

FILED
COURT OF APPEALS

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No. 40431-1-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

BERSCHAUER PHILLIPS CONSTRUCTION CO.,
a Washington State Corporation,

Plaintiff /Respondent,

vs.

MUTUAL OF ENUMCLAW INSURANCE COMPANY,
an insurance company;
W. SCOTT CLEMENT, an adult individual along with
“JANE DOW” CLEMENT and any marital community;
JOHN E. DROTZ, an adult individual along with
“JANE DOE DROTZ” and any marital community; and
JENNIFER FOWLER [sic], an adult individual;

Defendants/Appellants

RESPONDENT’S BRIEF

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I. INTRODUCTION

This is an appeal about a trial court's discretion to manage its own calendar.

Respondent, Berschauer Phillips Construction Company ("BP"), is the judgment creditor to whom the judgment debtor, a company called Concrete Science Services of Seattle, LLC ("CSS"), owes over three hundred thousand dollars from a default judgment in King County Superior Court. The judgment unsatisfied, BP obtained writs of execution and executed and levied on choses in action that CSSS possessed against its insurance company, Appellant Mutual of Enumclaw ("MOE"), its former counsel, Appellants W. Scott Clement and John E. Drotz, and its former owner and principal, Appellant Jennifer Faller. Thereupon, BP, believing that having executed and levied on the choses its status as "real party in interest" was firmly cemented, filed suit in Thurston County Superior Court. *See below* for complete chronology.

Later, fearing that perhaps its status as real party in interest was incomplete, BP again obtained writs of execution and executed and levied on CSS's choses, and then set them for Sheriff's sale, where BP planned to purchase them. Whereupon, MOE, Messrs. Clement and Drotz, and Ms.

Faller moved the King County Superior Court to quash the writs of execution and strike the sheriff's sale, which motions the King County Superior Court granted. BP appealed the King County Superior Court's decisions as a matter of right to the Division I Court of Appeals, which appeal is presently pending.

Meanwhile, MOE and Messrs. Clement and Drotz moved the Thurston County Superior Court, the Honorable Richard D. Hicks presiding, for summary judgment based on BP's failure to purchase the choses on which it had executed and levied before filing suit. BP moved the Thurston County Superior Court for a stay pursuant to CR 17(a), arguing that it needed a reasonable time (the time necessary to prosecute its appeal in Division I, and if prevailing, the time to again execute, levy, set for Sheriff's sale, and then purchase the choses) to perfect its status as real party in interest. The Thurston County Superior Court agreed and granted the stay, delaying its decision on the motions for summary judgment pending resolution of the appeal to Division I.

The sole issue in this case is this: did Judge Hicks have discretion, under the civil rules, to manage his own trial calendar and delay a ruling on a motion for summary judgment pending a ruling on a dispositive issue by a higher court? *Yes.*

II. RESPONSE TO ASSIGNMENTS OF ERROR

Judge Hicks did not err when he exercised his discretion to manage his trial calendar and granted relief pursuant to CR 17(a), staying the action and delaying a ruling on motions for summary judgment pending resolution of a dispositive issue by the Division I Court of Appeals.

III. ISSUES PERTAINING TO RESPONSE TO ASSIGNMENTS OF ERROR

A trial court has subject matter jurisdiction to determine whether standing exists and whether the real party in interest is a party to the suit, and has subject matter jurisdiction to delay dismissal of a case pursuant to CR 17(a), for a “reasonable time...for ratification of commencement of the action by, or joinder or substitution of, the real party in interest.” The test is whether the defendant had notice of the lawsuit and accordingly was not prejudiced. The law changed with the adoption of CR 17(a).

IV. STATEMENT OF THE CASE

In or around spring of 2002, BP, the general contractor for the Lake Washington School District, performing construction work at the Redmond Junior High School, entered into a contract with CSS, a Minnesota Limited Liability Company, to strip and restrain concrete floors at the Redmond Junior High School. CP 465; 156. CSS performed the

work during the summer of 2002, which work failed, and also damaged other property. CP 156-157. CSS was terminated by the State of Minnesota on September 12, 2003. CP 24. Before termination, CSS made no provision for payment of its debts, obligations, and liabilities to BP.

Damaged by CSS, BP brought suit against CSS and other defendants in King County Superior Court, filing its amended complaint on March 17, 2004, less than a year after CSS was terminated. CP 28. During the course of the lawsuit, Ms. Faller, CSS's owner and principal, executed a Declaration dated April 4, 2005. CP 162; 29. This Declaration of Jennifer Faller was submitted in support of another defendant's, Vexcon Chemicals' motion for summary judgment. CP 162. The caption on Ms. Faller's Declaration names CSS as a defendant. CP 162. However, despite assisting Vexcon Chemicals in opposing BP's lawsuit, Ms. Faller did not help CSS to do the same. No answer was ever filed on behalf of CSS, and Ms. Faller, despite knowing at least by April 4, 2005 (the date she signed the declaration) that CSS was being sued, did not inform CSS's insurance company, MOE, of the lawsuit. CP 465; 471.

