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METCO HOMES, LLC,
a Washington limited liability company, MARYLAND CASUALTY
COMPANY, a domestic insurance company,

Petitioner,

v.

N.P.R. CONSTRUCTION, INC., a Washington corporation;
NATHAN A. ANDREWS AND JENNIFER ANDREWS d/b/a N.P.R.,
N.P.R. FENCE, N.P.R FENCING, N.P.R. FENCE, INC., N.P.R.
FENCING, INC., a Washington corporation,

Respondents.

BRIEF OF RESPONDENTS

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I. ASSIGNMENTS OF ERROR

A. The trial court properly ruled that under Washington's Limited Liability Companies Act, Chapter 25.15, Metco Homes, LLC lacked standing to pursue any claims against NPR after its certificate of formation was cancelled on June 1, 2008.

B. The trial court properly ruled that Metco Homes, LLC and its liability insurance carrier, Maryland Casualty Company, are liable for NPR's attorney's fees and costs pursuant to the prevailing attorney fee clause in the Master Contract.

C. The trial court properly denied Metco Homes, LLC's and Maryland Casualty Company's motion to vacate the July 31, 2008 order granting NPR's motion for summary judgment based on unsubstantiated allegations of delays and misleading conduct by NPR's counsel.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. RCW 25.15.070(2)(c) and RCW 25.15.295(2) make it clear that a limited liability company shall be a separate legal entity until the cancellation of the limited liability company's certificate of formation. Here, Metco Homes, LLC failed to file a certificate of reinstatement within the two year period after the effective date of its administrative dissolution, and its certificate of formation was

cancelled on June 1, 2008. Does a limited liability company have standing to maintain a cause of action after its certificate of formation is cancelled and it is no longer a legal entity?

B. Metco Homes, LLC and its liability insurance carrier, Maryland Casualty Company, filed this action against NPR seeking recovery under a Master Agreement that contained a prevailing attorney fee clause. The trial court awarded NPR its attorney's fees and costs as the prevailing party on summary judgment. Should a party who successfully defeats a contract claim brought by a cancelled limited liability company and its liability insurance carrier, be allowed to recover its attorney's fees and costs as the prevailing party?

C. After the court granted NPR's motion for summary judgment, Metco Homes, LLC filed a motion to vacate the order granting summary judgment contending that although its certificate of formation was cancelled on June 1, 2008, it should be allowed to maintain a cause of action against NPR based on unsubstantiated allegations that NPR's counsel delayed its own "diligent" prosecution of its claims. May a limited liability company reinstate its certificate of formation and legal status and maintain a cause of

action based on unsubstantiated allegations concerning an opposing party's delays?

III. STATEMENT OF THE CASE

The fundamental issue in this case is whether Washington's Limited Liability Companies Act has any provision for the preservation of any claims by an LLC after its certificate of formation has been cancelled.

On February 15, 1995, Metco Homes, LLC was formed as a limited liability company.¹ Metco Homes, L.L.C. was the developer and general contractor of a project known as the Garden Groves II Project ("Project")².

In 1992, Nathan Andrews formed a sole proprietorship named "NPR". The names "NPR" and "NPR Fence" were commonly used by Nathan Andrews as a sole proprietorship in contracting to perform fencing work. Approximately ten years ago, in late 1998, the sole proprietorship of NPR Fence orally contracted with Metco Homes, LLC to install vinyl siding and fencing on Buildings E through DD at the Garden Grove II Project.³

¹ CP 141.

² CP 188.

³ CP 184.

Almost five years ago, on March 11, 2004, Metco Homes, LLC and its liability insurance carrier, Maryland Casualty Company, filed a Complaint against the separate entity of “NPR Construction, Inc.” alleging causes of action for breach of contract, contractual indemnity, and equitable indemnity.⁴ Subsequently, Metco Homes, LLC and Maryland Casualty Company filed an amended complaint adding the sole proprietorship, NPR Fence, and several other NPR entities as party defendants.⁵

Metco Homes, LLC and Maryland Casualty Company contended that Metco entered into a master contract with NPR Fence on June 5, 1997 for all of its projects with Metco Homes, LLC, including the Garden Grove project.⁶ The Subcontract General Conditions, Article T, contain a prevailing attorney fee clause which states that “In any dispute between Contractor and Subcontractor, the prevailing party shall be awarded its reasonable attorney’s fees and costs”.⁷

⁴ CP 187-193.

