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Cause No. 94088-6

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 47316-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

BUSINESS SERVICES OF AMERICA II, INC.,

Appellant,

v.

WAFERTECH LLC,

Respondent.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Business Services of America II, Inc. (“BSofA”) seeks review of a Court of Appeals decision that does not conflict with any precedent, RAP 13.4(b)(1), (2), and that presents a procedural issue of importance only to the parties and not one of “substantial public interest.” RAP 13.4(b)(4) BSofA’s argument is based on the false premise that BSofA is a “misnomer.” After multiple opportunities in the trial court, BSofA could not meet its burden to prove that BSofA was a “misnomer” for a similarly-named, but long-defunct, Delaware corporation. Moreover, BSofA exhausted its appeal of the “misnomer” issue in 2014, and BSofA did not ask this Court to review a 2014 Court of Appeals decision which affirmed the trial court’s ruling that BSofA is not a “misnomer.” The Court of Appeals did not abuse its discretion in applying the law of the case from its 2014 decision. This Court should deny review.

II. PERTINENT APPELLATE HISTORY

On October 21, 2014, the Court of Appeals affirmed the trial court’s rejection of BSofA’s argument that its corporate name was a “misnomer.” October 21, 2014 Opinion at 1, App. A. The Court of Appeals also issued a limited remand to the trial court solely to allow the trial court to determine whether any other evidence existed that would somehow allow BSofA to continue its appeal. *Id*. at 14. Notably, BSofA

did not seek review of that 2014 Unpublished Opinion, which is now law of the case.

On February 20, 2015, adhering to the 2014 Court of Appeals' mandate, the trial court held an evidentiary hearing into BSofA's legal status at which BSofA *admitted* that it never had any independent legal existence. October 18, 2016 Opinion at 5, App. B. On February 20, 2015, the trial court entered findings of fact and conclusions of law confirming that BSofA had no legal status and lacked the capacity to sue or be sued. *Id*. BSofA appealed. In its October 18, 2016 Unpublished Opinion, the Court of Appeals applied longstanding precedent and properly ruled that substantial evidence supported the trial court's 2015 Findings of Fact, which in turn supported the trial court's Conclusions of Law. *Id*.

III. RESTATEMENT OF ISSUES

A. Did the Court of Appeals properly affirm the trial court's findings that BSofA does not legally exist and lacks capacity to sue or be sued as supported by substantial evidence?

B. Did the Court of Appeals abuse its discretion in refusing to revisit October 21, 2014 Opinion, which held that the trial court did not abuse its discretion in determining that BSofA is *not* a "misnomer" for some other entity?

C. Did the Court of Appeals properly determine in its 2016 decision that BSofA is not an "aggrieved party" that is competent to prosecute this appeal within the meaning of RAP 3.1?

IV. RESTATEMENT OF THE CASE

A. Original Litigation

This case has been pending for nearly 19 years. The dispute arose over cost overrun and safety issues during the construction of WaferTech's $1.2 billion silicon wafer manufacturing plant in Camas, Washington. (CP 1) The prime contractor, Meissner + Wurst ("M+W"), hired Natkin/Scott as a subcontractor to assist with construction of the facility's "clean room." (CP 110) On April 22, 1998, M+W terminated Natkin/Scott (BSofA's predecessor) for repeated violations of the project's safety rules. (CP 97) Natkin/Scott then filed a mechanic's lien against WaferTech's property and commenced this lawsuit against M+W and WaferTech, seeking over $7.65 million for allegedly unpaid work. (CP 3)

In fall 2000, the trial court held that Natkin/Scott had waived its right to a lien against WaferTech's property for any work before February 1, 1998. (CP 373) In February 2001, the trial court held that Natkin/Scott's lien claim was clearly excessive, and the trial court reduced the claim to a *maximum* of $1.5 million. (CP 375)

On March 19, 2001, Natkin/Scott settled with M+W for $2.4 million. October 21, 2014 Opinion at 2. As part of the settlement, M+W assigned its pass-through claims against WaferTech to Natkin/Scott. (*Id.*) The pass-through claims allowed Natkin/Scott to assert its breach of contract claims directly against WaferTech, in addition to Natkin/Scott's already-pending mechanic's lien claim.

On May 15, 2001, Natkin/Scott amended its complaint, substituting its successor, BSofA, as plaintiff. The amended complaint alleged that BSofA was a Delaware Corporation and was the assignee of Natkin/Scott's claims against WaferTech. (CP 109) This new complaint asserted the same pass-through claims against WaferTech that Natkin/Scott had previously brought against M+W for unpaid work on WaferTech's facility. (CP 09) On June 8, 2001, WaferTech answered, asserting that Natkin/Scott's settlement with M+W barred any recovery against WaferTech. (CP 117)

On May 22, 2002, during the trial, the trial court ruled that Natkin/Scott's lien waivers and claim releases barred all claims of any nature (including the pass-through claims) for work Natkin/Scott performed prior to February 1, 1998. (CP 427: "Plaintiff [BSofA's] claims are therefore limited to the recovery of job costs incurred on the WaferTech project after January 31, 1998.") Together with the trial court's

February 2001 Order reducing the lien claim to a maximum of $1.5 million, this order limited BSofA's aggregate claims for unpaid work to $1.5 million under any theory of recovery and against any defendant.

B. In the First Appeal, the Court of Appeals Affirmed the Dismissal of All But One of BSofA's Claims

BSofA appealed. On March 9, 2004, the Court of Appeals affirmed the dismissal of all of BSofA's pass-through claims, as well as BSofA's lien claim for work performed before February 1, 1998. *Bus. Servs. of Am. II, Inc. v. WaferTech, LLC,* noted at 120 Wn.App. 1042, 2004 WL 444724 (2004). The Court of Appeals remanded solely on BSofA's lien claim, as limited by the trial court and on appeal. *Id.* Notably, the Court of Appeals affirmed the trial court's award to WaferTech of nearly $1 million in prevailing party attorney fees and costs. BSofA's surety paid WaferTech's judgment on BSofA's behalf. October 21, 2014 Opinion at 9.

C. In August 2013, the Trial Court Granted Summary Judgment to WaferTech on Equitable Setoff Grounds

In July 2012, after several years of inactivity, followed by an intervening dismissal and remand, BSofA filed its Third Amended Complaint, which alleged that "at the time of the filing of Plaintiff's Second Amended Complaint, substituting it as plaintiff, Business Services of America II, Inc. was a Delaware Corporation." (CP 306-307) WaferTech answered that it "lacks sufficient knowledge or information to

form a belief as to the truth of [BSofA's status as a Delaware Corporation], and therefore denies the same." (CP 311)

WaferTech moved for summary judgment against BSofA's Third Amended Complaint on the grounds that BSofA's sole remaining claim—foreclosure of its $1.5 million lien—was equitably setoff by the $2.4 million settlement BSofA had previously extracted from M+W. (CP 570). The trial court granted WaferTech's motion for summary judgment on equitable setoff grounds and dismissed BSofA's sole remaining lien claim. The trial court then awarded WaferTech prevailing party attorney fees and costs of $430,110. (CP 611, 616)

D. In December 2013, WaferTech First Learned that BSofA Lacked Legal Existence; WaferTech Promptly Sought Relief

BSofA appealed the trial court's summary judgment order and fee award, but BSofA refused to supersede or pay WaferTech's fee judgment. Moreover, WaferTech was unable to enforce its judgment because it learned while pursuing collection that no entity named "Business Services of America II" had ever been incorporated in Delaware. After failing to obtain a satisfactory explanation from BSofA's counsel regarding BSofA's apparent lack of existence, WaferTech moved to dismiss BSofA's appeal on the grounds that BSofA was not an "aggrieved party" within the meaning of RAP 3.1. The appellate commissioner passed

WaferTech's motion to the merits panel. October 21, 2014 Opinion at 4-5.

