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SUPREME COURT
STATE OF WASHINGTON

2008 MAY 29 P 4: 04 No. ~~80459-1~~

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SUPREME COURT OF THE STATE OF WASHINGTON

CLERK

80450-8
ORIGINAL

EMILY LANE HOMEOWNERS ASSOCIATION,
a Washington nonprofit corporation,

Respondent,

v.

COLONIAL DEVELOPMENT, LLC,
a Washington limited liability company,

Petitioner,

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,

Petitioners.

SUPPLEMENTAL BRIEF OF PETITIONERS

Eileen I. McKillop, WSBA 21602
Attorneys for Petitioners

OLES MORRISON RINKER & BAKER LLP
701 PIKE STREET, SUITE 1700
SEATTLE, WA 98101-3930
PHONE: (206) 623-3427
FAX: (206) 682-6234

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I. ASSIGNMENTS OF ERROR

A. The Court of Appeals misconstrues the June 7, 2006 amendment to the Washington Limited Liability Company Act, RCW 25.15.303, to allow claims against an LLC after the filing of a certificate of cancellation. The language of RCW 25.15.303, when read together with RCW 25.15.070 and RCW 25.15.295(2), make it clear that the survival statute is based on the *dissolution* of an LLC, and not the *cancellation* of an LLC.

B. The Court of Appeals improperly ruled that RCW 25.15.303 is retroactive as a remedial and curative statute. RCW 25.15.303 is not curative or remedial and creates a new substantive right to claimants for claims against a dissolved LLC.

C. The Court of Appeals misconstrues RCW 25.15.303 to only allow claims against a dissolved or cancelled LLC but does not allow a dissolved or cancelled LLC to pursue any claims. To interpret the statute as applying only to claims *against* a cancelled LLC leads to absurd and unnecessarily harsh consequences.

II. STATEMENT OF THE CASE

The fundamental issues in this case are whether Washington's Limited Liability Company Act has any provision for the preservation of

any claims against an LLC after its certificate of formation has been cancelled, and whether the June 7, 2006 amendment to the Act, RCW 25.15.303, applies to a cancelled LLC versus a dissolved LLC. Another issue is whether RCW 25.15.303 is retroactive as a remedial and curative statute. The issue then becomes whether the amendment only allows claims *against* an LLC, but does not allow an LLC to *prosecute* any claims.

Here, Colonial Development, LLC complied with the Act, completed its winding up of its affairs pursuant to RCW 25.15.295, paid all known claims, and filed a certificate of cancellation. Seven months later, Emily Lane HOA filed a Complaint against the LLC, its members, and two individuals for alleged construction defects relating to the construction of the Emily Lane condominiums.

On June 18, 2007, Division One of the Court of Appeals erroneously ruled that RCW 25.15.303 applies to both dissolved and cancelled LLCs and is retroactive as a remedial and curative statute. The Court of Appeals also held that RCW 25.15.303 only allows claims *against* a dissolved or cancelled LLC but does not allow a dissolved or cancelled LLC to *pursue* any claims.

III. SUMMARY OF ARGUMENT

The Court of Appeals' decisions contravenes the plain language of RCW 25.15.303 and allows suits against a cancelled LLC who has completed its winding up and has ceased to exist as a legal entity, making RCW 25.15.295(2) and RCW 25.15.070(2)(c) inoperative. The legislature chose to create a survival statute based on the *dissolution* of an LLC, instead of its *cancellation*, without amending RCW 25.15.295(2) or RCW 25.15.070(2)(c). The language of RCW 25.15.303 makes it clear that the survival statute is based on the *dissolution* of an LLC, and not the *cancellation* of an LLC.

The Court of Appeals also incorrectly decided that RCW 25.15.303 applies retroactively as a remedial and curative statute. RCW 25.15.303 is not curative because it does not clarify any ambiguity in the Limited Liability Company Act. Nor is the statute remedial. A statute is remedial if it relates to practice, procedure, or remedies and does not affect a substantive or vested right. The amendment is not remedial because it creates a new substantive right against a dissolved LLC. Thus, RCW 25.15.303 should not be applied retroactively.

Lastly, the Court of Appeals' decision that RCW 25.15.303 only allows claims *against* an LLC, but does not allow an LLC to *prosecute*

any claims, is a strained reading of the statute and leads to absurd results.

