

No. 68259-8-I

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

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BERSCHAUER PHILLIPS CONSTRUCTION CO.,  
a Washington State Corporation,

Plaintiff/Appellant,

vs.

MUTUAL OF ENUMCLAW INSURANCE COMPANY,  
an insurance company;

Defendants/Respondent

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APPELLANT'S OPENING BRIEF

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## **I. SUMMARY OF ARGUMENT**

This is a case where the Trial Court held that Plaintiff and Appellant, Berschauer Phillips Construction Co., was barred by res judicata from asserting its own direct claims in King County Superior Court against Defendant and Respondent, Mutual of Enumclaw Insurance Company (“MOE”). This was error. Even though Berschauer Phillips and MOE had earlier faced each other in Thurston County Superior Court, the only element of res judicata that was present was identity of persons or parties; all others were lacking. This Court should reverse and remand.

## **II. ASSIGNMENTS OF ERROR AND ISSUES PRESENTED**

**A.** The Trial Court erred in dismissing the case on res judicata.

*Does res judicata require identity of subject matter, identity of claim or cause of action, a final judgment on the merits, identity of parties, and identity of quality of parties? Yes. Were all the requisite elements present? No. Should this Court reverse and remand? Yes.*

## **III. STATEMENT OF THE CASE**

Appellant Berschauer Phillips has done business in the past with a company called Concrete Science Services of Seattle, LLC. Concrete Science was insured by Defendant Mutual of Enumclaw Insurance Company (“MOE”). In 2004, Berschauer Phillips sued Concrete Science in King County Superior Court, Cause Number 04-2-05087-1. Concrete

Science failed to appear at trial and on or around August 31, 2005, Berschauer Phillips obtained an order of default and a default judgment in lieu of trial in the amount of \$318,611.97 against Concrete Science. CP 110-118.

On September 14, 2005, Berschauer Phillips' counsel notified MOE of the default judgment. CP 87-88. On September 21, 2005, MOE had counsel appear for Concrete Science. Insurance defense counsel attempted to overturn the default judgment almost a year later. When they did so, after the long delay, Berschauer Phillips resisted and prevailed. The trial court ruled that the delay was inexcusable neglect, and let the default judgment in lieu of trial stand. CP 240. MOE appealed that decision; this Court affirmed the judgment and ordered MOE to pay Berschauer Phillips its attorney fees in the appeal. CP 246-47. Any potential defects in any tender of defense (or lack thereof) by Concrete Science to MOE were waived by MOE's appearance, attempt to overturn the default judgment, and subsequent appeal. MOE paid the attorney fees on appeal, but did not pay the underlying judgment against its insured.

Thereafter, Berschauer Phillips attempted to "attach" the claims and choses of action that Concrete Science, the judgment debtor, had against its insurance company, MOE, in a writ of execution on August 8, 2008. Believing it had done so [this is written with the benefit of

hindsight; at that time Berschauer Phillips did not direct the sheriff, having levied on the choses, to set them for sheriff's sale], Berschauer Phillips served MOE with a lawsuit in Thurston County on November 6, 2008, Cause No. 08-2-02538-9. CP 251. In its complaint, Berschauer Phillips alleged, "BPCC [Berschauer Phillips], having attached all choses in action Concrete Science has against the MOE insurance policy, now has standing to assert in court all claims Concrete Science had against MOE. In this action BP seeks to have Concrete Science's right to be indemnified by MOE from BP's judgment enforced by having the BP judgment satisfied by the MOE insurance policy." CP 21. The complaint did not include any claim from Berschauer Phillips directly against MOE. MOE's counsel characterized the claims as "breach of contract and bad faith in delaying efforts to set aside the default judgment." CP 120-121.

Berschauer Phillips also served MOE with discovery requests, including a request for production that asked "Produce a certified copy of insurance policy No. PK90624 and any other insurance policies that could reasonably afford coverage in this matter or related to Concrete Science or this project, including but not limited to the policy itself, declaration(s), proof of payment of premiums, applications of insurance, and any correspondence evidencing or pertaining to same." CP 40.

MOE refused to answer the discovery requests, forcing Berschauer Phillips to file a motion to compel on February 5, 2009. CP 47-53. As part of the CR 26(i) process, counsel for Berschauer Phillips had a phone call with Mr. Gosselin on February 4. “Mr Gosselin explained that he believed Berschauer Phillips lacked standing, and that he intended to bring a motion to dismiss pursuant to CR 12. He stated he would not respond to Berschauer [Phillips’] discovery requests until and unless his intended motion to dismiss is denied.” CP 48. In response, MOE asked that Berschauer Phillips’ motion to compel be continued and heard at the same time as its motion to dismiss: “Defendant Mutual of Enumclaw (MOE) asks that the court stay Plaintiff’s Motion to compel until after the court has decided MOE’s motion to dismiss, currently set for argument on February 20, 2009. In the alternative MOE asks that the motion be denied.” CP 55.

