

No. 64812-8-I

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

BERSCHAUER PHILLIPS CONSTRUCTION CO., a Washington State
Corporation

Appellant,

vs.

CONCRETE SCIENCE SERVICES OF SEATTLE, LLC d/b/a CONCRETE
SCIENCE SERVICES NW, et al.,

Defendants.

MUTUAL OF ENUMCLAW INSURANCE COMPANY, an insurance
company; W. SCOTT CLEMENT, an adult individual along with "JANE
DOE" CLEMENT and any marital community; JOHN E. DROTZ, an adult
individual along with "JANE DOE" DROTZ and any marital community;
and JENNIFER FALLER, an adult individual

Respondents

BRIEF OF RESPONDENT
MUTUAL OF ENUMCLAW INSURANCE COMPANY

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COUNTER-STATEMENT OF THE CASE

The other respondents, Clement and Drotz and Jennifer Faller, have filed briefs which thoroughly state the facts and arguments. To avoid unnecessary repetition, Mutual of Enumclaw (MOE) adopts the statements and arguments set forth in those briefs. MOE offers the following statements and arguments unique to it in this appeal.

MOE is an insurance company. Between September 22, 2000 and September 22, 2003, MOE issued insurance to Concrete Science Services (CSS). The insurance included commercial general liability insurance. (CP 669.)

In July, 2003, CSS prepared Notice of Dissolution and Articles of Termination. These were filed with the Minnesota Secretary of State. (CP 614-15.) On September 12, 2003, the Minnesota Secretary of State issued a Certificate of Termination. (CP 617.)

In March, 2004, Berschauer Phillips (BP) filed suit against CSS, among others. The suit arose out of work CSS did for BP on Redmond Junior High School for the Lake Washington School District. (See CP 344-49.) CSS never appeared or defended. Nor did it notify MOE of the suit or ask MOE to provide for its defense. (CP 671 at ¶14; 701-03 at ¶¶4, 7, 13.) As a result, on August 30, 2005, BP obtained a default judgment against CSS for \$318,611.97. (CP 342-43.)

On September 14, 2005, two weeks after BP obtained default judgment, BP's counsel sent a letter to MOE demanding that it pay the default judgment. (CP 669 at ¶¶ 4, 5; CP 673-75.) BP had never notified MOE of the lawsuit before.

MOE immediately undertook to contact CSS (CP 670 at ¶9), and also hired independent counsel, under reservation of rights (CP 677-80), to have the default judgment set aside. (CPP 669-70 at ¶8, 696; CP 713 at ¶¶ 4-5.) Because of CSS's 2003 termination, MOE had difficulty locating anyone associated with CSS. (CP 670 at ¶9.) After finally locating a representative of CSS, Jennifer Faller, MOE and the attorneys received little support or assistance. Ms. Faller has acknowledged she was uninterested in helping set aside the default judgment. (CP 700-03.) The efforts to have the default judgment set aside failed. (CP 351-60.)

On October 31, 2008, BP filed an action against Mutual of Enumclaw in Thurston County Superior Court. (CP 716-19.) BP claimed it could sue MOE because it had executed on CSS's choses in action against MOE in June, 2008, by serving CT Corporation, CSS's former registered agent, with a writ of execution. (CP 719 at ¶7.) CT Corporation had not been CSS's registered agent for years. (CP 702 at ¶12.) Based on this writ, BP asserted claims against MOE for breach of contract and bad faith. (CP 719.) On the bad faith claim, BP alleged that MOE was responsible for delay in having the

default judgment set aside. (CP 719.)

In actuality, BP had not obtained CSS's rights, if any, against MOE. The June, 2008, writ of execution did not direct the Sheriff to sell CSS's purported claims against Mutual of Enumclaw. (CP 721-22.) As a result, those claims were never sold, and BP did not own the claims it sued upon in Thurston County.