Soon after WaferTech filed its motion to dismiss BSofA's appeal, BSofA filed a motion in the trial court under CR 60(a), arguing that BSofA was a "misnomer" for a long-void Delaware entity named "Business Service America II" ("BSAII"). (CP 637) On February 7, 2014, the trial court denied BSofA's motion. (CP 651) Undaunted, BSofA filed a new motion in the trial court, again seeking to change the name of the plaintiff/appellant to BSAII, presenting additional evidence in support of its argument that the name of the plaintiff was a "misnomer." (CP 669) The trial court denied BSofA's renewed motion on April 14, 2014. (CP 690)

E. In October 2014, The Court of Appeals Affirmed the Trial Court's Decision Denying BSofA's Motion to Change the Name of the Plaintiff to Business Service America II, and BSofA Did Not Seek Review.

BSofA appealed the trial court's denial of BSofA's "misnomer" motion. The Court of Appeals consolidated that appeal with BSofA's still-pending appeal of the trial court's order granting WaferTech's summary judgment motion on equitable setoff grounds. On October 21, 2014, the Court of Appeals affirmed the trial court's order denying BSofA's motion to correct the supposed "misnomer," holding that the trial court did not

abuse its discretion in refusing to change BSofA's name "because there was conflicting evidence in the record as to whether BSofA or BSA II was the actual assignee of Natkin/Scott's claims." October 21, 2014 Opinion at 8. The Court of Appeals remanded on narrow grounds so that the trial court could hear additional evidence and "determine BSofA's legal status and BSofA's ability to pursue its appeal against WaferTech." *Id*. at 1-2.

BSofA moved for reconsideration and twice moved to supplement the appellate record with new documents in support of BSofA's position that BSofA was some sort of "misnomer" for BSAII—allegedly the "actual" assignee of Natkin/Scott's claim against WaferTech. The Court of Appeals denied BSofA's motion for reconsideration and denied both of BSofA's motions to supplement the appellate record with additional documentary evidence. November 26, 2014, Order Denying BSofA's Motion for Reconsideration and Motions to Supplement the Record. BSofA did not seek review in this Court.

F. In October 2016, Following Remand, the Court of Appeals Affirmed the Trial Court's Findings that BSofA Lacked Legal Existence

On remand, the trial court granted WaferTech's application for an order to show cause, ordering BSofA to appear on February 20, 2015 to present evidence regarding BSofA's legal existence. At the hearing, BSofA conceded that it could not demonstrate that BSofA was a legal

entity, stating that "[BSofA does not] have any evidence regarding BSofA and [it] couldn't have any evidence." October 18, 2016 Opinion at 5, quoting VRP (Feb. 20, 2015 at 5-6) (brackets in original). In addition, BSofA failed to "present any evidence that BSofA was a valid corporation or entity in any jurisdiction." *Id*. BSofA again appealed.

On October 18, 2016, the Court of Appeals affirmed because "substantial evidence supports the trial court's findings of fact" and because "the trial court's findings of fact support the conclusions of law that "Business Services of America II, Inc. is a non-existent entity with no cognizable legal existence" and that [BSofA] "does not have the capacity to sue or be sued." *Id*., at 5, citing CP 767. On December 28, 2016, the Court of Appeals denied BSofA's motion for reconsideration, which again argued that BSofA was a "misnomer" for BSAII.

V. ARGUMENT WHY THIS COURT SHOULD DENY REVIEW

A. This Case is Not About a "Typographical Error" or a "Misnomer."

BSofA's petition for review rests on a false premise—that the Court of Appeals did not reach the merits of BSofA's claim against WaferTech because of a "misnomer" or a "typographical error" in the plaintiff's name. Petition at 2. The record refutes that contention. In the trial court, BSofA moved (three separate times!) to correct the supposed

typographical error in the plaintiff's name. Each time, BSofA argued that that BSAII, not BSofA, was the actual assignee of Natkin/Scott's claim against WaferTech. (CP 637, 669, 732) Each time, BSofA failed in the trial court to meet its burden proving the existence of a typographical error.

In its 2014 opinion, the Court of Appeals held that the trial court did not abuse its discretion in refusing to grant BSofA's "misnomer" motions. The Court of Appeals in 2014 found substantial evidence in the record that BSofA—not BSAII—was the correct plaintiff. October 21, 2014 Opinion at 8-9 (observing, *inter alia*, that: (1) two separate amended complaints identified BSofA as the plaintiff; (2) BSofA filed myriad court documents that identified BSofA as the plaintiff; (3) earlier judgments for over $800,000 in attorney fees against BSofA were paid; and (4) Joseph Guglielmo—identified in 2014 as the ostensible president of BSAII—signed an acknowledgement (as president of BSofA) that BSofA was the assignee of Natkin/Scott's claims.) The Court of Appeals' 2014 decision thus affirmed the trial court's denial of BSofA's "misnomer" motions and remanded to the trial court with narrow instructions to determine whether BSofA—not BSAII—had any independent legal existence sufficient to continue the appeal. *Id*. at 14.

B. The Law of the Case Doctrine Precludes Review of the Court of Appeals' October 2014 Opinion.

The Court of Appeals did not abuse its discretion in adhering to the law of the case and refusing to revisit its 2014 Opinion. Notably, BSofA did not seek review of the Court of Appeals' 2014 Opinion. Therefore, the "misnomer" issue has now been litigated through final appeal and is now law of the case. BSofA asks this Court to ignore the law of the case doctrine and overturn the Court of Appeals' October 21, 2014 Opinion. Petition at 18. But this Court has consistently ruled that exceptions to the law of the case doctrine are narrow and that "an appellate court may reconsider only those decisions that were clearly erroneous and that would work a manifest injustice to one party if the clearly erroneous decision were not set aside." *State v. Worl*, 129 Wn.2d 416, 425, 918 P.2d 905 (1996) (holding that the law of the case doctrine barred the Court of Appeals from reconsidering an earlier ruling); *see also Folsom v. City of Spokane*, 111 Wn.2d 256, 265, 759 P.2d 1196 (1988) (appellate court can only reconsider its prior ruling if the prior ruling is clearly erroneous); *Adamson v. Traylor*, 66 Wn.2d 338, 339, 402 P.2d 499 (1965) (holding that "questions determined on appeal, or which might have been determined had they been presented, will not again be considered on a subsequent appeal if there is no substantial change in the evidence at a

second determination of the cause" and that "the supreme court is bound by its decision on the first appeal until such time as it might be authoritatively overruled.")

