

No. 45325-8-II

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

BUSINESS SERVICES OF AMERICA II, INC.,

Appellant,

v.

WAFERTECH LLC,

Respondent.

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

Since being wrongfully terminated in 1998, BSA¹ has been seeking to recover payment for work it performed as a subcontractor on a large construction project. BSA has a mechanic's lien claim under RCW 60.04.021 against WaferTech, the owner, for the contract price for a portion of its work. WaferTech obtained two prior dismissals in the trial court, both unanimously reversed by this Court.

WaferTech resorts to desperate measures to defend the trial court's erroneous summary judgment ruling that the \$2.4 million settlement BSA obtained from the prime contractor, Meissner+Wurst ("M+W"), also satisfied WaferTech's liability for BSA's lien claim. These include: (1) making numerous legal assertions without citation to any legal authority, (2) repeatedly asserting that two claims were the "same claim," despite legal and factual differences between them, and (3) misrepresenting the record below.

WaferTech's arguments are specious. In eighteen pages of briefing (pp. 13-30) regarding setoff, WaferTech cites just two cases in

¹ Natkin/Scott was the subcontractor that performed the work and was wrongfully terminated. Natkin/Scott assigned its claim to Business Service America II, Inc. ("BSA"). For simplicity, this brief will refer to BSA as the subcontractor, unless the context requires Natkin/Scott to be identified.

support of its assertions, discussing one.² The other cases cited by WaferTech were in BSA's Opening Brief, which WaferTech attempts to distinguish, but does not cite contrary authority. Basically, WaferTech crafts an argument consistent with its distorted interpretation of one setoff case, but inconsistent with (1) basic rules regarding allocation of payments, finality of settlements, *res judicata*, and equity, (2) other cases applying setoff, and (3) its own arguments and admissions.

WaferTech fails to dispute several facts and rules that combined show WaferTech was not entitled to an equitable setoff. WaferTech does not dispute that BSA was seeking to recover over \$9 million in damages from M+W for work during the entire project, of which at least \$3.5 million was for work prior to January 31, 1998. WaferTech does not dispute that equitable setoff does not apply until a plaintiff has been "made whole" by its recovery from other defendants. These admissions alone show WaferTech was not entitled to an equitable setoff for any of the \$2.4 million paid by M+W.

Even if WaferTech was entitled to a \$2.4 million setoff, final judgment could not properly be entered. There was evidence that BSA's lien claim exceeded \$3.2 million, and the summary proceeding under

² The cases are *Eagle Point Condo. Owners Ass'n v. Coy*, 102 Wn.App. 697, 9 P.3d 898 (2000), discussed extensively in BSA's Opening Brief, and *Pub. Employees Mut. Ins. Co. v. Kelly*, 60 Wn.App. 610, 805 P.2d 822 (1991), cited in *Eagle Point* for the undisputed proposition that there shall be no "double recovery."

RCW 60.04.081(4) to reduce the recorded lien to \$1.5 million was not a final adjudication on the merits of the amount BSA could ultimately recover under the lien claim.

Finally, WaferTech's brief contains a motion to dismiss BSA's appeal based on a minor error in naming the plaintiff. Such an error is a "misnomer" that can be corrected by a CR 60(a) motion in the trial court, which is pending. There will not be a substitution of a new party. Dismissal of the appeal is not warranted.

II. Reply to WaferTech's Counterstatement of Issues

WaferTech questions BSA's standing to appeal under RAP 3.1, even though BSA has been the plaintiff (despite the misnomer) since 2001 and the appellant in two prior successful appeals in which WaferTech did not raise the issue of whether BSA was an "aggrieved party."

WaferTech then raises the "one satisfaction" rule in two issues, seemingly unaware of what it is. The "one satisfaction" rule prevents a judgment creditor from collecting the same judgment twice. 47 Am.Jur.2d *Judgments* § 811 (2013). BSA is not attempting to collect a judgment.³

³ WaferTech does not appear to put much stock in the "one satisfaction" rule, as it appears nowhere in the rest of its brief, nor is it mentioned in any case cited by WaferTech.

