

COURT OF APPEALS DIV I
STATE OF WASHINGTON

No. 68259-~~8~~1

2012 JUL -2 AM 11:53

3

COURT OF APPEALS, DIVISION ONE,
OF THE STATE OF WASHINGTON

BERSCHAUER PHILLIPS CONSTRUCTION CO., a Washington State
Corporation

Appellant,

vs.

MUTUAL OF ENUMCLAW INSURANCE COMPANY, an insurance
company

Respondents

BRIEF OF RESPONDENT
MUTUAL OF ENUMCLAW INSURANCE COMPANY

Timothy R. Gosselin, WSBA # 13730
GOSSELIN LAW OFFICE, PLLC
1901 Jefferson Avenue, Suite 304
Tacoma, WA 98407
(253) 627-0684

Attorney for Respondent, Mutual
of Enumclaw Insurance Company

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

NATURE OF THE CASE 1

COUNTER-STATEMENT OF THE CASE 1

COUNTER-STATEMENT OF THE ISSUES 9

 1. Whether a decision of a court that it lacked jurisdiction to hear plaintiff’s claims because the plaintiff lacked standing may be revisited, challenged, and collaterally attacked in a subsequent proceeding based on arguments the Plaintiff possessed but did not assert at the time of the first court’s decision?

 2. Whether issue preclusion (collateral estoppel) or claim preclusion (res judicata) prevents relitigation of a plaintiff’s standing, and the claims that standing might support, where there has been no change in the plaintiffs’ circumstances since a ruling denying standing?

ARGUMENT 10

 A. Standard of Review 10

 B. The insurance policy does not give BP rights as an insured or free it from policy defenses, and does not provide a basis for it to sue MOE. 11

 C. Collateral estoppel and res judicata bar relitigation of issues previously decided and claims that could have been decided. 14

 1. Res Judicata Bars BP’s second suit. 15

 a. The parties are identical 17

 b. The causes of action and

subject matter are identical.	17
c. The quality of persons is identical.	23
d. The first suit ended in a final judgment on the merits.	23
e. MOE did not waive its right to assert res judicata.	25
2. Collateral estoppel bars the second suit by preventing BP from disputing its lack of standing.	26
a. The issues are identical	27
b. The earlier proceeding ended in judgment sufficient to apply the doctrine	28
c. The parties are identical.	32
d. Applying the doctrine does not work an injustice.	32
CONCLUSION	33

TABLE OF AUTHORITIES

A. Washington Cases

Berschauer/Phillips Const. Co. v. Seattle School Dist. No. 1,
124 Wn.2d 816, 881 P.2d 986 (1994) 3

Brice v. Star, 93 Wash. 501, 161 P. 347 (1916) 26

Camer v. Seattle School Dist. No. 1, 52 Wn. App. 531,
762 P.2d 356 (1988) 23

*Campbell Crane & Rigging Services, Inc. v. Dynamic Intern.
AK, Inc.*, 145 Wn. App. 718, 186 P.3d 1193 (2008) 3

Christensen v. Grant County Hosp. Dist. No. 1,
152 Wn.2d 299, 96 P.3d 957 (2004) 14-15, 21, 33

CLEAN v. City of Spokane, 133 Wn.2d 455, 947 P.2d 1169 (1997) 10

Dept. of Ecology v. Yakima Reservation Dist.,
121 Wn.2d 257, 850 P.2d 1306 (1993) 24

Ensley v. Pitcher, 152 Wn. App. 891, 222 P.3d 99 (2009),
rev. denied, 168 Wn.2d 1028 (2010) 15, 16, 20

Hansen v. Friend, 118 Wn.2d 476, 824 P.2d 483 (1992) 10

Hardware Dealers Mut. Fire Ins. Co. v. Farmers Ins. Exch.,
4 Wn. App 49, 480 P.2d 226 (1971) 26

Harsin v. Oman, 68 Wash. 281, 123 P. 1 (1912)) 22

Hayes v. City of Seattle, 131 Wn.2d 706, 934 P.2d 1179 (1997) 18

Hisle v. Todd Pac. Shipyards Corp., 151 Wn.2d 853,
903 P.3d 108 (2004) 15

<i>Karlberg v. Otten</i> , No. 64595-1-I, slip op. (Wash. Ct. App. April 2, 2012)	16
<i>Kelly-Hansen v. Kelly-Hansen</i> , 87 Wn. App. 320, 941 P.2d 1108 (1997)	16-17
<i>Krikava v. Webber</i> , 43 Wn. App. 217, 716 P.2d 916 (1986)	25
<i>Kuhlman v. Thomas</i> , 78 Wn. App. 115, 897 P.2d 365 (1995)	17
<i>Kyreacos v. Smith</i> , 89 Wn.2d 425, 572 P.2d 723 (1977)	15
<i>Landry v. Luscher</i> , 95 Wn. App. 779, 976 P.2d 1274 (1999)	20, 23
<i>LeBire v. Dep't of Labor & Indus.</i> , 14 Wn.2d 407, 128 P.2d 308 (1942)	25
<i>Luisi Truck Lines, Inc. v. Wash. Utils. & Transp. Comm'n</i> , 72 Wn.2d 887, 435 P.2d 654 (1967)	15
<i>Lynn v. Dep't of Labor & Indus.</i> , 130 Wn. App. 829, 125 P.3d 202 (2005)	15
<i>Mellor v. Chamberlain</i> , 100 Wn.2d 643, 673 P.2d 610 (1983)	21-22
<i>Mitchell v. Doe</i> , 41 Wn. App. 846, 706 P.2d 1100 (1985)	13
<i>Nielson v. Spanaway Gen. Med. Clinic, Inc.</i> , 135 Wn.2d 255, 956 P.2d 312 (1998)	33
<i>Peacock v. Piper</i> , 81 Wn.2d 731, 504 P.2d 1124 (1973)	24
<i>Pederson v. Potter</i> , 103 Wn. App. 62, 1 P.3d 833 (2000), <i>rev. denied</i> , 143 Wn.2d 1006 (2001)	16, 20, 25
<i>Planet Ins. Co. v. Wong</i> , 74 Wn. App. 905, 877 P.2d 198 (1994)	6
<i>Qwest Corp. v. City of Bellevue</i> , 161 Wn.2d 353, 166 P.3d 667 (2007) .	10

