No. 94088-0

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.

PETITION FOR REVIEW

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A. INTRODUCTION AND IDENTITY OF PETITIONER

Business Service America II, Inc. ("BSA II") asks the court to accept review of the Court of Appeals decision designated in Part B of this Petition. That decision terminated review of a final judgment appealable as a matter of right under RAP 2.2(a)(1), without reaching the merits of the judgment appealed. The decision conflicts with settled law and violates RAP 1.2(a) exhorting the Court of Appeals to reach a decision on the merits. The rules are to be applied to reach the merits, not adjudicate actions on technicalities. *Fox v. Sackman*, 22 Wn.App. 707, 709, 591 P.2d 855 (1979). The decision makes a mockery of the right of review under RAP 2.2(a)(1).

The basis for the Court of Appeals avoiding review on the merits was the plaintiff's supposed lack of capacity, a pleading objection the defendant waived by waiting thirteen years before raising it while the action was on appeal for the third time. The result was to deny BSA II any recovery on a $4 million lien claim.

The Court of Appeals failed to apply numerous applicable court rules and legal authority, including: (1) CR 12 regarding waiver of objections to a plaintiff's capacity to sue, (2) CR 15 permitting a party to amend to address a capacity objection, (3) CR 25 permitting substitution of an assignee or the action continuing in the name of the assignor, and (4)

case law that an assigned claim can be adjudicated even though the assignee is not named as a party.

This Petition arises over eighteen years after the original plaintiff properly commenced this action in 1998 to foreclose its mechanic's lien against defendant WaferTech LLC. The plaintiff assigned its claim to BSA II. BSA II, as assignee, was made the plaintiff in 2001, but was mistakenly named Business Services of America II, Inc., ("BSofA") in the amended complaint, rather than BSA II.

BSA II and BSofA are not separate entities. There is no evidence a corporation named BSofA ever existed. CP 767. BSA II and BSofA both refer to the same entity. The misidentification of the assignee as "Business Services of America II, Inc." rather than "Business Service America II, Inc." originated in a letter from WaferTech's counsel to BSA II's counsel. CP 702-3. There is no evidence in the record that WaferTech or its counsel was ever confused as to the identity of the plaintiff.

There was a trial in 2002, then an appeal, with BSA II's lien claim remanded to the trial court. In 2013, the trial court entered a summary judgment in favor of WaferTech, which BSA II timely appealed.

The Court of Appeals never reviewed the summary judgment. Instead, after WaferTech objected to the appeal being pursued by BSofA,

the Court of Appeals remanded to the trial court for proceedings regarding BSofA's capacity and ability to pursue the appeal, despite WaferTech having never objected to BSofA's capacity in the trial court, waiving any capacity objection. Washington courts are unanimous that a defendant who fails to timely object to the plaintiff's capacity in the trial court waives such an objection. *Dearborn Lumber Co. v. Upton Enterprises, Inc.*, 34 Wn.App. 490, 493, 662 P.2d 76 (1983); *Trust Fund Services v. Glasscar, Inc.*, 19 Wn.App. 736, 745, 577 P.2d 980 (1978).

When the action was remanded to the trial court, BSA II moved under CR 15 and CR 25 to address WaferTech's waived capacity objection by changing the plaintiff's name from BSofA to BSA II. Inexplicably, the trial court denied the motions. CR 15 motions that only change the plaintiff are routinely granted. *Sprague v. Sysco Corp.*, 97 Wn.App. 169, 172, 982 P.2d 1202 (1999). Instead, the trial court ruled that BSofA lacked the capacity to sue.

After the action returned to the Court of Appeals, BSA II sought review of the trial court's denial of its CR 15 and CR 25 motions. The Court of Appeals did not address WaferTech's waiver of its capacity objection or BSA II's CR 15 or CR 25 motions. The Court of Appeals affirmed BSofA's lack of capacity, terminating review without addressing the effect, if any, of BSofA's lack of capacity on the action.

The end result is that by refusing to review the summary judgment, and instead focusing on a waived and correctible objection to capacity (a pleading matter), the Court of Appeals failed to decide the merits of BSA II's $4 million lien claim, denying any recovery.