The Court of Appeals' exercise of its discretion to refuse to review an earlier decision presents no issue for review under RAP 13.4(b). *See State v. Schwab,* 163 Wn.2d 664, 674, 185 P.3d 1151 (2008) ("Application of RAP 2.5(c)(2) is ultimately discretionary.") There has been no intervening change in the law or substantial change in the evidence since the Court of Appeals held in 2014 that the trial court properly exercised its discretion in denying BSofA's "misnomer" motions. Nor can BSofA point to a manifest injustice that would result from adhering to that 2014 decision.

The trial court similarly did not err in refusing to exceed the scope of the 2014 mandate from the Court of Appeals. In its 2014 Opinion, the Court of Appeals gave the trial court a very narrow mandate on remand: to determine whether BSofA had independent legal existence sufficient to continue its appeal. October 21, 2014 Opinion at 11. Ignoring the limited scope of that mandate, BSofA continued to assert its "misnomer" argument. (CP 725, 732). The trial court properly held that renewed consideration of BSofA's "misnomer" argument -- this time re-packaged under CR 15 and 25 -- was outside the scope of the trial court's mandate.

February 19, 2015 Transcript of Proceedings at p. 15:13-17 (Judge Gregerson: "[T]he Court of Appeals' mandate specifically wants this Court to address what, if any, is the status of the named plaintiff in this proceeding and that will be the limited inquiry of the Court [at the show-cause hearing]."

BSofA acknowledges that the scope of the remand was to "determine BSofA's legal status and BSofA's ability to pursue its appeal against WaferTech." Petition at 15. *Id*. But then BSofA goes on to argue that "BSofA's legal status was that it never existed; it was a misnomer for BSAII, the assignee, which the CR 15 and CR 25 motions addressed." *Id.* But the Court of Appeals had already decided that BSofA was *not* a "misnomer" for BSAII, and that BSAII was *not* the assignee of Natkin/Scott's claim against WaferTech. October 21, 2014 Opinion at 8-9.

The trial court was correct. The Court of Appeals in 2014 had already decided that BSofA was not a "misnomer." BSofA did not ask this Court to review that decision. RAP 12.2 authorizes trial courts to "hear and decide post judgment motions" only "so long as those motions do not challenge issues already decided by the appellate court." RAP 12.2. *See Schwab,* 163 Wn. 2d at 676 ("only an *appellate* court can revisit an earlier appellate decision") (emphasis in original).

In 2015, the trial court correctly determined that reconsideration of the "misnomer" issue was outside the scope of its mandate. In 2016, the Court of Appeals properly declined to revisit the "misnomer" issue because that issue was outside the scope of its 2014 mandate. October 18, 2016 Op. at 4, n.8. This Court should likewise decline BSofA's invitation to review the Court of Appeals' 2014 affirmance of the trial court's determination that BSofA is *not* a "misnomer" or typographical error for BSAII.

C. The Court of Appeals' October 2016 Opinion Does Not Involve a Significant Question of Law But is the Straightforward Result of BSofA's Concession that BSofA Lacks Legal Existence

The only issue presented by the Court of Appeals' decision is whether that court properly reviewed the trial court's findings regarding BSofA's lack of capacity for substantial evidence. That decision presents no ground for review. The Court of Appeals properly reviewed the trial court's findings for substantial evidence in light of the mandate and in the context of the substantial litigation history between these parties.

At the trial court's February 2015 show-cause hearing, BSofA's counsel conceded, "I don't have any evidence that [BSofA] exists." February 20, 2015 Transcript of Proceedings at p. 6:8-10. At the conclusion of the show-cause hearing, the trial court fulfilled its mandate

from the Court of Appeals by entering findings of fact and conclusions of law establishing that BSofA had no legal existence and lacked the capacity to sue or be sued. (CP 766, 770).

The Court of Appeals properly affirmed those findings based on the well-established substantial evidence standard. October 18, 2016 Opinion at 4-5, citing *Scott's Excavating Vancouver*, *LLC v. Winlock Properties LLC,* 176 Wn.App. 335, 341, 308 P.3d 791 (2013) (substantial evidence is a "quantum of evidence sufficient to persuade a rational[,] fair-minded person the premise is true.") As the Court of Appeals noted, BSofA "conceded that it cannot demonstrate that BSofA was a legal entity" and that BSofA did not present any evidence it was a valid corporation or entity in any jurisdiction. October 18, 2016 Opinion at 5. The Court of Appeals' holding that there is substantial evidence that BSofA does not legally exist and does not have the capacity to sue or be sued conflicts with no established precedent and presents no issue of substantial public concern. RAP 13.4(b).

D. WaferTech did not "Waive" its Objection to BSofA's Capacity, Which is Not a "Technical Nicety," But an Irreparable Defect Of Standing That May Not Be Remedied By an Untimely and Futile "Amendment."

In asking this Court to hold that WaferTech somehow "waived" its objection to BSofA's lack of existence (Petition at 10-12), BSofA ignores

that it first raised this argument in its 2016 appellate motion for reconsideration. The Court of Appeals followed settled law in refusing to address it. *Cowiche Canyon Conservancy v. Bosley,* 118 Wn.2d 801, 809, 828 P.2d 549 (1992) ("An issue raised and argued for the first time in a reply brief is too late to warrant consideration"). Because the Court of Appeals' 2016 Opinion did not consider BSofA's belatedly-raised argument that WaferTech waived its objections to capacity, there is nothing for this Court to review under RAP 13.4(b).

In any event, BSofA's waiver argument is not supported by the record or by any of the cases it cites. In *Foothills Dev't Co. v. Clark Board of Co. Comm'rs*, 46 Wn.App. 369, 377, 730 P.2d. 1369 (Div. 2, 1986) (Pet. at 11) the Court of Appeals affirmed the trial court's dismissal of defendant Clark Board of County Commissioners because the defendant was not a legal entity with capacity to sue or be sued, holding that the trial court properly rejected the plaintiff's argument that the defendant waived its lack of capacity objection by failing to raise the issue in its responsive pleading.

In *Dearborn Lumber Co. v. Upton Enterprises, Inc*., 34 Wn.App. 490, 493-4, 662 P.2d. 76 (1983) (Pet. at 10), Division One held that the defendants should have raised the plaintiff's non-compliance with

Washington's assumed-name statute (RCW 19.80.010) prior to trial.[1] But BSofA has no legal existence whatsoever, a fact that was not known to WaferTech until *after* WaferTech won summary judgment against BSofA's remaining claim and BSofA refused to pay WaferTech's judgment or to post an appellate bond. *See* October 21, 2014 Opinion at 13 ("to the extent WaferTech took a position [concerning BSofA's legal status], WaferTech's position *derived from its reliance on BSofA's own identification of itself*.") (emphasis added).

Here, WaferTech did not learn that BSofA lacked legal existence until December 2013, when BSofA refused to post a second appellate bond or to pay WaferTech's $430,110 judgment. WaferTech promptly brought the matter to the appellate court's attention, filing a RAP 3.1 motion to dismiss BSofA's appeal because BSofA was not an aggrieved party. *See Reese Sales Co., Inc., v. Grier*, 16 Wn.App. 664, 666-67, 557 P.2d 1326 (1977), where the Court of Appeals reversed the trial court's denial of defendant's motion to dismiss, holding that the plaintiff was a non-existent corporation and that the defendant did not waive its capacity objection.