<i>Rains v. State</i> , 100 Wn.2d 660, 674 P.2d 165 (1983)	15, 23
<i>Reninger v. Dep't of Corr.</i> , 134 Wn.2d 437, 951 P.2d 782 (1998)	27
<i>Rones v. Safeco Ins. Co. of America</i> , 60 Wn. App. 496, 804 P.2d 649 (1991), <i>aff'd</i> 119 Wn.2d 650 (1992)	2-3, 11
<i>Safeco Ins. Co. of America v. Butler</i> , 118 Wn.2d 383, 823 P.2d 499 (1992)	6
<i>Seals v. Seals</i> , 22 Wn. App. 652, 590 P.2d 1301, (1979)	21
<i>Schoeman v. New York Life Ins. Co.</i> , 106 Wn.2d 855, 726 P.2d 1 (1986)	24
<i>State v. Harner</i> , 153 Wn.2d 228, 103 P.3d 738 (2004)	33
<i>State v. Williams</i> , 132 Wn.2d 248, 937 P.2d 1052 (1997)	27
<i>Stevedoring Svcs. of Am. v. Eggert</i> , 129 Wn.2d 17, 914 P.2d 737 (1996)	24
<i>Tank v. State Farm Fire & Cas. Co.</i> , 105 Wn.2d 381, 715 P.2d 1133 (1986)	6
<i>Tyler Pipe Industries, Inc. v. State, Dept. of Revenue</i> , 105 Wn.2d 318, 715 P.2d 123 (1986)	33
<i>Ullery v. Fulleton</i> , 162 Wn. App. 596, 256 P.3d 406 (2011)	24, 30
<i>Vallandigham v. Clover Park Sch. Dist. No. 400</i> , 154 Wn.2d 16, 109 P.3d 805 (2005)	10
<i>Walsh v. Wolff</i> , 32 Wn.2d 285, 201 P.2d 215 (1949)	16
<i>Washington Educ. Ass'n v. Shelton School Dist. No. 309</i> , 93 Wn.2d 783, 613 P.2d 769 (1980)	1, 27
<i>Washington Federal Sav. & Loan Ass'n v. Alsager</i> , 165 Wn. App. 10, 266 P.3d 905 (2011)	10, 27

Woodley v. Myers Capital Corp., 67 Wn. App. 328,
835 P.2d 251, *rev. denied* 121 Wn.2d 1003 (1992) 23

B. Out of State Cases

Billings Mutual Ins. Co. v. Cameron Mutual Ins. Co.,
229 S.W.3d 138 (Mo. App. 2007) 13

Brereton v. Bountiful City Corp., 434 F.3d 1213 (10th Cir.2006) . . . 29, 30

Foster v. Mutual Fire, Marine and Inland Ins. Co., 154 Pa.Cmwlth.
356, 623 A.2d 928 (1993), *aff'd*, 636 A.2d 627 (1994) 12

In re Sonus Networks, Inc., Shareholder Derivative Litigation,
499 F.3d 47 (1st Cir. 2007) 28

In re V & M Management, Inc., 321 F.3d 6 (1st Cir. 2003) 30

Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee,
456 U.S. 694, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982) 29

Kasap v. Folger Nolan Fleming & Douglas, Inc.,
166 F.3d 1243 (D.C.Cir.1999) 29

Lewis v. Seneff, 654 F.Supp.2d 1349 (M.D. Fla. 2009) 30

LPP Mortgage Ltd. v. Hartzell, No. 08-1303
(U.S.D.C., C.D. Ill., June 14, 2011) 34

Magnus Electronics, Inc. v. La Republica Argentina,
830 F.2d 1396 (7th Cir. 1987) 30

Perry v. Sheahan, 222 F.3d 309 (7th Cir. 2000) 31-32

Rose v. Royal Ins. Co., 2 Cal. App. 4th 709, 3 Cal. Rptr. 2d 483 (1991) 12

Stadele v. Colony Ins. Co., 361 Mont. 459, 260 P.3d 145 (2011) 13

Stoll v. Gottlieb, 305 U.S. 165, 59 S.Ct. 134, 83 L.Ed. 104 (1938) 29

C. Statutes, Rules and Other Authorities

RCW 18.27.050

CR 41(a)(4) 24

CR 56(c) 10

7A Am.Jur.2d Automobile Insurance § 456, in part (1980) 12

G. Couch, Insurance § 45:859 (2d rev. ed. 1981) 3, 11

Thomas V. Harris, *Washington Ins. Law*, §10.01 (2nd Ed. 2006) 5, 20

Karl B. Tegland, WASHINGTON PRACTICE,
Civil Procedure § 35.32 (1st ed.2003). 14

Karl B. Tegland, WASHINGTON PRACTICE,
Civil Procedure § 35.33 (1st ed. 2007) 16

Philip A. Trautman, *Claim and Issue Preclusion in Civil Litigation
in Washington*, 60 WASH. L. REV. 805 (1985) 18

Allan D. Windt, *Ins. Claims & Disputes*, §9.11 (1995) 5, 6

18A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper,
FED. PRAC. & PROC. § 4436 (2002) 32

Restatement (Second) of Judgments §20 24

Restatement (Second) of Judgments §20, Comment n 17

www.bp-construction.com 3

www.defenseindustrydaily.com/329M-to-Berschauer-Phillips-to-
Build -Evervett-Seattle-Reserve-Center-05702/ 3

NATURE OF THE CASE

To have standing to bring suit, an individual must have a personal claim against a defendant. *Washington Educ. Ass'n v. Shelton School Dist. No. 309*, 93 Wn.2d 783, 790, 613 P.2d 769 (1980). In a prior lawsuit, this Court determined that Berschauer Phillips (BP) lacked standing to sue Mutual of Enumclaw (MOE). Before the trial court could act on this Court's mandate, BP stipulated to dismiss that lawsuit with prejudice, agreed that the dismissal resolved "all the claims of all the parties in this lawsuit," and agreed the order "constitutes final judgment in this matter." (CP 320) Nevertheless, without any change in its circumstances, BP sued MOE again. The second suit asserted the same claims, and sought the same relief. The trial court dismissed the lawsuit on the basis of res judicata. BP appeals.

COUNTER-STATEMENT OF THE CASE

In its statement of facts, BP has thrown in so much that keeping a response simple is difficult. Because so many of its statements, and the bad inferences it draws from them, are inaccurate, response is necessary, at least for the most glaring inaccuracies.

BP bases much of its argument on rights it claims it has under a "sue to recover judgment" provision in MOE policies. It cites the provision no less than seven times. In doing so it implies that the provision in essence

makes it an insured, free from policy defenses that would otherwise burden the actual insured, and free to assert extra-contractual theories of liability that only an insured may assert. Each citation, however, is a misquote, and the implications are simply wrong.

The full provision states:

No person or organization has a right under this policy:

- a. To join us as a party or otherwise bring us into a suit asking for damages from an insured*
- b. To sue us on this policy unless all of its terms have been complied with.*

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; but we will not be liable for damages that are not payable under the terms of this policy or that are in excess of the applicable limit of insurance. An agreed settlement means a settlement and release of liability signed by us, the insured and the claimant or the claimant's legal representative,

(CP 213, 430 (Italicized portion omitted from BP's quotation)) ” (CP 213, 430) As will be discussed, the provision is part of the “no action” clause, recognized by Washington courts as a standard policy provision. *Rones v. Safeco Ins. Co. of America*, 60 Wn. App. 496, 501-02, 804 P.2d 649 (1991), *aff'd* 119 Wn.2d 650 (1992). It does not make BP an insured. It does not protect third parties nor give them rights they otherwise would not have had, in particular right to assert extra-contractual theories of recovery. Rather it

restricts rights. “[I]ts purposes is to eliminate suits against the insurer by persons who have not established legal liability of the insured to them.” *Id.* citing 12A G. Couch, Insurance § 45:859 (2d rev. ed. 1981).

