No. 94088-6

SUPREME COURT
OF THE STATE OF WASHINGTON

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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# REPLY SUPPORTING PETITION FOR REVIEW

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

Prof. Bradley Shannon, WSB #18370
Florida Coastal School of Law
8787 Baypine Road
Jacksonville, FL 32256
(904) 680-7745

Attorneys for Petitioner Business Service America II, Inc.

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## I. INTRODUCTION

Many of us may recall a time in school when all the students were diligently working on a test or assignment. Suddenly, one student (maybe us) proudly rose up while the rest of students were not even close to being done, and strode confidently to the teacher's desk to turn in their paper, only to have the teacher turn it over to show the back side with additional questions to be answered.

The Court of Appeals here is that student, having completed the task of determining whether Business Services of America II, Inc. ("BSofA), the named plaintiff, ever existed, and considered its work done (the front page). This is shown by the conclusion of the Court of Appeals' decision regarding capacity:

> 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 capacity to sue or be sued.

October 18, 2016, Opinion at 7.

The problem with the court's decision is not what it says, but that it does not go on to address necessary issues related to BSofA's capacity objection, such as (1) WaferTech's waiver in 2002 of its objection to BSofA's capacity, which was improperly raised in 2014 while the action was on appeal, and (2) the right of Business Service America II, Inc.

("BSA II"), the assignee of the original plaintiff's claim, to address WaferTech's objection by amendment, substitution and/or ratification (which it attempted to do) before the Court of Appeals took adverse action based on the capacity objection (the back of the page).

BSA II respectfully asks this court to be the teacher, and point out the additional issues the Court of Appeals failed to address regarding WaferTech's capacity objection. The Court of Appeals must also review the merits of the summary judgment appealed in 2013 and never reviewed.

After this court accepts review, it can address the issues the Court of Appeals failed to address, or merely remand to the Court of Appeals with instructions for it to address those issues. That is the only way to exonerate BSA II's right of review under RAP 2.2(a) and comply with the requirement of RAP 1.2(a) to issue decisions on the merits.

WaferTech's new "issues" do not excuse or justify the Court of Appeals failure to decide all issues related to WaferTech's capacity objection. Whether the Court of Appeals addresses those intertwined issues, as required by court rules and *stare decisis*, in an action involving a $4 million claim seeking a remedy provided by RCW 60.04.171, which will ultimately benefit BSA II's creditors, pursued in the courts for over eighteen years, is a matter of substantial public interest under RAP 13.4(b).

The rest of this reply addresses some specific errors and deficiencies in WaferTech's Answer, but all that this court needs to understand to accept review is that there are additional issues regarding objections to capacity that must be addressed to fulfill BSA II's right of review under RAP 2.2(a).

## II. REPLY TO NEW FACTS IN WAFERTECH'S RESTATMENT OF THE CASE

WaferTech's Restatement of the Case does not point out where it contradicts BSA II Statement of the Case. It includes numerous facts only relevant to the summary judgment entered in 2013, which the Court of Appeals failed to review, prompting BSA II's Petition for Review. The Court of Appeals never even explicitly ruled on WaferTech's motion under RAP 3.1 to dismiss the appeal of the summary judgment, instead just terminating review after determining the capacity issue.

WaferTech makes an admission regarding its knowledge, more than a year prior to its motion to dismiss the appeal based on the named plaintiff's lack of capacity, that capacity was an issue, at least for WaferTech. At pp. 4-5, WaferTech points out that in July 2012 it asserted that BSofA was **not** a Delaware corporation. WaferTech does not explain why it waited until January 2014, after summary judgment and appeal, to raise that issue by motion.

WaferTech asserts at p. 5 that BSofA's surety paid WaferTech's 2002 judgment naming BSofA as the judgment debtor, without citing to the record, but then later asserts at p. 9 that BSofA never existed. WaferTech never explains how a non-existent entity was able to pay a surety the premium for a bond in excess of $1 million. The only evidence in the record as to who paid for the bond shows that BSA II paid for it. CP 123. BSA II has creditors it will pay out of the proceeds. CP 708.

At p. 8, WaferTech inexplicably points out that the Court of Appeals denied motions to include trial exhibits in the record on appeal. November 26, 2014, Order. WaferTech ignores that BSA II subsequently successfully moved in the trial court to include the exhibits in the trial court record. CP 1031. The exhibits were already part of the trial court record since 2001 and included record on appeal, attached to another document that was included in the clerk's papers. CP 1073-1106.

