

No. 47316-0-II

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

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BUSINESS SERVICES OF AMERICA II, INC.,

Appellant,

v.

WAFERTECH LLC,

Respondent.

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**APPELLANT'S REPLY BRIEF**

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## **I. Introduction**

Business Service America II, Inc. (“BSA II”) raised two primary issues in its Opening Brief. First, summary judgment on WaferTech’s defense of “equitable setoff” was erroneous. Equitable setoff did not apply, as it only prevents the double recovery of the same damages from different defendants; BSA II’s recovery from another defendant can be allocated to damages BSA II cannot recover from WaferTech.

Second, denial of BSA II’s CR 15 motion to change the name of the plaintiff to BSA II was erroneous. Prejudice to the opposing party is the only basis to deny amendment; changing the name of the plaintiff to BSA II will not prejudice WaferTech.

WaferTech’s brief focuses on Business Services of America II, Inc. (“BSofA”). BSofA is a red herring in this appeal. BSA II is the name of the appellant in the Notice of Appeal. CP 770. BSA II was the assignee of the original plaintiff, making it a real party in interest and an “aggrieved party” who can pursue this appeal.

WaferTech’s brief ignores applicable court rules and legal doctrines in its attempt to avoid the merits of this appeal. This comports with WaferTech’s conduct since 2002, when it commenced a pattern of consistently, but so far futilely, attempting to deny BSA II an adjudication on the merits of its claim:

2002 - WaferTech obtains dismissal; reversed by this Court.

2009 - WaferTech obtains dismissal; reversed by this Court.

2009 - WaferTech moves to dismiss BSA II's appeal; denied by Commissioner.

2014 - WaferTech moves to dismiss BSA II's appeal; denied by Commissioner.

2015 - WaferTech moves to bar BSA II from raising issues in this appeal; denied by Commissioner.

WaferTech now wants this Court to not adjudicate BSA II's claim based on a dispute regarding the name on the pleadings, without citing authority to support such a result. If WaferTech cannot persuade this Court of that, WaferTech asks this Court to affirm the trial court's setoff, but resorts to misrepresenting the record in order to make its argument. WaferTech then misstates the law of setoff, asserting it applies whenever a plaintiff *sues* two defendants for the same damages, when setoff only prevents the *recovery* of the same damages from two defendants.

## **II. Reply to WaferTech's Counterstatement of the Issues.**

WaferTech's Issues 1-3 focus on BSofA's status and whether it is a misnomer, when BSA II is the appellant and entitled to be named the plaintiff whether or not BSofA is a misnomer.

WaferTech's Issue 4 asserts that setoff applies when a party "sues" two defendants for the same damages, when setoff only prevents the recovery of the same damages from two defendants.

### **III. Reply to WaferTech's Restatement of the Case**

#### **A. WaferTech materially misrepresents the record.**

WaferTech materially misrepresents the record below when it mischaracterizes the trial court's order dated May 22, 2002, as applying to "all claims of any nature against any defendant," and that BSA II's claims were limited "under any theory of recovery and against any defendant." Respondent's Brief, p. 5. WaferTech's use of the term "any defendant" is not only misleading (WaferTech was then the only defendant), a review of claims asserted illustrates WaferTech's characterization is false.

Natkin/Scott asserted a contract claim against M+W and a lien claim against WaferTech. CP 1. By letter ruling, the trial court denied M+W's motion to limit the contract claim against M+W to work after January 31, 1998. Supp. CP \_\_ (Sub No. 397). After Natkin/Scott and BSA II settled with M+W, BSA II asserted a contract claim against WaferTech. CP 109.

In briefing to the trial court in 2001, WaferTech distinguished (1) the contract claim against WaferTech from (2) the settled contract claim against M+W. Supp CP \_\_ (Sub No. 578). WaferTech then sought



to limit BSA II's contract claim against WaferTech. CP 421-6. On page 5 of its motion WaferTech stated:

The conclusion is inescapable that plaintiff can only pursue recovery against WaferTech for damages allegedly incurred *after* January 1998. (emphasis in original)

CP 425. WaferTech concludes its motion by stating:

All of plaintiff's claims against WaferTech have been released through January 31, 1998. Thus, WaferTech is entitled to partial summary judgment limiting plaintiff's claims to the post-January 31, 1998 time period.

