, and JOSEPH NICHOLS, an individual,

Petitioners.

THE COURT has considered appellant's motion for reconsideration of this Court's opinion under date of March 13, 2014, and having reviewed the records and files herein, is of the opinion the motion should be denied. Therefore,

IT IS HEREBY ORDERED, appellant's motion for reconsideration is denied.

DATED: April 17, 2014

PANEL: Jj. Brown, Korsmo, Fearing

BY THE COURT:

LAUREL H. SIDDOWAY
CHIEF JUDGE

EXHIBIT B

Leonard D. Flanagan

From:	Dressler, Sam <Sam.Dressler@courts.wa.gov>
Sent:	Tuesday, November 26, 2013 1:16 PM
To:	mjk@witherspoonkelley.com; Ken Strauss; rpw@witherspoonkelley.com; Leonard D. Flanagan
Subject:	Court of Appeals, Division Three Hearing Notice for Case #311635
Attachments:	31163-5.2-6.pdf

Attached to this message is a hearing notice letter for the February 2014 Docket. This attached letter will be the **only** notice you receive.

We request that you respond "Yes" to a read receipt prompt, if your computer settings allow, or if not, a reply message acknowledging receipt is requested.

Ms. Sam Dressler
Court of Appeals
500 North Cedar
Spokane, WA 99201
509-456-3082

EXHIBIT C

rpw@witherspoonkelley.com | Attorney Profile | vCard

From: Leonard D. Flanagan [mailto:leonard@condodefects.com]
Sent: Wednesday, March 26, 2014 3:18 PM
To: Michael J. Kapaun; Ross P. White
Subject: RE: Houk v. Nichols & Shahan

Mike –

Thanks very much for the clarification about remaining parties.

I am going to check with the client and experts to see whether those claims against Stark are worth pursuing (since he's pro se, it seems unlikely), or whether we should dismiss. Assuming Stark is still a party, we can wait and get kicked back to the trial court with the mandate, then resolve the claims against Stark, and then seek discretionary review under RAP 13.4. That takes some of the time pressure of me to get a petition for review filed, which could be helpful to any negotiations between our clients.

I have authority to make a walk-away offer. That is, both parties would abandon the litigation, settle their differences, and neither would take any recovery of any sort. Please convey that offer to your client. If he has a counter, I will of course convey it to Mrs. Houk. However, as I mentioned on the phone, I don't have any indication that anything less than an immediate stand-down would be acceptable.

I can hold the walk-away offer open through tomorrow at close of business, and would appreciate a quicker response if possible. I am keeping the time frame of the offer short because I need to commit time to responding to your fee petition. Perhaps we can get the Court to agree to kick out the response and hearing date on the petition by stipulation, if you are inclined to do that, to allow for more leisurely negotiations. Of course, there is something to be said for pressure... I leave it up to you.

Thanks again for your courtesies and cooperation. I personally hope we get to continue this interesting legal battle, but other peoples' money is at stake, and practical considerations should probably govern.

Regards,

Leonard Flanagan
Attorney at Law
Stein, Flanagan, Sudweeks & Houser
901 5th Ave., Suite 3000

EXHIBIT D

Renee S. Townsley
Clerk/Administrator

(509) 456-3082
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of the
State of Washington
Division III

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November 4, 2014

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Leonard D. Flanagan
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leonard@condodefects.com

CASE # 311635
William Houk, et ux v. Best Development & Construction Co., Inc. et al
SPOKANE COUNTY SUPERIOR COURT No. 102052393

Counsel:

Enclosed is a copy of the Order Withdrawing Mandate issued on July 25, 2014 and Granting in Part Motion to Modify the Commissioner's Ruling of July 25, 2014.

A party may seek discretionary review by the Supreme Court of the Court of Appeals' decision. RAP 13.5(a). A party seeking discretionary review must file a motion for discretionary review in the Supreme Court and a copy in the Court of Appeals within 30 days after this Court's Order Withdrawing Mandate and Granting in Part Motion to Modify. The address for the Washington State Supreme Court is: Temple of Justice, P. O. Box 40929, Olympia, WA 98504-0929.

Sincerely,

Renee S. Townsley

Renee S. Townsley
Clerk/Administrator

RST:jcs
Encl.

c: Honorable Linda G. Tompkins, Superior Court Judge
E-Mail

c: Spokane County Superior Court Clerk
E-Mail

AUG -4 2014

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

WILLIAM HOUK, et ux., Respondents, v. BEST DEVELOPMENT & CONSTRUCTION COMPANY, INC., et al., Defendants, NICHOLAS & SHAHAN DEVELOPMENT, LLC, a Washington Limited Liability Company, and JOSEPH NICHOLS, an individual, Petitioners.	)	No. 31163-5-III ORDER WITHDRAWING MANDATE AND GRANTING IN PART MOTION TO MODIFY

THE COURT has considered petitioners' motion to modify the Commissioner's Ruling of July 25, 2014, and is of the opinion the motion should be granted in part. Therefore,

IT IS ORDERED, the July 25, 2014 mandate is hereby withdrawn.

IT IS FURTHER ORDERED, the motion to modify is hereby granted in part and the Commissioner's Ruling is modified as follows:

The fees awarded by the ruling are awarded only to Nicholas & Shahan Development LLC and Joseph Nichols, not to Best Development & Construction Co., Inc.;

The amount of the fees awarded is increased from $17,501.91 to $19,573.50 in order to reflect the intent of the court commissioner, which was to award 3/8 of the fees identified by petitioners' amended fee affidavit attesting to fees incurred in the appellate process *before* the petitioners' own proposed write-offs, not *after* those write-offs (*see* affidavit filed on July 8, 2014 at p. 3);

By way of clarification, the commissioner's award was a reasonable award of fees for all legal services reflected in the July 8, 2014 fee affidavit, including the services performed in the course of attempting to obtain discretionary review while the case was still pending in the trial court.

DATED: November 4, 2014

PANEL: Judges Siddoway, Brown, Korsmo.