Next, throughout its statement of the case, indeed its entire brief, BP portrays itself as a victim and MOE as a perpetrator. In light of that effort, it bears reminder that BP is a sophisticated major general contractor that has been operating for decades. See *Berschauer/Phillips Const. Co. v. Seattle School Dist. No. 1*, 124 Wn.2d 816, 881 P.2d 986 (1994); *Campbell Crane & Rigging Services, Inc. v. Dynamic Intern. AK, Inc.*, 145 Wn. App. 718, 186 P.3d 1193, (2008); www.bp-construction.com; <http://www.defenseindustrydaily.com/329M-to-Berschauer-Phillips-to-Build-Evervett-Seattle-Reserve-Center-05702/>. The project underlying the case was a major construction project, the construction of a junior high school. BP has all the legal resources it desires, including the best legal minds, at its disposal. Its legal decisions are fairly characterized as strategic, not inadvertent or reactionary. Yet throughout its brief, BP portrays MOE as the one responsible for its and CSS’s predicament. The facts are very much to the contrary.

There can be no doubt that from the start BP tried to set the stage for MOE to have the least opportunity to protect CSS’s interests and defend against BP’s claims. As a sophisticated contractor, BP most certainly knew

MOE insured CSS when CSS contracted with BP. RCW 18.27.050 (registered contractors must have proof of insurance or financial responsibility). BP undeniably knew that MOE insured CSS while its lawsuit against CSS was pending. Just two weeks after taking a default judgment against CSS, BP contacted MOE and blithely demanded payment. (CP 412) But, BP never notified MOE of the lawsuit while MOE could still defend CSS, its insured.

Without any evidence, BP has accused MOE of misconduct amounting to bad faith and fraud after it learned of the default judgment. On the same theory, BP sued the attorneys MOE hired to try and have the default judgment set aside. (CP 272-73) What BP does not tell the court is (1) it vigorously resisted MOE's and the attorney's efforts to set aside the default judgment and (2) every witness who has given testimony has said that MOE and the attorneys did all they could to get the judgment set aside. (CP 411-14, 416-19, 421-23) Aside from the fact that BP fought their efforts tooth and nail, they failed because they were met with hostility and an outright refusal to help or even cooperate by the insured, who had dissolved, and whose managers wanted nothing to do with the lawsuit or MOE. (CP 411-14, 416-19, 421-23)

BP states that its second lawsuit was justified because it did not learn

the terms of MOE policies until after the first lawsuit made its way to this court. It fails to tell the court that it had all the information it needed about the policy to sue MOE for breaching it in the first lawsuit. (CP 267-68) It fails to tell the court that in its second lawsuit it did not claim that the MOE policy gave it the right to sue, but rather general principles of law. (CP 2)(“when a claimant obtains a judgment on an insured claim against a party with a comprehensive general liability policy, the party obtaining the judgment has a direct right of action against the insurer to collect the judgment. . . .”) BP did not even mention a policy provision in its second complaint. And, it fails to tell that court that it did not need permission in the form of a policy provision to sue MOE to collect the judgment. See 2 Allan D. Windt, *Ins. Claims & Disputes*, §9.11 at 51 (1995)(“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.”); Thomas V. Harris, *Washington Ins. Law*, §10.01 (2nd Ed. 2006)(“A garnishment is a derivative process that allows a judgment creditor to collect the judgment by attaching the insurance “debt” owed by an insurer to an insured.”)

With this background, the following accurately states the relevant facts:

MOE had insured CSS before CSS dissolved. (CP 412) Noone had

ever notified MOE of BP's lawsuit until after BP took the default judgment. (CP 412, 417, 419) Even then, MOE received notice from BP, not from its insured. (CP 412) Representatives of CSS refused to cooperate. (CP 413-14, 417-19) Nevertheless, MOE hired counsel to protect CSS's interest and try to set aside the default judgment. (CP 412-13, 422-23) It did that under a reservation of rights. (CP 413, 417) And, while its efforts failed, the failure was due solely to lack of cooperation from CSS, not misconduct by MOE. (CP 422-23)

Since BP could not collect the judgment from CSS – CSS had nothing – it immediately set its sights on MOE. BP knew, however, that MOE would have substantial defenses to coverage. Every insurance policy includes duties to give notice of a lawsuit and cooperate in its defense. 1 Allan D. Windt, *Ins. Claims & Disputes*, §1.01 at 1, §30.02 at 110 (1995). Those and other defenses obviously applied here.

In Washington, bad faith can overcome policy defenses. *Safeco Ins. Co. of America v. Butler*, 118 Wn.2d 383, 395, 823 P.2d 499 (1992). But, absent an assignment, only an insured can assert bad faith. *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 393, 715 P.2d 1133 (1986); *Planet Ins. Co. v. Wong*, 74 Wn. App. 905, 909, 877 P.2d 198 (1994). BP could not get an assignment, so it had to do something else. That “something else” was

to just ignore the requirement. Even though it was merely a judgment creditor, BP decided just to act like the insured and sue MOE just like an insured. (CP 266-68) BP claimed it had attached all of CSS's claims against MOE and so stood in CSS's shoes, (CP 267, lns. 15-19), but it never had. With the same lack of concern for legal requirements, BP also sued the attorneys MOE hired to represent CSS.¹ (CP 270-75)

In its brief, BP details the long and winding road it took through the courts in its vain effort to transform itself into MOE's insured, and obtain coverage where it otherwise could not. The bottom line is that several courts, including this one, rejected its efforts because BP was not MOE's insured, and had not, and could not, acquire CSS's right to sue. (CP 249-56) As a result, BP did not have and could not get standing to sue MOE on the claims it was asserting. (CP 258-64)

After these several defeats, BP finally gave up on the lawsuit. It voluntarily dismissed all the defendants with prejudice. (CP 319-20; 373-75)

1. BP also sued one of CCS's former principals, Jennifer Faller, personally. (CP 270-75) It claimed that by failing to cooperate with MOE under MOE's policy, she effectively undercapitalized CSS, and thus was directly liable to BP. (CP 273-74, 298) The claim might have been justified as an alternative theory for getting the judgment paid but for the fact that Faller had recently gone through bankruptcy. (CP 298) That meant BP had no chance of succeeding against Faller. Therefore, the only justification for bringing her into the suit was to coerce her into moving off her sworn testimony that CSS had never tendered BP's lawsuit to MOE, refused to cooperate with MOE's investigation, and refused to help the attorneys' efforts to set aside the default judgment. (CP 416-19) The need for Faller to prove that fact went away when, after more than a year of litigation and appeal, BP agreed to her dismissal with prejudice. (CP 373-75)

As to MOE, BP even agreed “that with the dismissal all the claims of all the parties in this lawsuit are resolved and this order constitutes final judgment in this matter.” (CP 320)

Along the way, however, BP thought up a new reason why MOE could be liable to it. BP decided that “when a claimant obtains a judgment on an insured claim against a party with a comprehensive general liability policy, the party obtaining the judgment has a direct right of action against the insurer to collect the judgment. . . .” (CP 2) With this “direct right of action,” BP concluded, it could assert all the same claims it had asserted in the first lawsuit without the formality of having to attach CSS’s claims. (CP 1-2) Not deterred by the fact it had already prosecuted one claim to completion, and that it had no new facts just its new theory, BP sued again.