CP 426. WaferTech then drafted an order, which the trial court signed, stating:

The Court determines that Natkin/Scott [the original plaintiff] knowingly and voluntarily executed Lien Waivers and Releases which released WaferTech from all claims for work performed on the WaferTech project through and including January 31, 1998; ...

CP 427-8.

B. WaferTech ignores evidence in the record.

WaferTech ignores the trial court's order in 2001, and evidence from WaferTech, showing M+W was potentially liable for over \$3.5 million in damages for work prior to January 31, 1998, addressed in BSA II's Opening Brief, pp. 5-6. BSA II recovered only \$2.4 million from M+W.

WaferTech points out that the commissioner of this Court denied BSA II's motion "to admit additional exhibits to the record." Respondent's Brief, p. 11. WaferTech ignores that the commissioner's ruling went on to state that "the appellant may refile them [exhibits] in the trial court and then file a supplemental designation of clerk's papers as to those exhibits." Commissioner's Ruling, June 18, 2015. BSA II did just that. Supp. CP \_\_\_. (Sub No. 1265).

The exhibits at issue were WaferTech Trial Exhibits 899, 1016, and 1021. WaferTech discusses Ex. 899 in its brief, but ignores Exs. 1016 and 1021. Brief of Respondent, pp. 21-23. These exhibits contain the Sale and Servicing Agreement assigning Natkin/Scott's claims to BSA II (with no mention of BSofA), and other documents showing that assignment. Nowhere is assignee named BSofA. This Court stated in its October 21, 2014, opinion that the document assigning Natkin/Scott's claim would have been helpful in determining whether BSA II was the assignee and should be named the plaintiff.

C. WaferTech cites only to this Court's prior opinion, but to nothing in the trial court, to support limiting the lien claim.

WaferTech quotes this Court's 2004 Opinion for the assertion that BSA II's lien claim was limited to \$1.5 million. when there has never been a final and binding adjudication of the amount of BSA II's lien claim. The

trial court's order reducing the lien claim, which is the basis for the \$1.5 million figure relied upon by this Court, contained only one finding, which is that \$7,654,454 was "clearly excessive." CP 376. It goes on to explain how to calculate the actual value the lien claim:

That [BSA II's] claim of lien is limited to labor, materials and equipment supplied after January 31, 1998 for which it has not already received payment."

*Id.*

#### **IV. Reply to WaferTech's Summary of Argument**

WaferTech's summary of argument begins by asserting that the only issue for this Court to decide is whether BSofA ever existed, and if not, what effect that has on BSA II's lien claim. WaferTech cites no legal rule or authority that says that if there is no entity that goes by the name of the plaintiff, the action is dismissed or the claim denied. WaferTech ignores (1) the applicability of CR 15 at all times in an action and the lack of any misnomer prerequisite, (2) the comparability of "aggrieved party" under RAP 3.1 to real party in interest under CR 17(a), and (3) that CR 17(a) expressly precludes dismissal on the grounds that the action is not being pursued by a real party in interest.

WaferTech asserts that BSA II's dissolution while this action was pending precludes BSA II being the plaintiff, ignoring (1) BSA II's continued existence after dissolution under Delaware law to pursue

litigation as part of the winding up of its affairs, as set forth in *Citywide Investing Co. Liq. Trust v. Continental Casualty Co.*, 624 A.2d 1191 (Del. 1993), and (2) the relation back to 2001 (when BSA II was an active corporation) of the amendment changing plaintiff's name to BSA II.