⁵ CP 195-202.

⁶ CP 145-151.

⁷ CP 181.

Metco Homes, LLC failed to note the case for trial until July 11, 2007, more than three years after filing the action. The case was set for trial on May 5, 2008.⁸

On June 1, 2006, Metco Homes, LLC was administratively dissolved by the Secretary of State under RCW 25.15.285.⁹ Even though Metco Homes, LLC had filed a lawsuit against NPR, it failed to file a certificate of reinstatement within two years of dissolution. Consequently, on June 1, 2008, Metco Homes, LLC's certificate of formation was cancelled under RCW 25.15.290(4).

On February 6, 2008, NPR's counsel notified Metco's counsel that she had a conflict with the May 5, 2008 trial date due to the recent rescheduling of a trial date in a Snohomish County Superior Court matter in which she was involved, and asked Metco's counsel to stipulate to a short 30-60 day continuance of the trial date.¹⁰ Metco's counsel agreed to stipulate to a continuance of the trial date but advised that he was not available for trial until June 2008, and that if this date did not work, the trial would have to be continued until September 2008.¹¹ However, the Snohomish County Superior Court notified NPR's counsel that jury trials were

⁸ CP 647.

⁹ CP 204.

¹⁰ CP 642-645; CP 656; CP 650-654.

¹¹ CP 658.

now being set in October/November 2008.¹² The parties subsequently stipulated to a December 8, 2008 trial date to accommodate Metco's counsel's schedule and the Court's trial calendar.

On July 2, 2008, NPR filed a motion for summary judgment against Metco Homes, LLC and Maryland Casualty Company contending that Metco Homes, LLC is no longer a separate legal entity and lacks standing to maintain a cause of action against NPR.¹³ Metco Homes, LLC argued that under RCW 25.15.295, it could prosecute and defend suits until it filed a certificate of cancellation under RCW 25.15.080. It then argued that although it was administratively dissolved on June 1, 2006, it could continue to wind up its affairs forever because it never filed a certificate of cancellation.¹⁴ Metco Homes, LLC also contended that NPR's actions and unavailability caused "repeated delays" in Metco's prosecution of its claims against NPR. Metco argued that NPR's filing of a previous motion for summary judgment in September 2005 and a motion for discretionary review in January 2006

¹² CP 642-645.

¹³ CP 205-211.

¹⁴ CP 56-66.

prevented it from diligently pursuing its claims.¹⁵ Metco did not explain how NPR's actions in filing a motion for summary judgment and motion for discretionary review prior to its administrative dissolution prevented it from reinstating itself within the two year statutory period.

On July 31, 2008, the trial court granted NPR's motion for summary judgment and for attorney's fees and costs.¹⁶ On August 12, 2008, NPR filed a motion for calculation of the attorney's fees and costs awarded as the prevailing party.¹⁷ On September 4, 2008, the trial court entered a Judgment in favor of NPR and against Metco Homes, LLC and Maryland Casualty Company for a total of \$52,374.08 in attorney's fees and costs.¹⁸

On September 12, 2008, Metco Homes, LLC and Maryland Casualty Company filed an Amended Motion to Vacate the July 31, 2008 Order granting NPR's motion for summary judgment.¹⁹ Metco asserted, without any factual basis, that NPR misrepresented the need to continue the May 5, 2008 trial date for the sole purpose of filing its motion for summary judgment based on its administrative

¹⁵ CP 56-65.

¹⁶ CP 10-11.

¹⁷ CP 615-622; CP 482-614.

¹⁸ CP 421-424.

¹⁹ CP 404-420.

dissolution. NPR moved to strike Metco's motion to vacate because it failed to comply with CR 60(e), which was denied.²⁰ NPR presented evidence in opposition to the motion that the May 5, 2008 trial date caused a direct scheduling conflict with the April 28, 2008 trial date in the *Airtronics* case.²¹ Contrary to Metco's allegation, NPR did not obtain Metco's corporate documents from the Washington Secretary of State until **June 9, 2008**, almost four months after notifying Metco's counsel of the scheduling conflict.²² It was not until June 23, 2006, that NPR's counsel received notification from the Washington Secretary of State that Metco had not filed a certificate of reinstatement.²³ Only then did NPR's counsel begin drafting its motion for summary judgment based on Metco's failure to file a certificate of reinstatement.²⁴ Metco did not file a reply memorandum in support of its motion to vacate.