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[1] *See also Trust Fund Services v. Glasscar, Inc.*, 19 Wn.App. 736, 745, 577 P.2d 980 (1978) (the trial court did not err in denying the defendant's oral motion to amend to allege lack of capacity presented after losing motion for summary judgment and reconsideration) (Pet. at 3, 10, 11)

Even were this Court to consider BSofA's untimely motion to amend in the first instance, BSofA cannot now correct its inability to sue or be sued. Pet. at 12-13. Although the trial court properly rejected BSofA's CR 15 motion to amend its Third Amended Complaint by substituting the void entity BSAII as Plaintiff as outside the scope of its mandate, any such amendment would have been futile. *See Doyle v. Planned Parenthood of Seattle–King Cy., Inc.,* 31 Wash. App. 126, 132, 639 P.2d 240 (1982).

BSofA cites *Lewis v. Root*, 53 Wn.2d 781, 786, 337 P.2d 52 (1959), where this Court held that it was not error for the trial court to permit the plaintiff to amend its complaint to allege that the plaintiff had filed its certificate of assumed business name, as required by RCW 19.80.040. *Id*. Here, by contrast, BSofA has never had *any* legal existence and does not have any now, in any jurisdiction. Moreover, the entity BSofA proposes to substitute—BSAII—is not the assignee of Natkin/Scott's claim against WaferTech. And even if BSAII were the assignee, it is a long defunct Delaware corporation that lacks the capacity to substitute under controlling Delaware law. *Transpolymer Indus., Inc. v. Chapel Main Corp.*, 582 A.2d 936 (Del. 1990) (void Delaware corporation lacks capacity to sue or be sued).

Furthermore, BSofA waited far too long to bring a motion to substitute parties. When a party moves to amend its complaint "after the adverse granting of summary judgment, the normal course of proceedings is disrupted and the trial court should consider whether the motion could have been timely made earlier in the litigation." *Doyle at* 130-131, 639 P.2d 240 (1982) (holding that trial court did not err in denying post-summary judgment motion to amend complaint.)

WaferTech's discovery of BSofA's disingenuous prosecution of this litigation by a non-existent entity is not a "technical nicety" unrelated to the "merits." Petition at 18. BSofA's lack of existence fundamentally affects WaferTech's substantive rights, as evidenced by the fact that WaferTech is unable to enforce its existing judgment against a non-existent entity. Indeed, the Court of Appeals declined to award additional fees to WaferTech as a prevailing party in this appeal because "BSofA has no cognizable existence or capacity to sue or be sued, and thus, an award of attorney fees and costs is not appropriate." October 18, 2016 Opinion at 7. Continued litigation against a non-existent plaintiff would further prejudice WaferTech by forcing WaferTech to further incur attorney fees in litigation (under a fee-shifting statute) with an opponent against whom it can have no remedy.

Finally, it would be fundamentally unfair to allow a party to seek recovery from a solvent opponent while immunizing itself from any prevailing-party fee award by hiding behind a fictitious corporate shell. Because BSofA is a nullity that lacks capacity to sue or be sued, BSofA cannot have any financial, pecuniary, or personal interest in the outcome of the litigation and is not an aggrieved party within the meaning of RAP 3.1. *See Cooper v. City of Tacoma*, 47 Wn.App. 315, 316, 734 P.2d 541 (1987) (dismissing defendant city's appeal because city did not have a monetary or personal interest in outcome of the appeal). Thus, BSofA's resort to principles of fairness and "substantial justice" is meritless.

VI. CONCLUSION

This Court should deny BSofA's petition for review. The Court of Appeals' October 18, 2016 Opinion does not conflict with precedent. The Court of Appeals' October 18, 2016 Opinion presents an issue that is of importance only to the parties—it is not an issue of "substantial public interest."

DATED this 27th day of February, 2017.

Respectfully submitted,

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COURT OF APPEALS
DIVISION II

2014 OCT 21 AM 9:16

STATE OF WASHINGTON
BY DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

BUSINESS SERVICES OF AMERICA II, INC., Appellant, v. WAFERTECH LLC, Respondent.	Consolidated Nos. 45325-8-II 46138-2-II UNPUBLISHED OPINION

MAXA, J. — Business Services of America II, Inc. (BSofA) appeals the trial court's (1) grant of summary judgment to WaferTech LLC in BSofA's lien foreclosure action as assignee of a subcontractor wrongfully terminated on WaferTech's construction project, and (2) denial of BSofA's motion under CR 60(a) to correct an alleged error in its corporate name. In response, WaferTech argues that BSofA's appeal must be dismissed because a corporation called Business Services of America II, Inc. has never existed, and therefore BSofA cannot be an aggrieved party entitled to seek review under RAP 3.1.

We hold that the trial court did not abuse its discretion in denying BSofA's CR 60(a) motion, and therefore affirm that denial. However, the record does not allow us to determine whether BSofA has any legal existence sufficient to allow BSofA to pursue its appeal of the trial court's summary judgment order. Therefore we must remand for the trial court to determine BSofA's legal status and BSofA's ability to pursue its appeal

against WaferTech. Because of this disposition, we do not reach the merits of the summary judgment order.

FACTS

Lawsuit and Settlement

In early 1997, WaferTech hired Meissner + Wurst (M+W) as one of the prime contractors involved in constructing WaferTech's silicon wafer manufacturing plant. M+W subcontracted with Natkin/Scott to construct the facility's "clean room." Natkin/Scott performed some work under the subcontract, but it was terminated by M+W in April 1998 for failing to follow safety procedures. Natkin/Scott subsequently filed a mechanic's lien against WaferTech's property in the amount of $7,654,454.

In May 1998 Natkin/Scott sued both M+W and WaferTech, alleging breach of contract, wrongful termination, and quantum meruit against M+W and foreclosure of its construction lien against WaferTech. M+W later asserted a cross-claim against WaferTech, alleging that if Natkin/Scott obtained a judgment against M+W, WaferTech would be obligated to indemnify M+W for that judgment.

In March 2001 Natkin/Scott agreed to resolve its claims against M+W. Under the agreement, M+W paid Natkin/Scott $2.4 million to settle the claims against it. In addition, M+W assigned its "pass-through" rights against WaferTech to Natkin/Scott, allowing Natkin/Scott to directly assert M+W's claims against WaferTech. Subsequently, M+W was dismissed with prejudice from the lawsuit.

In May 2001, BSofA, as "the assignee of claims by Natkin/Scott," substituted as plaintiff in the action and filed a second amended complaint against WaferTech. Clerk's Papers (CP) at

232. As an assignee, BSofA asserted M+W's pass-through claims as well as Natkin/Scott's original lien foreclosure claim. The second amended complaint alleged that on July 23, 1999 Natkin/Scott and BSofA had entered into a sale and servicing agreement in which Natkin/Scott assigned its claims against WaferTech to BSofA.

Trial and Two Appeals

At trial in May 2002, the trial court dismissed all of BSofA's claims based on a finding that its assignor Natkin/Scott was not a registered contractor when it contracted with M+W. The trial court also awarded WaferTech over $850,000 in attorney fees and costs in two separate judgments.

