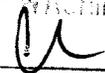


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STATE OF WASHINGTON

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NO. 404311-II

COURT OF APPEALS STATE OF WASHINGTON  
DIVISION II

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MUTUAL OF ENUMCLAW INSURANCE COMPANY, an insurance company; W. SCOTT CLEMENT, an adult individual along with "JANE DOE" CLEMENT and any marital community; JOHN E. DROTZ, an adult individual along with "JANE DOE" DROTZ and any marital community; and JENNIFER FOWLER, an adult individual,

Petitioners.

v.

BERSCHAUER PHILLIPS CONSTRUCTION CO., a Washington State Corporation,

Respondent.

---

REPLY IN SUPPORT OF BRIEF OF APPELLANTS  
W. SCOTT CLEMENT AND JOHN E. DROTZ

---

Michelle A. Corsi, WSBA No. 24156  
Dan J. Von Seggern, WSBA No. 39239  
Attorneys for Appellants  
W. Scott Clement and John E. Drotz

LEE SMART, P.S., INC.  
1800 One Convention Place  
701 Pike Street  
Seattle, WA 98101  
(206) 624-7990

5281253

**ORIGINAL**

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## I. INTRODUCTION

Appellants Clement and Drotz reply to the response filed by Respondent BP. Clement and Drotz also join in the Reply briefs as presented by Appellants MOE and Faller.

## II. ARGUMENT

**A. Review is *de novo* and reversal is warranted where the trial court had no jurisdiction to enter a stay of the case when BP admittedly lacked standing.**

Contrary to the assertion that BP makes, this is not “an appeal about a trial court’s discretion to manage its own calendar.” BP’s Response brief at 1. Rather, this is an appeal over a trial court’s ruling to stay a case when it had no jurisdiction to do so because BP lacked standing to file suit in the first place. If a plaintiff lacks standing to bring a suit, courts lack jurisdiction to consider it. *High Tide Seafoods v. State*, 106 W2d 695, 702, 725 2Pd 411 (1986), *dismissed*, 479 US 1073 (1987). As such, the matter should have been dismissed.

Review is *de novo*. *Mack v. Armstrong*, 147 Wn. App. 522, 527, 195 P.3d 1027 (2008). Even if review were discretionary as BP advocates without citing any legal authority, the trial court’s ruling was in error and thus an abuse of discretion. BP contends that the outcome in its case pending in Division I, served as a valid basis for the trial court’s ruling to stay its separate case filed in Thurston County. This erroneous argument

has been advanced by BP several times in the trial court, on appeal and most recently in its Motion to Transfer this Division II matter to Division I, which was denied. What BP fails to explain, because it cannot, is that the issues are different in Divisions I and II, the records are different and the decision in Division I is not outcome-determinative of the appeal in Division II.

Moreover, the outcome in Division I will not resolve the lack of standing issue for BP. “The doctrine of standing prohibits a litigant from asserting another’s legal right.” *West v. Thurston County*, 144 Wn. App. 573, 578, 183 P.3d 346, 349 (2008) (citations omitted). Standing is a matter of jurisdiction. *Lane v. City of Seattle*, 164 Wn.2d 875, 885, 194 P.3d 977 (2008). “If a plaintiff lacks standing to bring a suit, courts lack jurisdiction to consider it.” *High Tide Seafoods v. State*, 106 Wn.2d 695, 702, 725 P.2d 411 (1986). When a party lacks standing, the court is without subject matter jurisdiction to entertain the claim. *Skagit Surveyors & Eng’rs, LLC v. Friends of Skagit County*, 135 Wn.3d 542, 556–57, 958 P.2d 962 (1998); *Deschenes v. King County*, 83 Wn.2d 714, 716, 521 P.2d 1181 (1974) (“The rule is well known and universally respected that a court lacking jurisdiction of any matter may do nothing other than enter an order of dismissal.”). Where a court lacks jurisdiction, “dismissal without

prejudice is the limit of what a court may do.” *Housing Authority of the City of Everett v. Kirby*, No. 62052-5, Slip Op. at p. 6 (Div. I, March 8, 2010) (where court lacked subject matter jurisdiction due to defect in process served, court properly dismissed action and could do no more). Moreover, “[t]he absence of a valid or subsisting title or right of action at the inception of a suit cannot be cured by filing a supplemental complaint alleging subsequent acquisition of such title or right of action.” *Amende v. Town of Morton*, 40 Wn.2d 104, 106, 108, 241 P.2d 445 (1952) (“An assignee for collection can sue only where he has title to the chose.”).