MOE moved to dismiss the new suit. (CP 384-407) It argued collateral estoppel precluded BP from challenging its standing again, and thereby barred the second suit. (CP 390-94) It also argued that res judicata applied because the claims BP was asserting in the new lawsuit were claims it could and should have asserted in the first lawsuit. (CP 394-403)

BP’s only defense from these claims was to argue that something had changed between the first and second suits that justified the latter. Caught in the reality of its own pleading – that the law in existence at the time of the

first suit allowed BP to assert direct claims against MOE (CP 2) – BP could not argue a change in the law. So, it shifted gears. Instead it argued it was a victim. It contended that, despite the fact it had sued for breach of contract in the first lawsuit, it just learned about a policy provision standard to MOE – and virtually every other insurance policy – which allowed it to sue MOE directly. (CP 424-25) BP was a victim, it contended, because MOE had not told BP about the provision in the first lawsuit. (CP 441-42)

The trial court did not buy BP’s arguments. The court decided that res judicata barred BP’s second suit and dismissed it. (CP 473) Undeterred but with no new evidence, argument, or authority, BP asked the court to reconsider. (CP 475) With restraint, the court denied that motion as well. (CP 493) BP now appeals, asking this court yet again to rescue it from the failures of its own machinations. (CP 480-92)

COUNTER-STATEMENT OF THE ISSUES

1. Whether a decision of a court that it lacked jurisdiction to hear plaintiff’s claims because the plaintiff lacked standing may be revisited, challenged, and collaterally attacked in a subsequent proceeding based on arguments the Plaintiff possessed but did not assert at the time of the first court’s decision?

2. Whether issue preclusion (collateral estoppel) or claim preclusion (res judicata) prevents relitigation of a plaintiff’s standing, and the claims that standing might support, where there has been no change in the plaintiffs’ circumstances since a ruling denying standing?

ARGUMENT

A. Standard of Review

Appellate courts review orders granting summary judgment de novo, engaging in the same inquiry as the trial court. *Qwest Corp. v. City of Bellevue*, 161 Wn.2d 353, 358, 166 P.3d 667 (2007). A court may grant summary judgment if there are no genuine issues as to any material fact, thus entitling the moving party to judgment as a matter of law. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005); CR 56(c). The court considers the evidence in the light most favorable to the nonmoving party. *CLEAN v. City of Spokane*, 133 Wn.2d 455, 462, 947 P.2d 1169 (1997). When reasonable persons could reach but one conclusion, summary judgment should be granted. *Hansen v. Friend*, 118 Wn.2d 476, 485, 824 P.2d 483 (1992).

The trial court granted summary judgment on the basis of res judicata. In doing so, it rejected MOE's argument that collateral estoppel also applied. 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).

B. The insurance policy does not give BP rights as an insured or free it from policy defenses, and does not provide a basis for it to sue MOE.

BP's central contention must be addressed up front. At the heart of BP's argument is the contention that fairness requires it be allowed to prosecute the second action because it just learned of a policy provision – the “sue to recover judgment” provision – that gives it a right to sue directly. It blames MOE for just learning of the provision. It claims the provision is important because it gives BP rights against MOE that are independent of CSS. Brief of Appellant at 14, 22, 32. It cites no authority for the proposition, and repeatedly (at least seven times) misquotes the provision by quoting only half of it. The full provision is quoted above. See *supra* at 2.

This part of BP's argument is a red herring. The provision is part of the “no action” clause, recognized by Washington courts as a standard policy provision. *Rones v. Safeco Ins. Co. of America*, 60 Wn. App. 496, 501-02, 804 P.2d 649 (1991), *aff'd* 119 Wn.2d 650 (1992). It does not give judgment creditors the rights of an insured. It does not protect third parties or give them rights they otherwise would not have had. It does not even give rights to an insured. Rather it restricts rights. “[I]ts purposes is to eliminate suits against the insurer by persons who have not established legal liability of the insured to them.” *Id.* citing 12A G. Couch, Insurance § 45:859 (2d rev. ed.

1981).

The form of “no action” clause in common use provides that no action shall be brought against the insurer until after the determination of the liability of the insured by a final judgment or by an agreement entered into between the insurer, the insured, and the claimant. The validity of such clauses has generally been sustained, and in respect to policies containing such clauses the courts in numerous cases have denied to the injured person the right to maintain an action against the insurer, either severally or jointly with the insured, before the recovery of a judgment against the insured, or a determination of the liability of the insured by an agreement between the insurer, the insured, and the injured person.

Id. at 502, quoting 7A Am.Jur.2d Automobile Insurance § 456, in part (1980).

The provision “protects an insurer’s legitimate interest in not being made to indemnify its insured pursuant to a judgment based on collusion between the insured and the injured party.” *Rose v. Royal Ins. Co.*, 2 Cal. App. 4th 709, 716, 3 Cal. Rptr. 2d 483 (1991); accord *Foster v. Mutual Fire, Marine and Inland Ins. Co.*, 154 Pa.Cmwlth. 356, 623 A.2d 928, 930 (1993), *aff’d*, 535 Pa. 516, 636 A.2d 627 (1994). The provision gives BP no rights it otherwise did not have. MOE had no reason to hide it from BP.²

2. In light of this, BP’s claim that MOE is estopped from relying on res judicata because it fraudulently concealed its insurance policy from BP (Brief of Appellant at 33-34) requires only a cursory response. The gist of its argument is that BP was entitled to discovery on claims it had no right to bring, and MOE was “fraudulent” in not responding to that discovery. The failures in this argument are both obvious and multiple.

- The trial court never ordered discovery. The orders to which BP refers are actually minute notes, neither of which reflect orders compelling MOE to do anything other than pay sanctions of \$500 for noting its challenge to standing as a 12(b) motion

The provision also does not free a judgment creditor from coverage defenses the insurer would have against the insured. Rather, the provision explicitly conditions any recovery on compliance with that all the policy terms and proof the judgment is covered by the policy, just as the insured would have to show if it was suing to enforce the judgment. See, e.g., *Steadele v. Colony Ins. Co.*, 361 Mont. 459, 260 P.3d 145, 150-51 (2011)(sue to recover judgment provision did not allow judgment creditor to enforce judgment against insurer where insured failed to notify insurer of underlying claim); *Billings Mutual Ins. Co. v. Cameron Mutual Ins. Co.*, 229 S.W.3d

instead of summary judgment. (CP 206, 208)

- Because the trial court lacked jurisdiction, it lacked authority to order discovery. *Mitchell v. Doe*, 41 Wn.App. 846, 706 P.2d 1100 (1985)
- BP had no right to discovery on claims it had no right to bring.
- MOE did not conceal anything from BP, fraudulently or otherwise. BP was always aware it did not have the insurance policy. [If, indeed, it did not. Remember BP is the one who gave MOE notice of the default judgment, and sued for breach of contract in the first action.]
- If BP was concerned about discovery, the proper forum was the Thurston County action, not this action.
- BP did not need discovery to know it had a direct right of action against MOE. As discussed previously, authority that was well-established at the time of the first suit, and which BP has cited in its brief (Brief of Appellant at 19-23), provided a recognized basis for BP to enforce the judgment directly against MOE in the first lawsuit if it wanted to. BP even recited that law in its second complaint. (CP 2) BP did not need the insurance policy, and indeed did not rely on the insurance policy, as the basis for the second action.
- The policy provision does not give BP the rights it claims. Whatever rights BP has to sue MOE directly, if any, come from legal sources, not the policy.

