

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.

BRIEF OF PETITIONER
MUTUAL OF ENUMCLAW INSURANCE COMPANY

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COURT OF APPEALS
10 JUN 29 PM 3:52
STATE OF WASHINGTON
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NATURE OF THE CASE

In this action, a judgment creditor filed suit against a judgment debtor's insurer, attorneys and one of its employees, asserting the debtor's claims. The judgment creditor, however, had never obtained a right to assert the debtor's claims. When the trial court refused to dismiss the suit, the defendants sought discretionary review.

ASSIGNMENTS OF ERROR

1. The trial court erred when it stayed proceedings pending the outcome of plaintiff's appeal in another case.
2. The trial court erred when it declined to decide the defendants' motions for summary judgment.
3. The trial court erred when it refused to dismiss plaintiffs' claims.

ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Plaintiff Berschauer Phillips filed suit against its judgment debtor's insurers, attorneys and employees, asserting claims on behalf of the debtor. But Berschauer Phillips did not own the claims or have any right to assert them on behalf of the debtor. When the defendants asked the trial court to dismiss the lawsuit because Berschauer Phillips lacked standing, the trial court declined, staying the action until Berschauer Phillips could obtain standing. The issue in this case is whether a trial court may properly entertain a lawsuit brought by a plaintiff who does not own or possess the claims on which it has sued?

STATEMENT OF THE CASE

Berschauer Phillips is a general contractor. It worked on a project at

Redmond Junior High School for Lake Washington School District. Concrete Science Services of Seattle (CSSS) was one of the subcontractors, working on the project in June and July, 2002. *CP 18-22*. Jennifer Faller worked for CSSS on the project. *CP 290*. CSSS was a Minnesota limited liability company. It terminated on September 12, 2003. *CP 24*.

In March, 2004, BP filed suit in King County against several contractors who worked on the project, including CSSS. *CP 18*. The suit was given cause no. 04-2-05087-1SEA. CSSS never appeared or responded to the suit. On August 31, 2005, BP obtained a default judgment against CSSS for \$233,403.00. *CP 152-53*.

MOE insured CSSS at the time of the Redmond Junior High project. *CP 253*. After taking the default judgment, BP notified MOE of the claim, and demanded that MOE pay the default judgment. MOE refused, and hired counsel (Clement & Drotz) to defend CSSS and have the judgment set aside. *CP 9*. That effort failed. *CP 161-72*.

On October 31, 2008, Berschauer Phillips (BP) filed this lawsuit against MOE in Thurston County. *CP 5-7*. BP alleged MOE breached its insurance contract with CSSS when it failed to pay the judgment, and engaged in bad faith when it attempted to set aside the default judgment. BP's suit acknowledged these claims belonged to CSSS, but alleged had obtained the claims ("choses in action") as CSSS's judgment creditor. *CP 6*.

In August, 2009, BP amended its complaint to add claims against Clement & Drotz and CSSS's employee, Ms. Faller. *CP 8-13*. BP alleged Clement & Drotz committed legal malpractice in handling CSSS's defense and efforts to set aside the default judgment. *CP 10-11*. BP claimed Faller was the principle and owner of CSSS who failed in her responsibilities to CSSS when she allowed the default judgment to be entered and in her lack of efforts to have the judgment set aside. *CP 11-12*. As with its claims against MOE, BP acknowledged these claims belonged to CSSS, but alleged it had obtained the claims as CSSS's judgement creditor. *CP 10*.

In fact, BP had not obtained the claims it was suing on. Realizing this error, in December, 2009, BP obtained writs of execution from the King County Superior Court directing the Thurston County Sheriff to take possession of CSSS's "choses in action" against MOE, Clement & Drotz, and Faller, and sell them at Sheriff's sale on February 10, 2010. *CP 57-59, 126-32, 260-67*. Presumably, BP would have attempted to buy them at this sale.

Two important events followed. First, all of the defendants (Clement & Drotz, Faller and MOE) filed motions in the King County action asking the that court to quash the writs of execution. *CP 181-96, 206-27, 301-12*. The court granted those motions. *CP 102-07, 197-98, 295-99*. As a result, the planned Sheriff's sale did not occur, and BP did not purchase the claims on which it was suing. BP appealed those orders. *CP 108-13, 363-66*. Its

appeal is pending in Division One under cause no. 64812-8-1.