On August 30, 2005, BP obtained an order of default and a default judgment in the amount of \$318,611.97 against CSS. CP 152-153. The King County Superior Court entered findings of fact and conclusions of

law in the matter. CP 154-160. After BP obtained the order of default and default judgment, BP's counsel informed CSS's insurance company, MOE, and demanded payment of the \$318,611.97. CP 480-481. MOE responded on October 7, 2005, informed BP's counsel that it had retained the attorney Mr. Scott Clement to represent CSS, and announced its intentions to try to vacate the default and default judgment. CP 503. MOE also expressed concern that it had been unable to locate anyone from CSS. BP's counsel responded promptly and gave MOE a lead on locating the owner and principal of CSS, Ms. Faller. CP 505.

Despite having had assistance from BP in locating Ms. Faller, MOE and the counsel it retained on behalf of CSS (in the intervening months since MOE retained Mr. Clement, Mr. Clement formed a new law firm with Mr. John E. Drotz; both Messrs. Clement and Drotz represented CSS) waited a full ten months before filing a motion to vacate the default judgment. The Motion to Vacate was filed on August 10, 2006. CP 31. On August 29, 2006, the King County Superior Court, the Honorable Mary E. Roberts, denied the Motion to Vacate. CP 31. CSS appealed the denial of the Motion to Vacate to the Division I Court of Appeals. In an unpublished decision dated July 30, 2007, Division I (in Berschauer Phillips Construction Co. v. Concrete Science Services of Seattle, LLC,

d/b/a Concrete Science Services NW, et al., No. 58912-1-I) affirmed the trial court's ruling. Division I concluded:

[I]t is undisputed that CSS' insurer received notice of the default judgment in September 2005 and directed its counsel in October 2005 "to take action to set aside [the default judgment] on behalf of our insured." Yet, the motion to vacate was not filed until August 10, 2006. CSS offers no good reason for this 10-month delay. Considering the length of the delay and the absence of a sufficient excuse, we conclude CSS' motion to vacate was not brought within a reasonable time.

CP 166 (internal citations omitted).

Division I awarded BP its attorney fees incurred on appeal. CP 170. MOE paid the award of attorney fees, but did not pay the underlying judgment. CSS did not pay the underlying judgment either.

The judgment unsatisfied, BP set about to execute and levy on CSS's assets, including CSS's choses in action against MOE, concluding, based on Washington case law, that choses in action had accrued against MOE when MOE undertook its duty to defend its insured in bad faith. In the summer of 2008, BP executed and levied (BP filed various motions for writs and praecipis for writs in its initial confused attempts to do so; BP later learned (CP 173-174) that the King County Superior Court requires no motion for a writ of execution, merely that a praecipis be filed with the

Clerk of the Superior Court¹) on CSS's choses in action against MOE. CP 519-520. Thereafter, on October 31, 2008, BP filed suit on CSS's choses in action against MOE in Thurston County Superior Court, number 08-2-02538-9, this case. CP 05-07.

During the course of the first few months of this case, MOE induced Ms. Faller, CSS's owner and principal, to sign a declaration taking all blame for MOE's bad faith defense of CSS and all blame for Messrs. Clement's and Drotz's dilatory efforts on behalf of CSS on herself. CP 464-467. That is, MOE placed its own interests above those of its insured. While BP initially thought it could not execute and levy on choses of action against attorneys sounding in legal malpractice, it later determined that it could (*see, e.g.*, CP 177-188). In June of 2009 BP obtained a writ of execution for CSS's choses in action against Messrs. Clement and Drotz and executed and levied on the choses in action. CP 54-55 (neither the record in this case nor the record presently before Division I reflects this fact, but BP believes it also obtained a writ of

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This initial confusion caused consternation to Messrs. Clement and Drotz, Ms. Faller, and MOE, all who interpreted BP's later filings of praecipes with the King County Superior Court Clerk as attempts to circumvent rules of procedure, rather than what they were: compliance with King County's procedural requirements. *See, e.g.*, CP 181.

execution for CSS's choses in action against Ms. Faller and executed and levied on them as well). BP moved the Thurston County Superior Court for leave to file an amended complaint naming Messrs. Clement and Drotz and Ms. Faller as defendants, which leave the court granted. CP 177-188. The amended complaint asserted claims against Messrs. Clement and Drotz and Ms. Faller (while misspelling her name), including BP's own piercing-the-corporate-veil claims against Ms. Faller. CP 8-13.

