

NO. 64812-8-1

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

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

**Berschauer Phillips Construction Co.,
Appellant (Plaintiff)**

v.

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

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APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

The Appellant and Plaintiff, Berschauer Phillips Construction Co., a Washington corporation (“BP”), prevailed in this case and obtained a judgment against Defendant Concrete Science Services of Seattle, LLC, a recently dissolved Minnesota limited liability company (“CSS”). The judgment unsatisfied, BP, as judgment creditor, executed on, levied upon, and set for Sheriff’s sale the choses of action that CSS, the judgment debtor, possessed against its insurance company, Mutual of Enumclaw (“MOE”), against its former attorneys, Mr. John E. Drotz and Mr. W. Scott Clement, and against its principal, Ms. Jennifer Faller. MOE, Messrs. Drotz and Clement, and Ms. Faller all filed special notices of appearance and made motions to the King County Superior Court to quash the writs of execution and strike the Sheriff’s sales. The King County Superior Court granted the motions, quashed the writs, and struck the Sheriff’s sales. BP appeals from those orders.

II. ASSIGNMENTS OF ERROR

Assignments of Error

1. The trial court erred in concluding that at the time BP executed on CSS’s personal property – the choses in action – CSS had no property on which to execute.

2. The trial court erred in concluding that if CSS did have property on which to execute, the choses in action were not property subject to execution.

Issues Pertaining to Assignments of Error

1. Where a Minnesota limited liability company, upon dissolution, distributes its assets to its members, and thereafter claims against its insurance company, its attorneys, and its principals accrue, were those after-accrued claims – those choses in action – distributed to its members when no attempt was made to do so? *No*. Where a state like Minnesota has no statute limiting the time period during which a limited liability company may bring suit after dissolution, may a Minnesota limited liability company bring suit after dissolution? *Yes*. Where a Minnesota limited liability company fails to make provision for known liabilities during its winding-up period, should the courts do equity to remedy that failure? *Yes*.

2. Where the dollar amount that a plaintiff might possibly be awarded on its claims is contingent upon a trial court's decision on past events, *not contingent* upon events that have not yet occurred, are those claims – those choses in action -- too uncertain to constitute property subject to execution? *No*. Where Washington caselaw forbidding the assignment of legal malpractice claims affirms the distinction between

assignment of claims and execution upon claims, are choses in action sounding in legal malpractice property subject to execution? *Yes.*

III. STATEMENT OF THE CASE

On August 15, 2000, the Minnesota limited liability company Concrete Science Services of Seattle, LLC, (“CSS”) was legally organized under the laws of the State of Minnesota. CP 612.

In or around spring of 2002, Berschauer Phillips Construction Co. (“BP”), who was the general contractor for Lake Washington School District, performing construction work at the Redmond Junior High School, entered into a contract with CSS to strip and restrain concrete floors at the Redmond Junior High School. CP 4-5. CSS performed the work during the summer of 2002, which work failed, and also damaged other property. CP 6-8. During the time of the failure and damage to other property, CSS knew that its work had failed and had damaged other property. *See, generally*, CP 105-27, *especially* CP 120, where Ms. Faller, of CSS, writes, “I called Bob and ED [from BP] on their cell phones [regarding the failure and CSS’s unsuccessful attempt to fix the failure] and left messages. By then they all had left and were so dejected that they did not return my calls. I finally spoke to one of them later that day, I was told that the decision to open the school without staining had been made

and there was no time for discussions.” CSS blamed BP and the Redmond Junior High School project for CSS’s going out of business: “As a result of this project, Concrete Science ceased operations. That company went broke.” CP 109.

On July 1, 2003, CSS’s manager, Steven W. Hicks, executed a Notice of Dissolution, which was filed with the Minnesota Secretary of State on September 12, 2003. The dissolution was “effective as of July 1, 2003.” CP 614. Also on July 1, 2003, Mr. Hicks executed CSS’s Articles of Termination, which were likewise filed with the Minnesota Secretary of State on September 12, 2003. The articles stated “All known debts, obligations, and liabilities of the Company have been paid and discharged or adequate provision therefor has been made.” CP 615. This statement was untrue: despite Ms. Faller’s knowing that CSS’s work had failed and damaged other property and that CSS’s attempt to fix the failure had also failed, CSS had made no provision for payment of its debts, obligations, and liabilities to BP.