Those documents do more than show that "BSofA was some sort of 'misnomer' for BSA II–allegedly the 'actual' assignee of Natkin/Scott's claims against WaferTech," as WaferTech states at p. 8. They comport with WaferTech's *own motion* in 2001 to make BSA II the plaintiff. CP 997. That motion relied upon the very exhibits WaferTech now contends are insufficient to identify the assignee as BSA II. CP 997, 1058. Given the requirement of CR 11 for motions to be "well grounded in fact,"

WaferTech believed in 2001 the documents showed BSA II was Natkin/Scott's assignee. WaferTech never explains what evidence it acquired since 2001 to show it was wrong in 2001.

## III. REPLY TO NEW ISSUES RAISED BY WAFERTECH

WaferTech raises several issues new issues. The most important issue relates to WaferTech's assertion that the trial court's denial of BSA II's CR 15 motion to amend to change the name of the plaintiff from BSofA to BSA II, which the Court of Appeals did not review, was justified on the basis that it would be "futile." WaferTech previously conceded that if it would not be futile to make BSA II the plaintiff, WaferTech would not oppose making BSA II the plaintiff in the action, which would make WaferTech's objection to BSofA's capacity moot.

WaferTech also asserts that BSA II's CR 15 and CR 25 motions to make BSA II the plaintiff were untimely, without identifying any deadline, or barred by "law of the case," when CR 15 and CR 25 had never been reviewed previously. Finally, WaferTech asserts that BSA II waived an argument in support of an issue BSA II set forth in its Assignment of Errors.

### A. BSA II's CR 15 motion was not futile.

WaferTech contends, at p. 18, that BSA II's CR 15 motion was futile, based on BSA II's dissolution in 2006, ignoring that (1) the

amendment would relate back to 2001 when BSA II was an ongoing Delaware corporation with capacity, and (2) BSA II's subsequent dissolution in 2006 had no effect on BSA II's capacity to continue to pursue the action.

1. The CR 15 motion would make BSA II the plaintiff as of 2001.

BSA II's CR 15 motion would not assert a new claim or new theory of liability, so it would not raise a "futility" issue. When a motion asserts a new claim or a new theory of liability that is not viable, amendment may be denied on the basis that it is futile. *Doyle v. Planned Parenthood of Seattle-King Cy., Inc.*, 31 Wn.App. 126, 132, 639 P.2d 240 (1982).

Here, BSA II's CR 15 amendment would merely change the name of the plaintiff. Amendments changing the plaintiff or the plaintiff's name are routinely granted, and such amendments relate back to the date of the pleading amended, as defendants are not prejudiced by changing the party who benefits from the action. *Kommavongsa v. Haskell*, 149 Wn.2d 288, 315, 67 P.3d 1068 (2003); *Miller v. Campbell*, 164 Wn.2d 529, 537-9, 192 P.3d 352 (2008).

BSA II's CR 15 motion would have made BSA II the plaintiff in this action as of 2001. BSA II was an active Delaware corporation in

2001. An amended complaint making BSA II the plaintiff would be making an active Delaware corporation the plaintiff. There would not be even an arguable objection to BSA II's capacity to be the plaintiff in 2001.

2. BSA II's dissolution in 2006 had no effect on its capacity.

BSA II's subsequent dissolution in 2006 would have no effect on BSA II's capacity to be the plaintiff in this action. There is controlling Delaware law that the dissolution of BSA II, a Delaware corporation, while this action was pending, has no effect on BSA II's capacity to be a party in this action. A dissolved Delaware corporation "remains a viable entity authorized to ... sue and be sued incident to winding up of its affairs." *City Investing Co. Liq. Trust v. Continental Casualty Co.*, 624 A.2d 1191, 1195 (Del. 1993).