FOR THE COURT:

LAUREL H. SIDDOWAY, Chief Judge

EXHIBIT E

COPY
ORIGINAL FILED

NOV 04 2014

SPOKANE COUNTY CLERK

Presented EX PARTE
By the Clerk

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

WILLIAM HOUK and JANICE HOUK, husband and wife,

Plaintiff,

v.

BEST DEVELOPMENT & CONSTRUCTION COMPANY, INC. , a Washington Corporation, NICHOLS & SHAHAN DEVELOPMENT, LLC, a Washington Limited Liability Company, DAVE WINLOW dba SUNDANCE EXCAVATING, BURT SHAHAN, an individual, JOSEPH NICHOLS, an individual, LANCE POUNDER EXCAVATION, INC., a Washington Corporation, JOHN AKINS MASONRY, INC., a Washington Corporation, R.K. STARK CONSTRUCTION, CO., CHARLES MAYFIELD, an individual dba CM SIDING, TIM VIGIL, an individual dba TJ VIGIL CONSTRUCTION, APOLLO ELECTRIC, INC., a Washington Corporation, GALE INSULATION, WALKER ROOFING, LLC, a Washington Limited Liability Company, REED CONCRETE COMPANY, INC., a Washington Corporation, STI NORTHWEST, INC., a Washington Corporation, RICK'S PLUMBING & HEATING, INC., a Washington Corporation

Defendants.

No: 10-2-05239-3

ORDER GRANTING PLAINTIFF'S MOTION FOR CR 41(a)(1)(B) VOLUNTARY DISMISSAL WITHOUT PREJUDICE OF DEFENDANTS BEST DEVELOPMENT & CONSTRUCTION COMPANY, INC. AND R.K. STARK CONSTRUCTION, CO.

[PROPOSED]

(Clerk's Action Required)

STEIN, FLANAGAN, SUDWEEKS & HOUSER, PLLC
901 FIFTH AVENUE, SUITE 3000
SEATTLE, WA 98164
206.388.0660; FAX 206.286.2660

THIS MATTER having come before the undersigned judge in the above-entitled court, the Court having reviewed Plaintiff's Motion For CR 41(a)(1)(B) Voluntary Dismissal Without Prejudice Of Defendants Best Development & Construction Company, Inc. and R.K. Stark Construction, Co., and otherwise deeming itself fully advised in the premises, it is now, therefore

ORDERED, ADJUDGED AND DECREED that all Plaintiff's claims asserted against Defendants Best Development & Construction Company, Inc. and R.K. Stark Construction, Co. shall be dismissed without prejudice and without costs or attorney's fees to any party.

DATED this 31st day of October, 2014.

HAROLD D. CLARKE

Judge/Commissioner

Presented by:

STEIN, FLANAGAN, SUDWEEKS & HOUSER, PLLC

Leonard Flanagan, WSBA No. 20966
Justin D. Sudweeks, WSBA No. 28755
Daniel S. Houser, WSBA No. 32327
Attorneys for Plaintiff

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206.388.0660; FAX 206.286.2660

EXHIBIT F

NO. _____

SUPREME COURT OF
THE STATE OF WASHINGTON

Court of Appeals, Division III
Cause No. 31163-5-III

WILLIAM HOUK, et ux.,

Petitioners,

v.

BEST DEVELOPMENT & CONSTRUCTION COMPANY, INC., et al.,

Defendants.

NICHOLS & SHAHAN DEVELOPMENTS, LLC, a Washington Limited Liability Company and JOSEPH K. NICHOLS, individually,

Respondents,

PETITION FOR REVIEW

Leonard D. Flanagan, WSBA # 20966
Justin D. Sudweeks, WSBA # 28755
Daniel S. Houser, WSBA # 32327
Attorneys for Petitioner

STEIN, FLANAGAN, SUDWEEKS & HOUSER, PLLC
901 Fifth Ave, Suite 3000
Seattle, WA 98146
(206)388-0660

A. Identity of Petitioner

Petitioner is the plaintiff and respondent below, Janice M. Houk.

B. Citation to Court of Appeals Decision

Mrs. Houk seeks review of the decision of the Court of Appeals, Division 3, filed herein on March 13, 2014, and the resulting attorney fee and cost award. (Appendix A.)

C. Issues Presented for Review

This case presents issues of substantial public interest arising from the dissolution and cancellation provisions of the Limited Liability Company Act at Chapter 25.15, RCW ("the LLC Act"), as originally written, as amended in 2006, and as amended in 2010 in response to *Chadwick Farms Owners Ass'n v. FHC, LLC*, 166 Wn.2d 178, 207 P.3d 1251 (2009). As in *Chadwick Farms*, the limited liability company ("LLC") in this case is (or was) a single-asset real estate developer with unsatisfied warranty obligations, which allowed itself to be secretly dissolved and cancelled without making provision for those obligations. The issues presented are:

(1) Is former RCW 25.15.303 a statute of limitations, or instead a survival statute intended to preserve claims against dissolved LLCs?

(2) Does the automatic cancellation of an LLC's "certificate of formation" under prior law toll statutes of limitations on claims against the LLC under the common law and RCW 4.16.180, because creditors were statutorily disabled from maintaining suit against a cancelled LLC?

(3) Did the 2010 amendments to the LLC Act render the defendant LLC again susceptible to suit, because cancellation of its certificate of formation became legally meaningless at that point?

(4) Is the defendant LLC estopped, under principals analogous to the doctrine of *de facto* corporations, to assert its dissolution as a defense?

(5) Assuming that the defendant LLC has no legally recognized existence "for any purpose" under the *Chadwick Farms* decision, may it be awarded prevailing-party attorney fees under the real estate purchase and sale agreement ("REPSA") at issue in this suit?

(6) Is the defendant LLC entitled to an award of prevailing-party attorney fees when it was not a party to the REPSA?

(7) Does former RCW 25.15.303 bar claims against an LLC member sued as the named seller under a REPSA (or as the selling agent of an undisclosed principal), irrespective of his membership in an LLC?