To try to correct the deficiency, BP obtained another writ of execution from the King County Superior Court Clerk on or about December 2, 2009. (CP 726-27.) This time, the writ directed the Sheriff to levy CSS's putative claims against MOE, and also to sell the claims at a sheriff's sale. (CP 726-27.) BP obtained this writ ex parte, without notice to MOE until after it was obtained.

After learning of the writ, MOE appeared in this action, and moved to quash the writ. (CP 652.) MOE argued that as a long-ago terminated limited liability company, CSS did not own property. Thus, CSS had no property subject to execution. (CP 656-59.) MOE also argued that even if CSS did still own property, the choses in action BP was seeking to levy were illusory and were not "property" subject to execution. (CP 659-62.)

The trial court agreed. On February 2, 2010, it quashed the writ. (CP 861-62.) BP appeals that decision.

COUNTER-STATEMENT OF THE ISSUES

1. May BP challenge CSS's status as a terminated limited liability company?
2. If BP can challenge CSS's status as a terminated limited liability company, did it present sufficient evidence to establish that CSS was not lawfully terminated?
3. Is the chose in action against MOE, which BP sought to levy and have sold, "property" that is subject to execution?

ARGUMENT

1. BP mischaracterizes MOE's argument.

At the outset, a misstatement requires correction. In the opening sentence of the argument in its brief, BP states: "All respondents argued that CSS had no property on which BP could execute because CSS had dissolved." Brief of Appellant at 13. The statement mis-characterizes MOE's, and likely the other respondents', arguments. It also suggests that MOE misunderstood the distinction between the process of winding up a limited liability company, called "dissolution," and the ending of that process, called "termination."

No such misunderstanding existed. Indeed, MOE specifically discussed the distinction in its motion to quash. (CP 656-59.) MOE's argument was not that CSS had no property on which BP could execute because CSS had dissolved, its argument was that CSS had no property on which BP could execute because CSS had terminated. (Id.) MOE gives no

concession when it acknowledges that a company remains in existence and can own property while it is in the process of winding up its affairs. **MRS 322B.81(2)** (“[E]xistence continues . . . until . . . articles of termination are filed.”); *Chadwick Farms Owner’s Ass’n v. FHC, LLC*, 166 Wn.2d 178, 207 P.3d 1251 (2009).

The acknowledgment, however, begs the question here. The Minnesota Secretary of State issued a Certificate of termination for CSS on September 13, 2003. (CP 617.) BP attempted to execute against CSS property in December, 2009. Thus, CSS was terminated, not merely in dissolution, when BP sought its writ of execution. All the authorities BP cites which discuss the rights of creditors and the ownership of claims during dissolution, and all the arguments BP makes regarding the right to claim property from a limited liability company in dissolution do not apply if CSS was terminated.

2. BP may not challenge CSS’s status as a terminated limited liability company.

Written between the lines of BP’s brief is its acknowledgment (finally) that a terminated limited liability company cannot hold property subject to execution. Instead of arguing to contrary as it did in the trial court, BP takes a different tack on appeal: BP argues for the first time that CSS’s termination was defective so that it remained in the dissolution or winding up

phase and never actually terminated. BP bases this argument on the contention that CSS filed defective articles of termination which falsely attested that it had paid the claims of all known creditors and claimants. BP argues the statement was false because BP had a claim which CSS knew of but did not pay.

BP's argument ignores Minnesota law. Minnesota law states clearly that termination occurs when articles of termination are filed and the Secretary of State issues a certificate of termination. **MRS 322B.03(48), 322B.826.** The Minnesota Secretary of State issued the certificate of termination on September 12, 2003. (CP 617.) Under Minnesota law, CSS is terminated.

This court is not free to ignore that status. Under Article IV, Section 1 of the United States Constitution, full faith and credit must be given in each state to the public acts, records, and judgments of every other state. *U.S. CONST.* art. IV, § 1; *State v. Esquivel*, 132 Wn. App. 316, 321, 132 P.3d 751 (2006). BP's remedy is not to collaterally attack the termination in this proceeding, but to challenge the Minnesota action directly either by asking the Minnesota Secretary of State to revoke the certificate of termination, or by asking Minnesota courts to reverse a refusal to do so.