138, 145 (Mo. App. 2007). This means that to enforce the judgment, BP must overcome the same defenses and produce the same evidence regardless of whether it is suing on so-called “direct” or “attached” claims.

Most certainly, the provision does not transform the judgment creditor into an insured. Thus, it does not give the judgment creditor rights only the insured possesses. MOE does not owe BP a duty of good faith, and BP has no right to extra-contractual damages for bad faith. *Tank v. State Farm Fire & Cas. Co.*, supra, 105 Wn.2d at 391-93(judgment creditor not allowed to assert insured’s bad faith claims).

C. Collateral estoppel and res judicata bar relitigation of issues previously decided and claims that could have been decided.

Having disposed of BP’s main argument, your author turns to the actual issues in the case: whether res judicata and collateral estoppel preclude BP’s second suit where nothing changed from the first suit, and BP is simply arguing a different theory of standing.

Collateral estoppel, or issue preclusion, bars relitigation of an issue in a subsequent proceeding involving the same parties. *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d 299, 306, 96 P.3d 957 (2004), citing 14A Karl B. Tegland, WASHINGTON PRACTICE, Civil Procedure § 35.32, at 475 (1st ed.2003). Res judicata prevents a second litigation between the

parties, even though a different claim or cause of action is asserted. *Christensen, supra* at 306, quoting *Rains v. State*, 100 Wn.2d 660, 665, 674 P.2d 165 (1983); *Kyreacos v. Smith*, 89 Wn.2d 425, 427, 572 P.2d 723 (1977). Claim preclusion/res judicata “is intended to prevent relitigation of an entire cause of action and collateral estoppel [issue preclusion] is intended to prevent retrial of one or more of the crucial issues or determinative facts determined in previous litigation.” *Christensen*, 152 Wn.2d at 306, quoting *Luisi Truck Lines, Inc. v. Wash. Utils. & Transp. Comm’n*, 72 Wn.2d 887, 894, 435 P.2d 654 (1967).

Whether res judicata or collateral estoppel applies is a question of law. *Lynn v. Dep’t of Labor & Indus.*, 130 Wn. App. 829, 837, 125 P.3d 202 (2005). The party asserting the defense bears the burden of proof. *Ensley v. Pitcher*, 152 Wn. App. 891, 902, 222 P.3d 99 (2009), *rev. denied*, 168 Wn.2d 1028 (2010)(citing *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 865, 903 P.3d 108 (2004)).

Ordinarily, res judicata and collateral estoppel present distinct questions and there is significance to determining which applies. That is not true here. Under the unique facts of this case, both apply.

1. Res Judicata Bars BP’s second suit.

Res judicata bars the second litigation if the claims are based upon the

same cause of action. *Ensley*, 152 Wn. App. at 899 (citing 14A Karl B. Tegland, *Washington Practice: Civil Procedure* § 35.33, at 479 (1st ed. 2007))(distinguishing collateral estoppel’s requirement that the issue be actually litigated from res judicata’s more lenient standard where issues that could have been litigated and resolved are barred)). 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). The doctrine “puts an end to strife, produces certainty as to individual rights, and gives dignity and respect to judicial proceedings.” *Karlberg v. Otten*, No. 64595-1-I, slip op. at 14 (Wash. Ct. App. April 2, 2012), quoting *Walsh v. Wolff*, 32 Wn.2d 285, 287, 201 P.2d 215 (1949).

Res judicata requires identity between a prior judgment and a subsequent action as to (1) persons and parties, (2) causes of action, (3) subject matter, (4) the quality of persons for or against whom the claim is made. It also requires a final judgment on the merits. *Karlberg v. Otten*, *supra*, slip op. at 14; *Pederson v. Potter*, 103 Wn. App. 62, 67, 11 P.3d 833 (2000), *rev. denied*, 143 Wn.2d 1006 (2001). However, the case law makes clear that there is no single, mechanistic test for when claim preclusion

applies. *Kelly-Hansen v. Kelly-Hansen, supra*, 87 Wn. App. at 330; accord Restatement (Second) of Judgments §20, Comment n (stating that the rule regarding finality is not an inflexible one. “In some instances, the doctrines of estoppel or laches could require the conclusion that it would be plainly unfair to subject the defendant to a second action.”). Here, all the elements are met.

a. The parties are identical

BP concedes this point. Brief of Appellant at 28. BP and MOE were parties to the Thurston County lawsuit. In both suits they are in the same alignment: plaintiff and defendant.

b. The causes of action and subject matter are identical.

Though there is no specific test for determining when causes of action are the same, among the factors the court should consider are (1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts. *Kuhlman v. Thomas*, 78 Wn. App. 115, 122, 897 P.2d 365 (1995). The critical factor for determining whether subject matter is identical is the nature of the claims and the parties. *Hayes*

v. *City of Seattle*, 131 Wn.2d 706, 712, 934 P.2d 1179 (1997), quoting Philip A. Trautman, *Claim and Issue Preclusion in Civil Litigation in Washington*, 60 WASH. L. REV. 805, 812-13 (1985).

The causes of action and subject matter are clearly identical. Both suits arise solely out of CSS's contractual rights and obligations vis-a-vis MOE. Both seek payment of the same judgment. Both claims required BP to (1) prove the contract, (2) prove that the facts and losses underlying the default judgment gave rise to coverage, and (3) avoid obvious policy defenses such as the insured's admitted failure to cooperate. Though without basis, in both suits BP invoked coverage by estoppel to avoid policy defenses, a remedy only allowed to insureds. (CP 2, ln. 12; 267, ln. 27) Consistent with these facts, BP submitted the same discovery in both actions. (Compare CP 325-47 with CP 349-71) If in the first action BP had been unsuccessful proving that MOE breached the policy and that CSS had not, it would clearly have no claim in the second action. Thus, while BP argues there is no identity of claim or cause of action because BP's "own direct claims against MOE, arising out of the policy language, are no more the same claim or cause of action . . . as the chose in action . . . on which [BP] attempted to sue in Thurston County" (Brief of Appellant at 18), saying it is so does not make it so.