After Berschauer Phillips filed its reply (CP 61-66) and at the hearing on the matter, the court continued Berschauer Phillips’ motion, ruling that full production and discovery would be delayed until after Berschauer Phillips’ claims had been tested on MOE’s “motion to dismiss,” which, since it was supported by affidavits, was actually a motion for summary judgment arguing lack of standing, and ruled that MOE’s summary judgment motion needed to be properly noted. The

court also ruled that a CR 56(f) motion from Berschauer Phillips, seeking limited pre-hearing discovery of evidence necessary to respond to the motion for summary judgment, was proper. Finally, the court awarded terms of \$500 from MOE, which MOE paid rather than produce. CP 206.

After the hearing, Berschauer Phillips filed a Motion Pursuant to CR 56(f). CP 72-79. Since one of the grounds for which MOE sought summary judgment was the argument that Concrete Science lacked claims against MOE, i.e., that “[Berschauer Phillips] executed on illusory, non-existent claims,” Berschauer Phillips sought discovery, including the insurance policy from MOE to Concrete Science, in order to demonstrate that Concrete Science possessed claims against MOE, and submitted declarations. CP 81-96; CP 98-103; CP 105-121.

MOE filed a response to Berschauer Phillips’ CR 56(f) motion where it argued that the claims of Concrete Science did not exist and that Berschauer Phillips was not entitled to seek discovery:

As pointed out in MOE’s Motion to Dismiss, Washington courts have rejected the so-called “shoot first, ask questions later” litigation style where a party who lacks conclusive evidence of a claim may file suit and invoke the civil discovery rules to force disclosure of information not otherwise available.

CP 125-26. Berschauer Phillips filed its reply, arguing, “Parties to lawsuits have a right to try to prove their cases, and the rules of discovery and summary judgment allow parties to access information needed to

make the attempt.” CP 135. At the hearing on Berschauer Phillips’ CR 56(f) motion, the court granted the motion and ordered that after the limited discovery was produced, including the insurance policy, that Berschauer Phillips would have two weeks to submit its response to MOE’s summary judgment, MOE would have another week to submit a reply, and then the court would hear argument. CP 208. Even though the court had ordered the limited discovery, including the insurance policy, MOE never produced it. MOE’s summary judgment motion was never heard.

Meanwhile, Berschauer Phillips obtained new writs of execution on and levied on the choses of action of Concrete Science against its former counsel and principal and amended its complaint to add as defendants Concrete Science’s insurance defense counsel, the attorneys W. Scott Clement and John E. Drotz, as well as Jennifer Fowler [Faller], Concrete Science’s principal. CP 198; CP 251. Berschauer Phillips did not then direct the sheriff, having levied on the choses, to set them for sheriff’s sale. Later, the writs of execution having expired, Berschauer Phillips obtained new writs of execution and levied again on all the choses (including the choses against MOE), and this time directed the sheriff to set them for sale. CP 199; CP 252. At this point, the defendants made motions to the King County Superior Court (where Berschauer Phillips

had obtained the judgment against Concrete Science) to quash the writs of execution and strike the pending sheriff's sale. CP 199; CP 252. The King County Superior Court granted the motion and an appeal followed. This Court affirmed the court on the grounds that Concrete Science, a dissolved Minnesota limited liability company, had no property on which Berschauer Phillips could levy and that the choses in action were too uncertain to be subject to execution. CP 256.

Concurrently, in Thurston County, the defendants made motions for dismissal arguing that Berschauer Phillips lacked standing to sue in Concrete Science's shoes, not having actually purchased the choses of action, and that therefore the court lacked subject matter jurisdiction over the case. CP 200. The court continued the motion pending resolution of the appeal of the King County Superior Court's quashing of the writs of execution. CP 200. Defendants appealed. This Court (Division II transferred the matter to this Court) reversed the Thurston County Superior Court and held that because Berschauer Phillips lacked standing to sue in Concrete Science's shoes, the court lacked subject matter jurisdiction to hear the case. "BPCC had no standing at the time it filed the action, nor did it having standing at the time the stay was issued. The Trial Court lacked subject matter jurisdiction to hear the case and thus

erred in granting BPCC's request for a stay, rather than dismissing the case." CP 202.

This Court's opinion was dated June 27, 2011 and the mandate dated August 5, 2011. CP 194-95. The Thurston County case was dismissed on August 19, 2011. CP 192-93. Independently, and outside of the Thurston County lawsuit, counsel for Berschauer Phillips obtained a copy of a paper which was represented as being standard boilerplate language in most, if not all, MOE insurance policies. CP 212. This paper states: "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 213. If Concrete Science's insurance policy with MOE contained such a provision, then Berschauer Phillips, as a judgment creditor with a judgment against MOE's insured, Concrete Science, has a direct right of action against MOE. Accordingly, Berschauer Phillips filed this instant lawsuit in King County making its own claims against MOE, serving MOE with the lawsuit on April 25, 2011. CP 1-2. MOE appeared on May 9, 2011, before Division I issued its opinion on June 27, 2011, and before Thurston County dismissed the other case on August 19, 2011.

