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NO. 64812-8-I

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

**(King County Superior Court No.
04-2-05087-1-SEA)**

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FILED
COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

Berschauer Phillips Construction Co.,

Appellant (Plaintiff)

v.

**Concrete Science Services of Seattle LLC
d/b/a Concrete Services NW, et al.,**

Respondents (Defendants)

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

Appellant, Berschauer Phillips Construction Co. (“BP”), made its arguments in its opening brief. Respondents, Mutual of Enumclaw Insurance Company (“MOE”), Ms. Jennifer Faller, and Mr. W. Scott Clement and Mr. John E. Drotz, largely ignore those arguments in their response briefs and argue oranges when apples are in question. They also cite to new Washington caselaw that helps BP’s position.

II. STATEMENT OF THE CASE

All of Respondents’ statements of the case, in their response briefs, ignore some very important facts. At the time Concrete Science Services of Seattle, LLC (“CSS” – a Minnesota limited liability company and BP’s subcontractor), dissolved, it knew – through its principal, Jennifer Faller – that it had debts, obligations, and liabilities to BP and neither paid them, made arrangements for paying them, nor notified BP that it was dissolving.

Ms. Faller herself, in a sworn declaration, set forth facts showing that she knew, at the time that CSS breached its contract with BP and damaged other work at the Redmond Junior High School, that CSS had damaged BP by CSS’s breach and by its damage to other work: *see, generally*, CP 105-27, *especially* CP 120, where Ms. Faller, of CSS,

writes, "I called Bob and ED [from BP] on their cell phones [regarding the failure and CSS's unsuccessful attempt to fix the failure] and left messages. By then they all had left and were so dejected that they did not return my calls. I finally spoke to one of them later that day, I was told that the decision to open the school without staining had been made and there was no time for discussions."

Despite Ms. Faller's knowledge of CSS's debts, obligations, and liabilities to BP, on July 1, 2003, CCS's manager, Mr. Hicks, dissolved the company and also executed CSS's Articles of Termination. The articles stated "All known debts, obligations, and liabilities of the Company have been paid and discharged or adequate provision therefor has been made." CP 615. This statement was untrue: despite Ms. Faller's knowing that CSS's work had failed and damaged other property and that CSS's attempt to fix the failure had also failed, CSS had made no provision for payment of its debts, obligations, and liabilities to BP.

BP brought suit against CSS and other defendants, filing its amended complaint on March 17, 2004, less than one year after the Notice of Dissolution was executed. CP 35. This was in accordance with Minnesota law. Minnesota law specifically provides that when a limited liability company like CSS "*has not paid or provided for all known creditors and claimants at the time articles of termination are filed,*" that

a person must file a claim or pursue a remedy within two years of the date of the filing of the notice of dissolution. Minn. Stat. 322B.82 (subd. 3(b)) (emphasis added).

The Minnesota statute cited by Ms. Faller in her “Statement of Fact”, Minn. Stat. 322B.863, is inapplicable. *See* Faller Response at p. 5. Minn. Stat. 322B.863 (subd. 2) concerns limited liability companies who have filed articles of termination with the Minnesota Secretary of State *after* having “made or provided for” the payment of “claims of all known creditors and claimants.” CSS did not. Likewise, Minn. Stat. 322B.863 (subd. 3) concerns debts, obligations, and liabilities “incurred in the course of winding up and terminating the limited liability company’s affairs.” CSS’s debts, obligations, and liabilities to BP were incurred when CSS was acting as BP’s subcontractor, before the winding-up process began. (*See below* for argument on why Minn. Stat. 322B.863 is inapplicable).

III. ARGUMENT

A. BP Argued Minnesota Law Below

Respondents are incorrect in stating that “in opposition to the motions to quash, BP did not cite to or brief Minnesota law.” *See* Messrs. Clement’s and Drotz’s Response at 12. There were three motions to quash and three responses. Messrs. Clement and Drotz did not cite to Minnesota

law in their motion to quash. CP 428-443. Accordingly, BP did not cite to Minnesota law in its response to Messrs. Clement's and Drotz's motion. However, both Ms. Faller and MOE cited to Minnesota law in their motions to quash. CP 639 and 656. In response to Ms. Faller's motion, BP argued and quoted Minnesota law but did not give the citation. CP 839. In response to MOE's motion, BP argued, quoted, and cited Minnesota law. CP 846. In oral argument on Ms. Faller's and MOE's motions (there was no oral argument on Messrs. Clement's and Drotz's motion), BP argued Minnesota law. Verbatim Report of Proceedings (Feb. 9, 2010) at pp. 21-23, 28.