BP claims that the subject matter of the two suits is not identical because the subject matter of the first suit 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.’” Brief of Appellant at 16. In reality, BP’s first complaint was not nearly so limited. In it, BP claimed it had attached “all” of CSS’s causes of action against MOE and claimed standing to assert “all” of them. (CP 267, Ins. 15-18) Consistent with those allegations, BP broadly alleged theories of breach of contract, negligence, bad faith and violation of Washington’s Consumer Protection Act. (CP 267, Ins. 21-24) BP expressly stated the acts underlying its claims were “not limited to” how MOE dealt with the default judgment. (CP 267 Ins. 25-26) In its prayer for relief, BP sought declaratory judgment that the judgment was covered by the policy, and damages and attorney fees for having to enforce the policy. (CP 268, Ins 4-6) BP sought “all damages incurred” for breach of contract, negligent claim handling, bad faith, and violation of Washington’s Consumer Protection Act. (CP 268, Ins. 7-15) BP also asked for other damages “as the Court deems just and equitable.” (CP 268, Ins. 20-21) BP even asked permission to amend as new information was found in discovery. (CP 268, ln. 19) 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.

Nor does the fact that BP based its standing on different theories change the identity of subject matter. Brief of Appellant at 25. Res judicata not only prohibits the relitigation of claims and issues that were litigated in a prior action, but those *that could have been litigated* as well. *Ensley v. Pitcher, supra*, 152 Wn. App. at 891; *Pederson v. Potter, supra*, 103 Wn. App. at 67. The general rule is that “if an action is brought for part of a claim, a judgment obtained in the action precludes the plaintiff from bringing a second action for the residue of the claim.” *Landry v. Luscher*, 95 Wn. App. 779, 782, 976 P.2d 1274 (1999)(suit for personal injury and suit for property damage arising from the same accident present identical causes of action and subject matter). A party does not avoid res judicata just by pleading a different theory.

BP devotes substantial discussion to whether or not garnishment is the appropriate method by which a judgment creditor may collect from the debtor’s insurer, and whether it could have sought a writ of garnishment. Brief of Appellant at 19-24. While also incorrect,³ it misses the point. Res judicata does not turn on whether BP could have recovered as a garnishor.

3. See Thomas V. Harris, *Washington Ins. Law*, §10.01 (2nd Ed. 2006)(“A garnishment is a derivative process that allows a judgment creditor to collect the judgment by attaching the insurance “debt” owed by an insurer to an insured.”), citing RCW 6.27.020.

Res judicata turns on whether the causes of action and subject matter BP now asserts, whatever they may be, could and should have been asserted in the first action. *Christensen v. Grant County Hosp. Dist. No. 1, supra*, 152 Wn.2d at 306. On that point BP concedes two critical points: (1) Whatever basis for recovery it has asserted in the second suit it possessed at the time of the first. BP has not obtained some right it did not possess while the first suit was pending. (2) Well-established authority recognizing BP's right to sue directly existed and was available to BP at the time of the first suit. See Brief of Appellant at 19-23. Indeed, as noted previously, BP made that very point when it pled its second lawsuit. (CP 2)

BP's citation to *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 unavailing. In *Seals* the first action made the ex-spouses tenants in common. The second action sought to divide the common interest created in the first. The first action made the second action necessary. The actions were, by necessity, separate. 22 Wn. App. at 655. That is not the circumstance here.

Mellor involved a dispute over covenants of title where, the court acknowledged, "res judicata principles are less strictly adhered to." 100 Wn.2d at 646. The first lawsuit disputed whether the sellers misrepresented

the parking lot as part of the sale. The second questioned whether a neighbor's claim of encroachment breached the covenant of title. The court decided that res judicata did not apply because "although both lawsuits arose out of the same transaction (sale of property), their subject matter differed" and "evidence to show who owned the parking lot was not directly pertinent in deciding whether the building encroached a few inches." 100 Wn.2d at 646. In reaching its holding, the court was careful to point out that while the subject matter of a cause of action can be litigated many times, it can only be litigated "as often as an independent cause of action arises which, *because of its subsequent creation*, could not have been litigated in the former suit, as the right did not then exist." *Id.* at 647, quoting *Harsin v. Oman*, 68 Wash. 281, 283, 123 P. 1 (1912)). In that case, the second action did not exist when the first action was filed.

Here that differentiation is not possible. The basis for both suits existed at the same time. Both suits are factually and legally identical. Both arise out of the same nucleus of facts: those underlying the default judgment and those underlying coverage. Both seek to enforce the same judgment and vindicate the same rights. Both assert the same contract, tort, statutory or estoppel remedies to obtain that goal. Both require proof that the insurance policy applied in precisely the same way to CSS's liability. Therefore, the

applicable legal principles and burdens are the same. If BP had been successful or unsuccessful in the first suit, any further action on the policy would have been precluded. See *Landry v. Luscher, supra*, 95 Wn. App. 779 (suit for personal injury and suit for property damage arising from the same accident present identical causes of action and subject matter).

c. The quality of persons is identical.

Though BP claims to have been asserting different claims in the two lawsuits, in both it was acting in its own name, solely on its own behalf and for its own interest and benefit. In both proceedings BP and MOE were adversaries. In both proceedings BP had full opportunity to protect its own interest. That is what the doctrine requires. See *Rains v. State*, 100 Wn.2d 660, 664-65, 674 P.2d 165 (1983)(the State and members of a commission are qualitatively the same); *Camer v. Seattle School Dist. No. 1*, 52 Wn. App. 531, 535, 762 P.2d 356 (1988)(parents suing on behalf of one child are qualitatively the same when they sue on behalf of another child); *Woodley v. Myers Capital Corp.*, 67 Wn. App. 328, 337, 835 P.2d 251, *rev. denied* 121 Wn.2d 1003 (1992).

d. The first suit ended in a final judgment on the merits.

Finally, the first suit ended in a final judgment on the merits. It is true: this court ordered dismissal of the Thurston County lawsuit because BP

lacked standing and therefore the Thurston County Court lacked jurisdiction. (CP 264) It also is true that ordinarily dismissal for lack of jurisdiction is not a final judgment on the merits, and therefore may not support a res judicata defense. *Stevedoring Svcs. of Am. v. Eggert*, 129 Wn.2d 17, 41, 914 P.2d 737 (1996); *Peacock v. Piper*, 81 Wn.2d 731, 734, 504 P.2d 1124 (1973); *Ullery v. Fulleton*, 162 Wn. App. 596, 256 P.3d 406 (2011); Restatement (Second) of Judgments §20. The rule does not apply here, however, because the court’s holding on jurisdiction never became effective. Before the trial court could enforce the mandate, BP stipulated to the dismissal of its claims against MOE with prejudice. In doing so, it acted consistent with its actions towards the other defendants – those against whom BP was asserting “attached” claims and those against whom it was asserting direct claims – in stipulating to their dismissal with prejudice. (CP 373-75.) A stipulated voluntary dismissal with prejudice is sufficient to bar a subsequent action between the same parties.⁴ CR 41(a)(4); *Dept. of Ecology v. Yakima Reservation Dist.*, 121 Wn.2d 257, 290, 850 P.2d 1306 (1993)(dismissal with prejudice is a final judgment and res judicata in a subsequent action), citing *Schoeman v. New*

4. To the extent BP argues that the Thurston County court lacked jurisdiction to enter the parties’s stipulated order, it is wrong. In Washington, a defense based on standing can be waived. *Ullery v. Fulleton*, 162 Wn. App. 596, at ¶18, 256 P.3d 406 (2011). Thus, the parties were free to agree on the form of dismissal, and waive the defense to the extent of that agreement.