The Articles of Termination also stated: “The remaining property, assets, and claims of the Company have been distributed to the members of the Company.” CP 615. If CSS had any claims that existed as of July 1, 2003, they would have been distributed to CSS’s members along with the other assets in that distribution of July 1. Likewise, the members of

CSS executed a “Unanimous Writing in Lieu of Meeting of the Members and Governors of Concrete Science Services of Seattle, LLC,” in which they resolved, “effective as of the 1st day of July, 2003,” “[t]hat all property and assets of the Company *as of the effective date of the termination* of the Company shall be distributed, in their entirety, to the members of the Company in accordance with, and in the proportion of, their membership interests in the Company.” CP 41 (emphasis added). On September 12, 2003, the Minnesota Secretary of State issued a Certificate of Termination for CSS. CP 617. There is *no subsequent distribution to members of any assets, including claims*, anywhere in the record.

BP brought suit against CSS and other defendants, filing its amended complaint on March 17, 2004, less than one year after the Notice of Dissolution was executed. CP 35. During the course of the lawsuit, Ms. Faller, CSS’s principal, executed a Declaration dated April 4, 2005. CP 105-27. This Declaration of Jennifer Faller was submitted in support of another defendant’s, Vexcon Chemicals’, motion for summary judgment. CP 149; CP 173; CP 257. The caption on Ms. Faller’s Declaration names CSS as a defendant. CP 105. 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, Mutual of Enumclaw ("MOE") of the lawsuit. *See, e.g.*, CP 170. *See also* CP 301; CP 669.

On August 30, 2005, BP obtained an order of default and a default judgment in the amount of \$318,611.97 against CSS. CP 1-2. The King County Superior Court entered findings of facts and conclusions of law in the matter. CP 3-9. 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 167-69. 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 and vacate the default and default judgment. CP 170. *See also* CP 710. 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 principal of CSS, Ms. Faller. CP 834.

Despite having had assistance from BP in locating CSS's principal, Ms. Faller, MOE and the counsel that 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; CP 712-13) 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 12. On August 29, 2006, the King County Superior Court, the Honorable Mary E. Roberts, denied the Motion to Vacate. CP 232-33. CSS appealed the denial of the Motion to Vacate to this Court. In an unpublished decision dated July 30, 2007, this Court (in Berschauer Phillips Construction Co. v. Concrete Science Services of Seattle, LLC, d/b/a Concrete Science Services NW, et al., No. 58912-1-1) affirmed the trial court's ruling. This Court 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 261 (internal citations omitted).

This Court awarded BP its attorney fees incurred on appeal. CP 254; CP 265. 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 praecipes for writs in its initial confused attempts to do so; BP later learned (CP 591-92; CP 556) that the King County Superior Court requires no motion for a writ of execution, merely that a praecipe be filed with the Clerk of the Superior Court¹) on CSS's choses in action against MOE. CP 266-84; CP 721-22. 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. CP 718-19.

During the course of the first few months of the case against MOE in Thurston County Superior Court, MOE induced Ms. Faller, CSS's principal, to sign a declaration taking all blame for MOE's bad faith defense of CSS and all blame for Mr. Clement's and Mr. Drotz's dilatory efforts on behalf of CSS on herself. CP 300-03. That is, MOE placed its own interests above those of its insured. While BP initially thought it

¹ This initial confusion caused consternation to Messrs. Clement and Drotz, Ms. Faller, and MOE, all of whom 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 428-31; CP 632, 634; CP 652.

could not execute and levy on choses of action against attorneys sounding in legal malpractice, it later determined that it could. 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 394-99 (the record does not reflect this fact, but BP believes that it also obtained a writ of execution for CSS's choses in action against Ms. Faller and executed and levied on those choses 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 Thurston County Superior Court granted. CP 557-60; CP 619-24. 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 619-24.

Meanwhile, while it is not now clear whether they were acting on their own behalf or on behalf of their client, CSS (*cf.* CP 286 with CP 297), the law firm of Clement & Drotz, PLLC, filed a motion with the King County Superior Court asking the Court to deny BP's request for a writ of execution on the choses against Messrs. Clement and Drotz. In response, BP made legal argument that choses of action sounding in legal malpractice are personal property capable of execution, and also informed the King County Superior Court that a writ had already been issued:

“Plaintiff Berschauer Phillips has already *executed and attached* Concrete Science Services’ choses of action against its attorneys. Such an attachment is allowed under Washington State law. Judge Hilyer signed the writ on June 12, 2009 and a copy was received by Cushman Law Offices on June 22, 2009.” CP 365 (emphasis as in original).

The King County Superior Court, the Honorable Mary Roberts, denied Clement & Drotz, PLLC’s motion. The order read: “As far as the court can tell, there is no writ needing quashing, and no pending motion for such a writ.” CP 402. It is BP’s position that because the writ of execution (the existence of which it informed the court) was properly obtained and on property subject to execution, there was indeed no writ *needing* quashing.