B. COURT OF APPEALS DECISION

The Court of Appeals, Div. II, issued a decision dated October 18, 2016, terminating review, and then denied a motion for reconsideration on December 28, 2016. A copy of the opinion is in the Appendix at A-1 through A-7. A copy of the order denying reconsideration is in the Appendix at A-8.

C. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals err by ignoring prior appellate court decisions that a defendant who fails to timely move under CR 12 to object to the plaintiff's capacity prior to trial waives that objection?

2. Did the Court of Appeals err by ignoring prior appellate court decisions that a plaintiff is entitled to address objections to capacity prior to the court taking any adverse action on the plaintiff's claims?

3. Will review of the Court of Appeals decision bring up for review WaferTech's waiver of its objection to BSofA's capacity and BSA II's right to address that objection?

4. Is review necessary to avoid having BSA II's $4 million claim determined by a pleading error (a typographical error)?

D. STATEMENT OF THE CASE

The history of this action has been that BSA II has been engaged in the almost Sisyphean task of pushing this matter forward to obtain an adjudication on the merits, with WaferTech repeatedly trying to avoid it.

1. This action was commenced by a subcontractor on a large construction project to foreclose a mechanic's lien for which it is seeking over $4 million.

The original plaintiff in this action, Natkin/Scott, commenced this action under RCW 60.04.171 to foreclose its mechanic's lien for work as a subcontractor on a large construction project owned by WaferTech. CP 1. The contract price of the unpaid work was over $1.1 million. CP 534. With prejudgment interest for over eighteen years, plus attorney's fees as the prevailing party, BSA II now seeks over $4 million.

2. WaferTech did not object to the substitution of BSofA as the plaintiff prior to trial of the lien claim in 2002.

Natkin/Scott assigned its lien claim to BSA II in exchange for valuable consideration. CP 707. BSA II has debts that will be paid out of the proceeds of BSA II's recovery. CP 708.

Relying upon the assignment documents naming BSA II as the assignee, WaferTech moved to require that BSA II, as the real party in

interest, be made the plaintiff. CP 997. BSA II then filed the second amended complaint, asserting the lien claim. CP 698. The amended complaint incorrectly named the plaintiff/assignee BSofA. CP 698.

WaferTech did not plead an objection to the capacity of BSofA to sue in its answer. CP 117. WaferTech never filed a motion in the trial court asserting BSofA lacked capacity.

3. BSofA was twice named as the judgment debtor and appellant, without objection by WaferTech.

After a trial in 2002 in which WaferTech prevailed on an affirmative defense, WaferTech obtained a judgment against "BSofA" for nearly $800,000 in attorney's fees and costs under RCW 60.04.181(3) as the prevailing party. CP 608. That judgment was satisfied. CP 284. The Court of Appeals remanded the lien claim for further proceedings. Unpublished Opinion (March 9, 2004).

There was a dismissal and second judgment against "BSofA" for attorney's fees in 2009, which this court reversed. *Business Services of America II, Inc. v. WaferTech LLC*, 174 Wn.2d 304, 274 P.3d 1025 (2014).

After remand, the trial court granted summary judgment to WaferTech on a different affirmative defense in 2013. CP 572. It then

entered a third judgment against "BSofA." CP 616. BSA II (identified as BSofA) timely appealed. CP 604.

4. WaferTech suddenly objected to the plaintiff's capacity while the action was on appeal in 2014.

During the appeal in 2014, WaferTech suddenly moved to dismiss the appeal on the ground that "BSofA" was not an "aggrieved party" under RAP 3.1. BSA II opposed the motion. The commissioner denied the motion without prejudice to WaferTech raising it again in its brief. Commissioner's Ruling, January 9, 2014.

BSA II attempted to address WaferTech's objection to BSofA by moving in the trial court under CR 60(a) to change the name of the plaintiff in the judgment being appealed to BSA II, the name of the assignee. CP 637, 669. The trial court denied the motion without entering any findings regarding the correct name of the assignee. CP 690. BSA II again appealed. CP 693. The commissioner consolidated the two appeals.

The Court of Appeals did not rule on WaferTech's renewed RAP 3.1 motion contained in its brief, nor did it rule on the merits of the summary judgment in 2013. It remanded the action to the trial court to determine the BSofA's capacity and ability to pursue the appeal. Unpublished Opinion, p. 14 (October 21, 2014). In the opinion, it incorrectly stated the assignment document from Natkin/Scott to BSA II

was not in the trial court record. Unpublished Opinion, p. 8 (October 21, 2014). That document was filed in the trial court in 2001. CP 1073-1106.