On October 2, 2008, a hearing was held on Metco's Motion to Vacate before The Honorable James H. Allendoerfer. At the hearing, Judge Allendoerfer did not agree with Metco's contention that NPR's counsel's conduct in requesting a continuance of the

²⁰ CP 667-676.

²¹ CP 667-676; CP 642-666.

²² CP 642-666.

²³ CP 642-666.

²⁴ CP 642-666.

trial date due to a conflict in the *Airtronics* case was improper or a misrepresentation.²⁵ Judge Allendoerfer also found that NPR's counsel had a legitimate trial conflict and that even if the May 5, 2008 trial date had gone forward, Metco was no longer a legal entity as of June 1, 2008 and had no standing to pursue any judgment against NPR.²⁶ Judge Allendoerfer found that it was Metco's own negligence in not filing a certificate of reinstatement that is the reason that it can no longer pursue any claims against NPR.²⁷ On October 2, 2008, the trial court entered an order denying Metco Homes, LLC's and Maryland Casualty Company's motion to vacate.²⁸

Notwithstanding these rulings, Judge Allendoerfer *sue sponte* raised the issue of whether CR 11 sanctions should be imposed on NPR for not contacting the Snohomish County Clerk to withdraw the Stipulation and Order Continuing the Trial Date in this action before it was filed on February 27, 2008.²⁹ NPR's counsel objected to the court's raising the issue of CR 11 sanctions when the issue had not been raised by Metco and NPR had no

²⁵ CP 237-244.

²⁶ CP 237-244.

²⁷ CP 237-244.

²⁸ CP 290-291.

²⁹ CP 237-244.

opportunity to brief the merits of issuing CR 11 sanctions against it.³⁰ Judge Allendoerfer found that because Metco had alleged that NPR made misrepresentations and requested that NPR not be awarded any attorney's fees and costs, that the issue of CR 11 sanctions had been raised.³¹ Judge Allendoerfer then ruled that NPR's conduct in not contacting the Snohomish County Clerk to withdraw the Stipulation and Order Continuing the Trial Date justified imposing CR 11 sanctions against NPR.³² The Court gave counsel two weeks to file a brief on the issue of the amount of sanctions that should be imposed on NPR.³³ Metco never filed a brief on the issue of the CR 11 sanctions.

On October 10, 2008, NPR filed a motion for reconsideration of the court's Order Imposing CR 11 Sanctions.³⁴ The motion for reconsideration was noted for hearing on October 22, 2008. On November 3, 2008, twelve days after the hearing date, Metco filed an opposition to the motion for reconsideration.³⁵ NPR filed a motion to strike Metco's opposition as untimely under SCLR 59(e)(3)(B). On November 5, 2008, Judge Allendoerfer signed an

³⁰ CP 237-244.

³¹ CP 237-244.

³² CP 237-244.

³³ CP 237-244.

³⁴ CP 266-277; CP 237-330.

³⁵ CP 633-641.

order denying NPR's Motion to Strike and granting NPR's Motion for Reconsideration and awarded NPR an additional \$2,573.00 in attorney's fees and costs.³⁶ Judge Allendoerfer's November 5, 2008 Order states that his ruling on September 20, 2008 on the CR 11 sanctions was only oral and "tentative and incomplete" and that a final order had not been entered.³⁷

IV. ARGUMENT

A. METCO HOMES, LLC' CERTIFICATE OF FORMATION WAS CANCELLED AS OF JUNE 1, 2008 AND IT CAN NOT MAINTAIN A CAUSE OF ACTION AGAINST NPR.

Metco Homes, LLC was administratively dissolved on June 1, 2006. Metco contends that under RCW 25.15.295, it could prosecute and defend suits until it filed a certificate of cancellation under RCW 25.15.080. It then contends that although it was administratively dissolved on June 1, 2006, it could continue to wind up its affairs forever because it never filed a certificate of cancellation. Metco's argument is contrary to plain wording of the statute and Washington case law.

Under RCW 25.15.285, a limited liability company may be administratively dissolved by the Secretary of State after written notice of the determination. RCW 25.15.295 states that until a

³⁶ CP 679-680.