As already described, BP had executed and levied on CSS’s choses in action against MOE and against Messrs. Clement and Drotz (and BP believes it had already executed and levied on CSS’s choses in action against Ms. Faller as well). BP later deemed it prudent to set for Sheriff’s sale, and then 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 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, Messrs. Clement and Drotz, and Ms. Faller. CP 530-32; CP 627-29; CP 726-28. The Thurston County Sheriff levied on the choses and set them for Sheriff's sale on February 10, 2010. CP 534-40; CP 626-31; CP 724-31.

Counsel for Messrs. Clement and Drotz, for MOE, and for Ms. Faller all filed special notices of appearance in King County Superior Court. CP 1026-27; CP 1042-43; CP 1052-53. Counsel for Messrs. Clement and Drotz filed a motion to quash the writ and strike the sheriff's sale. CP 428-43. BP responded, and Messrs. Clement and Drotz replied. The King County Superior Court, the Honorable Brian Gain, granted the motion on January 11, 2010. CP 607-08. The order does not reflect why Judge Gain granted the motion, but Messrs. Clement and Drotz had argued that "there are no such claims that plaintiff seeks to attach, and even if there were, such claims are not subject to being executed upon." CP 429. BP appealed to this Court.

Next, both MOE and Ms. Faller filed motions to quash their writs and strike their sheriff's sales. CR 632-41; CR 652-63. BP responded and requested oral argument, and MOE and Ms. Faller replied. At oral argument on February 9, 2010, the King County Superior Court, the Honorable Paris K. Kallas, granted MOE's and Ms. Faller's motions. CP 861-62. 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. The Court adopts Faller and MOE's arguments on these two points." CP 862. BP appealed to this Court.

Thereafter, the Thurston County Sheriff cancelled the sales and returned the writs of execution to the King County Superior Court. CP 863-935. In BP's action pending in Thurston County Superior Court, Messrs. Clement and Drotz and MOE made motions for summary judgment arguing that BP was not a proper party in interest, not having purchased the choses at Sheriff's sale. BP moved the Thurston County Superior Court for stay of the entire action pending resolution by this Court of BP's appeals of the orders quashing the writs and striking the Sheriff's sales. The Thurston County Superior Court, the Honorable Richard D. Hicks, granted the motion, delayed ruling on Messrs. Clement's and Drotz's and MOE's motions for summary judgment and stayed the entire case. Messrs. Clement and Drotz, MOE, and Ms. Faller all sought discretionary review of the order delaying ruling and staying the action from the Division II Court of Appeals. The Division II Court of Appeals accepted discretionary review.

This Court consolidated BP's two appeals to this Court into one. BP made a motion to the Division II Court of Appeals to transfer the case pending there to this Court, for consolidation with this case. The Division II Court of Appeals denied BP's motion.

IV. ARGUMENT

A. Even though CSS had dissolved, it still had property on which BP could execute, choses in action on which BP could file suit

1. The choses of action accrued after CSS distributed its existing assets to its members, and there was no subsequent distribution

All respondents argued that CSS had no property on which BP could execute because CSS had dissolved. In particular, MOE argued, "But Minnesota law did not simply hold CSS's property. By operation of law, CSS's property had been distributed to its managing agents." CP 760. MOE also argued, "under Minnesota law – and consistent with Washington law – the assets were distributed to the managing agents." CP 762. MOE is partly right here and partly wrong. On July 1, 2003, CSS did distribute its property that was then in existence to its members; the members resolved that "all property and assets of the Company as of the effective date of the termination of the Company shall be distributed, in their entirety, to the members of the Company in accordance with, and in

the proportion of, their membership interests in the Company.” CP 41. The assets that were in existence as of July 1 *were* distributed, but not “by operation of law.” They were distributed by CSS members themselves.

And what of the assets that were not in existence as of July 1, 2003, but came into existence thereafter? They were not distributed on July 1, because they did not yet exist. Nor were they distributed subsequently, because there was no further distribution. And the choses of action on which BP executed – CSS’s choses of action against its insurance company, MOE, its counsel, Messrs. Clement and Drotz, and against its principal, Ms. Faller – all accrued during the course of BP’s superior court action against CSS, which was filed in 2004, after CSS was dissolved.