Later, BP deemed it prudent to set for Sheriff's sale and purchase at Sheriff's sale CSS's choses in action against MOE, Messrs. Clement and Drotz, and Ms. Faller. However, the time period during which a sheriff could set for the sale the choses on which the sheriff had already levied had passed. Accordingly, BP once again filed praecipes and obtained new writs of execution on CSS's choses of action against MOE and Messrs. Clement and Drotz. CP 57-59; 63-67; 262-267. (Though the record here does not reflect it, BP *also* obtained new writs of execution on CSS's choses of action against Ms. Faller; *see* CP 627-629 in the case presently pending before the Division I Court of Appeals, Berschauer Phillips Construction Co. v. Concrete Science Services of Seattle, LLC, d/b/a Concrete Science Services NW, et al., No. 64812-8-I). The Thurston County Sheriff levied on the choses and set them for Sheriff's sale on

February 10, 2010. CP 61-62; 260-261. *See also* CP 627-629 in case number 64812-8-I, presently pending before Division I.

Counsel for Messrs. Clement and Drotz, for MOE, and for Ms. Faller all filed special notices of appearance in King County Superior Court. Counsel for Messrs. Clement and Drotz filed a motion to quash the writ and strike the Sheriff's sale. CP 181-196. The King County Superior Court, the Honorable Brian Gain, granted the motion on January 11, 2010. CP 197-198. Messrs. Clement and Drotz had argued "there are no such claims that plaintiff seeks to attach, and even if they were, such claims are not subject to being executed upon." CP 182. BP appealed to Division I. CP 110-113.

Next, both MOE and Ms. Faller filed motions in King County to quash their writs and strike their sheriff's sales. CP 301-312. *See also* CP 652-663 in case number 64812-8-I, presently pending before Division I. The Honorable Paris K. Kallas granted the motions. CP 298-299. In the order, Judge Kallas held: "The motions to quash are granted on the alternative and equally applicable grounds that (1) at this time CSS has no property on which to execute; (2) if any property exists, it is not property capable of execution because it is too uncertain." CP 299. BP appealed to Division I. CP 333-337. The two appeals in Division I were consolidated.

Thereafter, the Thurston County Sheriff cancelled the sales and returned the writs of execution to the King County Superior Court. In BP's action pending in Thurston County Superior Court, Messrs. Clement and Drotz and MOE made motions for summary judgment (Ms. Faller did not), arguing that BP was not a proper party in interest, not having purchased the choses at Sheriff's sale prior to filing suit. CP 78-98; 252-256. BP responded, CP 133-147, and moved the Thurston County Superior Court (Honorable Richard D. Hicks presiding) for stay of the entire action, pursuant to CR 17, pending resolution by Division I of BP's appeals of the orders quashing the writs and striking the sales. CP 119-121; 245-249; 342.

Judge Hicks granted the motion to stay, delayed ruling on Messrs. Clement's and Drotz's and MOE's motions for summary judgment and stayed the entire case. CP 394-397. In oral ruling, Judge Hicks held:

...I think both parties are right that based on what's happened in King County, the interruption of the sheriff's sale, the adverse decision, which also happens to be the determinative decision, is before the Court of Appeals in Division I, and if that decision affirms what the King County Superior Court judges ruled, then there is no standing and the case should be dismissed here as well. But I am concerned that it is at least debatable, even if not more likely than not, but debatable, it's a debatable issue, whether or not that case was properly dismissed in King County and the sheriff's sale interrupted. And if the Court

of Appeals should turn it around, then the parties should be able to go to the issue on the merits and not have the suit [dismissed] on a technicality, maybe a big technicality insofar as standing and the statute of limitations are concerned, but still on procedure grounds instead of on the substantive merits of the case.

Verbatim Report of Proceedings (Feb. 19, 2010), p. 25:5-22.

As to MOE's argument that BP's lawsuit should be dismissed even in the event that BP prevails in Division I and executes, levies, sets for Sheriff's sale and purchases at Sheriff's sale the choses, on the grounds that BP did not own the choses when it filed suit, Judge Hicks held:

I don't think your arguments are silly, but I'm uncomfortable when there's a debatable issue that's determinative, and that if I don't stop this from continuing to unfold until we get that result, that I've locked somebody out by a technicality or procedural issue when they would have had the possibility of a result on the merits. And I just say the "possibility" of a result on the merits.

VP (Feb. 19, 2010), p. 29:5-12.

And as to the various defendants' arguments that a stay of the action is prejudicial, Judge Hicks held:

So I listened closely as to what the prejudice would be here, and the prejudice I hear is that, well, we have a right to have the statute of limitations enforced the same as anybody else and that the passage of time alone works a prejudice. That's true, but I'm not sure that's what I would call undue prejudice. The prejudice if I don't grant the stay is the whole matter is dismissed on a procedural issue, which that's why we have rules is so that we can count on

procedural issues, but it isn't abstract because concretely the Court of Appeals in Division I has the determinative issue under consideration, and I don't see where there is great prejudice to wait and see what they do.

