

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,

Respondents.

**REPLY BRIEF OF APPELLANT/CROSS-RESPONDENT
COLONIAL DEVELOPMENT, LLC
AND
BRIEF OF RESPONDENTS THE ALMARK CORPORATION,
CRITCHLOW HOMES, INC., MARK SCHMITZ, RICHARD AND
ESTHER WAGNER d/b/a WOODHAVEN HOMES, ALFRED MUS
AND JEFFREY CRITCHLOW**

Eileen I. McKillop, WSBA 21602
Attorneys for Appellant/Cross-Respondents
OLES MORRISON RINKER & BAKER LLP
701 PIKE STREET, SUITE 1700
SEATTLE, WA 98101-3930
PHONE: (206) 623-3427
FAX: (206) 682-6234

ORIGINAL

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. THE ASSOCIATION'S STATEMENT OF THE CASE.....	3
III. CURRENT PROCEDURAL POSTURE.....	10
IV. SUMMARY OF ARGUMENT.....	11
V. ARGUMENT.....	14
A. THE RIGHT TO BRING CLAIMS AGAINST A LLC IS GOVERNED BY THE LIMITED LIABILITY COMPANIES ACT, AND NOT THE CONDOMINIUM ACT.	14
B. THE LIMITED LIABILITY COMPANIES ACT IS NOT AMBIGUOUS.....	15
C. RCW 25.15.303 IS NOT REMEDIAL.	18
D. RCW 25.15.300 ONLY REQUIRES THAT UPON WINDING UP, AN LLC MAKE REASONABLE PROVISIONS TO PAY KNOWN CLAIMS.....	19
E. A LIMITED LIABILITY COMPANY'S INSURANCE POLICY IS NOT AN "ASSET" FOR DISTRIBUTION.	21
F. THE LLC AND THE RESPONDENTS HAVE NOT WAIVED THEIR DISSOLUTION DEFENSE BY DEFENDING THIS LAWSUIT.....	25
G. THE ASSOCIATION FAILED TO PROVE ITS CLAIMS AGAINST THE LLC, ITS MEMBERS, AND THE INDIVIDUALLY NAMED RESPONDENTS.....	27

1.	The LLC Moved for Summary Judgment on all of the Association's Claims.....	27
2.	Individuals Mark Schmitz, Richard Wagner and Esther Wagner, and Jeffrey Critchlow Are Not Members of the LLC and Have No Personal Liability to the Association.....	28
3.	The LLC Members Are Immune From Liability for the LLC's Debts, Obligations and Liabilities.....	29
4.	The LLC Members Are Not "Declarants" under the Condominium Act.....	30
5.	The LLC's Members Had No Fiduciary Duty to the Association.....	31
6.	The Association's Claim Under RCW 19.40.051(b) is Barred.....	33
7.	A Fraudulent Transfer Under RCW 19.40.041(a)(1) Requires Proof of Actual Intent to Defraud.....	33
8.	There Association Also Failed to Prove Constructive Fraud Under 19.40.041(a)(2)(i).....	36
9.	There Association Also Failed to Prove Constructive Fraud Under 19.40.051(a).....	37
10.	The Association Did Not Raise Any Arguments to Support its Claims Under RCW 64.34.405, 64.34.410 and 64.34.415.....	39
11.	The Association's Claims for Negligent Misrepresentation are	

	Barred by the Economic Loss Rule and There is No Evidence to Support A Claim for Fraudulent Concealment.....	40
12.	The Association's Consumer Protection Act Claim Should be Dismissed.....	45
H.	THE LLC IS ENTITLED TO RECOVER ITS ATTORNEY'S FEES AND COSTS AT THE TRIAL COURT LEVEL.	47
I.	THE RESPONDENTS ARE ENTITLED TO THEIR ATTORNEY'S FEES AND COSTS AS PREVAILING PARTIES.....	48
J.	THE LLC AND THE RESPONDENTS ARE ENTITLED TO THEIR ATTORNEY'S FEES AND COSTS UNDER RAP 18.1.....	49
VI.	CONCLUSION.....	50

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Federal Cases</u>	
<i>Scholes v. Lehmann</i> , 56 F.3d 750 (7 th Cir. 1995).....	37
<u>State Cases</u>	
<i>1000 Virginia Limited Partnership v. Vertecs Corp.</i> , 146 P.3d 423 (2006).....	38
<i>Atherton Condo. Apt. Owners' Ass'n B'd v. Blume Dev. Co.</i> , 115 Wn.2d 506, 799 P.2d 250 (1990).....	43
<i>Ballard Square Condominium Owners Ass'n v. Dynasty Const. Co.</i> , 146 P.3d 914 (2006).....	passim
<i>Bayless v. Community College Dist No. XIX</i> , 84 Wn. App. 309, 927 P.2d 254 (1996).....	18, 19
<i>Berschauer/Phillips Constr. Co. v. Seattle School District No. 1</i> , 124 Wn.2d 816, 881 P.2d 986 (1994).....	40, 41
<i>Clearwater v. Skyline Const. Co., Inc.</i> , 67 Wn. App. 305, 835 P.2d 257 (1992).....	35
<i>Culinary Workers Trust v. Gateway Café, Inc.</i> , 91 Wn.2d 353, 588 P.2d 1334 (1979).....	30
<i>Eagle Point Condominium Owners Ass'n v. Coy</i> , 102 Wn. App. 697, 9 P.2d 898 (2000)	48
<i>French v. Gabriel</i> , 116 Wn.2d 584, 806 P.2d 1234 (1991).....	26
<i>Griffith v. Centex Real Estate Corp.</i> , 93 Wn. App. 202, 969 P.2d 486 (1998).....	40, 41, 42

<i>Haddenham v. State</i> , 87 Wn.2d 145, 550 P.2d 9 (1976).....	17, 18
<i>In re F.D. Processing, Inc.</i> , 119 Wn.2d at 462, 832 P.2d 1303 (1992).....	16
<i>King v. Snohomish County</i> , 146 Wn.2d 420, 47 P.3d 563 (2002).....	26
<i>Luxon v. Caviezel</i> , 42 Wn. App. 261, 710 P.2d 809 (1985).....	44
<i>Lybbert v. Grant County</i> , 141 Wn.2d 29, 1 P.3d 1124 (2000).....	26
<i>McGee Guest Homes</i> , 142 Wn.2d at 325, 12 P.3d 144 (2000).....	16
<i>Norris v. Church</i> , 115 Wn. App. 511, 63 P.3d 153 (2002).....	43
<i>One Pacific Towers Homeowners' Association v. HAL Real Estate Investments, Inc.</i> , 148 Wn.2d 319, 61 P.3d 1094 (2002).....	30, 31
<i>Piepkorn v. Adams</i> , 102 Wn. App. 673, 10 P.3d 428 (2000).....	47
<i>Reynolds Metals Co. v. Alcan, Inc.</i> , 2006 WL 1169790 (W.D.Wash. May 01, 2006)	42
<i>Rogerson Hiller Corp. v. Port Angeles</i> , 96 Wn. App. 918, 982 P.2d 131 (1994).....	30
<i>Sedwick v. Gwinn</i> , 73 Wn. App. 879, 873 P.2d 528 (1994).....	35
<i>Stuart v. Coldwell Banker Commercial Group, Inc.</i> , 109 Wn.2d 406, 745 P.2d (1987).....	24
<i>Truckweld v. Olson</i> , 26 Wn. App. 638, 618 P.2d 1017 (1980).....	30

<i>Voicelink Data Servs., Inc. v. Datapulse, Inc.</i> , 86 Wn. App. 613, 937 P.2d 1158 (1997).....	26
---	----