For example, CSS’s choses of action against Ms. Faller likely accrued around April 4, 2005, the date on which Ms. Faller executed her declaration that was submitted in support of another defendant’s motion for summary judgment, a declaration that in its caption showed clearly that BP was suing CSS, while Ms. Faller was failing to notify CSS’s insurance company of the claims against it. (BP’s own piercing-the-veil claims against Ms. Faller may have accrued at a different time or times). CSS’s choses of action against MOE and against Messrs. Clement and Drotz likely accrued during the 10 months between which MOE learned of the

default order and default judgment against its insured, CSS, and retained Mr. Clement to represent CSS, and the date on which Messrs. Clement and Drotz filed the extremely tardy motion to vacate the order of default and default judgment. That is, CSS's chases of action against MOE and against Messrs. Clement and Drotz likely accrued during the time that MOE undertook its duty to defend its insured in bad faith² and during the time during which Messrs. Clement and Drotz had "no good reason" for the 10-month delay. CP 261. This time period was between October 2005 and August 2006, that is, after the July 1, 2003 distribution of existing assets. Neither CSS's claims against Ms. Faller nor its claims against MOE and Messrs. Clement and Drotz existed at the time of the July 1, 2003 distribution. They accrued to CSS thereafter.

And is that possible? Can assets accrue to a dissolved Minnesota limited liability company? *Yes, under certain circumstances.*

² "Once the insurer breaches an important benefit of the insurance contract, harm is assumed, the insurer is estopped from denying coverage, and the insurer is liable for the judgment. The insurer who in bad faith refuses to acknowledge its broad duty to defend is not less liable than the insurer who accepts the duty to defend under a reservation of rights, but then performs the duty in bad faith." Kirk v. Mt. Airy Ins. Co., 134 Wn.2d 558, 564, 951 P.2d 1124 (1998).

[T]he Minnesota Limited Liability Company Act, Minn.Stat. §§ 322B.01-.960 (1996), specifically incorporates the definition and use of the term “dissolution” from the Uniform Partnership Act. *See* Minn.Stat. § 322B.03, subd. 15 (1996) (stating dissolution “obligates the limited liability company to wind up its affairs and to terminate its existence as legal entity”)...Under both statutes, the entity is not terminated upon dissolution, but continues until all business issues are resolved.

Hurwitz v. Padden, 581 N.W.2d 359, 362 (Minn. Ct. App. 1998). And here, all business issues are still not yet resolved and therefore the entity – CSS – is not yet terminated. Assets, including claims and choses of action, can still accrue to CSS and did so as argued above. In Hurwitz, assets accrued to the limited liability company after dissolution but before termination. *See generally*, Hurwitz, 581 N.W.2d at 359-64.

Now, CSS did execute Articles of Termination, also on July 1, 2003, and likewise filed them with the Minnesota Secretary of State on September 12, 2003. CP 615. However, CSS executed these Articles of Termination in violation of Minnesota law.

CSS chose to wind up its affairs without giving notice to creditors and claimants; that is, CSS chose to wind up its affairs under Minn. Stat. § 322B.82. “Notice of the dissolution of [CSS] has not been given to the creditors of the Company. These Articles of Termination are being filed pursuant to Minnesota Statutes 322B.82, Subd. 1. All known debts,

obligations and liabilities of the Company have been paid and discharged or adequate provision therefor has been made.” CP 615.

However, Minn. Stat. § 322B.82, Subd. 1 reads: “Articles of termination for a limited liability company...that has not given notice to creditors and claimants...*must* be filed with the secretary of state *after*: (1) the payment of claims of all known creditors and claimants has been made or provided for; or (2) at least two years have elapsed from the date of filing the notice of dissolution” (emphasis added). Even though Ms. Faller knew, as of the time of the failure of CSS’s work, the damage CSS caused to other work, and the failure of CSS’s attempt to fix its work that CSS’s work had failed and had damaged other work, that is, even though Ms. Faller knew that CSS had damaged BP (*see* Statement of the Case, above, *see also generally* CP 105-27, *especially* CP 120), CSS neither paid BP nor made provision for payment to BP.

CSS’s Articles of Termination contained a false statement and were filed with the Secretary of State of Minnesota *before* payment of claims of all known creditors had been made or provided for, and were filed with the Secretary of State of Minnesota *on the same day* that the Notice of Dissolution was filed.

In such a case, the Articles of Termination that were filed in violation of Minnesota law are ineffective. CSS is still – to this day – in

its winding-up period, because it has not yet completed its affairs. *See, e.g., Hurwitz*, 581 N.W.2d at 363: “Until the firm’s affairs are wound-up, the entity remains intact for the purposes of completing its affairs....”

BP, the claimant or creditor whom CSS ignored, had a remedy.

Minn. Stat. § 322B.82, Subd. 3(b), states:

If the limited liability company has not paid or provided for all known creditors and claimants at the time articles of termination are filed, a person who does not file a claim or pursue a remedy in a legal, administrative, or arbitration proceeding within two years after the date of filing the notice of dissolution is barred from suing on that claim or otherwise realizing upon or enforcing it, except as provided in section 322B.863.