3. BSA II again attempted to address WaferTech's capacity objection after remand in 2014.

On remand, the trial court denied BSA II's motions under CR 15 and CR 25 to address WaferTech's objection to BSofA's capacity, without finding (1) that BSofA was the name of the assignee or (2) any prejudice to WaferTech if it granted any of the motions. CP 766. The trial court ruled BSofA lacked capacity. *Id.*

BSA II appealed the order denying its CR 15 and CR 25 motions. CP 770. BSA II assigned error to the trial court's 2013 summary judgment and denial of its CR 15 and CR 25 motions. BSA II's Opening Brief, Ass. of Err. Nos. 1 and 6, pp. 2-3.

4. The Court of Appeals affirmed the trial court's ruling that the plaintiff lacked capacity, but ignored WaferTech's waiver of its objection and the trial court's denial of BSA II's CR 15 and CR 25 motions.

The Court of Appeals then issued its latest opinion terminating review on the basis of BSofA's lack of capacity, in effect granting WaferTech's RAP 3.1 motion, but ignoring (1) WaferTech's waiver of its objection, and (2) BSA II's efforts under CR 15 and CR 25 to address WaferTech's waived objection. The opinion did not address what effect,

if any, BSofA's lack of capacity had on the action, or the merits of the summary judgment in 2013.

E. SUMMARY OF ARGUMENT

Petitions for review are granted when the Court of Appeals decision conflicts with other Court of Appeals decisions and Supreme Court decisions. RAP 13.4(b)(1) and (2). This Petition shows that the Court of Appeals' decision conflicts with, and fails to address, settled law on (1) waivers of objections to capacity, and (2) the right to address objections to capacity prior to courts taking any adverse action based on the objection.

The decision this Petition seeks to review was the final decision by the Court of Appeals on WaferTech's motion to dismiss the appeal of a summary judgment based on the appellant's lack of capacity, so it brings up for review that summary judgment and any issues related to capacity.

By ignoring settled law on objections to capacity, the Court of Appeals avoided addressing the merits of the summary judgment entered in 2013 on the $4 million lien claim. Without review by this court, BSA II will be denied appellate review of a final judgment based on a typographical error in its name that had no effect on the action, as BSA II is already bound by the results in this action.

F. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. The Court of Appeals' decision conflicts with other decisions regarding waiver of objections to capacity.

WaferTech waived any objection it had to BSofA's alleged lack of capacity by waiting until the action was on appeal in 2014 to raise the objection for the first time. An objection to capacity is waived if not timely raised in the trial court. *Dearborn Lumber*, 34 Wn.App. at 493; *Trust Fund Services*, 19 Wn.App. at 745.

Here, WaferTech's motion to dismiss the 2013 appeal of the summary judgment based on BSofA's lack of capacity was twelve years too late and in the wrong court. The second amended complaint with "BSofA" asserting a lien claim was filed in 2001, with trial of the lien claim in 2002. WaferTech was obligated object to BSofA's lack of capacity by motion in the trial court prior to trial in 2002. When WaferTech failed to do so, it waived its objection.

Waiver of capacity objections is settled law. In *Dearborn Lumber*, the defendant waited until trial to object to the plaintiff's capacity. 34 Wn.App. at 492. The defendant argued on appeal that the plaintiff lacked capacity. The Court of Appeals ruled the requirement to timely object prior to trial was so clear (it cited decisions from 1912 and 1916),

that the defendant was pursuing a frivolous appeal, sanctioning the defendant. 34 Wn.App. at 494.

In *Trust Fund Services*, the defendant sought to raise an objection to the plaintiff's capacity in the trial court *after* a summary judgment hearing. The appellate court noted that the defendant "did not comply with the requirements" for timely objecting to capacity, denying the objection. 19 Wn.App. at 745.

Federal courts, applying comparable rules on objections to capacity to our Civil Rules, agree that the objection is waived if not asserted by motion prior to trial. Wright & Miller, *Fed. Prac. & Pro.: Civil 3d* § 1295, pp. 27-29 (2004); 2 *Moore's Fed. Prac.* § 9.02[6], p. 9-15 (3rd Ed. 2016).