In this lawsuit, Berschauer Phillips submitted discovery requests to MOE which sought among other records, a copy of the insurance policy from MOE to Concrete Science, which policy would confirm whether

Berschauer Phillips does, as it suspects, have a direct right of action against MOE. CP 168-190; CP 183. MOE refused to respond to the discovery requests, arguing that BP had no right to bring this second lawsuit and announcing its intention to bring a motion to dismiss. CP 204; CP 4. Berschauer Phillips then made a motion to compel. CP 3-14.

In its motion to compel, Berschauer Phillips anticipated that MOE's motion to dismiss would be on the issues of collateral estoppel and res judicata, and argued to the Trial Court that neither doctrine applied. CP 9-12. In short, Berschauer Phillips argued that collateral estoppel did not apply because the issue decided in Thurston County was whether Berschauer Phillips had standing to assert Concrete Science's claims, but the issue to have been decided in the instant case was whether Berschauer Phillips might directly proceed against MOE pursuant to a clause in the insurance policy. CP 379-80. As to res judicata, Berschauer Phillips argued that it does not apply because if the question were whether Berschauer Phillips could step into the shoes of Concrete Science and have standing to sue MOE, that would be barred by res judicata because there was final judgment on *those* merits. However, the question before the Trial Court was whether Berschauer Phillips might directly proceed against MOE pursuant to a clause in the insurance policy. CP 380. As to both doctrines, Berschauer Phillips argued that MOE had prevented

Berschauer Phillips from earlier discovering the elements of the cause of action of Berschauer Phillips' own direct claim against MOE – the insurance policy that MOE has never yet produced.

The Trial Court denied Berschauer Phillips' motion to compel without prejudice, pending resolution of the anticipated motion to dismiss to be filed by MOE. CP 381-83. MOE filed a motion for summary judgment and attorney fees, arguing that Berschauer Phillips' claims were barred by the doctrines of collateral estoppel and res judicata and that Berschauer Phillips lacked standing. CP 384-407; CP 408-423. Berschauer Phillips responded and made a CR 56(f) motion for continuance. CP 431-448; CP 424-430. MOE replied. CP 449-455.

At oral argument on the motion for summary judgment, the issues were crystallized. RP at 47, ll. 14-16. For one thing, MOE “essentially acknowledged” that the boilerplate insurance language Berschauer Phillips discovered was identical to the language in the insurance policy at issue. RP at 5, ll. 8-10. The insurance policy language at issue, out of which Berschauer Phillips derives its own direct claims against MOE, is:

“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. It became apparent that MOE was arguing that Berschauer Phillips could have *and should have* obtained a writ of garnishment against MOE, and that this “could have obtained” meant that Berschauer Phillips was barred from now bringing its own direct claims against MOE arising out of the boilerplate policy language that Berschauer Phillips independently found, and, indeed, that the policy language is irrelevant or immaterial. RP at 14, ll. 7-12; RP at 19, ll. 11-22. MOE argued that garnishment is the only known way of asserting claims against an insurer by a third-party plaintiff. RP at 21, ll. 7-23. MOE’s position was that “it doesn’t really matter what the policy says.” RP at 25-26, ll. 22-25; 1-2.

In response, Berschauer Phillips argued that it *does* matter what the policy says, and that the policy language at issue here – “A person or organization may sue us to recover an agreed settlement on a final judgment against an insured obtained after an actual trial” – gave Berschauer Phillips an independent right of action against MOE, qualitatively different from a garnishment action, which would be against money or property owned by Concrete Science, in the possession of MOE. RP at 28-29, ll. 17-25; 1-20; RP at 32-33, ll. 14-25; 1-22. Berschauer Phillips argued that the question of standing was different depending on the specific claims that are at issue. RP at 30, ll. 14-16. Berschauer

Phillips argued that it could not have made its own direct claims against MOE because MOE had prevented Berschauer Phillips from discovering the elements of the cause of action, and that therefore was not barred from now bringing them.

While the Trial Court took the matter under advisement and did not issue a decision on MOE's motion for summary judgment at oral argument, the Trial Court did, at oral argument, deny Berschauer Phillips' motion for a CR 56(f) continuance, without hearing argument from Berschauer Phillips. RP at 5, ll. 11-12.

Before the Court issued a decision on the motion for summary judgment, Berschauer Phillips filed a motion for reconsideration of the Trial Court's denial of the CR 56(f) continuance. CP 457-65. Berschauer Phillips argued that at oral argument, MOE had made representations to the Trial Court about how other courts had construed the insurance policy at issue, without MOE having produced the insurance policy to Berschauer Phillips or to the Trial Court and without having briefed the issue of how other courts have construed the same language at issue. Berschauer Phillips argued that granting summary judgment to MOE based on the unbriefed and unsubstantiated representations would prevent Berschauer Phillips from having a fair hearing on the summary judgment motion. CP 460-61.

The Trial Court granted MOE's motion for summary judgment and denied Berschauer Phillips' motion for reconsideration of its denial of Berschauer Phillips' CR 56(f) motion, and dismissed Berschauer Phillips' case. CP 466-74. The Trial Court found that res judicata barred Berschauer Phillips' claims, because Berschauer Phillips could have sought a writ of garnishment. CP 472; CP 473. Berschauer Phillips made a motion for reconsideration. CP 475-79. Berschauer Phillips argued that the causes of action in a hypothetical garnishment action and in an action where Berschauer Phillips is suing on its own direct claims against MOE are not identical. CP 476. The Trial Court denied the motion. CP 491-492. This appeal followed. CP 480-492.