B. BP is the Type of Claimant Contemplated by Minnesota Law

Respondents argue that BP did not become a creditor of CSS until the default judgment was entered against CSS, and that therefore CSS was not required, under Minnesota law, to pay or make provision for its debts, obligations, and liabilities to BP upon its dissolution and before filing the articles of termination. Respondents also argue that BP did not become a claimant until it filed the lawsuit against CSS, after CSS filed its untruthful Articles of Termination. Both are incorrect. BP became a *judgment creditor* of CSS upon the entry of the default judgment, but before that, and before CSS filed dissolution or filed its untruthful Articles

of Termination, BP was owed “debts, obligations, and liabilities” from CSS when CSS injured BP by breach and by damaging other work. Therefore, BP is indeed the kind of “creditor or claimant” that is contemplated *and protected* by Minnesota law.

Minn. Stat. 322B.82, concerning the Articles of Termination that a limited liability company files when it is *not* giving notice to creditors or claimants has three separate requirements for the contents of the Articles of Termination. First, the Articles of Termination must state: “that all known debts, obligations, and liabilities of the limited liability company have been paid and discharged or that adequate provision has been made for payment or discharge.” Minn. Stat. 322B.82 (subd. 2 (1)). The second requirement does not concern us, but the third requirement is that the Articles must state “that there are no pending legal, administrative, or arbitration proceedings by or against the limited liability company.” Minn. Stat. 322B.82 (subd.2 (3)). The Minnesota statute itself therefore distinguishes between “debts, obligations, and liabilities” and “pending legal, administrative, or arbitration proceedings.” Simply because BP had not yet filed its lawsuit did not mean that its claims for the debts, obligations, and liabilities that CSS owed it were any less real. CSS knew of its debts, obligations, and liabilities to BP – Ms. Faller’s own

declaration shows that. BP was thus a “known” creditor or claimant and is protected by Minn. Stat. 322B.82.

And BP’s lawsuit, filed in King County Superior Court around six months after CSS filed its untruthful Articles of Termination, was proper. Minn. Stat. 322B.82 (subd. 3(b)) specifically provides for the instance that a limited liability company like CSS could file untruthful Articles of Termination where it stated that it had paid or provided for payment of debts, obligations, and liabilities but in fact had not. In such a case, a creditor or claimant like BP can “file a claim or pursue a remedy in a legal, administrative, or arbitration proceeding within two years after the date of filing the notice of dissolution.” If BP had not filed a claim or pursued a remedy within two years, BP would be “barred from suing on that claim or otherwise realizing upon or enforcing it, except as provided in section 322B.863.” This section, of course, is the section that Respondents argue that BP should have followed.

Minn. Stat. 322B.863, which provides for going after the managers, members, and officers of a company rather than after the company itself, is what Respondents are arguing BP should have done. *See Faller Response at 5.* However, since BP filed suit against CSS within two years of the CSS’s filing the untruthful Articles of Termination, where

CSS stated it had either paid or made provision for paying all debts, obligations, or liabilities, BP has no need to rely on Minn. Stat. 322B.863 (which also, on its face, appears to apply to cases where the Articles of Termination were truthful, not untruthful). BP properly filed its lawsuit against CSS under Minn. Stat. 322B.82 (subd. 3(b)).

C. Under Minnesota Law a “Terminated” Company Continues in Existence When a Lawsuit is Filed

Since Minn. Stat. 322B.82 (subd. 3(b)) allows a lawsuit against a limited liability company that has filed untruthful Articles of Termination, that is, against a “terminated” limited liability company, that means that such a company continues in existence in at least certain respects when a lawsuit is filed. Whether this is best expressed by stating that the untruthful Articles of Termination were “void,” or by stating that the company is “terminated,” but continues in existence for the purpose of the lawsuit is immaterial. The fact is that CSS was and is still in existence. BP filed the lawsuit and got a default judgment against CSS which it successfully defended against a very tardy motion to vacate and an appeal, during the course of which CSS’s principal, Jennifer Faller, insurance company, MOE, and attorneys, Messrs. Clement and Drotz, injured CSS

by breaching duties they owed to CSS.¹ In injuring CSS, Ms. Faller, MOE, and Messrs. Clement and Drotz gave rise to choses in action that CSS had against them. These choses in action are CSS's personal property.