On appeal, we held that Natkin/Scott had substantially complied with the contractor registration statute, and therefore we reversed the trial court's dismissal of BSofA's lien foreclosure claim. *See Bus. Servs. of Am. II, Inc. v. WaferTech, LLC*, noted at 120 Wn. App. 1042, 2004 WL 444724, at *4-5. However, we affirmed the trial court's dismissal of the pass-through claims and the award of attorney fees to WaferTech. *Bus. Servs. of Am. II, Inc.*, 2004 WL 444724, at *8. In April 2005 WaferTech filed a satisfaction of judgment with respect to the attorney fee judgments, which stated that the surety of a supersedeas bond BSofA posted had paid the judgments.

After remand, very little appears to have happened in the case for four years. In September 2009, the trial court granted WaferTech's motion to dismiss the case because of BSofA's failure to timely prosecute. BSofA appealed, and we reversed. *Bus. Servs. of Am. II, Inc. v. WaferTech LLC*, 159 Wn. App. 591, 245 P.3d 257 (2011). Our Supreme Court affirmed

our decision, *Business Services of America II, Inc. v. WaferTech LLC*, 174 Wn.2d 304, 274 P.3d 1025 (2012), and the case was mandated back to the trial court.

Dismissal Based on Settlement Offset

Following remand, BSofA filed a third amended complaint asserting its only remaining claim, Natkin/Scott's lien foreclosure claim. WaferTech moved for summary judgment, arguing that M+W's $2.4 million settlement payment to Natkin/Scott in March 2001 was a complete offset against Natkin/Scott's $1.5 million lien claim.[1] BSofA opposed the motion and filed a cross-motion for summary judgment. In August 2013, the court granted WaferTech's motion and dismissed BSofA's third amended complaint. The trial court subsequently awarded attorney fees and costs to WaferTech in the amount of $430,000. BSofA appealed.

BSofA's Incorrect Corporate Name

On January 2, 2014, WaferTech filed a motion in this court to dismiss BSofA's appeal under RAP 3.1 because there was no record that a Delaware corporation called Business Services of America II, Inc. had ever existed. WaferTech stated it discovered this fact during attempts to enforce the trial court's judgment for attorney fees. A commissioner denied WaferTech's motion without prejudice to its right to raise the issue in its brief.

BSofA subsequently filed a motion with the trial court to correct an error in the final judgment under CR 60(a). BSofA acknowledged that there is no registered corporation called Business Services of America II, Inc. According to BSofA, the correct name of the corporation is Business *Service* America II, Inc. (BSA II). BSofA explained that BSA II incorporated under

[1] The trial court previously had reduced the lien to $1.5 million.

the laws of Delaware in July 1999, and the plaintiff was mistakenly stated as Business Service<u>s</u> <u>of</u> America II, Inc. when the second amended complaint was filed.

BSofA had no explanation for how the mistake was made. Counsel for BSofA stated in a declaration that he drafted the second amended complaint, but he did not recall how he came to identify the plaintiff as Business Services of America II Inc.

BSofA argued the name of the plaintiff/judgment debtor was erroneous and moved the trial court to correct this mistake in the judgment. WaferTech objected to the motion to the correct the judgment, arguing that (1) BSofA failed to show the modification of the judgment debtor's name was a clerical error, and (2) even if it was an amendable clerical error, BSA II could not be substituted as a judgment debtor because BSA II was a void corporation that lacked power to act under Delaware law.

The trial court denied the CR 60(a) motion without prejudice. BSofA moved for reconsideration, submitting more extensive briefing on whether the court could correct the name of the judgment debtor. BSofA argued that (1) the error in the judgment debtor's name was a misnomer correctable under CR 60(a), and (2) WaferTech would not be prejudiced by allowing the alteration. The trial court again denied the motion. BSofA appealed this ruling.

ANALYSIS

A. CR 60(A) MOTION TO CORRECT PLAINTIFF'S CORPORATE NAME

BSofA argues that stating the wrong corporate name in its pleadings was an error caused by oversight or omission, and that an error in a party's name can be corrected under CR 60(a). As a result, BSofA argues that the trial court erred in refusing to correct this error. We disagree because there was conflicting evidence in the record as to whether BSofA or BSA II was the

actual assignee of Natkin/Scott's claims, and therefore the record was not clear on what entity was the correct plaintiff. Therefore, we hold that the trial court acted within its discretion in refusing to change the plaintiff's name to BSA II.

1. Legal Principles

We review a trial court's decision to grant or deny a CR 60(a) motion for an abuse of discretion. *Shaw v. City of Des Moines*, 109 Wn. App. 896, 900, 37 P.3d 1255 (2002); *see also Presidential Estates Apt. Assoc. v. Barrett*, 129 Wn.2d 320, 325-26, 917 P.2d 100 (1996) (applying an abuse of discretion standard of review). "The decision will not be overturned on appeal unless it plainly appears that the trial court exercised its discretion on untenable grounds or for untenable reasons." *Shaw*, 109 Wn. App. at 901.

BSofA relies solely on CR 60(a) in arguing that the trial court should have corrected its name.[2] CR 60(a) provides:

> Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. Such mistakes may be so corrected before review is accepted by an appellate court, and thereafter may be corrected pursuant to RAP 7.2(e).[3]

This rule allows a trial court to correct an error that renders a judgment inconsistent with the trial court's intention, as expressed in the trial court record. *Presidential Estates*, 129 Wn.2d at 326. The trial court under CR 60(a) can "correct[] language that did not correctly convey the intention of the court, or suppl[y] language that was inadvertently omitted from the original judgment."

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[2] BSofA asserts that it is not requesting a substitution of parties under CR 17.

[3] RAP 7.2(e) provides that the trial court has authority to decide certain matters despite a pending appeal.

Presidential Estates, 129 Wn.2d at 326. A trial court also can use CR 60(a) to clarify an ambiguity in a judgment. *Presidential Estates*, 129 Wn.2d at 328-29.

But CR 60(a) does not allow correction of a "judicial" error. *Presidential Estates*, 129 Wn.2d at 326. A judicial error is one that would require the trial court to amend the judgment to reflect an intention that the trial court record does not support. *Presidential Estates*, 129 Wn.2d at 326. In other words, CR 60(a) does not allow a trial court to "go back [and] rethink the case." *Presidential Estates*, 129 Wn.2d at 326. In addition, CR 60(a) does not allow for the correction of a trial court's intentional act, even if erroneous. *Krueger Eng'g, Inc. v. Sessums*, 26 Wn. App. 721, 723, 615 P.2d 502 (1980).

Under certain circumstances, it is an abuse of discretion for the trial court to refuse to grant a CR 60(a) motion to correct an error in a party's name. In *Entranco Engineers v. Envirodyne, Inc.*, the plaintiff's complaint named Envirodyne Industries Inc. as the defendant, but the plaintiff served Envirodyne Engineers Inc. – the plaintiff's intended defendant. 34 Wn. App 503, 504, 662 P.2d 73 (1983). In addition, "the complaint described only the activities of [Envirodyne] Engineers, the party served." *Entranco*, 34 Wn. App at 506. Following the entry of a default judgment against Envirodyne Industries Inc., the plaintiff filed a CR 60(a) motion to amend the default judgment to substitute in Envirodyne Engineers Inc. as the judgment debtor. *Entranco*, 34 Wn. App at 505. The trial court denied the motion. *Entranco*, 34 Wn. App at 505.