³⁷ CP 679-680.

certificate of cancellation is filed ***as provided in RCW 25.15.080***, the persons winding up the limited liability company's affairs may prosecute and defend suits in the name of the limited liability company. RCW 25.15.080 states as follows:

25.15.080 Cancellation of certificate. A certificate of formation shall be canceled upon the effective date of the certificate of cancellation, ***or as provided in RCW 25.15.290***, or upon the filing of articles of merger if the limited liability company is not the surviving or resulting entity in a merger. A Certificate of cancellation shall be filed in the office of the secretary of state to accomplish the cancellation of a certificate of formation upon the dissolution and the completion of the winding up of a limited liability company and shall set forth:

- (1) The name of the limited liability company;
- (2) The date of filing of its certificate of formation;
- (3) The reason for filing the certificate of cancellation;
- (4) The future effective date (which shall be a date not later than the ninetieth day after the date it is filed) of cancellation if it is not to be effective upon the filing of the certificate; and
- (5) Any other information the person filing the certificate of cancellation determines.
(Emphasis ours).

RCW 25.15.290 applies to limited liability companies that have been administratively dissolved, like Metco Homes, LLC. RCW 25.15.290 provides that a limited liability company administratively dissolved under RCW 25.15.285 may apply to the secretary of state for reinstatement within two years after the

effective date of dissolution. However, RCW 25.15.290(4) provides that if reinstatement is not made within the two-year period after the effective date of dissolution, the Secretary of State **shall** cancel the limited liability's certificate of formation:

(4) If an application for reinstatement is not made within the two-year period set forth in subsection (1) of this section, or if the application made within this period is not granted, **the secretary of state shall cancel the limited liability company's certificate of formation.**

RCW 25.15.290(4)(emphasis ours).

Contrary to Metco Homes, LLC's contention, the LLC statute mandates that an administratively dissolved company wind up its affairs within two years. RCW 25.15.270(6) provides as follows:

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

(6) the expiration of two years after the effective date of dissolution under RCW 25.15.285 without the reinstatement of the limited liability company.

(Emphasis ours).

RCW 25.15.290 does not require the Secretary of State to "file" a certificate of cancellation for an administratively dissolved company. RCW 25.15.080 provides that a certificate of formation shall be cancelled upon the effective date of the certificate of

cancellation “*or as provided in RCW 25.15.290...*” RCW 25.15.290 provides that if the LLC does not apply for reinstatement within two years of the administrative dissolution, the secretary of state “*shall*” cancel the certificate of formation. Since Metco Homes, LLC did not file an application for reinstatement within the two year period following its dissolution on June 1, 2006, the secretary of state cancelled its limited liability certificate of formation. The cancellation of a certificate of formation marks the end of the period within which the dissolved limited liability company may wind up its affairs:

Upon dissolution of a limited liability company and until the filing of a certificate of cancellation as provided in RCW 25.15.080, the persons winding up the limited liability company’s affairs may, in the name of, and for and on behalf of, the limited liability company, prosecute and defend suits, whether civil, criminal, or administrative, gradually settle and close the limited liability company’s business, dispose of and convey the limited liability company’s property, discharge or make reasonable provision for the limited liability company’s liabilities, and distribute to the members any remaining assets of the limited liability company.

RCW 25.15.295(2)(emphasis added).

The court in *Maple Court Seattle Condo. Ass’n v. Roosevelt, LLC*, 139 Wn. App. 257, 261, 160 P.3d 1068 (2007), rejected Metco’s argument that an administratively dissolved LLC can

defend and prosecute claims until the “filing” of a certificate of cancellation. On September 23, 2002, Roosevelt, LLC was administratively dissolved. Roosevelt, LLC argued that under RCW 25.15.295(2), it could prosecute and defend suits until it filed a certificate of cancellation under RCW 25.15.080.³⁸ The court rejected Roosevelt, LLC’s argument, finding that the Secretary of State’s cancellation of its certificate of formation under RCW 25.15.290(4) did not require the “filing” of a certificate of cancellation under RCW 25.15.295:

In order to adopt Roosevelt’s position, we would have to ignore the plain language of the statute requiring that winding up an administratively dissolved company be completed within two years. RCW 25.15.270(6). Roosevelt’s argument renders the secretary of state’s cancellation of a company meaningless. Statutes that are in derogation of common law are strictly construed. (citations omitted). The language is sufficiently clear that the statute prohibits Roosevelt from maintaining a cause of action against others once it is no longer a legal entity.³⁹

Metco Homes, LLC’s failure to reinstate itself within two years of its dissolution is fatal to its ability to maintain a cause of action against NPR. Under RCW 25.15.070(2)(c), once cancelled, an LLC is no longer a separate legal entity and is prohibited from

³⁸ *Maple Court Seattle Condo. Ass’n v. Roosevelt, LLC*, 139 Wn. App. 257, 263, 160 P.3d 1068 (2007).

