

No. 40431-1-II

COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

BERSCHAUER PHILLIPS CONSTRUCTION CO., a Washington State
Corporation

Respondent,

vs.

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.

REPLY BRIEF OF PETITIONER
MUTUAL OF ENUMCLAW INSURANCE COMPANY

FILED
COURT OF APPEALS
DIVISION II
10 SEP 28 PM 12:40
STATE OF WASHINGTON
DEPUTY

Timothy R. Gosselin, WSBA # 13730
GOSSELIN LAW OFFICE, PLLC
1901 Jefferson Avenue, Suite 304
Tacoma, WA 98407
(253) 627-0684

Attorney for Petitioner, Mutual of
Enumclaw Insurance Company

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Mutual of Enumclaw joins in the reply briefs submitted by the other appellants and offers the following in addition thereto.

REPLY TO RESPONDENT'S STATEMENT OF THE CASE

Despite thirteen pages of factual statement, BP does nothing to refute the central and critical facts of this case: Before BP sued, it had not executed on or gained any present legal interest in the choses in action on which it sued; BP had not been granted any right or authority to assert those choses in action on behalf of CSS; BP was merely a judgment creditor of CSS when it attempted to sue on CSS's alleged claims; BP has never obtained a present interest in the claims on which it has sued; and any judgment that might result from this action would accrue to CSS not BP. None of BP's explanation, however generously interpreted, shows that an issue exists as to any of those facts.

REPLY ARGUMENT

BP argues that because this action challenges a decision to stay proceedings, abuse of discretion rather than de novo is the standard of review. BP glosses over the true issue. The trial court's decision to stay proceedings is not the issue in this case. The issue is the trial court's exercise of authority in the form of a stay without jurisdiction. Appellants maintain there was no justiciable controversy before the court because BP lacked standing. Standing is a matter of the court's jurisdiction. Whether a party has standing

to sue and whether a court has jurisdiction to hear a claim are questions of law which are reviewed de novo. *Spokane Airports v. RMA, Inc.*, 149 Wn. App. 930, 939, 206 P.3d 364 (2009).

Next, BP devotes much argument to whether the trial court had jurisdiction to consider the parties' motions to dismiss. This is a red herring. There is no dispute the court had the minimal jurisdiction required to consider the motions to dismiss. The issue here is whether the trial court could retain jurisdiction when the plaintiff lacked standing.

In response to that issue, BP presents a two-fold argument. Relying on *Primark, Inc. v. Burién Gardens Associates*, 63 Wn. App. 900, 823 P.2d 1116 (1992), BP argues it had standing. *Primark* does not support that contention. In *Primark*, the court specifically noted that Primark was the purchaser of the property at issue in the case (63 Wn. App. at 902) and "paid money for the contract . . . giving it a present and substantial interest in the property" (63 Wn. App. at 908). BP has not purchased the choses in action, has not paid money for them, and indeed, had not even committed or paid for the right to do so in the future. It does not have a "present and substantial interest" in them. BP's "interest" in the choses in action are speculative and contingent on future events over which it has no control.

Next, relying on CR 17(a), BP argues the trial court could retain jurisdiction even if BP did not have standing. CR 17(a) allows a trial court

to retain a suit even after determining the real party in interest is not a party.

BP uses this narrow and limited exception to the standing rules as a basis for saying that trial courts always have authority to retain jurisdiction despite a plaintiff's lack of standing. Aside from the fact that BP offers no support for the contention, the argument has two fatal flaws.

First, the Supreme court has said CR 17(a) should not be applied as BP urges. In *Beal v. Seattle*, 134 Wn.2d 769, 954 P.2d 237 (1998), the court specifically cautioned against reading CR 17 to allow its application to every case where an inappropriate plaintiff had been named. 134 Wn.2d at 778, citing 6A CHARLES ALAN WRIGHT § 1555 (2d ed. 1990). The *Beal* court recognized CR 17(a) does not apply, and an action should be dismissed “when the determination of the right party to bring the action was not difficult and when no excusable mistake has been made.” *Id.* This limitation prevents plaintiffs from using the rule to “join or substitute persons whose interests were not contemplated from the beginning of the action.” MOE submits the speculative interests of a judgment creditor like BP with no right to the causes of action being sued upon is just the kind of interest the rule was not designed to include.

Second, our courts have refused to apply CR 17(a) as BP urges. *In re Estate of Boyd*, 5 Wn. App. 32, 485 P.2d 469 (1971). Having concluded the plaintiff lacked standing from the beginning, that court in that case

dismissed the suit as a nullity from inception. The court did this despite CR 17(a), and despite the plaintiff's efforts to amend her petition to name the proper parties as additional petitioners, filing a motion to allow said amendment and filing her notice of appeal from the denial of her motion. The court decided neither CR17(a) nor her subsequent actions could remedy the original defect. In doing so, the court refused the kind of broad application BP wants here.

Contrary to BP's assertion, neither result "robs CR 17(a) of effect." Brief of Respondent at 13. Both merely reflect the fact that CR 17(a) is a rule of limited scope which applies only in the narrow circumstances described in the rule and as an exception to the general rule that lack of standing requires dismissal.