And BP sued on its claim within two years after CSS filed its notice of dissolution. The notice of dissolution was filed on September 12, 2003. CP 614. BP filed its amended complaint on March 17, 2004, just over six months after CSS filed the notice of dissolution. CP 35 (BP’s original complaint was filed on March 15, 2004, two days earlier).³ BP’s filing of

³ CSS may not now attempt to argue that it made provision for payment of BP’s claims, nor may it now attempt to argue that Minn. Stat. § 322B.82, Subd. 3(b) did not apply and that BP improperly sued CSS. The time for so arguing has long passed: CSS waived that argument when it failed to answer BP’s amended complaint and failed to move for vacation

the lawsuit tolled the winding-up period for CSS. Even if CSS had attempted to re-file its Articles of Termination two years after filing the notice of dissolution on September 12, 2003, pursuant to Minn. Stat. § 322B.82, Subd. 1 (2), those hypothetical re-filed Articles of Termination would be of no effect: although dissolved, and precluded from conducting any business other than that of winding-up its affairs, CSS the entity is still in existence while BP is still attempting to sue on, realize, or enforce its claim.

The truth of this can plainly be seen by merely looking at the actions CSS took during BP's lawsuit, *after* the Notice of Dissolution was filed. For example, CSS filed a Motion to Vacate on August 10, 2006, where CSS argued that it "informally appeared" during BP's lawsuit, after the notice was filed. CP 12-19. In Ms. Faller's Declaration, also filed on August 10, 2006, she stated that she, on behalf of CSS, was deposed in a related case on June 24, 2004, after the notice was filed. CP 21. CSS also

of the default judgment in a timely fashion and is now estopped from so arguing. *See, e.g.,* Thomas v. Harlan, 27 Wn.2d 512, 178 P.2d 965 (1947); Witzel v. Tena, 48 Wn.2d 628, 295 P.2d 1115 (1956); King ex rel. King v. Snohomish County, 105 Wn. App. 857, 2 P.3d 1151, *rev. granted*, 145 Wn.2d 1001, *reversed* 146 Wn.2d 420, 47 P.3d 563 (2001).

appealed the King County Superior Court's denial of the motion to vacate on September 26, 2006, more than three years after the notice of dissolution was filed. CP 993-97. Based on all the actions CSS took after filing the notice of dissolution, CSS is estopped from arguing that it was not in existence as an entity after filing the notice of dissolution; it has waived that argument. *See, e.g., Thomas*, 27 Wn.2d 512; *Witzel*, 48 Wn.2d 628; *King*, 105 Wn. App. 857. Likewise, MOE, Messrs. Clement and Drotz, and Ms. Faller are likewise estopped and have waived that argument. All acted the way they did *because* CSS was still in existence (and still is today!).

Therefore, since CSS the entity was still in existence at the time its choses of action accrued against MOE, Messrs. Clement and Drotz, and Ms. Faller, those choses of action exist and are the property of CSS. And since CSS distributed only that property that was in existence as of July 1, 2003, to its members, and the choses of action had not yet accrued as of July 1, 2003, these choses were not distributed to the members: the choses are still the property of CSS.

2. CSS or BP may sue on the choses

BP filed suit on CSS's choses in action against MOE on October 31, 2008, in Thurston County Superior Court, number 08-2-02538-9. CP 718-19. This was entirely proper. CSS, still in existence as an entity,

although dissolved and in its wind-up period, can pursue and recover on outstanding legal claims, including claims accrued against MOE, Messrs. Clement and Drotz, and Ms. Faller during the wind-up period. *See, e.g., Faegre & Benson, LLP v. R & R Investors*, 772 N.W.2d 846, 853 (Minn. Ct. App. 2009). “This winding-up process could encompass pursuit of and recovery on an outstanding legal claim,” *Faegre*, 772 N.W.2d at 853, *citing Hurwitz*, 581 N.W.2d at 361; *citing also Lamborn & Co. v. United States*, 106 Ct.Cl. 703, 65 F.Supp. 569, 571 (1946).

This is consonant with Minnesota statute: “After a limited liability company has been terminated, any of its former managers, governors, or members may assert or defend, in the name of the limited liability company, any claim by or against the limited liability company.” Minn.Stat. § 322B.866. Of course, here, we are talking about an action filed during the winding-up period, since CSS is not yet terminated, the Articles of Termination having been filed in violation of Minnesota law and BP having tolled the winding-up period by filing suit against CSS. What that means that in the event BP is not correct, and CSS’s existence as a limited liability company is indeed “terminated,” a suit after “termination” by BP or CSS is still proper.