VP (Feb. 19, 2010), p. 25:23-25; p. 26:1-10.

After Judge Hicks signed the order dated February 19, MOE, Ms. Faller, and Messrs. Clement and Drotz moved for reconsideration. On March 1, 2010, Judge Hicks entered an order denying all three motions for reconsideration. CP 431-433. The original motions for summary judgment, and all three motions for reconsideration, argued that BP, the plaintiff, lacked standing. In the March 1 order, Judge Hicks held:

Because standing is a debatable issue, and no undue prejudice has been shown to the defendants, it is more equitable to allow the case to be stayed and then proceed on the merits. It is hoped that the Court of Appeals [Division I] will announce the law – which is now disputed. While a higher court has this very issue under consideration it is prudent for this court to wait and follow their ruling.

CP 432-433. Further, Judge Hicks held: “Defendants’ motions [for reconsideration] reargue what has already been argued. Their motions present no new factual considerations that might not have been available at earlier hearings. There is no manifest error, nor, is any legal authority cited which could not have been brought to the court’s attention with reasonable diligence.” CP 433.

The defendants sought discretionary review from this Court, which this Court granted on May 25, 2010.

V. ARGUMENT

Appellant's arguments would rob CR 17(a) of effect. They argue that if a plaintiff lacks standing, that all a court has the power to do is immediately dismiss the case, without even determining whether the plaintiff – and the plaintiff's claims and case – fit within the category of those for whom CR 17(a) can provide some relief.

CR 17(a) states that “No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.”

Here, BP is within the category of those for whom CR 17(a) can provide some relief. At the very least, it is a debatable point, and Judge Hicks exercised his discretion in choosing not to rule on the summary judgment motions (a ruling granting summary judgment would in effect be a determination that CR 17(a) does not apply in BP's case) until a

determinative issue – whether BP *can* even prevail at Division I and can execute, levy, set for Sheriff’s sale, and purchase the choses of action – had been decided by Division I. If Division I rules against BP, Judge Hicks will never even need to reach the issue of whether BP is within the category of those for whom CR 17(a) provides relief.

But there is at least a reasonable chance that BP may prevail at Division I. In BP’s opening brief in that case, BP argued that CSS, a Minnesota Limited Liability Company organized and governed by Minnesota law (including law on dissolution) did possess choses of action at the time BP executed and levied on the choses, and that the particular choses on which BP executed and levied were indeed subject to execution in Washington State.

When this Court granted discretionary review, the Honorable Commissioner Ernetta G. Skerlec held in dicta that a creditor cannot attach corporate property after dissolution, citing Brower Co. v. Noise Control of Seattle, 66 Wn.2d 204, 213, 401 P.2d 860 (1965). Respectfully, that case is distinguishable. The case itself concerned whether it was possible to garnish a company’s fund if it is the property of a liquidating trustee, and cited to a general rule on attaching corporate property after dissolution. It is the general rule that corporations and other business entities distribute

their assets upon dissolution. Here, in this case, the record shows that CSS was terminated by the Minnesota Secretary of State on September 12, 2003, at which point, presumably, the company's assets (including choses) were distributed to its members. But the record in this case also shows that CSS's choses of action against MOE, against Messrs. Clement and Drotz, and against Ms. Faller accrued *after* termination, during the course of the lawsuit filed by BP. BP has at least a fighting chance of prevailing on its arguments, based on Minnesota law, before Division I.

Which brings us back to Judge Hicks. Judge Hicks did not err, and did not abuse his discretion, in choosing not to rule both on BP's CR 17(a) argument and on the motions for summary judgment, instead staying the case pending a ruling from Division I on a determinative issue. This Court should affirm his decision.

A. The Standard of Review is Abuse of Discretion

The general rule is that an appellate court engages in the same inquiry as the trial court when reviewing a trial court's decision to *grant* summary judgment. But here, summary judgment was not granted. Instead, Judge Hicks stayed the case and delayed ruling pending a decision from Division I. Most frequently, trial courts grant continuances of motions for summary judgment under CR 56(f). And an appellate court

reviews a trial court's decision regarding a motion for continuance in summary judgment proceedings for abuse of discretion. *See, e.g., Butler v. Joy*, 116 Wn. App. 291, 299, 65 P.3d 671 (2003); *Mannington Carpets, Inc. v. Hazelrigg*, 94 Wn. App. 899, 902, 973 P2d 1103 (1999).

Of course, Judge Hicks did not continue the motions for summary judgment under CR 56(f) (though this Court should extend the reasoning); he granted BP's motion to stay brought under CR 17(a) pending resolution by Division I of a dispositive issue. And decisions regarding the application of the civil rules, including CR 17(a) are reviewed for abuse of discretion. *Sprague v. Sysco Corp.*, 97 Wn. App. 169, 171, 982 P.2d 1202 (1999).