D. STATEMENT OF THE CASE

1. Statutory and Case Law History

In 2005, Division I's *Ballard Square* decision held that the Business Corporations Act preserved from abatement only those claims existing before dissolution of a corporation, but not claims accruing after dissolution. *Ballard Sq. Condo. v. Dynasty Constr.*, 126 Wn.App. 285, 291, 108 P.3d 818 (2005), *aff'd on other grounds*, 58 Wn.2d 603, 146 P.3d 914 (2006). Following *Ballard Square*, the Legislature took up two measures. First was SB 6596, which amended the Business Corporations Act to preserve claims arising after dissolution for a specified period.

Second was SB 6531, later codified as RCW 25.15.303, which created a new survival statute claims against dissolved LLCs:

> 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. . . unless an action or other proceeding thereon is not commenced within three years after the effective date of dissolution.

SB 6531 provided that claims commenced within three years of an LLC's dissolution would *not* be impaired. The bill did not say that claims would abate or be barred after three years, if not asserted. In fact, it said nothing about what would happen to claims not commenced within the three year period, but left the question open and dependent on other law.

Testimony in committee, including by the bill's sponsor Senator Brian Weinstein, shows that the purpose of SB 6531 was to create a ***survival statute*** for claims against dissolved LLCs, with no hint of any intent to create a limitations period:

> Staff Report: "Senate Bill 6531 deals with the dissolution of limited liability corporations and the **survival of claims** against a limited liability corporation following its dissolution....
> "**There's no express provision in the LLC law dealing with the survival of claims after dissolution**. . . . What the bill does is provide a three year period during which the dissolution of an LLC does not in any way diminish a remedy or a claim that was filed before or after the dissolution. . . .
>
> Sen. Weinstein: ". . . .[T]he reason I'm here is that . . . this *Ballard Square* decision . . . was a decision involving a corporation that dissolved and there were claims against it, and once a corporation dissolves it no longer exists, so you couldn't sue it. And **there was no survival period. I knew that that was a problem for both corporations and LLCs** . . . .

(Appendix B, Transcript of House Judiciary Committee Hearing on SB 6531).[1] (Emphasis added.) Both the House and Senate Bill Reports also speak of the measure as a "survival" statute, not a period of limitation.

The Court of Appeals in two decisions preceding *Chadwick Farms* describe former RCW 25.15.303 as a survival statute.[2] Likewise, ***all*** of the *amici curiae* and every litigant in *Chadwick Farms* who addressed RCW 25.15.303 acknowledged that it was a survival statute.[3]

In *Chadwick Farms*, this Court held that under the LLC Act at the time, an LLC's "existence as a separate legal entity" was extinguished not by dissolution, as are corporations, but instead by automatic "cancellation" of its certificate of formation two years after administrative dissolution for failure to renew under RCW 25.15.070(2)(c). Thus, the Court declined to apply RCW 25.15.303 to save the claims at issue in the case because the LLCs were not only dissolved, but also cancelled. 166 Wn.2d at 188, 198.

In the course of its opinion, the *Chadwick Farms* court in *obiter dicta* comments, mischaracterized RCW 25.15.303 as a period of

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1 http://www.tvw.org/index.php?option=com_tvwplayer&eventID=2006021130 Beginning at time stamp 28:30

2 See *Emily Lane Homeowners Ass'n v. Colonial Dev., LLC*, 139 Wn. App. 315, 317, 160 P.3d 1073 (2007); and *Chadwick Farms Owners Ass'n v. FHC, LLC*, 139 Wn. App. 300, 307, 160 P.3d 1061 (2007).

3 Amicus WSBA Brief (Supreme Court No. 80459-1 consolidated with 80450-8), p. 12; Amicus WSTLA Brief (*Id.*), p. 1; Appellant Colonial Development, LLC's Brief (*Id.*), p. 11; Respondent Emily Lane Townhomes Condo Owners Association's Brief (*Id.*), p. 1; Chadwick Farms Owners Association's Supplemental Brief (*Id.*), p. 1; FHC, LLC's Petition for Review (*Id.*), p. 11.

Briefs are available at: http://www.courts.wa.gov/appellate_trial_courts/coaBriefs/index.cfm?fa=coaBriefs.ScHome&courtId=A08

limitations on claims that runs from the effective date of dissolution of an LLC. 166 Wn.2d at 182, 193, 196, 202.

In response, the Legislature quickly enacted SHB 2657, effective June 10, 2010. ("The 2010 amendments"). The 2010 amendments revised the LLC Act to remove all suggestion that a "cancelled" LLC no longer exists or is incapable of being sued. Instead, an LLC that dissolves, without more, now remains subject to suit indefinitely. The 2010 amendments also changed RCW 25.15.303 by providing that its three year survival period would only come into effect if a dissolved LLC files a "certificate of cancellation." (See Appendix C, SHB 2657, as enrolled, esp. §§ 2(2)(c), 7(4), 9 & 11.)

The House Bill Report noted that the 2010 amendments would "address and resolve two issues that need immediate attention. First, under the *Chadwick Farms* decision . . . a certificate of cancellation abates all legal claims. This decision leaves creditors in an untenable situation." Appendix D, House Bill Report for SB 2657, p. 4.[4]

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[4] The Senate Bill Report notes that the entire concept of "cancellation" was included in the original Act not for the purposes of protecting investors or bringing about an abatement of claims, but merely to keep an aging computer system in the Secretary of State's office functioning efficiently!

> The [LLC Act] as it was proposed to us originally did not include a process of cancellation. The concept of cancellation stemmed from a concern expressed by the [Office of the Secretary of State] with their computer system and a perceived need to have a clear end to an LLC so it may be wiped off the books.

Appendix E, Senate Bill Report for SB 2657, p. 3.

The chair of the subcommittee of the WSBA committee that drafted the 2010 amendments (and a primary drafter of the original LLC Act), explained to the House Judiciary Committee that

> It's really a very simple bill. I think it can fairly be described as **technical corrections**, and that's certainly the mindset we had when . . . drafting this version of the bill.