*City Investing* relies upon a Delaware statute that provides that "all corporations" continue after dissolution to prosecute and defend suits pending at the time of dissolution, or commenced within three years of dissolution. Del. Code Ann. Tit. 8 § 278. The *City Investing* court noted that the statute provides a "period of implicit corporate existence, of indefinite duration," as necessary to allow dissolved corporations to continue to pursue litigation. *Id.*

*City Investing* is not an outlier regarding a dissolved corporation's capacity to be a party to litigation. Numerous other published Delaware

decisions recognize this principle. *Frederic G. Krapf & Son, Inc. v. Gorson*, 243 A.2d 713, 715 (Del. 1968) (a dissolved corporation "is not dead for all purposes;" under § 278, a dissolved corporation remains alive for at least three years "for purpose of suit"); *In re RegO Co.*, 623 A.2d 92, 96 (Del.Ch. 1992) (§ 278 keeps a dissolved corporation alive beyond three years "for the purpose of concluding pending litigation"); *U.S. Virgin Islands v. Goldman, Sachs & Co.*, 937 A.2d 760, 788 (Del.Ch. 2007) (§ 278 bars dissolved corporations from bringing suit more than three years after dissolution).

This authority shows that under Delaware law, BSA II, even after dissolution, has capacity to be the plaintiff in this action, to pursue the claim assigned to it, as part of the winding up of its affairs. This only makes sense, just as when a person dies, their estate may collect debts owed to the decedent, and can be substituted for the decedent under CR 25 in pending actions.

Delaware law is more expansive law than Washington law when it comes to dissolved corporations capacity to maintain litigation. In Washington, dissolved corporations have capacity to maintain litigation pending at the time of dissolution. RCW 23B.14.050(f). Given this, BSA II still would have capacity to be a party to this action under Washington law, as the action was pending when BSA II was dissolved.

To counter this clear authority, WaferTech cites only one unpublished Delaware decision, which predates *City Investing* and does not cite the relevant statute, in which the court stated in *dicta* that a dissolved corporation did not have capacity. *Transpolymer Indus., Inc. v. Chapel Main Corp.*, 582 A.2d 936 (Del. 1990). There, the court first determined that it would dismiss the appeal on the ground that the corporation was being improperly "represented" by its non-attorney president, when corporations must be represented in court by an attorney. *Id.* It only then went on to mention the dissolved corporation's capacity, without providing any analysis or citing Del. Code Ann. Tit. 8 § 278.

To the extent any precedential weight is given to the *dicta* in the unpublished *Transpolymer* decision, it does not overcome the much greater weight given to the later *City Investing* decision and others after that. A contradictory later decision will overrule *sub silentio* a prior decision. *Duvall v. Charles Connell Roofing*, 564 A.2d 1132, 1137 (Del. 1989); *see Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 280, 208 P.3d 1092 (2009) (Washington law recognizes overruling decisions *sub silentio*). Controlling Delaware law on dissolved corporations' capacity is set forth in *City Investing* and other later published decisions discussing Del. Code Ann. Tit. 8 § 278, not unsupported *dicta* in the

unpublished *Transpolymer* decision, as WaferTech asserts at p. 18 of its opposition.

The importance of BSA II's capacity, even after dissolution, is shown by WaferTech's concession to the Court of Appeals in 2014 that if BSA II had not been dissolved (the basis for WaferTech's contention that BSA II does not have capacity), WaferTech would have no objection to BSA II being made the plaintiff. In essence, WaferTech conceded the capacity issue is moot if BSA II has capacity to be the plaintiff in this action.

At oral argument in 2014, the Court of Appeals specifically asked WaferTech's counsel why it opposed BSA II's CR 60(a) motion to amend the judgment to change the name of the plaintiff to BSA II, referencing *Entranco Eng'rs v. Envirodyne, Inc.*, 34 Wn.App. 503, 662 P.2d 73 (1983), a case allowing amendment to correct errors in a party's name in a judgment. WaferTech's counsel conceded that if BSA II had not been dissolved, WaferTech would have no objection making BSA II the plaintiff in the 2013 judgment being appealed.

The colloquy was as follows:

> COURT: So that's what you're basing your argument on, so if BSA II was currently fully registered in Delaware, you think it would be an abuse of discretion to deny it [the CR 60(a) motion to change BSofA to BSA II] in that situation?

> MR. MCDERMOTT: I do, I agree with that. If [BSA II] was an active, validly licensed, going-concern company, we wouldn't have opposed [the name change].

Excerpt of September 12, 2014, Oral Argument at 5-6.

WaferTech's reliance on BSA II's dissolution as a bar to BSA II being a party to this action is misplaced. BSA II, even after dissolution, may be a party. BSA II's CR 15 amendment to make it the plaintiff was not futile. It would make BSA II, a Delaware corporation with capacity to sue, the plaintiff as of 2001, rendering WaferTech's belated objection to BSofA's capacity moot.