Cases

<i>Blankenship v. Demmler Mfg. Co.</i> , 89 Ill. App. 3d 569, 411 N.E.2d 1153 (1980).....	23
<i>Gilliam v. Hi-Temp Products, Inc.</i> , 260 Mich. App. 98, 677 N.W.2d 856 (2004).....	23
<i>Gossman v. Greatland Directional Drilling, Inc.</i> , 973 P.2d 93 (Alaska 1999)	21, 22
<i>Penasquitos, Inc. v. Superior Court of San Diego Co.</i> , 53 Cal. 3d 1180, 812 P.2d 154 (1991).....	21, 22
<i>Pursell Constr. v. Hawkeye-Security Ins. Co.</i> , 596 N.W.2d 67 (Iowa 1999).....	24
<i>Quintana v. Los Alamos Medical Ctr.</i> , 119 N.M. 312 (N.M. Ct. App. 1994)	16
<i>Van Pelt v. Greathouse</i> , 364 N.W.2d 14 (Neb.1985).....	18
<i>Walden Home Builders, Inc. v. Schmit</i> , 62 N.E.2d 11, 326 Ill. App. 386 (1945).....	16, 17

State Statutes

RCW 19.40.011(3)	36
RCW 19.40.011(5)	36, 37
RCW 19.40.031	36
RCW 19.40.041(a)	34
RCW 19.40.041(a)(1).....	33, 34, 35, 36
RCW 19.40.041(a)(2)(i).....	33, 34, 37

RCW 19.40.041(a)(2)(ii)	34
RCW 19.40.041(b)	34, 35
RCW 19.40.051.....	33
RCW 19.40.051(a)	34, 37, 39
RCW 19.40.051(b)	33
RCW 19.40.091(c).....	33
RCW 23B.14	17
RCW 25.15.035.....	36
RCW 25.15.070.....	13
RCW 25.15.125.....	29, 30
RCW 25.15.230.....	36
RCW 25.15.295(2)	13, 15
RCW 25.15.300.....	passim
RCW 25.15.300(2)	20
RCW 4.16.080.....	38
RCW 64.32.....	28
RCW 64.34.....	28
RCW 64.34.020(13)	31
RCW 64.34.405(3)	39
RCW 64.34.410(1)(y)	39
RCW 64.34.445.....	14

State Rules

RAP 18.1 49

RAP 7.2(i)..... 49

Other Authorities

20 Eric M. Holmes, *Holmes' Appleman on Insurance*
2nd,
§ 129.2(l)(8)(2002)..... 24

House Bill Report, SB 6531, P. 2-3,
Preservation of Remedies..... 2

I. INTRODUCTION

Respondent Emily Lane Townhomes Condominium Owners Association ("Association") has made numerous unsubstantiated assertions about warranty claims never being completed or responded to, ongoing warranty claims that were pending at the time of dissolution, and alleged defects involving leaking windows or deck soffits "falling apart". None of these assertions are supported by any evidence and are a gross mischaracterization of the facts of this case.

The Association's position is that the Washington Condominium Act's four-year statute of limitations on implied and express warranties should preempt Washington's Limited Liability Companies Act. The fatal weakness in the Association's argument is the incorrect assumption that its right to sue Colonial Development, LLC ("the LLC") and its members exists by virtue of the Condominium Act, and not by virtue of statutes in Chapter 25.15 RCW.

The plain language of Washington's Limited Liability Companies Act precludes all claims against a limited liability company after its certificate of formation has been cancelled. The

House of Representatives recognized this fact in its House Bill

Report on SB 6531:

The law governing LLCs has no express provision regarding the preservation of remedies or causes of actions following dissolution of the business entity. There is an implicit recognition of the preservation of at least an already filed claim during the wind up period following dissolution, since the person winding up the affairs is authorized to defend suit against the LLC. ***However, there is no provision regarding the preservation of claims following the cancellation of the Certificate of Formation.***¹

Contrary to Association's contention, the Legislature's recent amendment to the Limited Liability Companies Act, RCW 25.15.303, does not apply retroactively to LLCs that were dissolved or cancelled prior to its effective date, June 7, 2006. 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 or cancelled 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 that never existed before.

¹ House Bill Report, SB 6531, P. 2-3, Preservation of Remedies (emphasis added).

Further, the amendment is not remedial because retroactive application will not supplement an existing right or remedy. Lastly, RCW 25.15.303 can not be applied retroactively to this lawsuit that was filed several months prior to its effective date.

II. THE ASSOCIATION'S STATEMENT OF THE CASE

The Association's "Statement of the Case" at pages 3 to 11 contain numerous misrepresentations, which are addressed as follows:

- The Association at multiple pages – Constantly refers to the respondents as "LLC members".

The five members of the LLC are Contempra Homes, Inc. (dismissed), Critchlow Homes, Inc., The Almark Corp, Richard and Esther Wagner d/b/a Woodhaven Homes, and Alfred Mus. (CP 190-191). Respondents Mark Schmitz and Jeffrey Critchlow are not members of the LLC. The Association has sued these individuals in their personal capacity, not as members of the LLC. Any reference to the Respondents as "LLC members" is simply inaccurate.

- The Association at page 4 - During the course of sales, the LLC controlled the Association's Board of Directors, retained Theresa May and Dan Mus as Board of Directors, and during this time, was faced with numerous warranty claims many of which were either ignored or not fully addressed.

None of the members of Colonial Development, LLC served as a board member for the Association during the approximately one year period from July 2001 until the transition date of June 27, 2002. (CP 155, CP 307-308). According to the Association, the initial board members were Daniel Mus, Sharon McKinney, Theresa May and Maureen Callaghaer. (CP 155 and CP 461). Theresa May, Sharon McKinney and Maureen Callaghaer were employed by Prudential MacPhersons. (CP 2131-2132, CP 717, CP 918, CP 2142-2145). According to Theresa May, neither McKinney nor Callaghaer were ever board members. (CP 2132). Regardless, none of these individuals were employed by the LLC, Fred Mus or any other member of the LLC. Dan Mus is the President of Contempra Homes, Inc. (CP 921). The Association voluntarily dismissed its claims against Dan Mus and Contempra Homes, Inc. in this lawsuit. (CP 1078-1080). Colonial Development, LLC is not vicariously liable for any of the Board Members, since they were not members or employees of the LLC.

Prior to the transition date, it is undisputed that the LLC and the Respondents had no actual knowledge of the alleged defects asserted in this action. (CP 917-919; CP 920-922; CP 923-925; CP 926-928; and CP 929-931). The Association argues that the LLC

and its members "should have known" of the defects because of warranty requests by the Owners. However, *none of the warranty claims involve any of the alleged defects asserted in this action.* In fact, the LLC responded to all warranty claims from these Owners, even years after their one year warranties had expired.

Between July 20, 2001 and December 4, 2002, twenty three of the twenty four units were sold. The last unit was sold on January 3, 2003. (CP 319-455). During the year 2003, the LLC performed only minor warranty repairs in the interiors of the units, such as caulking, grout problems, drywall repairs, torn vinyl flooring, and loose carpet. (CP 305-306 and CP 752-754). The only warranty claims relating to any windows was in units A201 and A102. (CP 721-729; CP 730-735; CP 736-737; and CP 746-750). The problems with these two windows were isolated and specific to the individual windows. The LLC sent the siding subcontractor out to Unit A201 to remove the siding and repair the window. (CP 721-729; CP 730-735; CP 736-737; and CP 746-750; CP 768-770). After the repairs, the superintendent, James Palmer, sprayed a hose on the window to make sure that there were no further leaks and there were none. (CP 768-770). The LLC did not receive any

further complaints about this window leaking. (CP 721-729; CP 720-735; CP 736-737; CP 746-750).

