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STATE OF WASHINGTON

No. 40431-1-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

BERSCHAUER PHILLIPS CONSTRUCTION CO.,  
a Washington State Corporation,

Plaintiff/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 [sic], an adult individual;

Defendants/Petitioners.

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BRIEF OF PETITIONER JENNIFER FALLER

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## **I. ASSIGNMENTS OF ERROR**

1. The Trial Court Erred In Declining to Dismiss this Matter for Lack of Standing.

2. The Trial Court Erred in Entering its February 19, 2010, Order Delaying Defendants' Motions for Summary Judgment and Staying this Matter Pending Resolution of Appeal in Another Matter.

3. The Trial Court Erred in Denying Reconsideration of its February 19, 2010, Order.

## **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Where a plaintiff asserts claims without standing, is the trial court required to dismiss for lack of jurisdiction? (Assignment of Error Nos. 1, 2 and 3)

2. May a trial court, before determining that jurisdiction exists, grant relief to a plaintiff by indefinitely refusing to dismiss claims brought without standing and by staying the case to prevent or delay the defendants from raising jurisdictional defenses? (Assignment of Error Nos. 1, 2 and 3)

3. Where a plaintiff lacks standing to bring claims, can dismissal be delayed based on whether or not there is prejudice to the defendant? (Assignment of Error Nos. 1, 2 and 3)

## II. STATEMENT OF THE CASE

Plaintiff/Respondent Berschauer Phillips Construction Co. (“BP”) is a general contractor which subcontracted with Concrete Science Services of Seattle, LLC (“CSSS”) regarding repairs of prior construction defects at a school in June and July of 2002. (CP 390, 410) CSSS was a Minnesota limited liability company which lost money on the school project and went out of business at the conclusion of the project. (CP 390, 410) CSSS was terminated by the State of Minnesota on September 12, 2003. (CP 24)

In March 2004, BP filed suit in King County Superior Court against CSSS and other subcontractors who worked on the project. (CP 18) BP obtained a default judgment against CSSS on August 31, 2005. (CP 153) After BP notified MOE of the default judgment, MOE retained Defendants/Petitioners Clement and Drotz to represent CSSS. (CP 9-11) Clement and Drotz moved to set aside the default judgment. (CP 161-170) BP successfully opposed this motion. Clement and Drotz pursued the matter on appeal. (*Id.*) BP successfully opposed the appeal and the default judgment was affirmed by Division I. (*Id.*)

On October 31, 2008, BP filed the present lawsuit in Thurston County Superior Court against Defendant/Petitioner Mutual of Enumclaw (“MOE”), CSSS’s insurer. (CP 5) BP’s complaint against MOE alleged that MOE committed bad faith against CSSS by failing “to act reasonably and

promptly in dealing with the default judgment” after it was notified of the default judgment. (CP 6) BP’s complaint purported to assert CSSS’s alleged bad faith claim against MOE. (CP 6-7)

At the time BP filed this lawsuit, it did not own or have the right to assert any claim of CSSS against MOE.

In July 2009, BP amended its complaint in the present matter to add Defendants/Petitioners Clement, Drotz and Faller<sup>1</sup> as defendants. (CP 8) Faller had worked as a supervisor for CSSS on the 2002 school project and, through another company, had been an investor in CSSS. (CP 390, 410) Faller subsequently went through a personal bankruptcy, obtained new employment in the State of Pennsylvania, and has resided in Pennsylvania since April 2005. (CP 390, 410)

BP’s amended complaint purported to assert legal malpractice claims of CSSS against Clement and Drotz for “failing to remove the default judgment in a timely manner.” (CP 11) Similarly, the amended complaint purported to assert claims of CSSS against Faller for “failing to reasonably assist” in removing the default judgment, which BP characterizes as a failure “to perfect” CSSS’s insurance coverage.<sup>2</sup> (CP 12)

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<sup>1</sup> Faller’s name is misspelled in the caption.

<sup>2</sup> Thus, BP has made contradictory claims in its two lawsuits. In its King County lawsuit, BP successfully argued the default judgment was proper and should not have been set aside. In its Thurston County lawsuit,

At the time BP filed its amended complaint, it did not own or have the right to assert any claim of CSSS against Clement, Drotz or Faller.<sup>3</sup>

BP served Faller in the State of Pennsylvania under the long arm statute in November 2009. (CP 390)

In December 2009, recognizing that it did not own the purported claims and choses of action of CSSS, BP attempted to levy upon the “claims and choses of action” of CSSS in the King County lawsuit. (CP 63-65, 128-130) However, those efforts were quashed by the King County Superior Court (CP 105-106, 298-99), no sheriff’s sale took place and BP did not purchase the purported claims of CSSS.