On appeal, Division One of this court held the trial court abused its discretion in not granting the plaintiff's CR 60(a) motion. *Entranco*, 34 Wn. App at 506. The court stated that naming the wrong party as the judgment debtor was not a judicial error because "the commissioner intended to enter a default judgment against the party whose activities were

described in the complaint." *Entranco*, 34 Wn. App at 507. The court concluded that the misnomer of the party defendant in the judgment was an error arising from oversight or omission that the trial court possessed authority to correct under CR 60(a). *Entranco*, 34 Wn. App at 507.

2. Existence of Error

BSofA argues that this case is similar to *Entranco* because here the trial court intended to enter the judgment against the assignee of Natkin/Scott's claims, regardless of the name of that assignee. Therefore, BSofA argues that entering the judgment against the wrong entity was a clerical error and not a judicial error. But the question here is not whether entering judgment against BSofA rather than BSA II was or was not a judicial error, but whether the trial court made an error at all. Because the record was not clear that there actually was an error in the judgment – that BSA II and not BSofA was the assignee of Natkin/Scott's claims – the trial court did not abuse its discretion in denying BSofA's CR 60(a) motion.

When considering the CR 60(a) motion, the trial court was faced with conflicting evidence as to whether BSofA or BSA II was the actual assignee and therefore which entity was the correct plaintiff. First, as noted above, the two amended complaints alleged that *BSofA* was the assignee. Nothing in the trial court record before BSofA's CR 60(a) motion suggested that these allegations were erroneous.[4] Specifically, the document in which Natkin/Scott assigned its claim never was placed in the trial court record, either before or after the court entered final judgment.

[4] The only document where the name Business Service America II, Inc. appears is the settlement agreement between Natkin/Scott and M+W. But that agreement was executed before the second amended complaint added BSofA as the plaintiff. The trial court could assume that the mistake was in the settlement agreement, to which BSofA was not a party, not in the complaint.

Second, *BSofA* was identified as the plaintiff in myriad pleadings, including in two appeals before this court, since first joining the litigation in 2001. The trial court could infer that if BSA II had been the actual assignee and therefore the correct plaintiff, BSofA would have sought to correct the name long before final judgment was entered.

Third, earlier judgments for over $800,000 in attorney fees against *BSofA* were paid. Further, the satisfaction of judgment stated that payment was made by the surety for a supersedeas bond posted by *BSofA*. The record does not indicate whether BSofA or BSA II reimbursed the surety for the payment, but the trial court could infer that the party against which the judgment was entered ultimately paid that judgment. And even assuming BSA II paid the judgment, the trial court could infer that if BSofA was not the correct party, BSA II would have discovered that fact when paying out over $850,000 on BSofA's behalf.

Fourth, and most significantly, in June 2001 Joseph Guglielmo – the person who in 2014 identified himself as BSA II's president – signed an acknowledgment that *BSofA* was the assignee of Natkin/Scott's claims. And he signed that document as president of *BSofA*, not as president of BSA II. Although the acknowledgement was not under oath, this document is compelling evidence that BSofA was in fact the assignee.

The above evidence and inferences created a factual issue as to whether there actually was an error in the judgment. If BSofA was the actual assignee, there was no error and CR 60(a) by its terms would be inapplicable. In other words, BSofA's CR 60(a) motion did not present a simple correction of an obvious error in the plaintiff's name. The trial court had to weigh the evidence showing that BSofA was the assignee of Natkin/Scott's claims against Guglielmo's new contention, contradicting his assertion in 2001, that BSA II was the actual assignee. And

the trial court had to make this factual determination without a copy of the document assigning Natkin/Scott's claims, which could have clarified the issue.

Because of the factual uncertainty as to whether there was an error in the judgment, the trial court did not abuse its discretion in refusing to change the plaintiff's name. Accordingly, we hold that the trial court did not err in denying BSofA's CR 60(a) motion.[5]

B. ABILITY OF AN UNREGISTERED CORPORATION TO PURSUE APPEAL

Under the trial court's CR 60(a) ruling and our affirmance of that ruling, BSofA remains the appellant in this appeal. WaferTech argues that BSofA's appeal must be dismissed because it is a nonexistent entity. In response, BSofA argues that WaferTech is estopped from raising this issue because it accepted the benefits of its 2002 judgment against BSofA. We must remand because we cannot determine from the appellate record whether BSofA can pursue this appeal. We also reject BSofA's estoppel argument.

1. Applicability of RAP 3.1

WaferTech argues that BSofA cannot pursue this appeal because it has no legal existence and does not have the capacity to sue (or be sued). Therefore, WaferTech argues that BSofA cannot be an aggrieved party under RAP 3.1. However, the appellate record does not allow us to determine BSofA's legal status. As a result, we must remand to the trial court to make this determination.

[5] WaferTech argues that even if the judgment is corrected to name BSA II as the judgment debtor, BSA II could not pursue this appeal under Delaware law because BSA II is a void corporation. We need not address this issue because we affirm the trial court's refusal to correct the judgment by naming BSA II as the judgment debtor.

As a general proposition, WaferTech may be correct that an entity with no legal existence cannot sue or be sued. *See Roth v. Drainage Improvement Dist. No. 5 of Clark County*, 64 Wn.2d 586, 590, 392 P.2d 1012 (1964) (drainage district that was overseen by the local county could not be sued in its individual capacity because the drainage district had no separate existence outside of the local county). But the record does not support WaferTech's contention that BSofA has no legal existence. WaferTech presented evidence that a corporation called Business Services of America II, Inc. has never been registered with the Delaware Division of Corporations. The fact that an entity has never been registered as a corporation in Delaware does not necessarily mean that it has no legal existence. BSofA could be a corporation registered in another state. In addition, even if BSofA is not a valid corporation it may have some other legal status – as a partnership, sole proprietorship, or some other entity – by operation of law. On the other hand, WaferTech may be correct and BSofA may have no legal existence.

Based on the appellate record, we cannot determine BSofA's legal status. The record does not establish whether BSofA does or does not have any legal existence sufficient to allow BSofA to pursue its appeal of the trial court's summary judgment order. Accordingly, we remand this case for the trial court to determine BSofA's legal status and BSofA's ability to pursue its appeal against WaferTech.[6]

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[6] If BSofA has no legal existence, WaferTech's judgment for attorney fees against BSofA may be meaningless. However, we do not address this issue.

2. Estoppel to Object to BSofA's Legal Status

BSofA contends WaferTech is precluded under judicial estoppel from arguing that BSofA is a non-existent legal entity because WaferTech accepted the benefits of a previous judgment entered against BSofA.[7] We disagree.

"Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position." *Bartley–Williams v. Kendall,* 134 Wn. App. 95, 98, 138 P.3d 1103 (2006). We examine whether the first position was accepted by the court, and "whether assertion of the inconsistent positions results in an unfair advantage or detriment to the opposing party." *First Citizens Bank & Trust Co. v. Harrison*, 181 Wn. App. 595, 600, 326 P.3d 808 (2014). A court's application of judicial estoppel may be inappropriate " 'when a party's prior position was based on inadvertence or mistake.' " *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 539, 160 P.3d 13 (2007) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 750-51, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001)).