The leak in A102 was caused by a broken seal in the window itself. (CP 721-729; CP 720-735; CP 736-737; CP 746-750). The window was replaced by Milgard Windows. (CP 2154). After the window was replaced, no further problems were reported with this window or any other windows. There is no evidence of any windows leaking or that the installation of the windows was improper. In fact, all of the windows, doors and vents are properly flashed and the weather resistive barrier was correctly lapped under the sill penetration flashing. (CP 932-937). No water intrusion or damage was found at any window, door, or vent. (CP 932-937). The only allegation the Association has made with respect to the windows is the claim that a couple windows have broken flanges at the lower corner of the windows, which could have easily occurred after original construction. (CP 932-936).

The only warranty claim received by the LLC in 2004 was from Unit C102 for some paint bubbling up on a toilet seat and some drywall repairs. (CP 457-458). Even though the one year warranty on Unit C102 had expired on October 9, 2002, the LLC still made the repairs. (CP 752-753).

- The Association at 4 - After paying off its construction loan, the LLC distributed all remaining money to its members, leaving it with no assets to address its ongoing statutory warranty obligations to its customers.

In addition to the construction loan, the five members of Colonial Development, LLC contributed a total of \$652,943.47 of personal capital to build this project. (CP 310-317). Instead of making a profit on the project, the members lost over \$400,000. (CP 310-317). 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 Development, LLC's debts had been paid, and twenty three of the twenty-four units had been sold. (CP 310-317). The distribution was only \$12,000 to each of the five members. After the last unit was sold on January 3, 2003, a second distribution of paid-in capital was made to each of the members on January 6, 2003, which was only \$33,000. (CP 310-317). After the second distribution was made, Colonial Development, LLC kept a reserve fund of \$12,818.90 for any remaining warranty work. (CP 310-317).

After the one year warranty had expired on the last unit 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 310-317). At this time, neither the LLC nor its members was aware of any claims by the Emily Lane Homeowners or the Owners. (CP 314). In fact, the Association did not discover any of the alleged construction defects asserted in this action until May 2005. (CP 589). The Association did not put the LLC on notice of any of the alleged construction defect until May 31, 2005. By this date, Colonial Development, LLC's certificate of formation had been cancelled.

- The Association at pages 5 and 6 - There are numerous latent building code violations and unworkmanlike conditions at Emily Lane.

Contrary to the Association's contention, there are no serious building code violations and unworkmanlike conditions at Emily Lane. The only observed damage in the entire complex is at some locations where the gypsum sheathing at the base of the columns was in contact with the landscaping. (CP 932-937). This problem was caused by the Association's own landscaping activities. No damage was observed at any of the treated wood columns or framing. (CP 932-937). There is no evidence of any organic growth observed in any wall cavity locations. (CP 932-937). Moreover, penetration flashings have been installed around all windows jambs, sills, and heads of the windows. (CP 932-937).

Additionally, the weather resistive barrier has been properly lapped at all of the windows, doors and vents, and no water intrusion or damage was found at ANY window. (CP 932-937). Even the bellybands have been flashed correctly and the weather resistive barrier correctly installed behind the bellyband and lapped over the bellyband flashing. (CP 932-937).

While the guardrails at some places are slightly below 42" in height, there are no structural calculations to support the claim that "the guardrails are unable to withstand minimal structural loads" and is not a safety concern. (CP 932-937). The Association's repeated accusations concerning "leaking windows" and "deck soffits falling apart from water intrusion" are blatant mischaracterizations of the evidence.

- The Association at page 7 – the LLC sold units before completing construction at Emily Lane.

The 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 remaining twenty three units were sold between July 31, 2001 and January 3, 2003. There is no evidence that at the time the units were sold, the

units could not be occupied or that any construction work remained to be completed.

III. CURRENT PROCEDURAL POSTURE

The trial court's order did not include a certification of its decision granting the Respondents' motion for summary judgment.

This court accepted review of the dismissal of the Association's claims against the Respondents for the sake of judicial economy.

The notation ruling by court commissioner Susan Craighead states that "in the interest of judicial economy I will allow this appeal to proceed to avoid the specter of two successive appeals involving the same underlying litigation." The Association now contends that this court should not consider the LLC's appeal of the denial of its motion for summary judgment of these same claims which involve the same underlying facts and litigation.

It is a waste of judicial resources to allow the Association to appeal the dismissal of its claims against the Respondents but not allow the LLC to appeal the denial of its motion for summary judgment of these same claims. The Association admits that the facts, evidence, and arguments supporting its claims against the

“LLC members” apply with equal force to the LLC.² The LLC and the other Respondents moved for summary judgment dismissal of all of the Association’s claims. The trial court granted the Respondents’ motion for summary judgment, but denied the LLC’s motion for summary judgment of these same claims. Contrary to the Association’s contention, the trial court did not make any finding that RCW 25.15.303 was retroactive. This court should consider all of the issues and arguments raised by the LLC in its motion for summary judgment of the Association’s claims because they involve the same claims, facts, arguments, and litigation and would avoid a piecemeal appeal.

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

² Respondent’s Brief, page 33, n.18.

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 Association's claims against Colonial Development, LLC and its members are barred.

The Association 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.

The Association's arguments are contrary to the plain wording of RCW 25.15.070 and RCW 25.15.295(2). Moreover, 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 Association 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 Association's suit against Colonial Development, LLC and its members is barred.

Lastly, the Association failed to prove any of the claims asserted against the LLC, its members, or the individually named Respondents, and most of the claims are barred by the economic loss rule or the statute of limitations.

V. ARGUMENT

A. THE RIGHT TO BRING CLAIMS AGAINST A LLC IS GOVERNED BY THE LIMITED LIABILITY COMPANIES ACT, AND NOT THE CONDOMINIUM ACT.

The Association maintains that its claims arise under the Condominium Act and that its right to sue a dissolved LLC should be governed by the four year statute of limitations under RCW 64.34.445. The Association does not explain how the Condominium Act governs the myriad of other causes of action set forth in its Complaint. The right to sue a dissolved LLC exists by virtue of statutes in Chapter 25.15 RCW, and not by the Condominium Act. It is illogical to conclude that a Condominium Association may sue a dissolved LLC at any time after its certification of formation has been cancelled as long as it is within the four-year statute of limitations under the Condominium Act. Such a result would render Chapter 25.15 RCW and RCW 25.15.303 meaningless. The plain language of Chapter 25.15 RCW and the legislative history surrounding the enactment of RCW

25.15.303 confirms that the Limited Liability Companies Act has no provision for the preservation of any claims following the cancellation of the certificate of formation.

B. THE LIMITED LIABILITY COMPANIES ACT IS NOT AMBIGUOUS.

The Association argues that because the Limited Liability Companies Act contains no provision for the preservation of any claims following cancellation of the certificate of formation, the statute is ambiguous and is therefore curative and retroactive. The Association further claims that by enacting RCW 25.15.303, the Legislature “retroactively corrected the decision of this Court in *Ballard Square*”. The Association finds no support for its arguments, however, in the statutes or in *Ballard Square*.

Filing a certificate of cancellation is the LLC's certification that it has completed winding up activities, including meeting its obligations pursuant to RCW 25.15.300. Under RCW 25.15.295(2), the filing of a certificate of cancellation terminates the LLC's ability to sue or be sued. Without any explanation, the Association concludes that RCW 25.15.303 is curative because it is ambiguous and corrects the decision of this Court in *Ballard Square*. An enactment is curative only if it clarifies or technically corrects an

ambiguous statute.³ RCW 25.15.303 does not clarify any ambiguous statute. It merely creates a new survival period for claims against dissolved LLCs that never existed before. The fact that the LLC Act did not provide for the survival of any claims against a cancelled LLC does not render the statute ambiguous. RCW 25.15.303 constitutes a substantive change in the law, and this court must presume it does not apply retroactively.⁴

Moreover, the fact that the Supreme Court in *Ballard Square* found the amendment to RCW 23B.14.340 on its face shows legislative intent that it applies retroactively to corporations dissolved prior to its effective date is significant in that the Legislature intentionally omitted this same language in RCW 25.15.303. This court may not imply that the Legislature intended RCW 25.15.303 to be applied retroactively because the Legislature included language in RCW 23B.14.340 that indicated on its face a clear intent that it be applied retroactively.