III. Reply to WaferTech's Counterstatement of the Case

WaferTech does not dispute or contest any of the facts in BSA's Statement of the Case. Despite this, rather than merely add additional facts it deems necessary, WaferTech proceeds to supply a whole new statement.

A. The lien claim for work after January 31, 1998, has never been adjudicated.

WaferTech mentions that M+W terminated Natkin/Scott for safety violations, omitting that M+W "wrongfully terminated" Natkin/Scott, entitling Natkin/Scott to be paid all of its reasonable direct costs, plus overhead and profit on work performed, pursuant to ¶ 13.4 of the subcontract. CP 78.

WaferTech asserts that after the settlement of Natkin/Scott's contract claim against M+W, BSA (as assignee of Natkin/Scott's claims) asserted the same contract claim against WaferTech. That is incorrect. The claim against M+W was a contract claim based on the Natkin/Scott-M+W subcontract. BSA's claim against WaferTech was a "pass-through" claim, based on the M+W-WaferTech contract and M+W's assignment of rights to BSA.⁴

⁴ The legal differences between a contract claim against a defendant in contractual privity with the plaintiff, and a "pass-through" claim against a third-party, in which a party assigns its contractual privity rights against that third-party to the plaintiff, allowing the

The plaintiff was mistakenly named “Business Services of America II, Inc.” in the second amended complaint. CP 232.

WaferTech’s answer admitted that plaintiff was the assignee of Natkin/Scott, the original plaintiff. CP 240.

WaferTech misrepresents the record when describing the trial court’s ruling on May 22, 2002. WaferTech asserts that the trial court ruled that Natkin/Scott’s lien waivers “barred all claims of any nature against any defendant” for work after January 31, 1998, citing to CP 267. Opposition Brief, p. 4. That is false. A review of the motion papers and order shows the trial court was only ruling on BSA’s “pass-through” claims against WaferTech, not on any claims against M+W.

WaferTech’s motion, dated July 20, 2001, asked the trial court to limit BSA’s pass-through claims against WaferTech, with no mention of M+W. The motion states that the lien waivers release “**WaferTech** from all present or future claims for work performed on the WaferTech project before February 1, 1998.” Supp. CP __ (Sub. No. 514). WaferTech argued that because BSA “had already released **WaferTech** from all present and future claims ... through January 31, 1998,” and M+W’s assignment “cannot revive those released claims.” *Id.* In the conclusion, it states “plaintiff released **WaferTech** from all present and future claims

assignee of those contract rights to stand in the shoes of the assignor, will be explained in detail in Sec. V.B. of this Reply Brief.

for work performed on the WaferTech project through January 31, 1998.”

Id.. In its reply brief, WaferTech again focuses on the effect of the releases on WaferTech’s liability, with no mention of claims against M+W. Supp. CP ____ (Sub. No. 541).⁵

The trial court denied WaferTech’s motion, with WaferTech renewing the motion on April 12, 2002. CP 261. WaferTech’s Renewed Motion stated “plaintiff can only pursue recovery against **WaferTech** for damages allegedly incurred after January 31, 1998.” CP 265. The conclusion states, “All of plaintiff’s claims against **WaferTech** have been released through January 31, 1998.” CP 266.

In granting the renewed motion, the trial court’s order (drafted by WaferTech’s counsel) states that the lien waivers “released **WaferTech** from all claims for work performed on the WaferTech project through and including January 31, 1998.” CP 267-8. There is no mention that claims against M+W were being considered or adjudicated. That is not surprising, given that those claims had been previously dismissed. Only

⁵ Nowhere in the motion or reply did WaferTech argue, as it does now, that BSA had released any claims against M+W for work prior to January 31, 1998. WaferTech sought summary judgment to limit BSA’s “pass-through” claims against WaferTech on the basis that BSA had released claims against WaferTech.