Lack of capacity is not a jurisdictional issue that cannot be waived under CR 12(h)(3); it is a defense in the nature of a failure to state a claim governed by CR 12(h)(2). *Foothills Dev't Co. v. Clark County Bd. of County Com'rs*, 46 Wn.App. 369, 730 P.2d 1369 (1986) (defendant timely raised its capacity objection prior to trial, so it was not waived).

The only authority on capacity cited by the Court of Appeals was *Roth v. Drainage Improvement Dist. No. 5*, 64 Wn.2d 586, 392 P.2d 1012 (1964). There, the defendant timely raised the lack of capacity objection by motion prior to trial. 64 Wn.2d at 587. Nowhere does *Roth* state that

the objection cannot be waived or that it can be raised for the first time on appeal. *Roth* does not support the Court of Appeals' decision.

The Court of Appeals should have denied WaferTech's motion to dismiss the appeal, proceeding to review the summary judgment. BSA II, as Natkin/Scott's assignee, would still be bound by the result. An assignee is bound by the results whether made a party or not. *Stella Sales, Inc. v. Johnson*, 97 Wn.App. 11, 17-8, 985 P.2d 391 (1999).

2. The Court of Appeals decision conflicts with prior decisions allowing a party to address objections to capacity, either by amendment, substitution, or ratification.

Even though it was not necessary to name BSA II as the plaintiff in order to deny WaferTech's motion to dismiss the appeal of the 2013 summary judgment, BSA II sought to do so. The Court of Appeals acted contrary to prior appellate decisions by affirming, without explanation, the trial court's refusal to name BSA II, a party with capacity that was already bound by the result, the plaintiff. A proper objection to capacity is not intended to be dispositive, as it does not prevent a plaintiff *with* capacity from pursuing the claim. *Roth*, 64 Wn.2d at 587.

There are numerous avenues for addressing an objection to capacity, or where here, there is an error in naming the plaintiff, including amendment, substitution, and/or ratification. An objection to a plaintiff's capacity may be addressed by amending under CR 15 to name as plaintiff

a party with capacity. *Lewis v. Root*, 53 Wn.2d 781, 786, 337 P.2d 52 (1959). An amendment to change the plaintiff can be made after judgment, as such an "amendment changes nothing except who benefits from the action." *Miller v. Campbell*, 164 Wn.2d 529, 537-9, 192 P.3d 352 (2008).

When the wrong party is named in a pleading, the party making the mistake is permitted to amend to correct the error, as "[d]ismissal should not be granted on a mere technicality easily remedied by amendment." *In re Marriage of Morrison*, 26 Wn.App. 571, 573, 613 P.2d 557 (1980).

Where, as here, there has been an assignment while the action was pending, CR 25(c) applies. Orland & Tegland, *3A Wash. Prac.: Rules Prac. CR 25*, p. 560 (2006). The action may continue in the name of the original plaintiff, unless the court directs that the assignee be substituted or joined. CR 25(c). The trial court here never required that BSA II be made the plaintiff, as WaferTech requested in 2001. The action could be pursued in the name of Natkin/Scott, the original plaintiff.

The Court of Appeals should have denied WaferTech's motion to dismiss BSA II's appeal of the summary judgment based on WaferTech's objection to BSofA being the plaintiff, instead of remanding to the trial court. When it did remand, there was no basis to deny BSA II's CR 15 and CR 25 motions in response to WaferTech's motion.

3. WaferTech's waiver of its objection to BSofA's capacity and BSA II's attempts to address that objection are within the scope of review of the Court of Appeals' decision terminating review.

BSA II is seeking review of the Court of Appeals' decision to terminate review based on BSofA's lack of capacity. BSA II was the appellant below, entitled to seek review of that decision. A party may seek review in this court of any Court of Appeals' decision terminating review. RAP 13.3(a)(1).

BSA II was Natkin/Scott's assignee intending to use the proceeds to pay its debts, giving it a pecuniary interest in the $4 million lien claim. That makes BSA II an aggrieved party. "An aggrieved party is one whose proprietary, pecuniary, or personal rights are substantially affected." *Cooper v. City of Tacoma,* 47 Wn.App. 315, 316, 734 P.2d 541 (1987).