Second, defendants Clement & Drotz and MOE filed motions for summary judgment in the Thurston County action asking to have it dismissed. *CP 78-97, 252-56*. They argued that because BP had not acquired the claims before filing suit, it did not have standing to sue on them. Simply being a judgment creditor of CSSS did not allow BP to assert CSSS's legal claims. In response, BP asked the Thurston County court to stay the proceedings. *CP 119-21, 342*. BP pointed out that it was appealing the King County Superior Court's decisions quashing the writs. If its appeal was successful – which BP argued would most certainly be the case – the claims on which it was suing would be sold at Sheriff's sale, BP would outbid all other bidders and purchase the claims, and then BP would have standing to sue the defendants, thereby making its lawsuit valid. *CP 199-20*. Underlying this argument was the belief that the law would allow BP to sue first, before it had standing, then validate the suit later by actually obtaining standing.

The trial court heard Defendants' Motions for Summary Judgment on February 19, 2010. *RP (2/19/10)*. The court accepted BP's argument and decided not to decide the motions. Instead, the court stayed the suit pending a decision from Division One of the Court of Appeals. *CP 394-97*. The Court reasoned that the decision from Division One would be "determinative" of whether BP could acquire standing to assert the claims it

was making against MOE and Clement & Drotz, and neither defendant could show prejudice by staying the Thurston County action pending that decision. *RP (2/19/10) at 25-29 (attached as Appendix A).*

The defendants requested reconsideration. *CP 398-408, 409-13, 418-30*. The court denied the motion – without response from BP – on March 1, 2010. *CP 431-33 (attached as Appendix B)*. The court reasoned that since statutes of limitation might hurt BP’s ability to assert some of the claims¹ if it was forced to refile the lawsuit after it obtained standing to sue, “equity” demanded that the suit be preserved so BP would not be harmed by its initial lack of standing. *CP 432*.

The defendants timely sought discretionary review from both orders. *CP 434-61*. This court granted review on May 25, 2010.

ARGUMENT

Defendants sought dismissal because BP lacked standing to assert the claims on which it was suing. Defendants argued that BP did not own or have a right to sue when it filed suit. Dismissal is the proper remedy where the plaintiff lacks standing. BP did not dispute it did not own the claims or lacked standing. Instead, BP asked the court to stay the lawsuit, giving it time to prosecute its appeal of the King County Superior Court’s decisions,

1. Neither BP nor the court identified which, if any, of BP’s claims a statute of limitation might preclude.

then acquire the claims through Sheriff's sale after winning that appeal. Underlying this argument was the belief that once it acquired the claims and thereby acquired standing, its suit would be validated.

The trial court wrongly accepted BP's arguments. Washington law does not allow plaintiffs to sue first and obtain standing later. In Washington, a suit brought by one who does not have standing is void *ab initio*. The filer cannot make the suit legitimate by later acquiring standing. BP's suit should have been dismissed with instructions to re-file if and when it actually obtained ownership of the claims.

1. Standard of Review

When reviewing a trial court's decision to grant summary judgment this court engages in the same inquiry as the trial court. *Reynolds v. Hicks*, 134 Wn.2d 491, 495, 951 P.2d 761 (1998). Summary judgment is properly granted when the pleadings and affidavits show there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). All facts and reasonable inferences are considered in a light most favorable to the nonmoving party. *Huff v. Budbill*, 141 Wn.2d 1, 7, 1 P.3d 1138 (2000).

This case raises the issue of BP's standing to sue. Whether a party has standing to sue is a conclusion of law which appellate courts review de novo. *Mack v. Armstrong*, 147 Wn. App. 522, 527, 195 P.3d 1027 (2008).

2. BP had not acquired an interest in CSSS's claims against MOE, Clement & Drotz or Faller before it filed suit, and has not acquired that interest to this day.

BP's only claim of standing is based on its status as a judgment creditor. Therefore, whatever basis BP has for suing on CSSS's claims against the defendants must flow from that status. But that status did not give BP the right to sue on CSSS's purported claims.