³⁹ *Id.*

affirmatively maintaining an action.⁴⁰ Thus, the trial court properly dismissed Metco Homes, LLC's and Maryland Casualty Company's claims against NPR.

B. RCW 25.15.303 DOES NOT APPLY TO A CANCELLED LLC.

1. RCW 25.15.303 Only Allows Claims Against a Dissolved LLC.

RCW 25.15.303 became effective on June 7, 2006, after Metco Homes, LLC's administrative dissolution. RCW 25.15.303 provides a new survival period of three years for causes of action against a dissolved limited liability company. 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.

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

⁴⁰ *Maple Court Seattle Condo. Ass'n v. Roosevelt, LLC*, 139 Wn. App. 257, 261, 160 P.3d 1068 (2007).

canceled. 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.

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.⁴¹ 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 by or against an LLC after its certificate of formation has been canceled. Rather, RCW 25.15.303 only allows suits against a dissolved LLC for three years following the effective date of dissolution.

2. RCW 25.15.303 Can Not Be Applied Retroactively.

RCW 25.15.303 was enacted on June 7, 2006, after Metco Homes, LLC's dissolution on June 1, 2006. The Court of Appeals in *Chadwick Farms Owners Association v. FHC, LLC*, 139 Wn. App. 300, 160 P.3d 1061 (2007) erroneously ruled that RCW

⁴¹ See *In re Sherwood's Estate*, 122 Wash. 648, 655-56 (1922).

25.15.303 is retroactive because it is remedial and curative and does not impair a vested right. Statutes are presumed to run prospectively.⁴² However, a statute or an amendment to a statute may be retroactively applied if the legislature so intended, if it is clearly curative, or if it is remedial, provided that retroactive application does not affect a substantive or vested right.⁴³ 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.⁴⁴ 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.⁴⁵ Because there was no prior ambiguous

⁴² *Wash. Waste Sys., Inc. v. Clark County*, 115 Wn.2d 74, 78, 794 P.2d 508 (1990).

⁴³ *1000 Virginia Ltd. Partnership v. Vertecs Corp.*, 158 Wn.2d 566, 584, 146 P.3d 423 (2006).

⁴⁴ *McGee Guest Homes, Inc. v. Dep't of Soc. & Health Servs.*, 142 Wn.2d 316, 325, 12 P.3d 144 (2000).

⁴⁵ *In re F.D. Processing, Inc.*, 119 Wn.2d 452, 462, 832 P.2d 1303 (1992).

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 affect a substantive or vested right.⁴⁶ In this case, retroactive application will not supplement an existing right or remedy. Under the Limited Liability Companies Act, Metco Homes, LLC had no right or remedy against NPR after its certificate of formation was cancelled on June 1, 2008. 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.⁴⁷

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.⁴⁸

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

⁴⁶ *1000 Virginia Ltd. Partnership v. Vertecs Corp.*, 158 Wn.2d 566, 584, 146 P.3d 423 (2006).

⁴⁷ *Department of Retirement Systems v. Kralman*, 73 Wn. App. 25, 33, 867 P.2d 643 (1994).

⁴⁸ *In re F.D. Processing, Inc.*, 119 Wn.2d at 462, 832 P.2d 1303 (1992).

statute retroactively if it brings about a change in substantive rights and imposes “new liability” on defendants.⁴⁹ Under these principles, RCW 25.15.303 does not apply retroactively as a remedial or curative statute. Thus, RCW 25.15.303 does not apply retroactively to Metco Homes, LLC’s claims.

C. NPR IS NOT RESPONSIBLE FOR METCO’S FAILURE TO FILE A CERTIFICATE OF REINSTATEMENT.

Metco Homes, LLC attempts to argue that its failure to reinstate itself within the two year statutory period was caused by NPR’s actions and unavailability.