In January 2010, MOE, Clement and Drotz brought motions which sought dismissal of the claims asserted against them by BP for lack of

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BP claims that Clement, Drotz and Faller have liability to CSSS for failing to get the default judgment set aside.

<sup>3</sup> Under RCW 25.15.005(3)(a), CSSS was a “foreign limited liability company” because it was an entity that was formed under the LLC laws of Minnesota. With respect to foreign LLCs, RCW 25.15.310(1)(a) provides that “[t]he laws of the state . . . under which a foreign limited liability company is organized govern its organization and internal affairs and the liability of its members and managers[.]” Under Minnesota law, after termination, a limited liability company no longer exists (MRS 322B.03(48)) and no longer can hold any assets, including “claims” against others (MRS 322B.813(subd. 5) and 322B.82 subd. 2(2)). The Minnesota Secretary of State terminated CSSS’s existence in 2003. Thus, BP’s claims are premised upon its hopes of obtaining title of purported claims of CSSS against its insurer, lawyers and an employee/investor which, if they ever existed, have not been possessed by CSSS for the past seven years.

standing, among other reasons. (CP 78, 122, 252) Faller was in the process of preparing a motion requesting the same relief. (CP 391-393, 412-13) In addition, Faller intends to raise jurisdictional defenses including lack of personal jurisdiction (Faller is a Pennsylvania resident who had no contacts with the State of Washington during the past five years and her alleged acts toward CSSS after the default judgment did not occur in this state; BP did not follow the procedure mandated by the long arm statute in serving her out of state), lack of subject matter jurisdiction (CSSS and Faller are both non-residents of Washington and the purported claims between them, if any, do not concern this state; Faller has been through a personal bankruptcy in which her liabilities were discharged), as well as other Civil Rule 12(b) defenses including statutory time bars (the construction defects for which BP seeks a judgment against Faller occurred in 2002) and BP's failure to state a claim upon which relief may be granted (BP's complaint asserts that Faller owed a duty to CSSS and/or to BP as a third party to "perfect CSSS's insurance" for a claim made years after CSSS no longer existed; Faller was never a governor or officer of the LLC).

In response to the motions of MOE, Clement and Drotz to dismiss for lack of standing, BP did not dispute that it lacked standing. Instead, it asked the court not to rule on the motions to dismiss and to stay the entire proceeding while BP pursued appeal of the orders in BP's King County

lawsuit and sought to acquire the right to assert claims belonging to CSSS. (CP 119, 134-135, 245, 342, 372) All Defendants/Petitioners opposed this request. (CP 237, 381, 389)

On February 19, 2010, the trial court granted the relief requested by BP despite the absence of standing/jurisdiction. (CP 394-395) It declined to dismiss the matter, stayed this matter in its entirety “pending resolution on appeal” of BP’s King County lawsuit against CSS and delayed action on motions to dismiss until after that time. (*Id.*) On March 1, 2010, the court also denied Faller’s and the other petitioners’ motions for reconsideration. (CP 431-433) In its letter ruling, the trial court acknowledged that BP does not have standing. (CP 432) More than a year and a half after commencing this matter, BP still has no standing to assert claims of CSSS against any party.

Nevertheless, the court’s orders allow the lawsuit to continue against Faller and the others. It prevents Faller and the others from seeking or obtaining dismissal for lack of standing and jurisdiction. It granted relief to BP despite the absence of subject matter jurisdiction. It prevents Faller and the others from raising other jurisdictional defects that may exist for an indefinite period of time. It purports to help BP avoid the application of the statute of limitations. It indefinitely prolongs litigation over events which took place eight years ago.

MOE, Clement, Drotz and Faller all sought discretionary review, which this court granted.