A judgment creates a judicial lien against the judgment debtor's property. The lien permits the creditor to execute against the asset and force its sale. A.M. Dickerson, R.B. Hagedorn & F.W. Smith, *The Law of Debtors & Creditors* §6:59 at 6-163 (Thompson West 2005).

Execution involves a judicial process regulated by statute, which results in issuance of a writ of execution by a court. The court, through the writ, orders a sheriff to levy upon property of a judgment debtor and to sell the property for the purpose of satisfying a judgment already obtained by a creditor. The levy creates a lien that enables a judgment creditor to obtain liquidation of the subject property and provides the judgment creditor with a priority in the property vis-à-vis other claimants.

Id. §6:49 at 6-129 (Thompson West 2005).

“Execution” is a four-step process:

First, . . . the creditor must have an executable judgment. Second, the judgment creditor asks the clerk of the court that rendered the judgment to direct the sheriff to satisfy the judgment by taking the land and personalty of the debtor to

the extent necessary and by selling the property and paying over the proceeds to the creditor. The request by the creditor usually takes the form of a motion to the court, with a supportive affidavit that establishes the existence of an unsatisfied judgment. . . . In the third step of the execution process, the sheriff to whom the writ of execution is issued must levy upon the judgment debtor's property. . . . [L]evy on personal property usually takes the form of the sheriff actually seizing the property and taking it into his possession. . . . The final step of the execution process involves the sale of the property levied upon.

Id. §6:50 at 6-131 - 6-133; RCW 6.17.130-160 .

Important to this case, levying against a debtor's property does not make the creditor the owner of the property or confer any rights with regard to the property. 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). "[A] lien is a charge upon property for the payment or discharge of a debt or duty. . . ." *Swanson v. Graham*, 27 Wn.2d 590, 597, 179 P.2d 288 (1947) (quoting 33 Am. Jur. 419, § 2); see also *State v. Teuscher*, 111 Wn.2d 486, 491, 761 P.2d 49 (1988) ("[a] lien is not a proprietary interest or estate in the land"); *Sullins v. Sullins*, 65 Wn.2d 283, 285, 396 P.2d 886 (1964) ("a lien is an encumbrance upon the property as security for the payment of a debt"). *A lien "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, 229-30, 47 P.2d 161 (2002)(emphasis added), quoting *Swanson v. Graham*, *supra*. To acquire a

proprietary interest or a right in the property, one must purchase the property through the Sheriff's sale which the levy makes possible.

Before filing this lawsuit, BP obtained a writ of execution instructing the Sheriff to levy CSSS's choses in action against MOE and take possession of them. But the writs did not order the Sheriff to sell the property, and the Sheriff never did. As a result BP had not purchased the claims against MOE. As to the claims against Clement & Drotz and Faller, BP had not even progressed that far: BP had not obtained writs of execution, so the Sheriff had not taken possession of the claims before BP sued on them. As to all the defendants, however, the result is the same: BP had not acquired ownership of any of the claims on which it was suing before it filed suit. Indeed, it has not acquired ownership to this day.

3. Because BP does not own the claims on which it is suing, it does not have standing.

The doctrine of standing requires that a plaintiff have a personal stake in the outcome of the case sufficient to bring suit. *Gustafson v. Gustafson*, 47 Wn. App. 272, 276, 734 P.2d 949 (1987); *Postema v. Snohomish Cty.*, 83 Wn. App. 574, 579, 922 P.2d 176 (1996). The interest must be grounded in a "clear legal or equitable right and a well-grounded fear of immediate invasion of that right." *DeFunis v. Odegaard*, 82 Wn.2d 11, 24, 507 P.2d 1169, (citing *State ex rel. Hays v. Wilson*, 17 Wn.2d 670, 673,

137 P.2d 105 (1943)) *vacated and remanded on other grounds*, 416 U.S. 312, 94 S.Ct. 1704, 40 L.Ed.2d 164 (1974). A denial of standing to sue means that the damages of which he complains are *damnum absque injuria* because no protectible interest or cause of action belonging to him has been violated. *Hoskins v. City of Kirkland*, 7 Wn. App. 957, 961, 503 P.2d 1117 (1972).