Appellants argue also that whether a party – BP – has standing to sue is a conclusion of law which appellate courts review de novo, citing *Mack v. Armstrong*, 147 Wn. App. 522, 527, 195 P.3d 1027 (2008). But Judge Hicks did not rule that BP had standing to sue. He stayed the entire action. In the event that BP prevails before Division I, BP still must satisfy the Thurston County Superior Court that BP falls within the class of plaintiffs for whom CR 17(a) provides relief. *See, e.g., VP* at p. 26: 20-25: "...I haven't ruled against counsel's motion about, well, even if they win, there's a statute of limitations issue. That's when I think I should

address that if that's still on the table, and would be on the table. I'm not making a ruling on that. I'm not making any negative rulings on the motion for summary judgment...."

For the foregoing reasons, appellants are wrong. The standard of review is not de novo, it is abuse of discretion. Under the abuse of discretion standard, this Court must determine whether discretion is "exercised on untenable grounds, or for untenable reasons." State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). And Judge Hicks exercised his discretion because the prejudice against BP, were Judge Hicks to have dismissed the case (the statute of limitations has run) was greater than any prejudice that appellants would suffer based on the passage of time alone. This is a tenable ground, and a tenable reason. Further, Judge Hicks exercised his discretion because he was reluctant to dismiss the case on procedural grounds where there was a debatable dispositive issue pending before Division I. This, too, is a tenable ground and a tenable reason. This Court should affirm Judge Hicks's decision.

B. BP's Interest in CSS's Choses of Action is That of a Judgment Creditor Who has Executed and Levied

BP has an interest in CSS's choses of action. BP is a judgment creditor who twice executed and levied on the choses, and once set them

for Sheriff's sale, planning to purchase them. The execution and levying process gave BP certain rights as to the choses. For example, it gave BP the right to set the choses for Sheriff's sale. That is, it gave BP the right to "obtain liquidation of the subject property" and provided BP "with a priority in the property vis-a-vis other claimants." A.M. Dickerson, R. B. Hagedorn & F.W. Smith, The Law of Debtors and Creditors §6:49 at 6-129 (Thompson West 2005). Had the King County Superior Court not quashed the second set of writs and stricken the Sheriff's sale, BP would have purchased the choses, cementing its status as real party in interest.

The point here is that BP is not standing at arm's length from CSS and the choses. BP took the steps it thought necessary to become the real party in interest before filing suit and then, after filing suit and fearing that the steps were insufficient, executed and levied *again* and set the choses for sheriff's sale. BP is no merely standing in the position of judgment creditor: it is in the position of judgment creditor who began the process of buying the choses, but was interrupted midway through. Therefore, the difference here is one of *capacity*: BP is now a judgment creditor who has executed and levied on the choses, such execution and levying giving BP *rights* and *priority* in the choses, two important sticks in the bundle of property rights sticks. What BP wants to be is a judgment creditor who

has executed, levied, and purchased the choses, meaning that BP would then possess all of the bundle of sticks.

MOE makes a misstatement of fact to this Court on page 9 of its brief. BP obtained writs of execution on the choses against Messrs. Clement and Drotz on June 12, 2009, *before* filing the First Amended Complaint naming Messrs. Clement and Drotz as defendants on July 16, 2009. *Cf.* CP 54-55 and CP 8-13. And while the record does not reflect that BP obtained writs of execution on the choses against Ms. Faller in June of 2009, BP believes that it did so. At any rate, the First Amended Complaint includes BP's own piercing-the-corporate-veil claims against Ms. Faller.

C. Judge Hicks Did Not Err in Staying the Case

In arguing that Judge Hicks erred in “failing to dismiss the case for lack of standing and jurisdiction,” appellants confuse the concepts of real party in interest, standing, and subject matter jurisdiction. In fact, the doctrines of the “real party in interest requirement” and “standing principles” are distinct. Sprague, 97 Wn. App. at 176, n. 2.

“Standing requires that the plaintiff demonstrate an injury to a legally protected right. The real party in interest is the person who possesses the right sought to be enforced.” Sprague, 97 Wn. App. at 176,

n. 2 (internal citations omitted). Here, BP has demonstrated an injury to a legally protected right. BP was damaged by CSS, sued CSS, and prevailed, obtaining a default judgment against CSS for over three hundred thousand dollars, which judgment is not yet satisfied. BP has standing. During the course of the same litigation in which BP prevailed, CSS accrued assets in the form of choses of action against its insurance company, its former attorneys, and its owner and principal. As judgment creditor, BP may execute and levy on those assets. It has done so, obtaining certain rights and priority as to those assets. BP seeks to purchase the assets – the choses – upon which, BP will have cemented its ownership of the right to prosecute the claims, that is, it will have cemented its status as “real party in interest.”

But imagine for a minute that BP does not yet have standing. Judge Hicks still has jurisdiction to decide whether BP stands within the class of plaintiffs who can obtain relief from CR 17(a), and has discretion to stay his determination of that question pending resolution of a dispositive question by Division I.