Finally, WaferTech erroneously argues that equitable setoff applies whenever a party *sues* two or more defendants for the same damages. Setoff only applies to the *recovery* of the same damages from more than one defendant. *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 672, 15 P.3d 115 (2000). BSA II's \$2.4 million recovery (WaferTech pejoratively says BSA II "extracted" this amount, implying force) from M+W can be allocated to work prior to January 31, 1998, while BSA II can only recover from WaferTech for work after that date, so BSA II cannot recover the same damages from M+W and WaferTech.

## **V. Reply to WaferTech's Argument**

### **A. Whether BSofA is a misnomer is a red herring.**

Sections A-C of WaferTech's brief focus on its contention that BSofA is not a misnomer. That is a red herring with no significance.

1. BSA II entitled to amend under CR 15 so long as WaferTech is not prejudiced.

CR 15 contains no requirement there be a misnomer prior to amendment. As BSA II pointed out in its Opening Brief at pp. 20-21, the

only basis for opposing amendment to change the plaintiff is prejudice to the defendant in presenting its defense. *Beal v. City of Seattle*, 134 Wn.2d 769, 780, 954 P.2d 237 (1998) (not addressed by WaferTech). Changing who benefits from an action does not prejudice the defendant. *Sprague v. Sysco Corp.*, 97 Wn.App. 169, 179-80, 982 P.2d 1202 (1999).

The prejudice WaferTech must show, but cannot, is how WaferTech is worse off by (1) the plaintiff being changed to BSA II in 2015, compared to (2) the plaintiff being named BSA II since 2001. The only prejudice WaferTech has identified is BSA II's dissolution in 2006, but that dissolution has no effect on WaferTech's defense. WaferTech is no worse off by BSA II's dissolution prior to BSA II being named the plaintiff than it would be if BSA II was dissolved after it was named plaintiff. Either way, WaferTech is defending against a lien claim being asserted by a dissolved corporation.

BSA II referred to BSofA as a misnomer in its Opening Brief for the same reason a prosecutor proves a motive in a criminal trial: although not essential to the case, it provides a context for why a party would do something. Prosecutors may provide proof of motive, even though it is not an element of the crime. *State v. Yarborough*, 151 Wn.App. 66, 83, 210 P.3d 1029 (2009). BSA II's contention that BSofA is a misnomer

explains why it moved under CR 60(a), and later under CR 15, to change the plaintiff's name, but was not an essential element of the CR 15 motion.

WaferTech several times refers to BSA II's "misnomer argument" and it having been rejected. BSA II did not make a "misnomer argument" in this appeal. BSA II's amendment argument regarding the name BSofA consists of a major premise (a party's name in pleadings may be amended, so long as the opposing party is not prejudiced), minor premise (WaferTech will not be prejudiced by changing the name of the plaintiff from BSofA to BSA II), and a conclusion (BSA II is entitled to amend the pleadings). BSofA being a misnomer is not part of BSA II's argument.

2. Law of the case does not preclude BSA II's CR 15 motion.

WaferTech accuses BSA II of "effectively" asking this Court to vacate its October 21, 2014 Opinion, and that this would violate law of the case doctrine. WaferTech is wrong in at least two respects. First, BSA II is not asking this Court to vacate its prior ruling regarding BSA II's CR 60(a) motion in 2014, "effectively" or otherwise. This Court can grant the CR 15 motion, or order that the trial court should have granted the CR 15 motion, without disturbing the trial court's denial of BSA II's CR 60(a) motion.

Second, law of the case only applies to an identical principle of law previously decided. *Cook v. Brateng*, 180 Wn.App. 368, 373, 321 P.3d

1255 (2014). Whether BSofA is a misnomer is not a principle of law. It is a factual issue: either Natkin/Scott's assignee was BSofA, or it was not. This Court's prior Opinion, at p. 9, stated it was a "factual issue" whether BSofA was a misnomer.