An order can be vacated under certain circumstances listed in CR 60(b), including fraud, misrepresentation, the judgment has been satisfied, released or discharged or it is no longer equitable that the judgment should have prospective application, or any other reason justifying relief from operation of the judgment. CR 60(b)(4), 60(b)(6), 60(b)(11). Metco moved under CR 60(b)(4) to vacate the order granting NPR’s motion for summary judgment and motion for attorney’s fees, alleging that NPR’s counsel misrepresented that she had a conflict with the May 5, 2005 trial date. To successfully vacate the order under this rule, Metco was required to show by

⁴⁹ 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).

clear and convincing evidence that the order granting NPR's motion for summary judgment and motion for attorney's fees and costs was procured by NPR's fraud, misrepresentation or misconduct.⁵⁰ The rule does not permit a party to assert an underlying cause of action for fraud that does not relate to the procurement of the judgment.⁵¹ Thus, the fraudulent conduct or misrepresentation must *cause* the entry of the judgment such that the losing party was prevented from fully and fairly presenting its case or defense.⁵² The party attacking a judgment under CR 60(b)(4) must establish the fraud, misrepresentation, or other misconduct by clear and convincing evidence.⁵³

In this case, there is no indication in the record that the order on summary judgment and the order granting NPR its attorney's fees and costs were entered as a result of fraud, misrepresentation, or misconduct by NPR's counsel. The court's granting of the summary judgment was based on Metco's failure to file a certificate of reinstatement within two years of its dissolution.

Further, Metco Homes, LLC failed to note the case for trial until July 11, 2007, more than three years after filing the action. It

⁵⁰ *Lindgren v. Lindgren*, 58 Wn. App. 588, 596, 794 P.2d 526 (1990).

⁵¹ See *In re Adamec*, 100 Wn.2d 166, 178, 667 P.2d 1085 (1983).

⁵² *Peoples State Bank*, 55 Wn. App. 367, 372, 777 P.2d 1056 (1989).

⁵³ *Id.*

is difficult to comprehend how NPR's filing of a motion for summary judgment back in September 2005, and its filing a motion for discretionary review of the trial court's decision, which was denied on May 3, 2006, prevented Metco Homes, LLC from pursuing its claims or reinstating itself within the two year statutory period. Metco Homes, LLC was not even administratively dissolved until June 1, 2006, long after NPR's motion for summary judgment and motion for discretionary review were decided.

Moreover, NPR's counsel's short unavailability in 2006 and 2007 has no bearing on the issues in this case. The parties stipulated to a continuance of the trial date because of NPR's counsel scheduling conflict in another matter. NPR's counsel had a legitimate trial conflict and her request for a continuance of the trial date due to a conflict was proper or was not a misrepresentation. Moreover, even if the May 5, 2008 trial date had gone forward, Metco was no longer a legal entity as of June 1, 2008 and had no standing to pursue any judgment against NPR. It was Metco's own failure to reinstate itself within the two years that results in a lack of standing to pursue its claims against NPR. At any time within two years of the effective date of the dissolution, Metco Homes, LLC could have applied for reinstatement but failed to act. Metco

Homes, LLC can not now claim that its inaction was caused by NPR.

D. NPR IS ENTITLED TO ITS ATTORNEY'S FEES AND COSTS AT THE TRIAL COURT LEVEL AND ON APPEAL.

Metco Homes, LLC and Maryland Casualty Company attempt to argue that there is no basis to award attorney's fees and costs to NPR because the LLC ceases to exist as a legal entity. Attorneys' fees are allowable as recoverable litigation costs as a matter of right under RCW 4.84.330 by a party who defeats claims arising out of a contract containing an attorney's fees provision. Washington follows a "reciprocal policy" whereby, if one party asserts a claim for attorney's fees pursuant to a contractual clause, then by law the opposing party is also entitled to attorney's fees if it prevails.⁵⁴ In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties, or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs.

⁵⁴ *Herzog Aluminum, Inc., v. General American Window Corporation*, 39 Wn. App. 188, 692 P.2d 867 (1984).

Here, both Metco Homes, LLC and Maryland Casualty Company sought damages from NPR premised upon a master contract which contains a prevailing attorney fee clause. Accordingly, NPR is entitled to an award of its attorney's fees and costs incurred in this action since it is the prevailing party.

