

No. 68259-8-I

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

BERSCHAUER PHILLIPS CONSTRUCTION CO.,
a Washington State Corporation,

Plaintiff/Appellant,

vs.

MUTUAL OF ENUMCLAW INSURANCE COMPANY,
an insurance company;

Defendants/Respondent

APPELLANT'S REPLY BRIEF

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I. SUMMARY OF ARGUMENT IN REPLY

Respondent Mutual of Enumclaw (“MOE”) knows that neither res judicata nor collateral estoppel apply in this case. Appellant Berschauer Phillips Construction Co.’s may maintain its own direct claims against MOE arising out of the insurance policy whereby MOE insured Berschauer Phillips’ judgment debtor, Concrete Science Services of Seattle, LLC.

Knowing that neither doctrine applies, MOE has focused its argument in the response on “spinning” the facts in the previous cases and ignoring their real import: this Court has decided, first, that Berschauer Phillips could not execute on and subsequently purchase at sheriff’s sale any choses of action possessed by Concrete Science against its insurer, MOE, because Concrete Science has dissolved and possesses no choses of action; and, second, that lacking Concrete Science’s choses of action, Berschauer Phillips lacked standing to sue MOE in Concrete Science’s shoes, and that therefore Thurston County Superior Court lacked subject matter jurisdiction to hear the case. The case where Berschauer Phillips attempted to sue MOE on Concrete Science’s choses was never heard.

Now, Berschauer Phillips is suing MOE in its *own* shoes and making its own direct claims against the insurer arising out of the insurance policy, a document that MOE refused to produce to Berschauer

Phillips. This case is not barred by res judicata or by collateral estoppel and this Court should look past MOE's "spin" and reverse and remand.

II. REPLY TO COUNTER-STATEMENT OF THE ISSUES

1. Where a defendant in a case has prevented a plaintiff from learning that the plaintiff has a basis for standing, which basis the plaintiff independently discovers after an appellate court decision, is a subsequent lawsuit in which the plaintiff asserts the new and different basis for standing and makes different claims a collateral attack on any prior decision? *No.*
2. Does either res judicata or collateral estoppel apply to block a subsequent lawsuit in which the plaintiff asserts a different basis for standing and asserts different claims, after the previous lawsuit was dismissed for lack of subject matter jurisdiction and the matter was never heard or decided? *No.*

III. REPLY TO COUNTER-STATEMENT OF THE CASE

MOE's Counter-Statement of the Case strays into argument. MOE complains that Berschauer Phillips "misquotes" from the insurance policy (that MOE refused to produce to Berschauer Phillips, preventing Berschauer Phillips from discovering it possessed its own direct claims against MOE, until Berschauer Phillips independently discovered the insurance policy language). In fact, Berschauer Phillips accurately quotes

from the insurance policy. Every single quotation in any written work, by definition, omits material on either side of the quoted work. What is reprehensible is to omit so much material from a quotation that the meaning is changed. This is what MOE accuses Berschauer Phillips of doing. In fact, the words on either side of the quoted insurance policy language do not change the meaning of the language. This language **gave Berschauer Phillips a direct right to sue MOE** and MOE deliberately and repeatedly refused to produce the insurance policy to Berschauer Phillips, preventing Berschauer Phillips from discovering the basis for this lawsuit until Berschauer Phillips discovered it entirely independently. CP 425. And what is the language?

“A person or organization may sue us to recover on an agreed settlement or on a final judgment against an insured obtained after an actual trial.”

CP 430. And what of the material on either side of this quote? It basically says that Berschauer Phillips can't sue MOE unless Concrete Science, the insured, complied with the terms of the insurance policy. This, respectfully, is immaterial to the question of whether res judicata or

collateral estoppel apply to block Berschauer Phillips from maintaining its own direct claims against MOE.