(Appendix B, Transcript of House Judiciary Committee Hearing on SHB 2657.)[5] (Emphasis added.) He also testified that

> I don't think we intended that cancellation of the certificate would result in the inability to bring actions against the LLC or the inability of the LLC to take actions. That was the extra step that the *Chadwick Farms* court took last year that produced the anxiety among those of us who are familiar with LLC practice.

Id. He further explained that SHB 2657 would correct that procedural deficiency in order to provide a remedy to creditors.

> [T]he bill does away with the statement . . . that the separate existence of the LLC as an entity continues until cancellation of the Certificate of Formation . . . . [It] eliminates the statement that suggests, by negative inference, that if a Certificate of Cancellation is filed the LLC goes, "poof," goes away and that was the basis for the *Chadwick Farms* decision.

Id.

2. NSD, Its Members, and the Property Sale Transaction.

Defendant Nichols & Shahan Developments LLC ("NSD") built the defective residence which is the subject of this lawsuit. (CP 112).

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[5] http://www.tvw.org/index.php?option=com_tvwplayer&eventID=2010011211 Beginning at time stamp 12:30.

NSD's managing members, defendants Joseph Nichols ("Nichols") and Burt Shahan ("Shahan"), were responsible for all major decisions of NSD. (CP 125). Presumably this includes winding up decisions.

On September 22, 2004, Nichols signed a real estate purchase and sale agreement ("REPSA") for the residence with plaintiffs. (CP 154). The REPSA identifies Nichols as the "Seller." (CP 154, 159, 160, 161). The REPSA does not reference NSD at any point. (CP 154-159, 162). When the sale was consummated around October 11 of 2004, however, title to the property was transferred by NSD to the Houks. (CP 168).

3. NSD's Notice of Houk Claims.

Shahan was advised by the Houks of some construction defects in the residence in November of 2004. (CP 8, 50, 90). NSD was thus aware of its outstanding warranty obligations to the Houks by that time.

4. Administrative Dissolution of NSD.

It appears that NSD did not file its annual renewal paperwork and/or fee with the Secretary of State in 2006. The Secretary of State issued a document entitled "Certificate of Administrative Dissolution" dated October 2, 2006. (CP 174). Nichols claims that the members did not receive notice that NSD had failed to renew. (CP 192, 119, 120).

5. NSD Continued Business Operations Following its Dissolution.

Nichols testified that in 2005 NSD applied for insurance, and that he "brought [NSD] into the mix on building the duplex up on lot one of Qualchan Hills." (CP 295). Nichols explained that NSD "was hiring Best

Construction to build the duplex through the Overlook, LLC." (Id.) The duplex was finished, probably, in 2007. (CP 191).

6. Cancellation of NSD's Certificate of Formation Tolled All Limitations Periods on Claims Against It.

Under the LLC Act as written at the time, NSD's "Certificate of Formation" was automatically cancelled by the Secretary of State two years after it was administratively dissolved.[6] This automatic cancellation terminated the company's legal existence, and rendered it incapable of being sued or maintaining suit as of October 2, 2008. *Chadwick Farms,* 166 Wn.2d at 195 and 199.

7. NSD's Susceptibility to Suit Was Restored Upon Amendment of the LLC Act.

Effective June 10, 2010, the Legislature made substantial revisions to the LLC Act. First, the provision in RCW 25.15.070(2)(c) which stated that cancellation of a certificate of formation ended an LLC's "separate legal existence" was excised from the Act. Second, the 2010 amendments established a new procedure whereby a dissolved LLC may notify known claimants of its dissolution, state a deadline for assertion of claims, and receive a bar to the prosecution of claims not timely asserted. RCW 25.15.298. Finally, the amendments provide that unless a "Certificate of Dissolution" is filed by an LLC, the passage of three years will not impair

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[6] *Chadwick Farms*, 166 Wn.2d at 190 ("[W]hen the secretary of state administratively dissolves a limited liability company for failure to pay fees or file reports (as here), cancellation of the certificate of formation automatically occurs two years later if the company does not seek reinstatement. See ... [former] RCW 25.15.290(4)...")

a creditor's right to pursue claims against a dissolved LLC, or an LLC's rights to pursue claims itself. RCW 25.15.303 (as amended).

8. This Suit Was Timely Commenced.

This suit alleging defective construction and implied warranty violations was commenced six months after the effective date of the 2010 amendments, on December 16, 2010. (CP 1). Assuming, as Mrs. Houk contends, that automatic cancellation of NSD's certificate of formation on October 2, 2008 tolled statutes of limitations on claims against NSD until its immunity from suit was removed by the 2010 amendments, then six months remained on the three year period of RCW 25.15.303.

9. Procedural History

NSD and Nichols moved for summary judgment, arguing that this suit was instituted more than three years following dissolution of NSD, and that claims against both NSD and Nichols were barred by former RCW 25.15.303 as a "statute of limitations." (CP 175-184).

Houk responded that: (1) the REPSA was between the Houks and Nichols personally, not NSD; thus, at most, Nichols was acting on behalf of an undisclosed principal (CP 187-189); (2) even following dissolution, NSD continued to conduct business operations (CP 190-191); (3) the members of NSD were not aware of the company's dissolution, and made no winding up provisions for known obligations (CP 192-194). Houk further argued (4) that the amended version of RCW 25.15.303 applies, and claims against NSD are not barred because NSD never filed a certificate of dissolution. (CP 195-204).

The trial court denied NSD's and Nichols' motion for summary judgment, reasoning that amended RCW 25.15.303 was curative, clarifying, and meant to correct the impact of *Chadwick Farms.*

NSD and Nichols were granted interlocutory review.

Pursuant to RAP 2.5(a) and *Otis Hous. Ass'n v. Ha*, 165 Wn.2d 582, 587, 201 P.3d 309 (2009), Mrs. Houk's new counsel advanced additional legal arguments on appeal for affirming the trial court's denial of summary judgment.[7] Mrs. Houk noted that: (1) former RCW 25.15.303 was not a limitations period; (2) even if former RCW 25.15.303 was a limitations period, it was tolled when NSD's certificate of formation was automatically cancelled; (3) NSD is estopped to assert its dissolution under principles analogous to the *de facto corporation* doctrine; and (4) if NSD has no legal existence, it may not be awarded prevailing party fees.