#### **IV. ARGUMENT**

MOE argued to the Trial Court that the terms of the insurance policy are irrelevant and immaterial. This is not correct. Berschauer Phillips derives its claims against MOE, and its standing to bring the claims, from the policy language that MOE acknowledged at oral argument:

“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. It was the Trial Court’s province – and this Court’s province – to construe this term of the insurance policy, and to determine whether or not Berschauer Phillips’ claims under this policy were barred by res judicata, if indeed Berschauer Phillips could have proceeded with a garnishment action against MOE.

And when this Court construes the insurance policy, it must resolve any ambiguities against the drafter-insurer, MOE. Weyerhaeuser Co. v Commercial Union Ins. Co., 142 Wn.2d 654, 666, 15 P.3d 115 (2000). It must not be forgotten that the purpose of insurance is to insure, and that construction should be taken which will render the contract operative, rather than inoperative. Phil Schroeder, Inc. v. Royal Global Ins. Co., 99 Wn.2d 65, 68, 659 P.2d 509 (1983), *modified on reconsideration*, 101 Wn.2d 830, 683 P.2d 186 (1984). The purpose of insurance is to give protection and it can be presumed that such was the intent of the parties. McDonald Indus. Inc. v. Rollins Leasing Corp., 95 Wn.2d 909, 915, 631 P.2d 947 (1981). Finally, any case law that purports to interpret other insurance policies with *different* policy language is not

on point. “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).

**A. Standard of Review is De Novo**

The Trial Court dismissed the lawsuit on summary judgment, on a finding that Berschauer Phillips’ claims were barred by res judicata. “Whether res judicata bars an action is a question of law we review de novo.” Ensley v. Pitcher, 152 Wn. App. 891, 899, 222 P.3d 99 (2009). Review of a trial court’s grant of summary judgment is de novo, with the reviewing court engaging in the same inquiry as the trial court. Korslund v. Dyncorp Tri-Cities Services, Inc., 156 Wn.2d 168, 177, 125 P.3d 119 (2005). The standard of review here is de novo.

**B. The Trial Court Erred in Concluding Res Judicata Barred Berschauer Phillips’ Own Direct Claims against MOE**

It is undisputed that Berschauer Phillips and MOE have faced each other before, in Thurston County Superior Court. It is also undisputed that there is a judgment in Thurston County Superior Court dismissing the claims that Berschauer Phillips filed when it attempted to stand in the shoes of Concrete Science. But a judgment has claim preclusive – res

judicata – effect only if the successive proceedings are identical in four respects. Rains v. State, 100 Wn.2d 600, 674 P.2d 165 (1983)<sup>1</sup>.

**1. There is No Identify of Subject Matter Between the Claims Here and the Claims in Thurston County**

The first respect is “identity of subject matter.” In the Thurston County lawsuit, the subject matter was Concrete Science’s claims against MOE arising due to MOE’s failure “to act reasonably and promptly in dealing with the default judgment against its insured.” CP 198. Here, the subject matter is Berschauer Phillips’ right, as a judgment creditor of Concrete Science, MOE’s insured, to bring a direct action against MOE for payment of the judgment against its insured pursuant to a clause in the insurance policy from MOE to Concrete Science. That is a different subject matter.

In Seals v. Seals, the court concluded that the same subject matter was not involved when the first proceeding was a dissolution of marriage and the second was an action to partition undisposed property. Seals v. Seals, 22 Wn. App. 652, 655, 590 P.2d 1301 (1979). And the reason that the property was not disposed of in the dissolution action was because the husband had refused to disclose the existence of the property in his

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<sup>1</sup> It appears that in federal law, res judicata has three elements, not four, as in Washington. See, e.g., Woodley v. Myers Capital Corp., 67 Wn. App. 328, 835 P.2d 239 (1992), *relying on* Kale v. Combined Ins. Co. of Am., 924 F.2d 1161 (1st Cir. 1991).

discovery responses in the dissolution action. The wife only found out about it later and was forced to bring the second action to partition the property. Similarly, MOE refused to answer Berschauer Phillips' discovery in Thurston County, even though ordered to do so by the court. Had MOE not refused to produce the insurance policy, Berschauer Phillips could have amended the complaint to add its own direct claims, which could have been adjudicated then and there.

But the larger point is also true: even though the same parties were involved in Seals and the dissolution action disposed of property and the partition action disposed of other property, the same subject matter was not involved. Similarly, here, the subject matters are different: first are Concrete Science's chases and the claim that MOE failed to act reasonably and promptly, and the others are Berschauer Phillips' own direct claims for payment of the judgment. *See also Mellor v. Chamberlin*, 100 Wn.2d 643, 646, 673 P.2d 610 (1983) (same subject matter not involved when first action was for misrepresentation in sale of real property and the second was an action for breach of covenant of title for that same piece of real property).