### **III. SUMMARY OF ARGUMENT**

Faller agrees with and incorporates by reference the legal arguments and authorities set forth in MOE's and Clement and Drotz' appeal briefs. Because the plaintiff lacked standing to bring the claims asserted at the time the lawsuit was filed, the lawsuit was void *ab initio*, the trial court lacked jurisdiction to grant any relief in the matter, and the trial court was required to dismiss the case. 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 trial court also erred in delaying dismissal based on a "no undue prejudice" standard. 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.

### **IV. ARGUMENT**

Whether a party has standing to sue is a conclusion of law which the appellate court reviews *de novo*. *Mack v. Armstrong*, 147 Wn. App. 522, 527, 195 P.3d 1027 (2008).

**1. The Trial Court Erred by Failing to Dismiss the Case for Lack of Standing and Jurisdiction.**

When BP commenced this lawsuit against MOE in 2008, it lacked standing to assert any of the claims asserted in its complaint. MOE correctly points out that BP did not fully execute against and did not obtain any property of CSSS nor any right to assert CSSS's purported claims against MOE or the other defendants/petitioners. Consequently, the trial court lacked subject matter jurisdiction and had no authority to delay dismissal for lack of subject matter jurisdiction, to grant relief to BP, or to prevent Faller or the other defendants/petitioners from bringing motions to dismiss or raising other jurisdictional defects.

“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, without which the court cannot hear a case. *Lane v. City of Seattle*, 164 Wn.2d 875, 885, 194 P.3d 977 (2008) (“standing is a matter of our jurisdiction. Without jurisdiction, we cannot hear a case”); *High Tide Seafoods v. State*, 106 Wn.2d 695, 702, 725 P.2d 411 (1986) (unanimously holding: “If a plaintiff lacks standing to bring a suit, courts lack jurisdiction to consider it.”) (citing *Grove v. Mead Sch. Dist.* 354, 753 F.2d 1528 (9th Cir. 1985)). 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.2d 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*, 154 Wn. App. 842, 850, \_\_\_ P.3d \_\_\_ (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.**”).

Because BP lacked standing to bring the claims asserted in its Thurston County lawsuit, the trial court lacked jurisdiction and the lawsuit was void at its inception. A lawsuit brought by one who lacks standing is considered a nullity from its inception. *In re Estate of Boyd*, 5 Wn. App. 32, 35-36, 485 P.2d 469 (1971).

Consistent with modern standing doctrine, “The rule supported by the overwhelming weight of authority appears to be that if a plaintiff or defendant has no valid and subsisting title or right to the subject of his action or counterclaim at the time of its commencement, he may not by the subsequent acquisition, or perfection of such right or title, remedy the defect so as to succeed in the action.” *Acquisition or Perfection after Commencement of Action of Right or Title to Claim or Property which Is the Subject of Action of Counterclaim*, 125 A.L.R. 612 (1940). *See also Marianna & B.R. Co. v. Maund*, 56 So. 670, 672 (Fla. 1911) (“A plaintiff cannot supply the want of a valid claim at the commencement of the action by the acquisition or accrual of one during the pendency of the action.”); *Tobin v. McCann*, 17 Mo. App. 481, 482 (1885) (“It is elementary law, that a plaintiff must recover, if at all, on his right of action as it existed at the institution of his suit. One cannot bring another into court and tax him with cost in defending against a non-existent right, upon the ground that a right may be created pending the procedure. . . . The trial court therefore erred in giving to the plaintiffs the benefit of an element which was essential to their cause of action, and yet which did not exist at the commencement of their suit.”)

This rule was long ago recognized in Washington. In *Amende v. Town of Morton*, *supra*, 40 Wn.2d 104, the plaintiff asserted claims as class representative on behalf of certain bond owners, alleging that he was a

member of the class by virtue of an assignment of bonds to him. However, there had been no valid assignment and the plaintiff did not in fact have title prior to commencement of the lawsuit. 40 Wn.2d at 108. The plaintiff later obtained title and attempted to amend his complaint. The Washington Supreme Court affirmed dismissal of the lawsuit, stating “**An assignee for collection can sue only where he has title to the chose.**” *Id.* at 107. In the addition, the Supreme Court said:

In his brief appellant concedes that he must rely upon the original assignment of the bonds . . . rather than the ratification thereof which occurred after the institution of suit; and that if the original assignment is not effective, he is not a member of the class and cannot maintain a lawsuit representing the class. This indicates a recognition of the general rule that 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.

*Id.* at 106 (emphasis added).