As importantly, this is not the proper time for BP to challenge the termination. BP raises this argument for the first time on appeal. Appellate

review is a second bite at the same apple, not a first bite into a new one. Thus, appellate courts generally do not consider arguments raised for the first time on appeal. RAP 2.5(a); *Powell v. Sphere Drake Ins. P.L.C.*, 97 Wn. App. 890, 899, 988 P.2d 12 (1999); *Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 780, 819 P.2d 370 (1991)(“We will not consider a theory as ground for reversal unless ... the issue was first presented to the trial court.”) quoting *Talps v. Arreola*, 83 Wn.2d 655, 658, 521 P.2d 206 (1974).

These rules are intended to afford the trial court an opportunity to correct any error, thereby avoiding unnecessary appeals and retrials. They are also supported by considerations of fairness to the opposing party: the opposing parties should have an opportunity at trial to respond to possible claims of error, and to shape their cases to issues and theories, at the trial level, rather than facing newly-asserted error or new theories and issues for the first time on appeal.

State v. Avendano-Lopez, 79 Wn. App. 706, 710, 904 P.2d 324 (1995)(internal quotations omitted).

BP’s arguments to the trial court are found at CP 547-54 (Response to Clement & Drotz motion to quash), CP 835-40 (Response to Faller motion to quash), and CP 841-48 (Response to MOE motion to quash). In none of those pleadings did BP make the arguments it now presents. In opposition to MOE’s motion to quash, BP argued it should be denied because the trial court lacked jurisdiction. (CP 842) In the alternative, it argued because Minnesota Revised Statute (MRS) 322B.866 allows former managers to sue

or defend a terminated limited liability company in the name of the company, the company owns property subject to execution. (CP 845-47) BP did not argue or present authority that CSS had not terminated and therefore could still own property. As a result BP deprived the parties of the opportunity to fully develop the record, and deprived the court of the opportunity to fully consider the issue.

Because Washington courts must honor Minnesota's termination of CSS and because CSS cannot raise the issue of the validity of CSS's termination, the court should reject BP's argument that CSS was not terminated and was in dissolution when BP obtained its writs.

3. BP's challenge to CSS's termination is unsupported. BP has not shown CSS knew BP had a claim that needed paying before CSS filed articles of termination.

Even if BP can challenge CSS's status as a terminated limited liability company, its challenge is ineffective. Under Minnesota law, notice of dissolution to creditors and claimants is required only when the limited liability company knows of a "claim." **MRS 322B.82**. BP has presented no evidence that CSS knew BP was making a "claim" against it before filing its articles of termination.

Minnesota statutes do not define "claim." Thus, the word is given its ordinary meaning. **MRS § 645.08(1)** ("In construing the statutes of this state . . . words and phrases are construed . . . according to their common and

approved usage; . . .”). Dictionary definitions apply. *State v. Robinson*, 539 N.W.2d 231, 237 (Minn. 1995). The dictionary definition of “claim” is “a demand of a right” or a “demand for . . . benefits.” *State v. Bodey*, 44 Wn. App. 698, 703, 723 P.2d 1148 (1986). BP’s evidence does not rise to this level.

BP admits it did not file suit for years after CSS’s termination. BP has submitted no evidence indicating it ever notified CSS it would sue prior to actually filing suit, let alone prior to CSS’s termination. BP has submitted no evidence that it notified CSS it was holding CSS accountable for the defects in the project.

Instead BP claims CSS knew circumstantially that BP was making a claim because Ms. Faller knew CSS’s work had failed, and because CSS went out of business because of the Redmond Junior High project. Brief of Appellant at 3-4, 17. But neither fact reveals BP as a claimant of CSS at the time of the termination. CSS’s knowledge that its work was unsuccessful is not synonymous with knowing BP blamed CSS for the failure. Going out of business because CSS spent more on the project than it earned and could bear is not synonymous with knowing BP was seeking damages from CSS. Neither fact shows CSS knew BP or anyone else blamed CSS for the failure of the stain, that BP was going to seek financial recompense from CSS, or that BP was going to sue CSS.