Generally, the doctrine of standing prohibits a litigant from asserting another's legal right. *West v. Thurston County*, 144 Wn. App. 573, 183 P.3d 346, 349 (2008); *Miller v. U.S. Bank*, 72 Wn. App. 416, 424, 865 P.2d 536 (1994); *Walker v. Munro*, 124 Wn.2d 402, 419, 879 P.2d 920 (1994); *Nelson v. Appleway Chevrolet, Inc.*, 129 Wn. App. 927, 939, 121 P.3d 95 (2005); *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 802, 83 P.3d 419 (2004); *Haberman v. Washington Pub. Power Supply Sys.*, 109 Wn.2d 107, 138, 744 P.2d 1032, 750 P.2d 254 (1987), appeal dismissed, 488 U.S. 805 (1988); *Timberlane v. Brame*, 79 Wn. App. 303, 307, 901 P.2d 1074 (1995). One must have some claim of ownership to have standing to sue. *Washington Sec. & Invest. Corp. v. Horse Heaven Hgts.*, 132 Wn. App. 188, 195, 130 P.3d 880 (2006); accord *Magart v. Fierce*, 35 Wn. App. 264, 266, 666 P.2d 386 (1983) (“Magart has the burden of proving ownership of the land in question and standing as a real party in interest. . . . Magart has no standing to bring this action as he is not the owner and real party in interest.”). “A creditor has no equitable standing to sue

derivatively.” *Haberman v. Washington Public Power Supply System*, 109 Wn.2d 107, 149, 744 P.2d 1032 (1987).

As noted previously, BP’s only relationship to CSSS is as a judgment creditor. As a judgment creditor, BP has no standing to sue on CSSS’s behalf. It can sue only if it acquired CSSS’s claims at a Sheriff’s sale. But none of CSSS’s rights have been sold at a Sheriff’s sale, to BP or anyone else. Because BP has not acquired the rights on which it sues, it does not have standing to sue.

4. A plaintiff may not sue first and obtain standing later.

Standing is a jurisdictional issue.

“If a plaintiff lacks standing to bring a suit, courts lack jurisdiction to consider it.”

High Tide Seafoods v. State, 106 Wn.2d 695, 701-02, 725 P.2d 411 (1986), appeal dismissed 479 U.S. 1073, 107 S. Ct. 1265, 94 L. Ed.2d 126 (1987); accord *Skagit Surveyors & Eng'rs, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 556-57, 958 P.2d 962 (1998); *Firefighters v. Spokane Airport*, 146 Wn.2d 207, 212 n.3, 45 P.3d 186 (2001); *Chelan County v. Nykreim*, 146 Wn.2d 904, 926, 52 P.3d 1 (2002); *Harrington v. Spokane County*, 128 Wn. App. 202, 209, 114 P.3d 1233 (2005); *Mitchell v. Doe*, 41 Wn. App. 846, 847-48, 706 P.2d 1100 (1985); *Postema v. Snohomish County*, 83 Wn. App. 574, 579-80. This is because, absent standing, there is no justiciable

controversy before the court. *Reid v. Dalton*, 124 Wn. App. 113, 122,100 P.3d 349 (2004) citing *Grant County Fire Prot. Dist.*, 150 Wn.2d at 802, 83 P.3d 419. Thus, 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).

When a court lacks jurisdiction over a matter, it must dismiss the action. *Olivine Corp. v. United Capitol Ins. Co.*, 122 Wn. App. 374, 380, 92 P.3d 273 (2004); *Dougherty v. Dept. of Labor & Indus.*, 112 Wn. App. 322, 333, 48 P.3d 1018 (2002).

“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.”

Deschenes v. King County, 83 Wn.2d 714, 716, 521 P.2d 1181 (1974); accord *Housing Auth. of Everett v. Kirby*, No. 62052-5-1, Slip op. at 6 (Div. I., March 8, 2010)(When a court lacks subject matter jurisdiction, “dismissal without prejudice is the limit of what a court may do.”); *In re Sentence of Hilborn*, 63 Wn. App. 102, 103, 816 P.2d 1247 (1991); *Branson v. Port of Seattle*, 152 Wn.2d 862, 879,101 P.3d 67 (2004); *Magart v. Fierce*, 35 Wn. App. 264, 666 P.2d 386 (1983); *Linklater v. Johnson*, 53 Wn. App. 567, 768 P.2d 1020 (1989).