The Associations continues to rely on out of state cases such as *Quintana v. Los Alamos Medical Ctr.*⁵ and *Walden Home*

³ *McGee Guest Homes*, 142 Wn.2d at 325, 12 P.3d 144 (2000).

⁴ *In re F.D. Processing, Inc.*, 119 Wn.2d at 462, 832 P.2d 1303 (1992).

⁵ *Quintana v. Los Alamos Medical Ctr.*, 119 N.M. 312 (N.M. Ct. App. 1994).

*Builders, Inc. v. Schmit*⁶ to support their arguments of retroactivity. Although the Association admits that in each of these cases, the lawsuits were filed after the effective date of the amendment to the statute, it argues that the date of filing is irrelevant. Under *Ballard Square*, the court held that the right to sue a dissolved corporation exists by virtue of statutes in Chapter 23B.14 and can be retroactively abolished by the Legislature, even if the lawsuit is pending.⁷ However, in each of these cases there was some indication that the Legislature intended the statute to be retroactive. In its amendment to RCW 23B.14.340, the Legislature specifically provided that it would apply to corporations dissolved prior to its effective date of June 7, 2006. In *Haddenham v. State*, 87 Wn.2d 145, 149, 550 P.2d 9 (1976), the Legislature specifically provided that coverage was to be extended under the Act to anyone injured as a result of a criminal act on or after January 1, 1972. In contrast, the Legislature intentionally omitted any language in RCW 25.15.303 indicating it intended it to be applied retroactively. The plain wording of the statute and the legislative history surrounding

⁶ *Walden Home Builders, Inc. v. Schmit*, 62 N.E.2d 11, 326 Ill. App. 386 (1945).

⁷ *Ballard Square Condominium Owners Ass'n v. Dynasty Const. Co.*, 146 P.3d 914 (2006).

the enactment of RCW 25.15.303, confirms that the Legislature never intended RCW 25.15.303 to be applied retroactively to LLCs that dissolved prior to June 7, 2006.

C. RCW 25.15.303 IS NOT REMEDIAL.

The Association argues that RCW 25.15.303 is "by its nature remedial." The Association contends that because the Legislature adopted SB 6531 and SB 6596 at the same time to correct the "controversy" raised by *Ballard Square*, then RCW 25.15.303 must be remedial. Under Washington law, remedial statutes "afford a remedy, or better forward remedies already existing for the enforcement of rights and the redress of injuries."⁸ In this case, retroactive application will not supplement an existing right or remedy. RCW 25.15.303 is a survival statute, not a statute of limitations, and, as such, it gives life to claims which would otherwise be extinguished. A statute of limitations relates to the remedy only and not to substantive rights . . . a survival statute operates on the right or claim itself.⁹ Before RCW 25.15.303, a dissolved corporation could not sue or be sued. Therefore, the

⁸ *Bayless v. Community College Dist No. XIX*, 84 Wn. App. 309, 312, 927 P.2d 254 (1996) (citing *Haddenham v. State*, 87 Wn.2d 145, 148, 550 P.2d 9 (1976)).

⁹ *Van Pelt v. Greathouse*, 364 N.W.2d 14, 20 (Neb.1985).

rights created by the statute are the right of the LLC to sue during the survival period and the right of others to sue the LLC during the survival period.

In this case, the filing a certificate of cancellation concluded any determination of rights relating to the LLC's assets or property. Once its Certificate of Formation was cancelled, no third-party can assert rights to the LLC's distributed assets and property, because any such claims are barred. Consequently, the members' interest in their distributions of paid in capital fully vested once the LLC's completed its winding up and its certificate of formation was cancelled. A remedial statute might be retroactive, but Legislation such as this that affects substantive rights is not remedial.¹⁰ In the absence of express directions for retroactive application of the statute, the inference is clear that the statute was intended to apply only prospectively.

D. RCW 25.15.300 ONLY REQUIRES THAT UPON WINDING UP, AN LLC MAKE REASONABLE PROVISIONS TO PAY KNOWN CLAIMS.

The Association argues that under RCW 25.15.300, the LLC made no provisions for its "known ongoing warranty obligations"

¹⁰ *Bayless*, 84 Wn. App. at 313, 927 P.2d 254 (1996).

and so no vested right is implicated. However, RCW 25.15.300(2) only requires that a limited liability company which has dissolved shall pay or make reasonable provision to pay all claims and obligations, including all contingent, conditions, or unmatured claims and obligations which are **"known to the limited liability company..."** The LLC and its members had no knowledge of the Association's claims prior to winding up the LLC's affairs and distributing its paid in capital. In fact, the Association did not even discover the alleged defects until May 2005, five months after the LLC had completed its winding up and its certificate of formation had been cancelled.

Since the members of the LLC had no knowledge of the Association's claims prior to dissolution, they had a vested right in the distribution of their paid in capital. The Association admits for the first time on appeal that RCW 25.15.303 only preserves claims against the LLC, and that the members have no individual liability for the LLC's obligations. On the other hand, the Association continues to seek recovery against the LLC, its members, and several individuals personally for the distributions of paid in capital. It would be entirely unjust and inequitable to impose these new

liabilities on LLCs and its members for assets which were distributed pursuant to RCW 25.15.300.

E. A LIMITED LIABILITY COMPANY'S INSURANCE POLICY IS NOT AN "ASSET" FOR DISTRIBUTION.

Predictably, the Association plays the inevitable "insurance" card. The Association argues that the statute should be applied retroactively because a voluntarily cancelled LLC has an "important remaining asset for distribution", i.e., an insurance policy. An insurance policy is not an "asset" of a cancelled LLC and can not be distributed under RCW 25.15.300. Under the LLC statute, no cause of action may be brought against a dissolved LLC after its certificate of formation has been cancelled.

The Association relies on *Penasquitos, Inc. v. Superior Court of San Diego Co.*, 53 Cal. 3d 1180, 812 P.2d 154 (1991) and *Gossman v. Greatland Directional Drilling, Inc.*, 973 P.2d 93 (Alaska 1999). But *Penasquitos* and *Gossman* each interpret a statutory scheme different from that adopted by Washington's Corporate Business Act (and the Limited Liability Companies Act). Unlike Washington, California and Alaska have not followed the Model Business Corporate Act (1984) by establishing time limits for claims against a dissolved corporation. The California Supreme

Court noted that, unlike the MBCA "our statutes permit the corporate existence to continue indefinitely for the purpose of post dissolution actions."¹¹ Moreover, the *Penasquitos* court discussed liability insurance as a source of recovery by postdissolution claimants separate from undisputed assets of later-discovered assets of a dissolved corporation.¹² Likewise, Alaska specifically repealed its two-year time-bar for claims after corporate dissolution and replaced it with a statutory scheme identical to that of California.¹³ The court noted that Alaska had chosen not to adopt § 14.06 or § 14.07 of the MBCA (1984).¹⁴ Thus, the *Gossman* court concluded that "Alaska Legislature intended to allow suits against dissolved corporations for an indefinite time."¹⁵

In contrast, a number of appellate decisions in other jurisdictions interpreting statutes similar to Washington's Corporate Business Act have rejected the Association's argument that an insurance policy might be an undistributed asset and have found

¹¹ *Penasquitos, Inc. v. Superior Court*, 53 Cal. 3d 1180, 1190, 819 P.2d 154 (Calif. 1991).