In addition, given that WaferTech's basis for opposing BSA II being the plaintiff was BSA II's dissolution, WaferTech necessarily conceded that (1) it was not relying on BSofA being the correct name of the plaintiff, and (2) changing the name of the plaintiff from BSofA to BSA II would not prejudice WaferTech.

The quoted colloquy also contradicts WaferTech's assertion at p. 18 that "the entity BSofA proposes to substitute—BSAII—is not the assignee of Natkin/Scott's claim against WaferTech." There would be no reason to allow BSA II to be made the plaintiff to pursue the lien claim if BSA II was not the assignee of the lien claim. WaferTech does not explain why in 2001 it wanted BSA II to be the plaintiff, and in 2014 it

conceded BSA II could be made the plaintiff if it had not been previously dissolved, both implying BSA II was the assignee, but in 2017 BSA II was not the assignee.

WaferTech cites *Doyle*, 31 Wn.App. at 132, to support is assertion that BSA II's name change amendment would be futile, when *Doyle* only mentions futility in regards to the plaintiff's attempt to amend to add a new claim based on a new legal theory. BSA II's amendment does not add a new claim; it only changes the name of the party who will benefit from the action. There is nothing futile about BSA II, an existing Delaware corporation at the time of the second amended complaint in 2001, being made the plaintiff as of 2001.

WaferTech's assertion, at p. 18, that BSA II is not Natkin/Scott's assignee, raises a further question: Who *is* Natkin/Scott's assignee? It was not BSofA; no entity named BSofA ever existed. CP 767. Neither the trial court nor the Court of Appeals has ever said BSA II was not the assignee.

B. BSA II's CR 15 and CR 25 motions were timely.

WaferTech asserts that BSA II's CR 15 and CR 25 motions were untimely. Nonsense. BSA II moved under CR 15 and CR 25 promptly after the 2015 remand to the trial court in response to WaferTech's objection to BSofA's capacity. A party is given an opportunity to address

a capacity objection after the objection is made. *Lewis v. Root*, 53 Wn.2d 781, 786, 337 P.2d 52 (1959).

When a party asserts, as WaferTech does, that a motion is untimely, that implies there was a deadline for asserting the motion and it passed before the motion was asserted. Despite this, WaferTech never identifies BSA II's deadline to assert a CR 15 or CR 25 motion.

C. "Law of the case" does not bar review of the trial court's denial of BSA II's CR 15 and CR 25 motions.

WaferTech asserts that "law of the case" supports the Court of Appeals' failure to review the denial of BSA II's CR 15 and CR 25 motions, even though (1) the Court of Appeals did not rely upon "law of the case," (2) "law of the case" does not apply to the CR 15 and CR 25 denials, which had not been addressed in any prior appeal, and (3) RAP 2.5(c)(2) limits "law of the case" when necessary to avoid an injustice and there is new evidence.

1. The Court of Appeals never mentioned "law of the case."

BSA II moved in the trial court to amend under CR 15 and substitute under CR 25, both to make BSA II the plaintiff rather than BSofA. After the trial court denied the motions and BSA II, appealed, BSA II assigned error to the denials. Ass. of Error No. 6; Issue No. 4.

Nowhere in the Court of Appeals opinion does it justify the failure to review the denials based on "law of the case."

2. "Law of the case" does not apply to the CR 15 and CR 25 denials.

Even if the Court of Appeals sought to rely upon "law of the case," such reliance would be erroneous. The Court of Appeals had never previously ruled on whether BSA II should be made the plaintiff under CR 15 or CR 25. "Law of the case" applies to the "identical legal issue" previously decided in a prior appeal in the action. *Folsom v. Spokane Co.*, 111 Wn.2d 256, 264, 759 P.2d 1196 (1988).

After WaferTech raised the issue of BSofA's capacity for the first time on appeal in 2014, the Court of Appeals remanded the action to the trial court. BSA II moved, at the first opportunity, under CR 15 and CR 25 to address WaferTech's objection. BSA II then appealed the trial court's denial of those motions, providing the Court of Appeals its first opportunity to rule on CR 15 and CR 25.

The Court of Appeals had previously ruled on the trial court's denial of BSA II's CR 60(a) motion, but that has no bearing on the CR 15 and CR 25 motions, as there are different factual issues considered and different legal standards. CR 60(a) is to correct clerical mistakes in

judgments. It requires the movant to show there was such a clerical mistake.