York Life Ins. Co., 106 Wn.2d 855, 861, 726 P.2d 1 (1986); *LeBire v. Dep't of Labor & Indus.*, 14 Wn.2d 407, 418, 128 P.2d 308 (1942)(“a final order or judgment, settled and entered by agreement or consent of the parties, is no less effective as a bar or estoppel than is one which is rendered upon contest and trial.”); *Pederson v. Potter*, 103 Wn. App. 62, 70-71, 11 P.3d 833 (2000)(court applied res judicata to a consent judgment “because the Pedersons knew of their potential claims against the Potters when they settled and signed the confession of judgment. They had the opportunity to be heard on these claims, and have them disposed of, but chose not to do so.”); *Krikava v. Webber*, 43 Wn. App. 217, 716 P.2d 916 (1986)(stipulation to dismissal with prejudice bars subsequent action between the adversaries in the first action).

While BP’s stipulation to dismissal with prejudice alone would satisfy the final judgment requirement, BP went further. In addition to agreeing to dismissal with prejudice, BP also expressly agreed that with the dismissal “all the claims of all the parties in this lawsuit are resolved and this order constitutes final judgment in this matter.” (CP 320) It could not be clearer that the parties intended the dismissal to be a final judgment.

e. MOE did not waive its right to assert res judicata.

BP argues that MOE waived its right to assert res judicata. Brief of

Appellant at 33. Waiver can occur when a defendant fails to raise the defense. See, e.g., *Hardware Dealers Mut. Fire Ins. Co. v. Farmers Ins. Exch.*, 4 Wn. App 49, 51, 480 P.2d 226 (1971)(“[A]ppellants were on notice of the valid transfer to respondent of the medical expense part of the cause of action and so were faced at the outset of the litigation with a separation of claims based upon a single tort. They did not object or raise a defense either with the court or respondent.”); *Brice v. Star*, 93 Wash. 501, 161 P. 347 (1916)(waiver occurred when defendant submitted to trial of second lawsuit without raising claim splitting defense based on first lawsuit). Here, however, MOE raised the defense from the very first communication it had with BP (CP 204), raised it in defense against BP’s motion to compel (CP 214-31), and thereafter promptly moved to dismiss. (CP 384-406) MOE did not explicitly or implicitly assent to BP’s multiple lawsuits.

In the first lawsuit, BP asserted direct and indirect claims against multiple parties. Ultimately, BP stipulated to dismissing all those claims with prejudice. The claims in the second lawsuit are the same as those in the first. Res judicata prevents BP from making those claims.

2. Collateral estoppel bars the second suit by preventing BP from disputing its lack of standing.

The trial court rejected MOE’s argument that the second lawsuit

should be dismissed because of collateral estoppel. This was error. In the first lawsuit BP had full opportunity to litigate its standing. Collateral estoppel prevents it from relitigating that issue. Because 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), collateral estoppel provides another ground for affirming summary judgment.

A party seeking to apply collateral estoppel must establish that (1) the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding, (2) the earlier proceeding ended in a judgment on the merits, (3) the party against whom collateral estoppel is asserted was a party to, or in privity with a party to, the earlier proceeding, and (4) application of collateral estoppel does not work an injustice on the party against whom it is applied. *Reninger v. Dep't of Corr.*, 134 Wn.2d 437, 449, 951 P.2d 782 (1998); *State v. Williams*, 132 Wn.2d 248, 254, 937 P.2d 1052 (1997). Here, too, all the elements are present.

a. The issues are identical

To have standing to bring suit, an individual must have a personal claim against a defendant. *Washington Educ. Ass'n v. Shelton School Dist. No. 309*, 93 Wn.2d 783, 790, 613 P.2d 769 (1980). In the first action, BP alleged it had standing. (CP 323) MOE challenged that allegation. (CP 259)

The Court of Appeals decided that issue: “**BPCC had no standing at the time it filed the action, nor did it have standing at the time the stay was issued.**” (CP 264 (emphasis added)) In the second lawsuit, BP again alleged it has standing to sue MOE. (CP 2) But BP has no claims or rights now that it did not have in the first suit. Thus, the identical issue presented here – BP’s standing to sue MOE – was decided in the earlier action.

b. The earlier proceeding ended in judgment sufficient to apply the doctrine.

The earlier proceeding ended when the trial court entered dismissal with prejudice by agreement of the parties. (CP 319-20) In the same document, BP agreed, and the trial court ordered, that all of the claims between BP and MOE were resolved, and the order constituted final judgment. (CP 320) Because the stipulation is a judgment barring a subsequent action between the same parties, see *supra* at 24-26, it alone is sufficient for collateral estoppel.

However, even if the stipulated order is not sufficient, the jurisdictional dismissal itself is final for purposes of that ruling. The general rule is that collateral estoppel does not require a judgment on the merits when the doctrine is applied to the jurisdictional decision itself. See, e.g., *In re Sonus Networks, Inc., Shareholder Derivative Litigation*, 499 F.3d 47, 59 (1st

Cir. 2007)(“[T]he accepted modern view [is] that issue preclusion does not depend on an earlier adjudication of the substance of the underlying claim; even adjudications such as dismissal for lack of jurisdiction or failure to join an indispensable party, which are expressly denominated by Rule 41(b) as not being ‘on the merits,’ are entitled to issue preclusive effect.”); *Brereton v. Bountiful City Corp.*, 434 F.3d 1213, 1218-19 (10th Cir.2006) (dismissal for lack of standing); *Kasap v. Folger Nolan Fleming & Douglas, Inc.*, 166 F.3d 1243, 1248 (D.C.Cir.1999) (dismissal for lack of subject matter jurisdiction). This stems from the need for finality even as to jurisdictional decisions. *Stoll v. Gottlieb*, 305 U.S. 165, 172, 59 S.Ct. 134, 83 L.Ed. 104 (1938)(“We see no reason why a court, in the absence of an allegation of fraud in obtaining the judgment, should examine again the question whether the court making the earlier determination on an actual contest over jurisdiction between the parties did have jurisdiction of the subject matter of the litigation. . . . After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined.”); *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n. 9, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982)(“A party that has had an opportunity to litigate the question of subject-matter jurisdiction may not ...

reopen that question in a collateral attack upon an adverse judgment. It has long been the rule that principles of res judicata apply to jurisdictional determinations--both subject matter and personal.”).

Several federal courts have addressed the issue and applied collateral estoppel to jurisdictional decisions including those based on standing.⁵ See, e.g., *Magnus Electronics, Inc. v. La Republica Argentina*, 830 F.2d 1396, 1400 (7th Cir. 1987)(finding the plaintiff was barred by res judicata from re-litigating issue of jurisdiction in a subsequent suit and the plaintiff could not simply add more factual allegations in the subsequent suit to establish jurisdiction when those facts were known at the time the first suit was filed); *In re V & M Management, Inc.*, 321 F.3d 6, 8-9 (1st Cir. 2003); *Brereton v. Bountiful City Corp.*, 434 F.3d 1213, 1218-19 (10th Cir.2006); *Lewis v. Seneff*, 654 F.Supp.2d 1349, 1357-64 (M.D. Fla. 2009).