What it is germane to, however, is the question of MOE's affirmative defenses against just such direct claims from Berschauer Phillips. Under ordinary circumstances, MOE could raise, as an affirmative defense, the fact that its insured, Concrete Science, did not tender Berschauer Phillips' claims to MOE for defense and could deny coverage. But these are not ordinary circumstances. MOE is "estopped from denying coverage" because MOE acted "in bad faith in handling a claim under a reservation of rights." Safeco Ins. Co. of Am. v. Butler, 118 Wn.2d 383, 392, 823 P.2d 499 (1992).

MOE is arguing that Berschauer Phillips may not bring its own direct claims against MOE because Concrete Science did not tender. But this argument amounts to the same argument made by Safeco and rejected by our Supreme Court: "Safeco asserts, however, that estoppel cannot be used to expand the scope of insurance contracts. Under Safeco's theory, if [the insured's act] is not covered, then nothing Safeco did [i.e., bad faith defense] could create coverage where it did not exist." Safeco, 118 Wn.2d at 392. But our Supreme Court rejected this argument, holding that estoppel was the remedy that protected against an insurance company's bad faith conduct. Safeco, 118 Wn.2d at 394. MOE is also arguing

(Response at 2) that Berschauer Phillips may not – since it is not the insured, Concrete Science – make bad faith **claims** against MOE. This is a straw-man argument, designed to confuse the issues. Berschauer Phillips is not making any bad faith **claims** against MOE. *See* Complaint, CP 1-2.

Indeed, this very circumstance is but one of the reasons that res judicata and collateral estoppel do not apply here. If Concrete Science were not a dissolved LLC and Berschauer Phillips had succeeded in executing on Concrete Science's choses in action and purchasing them at sheriff's sale, then Berschauer Phillips might properly bring bad faith **claims** against MOE, since it would then be standing in Concrete Science's shoes. And that is precisely what Berschauer Phillips attempted to do in the previous lawsuit. *See* Response at 19, *citing* CP 268.

Here, however, as a judgment creditor suing on its own direct claims pursuant to the insurance policy clause ("A person or organization may sue us to recover on an agreed settlement or on a final judgment against an insured obtained after an actual trial." CP 430), BP is not standing in the shoes of Concrete Science and is not making a bad faith **claim** against MOE. MOE is confusing a bad faith **claim**, wielded as a sword in an action sounding in tort, with the shield of **estoppel**, applicable here since MOE is estopped from denying coverage, in an action sounding

in contract, due to its own bad faith defense of Concrete Science. The cases that MOE cites in its Counter-Statement of the Case provide no support for MOE's argument: Tank v. State Farm Fire & Cas. Co., 105 Wn.2d 381, 394-95, 715 P.2d 1133 (1986) and Planet Ins. Co. v. Wong, 74 Wn. App. 905, 909-10, 877 P.2d 198 (1994) both stand for the proposition that absent an assignment or being the third-party beneficiary of an insurance policy, a non-insured cannot make a bad faith **claim** against an insurance company. But Berschauer Phillips is not making a bad faith claim, as it tried to do when it thought it possessed Concrete Science's choses of action; rather, it is invoking estoppel to MOE's coverage defense based on MOE's bad faith defense of Concrete Science.

And how did MOE defend Concrete Science in bad faith, if Concrete Science did not tender defense to MOE? The answer is simple: after Berschauer Phillips notified MOE of the judgment against its insured, MOE stepped in under a reservation of rights. MOE notified Berschauer Phillips it would attempt to vacate the default judgment. MOE had insurance defense counsel appear on behalf of Concrete Science. "The insurer's duty to defend the insured is one of the main benefits of the insurance contract. The insurer who accepts that duty under a reservation of rights, but then performs the duty in bad faith, is no less liable than the insurer who accepts but later rejects the duty." Safeco, 118 Wn.2d at 392.