Even if misnomer was a previously decided legal issue, this Court can review it. Under RAP 2.5(c)(2), "law of the case" is not used to prevent the appellate court from correcting errors. *Robinson v. Perez*, 156 Wn.2d 33, 42, 123 P.3d 844 (2005). Factual questions may be reconsidered in a second appeal when there is new evidence. *See Adamson v. Traylor*, 66 Wn.2d 338, 339, 402 P.2d 499 (1965).

This Court stated in its unpublished opinion that the document assigning Natkin/Scott's claim "could have clarified the issue" of whether BSofA was a misnomer, and incorrectly stated the document "never was placed into the trial court record." WaferTech identified the assignment documents as part of a trial exhibit in 2002. CP 151. The additional evidence in the record on review, including Ex. 899, 1016, and 1021, not part of the previous record on review, shows that BSofA was a misnomer.

WaferTech cites *Humphrey Industries, Ltd. v. Clay Street Associates, Inc.*, 176 Wn.2d 662, 295 P.3d 231 (2013), to support its "law of the case" argument, but acknowledges that there, it was the trial court, not the appellate court, that was bound by the prior decision. WaferTech

goes on to acknowledge that RAP 2.5(c)(2) permits the appellate court to correct prior errors if it would result in an injustice to not do so. A ruling that BSofA was Natkin/Scott's assignee, rather than a misnomer for that assignee, would be clearly erroneous. If that error precluded adjudication of the claim by Natkin/Scott's assignee, that would result in an injustice to that assignee, BSA II.

B. BSA II is a real party in interest entitled to pursue this appeal.

Sections D-F of WaferTech's brief focus on the trial court's denial of BSA II's CR 15 motion to amend. WaferTech urges this Court to not even consider the merits of BSA II's CR 15 motion, on the basis that BSA II moved too late and that such a motion was "outside the scope of the trial court's narrowly-tailored mandate." Respondent's Brief, p. 24. WaferTech ignores that the CR 15 motion was a timely response to WaferTech's objection raised on appeal that BSofA was not an "aggrieved party," and that CR 15 applies at all times in the trial court.

1. BSA II's CR 15 motion was timely.

BSA II's CR 15 motion was a timely response to address WaferTech's objection in 2014, during a prior appeal, that BSofA was not an aggrieved party. BSA II was entitled to address WaferTech's objection, which BSA II promptly did.



“Aggrieved party” is not defined in RAP 3.1, but is “similar in function to ... real party in interest and of standing.” 2A K. Tegland, Wash.Prac., *Rules Prac.*, RAP 3.1, p. 405 (6<sup>th</sup> Ed. 2004). Standing and real party in interest are sometimes used interchangeably. *Unifund CCR Partners v. Sunde*, 163 Wn.App 473, 481, 260 P.3d 915 (2011).

Dismissal is not the remedy when an action is not being pursued by a real party in interest; amendment or ratification is:

No action shall be dismissed on the ground that it is not prosecuted by the real party in interest until a reasonable time has been allowed *after objection* for ratification ... or joinder or substitution of the real party in interest; ...

CR 17(a) (emphasis added). CR 15 is used to allow the real party in interest to join the action, to prevent technicalities from interfering “with the merits of legitimate controversies.” *Kommavongsa v. Haskell*, 149 Wn.2d 288, 315, 67 P.3d 1068 (2003). Any joinder or substitution relates back to commencement of the action. CR 17(a).

The action can proceed without a real party in interest until the defendant objects. CR 17(a). If the defendant does not object prior to trial, it waives the objection. 3A K. Tegland, Wash. Prac., *Rules Prac.*, CR 17, p. 372 (5<sup>th</sup> Ed. 2006) (prior edition cited with approval in *Northwest Ind. Forest Mftrs. v. Dept. of Labor & Industries*, 78 Wn.App. 707, 716, 899 P.2d 6 (1995)).

WaferTech waived its objection to the action proceeding in the name of BSofA by not objecting prior to trial in 2002. Even if it did not waive it, BSA II was entitled to an opportunity to be named as the plaintiff or ratify the action when WaferTech finally objected in 2014. BSA II did so by promptly seeking to be named as the judgment defendant.