¹² *Id.*

¹³ *Gossman v. Greatland Directional Drilling, Inc.*, 973 P.2d 93, 95 (Alaska 1999).

¹⁴ *Gossman*, 973 P.2d at 98-99.

¹⁵ *Gossman*, 973 P.2d at 99.

the existence of an insurance policy irrelevant.¹⁶ Although a liability insurance policy is an asset to a viable corporation and to a corporation in the process of winding up its affairs, it is not an asset of a corporation or LLC that has completed its winding up, distributed all assets capable of distribution, and its certificate of formation has been cancelled.

Moreover, an insurer is only obligated to pay under a liability insurance policy when the insured is deemed to be “legally liable for damages.” After an LLC’s certificate of formation has been cancelled, it can never become “legally liable for damages.” Additionally, the Association’s claims concern the quality of construction, not injury or destruction of property. A CGL policy does not cover damages caused by construction defects and the owners associations’ claims do not fall within the provisions of a CGL policy that provides coverage for “property damage”. Most CGL policies define “property damage” as “physical injury to tangible property, including all resulting loss or the use of that

¹⁶ See *Gilliam v. Hi-Temp Products, Inc.*, 260 Mich. App. 98, 677 N.W.2d 856 (2004) (holding that an insurance policy is not an undistributed asset of a dissolved corporation and that the plain language of the statute bars plaintiffs’ claims); *Blankenship v. Demmler Mfg. Co.*, 89 Ill. App. 3d 569, 411 N.E.2d 1153 (1980) (rejected the plaintiff’s argument that an insurance policy might be an undisputed asset, concluding that plaintiff’s claims were barred under the survival statute).

property.” Construction defects concern the quality of construction, and are not “injury” or “property damage”.¹⁷

Furthermore, construction defects do not constitute an “occurrence”. The term “occurrence” is typically defined in a CGL policy as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.” Many courts have held that defective workmanship that results in damage to the insured’s work product is not an “occurrence” under a CGL policy.¹⁸

As one treatise on insurance law summarizes this issue:

The question of what constitutes an occurrence in the contractor setting is often litigated. When the claim against the insured contractor is based on the defective quality of the insured’s work, generally there is no covered occurrence under the CGL. A commercial general liability policy does not provide coverage for a claim against an insured for the repair of faulty workmanship that damages only the resulting work product. Mere faulty workmanship, standing alone, cannot constitute an occurrence as defined in a commercial general liability policy, nor would the cost of repairing the defect constitute “property damage.”¹⁹

A Declarant’s or Developer’s breach of its express or implied warranties under the Condominium Act, or breach of the purchase

¹⁷ See *Stuart v. Coldwell Banker Commercial Group, Inc.*, 109 Wn.2d 406, 420, 745 P.2d 1284 (1987) (distinguishing physical property damage from harm to a construction project for purposes of the economic loss rule).

¹⁸ See, e.g., *Pursell Constr. v. Hawkeye Security Ins. Co.*, 596 N.W.2d 67, 71 (Iowa 1999).

¹⁹ 20 Eric M. Holmes, *Holmes’ Appleman on Insurance* 2nd, § 129.2(1)(8)(2002).

and sale agreements, does not constitute an "occurrence" or "accident" under a CGL policy. Thus, the existence of an insurance policy is irrelevant here and is not an "asset" of an dissolved LLC.

F. THE LLC AND THE RESPONDENTS HAVE NOT WAIVED THEIR DISSOLUTION DEFENSE BY DEFENDING THIS LAWSUIT.

The Association argues that the LLC and its members have waived a dissolution defense because they are defending this lawsuit. This same argument was flatly rejected by the Supreme Court in *Ballard Square*. In *Ballard Square*, Justice J.M. Johnson stated:

The Association argues that Dynasty is still winding up because it is defending this lawsuit. However, it is illogical to conclude that a corporation that has otherwise liquidated its assets and ceased to exist is in the process of winding up merely because it must defend itself. To allow this result would mean that a corporation would be winding up forever at the will of plaintiffs' lawsuits.²⁰

The Association cites no case law supporting its assertion that a limited liability company resurrects its existence by merely defending a post-cancellation claim. The Association's argument undermines the entire statutory scheme regarding the rights of a limited liability to sue or be sued after the filing of a certificate of

²⁰ *Ballard Square Condominium Owners Ass'n v. Dynasty Const. Co.*, 146 P.3d 914, 926, n.1 (2006).

cancellation. By the Association's reasoning, a limited liability company that has filed a certificate of cancellation may be sued at any time following its cancellation, and the very act of defending against a post-dissolution or post-cancellation claim resurrects the existence of the limited liability company. As a practical matter, an LLC would exist forever so long as Plaintiffs wanted to sue.

Furthermore, engaging in discovery following the assertion of an affirmative defense does not indicate waiver.²¹ In this case, the LLC's and the other Respondents filed answers asserting an affirmative defense of the cancellation of Colonial Development, LLC's certificate of formation. Their answers to the Association's interrogatory questions set forth the factual and legal basis on which they were relying on in asserting the defense.

This case is in contrast to the facts in *Lybbert*²² and *King*²³.

In *Lybbert*, the defendant never mentioned service and proceeded with general discovery for nine months before pleading the

²¹ *French v. Gabriel*, 116 Wn.2d 584, 806 P.2d 1234 (1991) (once a defendant properly preserves a defense by pleading it in the answer, the defendant is not precluded from asserting the defense by proceeding with discovery). See also *Voicelink Data Servs., Inc. v. Datapulse, Inc.*, 86 Wn. App. 613, 937 P.2d 1158 (1997) (defendant's participation in substantive discovery does not result in waiver of an affirmative defense if it was pleaded prior to engaging in discovery).

²² *Lybbert v. Grant County*, 141 Wn.2d 29, 1 P.3d 1124 (2000).

²³ *King v. Snohomish County*, 146 Wn.2d 420, 47 P.3d 563 (2002).

affirmative defense of insufficient service of process. In this case, the LLC and the Respondents put the Association on notice of the defense in their original answers, in their opposition to the motion to amend, in their interrogatory answers, and the Association knew that the defendants were asserting the defense. There are simply no grounds to support a waiver in this case.

G. THE ASSOCIATION FAILED TO PROVE ITS CLAIMS AGAINST THE LLC, ITS MEMBERS, AND THE INDIVIDUALLY NAMED RESPONDENTS.

1. The LLC Moved for Summary Judgment on all of the Association's Claims.

The Association contends that the LLC never raised arguments to the trial court concerning the lack of evidence to support its claims for breach of contract, express warranty, and implied warranty of habitability. The Association is blatantly misleading this court. The LLC's motion for summary judgment raised arguments addressing each and every one of the Association's claims. (CP 146-180 and CP 650-681). For example, the LLC argued that all express and implied warranties, including the warranty of habitability, was specifically disclaimed, was barred, and that the warranty of habitability did not apply to subsequent purchasers. (CP 146-180, CP 650-681 and CP 942-956). Moreover, in opposition to the motion, the Association

argued that the WCA implied warranties are still viable under the NWMLS Form 29. The LLC argued that the NWMLS form 29 is only used in apartments under RCW 64.32 and to conversion condominiums under RCW 64.34 where renovation or construction remains uncompleted. (CP 670 and CP 942-956). The Association's attempts to piecemeal this appeal are without merit.

This Court should consider all of the LLC's arguments which were raised to the trial court in its motion for summary judgment.

2. Individuals Mark Schmitz, Richard Wagner and Esther Wagner, and Jeffrey Critchlow Are Not Members of the LLC and Have No Personal Liability to the Association.