BSA's claims against WaferTech were limited, and BSA does not contest that limitation.⁶

B. The prior appeals preserved the lien claim for work after January 31, 1998.

WaferTech omits from the prior appellate history that this Court affirmed the 2002 judgment WaferTech obtained against "Business Services of America II, Inc." for over \$800,000 in attorney's fees and costs. *BSA v. WaferTech*, No. 28886-9-II (March 9, 2004). The judgment was satisfied. Supp. CP __ (Sub. No. 1004)

WaferTech also omits from the "Prior Appellate History" that after the trial court dismissed BSA's lien claim in 2009, this Court (not just our Supreme Court) reversed the dismissal.

C. The trial court proceeding after the last remand.

WaferTech fails to mention that the Delaware records for "Business Service America II, Inc.," (the correct name of plaintiff/appellant) show that its president was Joe Guglielmo. Supp. CP __ (Sub. No. 1200). Guglielmo was also president of Scott Co. of California, one of the partners in Natkin/Scott, the original plaintiff who assigned its claim to BSA. *Id.*

⁶ WaferTech attempts to argue at pp. 20-21 of its brief, without any citation to authority, that the ruling in 2002 could apply to claims dismissed in 2001. That argument will be refuted in § V.B.3. of this brief.

Since the filing of WaferTech's brief, BSA has resubmitted its motion in the trial court to correct the name of the plaintiff to "Business Service America II, Inc." Supp. CP __ (Sub. No. 1202).

IV. Reply to WaferTech's Summary

WaferTech asserts that BSA cannot remedy the error in the name of the appellant by "substituting" Business Service America II, Inc., when no substitution under CR 17(a) will be involved. The name can be corrected under CR 60(a).

In addressing the merits of setoff, WaferTech continues to incorrectly focus on "potential liability," when setoff is concerned with actual recovery. WaferTech characterizes as a "windfall" BSA's attempt to retain the benefits of its settlement with M+W, which resulted in a recovery (\$2.4 million) which was less than BSA's damages for work through January 31, 1998 (at least \$3.5 million). This means BSA has yet to recover any of its damages for work after January 31, 1998.

WaferTech asks the Court to affirm the award of attorney's fees of \$430,000, without disputing that the trial court failed to calculate the reasonable number of hours, nor showing any benefit from hours worked on WaferTech's failed dismissal and referee appointment motions. BSA's Opening Brief showed the trial court abused its discretion. BSA expects to prevail, entitling it to recover its reasonable attorney's fees.

V. Reply to WaferTech's Argument

- A. Business Service America II, Inc., is an aggrieved party that can pursue this appeal.
- 1. The misnomer regarding the plaintiff/appellant can be corrected.

WaferTech's dismissal motion, on the grounds that the appeal is not being pursued by an aggrieved party, is without merit. It is merely another futile attempt to avoid an adjudication on the merits of BSA's claim. "Modern rules of procedure are intended to allow the court to reach the merits, as opposed to disposition on technical niceties." *Fox v. Sackman*, 22, Wn.App. 707, 709, 591 P.3d 855 (1979).

The plaintiff/appellant in this matter is, and has been since 2001, BSA. BSA is the assignee of the original plaintiff/lien claimant, Natkin/Scott. As assignee, BSA is the real party in interest. An assignee stands in the shoes of its assignor, and can sue in its own name. *Mutual of Enumclaw v. USF*, 164 Wn.2d 411, 424, 191 P.3d 866 (1999).

There was a minor error made in 2001 in naming BSA, with it misnamed as "Business Services of America II, Inc." An error in the name of a party is a "misnomer" that can be corrected under CR 60(a). *Entranco Eng'rs v. Envirodyne, Inc.*, 34 Wn.App. 503, 507, 662 P.2d 73

(1983) (judgment against “Envirodyne, Inc.” could be corrected to be against “Envirodyne Engineers, Inc.”).⁷

BSA’s CR 60(a) motion to correct the name of the judgment debtor is pending, which will address WaferTech’s objection, but it is not even necessary. WaferTech is estopped from now objecting. Judicial estoppel bars a litigant from benefiting from one position, then taking a contrary position later in the same litigation. *Johnson v. Si-Cor, Inc.*, 107 Wn.App. 902, 909, 28 P.3d 832 (2001). WaferTech accepted the benefits of a judgment entered against BSA when it was identified as “Business Services of America II, Inc.,” so it cannot now assert BSA is not an aggrieved party.⁸

2. There will be no substitution of a party.

There will be no substitution of a party under CR 17(a). The correction of a mistake in the name of a party does not change the party. C. Wright & A. Miller, *Fed. Prac. & Proc.* § 1498.2 (2008).