Because BP has failed to show CSS knew BP was a “claimant” when CSS filed its articles of termination, BP has no factual basis to challenge CSS’s termination in September, 2003.

4. A terminated limited liability company cannot acquire property after termination.

If CSS must be treated as having terminated in September, 2003, BP’s “after acquired property” argument fails. Under Minnesota law, termination means “the end of a limited liability company’s existence as a legal entity.” **MRS 322B.03(48)**. A non-existent entity cannot hold property. *Chadwick Farms Owner’s Ass’n v. FHC, LLC*, 166 Wn.2d 178, 207 P.3d 1251 (2009). By statute, the property of a Minnesota limited liability company passes to its members. **MRS 322B.813(5)** (All tangible or intangible property remaining “must be distributed to the members.”) It is basic logic that if CSS could not hold property after termination because it did not exist, it could not receive property after termination either. The corollary to that logic is that if property held by CSS at the time it terminated devolves to its members, property coming to CSS after termination devolves to the members as well.

In the trial court, MOE illustrated this logic with a question which Respondents Clement & Drotz repeat: Could CSS file suit against Mutual of Enumclaw today asserting the claims BP is seeking to attach? No. By statute, **MRS 322B.866**, only the company’s members may assert claims

formerly possessed by the limited liability company. This is because the members own whatever claim might exist. See *Sherron Assocs. Loan Fund V v. Saucier*, No. 28238-4-III, ___ Wn. App. ___, ___ P.2d ___ (Div. III, August 5, 2010)(as owner of assets of limited liability company after cancellation, member could assign judgment formerly held by the llc).

BP's brief shows it has finally accepted the reality that if CSS was terminated CSS did not exist, could not hold property, and could not acquire property at the time BP obtained its writ of execution. BP's machinations to avoid that reality by questioning whether CSS really had terminated fail. They are untimely, incorrect, presented in the wrong forum, and unsupportable factually. As a terminated limited liability company, CSS could neither hold nor acquire property.

5. The “chose in action” BP sought to execute upon was spun from whole cloth. It was not “property” subject to execution.

MOE agrees with and adopts the arguments of the other respondents in this appeal regarding the law pertaining to the reach of the execution statutes. It writes separately only to point out that, even if BP could attach property from CSS, the reach of Washington execution statutes does not extend to an alleged chose in action against MOE.

As the other respondents have shown, under Washington law, not all property is certain enough to be subject to execution. In *United Pac. Ins. Co.*

v. Lundstrom, 77 Wn.2d 162, 459 P.2d 930 (1969), the court held that the debtor's interest in a judgment of uncertain value was not property subject to execution. In *Safeco Ins. Co. v. Skeen*, 47 Wn. App. 196, 734 P.2d 41 (1987), the court held that the debtor's interest in stock appreciation rights (SAR's) were not property subject to execution. The court reasoned that the SAR's were purely personal to the debtor and could not bind his employer "unless and until [the debtor] should choose to exercise them." 47 Wn. App. at 201. And, the debtor could not be forced through the execution process to exercise the rights. *Id.* Where our courts have allowed a creditor to attach a chose in action, the debtor had acted upon the claim by asserting it or suing on it.

The rights BP seeks to attach regarding MOE are no more certain than those in *Lundstrom*, nor are they any less personal than the rights at issue in *Skeen* such that CSS could be forced to exercise them through the execution process. BP acknowledges neither CSS nor its members ever asserted a claim, let alone filed a lawsuit against MOE. Indeed, none has taken any act which would have confirmed the existence of a claim or even evidenced a belief that a claim might exist against MOE. Rather, the alleged chose in action is spun from whole cloth. If CSS were an individual, BP's efforts would be like executing on claims against family members in the hopes of discovering one of them owed the debtor money. Or like executing on

malpractice claims because after knee surgery the person still walked with a limp. Or, like executing against an individual's ideas and thoughts before a patent was applied for. Or, like executing against an individual's wage earning ability before the wages are earned. The execution statute does not reach so far.