CR 1 and RAP 1.2(a) require that actions be decided on their merits where possible. In *Fox v. Sackman*, 22 Wn.App. 707, 591 P.2d 855 (1979), a defendant sought dismissal after trial on the basis that the plaintiff was not a real party in interest. In denying dismissal, the court said it would not “allow a technicality to interfere with the merits of this case.” 22 Wn.App. at 710.

Real party in interest requirements under CR 17(a) are not intended to sanction even dilatory plaintiffs with a dismissal. *Rinke v. Johns-Manville Corp.*, 47 Wn.App. 222, 226, 734 P.2d 533 (1987). Instead, they are intended to expedite litigation, while still protecting defendants from prejudice by insuring that a claim is prosecuted by a proper party. *Id.* at 227. The real party in interest may be added to the action after trial. *Id.*

*Rinke* is not an isolated case. In both *Kommavongsa, supra*, and *Beal, supra*, claims were not being pursued by a real party in interest, but the defendants did not object until after the statutes of limitations had expired. In each action, the real party in interest was permitted to be

added as the plaintiff, with the addition relating back to the commencement of the action. *Kommavongsa*, 149 Wn.2d at 317; *Beal*, 134 Wn.2d at 783.

WaferTech is attempting to obtain the extraordinary relief of dismissal based on a rule intended to protect defendants from a risk WaferTech does not face (a subsequent action by the real party in interest), when the remedy provided in that rule is not dismissal (it is amendment or ratification). WaferTech is seeking relief expressly at odds with Washington law:

In Washington, when a party is incorrectly named in a lawsuit, dismissal is not the automatic remedy; rather the primary consideration is whether the party has been prejudiced.

*Professional Marine Co. v. Underwriters at Lloyd's*, 118 Wn.App. 695, 705, 77 P.3d 658 (2003).

2. CR 15 is within the scope of the mandate.

BSA II's CR 15 motion was within the scope of the mandate, as CR 15 applies to all actions at all times. CR 1 provides that the civil rules apply to all actions, with no exceptions for remanded actions. WaferTech previously argued unsuccessfully that the civil rules did not apply to this action after remand. "Without citing to authority, WaferTech asserts that CR 41(b)(1) does not apply after trial and appellate remand." *BSofA v.*

*WaferTech*, 159 Wn.App. 591, 598, 245 P.3d 257 (2011). This Court rejected that argument, noting that no “separate court rules exist for a civil case before a trial court on remand.” *Id.*

BSA II’s CR 15 motion was not only proper based on the application of the civil rules to all actions after remand, the CR 15 motion addressed the very issue upon which this Court remanded. The remand directed the trial court to address BSofA’s status. That was in the context of WaferTech’s objection that BSofA was not an “aggrieved party.” BSA II’s CR 15 motion addressed that objection.

3. WaferTech’s objections to amendment do not address its lack of prejudice.

WaferTech contends BSA II’s CR 15 motion was based on BSofA being a misnomer, which is incorrect. BSA II is entitled to be named the plaintiff by amendment without regard to whether BSofA was a misnomer, so long as WaferTech is not prejudiced in its defense.

WaferTech asserts that changing the name of the plaintiff to BSA II will be “disruptive,” but does not explain what the disruption would be. Such an unsupported claim of “disruption” is analogous to an unsupported assertion of prejudice. Unsupported claims of prejudice are not a basis to deny a CR 15 motion. *Walla v. Johnson*, 50 Wn.App. 879, 884, 751 P.2d 334 (1988).

The only authority WaferTech cites in support of denying a CR 15 motion is *Doyle v. Planned Parenthood of Seattle – King County, Inc.*, 31 Wn.App. 126, 639 P.2d 240 (1982), but an examination of that case supports amendment here. There, the plaintiff sought to add a new claim after a summary judgment hearing, in an attempt to delay or avoid entry of summary judgment in favor of the defendant and the subsequent review. 31 Wn.App. at 131. That made the amendment “disruptive.” In contrast, BSA II’s amendment is not disruptive, as rather than attempting to defeat the summary judgment of setoff and delay review, the amendment is intended to facilitate review of the summary judgment.