Even if the correction is deemed a substitution by BSA, substitution under CR 17(a) is not a bar. It relates back to the

⁷ A situation comparable to the present situation occurred in *California Central Airlines v. Fritz*, 337 P.2d 531 (Cal.App. 1959). The complaint identified the plaintiff as “California Central Airlines,” which did not exist, while the correct name was “California Coastal Airlines.” Amendment was allowed to correct the name.

⁸ Barring WaferTech from objecting to the error in the name, or at least from benefiting from that objection, is also consistent with equitable estoppel. Under equitable estoppel, an affirmative defense is waived if (1) asserting it is inconsistent with prior behavior, or (2) the party has been dilatory in asserting it. *Lybbert v. Grant Co.*, 141 Wn.2d 29, 38-9, 1 P.3d 1124 (2000).

commencement of the action. *Kommanvongsa v. Haskell*, 149 Wn.2d 288, 317, 67 P.3d 1068 (2003).

BSA's dissolution does not bar substitution. Pursuing litigation is not the conduct of business for which a foreign corporation must be registered. RCW 23B.15.010(2)(a). This litigation is part of the winding up of BSA's affairs. A dissolved corporation continues to exist and can wind up its affairs, including collecting assets. RCW 23B.14.050(1). Under Delaware law, a dissolved corporation may continue any action begun within three years of dissolution. Del. Code. Ann. Tit. 8 § 278. This action was pending prior to BSA's dissolution. BSA has standing to pursue this action, and be substituted as plaintiff under CR 17(a) if necessary.

B. Equitable setoff does not apply when there is no possibility that BSA will obtain a double recovery of the same damages.

BSA agrees with WaferTech that a plaintiff may not recover the same damages twice. However, neither of the two cases cited by WaferTech support its contention that equitable setoff applies when a plaintiff asserts the same claim against two defendants. Setoff deals with damages recovered, not claims for relief. As *Eagle Point* held:

“... offset was necessary as a matter of equity to ensure that the plaintiffs did not recover damages from both Coy and Brixx for the same defects.

Eagle Point, supra at 703 (emphasis added).⁹ Our Supreme Court is clear that entitlement to setoff is dependent upon damages recovered, not claims asserted. *Puget Sound Energy, Inc. v. Alba Gen. Ins. Co.*, 149 Wn.2d 135, 141-2, 68 P.3d 1061 (2003); *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 673, 15 P.3d 115 (2000).

Even if WaferTech was correct that at one time BSA asserted the same claim against M+W and WaferTech, setoff only limits the recovery of damages.¹⁰ A party can assert different claims to recover the same damages, but can only recover the same damages once. *Brink v. Griffith*, 65 Wn.2d 253, 396 P.2d 793, 797 (1964).

While it is irrelevant to setoff whether BSA was asserting the same claim against M+W and WaferTech, because WaferTech creates confusion by repeatedly making this contention, BSA will refute it.

BSA asserted a direct claim against M+W for breach of the subcontract. In the settlement with M+W, M+W assigned its rights against WaferTech to BSA. BSA then asserted a “pass-through” claim against WaferTech. Under a “pass-through” claim, the subcontractor is asserting the prime contractor’s right to recover from the owner. C.

⁹ This is the case upon which WaferTech relies almost exclusively to support setoff.

¹⁰ Suing more than one defendant for the same damages is even endorsed by statute. RCW 4.22.030-.070 contains provisions to apportion liability amongst joint tortfeasors who are all potentially liable for the same damages. A settlement with one does not absolve the others of liability, it merely limits their liability.

Calvert & C. Ingwalson, Jr., *Pass Through Claims and Liquidation Agreements*, 18 Constr. Law 29 (1998). The direct and pass-through claims are not the same.