BSofA argues that judicial estoppel applies because WaferTech benefitted from its failure to object to BSofA's corporate status earlier in the litigation when it obtained a judgment against BSofA for attorney fees and collected on that judgment. We reject BSofA's argument for two reasons. First, WaferTech never took a "position" that BSofA was a legal entity. The issue never arose. In fact, WaferTech specifically denied BSofA's allegations in its second and third

[7] BSofA also argues in a footnote that equitable estoppel applies. However, we generally refuse to address arguments raised only in a footnote. *See Norcon Builders, LLC v. GMP Homes VG, LLC*, 161 Wn. App. 474, 497, 254 P.3d 835 (2011); *State v. Johnson*, 69 Wn. App. 189, 194 n.4, 847 P.2d 960 (1993)). Accordingly, we decline to address this issue.

amended complaints that it was a Delaware corporation. To the extent WaferTech took a position, WaferTech's position derived from its reliance on BSofA's own identification of itself. Relying on BSofA's own allegations is not a sufficient "position" to warrant the application of the judicial estoppel doctrine.

Second, BSofA cites no authority for the proposition that once a party collects on a judgment against an entity that is not a registered corporation, it is precluded from later arguing based on newly discovered information that the entity has no legal existence and cannot pursue litigation. In the absence of any authority, we decline to apply judicial estoppel in this situation.

BSofA cannot establish the elements of judicial estoppel. Accordingly, we hold that judicial estoppel does not preclude WaferTech from challenging BSofA's ability to pursue this appeal.

C. EQUITABLE SETOFF AND ATTORNEY FEES

BSofA argues that the trial court erred in offsetting the $2.4 million M+W settlement against its $1.5 million lien claim, which resulted in summary judgment in favor of WaferTech. BSofA also challenges the trial court's award of $430,000 in attorney fees to WaferTech under RCW 60.04.181(3) as the prevailing party in a lien foreclosure action. Because we remand for the trial court to determine whether BSofA can pursue this appeal, we do not address these issues.

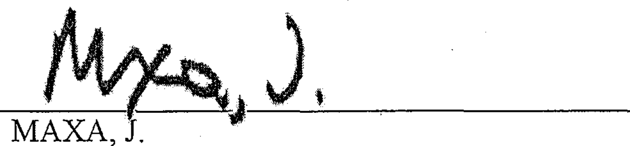
D. ATTORNEY FEES ON APPEAL

Both BSofA and WaferTech request reasonable attorney fees on appeal based on RCW 60.04.181(3), which allows the prevailing party in a lien foreclosure action to recover attorney fees. WaferTech is the prevailing party on the CR 60(a) appeal, and

BSofA is not the prevailing party on this issue. But because we do not address the merits of the trial court's dismissal of the lien foreclosure action, we cannot yet determine which party is the prevailing party of the entire action. Accordingly, we do not award attorney fees to either party.

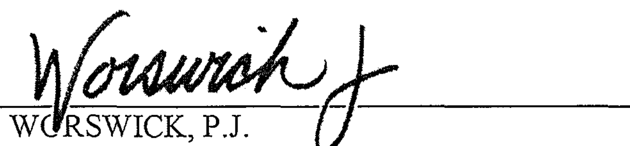
We affirm the trial court's denial of BSofA's CR 60(a) motion, but we remand for the trial court to determine BSofA's legal status and BSofA's ability to pursue its appeal against WaferTech.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

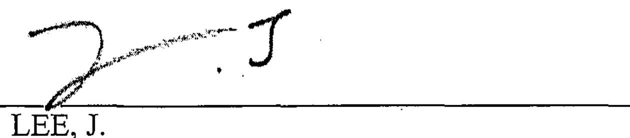


MAXA, J.

We concur:



WORSWICK, P.J.



LEE, J.

Filed
Washington State
Court of Appeals
Division Two

October 18, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

BUSINESS SERVICES OF AMERICA, II., INC. Appellant, v. WAFERTECH, LLC, Respondent.	No. 47316-0-II UNPUBLISHED OPINION

SUTTON, J. — Business Services of America, II., Inc. (BSofA) appeals the trial court's order on remand[1] and the order awarding sanctions.[2] This appeal arises after this court remanded the matter to the trial court "to determine BSofA's legal status and BSofA's ability to pursue its appeal against WaferTech." *Bus. Servs. of Am. II, Inc. v. WaferTech, LLC*, noted at 184 Wn. App. 1013, slip op. at *7 (2014). On remand, the trial court entered findings of fact and conclusions of law that BSofA "is a non-existent entity with no cognizable legal existence" and "does not have the capacity to sue or be sued." Clerk's Papers (CP) at 767. The trial court also ordered BSofA to pay $300 in sanctions to WaferTech because BSofA had served an incorrect motion. Both BSofA and WaferTech request reasonable attorney fees and costs on appeal.

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[1] Findings of Fact, Conclusions of Law, and Order of Dismissal with Prejudice, filed February 20, 2015.

[2] Order Granting Plaintiff's Motion to Admit Exhibits, filed July 24, 2015.

We hold that the trial court's findings of fact support the conclusions of law that BSofA is a non-existent entity with no cognizable legal existence and that it does not have the capacity to sue or be sued. We affirm the trial court's order on remand and affirm the trial court's order awarding $300 in sanctions to WaferTech. We decline to award either party its reasonable attorney fees and costs on appeal.

FACTS

BSofA, as the assignee of a subcontractor, sued WaferTech in a lien foreclosure action because WaferTech wrongfully terminated the subcontractor.[3] In August 2013, the trial court granted summary judgment to WaferTech in BSofA's lien foreclosure action. The trial court also denied BSofA's CR 60(a) motion to correct an alleged error in its corporate name.[4] BSofA appealed. *Bus. Servs. of Am.*, 184 Wn. App. 1013. This court affirmed the trial court's denial of BSofA's CR 60(a) motion, but held that the record before it did not provide the information needed to determine whether BSofA had any legal existence sufficient to allow it to pursue its appeal of the trial court's summary judgment order. "[W]e must remand for the trial court to determine BSofA's legal status and BSofA's ability to pursue its appeal against WaferTech." *Bus. Servs. of Am.*, slip op. at *7.

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[3] The parties have been involved in protracted litigation in a number of other proceedings that are not relevant to the issues on appeal here.

[4] BSofA alleged that the corporate name on court documents was incorrect and moved to change it from "Business Services *of* America II, Inc." to "Business Services America II, Inc." CP at 669 (emphasis added). To avoid confusion, we refer to "Business Services America II, Inc." as BSA II.

On remand, BSofA filed a motion to show cause as to why the trial court should not enter findings that "WaferTech has known since 2001 that the plaintiff in the action is BSA II and that [BSofA] is a misnomer for BSA II." CP at 725. The trial court clarified the scope of the show cause hearing and stated that "the Court of Appeals' mandate specifically wants this Court to address what, if any, is the status of the named plaintiff in this proceeding and that will be the limited inquiry of the Court [at the show cause hearing]."[5] Verbatim Report of Proceedings (VRP) (Feb 19, 2015) at 15. The trial court ordered BSofA to appear and present evidence as to BSofA's legal existence. At the hearing, BSofA's counsel stated that "[he did not] have any evidence that [BSofA] exist[ed]." VRP (February 20, 215) at 6.