IV. ARGUMENT

A. RCW 25.15.303 Only Applies to a Dissolved LLC and Not a Cancelled LLC.

RCW 25.15.303 provides that the *dissolution* of a LLC does not take away or impair any remedy against the LLC for any right or claim existing, whether prior to or after *dissolution*, unless an action is commenced within three years after the effective date of dissolution. The Legislature chose to create a survival statute based on the *dissolution* of the LLC, and not the cancellation of the LLC. RCW 25.15.303 can not be read in isolation. The statute must be read with related statutes to determine whether the plain statutory language shows the intended meaning of the statute in question.¹ The Legislature enacted RCW 25.15.303 without amending RCW 25.15.070(2)(c) or RCW 25.15.295(2). Under RCW 25.15.295(2), the persons winding up the LLC's affairs may not "prosecute and defend suits" after the certificate of formation is canceled. RCW 25.15.295(2) provides as follows:

Upon dissolution of a limited liability company and *until the filing of a certificate of cancellation as provided in*

¹ *Dev., Inc. v. Cananwill, Inc.*, 150 Wn.2d 674, 682, 80 P.3d 598 (2003).

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

RCW 25.15.295(2) makes it clear that there is a period of time between the dissolution of an LLC and the cancellation of its certificate of formation, that an LLC can sue and be sued. However, the filing of a certificate of cancellation terminates the LLC's ability to sue or be sued.

RCW 25.15.070 makes it clear that an LLC ceases to exist as a legal entity *when its certificate of formation is canceled*:

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

During that post-dissolution process, an LLC continues to exist, and its activities are limited to the winding up activities set forth in RCW 25.15.295(2), which include prosecuting and defending claims.⁴ Thus,

² RCW 25.15.295 (emphasis added).

³ *Berrocal v. Fernandez*, 155 Wn.2d 585, 590, 121 P.3d 82 (2005), *accord Ballard Square Condo. Owners Ass'n v. Dynasty Constr. Co.*, 146 P.2d 914, 919 (2006).

⁴ RCW 25.15.295.

under the Act, there is a difference between the “dissolution” of an LLC and the “cancellation of its certificate of formation.” The legislature intended that RCW 25.15.303, RCW 25.15.295(2) and RCW 25.15.070 would coexist, and that the latter statutes would do so without modification. All provisions in a statute must, so far as possible, be construed so as not to contradict each other.⁵ The language of RCW 25.15.303 when read together with RCW 25.15.070(2)(c) and RCW 25.15.295(2) plainly do not allow suits against an LLC after its certificate of formation has been canceled. Rather, RCW 25.15.303 allows suits against a dissolved LLC for three years following the effective date of dissolution.

B. RCW 25.15.303 is Not Curative or Remedial and Can Not Be Applied Retroactively.

The Court of Appeals erroneously ruled that RCW 25.15.303 is retroactive because it is remedial and curative and does not impair a vested right. The Court of Appeals did not even address the issue of whether RCW 25.15.303 affects a substantive right. Statutes are presumed to run prospectively.⁶ However, a statute or an amendment to a statute may be retroactively applied if the legislature so intended, if it

⁵ See *In re Sherwood's Estate*, 122 Wash. 648, 655-56 (1922).

⁶ *Wash. Waste Sys., Inc. v. Clark County*, 115 Wn.2d 74, 78, 794 P.2d 508 (1990).

is clearly curative, or if it is remedial, provided that retroactive application does not affect a substantive or vested right.⁷ RCW 25.15.303 contains no explicit direction concerning its retrospective or prospective application. An enactment is curative only if it clarifies or technically corrects an ambiguous statute.⁸ Here, RCW 25.15.303 does not clarify any statute. Prior to the enactment of RCW 25.15.303, the Limited Liability Companies Act did not provide for the preservation of any claims against a dissolved LLC. Where ambiguity is lacking in statutory language, the court should presume an amendment to the statute constitutes a substantive change in the law, and the amendment presumptively is not retroactively applied.⁹ Because there was no prior ambiguous statute for which RCW 25.15.303 could be “curing”, this exception does not apply.

Moreover, RCW 25.15.303 is not remedial. A statute is remedial if it relates to practice, procedure, or remedies and does not

⁷ *1000 Virginia Ltd. Partnership v. Vertecs Corp.*, 158 Wn.2d 566, 584, 146 P.3d 423 (2006).