When two claims are the “same,” they (1) infringe upon the same right, and (2) require the same evidence to prove them. *Rains v. State*, 100 Wn.2d 660, 664, 674 P.2d 165 (1983). Below is a short comparison of the claims, showing differences:

	<u>Claim v. M+W</u>	<u>Claim v. WaferTech</u>
Type:	Direct	Pass-through (Assigned)
Contract:	Subcontract	Prime contract
Rights Infringed:	BSA’s	M+W’s
Evidence:	M+W’s breaches	WaferTech’s breaches
Damages:	M+W liable to BSA	WaferTech liable to M+W

BSA’s claims against M+W and WaferTech are not the “same.”

1. Equitable setoff involves a legal question.

While there is case law supporting the proposition that equitable setoff is reviewed for an abuse of discretion, courts that have closely reviewed the granting of equitable relief (which equitable setoff is) distinguish between factual determinations affecting the remedy, and the law applied by the trial court. That nuance is what BSA was attempting to explain in its Opening Brief.

The reason for reviewing equitable relief for an “abuse of discretion” is that the trial court is applying a general rule to specific facts.

In re Jannot, 110 Wn.App. 16, 19, 37 P.3d 1265 (2002). Applying the wrong rule is deemed an abuse of discretion. *Sales v. Weyerhaeuser Co.*, 163 Wn.2d 14, 22, 177 P.3d 1122 (2008). The trial court's discretion is in *fashioning* the equitable remedy, not in determining if it is available. *Trotzer v. Vig*, 149 Wn.App. 594, 203 P.3d 1056 (2009).

The trial court did not have discretion to decide what the law is. As a matter of law, equitable setoff is not available unless and until the plaintiff has been "made whole" by its prior recovery. *Weyerhaeuser*, *supra* at 672. In addition, the trial court granted summary judgment, which is reviewed *de novo*. *McCormick v. Dunn & Black, P.S.*, 140 Wn.App. 873, 882, 167 P.3d 610 (2007).

2. *Eagle Point* does not support WaferTech's setoff argument.

WaferTech relies almost exclusively on *Eagle Point*, *supra*, to support its setoff argument, and as set forth in BSA's opening brief, *Eagle Point*, when examined closely, does not support setoff here. The *Eagle Point* court (as BSA urges here) focused on the damages actually recovered by the plaintiff, not the claims being asserted. When the *Eagle Point* court used the term "claim," it was not short for "cause of action," which is how WaferTech uses it. Instead, the context shows the *Eagle Point* court was focused on damages, and used "claim" as short for "claim of damages." *See* 102 Wn.App. at 702-3.

Where the *Eagle Point* court found there were damages suffered by plaintiffs for which the judgment defendant could not be liable (the \$10,000 in damages suffered by unit owners), the settlement payment was allocated to those damages, not to offset the judgment defendant's liability. Out of a \$65,000 settlement, defendant obtained only a \$55,000 setoff. Here, there were \$3.5 million in damages for which WaferTech cannot be liable, so the \$2.4 million from M+W is allocated to those damages, with no setoff.

WaferTech seeks to distinguish the allocation rules in *Oakes Logging v. Green Crow*, 66 Wn.App. 598, 832 P.2d 894 (1992) (those allocation rules require the allocation most favorable to the creditor, here BSA) on the basis that the payment there occurred pre-litigation. Nothing in *Oakes Logging*, or the cases relied upon by the court there, limits the allocation rules to pre-litigation payments. WaferTech provides no reasons or authority for its allocation argument, which should be ignored. Appellate courts ignore arguments without any authority, as it is assumed counsel attempted to find authority and there was none. *McCormick, supra* at 883.

WaferTech asserts that M+W's liability for work through January 31, 1998 was "*invalid*" (italics by WaferTech), without providing a definition or citing any authority explaining how a settled claim could be

subsequently ruled “invalid,” or that a payment could not be allocated to an “invalid” debt.