A plaintiff may not avoid dismissal by acquiring standing after filing

suit. *Amende v. Town of Morton*, 40 Wn.2d 104, 241 P.2d 445 (1952). In *Amende*, the plaintiff attempted to sue as a representative of a group of bond holders. Plaintiff obtained an assignment of the bonds prior to filing suit, but possession did not pass to him until after filing. The defendant alleged plaintiff lacked standing because the assignment was not effective, and he did not obtain an interest in the bonds until after he filed suit. The trial court dismissed the claim and refused to allow plaintiff to amend his complaint after he took possession of the bonds. 40 Wn.2d at 105. The Supreme Court affirmed the trial court. *Id.* at 108. Though the principle issue on appeal was whether the assignment was valid, once the Court found it was not, the Court sustained the dismissal and refusal to allow amendment. The court noted the result was appropriate under the general rule: “[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.” *Id.* at 106 citing 41 Am.Jur. 477, § 265; 125 A.L.R. 612, 613 and 619, and cases cited therein.

The Court of Appeals reached a similar result in *In re Estate of Boyd*, *supra*. There, Richard Boyd died, and his will was submitted to probate. His grandmother sued to have the will set aside. If the will was set aside, only Boyd’s niece and nephew were legal heirs, not the grandmother. The niece and nephew, however, failed to join in the lawsuit within the required four

month claim period. When the estate sought to have the grandmother's suit dismissed, the heirs asked the court to amend the complaint to add them as parties. The trial court denied the request and dismissed the complaint. The appellate court affirmed, holding that the lawsuit 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 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.

5 Wn. App. at 35-36.

BP's only defense has been to argue that dismissal for lack of standing is not a hard-and-fast rule. Citing to CR 17(a) and CR 15(c), and cases applying those rules, BP argues the trial court has authority to stay an action to allow joinder of the real party in interest, then relate the joinder back to the date of the original filing. BP contends that is what should occur here. The trial court accepted this argument, deciding it should withhold decision until Division One ruled on whether BP would be given a chance to purchase the claims. But neither the rules nor the spirit of the rules support what BP wants or the trial court did.

First, the rules clearly do not apply. Civil Rule 17(a) states:

Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest. (Emphasis added)

As the plain language indicates, the rule contemplates two distinct parties: the party who brought the suit and the real party in interest. The rule allows time for the real party in interest to ratify, join or substitute into the action. BP is not seeking time for the real party in interest to ratify, join or substitute into this action.

Civil Rule 15(c) also does not apply. That rule states:

Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper

party, the action would have been brought against him.

BP is not seeking to amend pleadings or relate anything back to an original pleading in this action.

Nor does the spirit of these rules support the result BP's wants. 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), 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.* The court specifically refused to read the rules as broadly as BP wants.

Here, there was no mistake. BP knew when it sued it did not own the claims it was suing on. To this day, it knows it does not own the claims and has no right to assert them on CSSS's behalf. Even if it wins in Division One, the most BP gets is the opportunity but not the right to purchase the claims. For now, BP's interest in the claims is purely speculative. BP's position is no different than a person admiring a house saying, "I think this house will be for sale soon. I'm going to plan on buying it. Therefore, I can sue the neighbor now for the encroachment I've come to learn exists." Neither CR 15(c) or CR 17(a) allows such a result.

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.

BP's status as a judgment creditor gave it a lien against CSSS's property, but not right, title, possession or ownership of the property. For that, BP had to purchase the property at Sheriff's sale. To this day, BP has not done that. As a result, BP does not own the claims on which it is suing, and therefore lacks standing to assert the claims. The trial court should have granted defendants' motions for summary judgment and dismissed the case. MOE asks this court to reverse the trial court and dismiss BP's suit against it.

Dated this 29th day of June, 2010.

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

Appendix A

1 written material.