In its opening brief, BP cited to binding Minnesota caselaw that stands for the proposition that a dissolved limited liability company may still acquire property. Minnesota, like Washington, is a state that incorporated many partnership principles in its law and caselaw on limited liability companies. Hurwitz v. Padden, 518 N.W.2d 359, 362 (Minn. Ct. App. 1998). And under both partnership law and LLC law in Minnesota, “the entity is not terminated upon dissolution, but continues until all business issues are resolved.” Hurwitz, 518 N.W.2d at 362. And here, despite the untruthful Articles of Termination, all of CSS's business issues are not yet resolved. BP, in accordance with Minn. Stat. 322B.82 (subd.

¹ These injuries that Ms. Faller, MOE, and Messrs. Clement and Drotz inflicted on CSS and that accrued during the course of the lawsuit matured and ripened later; this Court did not affirm the default judgment until July 30, 2007, less than two years before BP filed its complaint on CSS's choses in action against MOE and less than two years before BP filed its amended complaint on CSS's choses in action against Ms. Faller and Messrs. Clement and Drotz (including BP's own piercing-the-veil claims against Ms. Faller).

3(b)), filed suit against CSS within two years of the untruthful Articles of Termination. During the course of that lawsuit, choses of action accrued to CSS through the breaches of its principal, Ms. Faller, the insurance company, MOE, and the attorneys, Messrs. Clement and Drotz.

D. The Choses are the Personal Property of CSS, Not of its Members

It is BP's position that this personal property of CSS – the choses in action – that did not accrue until after the untruthful Articles of Termination were filed and that did not mature until this Court affirmed the order of default – were not in existence on July 1, 2003, and were not distributed by the July 1, 2003 distribution of assets that CSS made to its members. Since CSS remained in existence, pursuant to Minnesota law, with BP's filing its lawsuit against CSS, these choses of action are the personal property of CSS and are properly subject to execution, levying, and setting for Sheriff's sale by BP, CSS's judgment creditor. They did not pass to CSS's members. *See, e.g.*, Minn. Stat. 322B.87 "Omitted Assets." "Title to assets remaining after payment of all debts, obligations, or liabilities and after distributions to members may be transferred by a court in this state." It appears that under Minnesota law, assets of a terminated LLC do not pass to anyone without some sort of action, whether via payment, distribution, or court order.

But even if Respondents are correct and CSS's choices of action would, under the ordinary course (absent untruthful Articles of Termination and a properly filed lawsuit by BP against CSS) pass to a terminated limited liability company's members even without an official distribution by the manager of the company to the members, these choices in action are still property subject to the claims of CSS's creditor, BP. A recent Washington case cited by Respondents deals with just that question: a Washington limited liability company did not properly dissolve and its manager did not formally distribute the assets of the company to its members. *See Sherron Associates Loan Fund v. Saucier*, 157 Wn. App. 357, 237 P.3d 338 (2010).

The Division III Court of Appeals, after noting that "the question presented here is one left unanswered by Washington's limited liability company act, chapter 25.15 RCW," held that undistributed assets and liabilities "of a dead LLC pass to its owners," even without a formal distribution. *Sherron*, 157 Wn. App. at 361; 364.² But, however, under

² This question may have been left unanswered by Washington's limited liability company act but not by Minnesota's: *see, e.g.*, Minn. Stat. 322B.87 "Omitted Assets", "Title to assets remaining after payment of all debts, obligations, or liabilities and after distributions to members may be transferred by a court in this state."

this scheme, there is still one very important caveat. The Washington court held: “In the absence of a governing statute, title to LLC-owned property passes to the owner of the cancelled LLC subject to creditor claims.” Sherron, 157 Wn. App. at 363. BP is CSS’s judgment creditor. CSS’s personal property, including the choses of action against Ms. Faller, MOE, and Messrs. Clement and Drotz, is subject to BP’s claims. And here, BP has several times executed and levied on the choses, and likely would have purchased them at Sheriff’s sale, had not Messrs. Clement and Drotz, Ms. Faller, and MOE moved to quash the writs of execution and strike the sales.