⁸ *McGee Guest Homes, Inc. v. Dep't of Soc. & Health Servs.*, 142 Wn.2d 316, 325, 12 P.3d 144 (2000).

⁹ *In re F.D. Processing, Inc.*, 119 Wn.2d 452, 462, 832 P.2d 1303 (1992).

affect a substantive or vested right.¹⁰ In this case, retroactive application will not supplement an existing right or remedy. Under the Limited Liability Companies Act, the Emily Lane HOA had no right or remedy against Colonial Development, LLC after its certificate of formation was cancelled on December 31, 2004. A statute which provides a claimant with a right to proceed against persons previously outside the scope of the statute deals with a substantive right, and therefore applies prospectively only.¹¹

Where ambiguity is lacking in statutory language, this court presumes an amendment to the statute constitutes a substantive change in the law, and the amendment presumptively is not retroactively applied.¹²

The purpose of the new survival statute is to provide claimants new rights and remedies against a dissolved limited liability company. Washington Courts consistently refuse to apply a statute retroactively if it brings about a change in substantive rights and imposes “new liability”

¹⁰ *1000 Virginia Ltd. Partnership v. Vertecs Corp.*, 158 Wn.2d 566, 584, 146 P.3d 423 (2006).

¹¹ *Department of Retirement Systems v. Kralman*, 73 Wn. App. 25, 33, 867 P.2d 643 (1994).

¹² *In re F.D. Processing, Inc.*, 119 Wn.2d at 462, 832 P.2d 1303 (1992).

on defendants.¹³ Under these principles, RCW 25.15.303 does not apply retroactively as a remedial or curative statute.

C. To Interpret RCW 25.15.303 to Only Allow Claims Against a Dissolved LLC Leads to Absurd and Harsh Results.

The Court of Appeals erroneously interprets RCW 25.15.303 to only allow claims *against* a dissolved or canceled LLC, and not to actions *by* a dissolved or canceled LLC. Courts must avoid readings of statutes that result in unlikely, absurd, or strained consequences.¹⁴ The text of RCW 25.15.303 is similar to RCW 23B.14.340 in that it refers only to claims “against” a corporation, and not to claims “by” a corporation. Unlike a dissolved LLC, a cancelled LLC has no means to reinstate its certificate of formation. Thus, a cancelled LLC has no ability to pursue claims against its subcontractors for the damage they caused. To interpret the statute as applying only to claims *against* a cancelled or dissolved LLC would punish dissolved and cancelled LLCs more harshly than corporations that dissolve. This is the type of case where literal application of a statute would thwart its obvious purpose.

¹³ See, *Bayless v. Community College Dist No. XIX*, 84 Wn. App. 309, 312, 927 P.2d 254 (1996); *In re F.D. Processing*, 119 Wn.2d. 452, 460, 832 P.2d 1303 (1992).

¹⁴ See *1000 Virginia Ltd. Partnership v. Vertecs Corp.*, 158 Wn.2d 566, 924, 146 P.3d 423 (2006).

Like RCW 23B.14.340, RCW 25.15.303's evident purpose is to create a new three year survival statute for claims against a dissolved LLC. There is no rational reason the Legislature would choose to punish dissolved LLCs more harshly than dissolved corporations. This court should interpret the statute consistent with the legislative purpose, which is to provide a three year survival period for claims by or against a dissolved LLC.

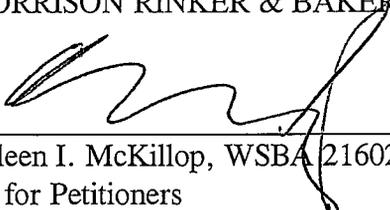
V. CONCLUSION

RCW 25.15.303 applies only to claims against a *dissolved* LLC and not to claims against a *canceled* LLC. RCW 25.15.303 can not be applied retroactively because it is not curative or remedial, and it creates a new substantive right. Lastly, RCW 25.15.303 should be construed to allow claims by or against a dissolved LLC. For all of these reasons, this Court should reverse the Court of Appeals' June 18, 2007 decisions.

DATED this 29 day of May, 2008.

OLES MORRISON RINKER & BAKER LLP

By



Eileen I. McKillop, WSBA 21602
Attorneys for Petitioners