And then MOE's insurance defense counsel did nothing for ten full months. CP 243. Finally, MOE's insurance defense counsel made a motion to vacate, which the Trial Court denied. This Court affirmed the denial on many bases, including that the "motion was untimely." CP 243. "The course cannot be rerun, no amount of evidence will prove what might have occurred if a different route had been taken. By its own actions, [the insurer] irrevocably fixed the course of events concerning the law suit for the first 10 months. Of necessity, this establishes prejudice." Transamerica Ins. Group v. Chubb & Son, Inc., 16 Wn. App. 247, 252, 554 P.2d 1080 (1976), *review denied*, 88 Wn.2d 1015 (1977), *quoted and cited* by Safeco, 118 Wn.2d at 391. MOE stepped in after the judgment against Concrete Science, accepted its duty to defend its insured under a reservation of rights, and then performed that duty in bad faith.

Of course, none of this is material to the question of res judicata or collateral estoppel. It appears that MOE, knowing that neither doctrine applies, is making arguments to this Court that it should be making to the Trial Court on remand, in hopes that this Court will subconsciously think, "oh, well, Berschauer Phillips will lose anyway so we might as well affirm the Trial Court." But not only is this line of argument inappropriate, it is wrong as a matter of law. MOE is estopped from denying coverage for Concrete Science's failure to tender, because MOE stepped in and

performed its duty to defend in bad faith. Safeco, 118 Wn.2d at 392.

Berschauer Phillips will **not** lose at the Trial Court level and this Court should reverse and remand because neither collateral estoppel or res judicata apply.

Next, in its Counter-Statement of the Case (and elsewhere in the Response, *see, e.g.*, Response at p. 34 “Berschauer Phillips was too clever by half”), MOE argues that Berschauer Phillips was playing the role of the Artful Dodger and that this Court should overlook the fact that MOE has repeatedly refused to produce the insurance policy that gave Berschauer Phillips the right to sue MOE directly. MOE argues that Berschauer Phillips was trying “to skirt obvious defenses to coverage.” Response at 34; *see also* Response at 3-4. The obvious defense to coverage that MOE is talking about is Concrete Science’s failure to tender. But MOE is estopped from denying coverage because it stepped in and performed its duty to defend in bad faith. The fact is that Berschauer Phillips did not attempt to begin executing on choses of action belonging to Concrete Science until after MOE had stepped in and performed its duty to defend in bad faith. There was no obvious defense to coverage to skirt, because MOE had already, through its own actions, estopped itself from asserting the defense of failure to tender.

MOE also charges that Berschauer Phillips should have asserted its own direct claims against MOE earlier, when MOE was refusing to produce the insurance policy; that argument is without merit. MOE states – without citation – that the clause in the insurance policy that gives Berschauer Phillips the right to sue MOE directly is “a policy provision standard to MOE – and virtually every other insurance policy.” Response at 9. However, this ignores the fact that insurance policies differ and change. “Coverage decisions are policy specific; older policy forms are replaced by newer forms. Consequently, courts and litigants should not mechanically rely upon decisions interpreting older forms.” Thomas Harris, Washington Ins. Law, § 6-11 at 6-34 (3rd ed. 2010). *See also* Declaration of Jon E. Cushman at CP 425:

I did not assert direct claims against MOE on behalf of Berschauer Phillips in the last lawsuit...because at the time of filing the suit I was not aware of any basis in law or fact for any such direct claims. In my experience, I have observed that each insurance policy is different, with different terms (indeed, an insurance policy is a written contract), and I am not aware of any body of law that would permit a direct suit from a judgment creditor against the judgment debtor’s insurance company absent a specific basis therefor in the insurance policy at issue.