## **2. There is No Identity of Claim or Cause of Action**

The second element is identity of claim or cause of action. Unlike issue preclusion (collateral estoppel), which applies only to issues actually

litigated, claim preclusion applies to what might, or should, have been litigated as well to what was actually litigated, if all part of the same claim or cause of action. Norris v. Norris, 95 Wn.2d 124, 130, 622 P.2d 816 (1980). At oral argument, it became clear that MOE was arguing that Berschauer Phillips *could and should have* maintained a garnishment action against MOE, and, MOE argued, because a garnishment action was the same as Berschauer Phillips' own direct claims against MOE arising out of the insurance policy clause, that Berschauer Phillips was barred by res judicata from maintaining its own direct claims against MOE. Further, it was on this basis that the Trial Court granted summary judgment and dismissed Berschauer Phillips' claim.

But this argument and holding are incorrect. Berschauer Phillips' own direct claims against MOE, arising out of the insurance policy language, are no more the same claim or cause of action as the garnishment action that MOE argues Berschauer Phillips should have brought, then they are the same claim or cause of action as the choses in action – Concrete Science's choses in action -- on which Berschauer Phillips attempted to sue in Thurston County. Moreover, Berschauer Phillips could not have maintained a garnishment action against MOE, nor *need* Berschauer Phillips have done so. Since Berschauer Phillips *could* not and *need* not have maintained a garnishment action, and since

Berschauer Phillips' own direct claims against MOE are different from a garnishment action, this Court should conclude that res judicata does not bar Berschauer Phillips' claims here.

**a. Berschauer Phillips Need Not Have Maintained a Garnishment Action Against MOE**

MOE argued that Berschauer Phillips *should* have maintained a garnishment action against MOE because garnishment “is the only known way of asserting claims against an insurer by a third-party plaintiff.” RP at 21, ll. 10-11. MOE argued, after agreeing with the Trial Court that *assignment* was another way of asserting claims against an insurer by a third-party plaintiff: “It is – and it has been that way for a hundred years. Anyone familiar with insurance law knows that garnishment is the process that you use to collect on a judgment against an insurance policy. That’s the way it is. I tend to think that the gorilla in the room here is possibly that Plaintiff’s counsel didn’t understand what the law held.” RP at 21, ll. 15-22. However, MOE is incorrect. Garnishment is not the only known way of asserting claims against an insurer by a third-party plaintiff.

There are at least five ways of asserting claims against an insurer by an injured party. Berschauer Phillips need not have maintained a garnishment action against MOE if it had standing to maintain another cause of action. In the same insurance treatise cited by MOE in its

summary judgment pleadings, the author begins to write: “In all states...an injured party who has once obtained a judgment against the insured can then sue the carrier for the amount owed under the policy. The injured party will have standing to sue: (1) As an assignee, if he or she has obtained an assignment of the insured’s rights against the insurer; (2) In most states, by proceeding pursuant to the state’s garnishment statute, which affords a means of collecting a judgment by suing a debtor of the judgment debtor.” 2 A. Windt, Insurance Claims & Disputes, § 9.11 at 9-45 - 9-46 (5th ed. 2007). Here, of course, is suit by assignment, as the Trial Court suggested, and garnishment, as MOE argues.

But that is not all. The author of the same insurance treatise continues on to say that there is standing: “(5) In some states, by proceeding as a third-party beneficiary of the insurance contract, which status the injured person would have achieved on obtaining a judgment against the insured.” 2 A. Windt, Insurance Claims & Disputes, § 9.11 at 9-47 - 9.48. MOE had argued at the summary judgment hearing that courts had interpreted the clause in question as conferring injured parties like Berschauer Phillips “third-party beneficiary” status. But MOE did not brief this argument nor cite to any authority. The question of whether an injured party is a third-party beneficiary of an insurance contract is a fact-specific one, requiring courts to interpret and construe the terms of the

insurance contract. *See, e.g., State Farm Mut. Auto Ins. Co. v. Lou*, 36 Wn. App. 838, 841, 678 P.2d 339, 341 (1984): “Lou received benefits under the State Farm policy because, as an injured passenger, he came within the definition of an “insured” in the PIP endorsement. Lou became a third party intended beneficiary of the policy, and as such was bound by the terms and conditions of the State Farm policy.”

What Berschauer Phillips has been arguing from the inception of this lawsuit is that Berschauer Phillips has a direct right of action against MOE arising out of the terms of the insurance policy. In fact, the same insurance treatise quoted by MOE in its summary judgment materials specifically provides support for Berschauer Phillips’ position that *it has direct claims against MOE* arising out of the policy: the third basis for standing recognized by courts for an injured party to sue the insurance company is “(3) 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 & Disputes, § 9.11 at 9-47 (5th ed. 2007). And Washington courts recognize this policy-based right. *See, e.g., Murray v. Mossman*, 56 Wn.2d 909, 911-12 and 912 n. 1, 355 P.2d 985 (1960), and Vaughn v. Vaughn, 23 Wn. App. 527, 530 n. 3, 597 P.2d 932 (1979). (The fourth basis for standing recognized in the insurance treatise, neither argued by MOE nor claimed by Berschauer Phillips, is

“(4) In some states, pursuant to a statute expressly authorizing such a post-judgment remedy.” 2 A. Windt, Insurance Claims & Disputes, § 9.11 at 9-47 (5th ed. 2007)).