E. The Owner of the Choses May Sue on Them

Respondents argue that only CSS’s former managers, governors, or members may sue on CSS’s choses. They argue this pointing to Minn. Stat. 322B.866. However, this statute does not use the word “only” (what *is* important about this statute is that it allows suit to be filed on a dissolved Minnesota limited liability company’s choses in action even after termination). And BP, in its opening brief, cited to caselaw relied upon by the Minnesota Court of Appeals that stands for the proposition that assignees of a dissolved business entity’s choses in action are proper parties to maintain a lawsuit on the choses formerly owned by the

dissolved business entity. See Pagan v. Sparks, 18 F. Cas. 976, 2 Wash. C.C. 325, No. 10659 (C.C. Pa. 1808) and Daby v. Ericsson, 6 Hand 786, 45 N.Y. 786 (N.Y. 1871), relied upon by Lamborn & Co. v. United States, 106 Ct. Cl. 703, 65 F.Supp. 569 (1946), itself relied upon by Faegre & Benson, LLP v. R & R Investors, 772 N.W.2d 846, 853 (Minn. Ct. App. 2009) (“This winding-up process could encompass pursuit of and recovery on an outstanding legal claim”). BP, upon acquiring the choses, may, just like the assignees in Pagan and Daby, pursue and recover on CSS’s outstanding legal claims against its former principal, Ms. Faller, its insurance company, MOE, and its attorneys, Messrs. Clement and Drotz.

F. This Court Should Do Equity

BP repeats its arguments it made in its opening brief: BP was damaged by CSS’s breaches and by CSS’s damage to other work. CSS knew it had breached, knew that BP was damaged, but made no provision for payment to BP. Instead, CSS filed untruthful Articles of Termination stating that it had paid or made provision for payment for all its debts, obligations, and liabilities. CSS had insurance with MOE during the time that CSS damaged BP’s work and breached the contract, insurance that would have covered BP’s claims. When BP sued CSS, Ms. Faller, CSS’s principal, knew of the lawsuit but did not notify MOE nor help CSS defend the lawsuit in any way. This inaction by Ms. Faller was

detrimental to CSS (the company that Ms. Faller owned was not the only member of CSS). When, after BP obtained an order of default and default judgment against CSS, and notified MOE, MOE undertook a defense of CSS in bad faith. It hired counsel, Messrs. Drotz and Clement, who were dilatory and waited a full ten months before filing a motion to vacate, an unreasonable delay. These actions by MOE and Messrs. Drotz and Clement were detrimental to CSS.

CSS could have maintained actions against its principal, Ms. Faller, and against MOE and Messrs. Drotz and Clement in an effort to obtain funds with which to satisfy BP's judgment against CSS. CSS has not. The judgment unsatisfied, BP, the judgment creditor, executed and levied on those choses in action that accrued during BP's own lawsuit.

BP believes that its arguments, above, are sufficient for this Court to decide as a matter of law that CSS, a dissolved Minnesota limited liability company, has property on which BP can execute. However, equity is on BP's side as well. Minn. Stat. § 322B.833, Subd. 1 (3)(i) states: "A court may grant any equitable relief it considers just and reasonable in the circumstances...(3) in an action by a creditor when: (i) the claim of the creditor has been reduced to judgment and an execution on the judgment has been returned unsatisfied" (this statute is not confined to pre-termination proceedings). That is what happened here. BP's claim

has been reduced to judgment, BP as judgment creditor executed, levied, and set for Sheriff's sale the choses in action, and then, after the King County Superior Court quashed the writs and struck the Sheriff's sale, the Thurston County Sheriff returned the execution unsatisfied. CP 863-935. This Court should do equity.

G. The Choses in Action Are Property Upon Which Execution is Possible

It truly appears that Respondents MOE, Ms. Faller, and Messrs. Clement and Drotz have failed, in their responses, to address the arguments that BP made in its opening brief on the issue of whether the choses were personal property subject to execution. Rather, the arguments that they made were ones that BP anticipated in its opening brief and already addressed. BP therefore stands on its arguments that it made in its opening and will highlight them only briefly.

Washington's execution statute allows execution on "unliquidated tort claims even if of dubious value." RCW 6.17.090; Woody's Olympia Lumber, Inc. v. Roney, 9 Wn. App. 626, 633, 513 P.2d 849 (1973). CSS's choses in action on which BP executed and levied are just such unliquidated tort claims. The claims are not too uncertain; the one Washington case that has held tort claims to be too uncertain for execution was United Pac. Ins. Co. v. Lundstrom, 77 Wn.2d 162, 459 P.2d 930

(1969). There, the value of the judgment that had already been rendered could not be mathematically calculated before some future event happened. This case is distinguishable. The value of any judgment on CSS's chases against Ms. Faller, MOE, and Messrs. Clement and Drotz will be based on events that have happened in the past, not events yet to happen in the future.