Similarly, in *In re Estate of Boyd, supra*, 5 Wn. App. 32, the grandmother of a decedent brought an action to set aside a will, within allowable time limits, in her own capacity, but she was not an heir or an assignee of an heir, and therefore lacked standing to challenge the will. 5 Wn. App. at 33-35 and 36. After the time limit expired, she attempted to amend her petition to add a niece and nephew who were heirs but who did

not challenge the will within the allowable time limit. The court held that dismissal was required because the action was a “nullity from its inception”:

Our examination of the record compels us to agree with the implicit conclusions of the trial court that Sadie Boyd, solely in her capacity as grandmother, desired to challenge the will, that she had no standing to do so, and that consequently her action was a nullity. The petition being a nullity from its inception, Sadie Boyd’s subsequent actions in filing an amended petition naming 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 could not remedy the original defect.

*Id.* at 36 (emphasis added).

In sum, the trial court erred in failing to dismiss this matter for lack of standing. The court’s February 19, 2010, order “delaying” motions to dismiss and staying the case should be reversed and the case dismissed.

**2. The Trial Court Erred By Granting Relief Before Considering Possible Jurisdictional Defects and Before Establishing The Existence of Jurisdiction.**

The Trial court granted relief to BP (delaying motions to dismiss, refusing to dismiss and staying the case) without first establishing the existence of jurisdiction.

Moreover, lacking of standing is not the only jurisdictional defect in this matter which the trial court failed to address before granting relief to BP. There are other jurisdictional defects which the court’s order has precluded

the parties from raising. BP's motion pre-empted -- and the trial court's stay order has precluded -- Faller from bringing motions to dismiss under Civil Rule 12(b)(6) not only for lack of jurisdiction based on lack of standing, but also for:

- **lack of personal jurisdiction** - (1) Faller is a Pennsylvania resident and has committed no act within the State of Washington since she moved away five years ago; (2) BP purportedly served Faller with Process in out-of-state under the long-arm statute without complying with mandatory procedures required by the statute to effectuate service, including failing to file the affidavit required by RCW 4.28.185(4).
- **lack of subject matter jurisdiction** - (1) CSSS is a Minnesota LLC and resident which was dissolved seven years ago and Faller's purported breach of duties to CSSS is a matter between two non-residents involving purported acts which took place outside the State of Washington; (2) Faller has received a discharge of liabilities in a personal bankruptcy.
- **statutory time bars** - BP seeks to impose liability on Faller for construction defects which occurred in 2002 (eight years ago) when Faller was employed by CSSS and participated in a construction project in this state. To the extent BP has any claim against Faller in its own name for her participation in the purported construction defects, such claims are barred by the applicable statutes of limitations and builder's statute of repose.
- **failure to state a claim upon which relief may be granted** - BP's complaint asserts no legally cognizable claim against Faller either in its own name or in the name of CSSS. The allegation that she owed an actionable duty directly to BP as a third party

claimant to “perfect insurance” of CSSS is not legally cognizable. The allegation that she owed an actionable duty to CSSS is not legally cognizable or a matter of concern to Washington courts. The allegation that CSSS has a chose of action against Faller which is subject to execution and sale is not true.

In opposing BP’s request for a stay, Faller notified the court of the presence of these issues and Faller’s intent to raise them. (CP 390-391, 412 at n.1; RP at 22) In entering its all-encompassing stay order, the trial court set aside the lack of standing and did not address these other jurisdictional issues. The court’s stay order granted relief to BP without first resolving jurisdictional issues.

By setting aside jurisdictional challenges and granting relief to BP, the trial court violated a fundamental principle of jurisprudence and due process, as set forth above, that a court without jurisdiction can grant no relief other than to dismiss the action. In *Lane v. City of Seattle*, *supra*, 164 Wn.2d 875, the defendant had raised and later dropped an argument that the plaintiff lacked standing to challenge a city tax. Nevertheless, the Supreme Court found it necessary to determine that the plaintiff did indeed have standing in order to determine that the court had jurisdiction to hear the case:

Seattle challenged Lane’s standing to challenge the tax at trial but has dropped the argument here. However, standing is a matter of our jurisdiction. Without jurisdiction, we cannot hear a case, even if every party

concedes standing. *High Tide Seafoods v. State*, 106 Wash.2d 695, 702, 725 P.2d 411 (1986).