In reviewing the Court of Appeals' decision to terminate review based on BSofA's lack of capacity, which effectively granted WaferTech's RAP 3.1 motion, it is relevant whether (1) WaferTech waived its objection to BSofA's capacity or (2) BSA II was entitled to address WaferTech's objection to avoid dismissal based on that objection. If WaferTech waived the objection or BSA II properly addressed it, the Court of Appeals should have denied the RAP 3.1 motion.

The trial court denied BSA II's CR 15 and CR 25 motions to address WaferTech's objection to BSofA's lack of capacity. Granting either motion would have rendered WaferTech's RAP 3.1 motion moot, as BSofA would no longer be the plaintiff/appellant. Denial of the CR 15 and 25 motions in effect determined the action. Decisions that in effect determine an action are appealable as a matter of right. RAP 2.2(a)(3).

BSA II's post-remand motions under CR 15 and 25 to address BSofA's alleged lack of capacity were within the scope of the 2014 mandate. The remand was directed to "determine BSofA's legal status and BSofA's ability to pursue its appeal against WaferTech." BSofA's legal status was that it never existed; it was a misnomer for BSA II, the assignee, which the CR 15 and CR 25 motions addressed.

In addition, upon remand, the trial court is authorized to "hear and decide postjudgment motions" that "do not challenge issues already decided by the appellate court." RAP 12.2. The Court of Appeals had never decided whether BSA II could amend under CR 15 or be substituted under CR 25, prior to BSA II filing those motions, nor had there been any findings or rulings that BSA II was not the assignee at the time of the amended complaint naming the assignee as BSofA.

CR 15 and CR 25 motions can be made after judgment is entered. *Ennis v. Ring*, 56 Wn.2d 465, 470, 353 P.2d 950 (1960) (CR 15 motion

can be made at any time, even after judgment and appeal); *Stella Sales*, 97 Wn.App. at 18 (CR 25 motion may be made after entry of judgment). Both this court and the Court of Appeals noted in a prior appeal in this action that the Civil Rules apply upon remand. *Business Services of America II*, 174 Wn.2d at 310.

The proceedings after the remand in 2014 were BSA II's first opportunity to use CR 15 and CR 25 to address WaferTech's capacity objection. If WaferTech had properly objected in the trial court, there would have been no issue as to whether BSA II could use CR 15 and/or CR 25 to address WaferTech's objection. To deny review of the CR 15 and CR 25 motions based on the 2014 mandate would reward WaferTech for improperly waiting until appeal to object to BSofA's capacity.

Once the Court of Appeals did not deny WaferTech's motion to dismiss the appeal, relief under CR 15 or CR 25 would be a basis for denying the motion to dismiss the appeal. That made those motions determinative, with the Court of Appeals obligated to review them. The appellate court must review and decide all determinative issues. *Hall v. American Nat'l Plastics, Inc.*, 73 Wn.2d 203, 205, 437 P.2d 693 (1968).

Once WaferTech's motion to dismiss the appeal was denied, the Court of Appeals then would have proceeded to properly review the merits of the appeal, which was the summary judgment on the $4 million lien

claim. The summary judgment was a final judgment appealable as a matter of right under RAP 2.2(a)(1).

"Law of the case" does not bar review of the summary judgment. RAP 12.7(d) provides that RAP 2.5(c)(2) is an exception to the finality of a mandate. Under RAP 2.5(c)(2), prior appellate court decisions may be reviewed "where justice would best be served." Prior decisions are reviewed where to not do so would work an injustice to one party. *Folsom v. City of Spokane*, 111 Wn.2d 256, 264, 759 P.2d 1196 (1988).

It would be an injustice to BSA II and its creditors to deny review of a summary judgment, and ultimately any recovery for a $4 million lien claim, on the basis of an untimely, waived, and easily correctible objection to the plaintiff's capacity. A right of appeal, which BSA II timely exercised in 2013 after the summary judgment, is meaningless if the Court of Appeals never reviews the matter appealed.

This court has made clear that no prior decisions by the Court of Appeals are beyond review by this court. In *First Small Business Investment Co. of California v. Intercapital Corp. of Oregon*, 108 Wn.2d 324, 738 P.2d 263 (1987), there was a final decision in the Court of Appeals and remand to the trial court. In a subsequent appeal, a party challenged this court's authority to review the Court of Appeals' prior final decision. This court held it could review it.