The trial court erred by refusing to dismiss the case and by granting relief to BP despite the lack of jurisdiction, and by preventing MOE, Clement, Drotz and Faller from raising additional jurisdictional defects. The court’s February 19, 2010 order delaying dismissal and staying the case in its entirety pending resolution of BP’s appeal in its King County lawsuit against CSSS should be reversed and this matter should be dismissed.

**B. BP’s makes misrepresentations of fact and assertions not supported by the record in its Response.**

In its response brief, BP makes misrepresentations of fact and assertions not supported by the record. BP also inserts its entire factual argument on the Division I case, even though any outcome in Division I is

not determinative of this appeal in Division II. Clement and Drotz incorporates by reference the arguments advanced by Faller and MOE on this issue.

First, BP repeatedly states that it “executed and levied upon” CSSS’s choses of action against MOE, Clement, Drotz and Faller before commencing this action. *See e.g.*, BP’s Response at 1, 6, 7, 17. This is untrue. Execution is a four-step process; BP neither completed nor perfected this four-step process of execution.

Before commencing this action in October 2008, BP had obtained a judgment against CSSS (CP 516) and on June 16, 2008, filed a writ with clerk (CP 520) which stated:

[Y]ou are directed to attach judgment debtor’s claim against its insurance company, Mutual of Enumclaw, policy number PK 90624, by serving this writ of attachment upon the registered agent for Concrete Science Services of Seattle, LLC, K. Parker, at CT Corporation System . . .

CP 520.

BP’s request is riddled with errors and was confusing. It requested a writ of “attachment” instead of a writ of “execution.” The clerk crossed out the word “attachment” and hand wrote “execution,” but even after the clerk made this change, BP’s writ only requested that this writ “be served upon the registered agent for Concrete Science Services.” It did not ask

that the sheriff to take possession of and sell CSSS's purported claim against MOE. It did not direct the sheriff to do anything to satisfy the judgment. It did not comply with the requirements of RCW 6.17.110 (form and content of writs of execution). Thus, BP did not even request the things that needed to be done in order to execute upon the purported claim of CSSS against MOE. The writ does not mention or encompass CSSS's purported claims against Drotz, Clement or Faller.

BP never accomplished the second, third and fourth steps of the execution process. BP commenced this action without executing on the purported claims against MOE or anyone else. The only step BP accomplished prior to commencing this action was to obtain a judgment against CSSS, which is not execution. BP's repeated representations to this Court that it "executed" upon purported choses of action of CSSS against MOE, Clement and Drotz and Faller prior to commencing its Thurston County action are untrue and unsupported by the record.

In June 2009 (eight months after commencing this action), BP obtained a similar writ of execution directing the sheriff to "attach" purported claims of CSSS against its attorneys, Clement and Drotz "by serving this writ of execution upon the registered agent for Concrete Science Services." CP 54-55. This writ did not direct the sheriff to sell

the property to satisfy the judgment. Thus, BP did not accomplish execution on the purported claims against Clement & Drotz, either.

BP admits that “the record does not reflect that BP obtained any writs of execution on the choses against Ms. Faller in June of 2009.” BP’s Response Brief at 19. BP also admits that the record of the King County Superior Court (the court which purportedly issued the writ) contains no record that such a writ was ever issued. *Id.* at 7. Nevertheless, BP proceeds to state as fact that it obtained the non-existent writ and to make arguments this constitutes “execution” on purported claims against Faller. There is no such writ. BP did not execute on purported claims of CSSS against Faller. BP’s statements and arguments in this regard are unsupported by the record.

In sum, BP did not execute on purported claims of CSSS against any defendant prior to commencing this matter in October 2008. First, BP did not execute on purported claims of CSSS against MOE prior to filing its lawsuit in October 2008 against MOE. Similarly, BP did not execute on purported claims at any time against Clement, Drotz or Faller at any time before joining Clement, Drotz and Faller as a parties in 2009.

**C. CR 17 does not defeat BP’s lack of standing in this matter.**

Even admitting it has no standing and owns no claims, BP

continues to rely on the guise of CR 17. However, CR 17 does not apply here and it was error for the trial court to use CR 17 as a basis to stay the action.