Washington has forbidden the assignment of legal malpractice claims against attorneys, not claims against insurance companies or a limited liability company's own principal. But while Washington has forbidden the assignment of legal malpractice claims, it has not forbidden execution on legal malpractice claims. In fact, the seminal case forbidding assignment of legal malpractice claims, Kommavonsga v. Nammathao, 149 Wn.2d 288, 67 P.3d 1068 (2003), specifically affirmed the legal reasoning in a Ninth Circuit case interpreting Washington law (which itself is persuasive authority) that distinguished between assignment and execution and allowed execution on legal malpractice claims.

Kommavonsga, 149 Wn.2d at 317, n. 7, approving of Ikuno v. Yip, 912 F.2d 306 (9th Cir. 1990). The public policy arguments against assignment of legal malpractice claims do not apply in the case of execution of legal malpractice claims, and do not apply in the case of execution of claims

against an insurance company or against a limited liability company's own principal.

H. Attorney Fees

In their response brief, Messrs. Clement and Drotz seek an award of attorney fees from BP under RCW 4.84.185 and CR 11. They make no argument stating that either the rule or the statute apply here. And they do not. BP's argument is serious, well-reasoned, and supported by Washington and Minnesota law. This Court should deny the request.

V. CONCLUSION

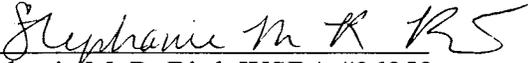
BP was injured by CSS's breaches and its damage to other work. CSS failed to pay its obligations, liabilities, and debts to BP and filed untruthful Articles of Termination stating that it had. BP has a remedy, however, which it exercised. It filed suit against CSS with the two years allowable under Minnesota law after a company has filed untruthful Articles of Termination. Because of the actions and inactions of CSS's principal, Ms. Faller, its insurance company, MOE, and its attorneys, Messrs. Clement and Drotz, CSS paid nothing to BP, despite having had entered against it a default judgment for over \$300,000. But again, BP has a remedy. CSS has acquired, during the course of the lawsuit, choses of action against Ms. Faller, MOE, and Messrs. Clement and Drotz, choses of

action that are subject to execution by BP, the judgment creditor, being neither too uncertain nor barred by Washington's prohibition against assignment of a legal malpractice claim.

Unfortunately, Ms. Faller, MOE, and Messrs. Clement and Drotz all moved to quash BP's properly obtained writs of execution on the choses, which motions the King County Superior Court erred in granting. This Court should reverse the King County Superior Court and reinstate the writs and the Sheriff's sale.

SUBMITTED this 18th day of October, 2010.

CUSHMAN LAW OFFICES, P.S.


Stephanie M. R. Bird, WSBA #36859
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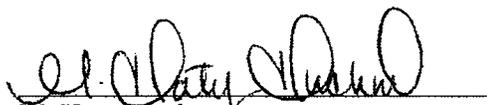
CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on October 18, 2010, I caused to be served a true copy of the foregoing Motion, by the method indicated below, and addressed to each of the following:

Original/Copy:	Court of Appeals, Division I One Union Square 600 University Street Seattle, Washington 98101-4170	<input type="checkbox"/> U.S. Mail, Postage Prepaid <input checked="" type="checkbox"/> HAND DELIVERY <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile
Copy:	Timothy R. Gosselin Gosselin Law Office, PLLC 1901 Jefferson Avenue, Suite 304 Tacoma, WA 98402	<input type="checkbox"/> U.S. Mail, Postage Prepaid <input checked="" type="checkbox"/> Legal Messenger <input type="checkbox"/> Overnight Mail <input checked="" type="checkbox"/> Electronic Mail
	John T. Kugler Burgess Fitzer, P.S. 1145 Broadway, Suite 400 Tacoma, WA 98402	<input type="checkbox"/> U.S. Mail, Postage Prepaid <input checked="" type="checkbox"/> Legal Messenger <input type="checkbox"/> Overnight Mail <input checked="" type="checkbox"/> Electronic Mail
	Michelle A. Corsi Lee Smart 701 Pike St Ste 1800 Seattle, WA 98101-3929	<input type="checkbox"/> U.S. Mail, Postage Prepaid <input checked="" type="checkbox"/> Legal Messenger <input type="checkbox"/> Overnight Mail <input checked="" type="checkbox"/> Electronic Mail

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DATED this 18th day of October, 2010 in Olympia, Washington.


 M. Katy Kuchno
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