In the federal courts, standing is likely a subject matter jurisdiction question. “Article III of the [United States] Constitution confines the federal courts to adjudicating actual ‘cases’ and ‘controversies.’ ” Allen v.

Wright, 468 U.S. 737, 750, 104 S.Ct. 3315 (1984). “Standing” is one of the doctrines that cluster about Article III, stating “fundamental limits on federal judicial power.” Allen, 468 U.S. at 750. Questions of standing “must be answered by reference to the Art. III notion that federal courts may exercise power only in the last resort, and as a necessity.” Allen, 468 U.S. at 752 (internal citations omitted).

But this is not necessarily so in Washington, where standing goes to the right of a person to press a claim. High Tide Seafoods v. State, 106 Wn.2d 695, 701-02, 725 P.2d 411 (1986), does say that “If a plaintiff lacks standing to bring a suit, courts lack jurisdiction to consider it.” However, High Tide is citing to a Ninth Circuit case on *federal standing*, as well as to Allen, *also* on federal standing. High Tide, 106 Wn.2d at 701-02, *citing* Grove v. Mead School Dist. No. 354, 753 F.2d 1528, 1531 (9th Cir. (Wash.) 1985) and Allen, 468 U.S. at 752.

Further, High Tide is concerned with whether a court can decide the merits of a case when a plaintiff lacks standing, not whether a court can grant relief pursuant to CR 17(a) to a plaintiff whose standing is imperfect. And a later Washington case states quite firmly that the rule on “whether standing is jurisdictional in Washington” is in flux. Lane v. City of Seattle, 164 Wn.2d 875, 885 n. 1, 194 P.3d 977 (2008).

In fact, in Washington, the “critical concept in determining whether a court has subject matter jurisdiction is the ‘type of controversy.’ ” Dougherty v. Dep’t of Labor & Indus., 150 Wn.2d 310, 316, 76 P.3d 1183 (2003), *quoting* Marley v. Dep’t of Labor & Indus., 125 Wn.2d 533, 539, 886 P.2d 189 (1994). “If the type of controversy is within the subject matter jurisdiction, then all other defects or errors go to something other than subject matter jurisdiction.” Dougherty, 150 Wn.2d at 316; Marley, 125 Wn.2d at 539. BP would argue that while a lack of standing is a defect, it goes to *something other than subject matter jurisdiction*. This is true in Washington but not necessarily so in the federal courts, where, for example, diversity jurisdiction requires diversity of parties. A party lacking standing might mean incomplete diversity; a federal court would then lack subject matter jurisdiction over the case.

This Court has recognized that standing and subject matter jurisdiction are not the same and has distinguished between them:

Jurisdiction – the power of the court to entertain a proceeding – can be raised for the first time on appeal. RAP 2.5(a)(1). The rationale for this is self-evident. It would be pointless to consider claimed errors where the proceeding itself was incurably defective for lack of jurisdiction. The same rationale applies to standing, the right of a person to press a claim. Facts establishing standing are as essential to a successful claim for relief as is the jurisdiction of a court to grant it. Thus, we hold that the

insufficiency of a factual basis to support standing may also be raised for the first time on appeal in accordance with RAP 2.5(a)(2).

Mitchell v. Doe, 41 Wn. App. 846, 847-48, 706 P.2d 1100 (1985) (internal citations omitted).

This distinction between “the right of a person to press a claim” (standing) and “the power of a court to entertain a proceeding” (subject matter jurisdiction) is important. A standing defect may be remedied under our modern rules of pleading. However, a lack of subject matter jurisdiction may, under many circumstances, preclude a court from doing anything other than dismissing the case without prejudice.² Any defects in BP’s standing go to “the right of a person to press a claim,” rather than to the “power of the court to entertain the proceedings.” Judge Hicks has the power to entertain the proceedings, has the power to delay ruling on the motions for summary judgment, and has the power to grant a stay pending

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This is not always so. Sometimes a lack of subject matter jurisdiction may be remedied as well. For example, MOE cites to Dougherty v. Dep’t of Labor & Indus., 112 Wn. App. 322, 333, 48 P.3d 1018 (2002), for the proposition that “once a court recognizes that it lacks jurisdiction over a matter, it must dismiss the action.” MOE’s Brief at 12. In fact, this case was *overruled* by the Supreme Court in Dougherty, 10 Wn.2d at 310 (full cite *supra*). The Supreme Court held that filing an appeal from a decision of the Board of Industrial Insurance Appeals in the wrong county does not defeat subject matter jurisdiction and can be cured by a change of venue.

a ruling by the Division I Court of Appeals on a dispositive issue.