In *Greene v. W.R. Rothschild*, 68 Wn.2d 1, 402 P.2d 356 (1965), this court, in a second appeal, overruled its own remand in the first appeal, once it determined the decision upon which the remand was based was erroneous. 68 Wn.2d at 5. The remand here in 2014 to address BSofA's capacity, when WaferTech had already waived its objection to capacity such that it could not be a proper basis to terminate review, was erroneous. The 2014 remand does not prevent correcting that error.

4. Review is necessary to adjudicate the action on its merits, rather than a typographical error.

The Court of Appeals decision to terminate review based on a capacity objection avoided the merits of the action. Courts should not be looking for technicalities to avoid reviewing the merits of an action. Courts are to decide actions on their merits, not "dispose of cases on technical niceties." *Rinke v. Johns-Manville*, 47 Wn.App. 222, 227, 734 P.2d 533 (1987); *Fox v. Sackman*, 22 Wn.App. at 709.

WaferTech's motion to dismiss the 2013 was both frivolous and disingenuous. Raising an objection to a party's capacity on appeal, as WaferTech did, is too late, for which the defendant in *Dearborn Lumber*, *supra*, was sanctioned for being frivolous.

WaferTech's motion was disingenuous, given WaferTech's knowledge in 2001 that BSA II was the name of the original plaintiff's

assignee, such that WaferTech was never confused about the plaintiff's identity, which WaferTech did not disclose.

The sole basis for WaferTech's objection is the typographical error in BSA II's name. Actions are not determined based on discrepancies or mistakes in parties' names. *Entranco Eng'rs v. Envirodyne, Inc.*, 34 Wn.App. 503, 507, 662 P.2d 73 (1983); *In re Marriage of Morrison*, 26 Wn.App. at 573. Courts correct or ignore them in order to reach the merits.

Whether BSofA has capacity is not relevant if BSofA is not the assignee, and the assignee is seeking to be named as the plaintiff. The parties agree, and the documents in the record show, BSA II was the assignee. It is bound by the results. The Court of Appeals erred in terminating review based on BSofA's lack of capacity.

While BSA II attempted to promptly address WaferTech's objection (which it was not required to do) by moving in the trial court under CR 60(a), perhaps a motion under RAP 3.2 would have been better procedurally. Either motion, if granted, would lead to the same result, which is to have the plaintiff be BSA II instead of BSofA. (The CR 15 and CR 25 motions would also lead to this same result.) Whether RAP 3.2 or CR 60(a) was the proper procedure, or there was another better procedural option, deciding to not review the 2013 summary judgment on

the basis of whether BSA II used the proper procedure to change the name of the plaintiff is elevating form over substance, in violation of RAP 1.2(a).

G. CONCLUSION

Without justification or authority, the Court of Appeals dismissed an appeal of a final judgment rather than reviewing the merits. For the reasons set forth in the foregoing Petition, this court should accept review to address the injustice perpetrated by the Court of Appeals' failure to decide the appeal on the merits.

DATED this 27th day of January, 2017.

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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 27th day of January, 2017, to:

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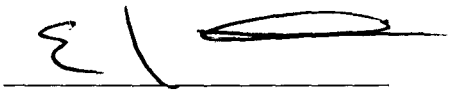

Eric R. Hultman

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.

[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.

[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.

[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.
SUTTON, J.

We concur:

Johanson, J.
JOHANSON, P.J.

J
LEE, J.

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 ORDER GRANTING MOTION TO STRIKE REPLY TO MOTION FOR RECONSIDERATION AND ORDER DENYING MOTION FOR RECONSIDERATION

RESPONDENT filed a motion to strike appellant's reply to the motion for reconsideration. Upon consideration, the Court grants the motion to strike.

APPELLANT moves for reconsideration of the Court's **October 18, 2016** opinion. Upon consideration, the Court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Johanson, Lee, Sutton

DATED this 28th day of December, 2016.

FOR THE COURT:

Johanson, J.
PRESIDING JUDGE

cc: James T. McDermott
Howard Mark Goodfriend
Eric Ronald Hultman
Gabriel Matthew Weaver
Bradley Scott Shannon