As to the rest of MOE’s Counter-Statement of the Case, a few corrections bear noting. The lengthy history of Berschauer Phillips’ attempts to acquire the choses of action of Concrete Science is well-

known to this Court and Berschauer Phillips need not repeat it (*see* Response at 7). These attempts culminated in two decisions from this Court that effectively and finally closed the door on Berschauer Phillips' attempts to acquire the choses of Concrete Science and to sue MOE in Concrete Science's shoes: (1) this Court affirmed the King County Superior Court in quashing the writs of execution on the basis that Concrete Science, a dissolved Minnesota Limited Liability Company, possessed no choses of action on which Berschauer Phillips could execute, and (2) this Court reversed the Thurston County Superior Court's stay of the previous lawsuit on the basis that, lacking Concrete Science's choses, Berschauer Phillips lacked standing to sue MOE in Concrete Science's shoes, and the Thurston County Superior Court lacked subject matter jurisdiction to hear the case. (*Cf.* Response at 8: "[BP] had already prosecuted one claim to completion").

Once this Court had quashed the writs of execution and held that Concrete Science had no choses on which to execute, there was no point in proceeding further against either Concrete Science's former counsel or its principal. Accordingly Berschauer Phillips stipulated to dismiss, with prejudice, the claims against the attorneys Clement and Drotz and Jennifer Fowler [Faller]. Berschauer Phillips did not so stipulate as to MOE, for the reason that it hoped to avoid any argument that the dismissal was on

the merits. This Court will recall that Berschauer Phillips and MOE appeared at oral argument on appeal of the Thurston County case. That appeal culminated in this Court's opinion holding that absent the choses of action, Berschauer Phillips had no standing to sue in Concrete Science's shoes, and that the Thurston County Superior Court lacked subject matter jurisdiction over the case.

It was only after this opinion from this Court that Berschauer Phillips agreed to stipulate to dismissal with MOE. It saved time, effort, and attorney fees to so stipulate, rather than to go through the charade of forcing MOE to bring a motion to dismiss, responding to the motion to dismiss, reading and studying MOE's reply to the motion to dismiss, and then conducting oral argument in front of the Trial Court. Given that this Court had held that the Thurston County Superior Court lacked subject matter jurisdiction, a dismissal was foreordained. And in stipulating to an order of dismissal, MOE and Berschauer Phillips specified that the claims of the parties "in this lawsuit" were resolved (not any other lawsuit) and that the order constituted final judgment "in this matter" (not any other matter).

Recall, too, that by this time Berschauer Phillips had already independently discovered the MOE insurance policy boilerplate language that gave it the right to directly sue MOE. Berschauer Phillips had already

filed its complaint and served MOE. MOE had already appeared in the lawsuit. At the time that MOE's attorney agreed to the language "in this lawsuit" and "in this matter," MOE already knew that Berschauer Phillips had filed this present lawsuit to enforce its own direct claims against MOE.

IV. ARGUMENT

A. Standard of Review

Berschauer Phillips and MOE agree that the standard of review is *de novo*.

B. The Insurance Policy Gives Berschauer Phillips Rights

MOE argues that the insurance policy provision in question does not give Berschauer Phillips the right to sue MOE. While putting aside for the moment that fact that MOE has never yet produced the insurance policy in question – only tacitly admitting to the Trial Court that at least for the purposes of summary judgment the Trial Court could take the boilerplate language that Berschauer Phillips found as being representative of the language in the actual policy wherein MOE insured Concrete Science – that argument is ridiculous. Consider the language Berschauer Phillips found:

“A person or organization may sue us to recover on an agreed settlement or on a final judgment against an insured obtained after an actual trial.”

CP 430. This provision, in black and white, gives Berschauer Phillips the right to sue MOE on its own direct claims. Berschauer Phillips need not obtain writs of execution on Concrete Science’s choses. Berschauer Phillips need not argue that it is a third party beneficiary. Berschauer Phillips need not obtain a writ of garnishment against MOE. This insurance policy provision **gives Berschauer Phillips the right to sue MOE directly**. And MOE concealed this insurance policy provision from Berschauer Phillips, costing needless attorney time and court time.