*Doyle* cites *Trust Fund Services, Inc. v. Glasscar*, 19 Wn.App. 736, 577 P.2d 980 (1978) to support denial of a “disruptive” amendment. In *Trust Fund*, the defendant attempted after a summary judgment ruling to raise the defense that the plaintiff did not have capacity to sue, which was too late. 19 Wn.App. at 744-5. Here, WaferTech raised its objection to the name BSofA as a defense after summary judgment. In essence, WaferTech’s cited authority regarding amendment implies it is too late for WaferTech to object to the plaintiff being named BSofA.

WaferTech’s tactic of waiting until after trial and a subsequent summary judgment prior to asserting an affirmative defense was rebuked by our Supreme Court, where such a delay was described as lying “in

wait.” *Lybbert v. Grant Co.*, 141 Wn.2d 29, 40, 1 P.3d 1124 (1990). The defense was waived. *Id.*

WaferTech then asserts amendment should be denied because the plaintiff to be named is a dissolved corporation, but that dissolution does not prejudice WaferTech in its defense. WaferTech cites one unpublished Delaware decision that a dissolved corporation cannot pursue an appeal, while ignoring three elements of the decision that undercut’s WaferTech’s position: (1) the dissolved corporation did not appear through counsel, as required, providing an independent basis for the dismissal, (2) the decision does not address Del. C. Tit. 8 § 278, the Delaware statute that grants a dissolved corporation standing to be a party to litigation, and (3) the decision does not address or distinguish other Delaware decisions recognizing a dissolved corporation’s standing to pursue litigation.

Subsequent to the unpublished decision, the same court decided *Citywide Investing, supra* (cited by BSA II in its Opening Brief), recognizing a dissolved Delaware corporation’s standing. This is in accord with other published Delaware decisions. *Frederic G. Krapf & Son, Inc. v. Gorson*, 243 A.2d 713, 715 (Del. 1968); *U.S. Virgin Islands v. Goldman Sachs*, 937 A.2d 760, 788 (Del. Ch. 2007); *In re RegO Co.*, 623 A.2d 92, 96 (Del. Ch. 1992).

WaferTech urges dismissal of the appeal under RAP 3.1, which requires that appeals be pursued by an “aggrieved party.” WaferTech ignores that BSA II filed the Notice of Appeal initiating this appeal. WaferTech also ignores that even if BSA II is not considered the appellant, it can still be an aggrieved party, as long as it has a pecuniary interest in the outcome. A non-party may be an “aggrieved party.” *Breda v. B.P.O. Elks Lake City*, 120 Wn.App. 351, 353, 90 P.3d 1079 (2004) (cited by WaferTech). There, the court noted that a non-party ordered to pay attorney’s fees by the trial court was an “aggrieved party” who could appeal that order. *Id.* BSA II, as assignee of the lien claim adjudicated in the summary judgment, has a pecuniary interest in the outcome of this appeal, even it was not a named party.

Neither of the other authorities cited at p. 27 of Respondent’s Brief support dismissal of this appeal. In *Roth v. Drainage Imp. Dist. No. 5 of Clark County*, 64 Wn.2d 586, 392 P.2d 1012 (1964), the plaintiff sued an entity that never existed, and made no attempt to amend to name an existing entity as defendant. BSA II existed and is seeking to amend.

WaferTech does not state the rule for which it cites *Polygon Northwest Co. v. American Nat’l Fire Ins. Co.*, 143 Wn.App. 753, 189 P.3d 777 (2008). There, the defendant who sought to appeal was not “aggrieved” by trial court’s decision on claims against other defendants, as

it had settled the claims against it. BSA II has not settled its claim against WaferTech, so it is aggrieved by the summary judgment.