NSD and Nichols responded to the additional legal arguments with comprehensive briefing, and made no suggestion that the record needed further development to decide them.

10. Division III Opinion

The Court of Appeals reversed and awarded summary judgment to NSD and Nichols. It also awarded both NSD and Nichols attorney fees under the REPSA. *Houk v. Best Dev. & Constr. Co.,* 179 Wn.App. 908, 915-16, 322 P.3d 29 (2014). Because the Court of Appeals did not

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[7] Under RAP 2.5(a), a party may present a ground for affirming a trial court "if the record has been sufficiently developed to fairly consider the ground" and under *Otis Hous. Ass'n,* the appellate court "may affirm the trial court on any grounds established by the pleadings and supported by the record."

mention the additional bases for affirmance identified above, or describe any exercise of reasoned discretion in declining to consider them, Mrs. Houk moved for reconsideration. The motion was denied without opinion.

E. ARGUMENT

1. Former RCW 25.15.303 Was Not A Limitations Period.

The Court of Appeals erred on an issue of substantial public interest because former RCW 25.15.303 created a survival statute to preserve claims against feared abatement upon dissolution of an LLC. It contained no period of limitations on claims against dissolved LLCs.

Former RCW 25.15.303 never says what happens to claims against a dissolved LLC *after* the three-year period has expired. It never states that claims against a dissolved LLC are barred after three years, though that is one possible reading, by negative inference. From all that appears, under section .303 what happens to claims three years after dissolution is an open question to be decided by reference to other law.[8]

Limitations statutes positively state that claims may not be brought after a certain period of time.[9] Former RCW 25.15.303 does not. Thus, the Court of Appeals' conclusion that former RCW 25.15.303 bars all

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[8] A survival statute differs from a statute of limitations in that a survival statute extends the life of a corporation for a limited time so that it may sue or be sued, while a statute of limitations affects the time in which a stale claim may be brought. *Ballard Sq.*, 126 Wn. App. at 289, fn 10.

[9] See, for example: RCW 4.16.005 ("**actions can only be commenced within the periods provided** in this chapter after the cause of action has accrued"); RCW 4.16.040, .080, ("The following actions **shall be commenced** within [six/three] years ..."); RCW 7.72.060 ("**no claim under this chapter may be brought** more than three years from the time the claimant discovered or in the exercise of due diligence should have discovered the harm and its cause"); RCW 9A.04.070(1) ("Prosecutions for criminal offenses **shall not be commenced after the periods prescribed** in this section...")

claims three years after an LLC's dissolution rests on one possible negative inference, not on the actual language of the statute.[10]

The Court of Appeals, however, correctly noted that *Chadwick Farms* refers in passing to RCW 25.15.303 as a "limitations" period. However, that comment in *Chadwick Farms* was *dicta*, and not the basis for decision. The statute was not applied as a limitations period.[11]

Chadwick Farms' dicta suggestion that former RCW 25.15.303 was a statute of limitations was simply wrong, as demonstrated above. At best, the Court's comment describes one *possible* reading. It is more plausible that the Legislature meant that once three years passes from dissolution, unfiled claims are no longer saved from abatement, if that is what the law calls for. Had the Legislature meant that a claim not filed

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[10] Use of the word "unless" in RCW 25.15.030 suggests the possibility that that if three years passes following dissolution, a claim against an LLC either is or *may be* either "impaired" or "taken away," though it is not clear which, or how they are different. The trouble arises from the imprecise use of the word "unless," along with a cumbersome, double-negative structure. Like the word "or," the word "unless" is frequently ambiguous. Does "unless" in this context mean "except that dissolution *shall* take away or impair remedies if a claims is not timely filed?" Or does it mean "except that dissolution *may* impair or take away claims that are not timely filed"? Used in this fashion, the word "unless" renders the sentence structurally ambiguous. This the kind of ambiguous use of the word "unless" was identified, for example, in *Sec'y of Labor v. Excel Mining, LLC*, 334 F.3d 1, 10 (D.C. Cir. 2003), whereby a regulation was silent as to what happened under the first proposition if the second proposition following the word "unless" was true instead of false.

Note that the statute is also ambiguous about what does or could happen to claims not asserted within three years. Are they "impaired," and if so, how and to what degree? Or are they "taken away"? This ambiguity suggests that this section does not determine what happens as a result of dissolution after three years, and that the question is committed to other law.

[11] *Chadwick Farms,* 166 Wn.2d at 198 ("In light of our holding that RCW 25.15.303 does not permit actions against a canceled limited liability company, we **need not reach the question** whether the statute applies retroactively.") (Emphasis added.)

within three years of dissolution will be forever barred, it clearly knew how to say so, but it did not.

Former RCW 25.15.303 was enacted in the aftermath of the *Ballard Square* decision, as part of an effort to provide a survival period for claims against LLCs. On its face, former RCW 25.15.303 suggests either a survival period, or possibly a period of limitation. In light of this ambiguity, the Court should look to the legislative history[12]; that history demonstrates that former RCW 25.15.303 was never intended to be a limitations period at all, but only a survival statute.

Accordingly, NSD's motion to dismiss based on former RCW 25.15.303 as a *limitations period* was properly denied. Whether the statute was a limitations period or a survival period is obviously a matter of great significance to home buyers and all creditors of defunct LLCs.

b. All Supposed Limitations Periods On Claims Against NSD Were Tolled When Its Certificate of Formation Was Automatically Cancelled.

NSD was not subject to suit upon cancellation of its certificate of formation. At the time of the cancellation of NSD's certificate of formation, Mrs. Houk still had a full year to sue NSD and still be within the period set out in former RCW 25.15.303.