Even the trial court recognized the exception described by CR 17(a) does not apply in this case. (RP at p.5, lns. 20-21) BP's action falls outside the literal language of Rule 17(a): BP is not seeking time for the real party in interest to ratify, join or substitute into this action. Moreover, this is not a case where the rule was intended to apply. BP has not shown or even argued that excusable neglect or unusual complexity lead to the naming of an incorrect party. BP knew all along it was merely a judgment creditor who had not obtained any present right in the choses on which it sued. BP knew it did not have CSS's consent to sue, and therefore lacked authority to sue on

CSS's behalf. There is far less basis to allow this lawsuit to proceed than there was in *In re Estate of Boyd*.

Spokane Airports v. RMA, Inc., 149 Wn. App. 930, 206 P.3d 364 (2009), illustrates the proper analysis in this case. Spokane Airport is a joint venture between the City and County of Spokane, created to operate a regional airport. It sued one of the airport tenants, RMA, to condemn a right of possession to buildings RMA had leased on the airport premises. RMA challenged Spokane Airport's standing, arguing that even though the County and City had delegated authority to the joint venture, only the County and the City could prosecute condemnation proceedings. The trial court allowed the proceedings to continue. The Court of Appeals agreed with RMA, reversed and dismissed the lawsuit. *Id.* at ¶39. It reasoned that trial courts lack subject matter jurisdiction when a necessary party is not a party to the action before it. 149 Wn. App. at ¶33. This is because judicial power extends only to cases and controversies. When the plaintiff lacks standing, there is no case or controversy. *Id.* at ¶22. Because the City and County could not delegate condemnation authority to Spokane Airport, it lacked standing to prosecute the case and the trial court lacked jurisdiction to entertain it. Because Spokane Airport was not a proper plaintiff, "there is no cognizable condemnation action." *Id.* at ¶39.

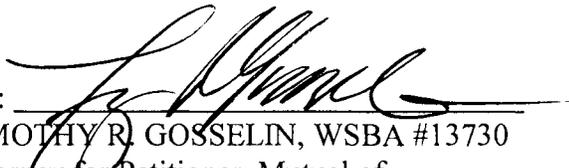
As did *Spokane Airports v. RMA, Inc.*, this case stands independent

of CR 17(a). BP is not suing in a representative capacity, but on its own behalf. BP has no recognized interest in the claims on which it sued – if they exist, the claims still belong to CSS’s managers to whom they devolved upon CSS’s dissolution. Until BP obtains ownership of the claims through execution and sale, any benefit of the claim also devolves to CSS’s managers. See *Sherron Assocs. Loan Fund V v. Saucier*, No. 28238-4-III, ___ Wn. App. ___, ___ P.2d ___ (Div. III, August 5, 2010). Therefore, BP lacked standing to prosecute the claims. Because BP lacked standing and there was no other proper plaintiff, there was no case or controversy before the trial court. Because there was no case or controversy, the trial court lacked subject matter jurisdiction. Because it lacked subject matter jurisdiction, the trial court should have dismissed BP’s lawsuit.

CONCLUSION

MOE asks this court to reverse the trial court and dismiss BP’s suit against it.

Dated this 27th day of September, 2010.

By : 
TIMOTHY R. GOSSELIN, WSBA #13730
Attorney for Petitioner, Mutual of
Enumclaw Insurance Co.

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DECLARATION
OF SERVICE

BY _____
DEPUTY
STATE OF WASHINGTON
10 SEP 28 PM 12:40

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DIVISION II

On this day, I, the undersigned, did serve the following documents:

1. REPLY BRIEF OF PETITIONER MUTUAL OF ENUMCLAW INSURANCE COMPANY;

and this Declaration on the parties listed below by depositing true and correct copies of them in the United States Mail addressed for delivery as follows:

Counsel for Plaintiff:

Jon E. Cushman
Ben D. Cushman
Joseph Scuderi
Stephanie M.R. Bird

CUSHMAN LAW OFFICES, P.S.
924 Capitol Way South
Olympia, WA 98501

DECLARATION OF SERVICE

GOSSELIN LAW OFFICE, PLLC
1901 JEFFERSON AVENUE, SUITE 304
TACOMA, WASHINGTON 98402
OFFICE: 253.627.0684 FACSIMILE: 253.627.2028

Counsel for Co-Defendant

Faller:

John T. Kugler
BURGESS FITZER, P.S.
1145 Broadway, Suite 400
Tacoma, WA 98402

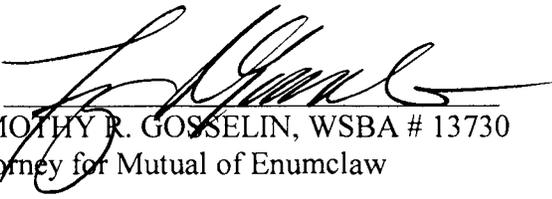
Counsel for Co-Defendants

Clement and Drotz:

Joel Wright
Michelle A. Corsi
LEE SMART, P.S.
1800 One Convention Place
701 Pike Street
Seattle, WA 98101-3929

I declare and state under the penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 27th day of September, 2010.

By: 

TIMOTHY R. GOSSELIN, WSBA # 13730
Attorney for Mutual of Enumclaw

DECLARATION OF SERVICE

GOSELIN LAW OFFICE, PLLC

1901 JEFFERSON AVENUE, SUITE 304
TACOMA, WASHINGTON 98402
OFFICE: 253.627.0684 FACSIMILE: 253.627.2028