A disputed or doubtful claim may be the basis of a compromise settlement *Harding v. Will*, 81 Wn.2d 132, 138, 500 P.2d 91 (1972). The claim need not even exist, as such a “rigorous standard would discourage compromise.” *Id.* The claim need only be asserted in good faith. *Id.*

Here, BSA’s claim against M+W for work both before and after January 31, 1998, was asserted in good faith. The claim was litigated from 1998-2001. The portion of the claim for damages for work through January 31, 1998, survived a summary judgment motion by M+W. There was nothing “invalid” about the claim for purposes of settlement.

M+W’s contention that Natkin/Scott “released” its claim for work through January 31, 1998, was M+W’s affirmative defense. “Release” is an affirmative defense. CR 8(c). A settlement of a claim is a waiver of any defenses that could be asserted. *Symington v. Hudson*, 40 Wn.2d 331, 338, 243 P.2d 484 (1952). M+W waived its defense that BSA released its claim against M+W for work prior to January 31, 1998. Once M+W waived its defense to BSA’s claim, WaferTech could not assert it. A settlement is *res judicata* for any defenses that could have been raised. *McClure v. Calispell Duck Club*, 157 Wn. 136, 288 P. 217 (1930).

WaferTech distorts this court's unpublished decision affirming the trial court's May 25, 2002, order granting summary judgment in favor of WaferTech. As pointed out previously, that order applied to BSA's claims against WaferTech, not the previously settled claim against M+W. When this court stated that the releases "released all claims," the context implies "all claims *against WaferTech*." Those were the only claims at issue to be adjudicated by the trial court, so those were the only claims addressed by this Court. Appellate courts generally only review issues first raised in the trial court. RAP 2.5(a).

WaferTech attempts to distinguish our Supreme Court's decisions on setoff cited by BSA. WaferTech again wrongly focuses on the supposed identity of claims being asserted by BSA against both M+W and WaferTech as distinguishing this case from the Supreme Court cases. This ignores the crucial issue of the different damages BSA will recover from M+W and WaferTech. Our Supreme Court focused on the damages the plaintiff recovered from settling defendants and will recover from the non-settling defendant in determining setoff. *Weyerhaeuser, supra; Puget Sound Energy, supra*.¹¹

¹¹ Both cases cite *Pederson's Fryer Farms, Inc. v. Transamerica Ins. Co.*, 83 Wn.App. 432, 922 P.2d 126 (1996) with approval. There, a plaintiff obtained judgment for cleanup costs. The defendant sought a setoff for a settlement the plaintiff obtained from other insurers. It was denied, because the settlement was recovered for more than "cleanup costs," so the defendant did not show there would be a "double recovery."

WaferTech acknowledges that when a settling and non-settling defendant face different risks, setoff may not be available. Respondent's Brief, pp. 18-19. M+W faced the risk of \$9 million in damages for work throughout the project. WaferTech faces a lesser risk of damages, for work after January 31, 1998, only.

3. The \$2.4 million settlement could be allocated to work through January 31, 1998.

WaferTech makes an admission that undercuts its setoff argument. That argument hinges on WaferTech's contention that BSA could not recover damages from M+W for work prior to January 31, 1998. Only then could the entire \$2.4 million settlement be allocated to pay for work after January 31, 1998.

WaferTech undercuts that position in a heading which states, "BSA's Settlement with M+W was Allocated to its Work on the Entire Project." Respondent's Brief, p. 20. The entire project includes work both before and after January 31, 1998. Given that some of the settlement could be allocated to work before January 31, 1998 (WaferTech admits), the next question is how much? Under allocation and setoff doctrines, the answer is "as much as possible." BSA's damages for work prior to January 31, 1998, undisputed by WaferTech, exceeded \$3.5 million.

Therefore, the entire \$2.4 million is allocated to damages for work prior to January 31, 1998.