Assuming that former section .303 *was* a statute of limitation, it was tolled upon NSD's cancellation. Statutes of limitation are tolled during the period when a plaintiff is disabled by statute from commencing

[12] *Dep't of Transp. v. James River Ins. Co.*, 176 Wn.2d 390, 396, 292 P.3d 118 (2013).

suit against a defendant; but if the statute is thereafter amended to remove the disability, the limitations period commences again where it left off.[13]

Thus, even if former RCW 25.15.303 was a limitations period, under established precedent either: (1) the period has never expired *to this day* because NSD has no legal existence even now, in which case plaintiff's and NSD's claims for fees have both abated under *Chadwick Farms*, or else (2) the period began to run again when NSD was again made susceptible to suit upon amendment of the LLC Act in 2010, in which case this suit was timely filed. Either way, the Court of Appeals' decision that the three year supposed limitations period of former RCW 25.15.303 had expired before this suit was commenced is clear error and in conflict with this Court's decisions.

c. A Change To The Periods for Survival of Claims Against a Corporate Type-Entity, And of Its Continued Existence, Involves No Vested Rights.

Continuing with the assumption that former RCW 25.15.303 was a statute of limitation, the 2010 amendments to .303 apply here because it never expired. A limitations period may be changed by the Legislature and applied to any defendant as to whom it has not yet expired. *Unruh v. Cacchiotti*, 172 Wn.2d 98, 109, 257 P.3d 631 (2011). Accordingly, the

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[13] *Duke v. Boyd*, 133 Wn.2d 80, 94, 942 P.2d 351 (1997), *Stephens v. Stephens*, 85 Wn.2d 290, 293, 534 P.2d 571 (1975), and *Seamans v. Walgren*, 82 Wn.2d 771, 774-775, 514 P.2d 166 (1973).

Moreover, under RCW 4.16.180, limitations periods are tolled while a defendant is "absent" from the jurisdiction such that it is not subject to suit.

Court need not reach a "retroactivity" analysis of the 2010 amendments to the LLC Act, and the matter is governed by established law under *Unruh*.

Even assuming retroactive application of the 2010 amendments is required, that would be appropriate because the amendments are both curative and remedial as shown below. The 2010 amendments to the LLC Act established a new period of legal existence for LLCs by removing "cancellation" as determiner of corporate existence. Thus the amendments restored *remedies* where none previously were available by reason of procedures governing LLC renewal. But the period of legal existence of a corporate-type entity, and the period for survival of claims against such an entity, are matters of procedure, and create no vested rights. The entity exists entirely as a matter of legislative grace. The weight of authority holds that changes to survival periods are procedural, and confer no new rights: they merely preserve existing ones. Such changes are therefore ***remedial and presumptively retroactive***.[14]

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[14] In *Ballard Square*, the Supreme Court applied a new corporate survival statute retroactively, ***even when it was enacted while the litigation was pending***. *Ballard Square Condo. Owners Ass'n v. Dynasty Constr. Co.*, 158 Wn.2d 603, 617, 146 P.3d 914 (2006), *citing 1000 Va. Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 146 P.3d 423 (2006). The Court explained that ***the length of time in which claims may be prosecuted against entities that exist purely by Legislative grace may be changed without impacting any vested rights.*** 158 Wn.2d at 617-618.

This is entirely consistent with the law nationally.See *Quintana v. Los Alamos Medical Ctr.*, 119 N.M. 312, 314, 889 P.2d 1234 (N.M. Ct. App. 1994) ("Statutes concerning the survival period of a corporation after dissolution are generally construed as procedural rather than substantive. . . . **As a remedial or procedural matter, the survival period adopted after dissolution may apply to corporations dissolved before the effective date of the new survival statute.**"); *Walden Home Builders v. Schmit*, 326 Ill. App. 386, 62 N.E.2d 11, 13 (1945) ("[T]**he statute is one which merely provides a different method of winding up and administering the affairs of dissolved corporations. It creates no causes of action and deprives no one of property.** . . . [I]t

The 2010 amendments are also curative and retroactive. A technical correction to an ambiguous statute is curative and retroactive. *In re F.D. Processing,* 119 Wn.2d 452, 461, 832 P.2d 1303 (1992). The Legislature plainly considered the change to RCW 25.15.303 and other portions of the LLC Act to be technical corrections.

Moreover, the statute was clearly ambiguous: it is not clear from the face of the statute whether RCW 25.15.303 was meant to be a limitations period or a survival period, for example. Nor does *Chadwick Farms* foreclose the issue of ambiguity. Considered in context, the *Chadwick Farms* court said only that former RCW 25.15.303 is "unambiguous" in its reference to saving claims from "dissolution," and not saving them from "cancellation" of an LLC's "certification of formation." That is far cry from saying that the provision contains no ambiguity subject to legislative correction.

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appears to be well settled that when a corporation is dissolved, its assets do not vanish and its debtors are not absolved or released. . . . No valid reason has been suggested why the amendment should not apply to corporations previously dissolved."); *United States v. Village Corp.*, 298 F.2d 816, 816-17, 819 (4th Cir. 1962) ("The District Court held that a Virginia statute permitting the institution at any time of suits against Virginia corporations in the process of liquidation does not apply to suits against corporations the charters of which have been revoked prior to the enactment of the statute. We think it does. . . . [The statute is a] **complete reversal of the common law rule of abatement of actions upon dissolution are remedial measures entitled to a liberal construction** to effectuate their purposes.")

See also *Haddenham v. State*, 87 Wn.2d 145, 148, 550 P.2d 9 (1976) ("Where...a statute is remedial and its remedial purpose is furthered by retroactive application, the presumption favoring prospective application is reversed. Remedial statutes, in general, afford a remedy, or better or forward remedies already existing for the enforcement of rights and the redress of injuries.") (Internal citations omitted.)

The Court of Appeals cited *Dep't of Ret. Sys. v. Kralman*, 73 Wn. App. 25, 33, 867 P.2d 643 (1994) in reasoning that the amendment to RCW 25.15.303 cannot be procedural, remedial, and therefore retroactive, because it attempted to provide a claimant "with the right to proceed against persons previously outside the scope of the statute..." That analysis is clearly in error.