The Association continues to assert that individuals Mark Schmitz, Richard Wagner, Esther Wagner, and Jeffrey Critchlow are LLC members and that they are personally liability as "Declarants" under the Washington Condominium Act, as Sellers of the Purchase and Sale Agreements, and as Board of Directors of the Association. Mark Schmitz, Richard Wagner and Esther Wagner, and Jeffrey Critchlow, have never been members of the LLC, are not identified as "Declarants" under the Condominium Declaration, were never "sellers" under any Purchase and Sale Agreements for these condominiums, and were never Board

Members. The Association has presented no evidence that Mark Schmitz, Richard Wagner, Esther Wagner, and Jeffrey Critchlow in their individual capacities executed the declaration, reserved a special declarant right, exercised a special declarant right, or owned a fee interest in the real property that is the subject of the declaration. Thus, none of these individuals are personally liable to the Association under any legal theory.

3. The LLC Members Are Immune From Liability for the LLC's Debts, Obligations and Liabilities.

The Association contends that it should be allowed to collect on the LLC's debt directly from its members, Critchlow Homes, Inc., The Almark Corporation, Richard E. Wagner and Esther Wagner d/b/a Woodhaven Homes, and Fred Mus. There is a difference between the LLC itself being liable for a debt and the individual members of the LLC itself being personally liable for its debts or liabilities. Under RCW 25.15.125, members of a LLC are not personally liable for the debts, obligations, and liabilities of a limited liability company, whether arising in tort or contract. A member of a LLC is only personally liable for his or her own torts. In this case, the Association's claims against the members are based solely on their status as a member of the LLC. None of the Association's

claims involve individual torts by any of these members. Thus, under RCW 25.15.125, members Critchlow Homes, Inc., The Almark Corporation, Richard E. Wagner and Esther Wagner d/b/a Woodhaven Homes, and Fred Mus are not be personally liable to the Association.

The same policy considerations in piercing the veil of a corporation apply to a limited liability company. Piercing the corporate veil requires a showing of fraud or abuse.²⁴ Piercing the corporate veil also requires an "overt intention to disregard the corporate entity by using it for an improper purpose."²⁵ The Association's claims must fail for the complete lack of proof of any corporate disregard, fraud or abuse by any of its members, or officers of the members.

4. The LLC Members Are Not "Declarants" under the Condominium Act.

The Association relies on *One Pacific Towers Homeowners' Association v. HAL Real Estate Investments, Inc.*, 148 Wn.2d 319, 61 P.3d 1094 (2002), to argue that the LLC members are

²⁴ *Truckweld v. Olson*, 26 Wn. App. 638, 644-45, 618 P.2d 1017 (1980); *Rogerson Hiller Corp. v. Port Angeles*, 96 Wn. App. 918, 924, 982 P.2d 131 (1994).

²⁵ *Culinary Workers Trust v. Gateway Café, Inc.*, 91 Wn.2d 353, 366, 588 P.2d 1334 (1979).

"Declarants" under Washington's Condominium Act. The Declaration for the Emily Lane Townhomes identifies the Dedicator as "Colonial Development, LLC" and on the last page it identifies the Declarant as "Colonial Development, LLC". (CP 197-288). No other entity is identified as either a "Dedicator" or as a "Declarant" on the Declaration.

The Washington State Legislature has abrogated *One Pacific Tower's* broad interpretation of "acting in concert" by amending the RCW 64.34.020(13) on July 1, 2004 to eliminate the "acting in concert" language in the definition of a "Declarant". (CP 623-631). The Legislature changed the definition of "Declarant" to avoid the absurd result that the Association advocates here making members liable as declarants merely based on their ownership in a limited liability company. The Legislature's intent is clear - members and shareholders cannot be liable based solely on their position as a member in the entity that is the named declarant.

5. The LLC's Members Had No Fiduciary Duty to the Association.

The Association raises for the first time on appeal a new argument that the LLC members, Fred Mus and Contempra Homes, are vicariously liable for their so called "employees",

Theresa May and Dan Mus, because neither Ms. May or Mr. Mus disclosed "their knowledge" regarding construction defects at Emily Lane or the intention of the LLC to dissolve. But the Association originally argued to the trial court that the LLC, 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. Further, the Association argued that the individual homeowners' warranty requests put the LLC and its members on inquiry notice.

It is undisputed that none of the members of the LLC served as a board member during the period of declarant control from July 2001 until June 27, 2002. Moreover, Theresa May was employed by Prudential MacPhersons, not Fred Mus. Dan Mus is the President of Contempra Homes, Inc. However, the Association voluntarily dismissed its claims against Dan Mus and Contempra Homes, Inc. in this lawsuit. Neither the LLC or any of its members are vicariously liable for any of the Board Members, since they were not LLC members or employees of the LLC members. Furthermore, the Association failed to present any evidence that the LLC, its members, or any of the Respondents had actual

knowledge of any of the defects during the period of declarant control.

6. The Association's Claim Under RCW 19.40.051(b) is Barred.

Under RCW 19.40.091(c), a cause of action under RCW 19.40.051(b) must be brought within one year after the transfer was made or the obligation was incurred. The first distribution was paid on December 4, 2002. The second distribution was paid on January 6, 2003 and the last distribution was paid on December 31, 2004. The Association did not file this lawsuit until July 19, 2005, more than a year after the first and second distributions. Thus, the Association's action under RCW 19.40.051(b) with respect to the first and second distributions is barred and should be dismissed.

7. A Fraudulent Transfer Under RCW 19.40.041(a)(1) Requires Proof of Actual Intent to Defraud.

The Association's Complaint asserts claims against the LLC, its members, and the individually named Respondents for violation of RCW 19.40.041 and 19.40.051, the Uniform Fraudulent Transfer Act ("UFTA"). The Association on appeal wisely abandons its claim under RCW 19.40.041(a)(1) because it can not prove actual intent to defraud any creditor, and instead, focuses its arguments on proving construction fraud under RCW 19.40.041(a)(2)(i). Under

the UFTA, a transfer may be fraudulent under any one of the following circumstances. First, a transfer made by a debtor with actual intent to hinder, delay, or defraud any creditor is fraudulent.

RCW 19.40.041(a)(1). The trial court may consider 11 factors in

determining whether the requisite intent was present. RCW

19.40.041(b). Second, a transfer made without adequate

consideration is constructively fraudulent, i.e., without regard to the

actual intent of the parties, where any one of the following exists:

(1) the debtor was left by the transfer with unreasonably small

assets for a transaction or the business in which the debtor was

engaged, RCW 19.40.041(a)(2)(i); (2) the debtor intended to incur,

or believed he or she would incur, more debts than the debtor

would be able to pay, RCW 19.40.041(a)(2)(ii), or; (3) the debtor

was insolvent at the time or as a result of the transfer, RCW

19.40.051(a). Specifically, RCW 19.40.041(a) provides:

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.²⁶ Under that section, a transfer is fraudulent if it is made by a debtor with the actual intent to hinder, delay, or defraud any creditor.²⁷ In determining whether actual intent was present, consideration may be given to the eleven factors of "badges of fraud" listed in RCW 19.40.041(b). Any party making a claim under the UFTA carries the burden of proving that the transfer in question was fraudulent.²⁸

Here, there are no factors which support the Association's claim that the LLC made transfers to its members with actual intent to hinder, delay or defraud the Association. At the time the last distribution of paid in capital was made on December 31, 2004,

²⁶ *Clearwater v. Skyline Const. Co., Inc.*, 67 Wn. App. 305, 321, 835 P.2d 257 (1992).

²⁷ *Sedwick v. Gwinn*, 73 Wn. App. 879, 885, 873 P.2d 528 (1994).

²⁸ *Sedwick v. Gwinn*, 73 Wn. App. 879, 885, 873 P.2d 528 (1994).