It is MOE’s argument that is the red herring. The case that MOE cites to, Rones v. Safeco Ins. Co. of Am., 60 Wn. App. 496, 501, 804 P.2d 649 (1991), *aff’d*, 119 Wn.2d 650, 835 P.2d 1036 (1992), contains policy language that is different: “[U]nder the Liability Coverage, no legal action may be brought against us [the insurer] until we agree in writing that the covered person has an obligation to pay or until the amount of that obligation has been finally determined by judgment after trial.” Further, MOE argues, “[I]ts purpose is to eliminate suits against the insurer by persons who have not established legal liability of the insured to them.”

12A G. Couch, Insurance § 45:859 (2d rev. ed. 1981). Here, Berschauer Phillips has already established the legal liability of Concrete Science: it has a judgment!

Further, MOE argues: “The provision gives BP no rights it otherwise did not have. MOE had no reason to hide it from BP.” Response at 12. Actually, MOE did have a reason. (Query: why, to this day, has MOE refused to produce the insurance policy? What else is in there that MOE does not want Berschauer Phillips or the courts to see?).

Most of the methods for enforcing a judgment against a judgment debtor’s insurance company require the judgment creditor to step into the shoes of the judgment debtor. That is what Berschauer Phillips attempted to do when it sought to execute on Concrete Science’s choses and buy them at sheriff’s sale. That is what MOE urged that Berschauer Phillips should have done when it argued to the Trial Court that Berschauer Phillips should have garnished money or property belonging to Concrete Science in the possession of MOE. That is what an assignment of rights would have done, were that even possible in this case. *See* 2 A. Windt, Insurance Claims & Disputes, § 9.11 at 9-45 – 9-46 (5th ed. 2007).

However, **MOE successfully argued, to the King County Superior Court and this Court**, that since Concrete Science is a dissolved limited liability company, it has no choses or rights of action. Imagine if

Berschauer Phillips had obtained a writ of garnishment against MOE: MOE would have argued that in obtaining a writ of garnishment, Berschauer Phillips was standing in the shoes of Concrete Science in proceeding against MOE, and that, as a dissolved Minnesota Limited Liability Company, Concrete Science had no rights or choses against MOE! The same would have happened had Concrete Science attempted to assign claims to Berschauer Phillips after it dissolved.

The other two avenues for enforcing a judgment against an insured's insurance company are **both policy based**: by proceeding as a third-party beneficiary of the insurance contract, or by "proceeding pursuant to the terms of the policy, which sometimes expressly gives a judgment creditor of the insured the right to bring suit." 2 A. Windt, Insurance Claims and Disputes, § 9.11 at 9-47 – 9-48 (5th ed. 2007). As long as MOE could hide the policy from Berschauer Phillips, MOE could prevent Berschauer Phillips from learning that the terms of the policy expressly give Berschauer Phillips the right to bring suit, or, alternatively (recall, MOE has never yet produced the insurance policy), whether there is any basis in the insurance policy for a third-party beneficiary claim. And since MOE was successfully arguing to the King County Superior Court and to this Court that Concrete Science was dissolved and had no choses, the hiding of the policy would have prevented Berschauer Phillips

from enforcing the judgment, except that Berschauer Phillips found the boilerplate language independently and has filed this lawsuit.

And MOE is, indeed, estopped from relying on res judicata because it concealed and is concealing the insurance policy. Berschauer Phillips does not have to show fraud, only mistake induced by the other party. If it was a mistake to not amend the complaint in the previous lawsuit to include Berschauer Phillips' own direct claims against MOE – or a third-party beneficiary claim (assuming there some basis in the policy for such a claim), that was a mistake induced by MOE, who refused to produce the discovery – including the policy -- when ordered by the Thurston County Superior Court. Where the parties have been induced by fraud not to bring into the original action all the matters that might have been therein litigated, they are not then precluded from introducing those matters in a subsequent lawsuit (Rosenberg v. Rosenberg, 141 Wash. 86, 91-92, P. 947 (1926)); mistake induced by the other party is similarly treated. (White v. Miley, 137 Wash. 80, 83, 241 P. 670 (1925)).