This legal proposition is supported by CR 17 as well as by caselaw. For example, in In re Estate of Boyd, 5 Wn. App. 32, 485 P.2d 469 (1971), the court considered carefully whether the relation-back provision of CR 17(a) applied; that is, the court had subject matter jurisdiction over the *case* even though the court eventually held that the grandmother lacked standing, after which the case was dismissed. Likewise, Judge Hicks has subject matter jurisdiction over the case and over the question of whether BP is within the class of plaintiffs to whom CR 17(a) affords relief. If Judge Hicks answers that question in the negative, he will dismiss the case. If Division I affirms the King County Superior Court, Judge Hicks will not have to reach that question.

Another case supporting the proposition that BP has standing is from Division I. Having twice executed and levied on the choses, BP has a present, substantial interest in the choses. “To have standing, a party must show a real interest in the subject matter of the lawsuit, that is, a present, substantial interest, as distinguished from a mere expectancy, or future, contingent interest, and the party must show that a benefit will accrue it by the relief granted.” Primark, Inc. v. Burien Gardens Associates, 63 Wn. App. 900, 907-08. 823 P.2d 1116 (1992). In the

Primark case, the plaintiff, Primark, was a prospective purchaser of some real property, who had paid some money down on the contract. The sale was *contingent* on Primark obtaining a building permit from King County, just as BP's purchase of the choses is *contingent* on Division I overruling the King County Superior Court. The Primark Court held that Primark had standing. BP's interest in the choses is no more contingent than the Primark plaintiff's interest in the real property.

BP is also the real party in interest. While its status as "real party in interest" may be imperfect, CR 17(a) allows BP to remedy any defects. For example, in Eastlake Const. Co., Inc. v. Hess, 33 Wn. App. 378, 655 P.2d 1160 (1982), the plaintiff sued the defendant, who counterclaimed for breach of contract on the construction of an condominium building. The plaintiff argued that the defendant, who had already transferred the units to purchasers, was a proper *defendant* as a party to the contract, but not a real party in interest as contemplated by CR 17(a), and therefore incapable of asserting the counterclaim. *After* the plaintiff objected that the defendant lacked status as "real party in interest," the defendant obtained assignments of the purchasers' choses of action against the plaintiff, thereby ratifying the action. The trial court and the appellate court *both* held that, post-assignment, the defendant *was* a real party in interest and

could assert the counterclaim. Contrary to Appellants' arguments, therefore, a lawsuit brought by a claimant who has imperfect status as a real party in interest at the time of filing the claim is not a "nullity" from its inception.

D. The Law in Washington Has Changed Since the Adoption of CR 17

Appellants rely on Amende v. Morton, 40 Wn.2d 104, 241 P.2d 445 (1952) for the proposition that the absence of a valid or subsisting title or right of action at the inception of a suit cannot be cured by filing a supplemental complaint alleging subsequent acquisition of such title or right of action. Amende, 40 Wn.2d at 106. However, Amende was decided in Washington in 1952, many years before the adoption of CR 17 and when the law in Washington was quite different. How do we know this?

We know it by reading Robert Meisenholder, The Effect of Proposed Rules 7 through 25 on Present Washington Procedures: Part II, 32 Wash. L. Rev. 336 (1957), written five years after Amende. Professor Meisenholder quotes the proposed CR 17(a) in full:

Every action shall be prosecuted in the name of the real party in interest; but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or

a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought.

32 Wash. L. Rev. at 355. This is very different from the CR 17(a) that was adopted in 1960 and that is our present day rule. As to the proposed rule *circa* 1957, Professor Meisenholder wrote, “Subdivision (a) merely restates the language of RCW 4.08.010 and RCW 4.08.020 without any important change in meaning.” 32 Wash. L. Rev. at 356. These statutes have now been repealed.

Amende applied the law that existed in 1952. That law has changed. CR 17(a) allows a plaintiff to perfect standing or status as real party in interest, including by *acquiring title after filing suit*: *See, e.g., Eastlake*, 33 Wn. App. 378 (counter-claiming defendant acquired assignment of purchasers’ choses in action *after* filing counterclaim). If BP prevails in Division I and purchases the choses in action, BP’s interest in the choses will be no more contingent than the counter-claiming defendant in Eastlake. Why should BP be treated any differently?

Perhaps most representative of the new state of the law is Beal for Martinez v. City of Seattle, 134 Wash.2d 769, 954 P.2d 237 (1998). Appellants misrepresent the holding in this case. *See* MOE’s brief at 16: “The Beal Court recognized CR 17(a) does not apply, and an action should

be dismissed ‘when the determination of the right party to bring the action was not difficult and when no excusable mistake has been made.’” This is wrong. *See also* Clement’s and Drotz’s brief at 15.