2 MR. GOSSELIN: Okay.

3 THE COURT: Well, this is one of the most
4 interesting and difficult motions I've had to wrestle
5 with. It's that way because I think both parties are
6 right that based on what's happened in King County, the
7 interruption of the sheriff's sale, the adverse
8 decision, which also happens to be the determinative
9 decision, is before the Court of Appeals in Division I,
10 and if that decision affirms what the King County
11 Superior Court judges ruled, then there is no standing
12 and the case should be dismissed here as well. But I am
13 concerned that it is at least debatable, even if not
14 more likely than not, but debatable, it's a debatable
15 issue, whether or not that case was properly dismissed
16 in King County and the sheriff's sale interrupted. And
17 if the Court of Appeals should turn it around, then the
18 parties should be able to go to the issue on the merits
19 and not have the suit discussed on a technicality, maybe
20 a big technicality insofar as standing and the statute
21 of limitations are concerned, but still on procedure
22 grounds instead of on the substantive merits of the case.

23 So I listened closely as to what the prejudice would
24 be here, and the prejudice I hear is that, well, we have
25 a right to have the statute of limitations enforced the

1 same as anybody else and that the passage of time alone
2 works a prejudice. That's true, but I'm not sure that's
3 what I would call undue prejudice. The prejudice if I
4 don't grant the stay is the whole matter is dismissed on
5 a procedural issue, which that's why we have rules is so
6 that we can count on procedural issues, but it isn't
7 abstract because concretely the Court of Appeals in
8 Division I has the determinative issue under
9 consideration, and I don't see where there is great
10 prejudice to wait and see what they do.

11 So I'm going to delay ruling on the summary judgment,
12 grant the stay, but I'm going to stay the entire suit so
13 that those parties who otherwise I think would prevail
14 here don't have to defend any more, so I'm not going to
15 allow Berschauer Phillips for instance to run up bills
16 or prosecute issues by discovery and so on so that we
17 just wait and see what the Court of Appeals does and not
18 put the defendants to any more attorney's fees or legal
19 costs until we get a decision from the Court of Appeals,
20 and then I haven't ruled against counsel's motion about,
21 well, even if they win, there's a statute of limitations
22 issue. That's when I think I should address that if
23 that's still on the table, and would be on the table.
24 I'm not making a ruling on that. I'm not making any
25 negative rulings on the motion for summary judgment, so

1 on any of their theories. I just think this matter
2 would be very easily determined. If the Court of
3 Appeals upholds what was done in King County, I think
4 this case is over.

5 MR. GOSSELIN: Your Honor, I was going to ask
6 for a clarification also. Our motion was brought before
7 the order to quash the writ was either brought or
8 decided.

9 THE COURT: Insofar as the earlier order I
10 granted which was never reduced to writing? Is that the
11 one you're talking about?

12 MR. GOSSELIN: No, no. This is a separate
13 issue. What I'm saying is we -- both parties filed
14 their motion before the order -- the motions to quash
15 were decided, before the King County court decided that
16 Berschauer Phillips couldn't go forward with its
17 execution proceedings. And the reason we brought our
18 motion was we argued that the lawsuit was a nullity from
19 its inception because Berschauer Phillips didn't yet own
20 the claims. Once they owned the claims, they could then
21 file suit. Now what Your Honor seems to be saying is
22 suppose the Court of Appeals reverses the decision,
23 gives them the right to then acquire ownership and
24 Berschauer Phillips actually follows through and obtains
25 that ownership. What my question is, and what I'd like

1 clear for the record, because with due respect, this is
2 likely to go up, if Berschauer Phillips subsequently
3 acquires ownership of these claims, is Your Honor saying
4 that the initial filing was in fact correct? And if
5 you're not saying that, why can't we have dismissal now?
6 Because they -- we were entitled to it whether or not
7 the King County proceeding moved forward as it did.