Lamborn, relied upon by the Minnesota Court of Appeals, held that the surviving partners were proper parties to bring a cause of action

accruing to the partnership during its existence. 65 F.Supp. at 571. Lamborn itself was relying upon even older case law, Pagan v. Sparks, 18 F. Cas. 976, 2 Wash. C.C. 325, No. 10659 (C.C. Pa. 1808), and Daby v. Ericsson, 6 Hand 786, 45 N.Y. 786 (N.Y. 1871). In Pagan, the Court held that assignees in bankruptcy of a surviving partner are the proper persons to sue to recover a debt due a firm. Pagan, 18 F. Cas. at 977. In Daby, the Court held that where a surviving partner of a firm assigned his rights to choses-in-action to the plaintiff, the plaintiff was the proper person to sue upon those choses-in-action. Daby, 45 N.Y. at 786. Here, BP executed and levied upon CSS's choses in action. If BP prevails here, on appeal, BP will again execute, levy, and set the choses for Sheriff's sale, where BP plans to purchase them. As purchaser of the choses-in-action, BP will stand in the same shoes as the assignee in bankruptcy in Pagan and the assignee of the surviving partner in Daby, cases upon which Lamborn relied, itself a case upon which the Minnesota Court of Appeals relied in Faegre. BP can sue on the choses.

3. This Court should do equity here

These are the facts. BP was damaged by CSS's breaches and by CSS's damage to other work. CSS knew it had breached, knew that BP was damaged, but made no provision for payment to BP. CSS filed a Notice of Dissolution with the Minnesota Secretary of State, gave no

notice to BP, and filed invalid Articles of Termination in contravention of Minnesota law. CSS had insurance with MOE during the time that CSS damaged BP's work and breached the contract, insurance that would have covered BP's claims. When BP sued CSS, Ms. Faller, CSS's principal, knew of the lawsuit but did not notify MOE. This inaction by Ms. Faller was detrimental to CSS (Ms. Faller was not the only member of CSS). When, after BP obtained an order of default and default judgment against CSS, and notified MOE, MOE undertook a defense of CSS in bad faith. It hired counsel, Messrs. Drotz and Clement, who were dilatory and waited a full ten months before filing a motion to vacate, an unreasonable delay. These actions by MOE and Messrs. Drotz and Clement were detrimental to CSS.

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

BP believes that its arguments, above, are sufficient for this Court to decide as a matter of law that CSS, a dissolved Minnesota limited liability company, has property on which BP can execute. However, equity is on BP's side as well. Minn. Stat. § 322B.833, Subd. 1 (3)(i)

states: “A court may grant any equitable relief it considers just and reasonable in the circumstances...(3) in an action by a creditor when: (i) the claim of the creditor has been reduced to judgment and an execution on the judgment has been returned unsatisfied.” That is what happened here. BP’s claim has been reduced to judgment, BP as judgment creditor executed, levied, and set for Sheriff’s sale the choses in action, and then, after the King County Superior Court quashed the writs and struck the Sheriff’s sale, the Thurston County Sheriff returned the execution unsatisfied. CP 863-935. This Court should do equity.

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

1. The Choses are Not Too Uncertain

Ms. Faller, principal of CSS, has declared that she has no interest in pursuing CSS’s claims against either MOE or CSS’s attorneys, Messrs. Clement and Drotz. CP 773. Presumably, Ms. Faller has no interest in pursuing CSS’s claims against herself, either. And, indeed, there is no question: CSS has filed no lawsuit against Ms. Faller, MOE, or Messrs. Clement and Drotz. But that does not mean that BP cannot sue, upon acquiring CSS’s choses of action against Ms. Faller, MOE, or Messrs. Clement and Drotz.

“All property, real and personal, of the judgment debtor that is not exempted by law is liable to execution.” RCW 6.17.090. Choses in action are personal property and are liable to execution, even uncertain choses, so long as they are capable of being converted into a judgment.

[CSS’s] claim, though undetermined and unliquidated, is capable of being converted into a judgment, and we believe it constitutes ‘property’ within the contemplation of [RCW 6.17.090]. There has been a steady trend of the law to make all species of property freely alienable and subject to the demands of the owner’s creditors. Our statute is sufficiently broad to include unliquidated tort claims even if of dubious value, and we see no reason to limit by judicial construction or prohibit the judicial process of attachment or execution by excluding such claims. If such a step is to be taken, it is for the legislature and not for the courts.