5. Though BP has never cited to the case, Washington courts have addressed the preclusive effect of a prior standing determination once, in *Ullery v. Fulleton*, 162 Wn. App. 596, 256 P.3d 406 (2011). In *Ullery*, the court decided whether a party whose claim was once dismissed on the basis of a curable standing defect is barred by the doctrine of issue preclusion from curing the standing defect and pursuing the claim in a second action. *Ullery* does not apply here because the standing defect was curable and was cured after the first court ruled. Here, BP cured nothing. Nothing changed between the time the first court ruled on BP's standing and the time BP filed its second action except that BP thought of a new theory of standing. BP possessed the basis for its claim to standing in the second action at the time MOE challenged its standing in the first. BP could have asserted that basis for standing in the first proceeding. Because of that fact, BP's position here is akin to what would have existed in *Ullery* if the plaintiffs actually had a proper assignment at the time of the first action but simply failed to produce it to the trial court. MOE suggests the result in *Ullery* would have been the opposite if that had been the case.

Perry v. Sheahan, 222 F.3d 309 (7th Cir. 2000), illustrates these cases. In *Perry*, the plaintiff sued various police officials alleging they violated his constitutional rights in seizing firearms and other items from his apartment (Perry I). He sought declaratory and injunctive relief. The district court dismissed the suit because Perry lacked standing. While the appeal of that decision was pending, Perry filed a second suit (Perry II). The second suit raised identical issues, but included additional factual allegations to support his standing to seek declaratory and injunctive relief. The district court dismissed that suit as well, holding that the claims were barred by res judicata. The Circuit Court affirmed, but on grounds of collateral estoppel. The court reasoned that while dismissals for lack of standing are not a judgment on the merits, they nevertheless bar relitigation of the issue actually decided, namely the jurisdictional issue. 222 F.3d at 317. The court also decided that Perry's addition of new factual allegations did not save the case because the new facts did not represent a change in his circumstances. "Only facts arising after the complaint was dismissed--or at least after the final opportunity to present the facts to the court--can operate to defeat the bar of issue preclusion." 222 F.3d at 317-18. Any other rule, the court reasoned, would "allow a plaintiff to begin the same suit over and over again in the same court, each time alleging additional facts that the plaintiff was aware of

from the beginning of the suit, until it finally satisfies the jurisdictional requirements.” That, the court concluded was precisely what Perry attempted. 222 F.3d at 318. Accord, 18A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, FED. PRAC. & PROC. § 4436 at 165-66 (2002).

That is precisely what BP is attempting as well. No fact has changed since the Thurston County action was dismissed. Nothing exists now that did not exist then. BP has simply thought of a new reason why it has standing to sue MOE.

In summary, the stipulation of the parties to dismissing the case with prejudice constitutes final judgment on the merits. Even if it did not, however, the order the Thurston County Superior Court would have entered following the mandate from the Court of Appeals would have resulted in a final judgment at least on the issue of BP’s standing.

c. The parties are identical.

The parties are identical in both proceedings. BP concedes that fact. Appellant’s Brief at 27-28.

d. Applying the doctrine does not work an injustice.

Generally, collateral estoppel will not work an injustice where the party had a full and fair opportunity to litigate the issue in the prior

proceeding. *Christensen v. Grant County Hosp. Dist. No. 1, supra*, 152 Wn.2d at 309; *Nielson v. Spanaway Gen. Med. Clinic, Inc.*, 135 Wn.2d 255, 264-65, 956 P.2d 312 (1998). Here, BP is a sophisticated consumer of legal services. It had the wherewithal to hire the best lawyers to assert every legal theory available. When it acts, it acts tactically. The court can reasonably assume it makes arguments or refrains from making arguments for a reason and not by accident. BP had every opportunity, in two courts – the Thurston County Superior Court and the Court of Appeals – with all the rights and protections due process guaranteed to assert any grounds available to it to support its standing to sue. BP chose the form of its first lawsuit so it could raise extra-contractual theories of recovery in addition to contractual theories. Justice does not require that it be freed from the consequence of that decision.

CONCLUSION

In Washington a defendant can waive a plaintiffs' lack of standing by failing to raise it in the trial court. *State v. Harner*, 153 Wn.2d 228, 234, 103 P.3d 738 (2004); *Tyler Pipe Industries, Inc. v. State, Dept. of Revenue*, 105 Wn.2d 318, 327, 715 P.2d 123 (1986). There is no logical reason why a plaintiff should not be held to the same standard, and required to raise all grounds available to support standing or waive those it does not. As one court addressing the same situation succinctly stated: "Whether res judicata

or collateral estoppel is the foundation of that statement matters not one bit. The finding of lack of standing was made final in the [first court], and [the second court] will not disturb that determination.” *LPP Mortgage Ltd. v. Hartzell*, No. 08-1303 (U.S.D.C., C.D. Ill., June 14, 2011).

In this case, Berschauer Phillips was too clever by half. In trying to skirt obvious defenses to coverage and get more than it was entitled to receive, it asserted novel but unsupportable grounds for suing MOE in the first lawsuit instead of asserting established and supportable grounds which it possessed at the same time. The trial court decided that BP could not have two bites at the apple.

Because res judicata required BP to assert all of the grounds it had to claim standing, and collateral estoppel precludes BP from relitigating its standing, the decision was correct. This court should affirm the trial court’s dismissal.

Submitted this 29th day of June, 2012

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

COURT OF APPEALS DIV I
STATE OF WASHINGTON

2012 JUL -2 AM 11:53

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

BERSCHAUER PHILLIPS
CONSTRUCTION CO., a
Washington State Corporation

Appellant,
vs.

MUTUAL OF ENUMCLAW
INSURANCE COMPANY, an
insurance company;

Respondent.

NO. 68259-8-I

DECLARATION
OF SERVICE

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

- 1. Brief of Respondent;

and this Declaration on the parties listed below by depositing true and correct
copies of them in the United States Mail addressed for delivery as follows:

Counsel for Respondent:
Jon E. Cushman
Ben D. Cushman
Joseph Scuderi
Stephanie M.R. Bird
CUSHMAN LAW OFFICES, P.S.
924 Capitol Way South
Olympia, WA 98501

I declare and state under the penalty of perjury under the laws of the

//

DECLARATION OF SERVICE

GOSSELIN LAW OFFICE, PLLC
1901 JEFFERSON AVENUE, SUITE 304
TACOMA, WASHINGTON 98402
OFFICE: 253.627.0684 FACSIMILE: 253.627.2028

State of Washington that the foregoing is true and correct.

Dated this 29th day of June, 2012.

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

DECLARATION OF SERVICE

GOSSELIN LAW OFFICE, PLLC
1901 JEFFERSON AVENUE, SUITE 304
TACOMA, WASHINGTON 98402
OFFICE: 253.627.0684 FACSIMILE: 253.627.2028