At the conclusion of the hearing, the trial court entered findings of fact that BSofA had never been registered as a corporation, partnership, sole proprietorship, or limited liability company, and does not have any other legal status whether by operation of law or otherwise in any state or territory of the United States of America, including the District of Columbia, or in any foreign jurisdiction. Based on its findings of fact, the trial court concluded that "as a matter of law, [BSofA] is a non-existent entity with no cognizable legal existence," and that "[b]ecause it lacks legal existence, [BSofA], does not have the capacity to sue or be sued." CP at 767. BSofA appealed.

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[5] This court's mandate is binding on the lower court and must be strictly followed. *Bank of Am., N.A. v. Owens*, 177 Wn. App. 181, 189, 311 P.3d 594 (2013).

On appeal, BSofA filed a motion under RAP 7.3,[6] to correct the misnomer of "Business Services of America II, Inc." to "Business Services America II, Inc." in the caption.[7] A commissioner of this court denied the motion, ruling, "Appellant's motion to correct misnomer is denied. The identity of the appellant is the legal issue in dispute, not simply a misnomer." Ruling by Commissioner dated June 18, 2015. When BSofA moved below to supplement the record, it served an incorrect motion on WaferTech. The trial court ordered BSofA to pay WaferTech $300 in sanctions because of BSofA's incorrectly served motion. BSofA also appeals the sanction award.

ANALYSIS

I. BSofA's Legal Status

BSofA assigns[8] error to the trial court's findings of fact and conclusions of law regarding its status as a legal entity. We hold that substantial evidence supports the trial court's findings and the trial court's findings support the conclusions.

We review a trial court's findings of fact to determine if substantial evidence supports the findings and whether the findings support the conclusions of law. *Scott's Excavating Vancouver,*

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[6] RAP 7.3 provides that "[t]he appellate court has the authority . . . to perform all acts necessary or appropriate to secure the fair and orderly review of a case."

[7] Appellant's Motion Under RAP 7.1 to Correction Misnomer, filed May 17, 2015

[8] BSofA argues many issues that are not before us on appeal, including arguments related to the August 15, 2013 orders granting summary judgment and an award of attorney fees to WaferTech. Those issues were the subject of BSofA's September 2013 appeal to this court. This court declined to reach those issues on the merits because this court remanded the case to the trial court to determine the legal existence status of BSofA and its ability to pursue an appeal. *Bus. Servs. of Am.*, slip op. at *1. Our review here is limited to the trial court's order on remand and order awarding sanctions.

LLC v. Winlock Properties, LLC, 176 Wn. App. 335, 341, 308 P.3d 791 (2013). Substantial evidence is "'a quantum of evidence sufficient to persuade a rational[,] fair-minded person the premise is true." *Winlock Properties*, 176 Wn. App. at 341-42 (internal quotations omitted, alteration in original) (quoting *Korst v. McMahon*, 136 Wn. App. 202, 206, 148 P.3d 1081 (2006)). We view reasonable inferences in the light most favorable to the prevailing party and defer to the trial court on issues of conflicting evidence, witness credibility, and persuasiveness of the evidence. *Winlock Properties*, 176 Wn. App. at 342. The party challenging a finding of fact bears the burden of showing that the record does not support it. *Winlock Properties*, 176 Wn. App. at 342. Unchallenged findings are verities on appeal. *Jensen v. Lake Jane Estates*, 165 Wn. App. 100, 105, 267 P.3d 435, (2011). We review a trial court's conclusions of law de novo. *Winlock Properties*, 176 Wn. App. at 342.

On remand, BSofA conceded that it cannot demonstrate that BSofA was a legal entity when it stated that "[BSofA does not] have any evidence regarding BSofA and [it] couldn't have any evidence." VRP (Feb. 20, 2015 at 5-6). Additionally, BSofA did not present any evidence that it was a valid corporation or entity in any jurisdiction. Therefore, substantial evidence supports the trial court's findings of fact. We hold that the trial court's findings of fact support the conclusions of law that "Business Services of America II, Inc. is a non-existent entity with no cognizable legal existence" and that it "does not have the capacity to sue or be sued." CP at 767. Accordingly, we affirm the trial court's findings of fact and conclusions of law.

II. Order Awarding Sanctions to WaferTech

BSofA argues that the trial court erred when it ordered BSofA to pay $300 in sanctions to WaferTech because BSofA had served an incorrect motion. BSofA makes the conclusory

statement that the trial court's award was "without any basis" but provides no citation to the record to support their argument.

We do not address issues that a party does not raise appropriately in their opening brief or that a party fails to discuss meaningfully with citations to authority. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); RAP 10.3(a)(6). BSofA elected not to provide a verbatim report of the hearing on the sanctions and, thus, the record of the trial court's decision is not before us. RAP 9.2(a).[9] Because BSofA fails to support its argument with citations to the record or authority, BSofA waives this argument under RAP 10.3(a)(6).[10] We affirm the trial court's order awarding $300 in sanctions to WaferTech.

ATTORNEY FEES

Both BSofA and WaferTech request reasonable attorney fees and costs on appeal under RAP 18.1(a)[11] and RCW 60.04.081(4). We decline to award either party its attorney fees and costs on appeal.

RCW 60.04.081 provides that a trial court may award reasonable attorney fees and costs to the lien claimant if "the court determines that the lien is not frivolous and was made with reasonable cause, and is not clearly excessive" or to the party challenging the lien if "the lien is

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[9] RAP 9.2(a) provides in relevant part, "If the party seeking review does not intend to provide a verbatim report of proceedings, a statement to that effect should be filed in lieu of a statement of arrangements within 30 days after the notice of appeal was filed or discretionary review was granted and served on all parties of record."

[10] We are not required to search the record to support a party's argument. *Bostwick v. Ballard Marine, Inc.*, 127 Wn. App. 762, 770, 112 P.3d 571 (2005).

[11] RAP 18.1(a) provides that we may award a party reasonable attorney fees and costs on appeal when applicable law grants to the party the right to recover them.

frivolous and made without reasonable cause, or clearly excessive." RCW 60.04.081(4). However, BSofA has no cognizable existence or capacity to sue or be sued, and thus, an award of attorney fees and costs is not appropriate. We exercise our discretion under RAP 18.1(a) and decline to award either party attorney fees and costs on appeal.

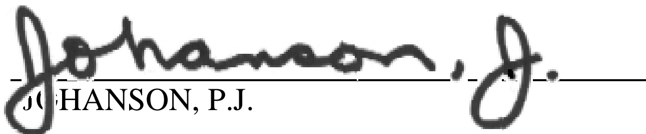
CONCLUSION

We hold that the trial court's findings of fact support the conclusions of law that BSofA is a non-existent entity with no cognizable legal existence and that it does not have the capacity to sue or be sued. We affirm the trial court's order on remand and affirm the trial court's order awarding $300 in sanctions to WaferTech. We decline to award either party attorney fees and costs on appeal.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

SUTTON, J.

We concur:



JOHANSON, P.J.

LEE, J.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document has been served by email, by agreement of counsel, on the 27th day of February, 2017, to:

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