If this Court does not want the plaintiff to be named BSofA or BSA II, it can reinstate Natkin/Scott, the original plaintiff, as plaintiff, applying CR 25(c). That rule addresses the transfer of a party's interest while the action is pending. After Natkin/Scott assigned its lien claim in 1999, while the action was pending, the correct plaintiff could remain Natkin/Scott (the court may allow the action to continue in the original plaintiff's name). The assignee is bound by the result whether named as a party or not. *Stella Sales, Inc. v. Johnson*, 97 Wn.App. 11, 17-8, 985 P.2d 291 (1999).

C. WaferTech misstates setoff by focusing on claims and damages sought, rather than damages recovered.

In Sections G-J of WaferTech's brief, WaferTech focuses on equitable setoff. WaferTech relies upon a misrepresentation of the record as to what the trial court ruled in 2002, contradicts its own characterization in 2001 of BSA II's claim adjudicated by the trial court in 2002, and misstates the law of setoff, in making its argument.

1. Setoff is within the scope of review.

WaferTech asserts that the setoff question is outside the scope of review, without even citing RAP 2.4, entitled "Scope of Review of a Trial



Court Decision.” RAP 2.4(a) provides that the appellate court reviews any decision designated in the notice of appeal.” The summary judgment on setoff was designated in the Notice of Appeal in 2013. CP 604. This Court has yet to review that decision.

RAP 2.4(b) provides that a notice of review brings up for decision any order that “prejudicially affects the decision designated in the notice.” The Notice of Appeal in 2015 arose out of the final decision by the trial court following this Court’s remand without reviewing the summary judgment re setoff. BSA II is entitled to have this Court review the summary judgment of setoff appealed in 2013.

WaferTech’s position that “law of the case” precludes this Court from addressing an issue raised in a prior appeal (such as the 2013 summary judgment) was rejected by this Court in *State v. Trask*, 98 Wn.App. 690, 990 P.2d 976 (2000). There, in a second appeal, this Court rejected the assertion that it was precluded from considering any issue it failed to consider, or inaccurately or incompletely considered, in the first appeal. 98 Wn.App. at 695.

2. BSA II’s recovery from M+W must be allocated to damages for which WaferTech is not liable.

In addressing setoff, WaferTech does not address the aspect of setoff requiring the court to allocate, where possible, a plaintiff’s recovery

from a settling defendant to damages for which the non-settling defendant is not liable. There is no requirement the plaintiff so allocate the recovery, only that the recovery could be allocated in that manner. BSA II's recovery from M+W could be allocated to damages for work prior to January 31, 1998.

WaferTech seeks to avoid the allocation of the \$2.4 settlement to BSA II's damages for work prior to January 31, 1998, by mischaracterizing the trial court's ruling in 2002. Despite its prior briefing in 2001 distinguishing the settled contract claim against M+W from the subsequent contract claim against WaferTech, and clear language in its 2002 motion and order that only BSA II's contract claim against WaferTech was being limited, WaferTech now erroneously states the order limited BSA II's settled contract claim against M+W.

In addition to the textual problem with WaferTech's revisionist history regarding its own motion, there is a legal problem. It violates the finality and *res judicata* effect of a settlement. A compromise agreement operates as a final judgment, and is "res judicata of all matters relating to the subject matter of the dispute." *Rasmussen v. Allstate Ins. Co.*, 45 Wn.App. 635, 637, 726 P.2d 1251 (1986). *Res judicata* applies to any defenses that could have been raised. *Loveridge v. Fred Meyer, Inc.*, 125 Wn.2d 759, 763, 887 P.2d 898 (1995). If M+W had a defense to any part

of BSA II's contract claim against M+W, including recovery of the \$3.5 million in damages for work through January 31, 1998, that defense was merged into the settlement and could not be asserted by M+W or WaferTech.