Moreover, the facts of this case illustrate how tentative these supposed choices in action are. BP attempts to execute on claims for breach of MOE's insurance policy with CSS and CSS's bad faith tort claim. Its breach of contract claim appears premised on the notion that MOE is obligated to indemnify CSS for CSS's liability to BP. Its bad faith claim appears premised on the notion that MOE was responsible for delay in efforts to have the default judgment set aside. But, it is well-settled that before a duty to indemnify arises, the insured must affirmatively inform the insured that its participation is desired. *Griffin v. Allstate Ins. Co.*, 108 Wn. App. 133, 140, 36 P.3d 552 (2001); *Mutual of Enumclaw Ins. Co. v. USF Ins. Co.*, 164 Wn.2d 411, 191 P.3d 866 (2008). Here, no one acting for or on behalf of CSS or its managers ever tendered the claim to MOE, or ever asked that MOE defend or indemnify it. (CP 671 at ¶14; CP 701-03 at ¶¶ 4, 5, 10, 13.) The only notice of the claim came from BP's counsel two weeks after

it obtained the default judgment.¹ (CP 669 at ¶ 6.) MOE hired independent counsel, and Jennifer Faller has testified under oath she was satisfied with their efforts. (CP 702-303 at ¶¶ 9, 12.) The attorneys acknowledge they recognized CSS as their client, exercised their best independent judgment on CSS's behalf, and MOE in fact assisted their efforts. (CP 713-14 at ¶¶ 6 - 8.) Testimony indicates it was the absence of CSS's assistance that caused the delay, and MOE worked to obtain that assistance. (CP 669-71 at ¶¶ 7-13; CP 701-02 at ¶¶ 8, 9.)

As MOE pointed out to the trial court, the execution statute is not a license to explore whether property exists. Nor is it a process created for judgment creditors to dupe the general public into purchasing non-existent property. Rather, it is a mechanism for judgment creditors to force the sale of actual, existing property, at public auction. As *Lundstrom* shows, execution is not available for contingent and uncertain "property." The trial court correctly recognized that nothing could be more contingent and uncertain than the "property" BP sought to attach.

CONCLUSION

As a terminated limited liability company, CSS no longer held

1. By this argument, MOE does not waive any right to assert policy defenses that may be asserted in the event someone is allowed to assert a breach of contract claim. These include, but are not limited to, the absence of coverage for the claims asserted by BP against CSS and untimely notice of the claim to MOE by CSS.

property subject to execution when BP sought its writ of execution. BP's challenge to CSS's terminated status is untimely and unsupported. Moreover, the target of the writ was not property subject to execution. For all these reasons, Respondent MOE asks this court to affirm the trial court's February 9, 2010, Order quashing writ of execution.

Dated this 16th day of August, 2010.

By : 
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Attorney for Respondent, Mutual of
Enumclaw Insurance Co.

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DECLARATION
OF SERVICE

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On this day, I, the undersigned, did serve the Brief of Respondent Mutual of Enumclaw and this Declaration on the parties listed below by sending true and correct copies of them vi email, and by depositing true and correct copies of them in the United States Mail addressed for delivery as follows:

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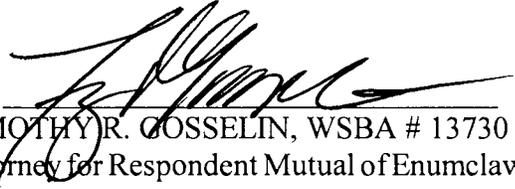
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I declare and state under the penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 16th day of August, 2010.

By: 
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Attorney for Respondent Mutual of Enumclaw