Kralman stands for the proposition that a statute providing a *new cause of action* or imposing a *new duty on a defendant* is not ordinarily retroactive.[15] Here, NSD's sale of a badly defective home has always been a breach of its warranty responsibilities; the amendments to the LLC Act do not change the substantive rights and duties of the Houks or NSD. Rather, the amendments effect only the procedural matter of when and for how long the remedies will remain available against dissolved LLCs. Such changes are remedial because they relate to practice, procedures, and availability of remedies against dissolved LLCs. See *Ballard Square,* 158 Wn.2d at 617 and cases cited at footnote 14 above.

d. NSD Is Estopped to Assert Its Dissolution as a Defense Because it Continued to Operate as a *De Facto* Limited Liability Company.

NSD's legitimate activities following dissolution were limited to winding up.[16] Because NSD never actually wound up, but continued as an

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[15] Specifically, in *Kralman* the amendment at issue imposed *new duties* on beneficiary banks regarding acceptance of Electronic Fund Transfer payment orders by nonexistent persons under UCC Article 4A – conduct that had not previously been regulated by the statute at all.

[16] Former RCW 25.15.295(1), SSHB 1235 (as enrolled in 1994, §806), and RCW 25.15.270(2) (Requiring reasonable provision for known obligations and unmatured claims).

ongoing enterprise, it should be estopped under Washington law applicable to *de facto* corporations to raise its dissolved status as the predicate to its defense. No Washington case has yet applied the common law doctrine of *de facto corporation* to an LLC. However, elsewhere the doctrine has been widely applied to bar a *de facto* limited liability company from defending on the basis of its terminated corporate status.[17]

Accordingly, the Court of Appeals' decision conflicts with the spirit and reasoning behind the *de facto corporation* doctrine as adopted by this Court, and raises an issue of substantial public importance that has not been squarely addressed in the context of LLCs.

e. Alternatively, The Court of Appeals' Decision Awarding NSD Its Attorney Fees Conflicts with *Chadwick Farms*, Under Which The Company Does Not Exist "For Any Purpose" And May Not Maintain a Claim for Fees.

Alternatively, if the 2010 amendments are ineffective to restore NSD's extant status and susceptibility to suit, then it is clear under *Chadwick Farms* that NSD does not exist "for any purpose." Accordingly, the Court of Appeals decision awarding attorney fees to NSD would still be manifestly in conflict with this Court's decisions in *Chadwick Farms.*

f. The Court of Appeals' Award of Attorney Fees Conflicts With Washington Precedent Because NSD Was Not a Party to the REPSA.

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[17] See, for example, *Duray Dev., LLC v. Perrin*, 288 Mich. App. 143, 159, 792 N.W.2d 749 (Mich. Ct. App. 2010); *Matter of Hausman*, 13 N.Y.3d 408, 412, 921 N.E.2d 191 (N.Y. 2009); *Leber Assocs., LLC v. Entm't Group Fund, Inc.*, 2003 U.S. Dist. LEXIS 13009 (S.D.N.Y. July 22, 2003); *Henderson Apt. Venture v. Miller*, 2012 U.S. Dist. LEXIS 94156 (D. Nev. July 6, 2012); *Global BTG LLC v. Nat'l Air Cargo, Inc.*, 2011 U.S. Dist. LEXIS 70386 (C.D. Cal. June 29, 2011); *Fashion Brokerage Int'l, LLC v. Jhung Yuro Int'l LLC*, 2011 U.S. Dist. LEXIS 25687 (D.N.J. Mar. 14, 2011).

The fee award to NSD and Nichols by the Court of Appeals is based on language in the REPSA providing that "in any dispute relating to this transaction or this Agreement" the prevailing "Buyer, Seller, or any real estate licensee or broker" shall be awarded fees. Even setting aside questions of NSD's existence, the record shows that NSD was not a party to the REPSA, and contains no evidence that it was an intended third party beneficiary. Accordingly, the Court of Appeals' decision to award NSD its attorney fees is in direct conflict with *Watkins v. Restorative Care Ctr.*, 66 Wn.App. 178, 195, 831 P.2d 1085 (1992) and other cases.

Moreover, Nichols has steadfastly insisted – despite the plain language of the REPSA – that he was *not* the "Seller" under the REPSA. (CP 113, 178). It was therefore inconsistent for Nichols to claim a fee award under the REPSA because he *is* the seller. The adoption of such inconsistent positions in this setting is barred by the doctrine of judicial estoppel. *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538, 160 P.3d 13 (2007). The Court of Appeals' failure to recognize this was error.

g. Nichols' Liability is as Seller or Agent of an Undisclosed Principal, Not as a Member of NSD.

Former RCW 25.15.303 states that dissolution of a limited liability company does not impair any remedy against the "limited liability company, its managers, or its members..." But Joe Nichols' potential liability in this case does not rest on his status as manager or member of NSD. Rather, it rests on his *individual* status as the named seller of the property, or as the agent of an undisclosed principal who was the actual

seller. As such, Nichols is jointly and *severally* liable with NSD for his *own warranties*, which he expressly or implicitly made in the REPSA. *Crown Controls v. Smiley*, 110 Wn.2d 695, 706, 756 P.2d 717 (1988).

Former RCW 25.15.303 cannot reasonably be read to confer a special limitations period for members of limited liability companies who are sued for their *own* "several" liabilities, based on personal conduct unrelated to membership in or management of an LLC.

F. CONCLUSION

Consider the upshot of the Court of Appeals' decision herein: an LLC may now secretly allow itself to dissolve, continue to do business as a subsisting company following dissolution, and fail to make any provisions for its only warranty obligation. Yet when sued three years later, the LLC and its members automatically escape all liability based on a supposed statute of "limitations" that was not written or intended as such, and which contains no language stating that claims are barred by the passage of time.

Even worse, having been immunized by a purely bureaucratic act (the now meaningless "cancellation" of its certificate of formation) that the LLC was not aware of and could not have relied upon, under the Court of Appeals' decision herein an LLC may then recover its attorney fees on the basis of an agreement to which it was not a party, notwithstanding the fact that it may not even exist.

The Court of Appeals' decision is in clear conflict with this Court's precedent, and is manifestly unjust. Review should be granted.