And MOE's argument that the Thurston County Superior Court had not authority to order discovery is meritless. The question before the Thurston County Superior Court was MOE's motion to dismiss, on whether Berschauer Phillips had standing to sue. Absent standing, of course, the Thurston County Superior Court would lack subject matter

jurisdiction. The Thurston County Superior Court allowed discovery on the very limited issue of whether Berschauer Phillips had standing – so that it might determine its own jurisdiction. One of the discovery materials that Berschauer Phillips sought – and that its insurance expert deemed necessary to address the question – **was the insurance policy**. “Although a court may ultimately decide that it lacks subject matter jurisdiction, a court always has the jurisdiction to determine whether subject matter jurisdiction is proper.” In re Marriage of Robinson, 159 Wn. App. 162, 167, 248 P.3d 532 (2010), as amended on reconsideration (Feb. 17, 2011). The case cited by MOE, Mitchell v. Doe, 41 Wn. App. 846, 706 P.2d 1100 (1985), is distinguishable. There, the Trial Court was not deciding whether or not it had subject matter jurisdiction. The ruling by the Thurston County Superior Court was proper and MOE was bound.

Finally, MOE argues, citing to out-of-state authority, that Berschauer Phillips would still have to show that Concrete Science had complied with the insurance policy terms. The out-of-state authority is distinguishable. In neither of those cases did the insurance company step in under a reservation of rights and undertake a bad faith defense of its insured, as MOE did here. Having undertaken a bad faith defense of Concrete Science, MOE is estopped from denying coverage. This is different than if Berschauer Phillips were attempting to assert a bad faith

claim against MOE. Berschauer Phillips is not attempting to use MOE's bad faith defense as a sword against MOE, only as a shield against the defense that Concrete Science did not tender the claim to MOE.

C. Collateral Estoppel and Res Judicata Do Not Apply

MOE argues that nothing has changed between the first suit and this suit. Actually, quite a bit has. For one thing, in the first suit, Berschauer Phillips attempted to sue on Concrete Science's choses of action, making claims that – MOE argues – can only be made by an insured against an insurer, like the claim of “bad faith failure to defend” or the breach of contract duties that MOE owed to Concrete Science. Now, in this lawsuit, Berschauer Phillips is suing MOE in its own capacity, in its own shoes, and is only – pursuant to the terms of the boilerplate insurance policy language (recall that MOE is still concealing the actual insurance policy) – making a claim for the amount of the judgment against Concrete Science, together with fees and costs incurred in enforcing the judgment. CP 2.

For another thing, this Court has ruled that as a dissolved limited liability company, Concrete Science has no choses or rights of action. If Berschauer Phillips is to enforce its judgment at all, it cannot do so through a writ of garnishment, or a writ of execution, or by assignment – all of which would require Berschauer Phillips to assert Concrete

Science's choices of action. The only way that Berschauer Phillips can enforce its judgment is through its own direct claims against MOE (or, presumably – not having actually seen the insurance policy) by making third-party beneficiary claims.

1. Res Judicata Does Not Apply

Under res judicata, a “matter may not be relitigated, or even litigated for the first time, if it could have been raised, and in the exercise of reasonable diligence should have been raised, in the prior proceeding.” Kelly-Hansen v. Kelly-Hansen, 87 Wn. App. 320, 329, 941 P.2d 1108 (1997) (emphasis added). Here, Berschauer Phillips exercised reasonable diligence in the prior proceeding. It made discovery requests seeking the insurance policy. When MOE refused to produce it, it made a motion to compel. When, at the hearing on the motion to compel, MOE argued that Berschauer Phillips lacked standing and announced its intention to bring a motion to dismiss for lack of standing, the Thurston County Superior Court continued Berschauer Phillips’ motion to compel. Faced with the motion to dismiss, Berschauer Phillips made a CR 56(f) motion seeking limited discovery – including the insurance policy – in order to respond to the motion. The Thurston County Superior Court granted the limited discovery and ordered production. MOE refused. MOE hid – and is still hiding – the insurance policy. MOE prevented Berschauer Phillips from

discovering that the insurance policy contains a direct right of action for Berschauer Phillips against MOE, until Berschauer Phillips discovered boilerplate language on its own (which MOE has tacitly admitted, for the purposes of summary judgment, as resembling the language in the actual hidden policy). MOE is estopped from claiming res judicata.