The clause in the insurance policy that gave Berschauer Phillips the right to sue MOE directly is thus:

“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 clause matches up with the third basis for standing recognized by courts for an injured party to sue the insurance company:

“(3) 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 & Disputes, § 9.11 at 9-47 (5th ed. 2007).

The insurance policy here, by its express terms, gives Berschauer Phillips, the judgment creditor of the insured, Concrete Science, the right to bring suit. Since the insurance policy gave Berschauer Phillips the right to bring suit – a right that is recognized by the same insurance treatise cited and quoted by MOE! – Berschauer Phillips *need not* have filed a garnishment action against MOE. MOE erred in so arguing and the Trial Court erred in

applying res judicata, which doctrine requires, for purposes of issue preclusion, that Berschauer Phillips *could* and *should* have filed a garnishment action. The “should” prong fails.

**b. Berschauer Phillips *Could* Not Have Maintained a Garnishment Action Against MOE**

Neither *could* Berschauer Phillips have maintained a garnishment action against MOE. In a garnishment action, Berschauer Phillips would not be suing on its own choses of action. MOE stated: “Garnishment is the process that gave them the ability to assert [Concrete Science’s] rights under the insurance policy.” RP at 19, ll. 16-17. In garnishment, Berschauer Phillips would be suing on Concrete Science’s choses of action, in order to reach that – money or property – which Concrete Science owned and that was in the possession of MOE. But in the prior proceeding before Thurston County, MOE successfully argued to the King County Superior Court (in moving to quash the writs of execution) and to this Court that Concrete Science, as a dissolved Minnesota LLC, *had no choses of action* – that there was nothing on which Berschauer Phillips could execute.

MOE is judicially estopped from arguing to this Court that Berschauer Phillips *could* have filed a garnishment action against MOE when MOE has already succeeded in arguing that the choses and rights

that would be necessary to do so did not exist because of Concrete Science's dissolution. There is a fundamental difference between Berschauer Phillips and Concrete Science: Berschauer Phillips is an existing entity that can sue on its own choses arising out of the MOE insurance policy language, whereas Concrete Science is a dissolved Minnesota LLC possessing neither choses nor rights, as both the King County Superior Court and this Court have held pursuant to MOE's argument. The "could" prong fails as well. Berschauer Phillips *could* not have maintained a garnishment action against MOE.

**c. Even if Berschauer Phillips "Could" and "Should" Have Maintained a Garnishment Action Against MOE, There is Still No Identity of Claim or Cause of Action**

Assume for the sake of argument that Berschauer Phillips *could* and *should* have maintained a garnishment action against MOE. There is still no identity of claim or cause of action between a garnishment action and Berschauer Phillips' own direct claims against MOE. Nor yet is there identity of claim or cause of action with Concrete Science's choses of action on which Berschauer Phillips did attempt to sue.

Courts have used four criteria to evaluate the scope of the claim or cause of action. Rains, 100 Wn.2d at 664. Would rights or interests established in the prior judgment be destroyed or impaired by prosecution

of this second action? *No*. In the Thurston County case, this Court held that because Berschauer Phillips lacked standing to bring Concrete Science's claims, the superior court lacked subject matter jurisdiction to consider the case. This holding would not be impaired by Berschauer Phillips bringing its *own* claims directly against MOE.

And in a hypothetical garnishment action, Berschauer Phillips would have a different base for standing as a garnishing party than it would as an injured party with a direct right of action against the insurance company pursuant to policy language. That is because the bases for standing of an injured party to sue an insurance company are all different and independent of each other. For example, courts in Washington have held that having standing to sue as a third-party beneficiary is a completely different basis for a lawsuit than having standing to sue as an assignee.

"Jordan's standing to sue Hartford as a third party beneficiary is a different issue from whether he may sue Hartford as an assignee of Lakeside's contractual rights." Estate of Jordan v. Hartford Acc. & Indem. Co., 62 Wn. App. 218, 224, 813 P.2d 1279 (1991), *rev'd*, 120 Wn.2d 490, 844 P.2d 403 (1993). Likewise, the factual inquiry as to whether an injured party has standing to sue the insurance company would differ depending on basis for standing and the claims asserted: e.g., compare "does the insurance policy provide for a direct action against the

insurance company?” with “did the garnishor properly serve the garnishment defendant with the writ?”

As to the second prong: Will substantially the same evidence be presented in the two actions? *No.* MOE refused to produce any discovery in Thurston County and the case was decided by the courts on questions of law, not evidence. And in the hypothetical garnishment case, the evidence would not necessarily be the same as in this lawsuit on Berschauer Phillips’ own direct claims against MOE. Berschauer Phillips’ right to sue MOE arose at the time it obtained a judgment against MOE’s insured, Concrete Science, so the evidence in that case would be the judgment. In a garnishment case, on the other hand, Berschauer Phillips would have to assert Concrete Science’s chuses against MOE, which would presumably be subject to MOE’s defenses, including Concrete Science’s failure to notify MOE of the pendency of the lawsuit. The evidence would thus include records showing the failure to notify MOE, as well as evidence concerning MOE’s defense counsel that it appointed for Concrete Science and their inexcusable neglect in delaying to move for vacation of the default order.