164 Wn.2d at 875 (emphasis added).

Here, the trial court failed to consider jurisdictional challenges or to determine that it had jurisdiction before hearing the case and granting relief other than dismissal of the case. Indeed, the trial court recognized that there is a lack of standing (CP 432) but nevertheless granted relief other than dismissal. The court refused to allow Faller to raise the other jurisdictional issues. The trial court erred by granting relief without first determining that it had jurisdiction. Because jurisdiction is fundamental to due process, this error was of constitutional magnitude. *See, e.g. Schell v. Tri-State Irrigation*, 22 Wn. App. 788, 591 P.2d 1222 (1979) (a judgment rendered without valid personal jurisdiction over the defendant violates due process); *Im Ex Trading Co. v. Raad*, 92 Wn. App. 529, 537, 963 P.2d 952 (1998) (long-arm contacts tests insure due process requirement has been met).

### **3. The Trial Court Erred in Applying an Improper “Prejudice” Standard.**

At the hearing on MOE’s, Clement’s and Drotz’s motions to dismiss and BP’s counter-motion for a stay, the trial court advised the parties to comment on whether a stay would cause prejudice to the defendants/petitioners. (RP at 3-4) In deciding to delay ruling on the

motions to dismiss and to stay the case, the court based its decision on its belief that there would be no undue prejudice to the defendants/petitioners. (RP at 25-26; CP 432)

The court's use of a "no undue prejudice" standard for refusing to grant relief of dismissal of claims brought without standing and for staying the case is unsupported by law. Whether or not there is prejudice is irrelevant. There is a lack of standing. The court lacked jurisdiction to hear this matter or to grant the "stay" relief requested by plaintiffs. Lack of undue prejudice is not a basis for conferring jurisdiction where there is none.

Moreover, even though Faller believes prejudice is irrelevant, she strongly disagrees with the trial court's assumption that its stay does not cause undue prejudice to her. The stay allows claims asserted by BP against her in this matter to continue indefinitely even though BP concedes -- and the court has recognized -- that BP did not have standing to assert claims on behalf of CSSS at the time BP commenced this matter and that BP has not obtained title to the purported claims in more than one and a half years since commencing this matter. The stay allows the lawsuit to continue against Faller even though the court lacks jurisdiction. It prevents Faller from answering the complaint and from raising any defenses. It prevents Faller from making a motion under Civil Rule 12(b) to address the lack of personal jurisdiction over her, the lack of subject matter jurisdiction over claims

asserted against her, that statutes of limitations and repose bar the claims against her, that the complaint fails to state a claim upon which relief may be granted, etc. By allowing the lawsuit to continue despite the absence of jurisdiction and prohibiting her from obtaining a dismissal on this ground, it deprives her of the due process of law guaranteed by both federal and state constitutions. It prevents her from doing discovery to obtain or preserve evidence that she may need to defend herself.

The stay and bar in raising defenses is not brief by any measure: The order indefinitely stays claims against Faller and the others “pending resolution on appeal” of the King County matter. Appellate review will take years. There is likely to be requests for review by the Supreme Court after the Court of Appeals makes a decision. In the meantime, memories will fade and witnesses may become unavailable. The stay causes severe prejudice to Faller.

Asserting judicial powers over a defendant where the court lacks personal and subject matter jurisdiction violates constitutional due process. It is hard to imagine greater prejudice than having the government violate one’s right of due process.

## **V. CONCLUSION**

The trial court erred in failing to dismiss this matter for lack of standing/jurisdiction. The trial court also erred by setting aside jurisdictional

challenges and granting relief without first establishing the existence of jurisdiction. There is a lack of subject matter and personal jurisdiction. The court's February 19, 2010, order "delaying" motions to dismiss and staying the case should be reversed and the case dismissed.

DATED: June 29, 2010.

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STATE OF WASHINGTON

### DECLARATION OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on June 30, 2010, I served the foregoing brief via both e-mail (per standing agreement with the parties) and by depositing a copy in first class U.S. Mail, postage-prepaid, to:

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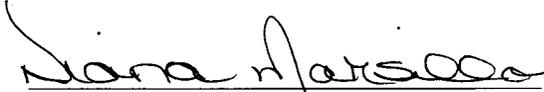
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DATED this 30<sup>th</sup> day of June, 2010, at Tacoma, Washington.

  
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