BP makes several attempts in its Response to gloss over its admissions as to lack of standing. However, BP has acknowledged that it commenced suit without first obtaining the purported claims and choses of action of CSSS, thus lacking standing. CP 133-147, 372-380. Judge Hicks acknowledged that BP lacked standing CP 432.

Rather, BP argues that it either is or one day might be the “real party in interest,” thus CR 17 applies and a stay was proper. This analysis is flawed.

As the plain language of CR 17 indicates, the rule contemplates two distinct parties: the party who brought the suit and the real party in interest. The rule allows a time for the real party in interest to ratify, join or substitute into the action. Here, BP is not seeking time for the real party in interest to ratify, join or substitute into this action. BP is the plaintiff and instead it is trying to buy time to acquire standing, not so another party will “ratify, join or substitute into the action.” As such, BP’s reliance on the *Beal* and *Kommavongsa* cases neither help nor apply to BP. BP’s Response at 29, 30.

BP wants this court to apply these rules to any case where the wrong plaintiff has been named. CR 17 is not intended to apply so broadly. *Beal v. Seattle*, 134 Wn.2d 769, 778, 954 P.2d 237 (1998). The court specifically refused to read the rules as broadly as BP wants in this case. CR 17 represents a very limited (as shown by *Beal*) extension of the standing rules. However, CR 17 does not apply here by its clear wording.

CR 17 is designed to ensure that the right parties are named in a suit, and therefore provides a reasonable time, after objection by the adversary, for “ratification of commencement of the action by, or joinder or substitution of, the real party in interest.” CR 17(a). It does not provide a reasonable time for a party without standing to somehow become the real party in interest, as BP seeks to do and some undetermined point in time. It does not confer jurisdiction on a court while a party attempts to create standing. All the defendants, MOE, Clement and Drotz, and Faller objected to the lawsuit on the basis of standing. BP cannot “ratify” or “substitute” in the matter in any reasonable time, as there is no basis to do so. BP’s arguments are without merit.

Even if BP’s argument was acknowledged and CR 17 could apply, it would not apply to this case. Again, CR 17 only authorizes a “reasonable time” to join the real party in interest and that it does not

allow extended periods or years to cure real party in interest defects. *Beal, supra*. Further, *Beal* cautions, “We recognize the potential for abuse in a literal interpretation of CR 17(a) if applied in every circumstance.” *Beal* at 783. Simply put, Washington law does not allow a plaintiff to sue first and obtain standing later, which is exactly what BP is trying to do. “The absence of a valid or subsisting title or right of action at the inception of a suit cannot be cured by filing a supplemental complaint alleging subsequent acquisition of such title or right of action.” *Amende v. Town of Morton*, 40 Wn.2d 104, 241 P.2d 445 (1952).

**D. BP does not have a *real* interest at this time.**

As set forth in the briefing to this court supporting discretionary review, BP has no standing and is not the real party in interest. The law is clear that where there is a lack of standing, the matter cannot proceed. This long recognized legal doctrine was recently repeated in *State v. Wise*, 148 Wn. App. 425, 422, 200 P.3d 266 (2009):

The standing doctrine generally prohibits a party from defending the rights of another person. *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 138, 744 P.2d 1032, 750 P.2d 254 (1987), *dismissed*, 488 U.S. 805 (1988). . . . There is a “general prohibition on a litigant’s raising another person’s legal rights.” *Allen v. Wright*, 468 U.S. 737, 751, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984). “[E]ven when the plaintiff has alleged injury sufficient to meet the ‘case or controversy’ requirement, [the United States Supreme Court] has held that the plaintiff generally

must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.” *Warth v. Seldin*, 422 U.S. 490, 499, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975). A plaintiff may only raise the rights of another person when “(1) the party asserting the rights has suffered an injury in fact, giving him a sufficiently concrete interest in the outcome of the litigation, (2) there is a sufficiently close relationship between the litigant and the person whose rights are being asserted so that the litigant will be an effective proponent of the rights being litigated, and (3) there is some hindrance to the third party’s ability to protect his own interests.” *United States v. De Gross*, 960 F.2d 1433, 1437 (9th Cir. 1992) (citing *Powers v. Ohio*, 499 U.S. 400, 410-15, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991)); see also *Ludwig v. Dep’t of Ret. Sys.*, 131 Wn. App. 379, 385, 127 P.3d 781 (2006); *Mearns v. Scharbach*, 103 Wn. App. 498, 511, 12 P.3d 1048 (2000), *review denied*, 143 Wn.2d 1011 (2001).