(which was only approximately \$1,956.00 to each member), neither the LLC nor any of its members had any knowledge of the defects being alleged in this case. In fact, the Association was not even aware of the alleged defects until May 2005, long after the last distribution of paid in capital was made. The Association failed to prove an actual intent to defraud under RCW 19.40.041(a)(1) and this claim should have been dismissed.

8. There Association Also Failed to Prove Constructive Fraud Under 19.40.041(a)(2)(i).

The Association contends that the LLC did not receive a reasonably equivalent value for the members' paid in capital. Value, as defined in RCW 19.40.031, is what is given for a transfer or obligation if, in exchange, property is transferred or an antecedent debt is secured or satisfied. RCW 19.40.011(5) defines debt as liability on a claim. A Claim includes "a right to payment". RCW 19.40.011(3). The LLC members had a statutory right to payment of the assets of the LLC to the extent of their capital contributions.²⁹ Under RCW 25.15.035, a member may lend money to and provide collateral for a limited liability company and has the

²⁹ RCW 25.15.230 and RCW 25.15.300.

same rights and obligations with respect to any such matter as a person who is not a member or manager.

There were no distributions that were made in excess of the capital contributions by the members. The distribution from a LLC to a member, to the extent of the member's capital contributions, fits within the meaning of debt under UFTA and RCW 19.40.011(5). In fact, the Seventh Circuit has established a rule that a distribution from a partnership to a limited partner, to the extent of the limited partner's investment, is a transfer for reasonably equivalent value.³⁰

The Association did not prove that the LLC's liabilities exceeded its assets after any of the distributions. The Association did not establish that the LLC, at the time of any distribution, was unable to pay its debts as they became due. Thus, the Association's claim under RCW 19.40.041(a)(2)(i) should be dismissed.

9. There Association Also Failed to Prove Constructive Fraud Under 19.40.051(a).

RCW 19.40.051(a) provides a third basis for establishing constructive fraud as to a creditor whose claim arose before the transfer. RCW 19.40.051(a) requires a showing that: (1) the

³⁰ *Scholes v. Lehmann*, 56 F.3d 750 (7th Cir. 1995).

creditor's claim arose before the transfer; and (2) the transfer was made without receiving a reasonably equivalent value in exchange for the transfer, or the debtor was insolvent at the time or the debtor became insolvent as a result of the transfer.

The Association argues that its claims arose at the time of the Purchase and Sale Agreements for the condominiums were consummated. Even if this were true, a claim for breach of contract involving construction accrues at the time of discovery.³¹ Moreover, the Association's tort claims arose at the time of discovery.³² The evidence shows that the Association did not discover any of the alleged defects until May 2005. Thus, the Association's claims did not arise before any of the distributions.

As previously discussed, the distribution from a LLC to a member, to the extent of the member's investment, is a transfer for reasonably equivalent value. Moreover, the LLC was not insolvent at the time of any distribution. The LLC's last distribution was made during the winding up of the LLC and was made in accordance with RCW 25.15.300. At the time of the last distribution, all of the units

³¹ *1000 Virginia Limited Partnership v. Vertecs Corp.*, 146 P.3d 423, 431-432 (2006).

³² RCW 4.16.080.

had been sold, all contractors had been paid, there were no liens or claims on the project, the one year warranties on all of the units had expired, and there was no notice of any claims by the Association. Thus, there is no evidence to support a finding of a fraudulent transfer under RCW 19.40.051(a).

10. The Association Did Not Raise Any Arguments to Support its Claims Under RCW 64.34.405, 64.34.410 and 64.34.415.

The Association did not refute the LLC's and Respondents' 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 trial 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. Here, the LLC and its members had no knowledge of any of the alleged defects at the time of drafting the Public Offering Statement. RCW

64.34.415 concerns conversation buildings, which is also not applicable here.

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

11. The Association's Claims for Negligent Misrepresentation are Barred by the Economic Loss Rule and There is No Evidence to Support A Claim for Fraudulent Concealment.

Contrary to the Association's contention, the trial court did not making any rulings that the "economic loss rule" does not apply to its claim for negligent misrepresentation or that the LLC is personally liable. The Association's claims for negligent misrepresentation is clearly barred by the economic loss rule. There is no dispute that the Association seeks only to recover the cost of repair, which is a purely economic loss. Purely economic damages are not recoverable in tort.³³ This same issue was addressed in *Griffith v. Centex Real Estate Corp.*, 93 Wn. App. 202, 969 P.2d 486 (1998), where a Class of Homeowners sued Centex for the negligent misrepresentation of its promise to provide a

³³ *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).

quality home. The court held that their claims were barred by the economic loss rule.³⁴

In *Berschauer/Phillips*, the general contractor sued a design professional in tort to recover economic damages resulting from construction delays. The court limited recovery to the remedies provided by the contract. "We so hold to ensure that the allocation of risk and the determination of potential future liability is based on what the parties bargained for in the contract. We hold parties to their contracts."³⁵ The court emphasized "the importance of the precise allocation of risk as secured by contract.

Another example, more closely related to the facts of this case, is *Griffith v. Centex*. There, the Griffiths purchased a home from Centex, a national "builder-vendor" that specialized in sales to first-time home buyers. Centex promised quality houses. Despite this promise, Centex required its purchasers to sign a real estate contract that both limited the extent of its warranties and the rights of its purchasers to sue on those warranties.³⁶ When the Griffiths

³⁴ *Griffith v. Centex Real Estate Corp.*, 93 Wn. App. 202, 213, 969 P.2d 486 (1998).

³⁵ *Berschauer/Phillips Constr. Co. v. Seattle School District No. 1*, 124 Wn.2d 816, 826, 881 P.2d 986 (1994).

³⁶ *Griffith*, 93 Wn. App. at 206-07, 969 P.2d 486.

sued Centex for the fraudulent misrepresentation of its promise to provide a quality home, the court held that their claim was barred by the economic loss rule.³⁷ In essence, the court would not allow the Griffiths to circumvent the negotiated terms of the contract by bringing a tort claim. Thus, the plaintiffs could recover only in a contract action and not in a tort action.

Here, the contract between the parties contained an allocation of future liability. It also contained a limited warranty agreement. In *Reynolds Metals Co. v. Alcan, Inc.*, 2006 WL 1169790 (W.D.Wash. May 01, 2006) (NO. C04-0175RJB), the court ruled that the purchase and sale contracts allocated risk and future liability sufficiently to invoke the economic loss rule. Thus, the economic loss rule applies and bars the negligent misrepresentation claim against the LLC, its members, and the individually named Respondents.

Even if the HOA's claims were not barred by the economic loss rule, the Association has failed to present any evidence to support its claims for negligent misrepresentation or fraudulent concealment. As the Association points out, to prove a fraudulent

³⁷ *Griffith*, 93 Wn. App. at 213, 969 P.2d 486.

concealment claim, the Association must show (1) a concealed defect in the premises of a residential dwelling, (2) the Builder knew of the defect, (3) the defect is dangerous to the property, health, of life of the purchaser, and (4) the defect was unknown to the purchaser and a reasonable inspection by the purchaser would not have disclosed the defects.³⁸ However, fraudulent concealment does not extend to those situations where the defects is apparent.³⁹ The builder's knowledge is determined at the time of sale.⁴⁰

The Association contends that the LLC fraudulently concealed from prospective purchasers that the "windows were improperly installed, that flashings were improperly installed, that railings were weak, and so forth". The Association argues that by virtue of their involvement in the construction, the LLC and its members knew or should have known of the alleged defects. However, each of the members testified that they had no knowledge of any of the alleged construction defects prior to the Association's notice of claim in May 2005. It is not sufficient to merely allege that the LLC and its members "should have known"

³⁸ *Norris v. Church*, 115 Wn. App. 511, 514, 63 P.3d 153 (2002).