In Beal, the plaintiff originally filed the lawsuit, a wrongful death action, alleging that he was the personal representative of the decedent, even though he was then only the guardian ad litem for the decedent’s children. After the statute of limitations ran, the plaintiff was appointed personal representative for the decedent and amended the complaint (ex parte under CR 15(a)) to name himself as plaintiff in the capacity as personal representative. (Only personal representatives may maintain wrongful death actions). Thereafter, the defendant moved to vacate and dismiss the amended complaint. The trial court dismissed the complaint under CR 12(b)(6); the appellate court affirmed. However, our Supreme Court reversed both the trial court and the appellate court, holding: “CR 17(a) and CR 15(c) do not bar amendment of the complaint and relation back in this case because the change is only in the representative capacity in which the suit is brought and the [defendant] is not prejudiced by the amendment.” Beal, 134 Wn.2d at 784.

Further, the Supreme Court held: “Application of the ‘inexcusable neglect’ or ‘honest mistake’ standard to a change in representative capacity

undermines the goals, as well as the literal language of the rules. Although we recognize the potential for abuse in a literal interpretation of CR 17(a) if applied in every circumstance, we conclude that allowing an amendment where the only change is a change in the capacity (guardian ad litem as opposed to personal representative of the decedent's estate) in which the suit is brought, when there is no prejudice to the defendant, better meets the literal language of CR 17(a)." Beal, 134 Wn.2d at 782-83.

Beal is on point. BP filed suit in its capacity as the judgment creditor of CSS who had executed and levied on CSS's personal property: the choses of action on which BP sued. In the event that BP prevails at the Division I Court of Appeals, BP will re-execute, re-levy, and re-set the choses of action for sheriff's sale, and plans to purchase the choses. Thereafter, BP will have the capacity of the judgment creditor of CSS who had executed, levied, and purchased CSS's personal property: the choses. BP can then move to amend its complaint to name itself as plaintiff in *that* capacity. In the event none of the defendants show prejudice from the amendment, Judge Hicks would then be able to properly grant the motion to amend under CR 17(a) and CR 15(c).

E. The Correct Test is "Prejudice"

Appellants argue that Judge Hicks erred in applying an improper

“prejudice” standard. They are wrong. Judge Hicks did not err. In Kommavongsa v. Haskell, 149 Wn.2d 288, 318, 67 P.3d 1068 (2003), the Court said:

In sum, after Beal, the test for relation back under CR 17(a) and CR 15(c) is not whether the wrong party filed the lawsuit out of mistake or inadvertence, or even based upon a calculated risk as to this court's ultimate decision in a case of first impression regarding public policy, but rather whether the defendant had notice of the lawsuit and accordingly was not prejudiced, and whether the real party plaintiff in interest ratified the lawsuit or sought to be substituted as plaintiff within a reasonable time after objection by the adversary.

Kommavongsa, 149 Wn.2d at 317. It is undisputed that all the defendants have had notice of the lawsuit. Judge Hicks found that they were not prejudiced by a stay. And BP was in the process of attempting to purchase the choses in order to perfect its status as “real party in interest” and thence, in that capacity, to ratify the lawsuit it had already filed as the judgment creditor who had executed and levied on the choses when defendants made their motions to the King County Superior Court and stopped the sale.

The above arguments refute Appellants’ contentions: that Judge Hicks lacked subject matter jurisdiction over the case, and that BP may not remedy any defects with its standing or status as “real party in interest.”

Judge Hicks has subject matter jurisdiction and BP has standing and is the “real party in interest,” albeit imperfectly. Thankfully, BP can remedy any defects with standing or status as “real party in interest,” pursuant to CR 17(a), Beal, and Kommanvongsa.

F. BP Reserves its Fee Request

No Appellant requested fees. BP here reserves its request for fees on appeal pursuant to RAP 18.1 pending determination by the trial court as to whether BP is entitled to fees and costs below. CP 13.

CONCLUSION

Truly, what is at issue here is Judge Hicks’s discretion to manage his calendar and his deference to higher courts. Judge Hicks chose to issue a stay pending resolution of a determinative issue by Division I and to delay a ruling both on the motions for summary judgment and on BP’s motion for relief under CR 17(a). There is a chance that BP will prevail in Division I, and there is a chance that Judge Hicks will grant BP’s motion under CR 17(a); there is certainly caselaw that supports BP’s position. But it is also possible that even if BP prevails at Division I, that Judge Hicks will still grant the motions for summary judgment and dismiss the case against MOE and Messrs. Clement and Drotz (not against Ms. Faller,

who made no motion for summary judgment). In either event, this Court should not take the decision out of Judge Hicks's hands. Judge Hicks did not abuse his discretion, did not exercise it for untenable reasons or on untenable grounds, and this Court should affirm his decision.

Respectfully Submitted this 27th day of August, 2010.

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on **August 27, 2010**, I caused to be served a true copy of the foregoing by the method indicated below, and addressed to each of the following:

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Signed this 27th day of August, 2010, in Seattle, Washington.

Stephanie M R Bird
Stephanie M. R. Bird

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