Woody’s Olympia Lumber, Inc. v Roney, 9 Wn. App. 626, 633, 513 P.2d 849 (1973). While the choses in action against MOE, Messrs. Clement and Drotz, and Ms. Faller may be of dubious value, they are capable of being converted into a judgment. The King County Superior Court erred in concluding that the choses were too uncertain to be liable to execution.

In their moving papers to the King County Superior Court, MOE, Messrs. Clement and Drotz, and Ms. Faller argued that the choses here differed from the ones in Woody’s Olympia because CSS had not filed suit on the choses, and because the choses were more uncertain than the ones in Woody’s Olympia. Both arguments fail.

a. It is immaterial that CSS did not file suit

Washington statutes on execution allow for the possibility that a judgment creditor may execute on a chose of action that has not been commenced in a lawsuit by a judgment debtor. RCW 6.17.160(7) requires, in the case of a chose of action that has already been commenced in a lawsuit, that a copy of the writ and the description of the property be filed with the Clerk of the Court in which the suit is pending. If a chose of action has not already been commenced in a lawsuit, RCW 6.17.160(7) requires nothing. Moreover, the Ninth Circuit Court of Appeals, applying and interpreting Washington's very broad execution statute, allowed a judgment creditor to execute on a claim not yet commenced in court. Ikuno v. Yip, 912 F.2d 306, 314-15 (9th Cir. 1990). The Ninth Circuit's interpretation of Washington law is persuasive authority.

Finally, BP, in executing, levying, setting the choses for Sheriff's sale, and purchasing them, is not attempting to *compel* CSS to bring suit on the choses. No; BP wants to bring suit on the choses itself, though it would not have stood in the way had CSS chosen to do so in an attempt to collect money with which to satisfy BP's judgment. The distinction between executing on personal property and compelling another to take action vis-à-vis that personal property is one that this Court recognized, in

Safeco Insurance Co. v. Skeen, 47 Wn. App. 196, 199 n. 2, 734 P.2d 41, *rev. denied*, 108 Wn.2d 1019 (1987).

b. The Choses Are Capable of Being Reduced to Judgment

The other argument that MOE, Messrs. Clement and Drotz, and Ms. Faller have made is that CSS's choses against them are too uncertain, citing to United Pac. Ins. Co. v. Lundstrom, 77 Wn.2d 162, 172-73, 459 P.2d 930 (1969).

At the time of this attachment it was uncertain whether a sum of money would ever be due from Milmanco to Lundstrom. The problems of contingency, uncertainty, possibility and dependency that have caused most states to decree that such a claim cannot be attached were clearly present. But whereas in Johnson v. Dahlquist, 103 Wash. 29, 225 P.817 (1924), the value of the attached cause of action would be mathematically ascertainable when judgment was rendered on the claim, that was not true here. The uncertainty and contingency still existed after Lundstrom had been awarded a judgment. The value of his judgment could not be mathematically calculated with any degree of certainty before something else happened. Lundstrom's judgment against Milmanco was only for such sums as he should thereafter pay on United's judgment against him. If he paid nothing, his judgment was worthless. If he paid some amount on United's judgment, then his judgment against Milmanco was worth at least an amount equal to what he had paid. His judgment against Milmanco did not therefore remove the uncertainty and the contingency which existed at the time of the attachment.

But as this quote from United Pacific shows, United Pacific is distinguishable. In that case, the value of the judgment "could not be mathematically calculated with any degree of certainty before something

else happened.” The value of the judgment was *contingent* upon some events that had yet to occur in the future. Here, BP’s claims against CSS have already been reduced to judgment. Ms. Faller, Messrs. Drotz and Clement, and MOE have already injured CSS, and the amount of damages their injuries caused is mathematically calculable. Certainly, the chases of action are of dubious value: their value depends on a court determining that as a matter of law the claimant – BP – is entitled to prevail on the facts that have already transpired. But their value does not depend on some future happening as in United Pacific.

2. Claims Sounding in Legal Malpractice May be Executed Upon, Although Not Assigned

An execution on a judgment debtor’s chases of action, sounding in legal malpractice, against its attorneys, is authorized under Washington State law. *See* RCW 6.17.090; *see also* Ikuno, 912 F.2d at 314-15, *citing* Woody’s Olympia, 9 Wn. App. 626. In Ikuno, the claim was one for legal malpractice and the 9th Circuit, applying Washington law, held that such a claim was property and subject to execution. “As noted in Woody’s Olympia, Washington has a broad statute on execution, and any limitation on its application should be left *to the legislature*.” Ikuno, 912 F.2d at 315, *citing* Woody’s Olympia, 9 Wn. App. at 633.