Third, do the two suits involve infringement of the same right? *No.* Concrete Science’s chuses of action that Berschauer Phillips attempted to prosecute in Thurston County were for MOE’s failure “to act

reasonably and promptly in dealing with the default judgment against its insured,” and were for *Concrete Science*’s rights as an insured. CP 198. Berschauer Phillips’ claims here, in contrast, seek to enforce Berschauer Phillips’ right to be compensated for the injury caused by Concrete Science. Likewise, in a hypothetical garnishment action, the rights at issue would, again, be Concrete Science’s choses of action against its insurer, MOE.

Finally, do the two suits arise out of the same transaction or nucleus of facts? They arise out of two separate and distinct phases of the same transaction or nucleus of fact. Berschauer Phillips’ own direct claims against MOE arise out of Berschauer Phillips’ having obtained a judgment against its insured, Concrete Science and out of the language in the insurance policy. And whether Berschauer Phillips was suing on Concrete Science’s choses of action having executed on them or in the course of maintaining a garnishment action, the choses of action would arise out of completely different terms and clauses in the insurance policy and also out of events that transpired *after* the judgment against Concrete Science – including MOE’s dilatory efforts to deal with the judgment against its own insured.

### **3. There is Identity of Persons and Parties**

Returning to the four elements necessary for res judicata, the third element is identity of persons and parties. This element is present.

#### **4. There is No Identity in the Quality of Persons**

The fourth element is whether there is identity in the *quality* of persons for or against whom the claim is made. This element would come into play in situations where the named parties are the same, but one or the other acts in a different capacity in the two proceedings. See Philip A. Trautman, Claim and Issue Preclusion in Civil Litigation in Washington, 60 Wash. L. Rev. 805, 820-21 (1985). In the case of Flesscher v. Carstens Packing Co., 96 Wash. 505, 165 P. 397 (1917), a father first sued as guardian ad litem for his daughter for personal injuries to her and then in a separate lawsuit sued to recover expenses that he himself incurred for medical care of the child. The court found that res judicata did not apply. And in Mellor, 100 Wn.2d at 646, the Court held that the quality of persons changed when the cause of action changed. Similarly, in Thurston County Berschauer Phillips sued in the *quality* of Concrete Science; it sued on Concrete Science's choses of action, which it would also do in a hypothetical garnishment action. In this lawsuit, however, Berschauer Phillips sued in its own *quality* as a judgment creditor entitled to a direct

action against the insurance company, MOE. This Court should conclude that there is no identity of quality.

#### **5. Even if there Were Identity, There Would Be No Claim Preclusion**

There is no claim preclusion, because there is no identify of subject matter, no identity of claim or cause of action, and no identity in the quality of parties. But assume for the sake of argument that the requisite four identities exist. What determinations have claim preclusive effects? Res judicata requires a final judgment on the merits. Leija v. Materne Bros., Inc., 34 Wn. App. 825, 827, 664 P.2d 527 (1983). In the Thurston County case, there was final judgment, but it was not on the merits (which would have been the merits of Concrete Science’s claims against MOE). Instead, it was on the discrete issue of whether or not the Thurston County Superior Court had subject matter jurisdiction.

“(1) A personal judgment for the defendant, although valid and final, does not bar another action by the plaintiff on the same claim: (a) when the judgment is one of dismissal for lack of jurisdiction....” Restatement (Second) of Judgments § 20 (1982). This is the law in Washington. “Appellants state...that they have prosecuted this appeal for the reason that, if they acquiesced in the court’s action in refusing to

construe the will, it might be claimed at some future time that the question as to whether the will was construed was *res adjudicata*. This cannot happen because the refusal was grounded wholly upon lack of jurisdiction.” In re Cogswell’s Estate, 189 Wash. 433, 436, 65 P.2d 1082 (1937). The case of Pederson v. Potter, 103 Wn. App. 62, 11 P.3d 833 (2000), is not on point here. There, the court held that a judgment was on the merits if the status of the action was such that the parties might have had their suit thus disposed of, if they had properly presented and managed their respective cases. 103 Wn. App. at 70. Here, however, the Thurston County case was dismissed for lack of subject matter jurisdiction, not for lack of proper presentation or management. And it was impossible for Berschauer Phillips to have made its own direct claims against MOE, since MOE had defied the Thurston County Trial Court’s order to produce discovery, including the insurance policy. A court always has jurisdiction to determine its own jurisdiction. The Thurston County Superior Court had ordered discovery that it might properly and fully decide MOE’s argument that the court lacked subject matter jurisdiction; MOE was thus bound by the court’s order.

This Court issued its decision on June 27, 2011, holding “The trial court lacked subject matter jurisdiction to hear the case and thus erred in granting BPCC’s request for a stay, rather than dismissing the case. We

reverse for dismissal.” CP 202. Thereafter, Berschauer Phillips and MOE stipulated to dismiss the case. Indeed, with this Court stating “We reverse for dismissal,” the parties could hardly do otherwise.