This Court has visited the doctrine of res judicata not four months ago. In Karlberg v. Otten, this Court observed “The defense of res judicata can be waived if the defendant is aware of a second suit for the same cause of action.” Karlberg v. Otten, No. 64595-1-I, slip op. at 5 (Wash. Ct. App. April 2, 2012). Here, while Berschauer Phillips argues that this present lawsuit is not the “same cause of action,” in the event that this Court concludes it is, MOE has waived the defense of res judicata. Berschauer Phillips filed and served this present suit on April 25, 2011. CP 1-2. MOE appeared on May 9, 2011. That was before this Court issued its opinion on June 27, 2011, holding that because Berschauer Phillips did not and could not possess the choses (Concrete Science being dissolved), that the Thurston County Superior Court lacked subject matter jurisdiction, and, lacking subject matter jurisdiction, erred in staying the case pending resolution on appeal of the King County case (in which this Court affirmed the quashing of the writs of execution). This Court having reversed and remanded for dismissal, having held that the Thurston

County Superior Court lacked jurisdiction, Berschauer Phillips and MOE then stipulated to dismissal in Thurston County, on August 19, 2011. At the time of the dismissal in Thurston County, MOE was thus amply aware of this present suit. Berschauer Phillips made this argument to the Trial Court. CP 12-13; CP 379.

But even if MOE was not estopped from claiming res judicata, and even if MOE had not waived the defense of res judicata, the doctrine would not apply here because the requisite four elements are not present.

a. The Parties are Identical

There is identity of parties.

b. The Causes of Action and Subject Matters Are Not Identical

Here, Berschauer Phillips is making its own direct claims against MOE. In the previous lawsuit, Berschauer Phillips attempted to assert the choses of Concrete Science. As MOE's insured, Concrete Science (assuming that it was not dissolved), would have had a cause of action against MOE for MOE's bad faith defense of its insured (MOE is estopped from denying coverage because of its bad faith defense), in addition to claims under Washington's Consumer Protection Act and the duties that MOE owed Concrete Science according to the insurance policy ("These represent all the subject matter and causes of action CSS could have

asserted as an insured if it was trying to enforce the policy and get the judgment paid.” Response at 19-20. As judgment creditor of an insured, Berschauer Phillips has a direct right of action arising out of the insurance policy, not all the causes of action that Concrete Science could have asserted. “If more than one party has a right to relief arising out of a single transaction, each such party has a separate claim for purpose of merger and bar.” Restatement (Second) of Judgments, *comment a* to § 24 (1982). Since both Concrete Science and Berschauer Phillips have the right to relief against MOE, each such claim is separate.

Moreover, “While it is often said that a judgment is res judicata of every matter which could and should have been litigated in the action, this statement must not be understood to mean that a plaintiff must join every cause of action which is joinable when he brings a suit against a given defendant. CR 18(a) permits joinder of claims. It does not require such joinder. And the rule is universal that a judgment upon one cause of action does not bar suit upon another cause which is independent of the cause which was adjudicated. 50 C.J.S. Judgments § 668 (1947); 46 Am.Jur.2d Judgments § 404 (1969).” Seattle-First National Bank v. Kawachi, 91 Wn.2d 223, 226, 588 P.2d 725 (1978).