RESPECTFULLY SUBMITTED this ____ day of November, 2014.

STEIN, FLANAGAN, SUDWEEKS & HOUSER, PLLC

_____
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CERTIFICATE OF SERVICE

This is to certify that on the ____ day of _____, 2014, I did serve true and correct copy of the foregoing document with all attachments to be delivered to the following recipient(s) by the method(s) as indicated:

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Attorneys STI Northwest, Inc. Matthew Ries STAMPER RUBENS PS 720 W. Boone, Suite 200 Spokane, WA 99201-2560	☐ US Mail ☐ FedEx X Hand Delivery ☐ E-Mail

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

Dated this ____ day of November, 2014 at Seattle, Washington.

_____

Mariah Lynge

EXHIBIT G

RONALD R. CARPENTER
SUPREME COURT CLERK

SUSAN L. CARLSON
DEPUTY CLERK / CHIEF STAFF ATTORNEY

THE SUPREME COURT
STATE OF WASHINGTON

TEMPLE OF JUSTICE
P.O. BOX 40929
OLYMPIA, WA 98504-0929

(360) 357-2077
e-mail: supreme@courts.wa.gov
www.courts.wa.gov

November 26, 2014

LETTER SENT BY E-MAIL ONLY

Leonard D. Flanagan
Kenneth W Strauss
Stein, Flanagan, Sudweeks & Houser
901 5th Avenue, Suite 3000
Seattle, WA 98164-2066

Ross P. White
Michael John Kapaun
Witherspoon Kelley Davenport & Toole
422 W. Riverside Avenue, Suite 1100
Spokane, WA 99201-0300

Hon. Renee Townsley, Clerk
Court of Appeals, Division III
500 N. Cedar Street
Spokane, WA 99201

Timothy W. Fitzgerald, Clerk
Spokane County Superior Court
1116 W. Broadway Avenue
Spokane, WA 99260-0350

Re: Supreme Court No. 91039-1 - William Houk, et ux. v. Nichols & Shahan Development, LLC, et al.
Court of Appeals No. 31163-5-III
Spokane County Superior Court No. 10-2-05239-3

Clerks and Counsel:

The Spokane County Superior Court Clerk forwarded to this Court the "PLAINTIFF'S NOTICE OF APPEAL TO THE SUPREME COURT OF THE STATE OF WASHINGTON" and it was received on November 24, 2014. The case has been assigned the above-referenced Supreme Court number.

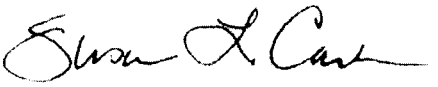
Review of the notice indicates that the Petitioner's intent is to seek review of the decision of the Court of Appeals entered on March 13, 2014. Pursuant to RAP 13.4, the proper procedure for seeking review of a Court of Appeals decision terminating review is by serving and filing a "petition for review". The petition for review should be filed in the Court of Appeals, not the county superior court. (It is noted that the notice of appeal was also filed in the Court of Appeals on November 19, 2014.)

Not only is the form of the notice not in compliance with the Rules of Appellate Procedure, but the attempt to seek review is not timely. RAP 13.4(a) provides that a petition for review must be filed within 30 days after an order denying a timely motion for reconsideration. Review of the Court of Appeals docket indicates that an order denying reconsideration was filed on April 17, 2014. Therefore, any petition for review should have been filed in the Court of Appeals by not later than May 19, 2014. (Note that the rules provide that if the due date falls on the weekend, the petition is due the following Monday. See RAP 18.6(a).)

The Petitioner may seek an extension of time in which to file a petition for review by filing a motion for extension of time to file a petition for review. Any such motion should be served and filed in this Court by not later than December 29, 2014. The motion should be supported by an appropriate affidavit establishing good cause for the delay in filing the petition for review; see RAP 18.8 as to extension of time for filings and RAP Title 17 as to the general rules governing motions and the service and filing of the same. **A motion for extension of time to file is normally not granted; see RAP 18.8(b).** At the same time as the Petitioner files a motion for extension of time, the Petitioner should also serve and file a proposed petition for review. Both the motion for extension of time and the proposed petition for review will be set for consideration by a Department of the Court. (The proposed petition for review would only be considered if the Department first grants the motion for extension of time.) The Petitioner is referred to RAP 13.4(c) for the proper form and content of a petition for review.

The Court of Appeals Clerk is requested to forward to this Court the entire file in the above referenced Court of Appeals case, along with the filing fee check referenced in the Court of Appeals docket.

Sincerely,



Susan L. Carlson
Supreme Court Deputy Clerk

SLC:kmt

OFFICE RECEPTIONIST, CLERK

To: Mariah A. Lynge
Cc: rpw@witherspoonkelley.com; mjk@witherspoonkelley.com; aliciaa@witherspoonkelley.com; Daniel S. Houser; Ian McDonald; Jerry H. Stein; Justin D. Sudweeks; Ken Strauss; Leonard D. Flanagan
Subject: RE: 91039-1 - William Houk, et ux. v. Nichols & Shahan Development, LLC, et al.

Received 12-22-2014

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Mariah A. Lynge [mailto:mariah@condodefects.com]
Sent: Monday, December 22, 2014 4:20 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: rpw@witherspoonkelley.com; mjk@witherspoonkelley.com; aliciaa@witherspoonkelley.com; Daniel S. Houser; Ian McDonald; Jerry H. Stein; Justin D. Sudweeks; Ken Strauss; Leonard D. Flanagan; Mariah A. Lynge
Subject: 91039-1 - William Houk, et ux. v. Nichols & Shahan Development, LLC, et al.

Dear Clerk of the Supreme Court,

Attached for filing is the Petitioners' Motion to for Extension of Time to File Petition for Review, Declaration of Leonard Flanagan, and [proposed] Petition for Review with subjoined Certificates of Service.

Thank you.

Mariah Lynge
Office Manager/ Paralegal

Stein, Flanagan, Sudweeks & Houser, PLLC
901 Fifth Avenue, Suite 3000
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