8 THE COURT: At the risk of mis-speaking and
9 being contradictory, I'm not going to respond to that.
10 I don't know in my mind that if Berschauer Phillips is
11 successful in getting the Court of Appeals to turn
12 around what happened in King County that after I read
13 whatever language they use that I might not have a whole
14 new perspective or view, or whoever's sitting here have
15 that view based upon what they read. I don't think any
16 of your arguments have been frivolous or silly. I hope
17 you understand that. I'm more concerned about there is
18 a debatable issue. It looks like a determination of
19 this issue is before the Court of Appeals which would
20 settle this on the merits, and I'd like to let that
21 happen before making a decision here. Frankly, if I
22 thought -- and you lay this, and not without good
23 reason, at the feet of Berschauer Phillips, why didn't
24 they move quicker, because I think I can say with
25 integrity on the record if we were six months away, not

1 from the end of the statute of limitations, but from
2 when it began to run, I might very well have granted
3 this motion and let them take their chance as to whether
4 they could get a stay from the Court of Appeals or
5 result prior. I don't think your arguments are silly,
6 but I'm uncomfortable when there's a debatable issue
7 that's determinative, and that if I don't stop this from
8 continuing to unfold until we get that result, that I've
9 locked somebody out by a technicality or procedural
10 issue when they would have had the possibility of a
11 result on the merits. And I just say the "possibility"
12 of a result on the merits.

13 MR. GOSSELIN: And I'm just trying to make sure
14 that I'm clear because my position has been that that
15 debatable issue that's on appeal isn't determinative in
16 this action. We're in -- Mutual of Enumclaw is entitled
17 to dismissal regardless of what happened in the Court of
18 Appeals.

19 THE COURT: My understanding is that's been your
20 position from the start.

21 MR. GOSSELIN: Okay.

22 MR. KUGLER: Your Honor, my point of
23 clarification, there are claims against my client that
24 don't have anything to do with claims being asserted
25 through CSS. We have heard that Berschauer Phillips is

1 making claims directly in its own name. The King County
2 rulings on whether or not Berschauer Phillips can buy
3 claims against -- of CSS and assert them has nothing to
4 do with those claims. And I'm wondering -- the
5 rationale that you've given for not -- for staying this
6 matter as to claims that could be asserted through CSS
7 doesn't seem to apply to claims asserted against Faller
8 in Berschauer Phillips's own name. There isn't -- no
9 matter how the court Division I rules on that, it isn't
10 going to affect those claims, and so I don't -- that's
11 where the real prejudice to my client is is in delaying
12 her ability to address those claims. Can we just stay
13 claims that are asserted through CSS and proceed with
14 claims that are asserted in Berschauer Phillips's own
15 name?

16 THE COURT: I don't see the utility in parsing
17 this out, but I was interested in that, and that's why I
18 invited you to show me how Ms. Faller would somehow be
19 prejudiced if we just put this matter on the shelf until
20 the principal brouhaha, without meaning to trivialize
21 it, the principal disputed matter is determined. Her
22 interests are separate to some extent. I understand
23 that. But why should we run up her attorney's fees when
24 this whole thing may go away? I don't even see that as
25 being in her own best interest. So I'm not going to say

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any more. That's as far as I'm going to go.

MR. KUGLER: Thank you, Your Honor.

MS. BIRD: Thank you, Your Honor.

MR. GOSSELIN: Thank you, Your Honor.

Appendix B

Superior Court of the State of Washington
For Thurston County

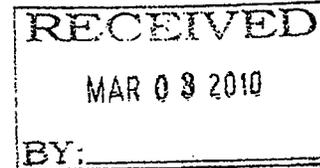


Paula Casey, Judge
Department No. 1
Thomas McPhee, Judge
Department No. 2
Richard D. Hicks, Judge
Department No. 3
Christine A. Pomeroy, Judge
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Carol Murphy, Judge
Department No. 8

March 1, 2010



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ORDER DENYING RECONSIDERATION

Re: *Berschauer Phillips Construction. v. Mutual of Enumclaw*
Thurston County No. 08-2-02538-9

Dear Counsel:

This case was filed on October 31, 2008. On February 13, 2009, defendants' motion to dismiss was denied. On May 15, 2009, a Case Schedule Order was entered. On October 16, 2009, the scheduled trial was continued. On January 22, 2010, a motion to stay was filed by the plaintiff and motions for summary judgment filed by the defendants (some motions were filed later than others). All of the matters were consolidated for hearing on February 19, 2010. After considering all the briefing and oral arguments, the court entered a stay of proceedings on that date. On February 26, 2010, all three defendants moved for Reconsideration.