³⁹ *Atherton Condo. Apt. Owners' Ass'n B'd v. Blume Dev. Co.*, 115 Wn.2d 506, 524, 799 P.2d 250 (1990).

⁴⁰ *Norris v. Church*, 115 Wn. App. 511, 514, 63 P.3d 153 (2002).

about the alleged defects. The Association failed to present any evidence to support the claim that the LLC and its members in fact knew of the alleged defects. The Association's standard of "should have known" is irrelevant in determining whether the LLC is liable for fraudulent concealment.

It is important to note that none of the alleged defects involve any past warranty claims submitted to the LLC. Even if they did, a builder cannot be held liable if he reasonably believes that a past defect has been corrected.⁴¹ The only defect involving the windows is that a couple of windows have broken nail flanges, which could have easily occurred after construction was complete. The Association failed to present any evidence that any of the alleged defects are dangerous to the property, health, or life of the Owners. There are no structural calculations to support the claim that the "railings are weak" and are not a safety concern. Lastly, the Association did not present any evidence showing that the alleged defects were unknown to the Owners or the Association and a reasonable inspection by the Owners or the Association would not have disclosed the defects.

⁴¹ *Luxon v. Caviezel*, 42 Wn. App. 261, 265, 710 P.2d 809 (1985).

Lastly, the Association contends that the LLC members had a duty to investigate the construction prior to dissolution and acted with reckless disregard to "potential defects" by not investigating. However, the LLC had no duty to perform an investigation of the Association's property prior to its dissolution. At the time of its dissolution, all of the one year warranties had expired on the units and the LLC had no further obligations to the Owners under its Limited Warranty.

Here, there is no evidence that the LLC or its members had any actual knowledge of the Association's alleged defects at the time of the sale of these units. Thus, the trial court should have dismissed Association's claims for fraudulent concealment and negligent misrepresentation.

12. The Association's Consumer Protection Act Claim Should be Dismissed.

The Association has not established any of the elements to support its Consumer Protection Act claim. The Association attempts to support its CPA claim by arguing that by inference, the LLC members "should have known" of the alleged defects. The Association also argues that the members (1) did not disclose to the Owners that there were two windows that were repaired under

warranty, (2) did not disclose that they intended to dissolve the LLC; (3) distributed assets to the members during the winding up period prior to dissolution; (4) included a Builders Limited Home Warranty in the Declaration; and (5) responded to the Association's notice of claim.

All of these allegations involve what the Association contends the LLC members "should have done". The Association did not cite any legal authority that a failure to disclose defects which are unknown to the Builder can be a CPA violation. The Association has not presented evidence of any deceptive or misrepresentation by the LLC or its members that was relied upon by the individual owners in their purchase of the units. The Association's arguments have another fundamental problem. The alleged defects were not discovered until May 2005. The LLC's certificate of formation was not cancelled until years after the units were sold. Therefore, the Owners could not have relied on any "failure to disclose" an intent to dissolve the LLC, or the final distribution of paid in capital, or the LLC's response to the Association's notice of claim, since all of these events occurred years after the units were sold. Thus, the trial court should have dismissed the Association's CPA claims.

H. THE LLC IS ENTITLED TO RECOVER ITS ATTORNEY'S FEES AND COSTS AT THE TRIAL COURT LEVEL.

When a contract or statute provides for payment of attorney fees, the prevailing party is entitled to reasonable fees and costs incurred at both trial and appeal.⁴² The Association argues without any supporting authority that the LLC (and only the LLC) is not entitled to any attorney's fees and costs as a prevailing party because it is a dissolved LLC. The Association has asserted a claim for attorney's fees under the Purchase and Sale Agreements, the Condominium Act, and the Consumer Protection Act.

The Association cites no authority for its arguments and it would be improper to deny the LLC an award of attorney's fees and costs as a prevailing party. The Association has vigorously pursued its claims against the LLC, despite full knowledge that its certificate of formation was cancelled. It would be illogical to conclude that by successfully defending against the Association's claim, the prevailing attorney fee clauses in the Purchase and Sale Agreements, the Condominium Act, and the Consumer Protection Act would be rendered meaningless as to the LLC.

⁴² *Piepkorn v. Adams*, 102 Wn. App. 673, 10 P.3d 428 (2000) (prevailing party entitled to award of attorney fees at trial and on appeal).

The Association then challenges the LLC's right to attorney's fees and costs as a prevailing party under the Condominium Act claiming that this is not "an appropriate case" for an award of fees to the LLC. The Association originally argued to the trial court that a "Declarant" is never entitled to an award of attorney's fees and costs under the Condominium Act. However, either the plaintiff or the defendant may be the prevailing party under the Condominium Act.⁴³ This is an appropriate case for an award of attorney's fees to the LLC because the Association filed its Complaint long before RCW 25.15.303 was enacted, and vigorously pursued claims against the LLC with full knowledge it was a cancelled LLC. The court may remand to the trial court the calculation of the amount of the award of attorney's fees and costs.

I. THE RESPONDENTS ARE ENTITLED TO THEIR ATTORNEY'S FEES AND COSTS AS PREVAILING PARTIES.

The Respondents prevailed on summary judgment on all of the Association's claims. The Respondents filed a motion for attorney's fees and costs under the prevailing attorney fees clause in the Purchase and Sale Agreements, the Condominium Act and

⁴³ *Eagle Point Condominium Owners Ass'n v. Coy*, 102 Wn. App. 697, 9 P.2d 898 (2000).

the Consumer Protection Act, which the trial court denied without prejudice to renew pending the outcome of this appeal. The trial court had authority to award attorney's fees and costs to the Respondents' under RAP 7.2(i), regardless of the outcome of this appeal. This is an appropriate case for an award of fees in favor of the Respondents. The Association sued these Respondents as "Declarants" under the Condominium Act knowing that the only real "Declarant" is Colonial Development, LLC. Most of the Respondents are individuals and the Association sued them in their individual capacity and their marital community. The Association admits that it only sued these Respondents after it became aware that the LLC was a dissolved limited liability company. There is no legitimate reason to deny an award of attorney's fees and costs to these Respondents.

J. THE LLC AND THE RESPONDENTS ARE ENTITLED TO THEIR ATTORNEY'S FEES AND COSTS UNDER RAP 18.1.

RAP 18.1 addresses the procedures for requesting attorney fees and expenses on appeal. If the LLC and the Respondents prevail on appeal, they are entitled to an award of their attorney's fees and costs in the trial court, and on appeal under RAP 18.1.

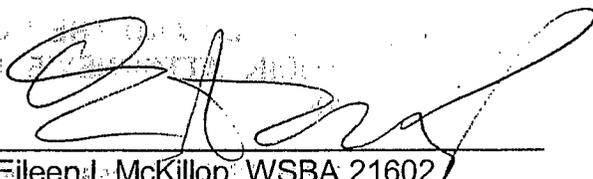
VI. CONCLUSION

The Association has no viable claims against either Colonial Development, LLC or the Respondents. RCW 25.15.303 does not apply retroactively to resurrect the Association's claims. Moreover, the Association failed to prove its claims against the LLC and the Respondents. This court should grant Colonial Development, LLC's motion for summary judgment and grant it an award of attorney's fees and costs incurred at the trial court level and on appeal. The court should also affirm the trial court's decision granting the Respondents' motion for summary judgment and grant them an award of attorney's fees and costs at the trial court level and on appeal.

DATED this 5 day of January, 2007.

OLES MORRISON RINKER & BAKER LLP

By


Eileen McKillop, WSBA 21602
Attorneys for Appellant / Cross-
Respondent Colonial Development,
LLC and Respondents