WaferTech mischaracterizes a question relevant to setoff. The key question is not, as WaferTech essentially urges: Did the plaintiff fail to allocate its recovery to damages for which the non-settling defendant was not liable?¹² WaferTech cites no authority requiring the plaintiff to make such an allocation to avoid setoff. Our Supreme Court expressly rejected such a requirement. In *Puget Sound Energy v. Alba*, 109 Wn.App. 683, 10 P.3d 445 (2000), the Court of Appeals attempted to impose such a burden, requiring a settling plaintiff to show it allocated the settlement funds to damages for which the non-settling defendant was not liable. 109 Wn.App. at 695.

Our Supreme Court ruled that was too onerous a burden. Instead, the key question was: Could the plaintiff allocate its recovery to damages for which the non-settling defendant was not liable. *Puget Sound Energy*, 149 Wn.2d at 142. It was the judgment defendant's burden to show what portion of the settlement could be allocated to damages for which the judgment defendant was liable. *Id.* at 141.

WaferTech never even attempted to meet that burden. Instead, it admits BSA's settlement was for work both before and after January 31,

¹² WaferTech focuses on BSA's failure to allocate the \$2.4 million recovery from M+W to work through January 31, 1998. Respondent's Brief, p. 22.

1998. BSA's damages for work prior to January 31, 1998, exceeded \$3.5 million. BSA could allocate the entire \$2.4 million recovery from M+W to work prior to January 31, 1998.

Even the *Eagle Point* court disagrees with WaferTech. The judgment defendant there complained that the plaintiffs did not allocate any of the \$10,000 settlement to the damages for which the judgment defendant was not liable. 102 Wn.App. at 703. The court still reduced the setoff by that \$10,000. *Id.*

WaferTech tries to get around its admission that the M+W settlement was allocated in part to work prior to January 31, 1998 by having the trial court's ruling in 2002, on BSA's "pass-through" claim against WaferTech, apply to BSA's settled claims against M+W. Whether BSA released claims against M+W for work prior to January 31, 1998, was never adjudicated; not in 2001, not in 2002, and cannot be adjudicated now. The court order WaferTech cites to purportedly support its assertion states that Natkin/Scott "released WaferTech," with no mention of M+W. CP 267.

To support its position, WaferTech's argument is as follows:

When the trial court ruled that BSA's "pass-through" breach-of-contract claim against WaferTech was limited to work performed after January 31, 1998, the ruling also meant that BSA's prior claims against M+W were subject to the same limitations.

Respondent's Brief, p. 21 (emphasis added).

WaferTech does not express the rule which supports this passage, nor does it cite to any legal authority to explain it. Out of thin air, WaferTech appears to propose the following rule:

A court can retroactively limit a previously settled claim when that court rules on a claim against a different defendant.

Such a bizarre rule, which would (1) violate the finality of settlements and would discourage them, and (2) violate *res judicata*, should not be adopted by this Court. Without the rule, however, there can not be an equitable setoff, as there is no basis to object to the allocation of the entire \$2.4 million to pay for work through January 31, 1998.

WaferTech goes on to assert that BSA's settled claim against M+W was still before the court in 2002; somehow, after a claim is settled and dismissed, it can then be "converted" into a claim against a different defendant. Again, WaferTech provides no legal authority for "converting" settled and dismissed claims so they can continue to be asserted.

4. Equitable factors, if considered, do not support setoff.

The only cases cited by WaferTech to support the trial court's application of equitable factors are *Pub. Employees, supra* (equitable setoff prevents double recovery of the same damages) and *Eagle Point*,

supra (equitable setoff is reviewed for an abuse of discretion). This brief has already addressed those points.

WaferTech is wrong when it describes the *potential* damages that could be recovered from M+W and WaferTech as identical. In asserting its “pass-through” claim, BSA (assignee) stood in the shoes of M+W (assignor), being able to recover only those damages that M+W could recover from WaferTech. An assignee can only recover what its assignor could recover. *Pain Diagnostics v. Brockman*, 97 Wn.App. 691, 699, 140 Wn.2d 1013 (1999).

Below is the difference in damages recoverable under each claim:

Direct Claim v. M+W

BSA’s reasonable direct costs

Pass-through Claim v. WaferTech

BSA’s reasonable direct costs for which WaferTech is liable to M+W

This comparison shows WaferTech is incorrect even when it asserts the *potential* damages against M+W and WaferTech were “identical.”