MOE argues that Seals v. Seals, 22 Wn. App. 652, 590 P.2d 1301 (1979) and Mellor v. Chamberlain, 100 Wn.2d 643, 673 P.2d 610 (1983),

are not on point because there, the first action made the second one necessary. Again, although res judicata does not apply here, the same is arguably true. When this Court decided that Concrete Science, a dissolved company, had no choses and no rights, and held that Berschauer Phillips, lacking any choses or rights of Concrete Science, lacked standing to assert Concrete Science's claims in the previous lawsuit, those decisions made this lawsuit necessary. Here, Berschauer Phillips is suing on its own claims, not Concrete Science's. (Likewise, MOE made this present lawsuit necessary by concealing the insurance policy).

c. The Quality of Persons is Not Identical

Berschauer Phillips sued on the choses of action of Concrete Science in the previous lawsuit. Now it is making its own direct claims. The quality of persons is not identical.

d. The Previous Lawsuit Did Not End In a Final Judgment On the Merits

The previous lawsuit did not end in a final judgment on the merits. This Court reversed and remanded for dismissal for lack of subject matter jurisdiction. The case was never heard! And though Berschauer Phillips agreed to stipulate to dismissal at the Trial Court, given this Court's decision and holding, that was in order to save time, effort, and attorney fees given the foregone conclusion. Moreover, the parties stipulated to

dismissal being careful to notate “in this lawsuit” and “in this matter,” when this present lawsuit was already pending! Berschauer Phillips certainly did not intend the dismissal to have res judicata effect, whatever MOE may have hoped.

e. MOE Waived Res Judicata

As argued above, MOE waived res judicata. It was aware of this present lawsuit before the dismissal of the earlier lawsuit. Karlberg, No. 64595-1-I, slip op. at 5.

2. This Court Should Affirm the Trial Court in Concluding That Collateral Estoppel Does Not Apply

The Trial Court concluded that collateral estoppel does not apply here. MOE did not cross-appeal that determination, but rather asks this Court to reverse the Trial Court on the grounds that “This court may affirm on any ground supported by the record.” Washington Federal Sav. & Loan Ass’n v. Alsager, 165 Wn. App. 10, 14, 266 P.3d 905 (2011). However, this goes beyond asking this Court to affirm; MOE asks this Court to reverse the Trial Court. Contentions on cross-appeal will not be considered in absence of any assignment of error in cross-appellant’s brief. Hafer v. Marsh, 16 Wn.2d 175, 181, 132 P2d 1024 (1943). The assignments of error in MOE’s brief are inadequate, failing to point out errors for which reversal is sought. Even if the assignments were

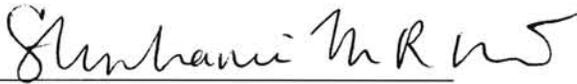
adequate, this Court should affirm the Trial Court on the issue of collateral estoppel, because the doctrine does not apply. There is not identity of issues. The basis on which this Court decided that Berschauer Phillips lacked standing was that it did not possess Concrete Science's choses. This is an entirely different basis for standing, arising out of the insurance policy. Further, the earlier proceeding ended with this Court's determination that the Trial Court lacked subject matter jurisdiction. The matter was never decided. There is no "final judgment" for collateral estoppel. In re Cogswell's Estate, 189 Wash. 433, 436, 65 P.2d 1082 (1937). Finally, application of the doctrine will work an injustice. MOE prevented Berschauer Phillips from discovering the insurance policy. MOE should not be rewarded.

V. CONCLUSION

MOE prevented Berschauer Phillips from discovering the insurance policy and its cause of action. The elements of res judicata and collateral estoppel do not apply. This Court should reverse and remand.

RESPECTFULLY submitted this 1st day of August, 2012.

CUSHMAN LAW OFFICES, P.S.

By: 
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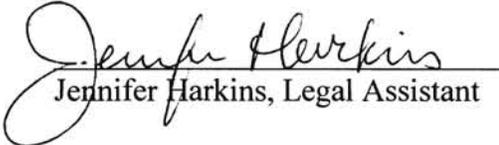
CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury as follows:

On August 1, 2012, I caused a copy of the foregoing document to be filed with the Court of Appeals, Division I and to be delivered via electronic mail to the parties as listed below:

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