Although there is no case law discussing an attorney's fee award against a cancelled LLC, appellate courts have awarded appellate costs both for and against dissolved corporations involved in litigation after their dissolution.⁵⁵ For example, the appellate court in *Catalina Investments, Inc. v. Jones* ordered Catalina to bear all costs on appeal *after* ruling that Catalina was dissolved and lacked the capacity to reinstate its corporate existence.⁵⁶ These cases indicate that when a dissolved corporation participates in litigation-especially when it instigates the litigation-it must also bear the consequences of that action. Normal consequences of litigation to a losing party include not only a judgment for monetary damages, but an order requiring the losing party to pay the prevailing party's litigation costs and-when appropriate under a contract or statute-attorney's fees. Finding that Metco Homes, LLC

⁵⁵ See, e.g., *Westoil Terminals Co. v. Harbor Ins. Co.*, 73 Cal. App. 4th 634, 643 (1999); *Catalina Investments, Inc. v. Jones*, 98 Cal. App. 4th 1, 10 (2002).

⁵⁶ *Id.* at pp. 7 & 10.

was a cancelled LLC, and that it no longer had the capacity to pursue its claims does not bar the court from awarding attorney's fees against Metco Homes, LLC in this matter.

Further, if Metco Homes, LLC would have been successful in its claims it would have been entitled to recover attorney's fees and costs from NPR. Under the reciprocity principal discussed above, now that Metco Homes, LLC has lost, it should not be able to avoid reimbursing NPR -who is the undisputed prevailing party in this action-for its attorney's fees by claiming that it is a cancelled LLC and thus no monetary judgment could be entered against it.

Furthermore, even if this court finds that a fee award cannot be assessed against Metco Homes, LLC because it is a cancelled LLC, NPR is still entitled to their attorney's fees from Plaintiff Maryland Casualty Company. It is Maryland Casualty Company that paid the settlement to the Garden Grove HOA on behalf of its insured Metco Homes, LLC, and is subrogated to the rights of Metco Homes, LLC. It is Maryland Casualty Company who authorized and pursued this litigation in the name of Metco Homes, LLC, claiming a right to indemnity under the contract. As such, Maryland Casualty Company can not claim to be a cancelled LLC to avoid an attorney fee judgment. Attorney's fees should be

assessed against Maryland Casualty Company who stepped into the shoes of Metco Homes, LLC, since it was the one who actually controlled this litigation.

For these reasons, the trial court correctly ruled that a judgment for attorney's fees and costs could be entered against Metco Homes, LLC and Maryland Casualty Company. Moreover, NPR is entitled to its attorney's fees and costs on appeal.

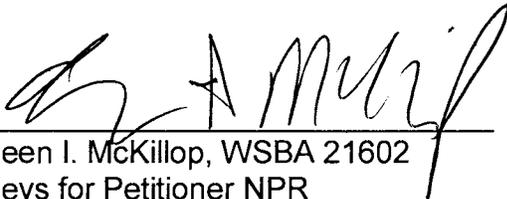
V. CONCLUSION

Respondents request that the court affirm the trial court's decision granting its motion for summary judgment and the Judgment on attorney's fees and costs. Moreover, NPR is entitled to an award of its attorney's fees and costs on appeal.

DATED this 9 day of January, 2009.

OLES MORRISON RINKER & BAKER LLP

By


Eileen I. McKillop, WSBA 21602
Attorneys for Petitioner NPR
Construction, Inc.

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STATE OF WASHINGTON

CERTIFICATE OF SERVICE

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BY RONALD L. CARPENTER

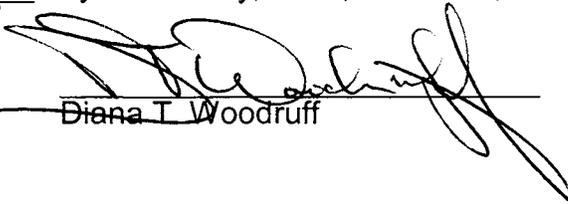
The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action,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

On the date given below I caused to be served the foregoing **BRIEF OF RESPONDENT** on the following individuals in the manner indicated:

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 Via Facsimile
 Via Hand Delivery / ABC Legal Messenger Service

SIGNED this 7th day of January, 2009, at Seattle, Washington.


Diana T. Woodruff