WaferTech argues it is not inequitable to deny BSA a recovery from WaferTech, because BSA was paid \$6.8 million during the project and \$2.4 million by M+W in settlement, a total of \$9.2 million. This seems like a lot, but not in comparison to the amount BSA was entitled to be paid.

Under ¶ 13.4 of the subcontract, BSA was entitled to recover all of its reasonable direct costs on work performed, plus 15% for overhead and profit. CP 78. WaferTech's own expert calculated those costs, less accounting adjustments, as \$11,497,562, and after accounting for M+W's \$2.4 million payment, left a shortfall of \$2,228,573, plus attorney's fees.¹³ Supp. CP ___ (Sub No. 1125). BSA will suffer a substantial loss if WaferTech is rewarded with a setoff; there will no windfall without it.

5. There are issues of fact that have never been adjudicated as to whether BSA's lien claim for work after January 31, 1998, exceeds \$2.4 million.

Even if WaferTech were entitled to a \$2.4 million setoff, WaferTech ignores the evidence that BSA's lien claim, just for work after January 31, 1998, exceeds \$3.2 million. CP 394. WaferTech relies upon a trial court ruling purporting to limit BSA's recovery under its lien claim to \$1.5 million, when that ruling was (1) incorrect, (2) not a final adjudication, (3) subject to amendment under RCW 60.04.091(2), and (4) would work an injustice that this court has authority under RAP 2.5(c) to correct.

The incorrectness is evident when one considers it was based on a calculation by WaferTech's counsel, based on cost records, that Natkin/Scott's costs after January 31, 1998, were \$1,687,811.31. Supp.

¹³ BSA calculated the amount recoverable, prior to M+W's payment of \$2.4 million, as \$9,033,000. CP 259-60. This would leave a shortfall of \$6,633,000

CP __ (Sub. No. 414B). WaferTech's own expert calculated those costs at over \$1.8 million. Supp. CP __ (Sub. No. 1125). BSA's expert calculates them at over \$3.6 million, with \$3.2 million unpaid. CP 1080.

A reduction of a recorded lien under RCW 60.04.081(4) is not intended to be an adjudication on the merits when there is a genuine dispute. The parties' experts dispute the cost calculation upon which WaferTech and the trial court relied in reducing the lien. Given this dispute, the trial court could not adjudicate the lien claim.

A lien can be amended in the same manner as a pleading. RCW 60.04.091(2). There is nothing in the statute that precludes amendment, even after the lien is reduced under RCW 60.04.081(4).

Finally, even if the trial court intended a final adjudication of the lien claim as no more than \$1.5 million, that would work an injustice, given the evidence from BSA's expert that the unpaid costs potentially recoverable under the lien exceeded \$3.2 million. This court is not bound by the "law of the case" to let this injustice stand. RAP 2.5(c). BSA is entitled to an opportunity to prove its lien claim exceeded \$2.4 million, and at a minimum, recover the difference.

C. The award of attorney's fees was excessive.

WaferTech does not show that the trial court calculated the reasonable number of hours, which is required under the lodestar method,

or that its work on the failed dismissal motion and appointment of a referee who did not serve should not be deemed “wasted or unproductive work,” for which the hours worked should be excluded.

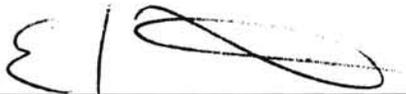
VI. Conclusion

Equitable setoff prevents “double recovery” of the same damages from different defendants. Before applying setoff, a court must first determine that a plaintiff has been “made whole.” BSA’s damages for work prior to January 31, 1998, for which it will not obtain any recovery from WaferTech, exceeded the \$2.4 settlement from M+W. BSA has not been “made whole.” There is no setoff.

BSA asks that this Court reverse the trial court’s erroneous summary judgment and vacate the judgment in favor of WaferTech.

DATED this 24th day of March, 2014.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document has been served by email, by agreement of counsel, on the 24th day of March, 2014, to:

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