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Pursuant to CR 59 motions for reconsideration may be filed within 10 days of filing of the written order. The ten days would run on March 1, 2010, so this motion is timely filed.

The standards for a motion for reconsideration are set out in LCR 59:

LCR 59 MOTIONS FOR RECONSIDERATION / REVISION

(1) Procedures

(A) Civil and Criminal Orders. At the time a motion for reconsideration is filed, working copies of the motion, brief, affidavit, proposed order, and notice of issue shall be provided to the judge's judicial assistant. All briefs and materials in support of a motion for reconsideration shall be filed at the time the motion is filed. At the time of filing, the motion for reconsideration shall be noted for a hearing to be held within 14 days. Briefs and materials in opposition to a motion for reconsideration, and reply briefs and materials shall be filed in accordance with LCR 5(b)(2). Each judge reserves the right to strike the hearing and decide the motion without oral argument. At the time of filing, the clerk of the court shall provide a copy of the first page of all motions for reconsideration to the judicial assistant for the assigned judge.

* * * * *

(3) Standards. Motions for reconsideration are disfavored. The court will ordinarily deny such motions in the absence of a showing of manifest error in the prior ruling or a showing of new facts or legal authority which could not have been brought to its attention earlier with reasonable diligence.

There is law and there is equity. Today we do not so clearly partition the two and nest them together under the modern rules. As the court explained at the hearing, the situation presented posed an equitable issue. Based on the ruling, now under active appeal, of the King County Superior Court, plaintiffs do not have standing – but that ruling is not yet final. Plaintiff cannot prevail unless they obtain standing by prevailing in the case now under review by Division I of the Court of Appeals. However, because the Statute of Limitations has run no re-filing of the case is possible if the Court of Appeals rules in their favor, and it should turn out that they do have standing; time will have barred hearing their claim on the merits.

This dispositive issue of standing is currently under review by the Court of Appeals. Whether plaintiff will prevail or not, and thus acquire standing, is a debatable issue. This will be the first appellate ruling in Washington on this precise issue, though there is *dictum* in a Ninth Circuit case that such standing might exist under Washington law.

Because standing is a debatable issue, and no undue prejudice has been shown to the defendants, it is more equitable to allow the case to be stayed,

and then proceed on the merits. It is hoped that the Court of Appeals will announce the law – which is now disputed. While a higher court has this very issue under consideration it is prudent for this court to wait and follow their ruling.

Defendants' motions reargue what has already been argued. Their motions present no new factual considerations that might not have been available at earlier hearings. There is no manifest error, nor, is any legal authority cited which could not have been brought to the court's attention earlier with reasonable diligence.

The motions for reconsideration are denied, the hearing is stricken, and the plaintiff need not further respond.

Sincerely,

A handwritten signature in black ink, appearing to read "R. D. Hicks", written over a circular stamp or seal.

Richard D. Hicks
Superior Court Judge

RDH/dkr

cc: Original filed in Thurston County No. 08-2-02538-9

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION TWO

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.

NO. 40431-1-II

DECLARATION
OF SERVICE

FILED
COURT OF APPEALS
10 JUN 29 PM 3:52
STATE OF WASHINGTON
BY
UTILITY

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

1. BRIEF OF PETITIONER MUTUAL OF ENUMCLAW INSURANCE COMPANY;
2. MUTUAL OF ENUMCLAW'S SUPPLEMENTAL DESIGNATION OF CLERKS' PAPERS

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:

DECLARATION OF SERVICE

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Clement and Drotz:

Joel Wright
Michelle A. Corsi
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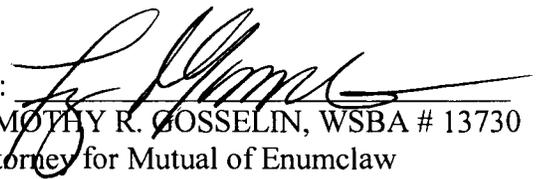
Counsel for Co-Defendant

Faller:

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

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 29th day of June, 2010.

By: 

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

DECLARATION OF SERVICE

GOSSELIN LAW OFFICE, PLLC
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