Now, the stipulated dismissal includes the words “with prejudice.” CP 193. However, that is not dispositive here. “[A] judgment may not have an effect contrary to that prescribed by the statutes, rules of court, or other rules of law operative in the jurisdiction in which the judgment is rendered. Thus in a jurisdiction having a rule patterned on Rule 41(b) of the Federal Rules of Civil Procedure, a dismissal for lack of jurisdiction...may not be a bar regardless of the specification [i.e., “with prejudice”] made. And even in the absence of such a rule, a dismissal on any of these grounds is so plainly based on a threshold determination [i.e., that the court lacks subject matter jurisdiction] that a specification that the dismissal will be a bar should ordinarily be of no effect.” Restatement (Second) of Judgments, *comment d* to §20 (1982).

Washington’s CR 41(a)(4) is modeled after FRCP 41(b). Since the stipulated dismissal was so plainly based on the Court of Appeals’ determination that “the trial court lacked subject matter jurisdiction to hear the case,” the dismissal should not be a bar here. Alternatively, the parties specified that the stipulated dismissal was only as to “Plaintiff’s claims against Defendant Mutual of Enumclaw in this lawsuit, Thurston County

Cause No. 08-2-02538-9,” that is, only as to Berschauer Phillips’ claims on Concrete Science’s choses, not its own direct action claim arising out of the language in the insurance policy:

“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.”

Any argument from MOE that the stipulated dismissal for lack of subject matter jurisdiction is a final judgment on the merits is inapplicable. In Allcantara v. Boeing Co., 41 Wn. App. 675, 705 P.2d 1222, *review denied*, 104 Wn.2d 1022 (1985), another court in another jurisdiction had already ruled that Washington was not the proper forum on the grounds of *forum non conveniens*. It was that determination that had direct estoppel effect on the *forum non conveniens* question in Washington.

Likewise, if Berschauer Phillips were to attempt to file suit on the Concrete Science choses now, breach of contract by MOE against Concrete Science, negligence of MOE harming Concrete Science, bad faith of MOE in defending Concrete Science, violation of applicable insurance related Washington Administrative Code provisions vis-a-vis its insured, Concrete Science, and violation of the Washington State

Consumer Protection Act, RCW 19.86, vis-a-vis its insured, Concrete Science, the determinations by this Court (No. 64812-8 and No. 66643-6) that since Concrete Science was a dissolved Minnesota LLC with no choses of action on which to execute, that Berschauer Phillips lacked standing to assert the choses and the Thurston County Superior Court lacked subject matter jurisdiction would have preclusive effect. But there is no preclusive effect on Berschauer Phillips' own direct claim arising out of the language in the insurance policy: "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."

And as to Pederson, 103 Wn. App. 62, that case is distinguishable. Here, Berschauer Phillips had already filed and served its own direct action in King County and MOE had already appeared when the parties stipulated to dismissal of the Thurston County action. MOE waived any Pederson defense by not raising it in a timely fashion.

#### **6. MOE is Estopped From Invoking Res Judicata**

MOE is estopped from invoking the doctrine of res judicata, because MOE, in defiance of an order from the Thurston County Superior Court, refused to provide discovery to Berschauer Phillips, which discovery would have informed Berschauer Phillips that it had a direct cause of action against MOE. 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, 250 P. 947 (1926)); mistake induced by the other party is similarly treated. (White v. Miley, 137 Wash. 80, 83, 241 P. 670 (1925)). Because MOE defied a court order and prevented Berschauer Phillips from discovering the insurance policy, Berschauer Phillips may bring its own direct claims against MOE arising out of that insurance policy in this subsequent lawsuit. This Court should conclude that res judicata does not apply.

## V. CONCLUSION

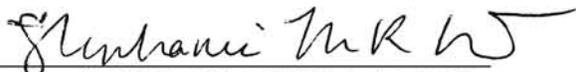
Res judicata does not apply here. Even though MOE prevented Berschauer Phillips from discovering the elements of the cause of action of Berschauer Phillips' own direct claim against MOE, Berschauer Phillips eventually did discover it on its own and asserted it before the Trial Court. And the claim is night and day different from the claims that Berschauer Phillips earlier attempted to assert by attempting to execute on the Concrete Science choses of action, or in any hypothetical garnishment action against MOE.

This Court should reverse the Trial Court's dismissal and remand the case back to superior court for determination, by the Trial Court, of the

ultimate issue in the case: Berschauer Phillips' own direct claims against  
MOE.

RESPECTFULLY submitted this 30th day of May, 2012.

CUSHMAN LAW OFFICES, P.S.

By:   
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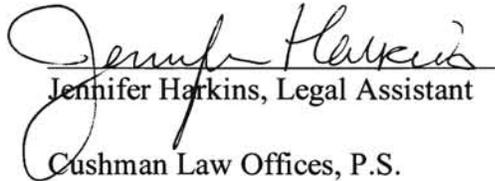
CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury as follows:

On May 30, 2012, I caused the original and one 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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