With the language of its own 2002 motion and the law of *res judicata* against it, WaferTech gets desperate. WaferTech misleads by asserting BSA II was seeking the same damages (for its work on the entire project) from two defendants. This was true at one time, when WaferTech was asserting a contract claim against M+W and a lien claim against WaferTech for work throughout the project, but is no longer true, as the lien claim has been limited to work after January 31, 1998.

WaferTech then contradicts itself when it states that after settlement with M+W, BSA II asserted the same claim against WaferTech it previously asserted against M+W. WaferTech's own briefing after settlement correctly stated that BSA II's new contract claim against WaferTech was M+W's claim, under which BSA II could *not* recover from WaferTech all the damages BSA II could have recovered from M+W. Supp. CP \_\_ (Sub. No. 578). BSA II could only recover the damages that M+W could have recovered from WaferTech. *Id.* WaferTech's deception regarding claims is pointless, as setoff focuses on

damages a party recovers, not the claims it asserts or the damages it seeks, but shows the weakness of WaferTech's position.

3. WaferTech misapplies setoff law.

WaferTech relies heavily on *Eagle Point Condo. Owners Ass'n v. Coy*, 102 Wn.App. 697, 9 P.3d 898 (2000), to support its setoff argument, but subtly misstates its holding. WaferTech cites it for the proposition that when a plaintiff sues two defendants for the same injury and then settles with one, "the non-settling defendant is entitled to a setoff of the settlement amount." Respondent's Brief, p. 29. In *Eagle Point*, the settlement amount was \$65,000, but there was only a \$55,000 setoff. There is a "setoff of the settlement amount" only under conditions not present in *Eagle Point* or here.

In *Eagle Point*, the \$10,000 difference between settlement amount and setoff was the \$10,000 in damages the plaintiffs could recover against the settling defendant, but not the non-settling defendant. The court noted there would be no double recovery of those damages, so it excluded \$10,000 from the setoff:

Because there was no danger of a double recovery for those defects [the \$10,000 in damages], it was not inequitable to reduce the offset by the amount of [the unit owner's] damage.

102 Wn.App. at 703. It did not matter that plaintiffs did not allocate any of the \$65,000 settlement to those \$10,000 in damages. *Id.*

Here, there is no danger that BSA II will obtain a double recovery of any of its damages. There were \$3.5 million in damages that BSA II could recover from M+W for work prior to January 31, 1998, that BSA II cannot recover from WaferTech. The entire \$2.4 million recovered from M+W can be allocated to those \$3.5 million in damages, so there is no setoff for WaferTech.

WaferTech futilely attempts to distinguish *Weyerhaeuser, supra*, and *Puget Sound Energy, supra*, both cited by BSA II, by noting there the settling and non-settling defendants faced different risks, which precluded setoff. WaferTech ignores that M+W faced a different set of risks at the time of settlement (damages for work through January 31, 1998) than that now faced by WaferTech (damages for work after January 31, 1998 only). WaferTech is in the same position as the non-settling defendants in *Weyerhaeuser* and *Puget Sound Energy* who were not entitled to a setoff.

WaferTech, having failed to show that the prerequisites for a setoff were even present, asks this court to affirm the setoff under an abuse of discretion standard. A trial court abuses its discretion if it bases it on untenable grounds, such as misunderstanding the law. *Nepstad v. Beasley*, 77 Wn.App. 459, 468, 892 P.2d 110 (1995). Here, the trial court

misunderstood the requirements for setoff. There is no possibility BSA II will recover the same damages from WaferTech that it recovered from M+W, so there can be no setoff.

**VI. Conclusion**

WaferTech fails to address the lack of prejudice from BSA II's CR 15 motion, when such prejudice was necessary to support the trial court's denial. WaferTech also misrepresents the record in order to mislead this Court into believing BSA II's recovery from M+W was for the same damages for which BSA II seeks recovery from WaferTech. Without that misrepresentation, there can be no double recovery by BSA II of the same damages, so the trial court erred in granting setoff.

DATED this 23<sup>rd</sup> day of November, 2015.

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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 23rd day of November, 2015, to:

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