Kommavongsa v. Nammathao, 149 Wn.2d 288, 67 P.3d 1068

(2003), stands for the proposition that a malpractice claim could not be *assigned*. No assignment is sought here. The Court in Ikuno noted the difference:

Li also cites cases prohibiting the assignment of legal negligence claims. His reliance on these cases is misplaced. The court in Woody's Olympia specifically rejected the argument that assignability is a factor to consider when deciding whether a claim is "property" under the Washington statute governing execution.

Ikuno, 912 F.2d at 315, *citing* Woody's Olympia, 9 Wn. App. at 633.

In fact, Kommavongsa specifically affirmed the legal reasoning in both Woody and Ikuno, distinguishing execution from assignment. 149 Wn.2d at 317, n. 7. The Kommavongsa Court explained:

In Ikuno v. Yip, 912 F.2d 306 (9th Cir. 1990), the Ninth Circuit relied upon Woody's Lumber in holding that an unliquidated legal malpractice claim is likewise property that is subject to execution. But as both the Woody's Lumber and the Ikuno courts observed, property that is subject to execution is not necessarily also subject to assignment. *See* Woody's Lumber, 9 Wn. App. at 633, 513 P.2d 849 ("Assignability affects the value of a property right, but its absence does not extinguish it. It is still property."); Ikuno, 912 F.3d at 315 n. 4 (recognizing that the Woody's Lumber court specifically rejected the argument that assignability is a factor to consider when deciding whether a claim is property under Washington's execution statute).

Kommavongsa, 149 Wn.2d at 317, n. 7.

The public policy arguments against the assignment of legal malpractice claims simply do not apply in the case of execution. There is no collusion where a judgment creditor executes, levies, sets for Sheriff's sale, and purchases a chose of action. And should BP be successful in executing, levying, setting for Sheriff's sale, and purchasing CSS's choses of action against its former attorneys, BP will not be forced to take a contrary position to the one it took in the lawsuit against CSS. This Court has held that a client in a legal malpractice action sustains her burden of proving causation if she proves that she would have prevailed or *achieved a better result* if the attorney had performed competently. Martin v. Northwest Legal Services, 43 Wn. App. 405, 409, 717 P.2d 779 (1986) (emphasis added).

Here, BP prevailed against CSS on default and got an order of default and an order of default judgment against it. CSS's attorneys waited a full 10 months before filing a motion to vacate, which was the primary reason that this Court affirmed the trial court's denial of the motion for default! It does not strain credulity for BP to say that, despite the strengths of its claims – which were very good – had CSS's attorneys lifted even a finger they would have at least achieved a marginally better result.

Likewise, the public policy arguments do not apply in the case of the choses of action that do not sound in legal malpractice, that is, CSS's choses of action against its principal, Ms. Faller, and its insurance company, MOE. Ms. Faller demonstrably injured CSS when she failed to give MOE notice of the lawsuit against CSS. MOE demonstrably injured CSS when it undertook its duty to defend in bad faith. Again, had either Ms. Faller or MOE lifted a finger, CSS could have achieved a marginally better result than an order of default and a default judgment.

V. CONCLUSION

This is a case that cries out for some equity to be done. BP had a good claim against CSS, a company that had insurance that would have covered that claim. BP prevailed against CSS, but because of the inaction of CSS's principal, Ms. Faller, the insurance company, MOE, refused to honor the claim, and because of Ms. Faller's inaction, CSS failed to make provision for BP when it filed its Notice of Dissolution and distributed the company's assets to its members. But MOE stepped in, undertook its duty to defend in bad faith, and hired counsel, Messrs. Clement and Drotz, who failed to file a motion to vacate for 10 months. BP executed and levied on CSS's choses of action that accrued during BP's lawsuit, and the actors who were individually and collectively responsible for CSS's inability to

pay the default judgment it owed to BP moved to have the writs of execution squashed and the Sheriff's sales struck.

Luckily for BP, the law is on its side. The choses of action are the personal property of CSS that CSS did not distribute to its members; they are still the property of CSS. Either CSS or BP would be proper parties to sue on the choses. The choses are personal property that is subject to execution. This Court should overrule the trial court's orders and reinstate the Sheriff's sale on the choses.

SUBMITTED this 20th day of June, 2010.

CUSHMAN LAW OFFICES, P.S.

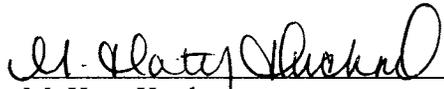

Stephanie M. R. Bird, WSBA #36859
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on June 30, 2010, I caused to be served a true copy of the foregoing Motion, by the method indicated below, and addressed to each of the following:

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

DATED this 30th day of June, 2010 in Olympia, Washington.



M. Katy Kuchno
Paralegal to Stephanie M. R. Bird

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