

No. 94088-6

SUPREME COURT
OF THE STATE OF WASHINGTON

BUSINESS SERVICES OF
AMERICA II, INC.,

Appellant,

v.

WAFERTECH LLC,

Respondent.

PETITIONER'S OPPOSITION TO
RESPONDENT'S MOTION TO
STRIKE REPLY TO PETITION FOR
REVIEW

A. IDENTITY OF RESPONDING PARTY

Appellant/Petitioner Business Service America II, Inc. ("BSA II")
is responding to the motion by Respondent WaferTech LLC to strike
BSA II's Reply to WaferTech's Answer to Petition for Review.

B. RELIEF SOUGHT BY RESPONDING PARTY

BSA II asks that the court deny WaferTech's Motion to Strike
BSA II's Reply Supporting Petition for Review.

3. FACTS RELEVANT TO MOTION

The trial court entered a summary judgment in 2013. CP 572. BSA II timely appealed. CP 604.

WaferTech moved to dismiss the appeal on the grounds that the named plaintiff/appellant, Business Services of America II, Inc. (“BSofA”), was not an “aggrieved party.” January 2, 2014, Motion. The Court of Appeals remanded the matter in 2014 without reviewing the summary judgment or deciding the motion to dismiss the appeal. October 21, 2014, Opinion.

BSA II moved for the first time under CR 15 and CR 25 to make BSA II the name of the plaintiff. The trial court denied those motions. CP 766. BSA II timely appealed. CP 770.

The Court of Appeals terminated review after determining that an entity named BSofA did not have capacity, without addressing (1) the 2013 summary judgment, (2) whether WaferTech waived its objection to BSofA’s capacity, or (3) whether BSA II could be made the named plaintiff under CR 15 and/or CR 25. October 18, 2016, Opinion.

BSA II sought review in this court. BSA II showed that the Court of Appeals’ decision was in conflict with other Washington appellate decisions on waivers of objections to capacity and the availability of

CR 15 and CR 25, at any stage of the proceedings, to address capacity objections, warranting review under RAP 13.4(b)(1) and (2).

In addition, the Court of Appeals failed to reach the merits of the appeal, in conflict with RAP 1.2(a), and failed to decide all necessary issues, in conflict with RAP 2.2(a). Ignoring *stare decisis* and applicable court rules to deny review on the merits, resulting in denial of any recovery for a \$4 million lien claim (WaferTech asserts it is limited to “only” \$1.5 million) that has been litigated for over eighteen years, involving several appeals and millions of dollars in legal fees, based on a pleading error ignored for over twelve years, was a matter of substantial public interest, warranting review under RAP 13.4(b)(4).

WaferTech’s answer opposed review, but instead of only addressing the issues raised by BSA II’s petition, raised issues the Court of Appeals did not address, such as whether (1) the CR 15 and CR 25 motions could be denied on the basis of “law of the case” or futility, and (2) BSA II waived its right to argue that WaferTech waived its objection to BSA II’s capacity. BSA II’s reply addressed those additional issues.

4. GROUND FOR RELIEF AND ARGUMENT

A. BSA II was entitled to reply to WaferTech's new issues.

WaferTech raised new issues that it sought to have this court review in determining whether to grant the petition for review, and if the court granted the petition, WaferTech could argue supported the Court of Appeals' decision. If this court accepts review, it will only review questions raised in a petition for review or answer. RAP 13.7(b).

The Drafter's Comment to the 2006 Amendment to RAP 13.4 states that RAP 13.7(b) must be read together with RAP 13.4(b) as a warning to the unwary respondent that, if it intends to argue to this court a different ground for upholding the Court of Appeals' decision than that set forth by the Court of Appeals, it is advised to raise it as a new issue in its answer under RAP 13.4(b). The comment cites *State v. Barker*, 143 Wn.2d 915, 919-20, 25 P.3d 423 (2001), in which this court refused to consider issues (which supported the Court of Appeals' decision) not asserted by respondent in an answer to the petition.

Given RAP 13.7(b), WaferTech, in order to have this court consider its contentions that (1) BSA II waived its right to argue that WaferTech its objection to BSoFA's capacity, and (2) the CR 15 and CR 25 motions could be denied on the basis of "law of the case" or futility,

it needed to raise them in its answer. Once it did so, BSA II was entitled to an opportunity to address them. A party may file a reply to address new issues raised in an answer. RAP 13.4(d).

The court rules are interpreted to promote justice. RAP 1.2(a).

When WaferTech had an opportunity to address issues raised by BSA II in its petition, such as (1) WaferTech's waiver of its objection to BSofA's capacity and (2) that the CR 15 and CR 25 motions were properly before the trial court and improperly denied, justice requires that BSA II have an opportunity to address issues raised by WaferTech.

B. BSA II is merely seeking to require the Court of Appeals to review the summary judgment appealed in 2013.

All the arguments about capacity, waiver, "law of the case," etc., should not distract from the real issues in deciding BSA II's petition, and what is at stake when doing so. The issues are whether the Court of Appeals complied with RAP 1.2(a) and RAP 2.2(a) when it failed to review the summary judgment appealed in 2013, and ignored *stare decisis* when considering WaferTech's arguments for avoiding the merits.

WaferTech's assertions of "lack of capacity," "law of the case," and futility, are merely attempts to justify not reaching the merits of BSA II's

\$4 million lien claim. That capacity objection is based on a typographical error in the plaintiff's name that had no effect on the action.

BSA II's petition showed that the Court of Appeals violated *stare decisis* and court rules when ruling on WaferTech's objection and terminating review without reaching the merits. WaferTech so abhors appellate court review of the summary judgment that it does not want this court to even consider BSA II's *arguments* for review.¹ One wonders why WaferTech so fears BSA II's arguments.

For the foregoing reasons, BSA II asks that the court deny WaferTech's motion to strike BSA II's reply addressing WaferTech's issues.

RESPECTFULLY SUBMITTED: March 22, 2017.

/s/ Eric Hultman

Eric R. Hultman, WSB #17414
Hultman Law Office
218 Main St., #477
Kirkland, WA 98033
425-943-0649

Attorney for Appellant Business Service
America II, Inc.

¹ This is not the first time WaferTech has sought to prevent a court from considering BSA II's arguments. It unsuccessfully sought to strike BSA II's opening brief in the Court of Appeals. October 2, 2015, Commissioner's Ruling.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document has been served by emailing the same, on March 22, 2017, to:

James T. McDermott
Ball Janik L.L.P.
One Main Place
101 S.W. Main Street, Suite 1000
Portland, OR 97204-3219
Attorneys for Respondent WaferTech, L.L.C.
jmcdermott@balljanik.com

Howard Goodfriend
Smith Goodfriend
1619 8th Ave. N.
Seattle, WA 98109-3007
Attorneys for Respondent WaferTech, L.L.C.
howard@washingtonappeals.com

/s/ Eric Hultman
Eric R. Hultman