*Id.*

BP’s stated *real interest* is speculative and does not meet the test for standing. BP Response at 25. “A party has standing if it demonstrates ‘a real interest in the subject matter of the lawsuit, that is, a present, substantial interest, as distinguished from a mere expectancy, or future, contingent interest, and the party must show that a benefit will accrue it by the relief granted.’” *Timberlane Homeowners Assn. v. Brame*, 79 Wn. App. 303, 308 (1995), citing *Primark, Inc. v. Burien Gardens Associates*, 63 Wn. App. 900, 907, 823 P.2d 1116 (1992).

BP has admitted several times that it lacks standing, but hopes to gain standing one day by purchasing various choses of action at a sheriff’s

sale. Because BP had only a mere expectancy at the time, its lawsuit was premature and should have been dismissed. The courts have long held that execution does not confer ownership. A levy of execution only creates a lien against the property seized. *Robb v. Kaufman*, 81 Wn. App. 182, 189, 913 P.3d 828 (1996). The lien is not a property right:

The holder of a lien does not have any right, title or interest in the land the lien encumbers; in the words of our Supreme Court: “[A] lien is a charge upon property for the payment or discharge of a debt or duty. . . . [I]t confers no general right of property or title upon the holder; on the contrary, it necessarily supposes the title to be in some other person.

*Capital Inv. Corp. v. King County*, 112 Wn. App. 216, 229, 47 P.3d 161 (2002) quoting *Swanson v. Graham*, 27 Wn.2d 590, 597, 179 P.2d 288 (1947).

BP lacked and still lacks standing. This cannot be cured by CR 17 and it was error for the trial court to stay the case. The matter should have been dismissed.

**E. Fees to BP are not warranted.**

BP asserts a reservation of rights to request fees pursuant to RAP 18.1. BP’s Response at 31. There is no basis for BP to recover fees against Clement and Drotz as required pursuant to RAP 18.1(a). Further, BP did not provide any argument in its brief supporting the request for fees pursuant to RAP 18.1(b). As such, BP’s request is deficient and is also not

warranted or appropriate. BP's request should be denied.

### III. CONCLUSION

When the plaintiff lacks standing, the court lacks jurisdiction over the suit. When a court lacks jurisdiction, its only option is to dismiss the action. The trial court ignored the limits of its jurisdiction. Undefined notions of "equity" under CR 17 to protect BP from the consequences of its own failures at the expense of the defendants' rights do not justify the court's actions in this case. The case should have been dismissed on summary judgment and the trial court's decision to stay the case was error.

Respectfully submitted this 24<sup>th</sup> day of September, 2010.

LEE SMART, P.S., INC.

By:   
Michelle A. Corsi, WSBA No. 24156  
Dan J. Von Seggern, WSBA No. 39239  
Of Attorneys for Petitioners W. Scott  
Clement and John E. Drotz

**DECLARATION OF SERVICE**

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that on September 24, 2010, I caused service of the foregoing pleading on each and every attorney of record herein:

**VIA LEGAL MESSENGER**

Court of Appeals, Division II  
950 Broadway, Suite 300  
Tacoma, WA 98402-4427

Mr. Ben Cushman  
Mr. Joe Scuderi  
Ms. Stephanie Bird  
Cushman Law Offices, P.S.  
924 Capital Way South  
Olympia, WA 98501-8239

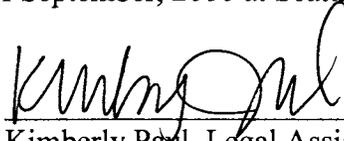
**VIA E-MAIL AND U.S. MAIL**

Mr. Timothy Gosselin  
Gosselin Law Office, PLLC  
1901 Jefferson Avenue, Suite 304  
Tacoma, WA 98402

Mr. John Kugler  
Burgess Fitzer, P.S.  
1145 Broadway, Suite 400  
Tacoma, WA 98402-3583

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DATED this 24<sup>th</sup> day of September, 2010 at Seattle, Washington.

  
\_\_\_\_\_  
Kimberly Paul, Legal Assistant