Neither CR 15 nor CR 25 requires a clerical mistake as a prerequisite to granting relief. CR 15 motions are granted unless the opposing party would be prejudiced. *Olson v. Roberts & Schaeffer*, 25 Wn.App. 225, 227, 607 P.2d 319 (1980). CR 25 motions are granted when there has been an assignment of a claim while the action was pending; the new party assumes the predecessor's position in the action with no other change in the status of the action. Orland & Tegland, *Wash. Prac.: Rules Prac.*, CR 25, p. 560 (2006). Denial of a CR 60(a) motion does not establish "law of the case" for a CR 15 or CR 25 motion.

In support of its "law of the case" argument, WaferTech asserts at p. 13 that the Court of Appeals ruled in 2014 that BSofA was not a "misnomer" for BSA II. WaferTech is wrong. Nowhere did the Court of Appeals rule BSofA was not a misnomer. Instead, in 2014, the Court of Appeals merely stated there was "factual uncertainty" whether there was an error in naming the plaintiff BSofA rather than BSA II. October 21, 2014, Opinion at 10.

In stating there was uncertainty, the Court of Appeals itself mischaracterized the trial court record, asserting the assignment documents (which the court said would have been helpful to resolving the

misnomer question), were not in the trial court record. *Id.* The documents were placed in the trial court record in 2001, in support of WaferTech's motion to make BSA II (not BSofA) the plaintiff. CP 1073-1106.

3. RAP 2.5(c)(2) limits the "law of the case" doctrine when it works an injustice or there is new evidence.

Even if the Court of Appeals had relied on "law of the case," and the denial of the CR 15 and CR 25 motions arguably fit within the doctrine, it would still not be applied to uphold the denial of the CR 15 and CR 25 motions, as it would ignore new evidence and work an injustice on BSA II. "Law of the case" is not applied when there is new evidence or it would work an injustice. *Folsom*, 111 Wn.2d at 263-4.

Here, when WaferTech moved under RAP 3.1 to dismiss BSA II's appeal of the summary judgment in 2013, BSA II was entitled to an opportunity to address the objection prior to any adverse action taken on BSA II's claim. BSA II promptly sought to do that by moving under CR 15 and CR 25. Refusing to allow BSA II to address the objection, and instead terminating review based on the objection, denied BSA II review on the merits of the summary judgment entered in 2013. To uphold that denial based on "law of the case," rather than reaching the merits, would be an injustice.

In addition, as stated earlier, when the Court of Appeals ruled in 2014 that there was uncertainty regarding the name of the assignee, and that the assignment documents could have clarified the issue, it was mistaken when it said the documents were not in the trial court record. They had been in the trial court record since 2001, but neither party had designated them to be in the record on appeal. In 2016, the assignment documents naming the assignee as BSA II were before the Court of Appeals. CP 1073-1106. That new evidence justifies not applying "law of the case" to justify refusing to consider whether BSofA or BSA II is the name of the assignee.

D. BSA II did not waive the issue of whether WaferTech waived its capacity objection.

WaferTech argues that BSA II waived the issue of whether BSofA's lack of capacity was a bar to continuation of the action. BSA II did not waive its objection to WaferTech's untimely assertion of its objection to BSofA's capacity, as its assignment of errors show it did not, intentionally or otherwise, relinquish its right to argue WaferTech waived its objection to BSofA's capacity. Waiver is the intentional relinquishment of a known right. *Hadaller v. Port of Chehalis*, 97 Wn.App. 750, 757, 986 P2d 836 (1999).

Here, BSA II assigned error in its Opening Brief to the trial court entering any findings and conclusions regarding the capacity of BSofA. The legal basis for this assignment is that BSofA's status is irrelevant to whether the action can continue, as (1) WaferTech waived its objection to BSofA's capacity, and (2) BSA II seeking to be made the plaintiff renders WaferTech's object to BSofA's capacity moot. BSA II, by assigning error to any findings or conclusions related to BSofA, was preserving, not waiving, its right to challenge WaferTech's objection to BSofA's capacity.

Appellate courts have duty to see that justice is done in cases that come before them. *Iverson v. Marine Bancorporation*, 83 Wn.2d 163, 167, 517 P.2d 197 (1973). That includes construing assignments of error to allow the court to reach the merits of issues raised in an appeal. *In re Marriage of Stern*, 157 Wn.App. 707, 710, 789 P.2d 807 (1990). In order to properly rule on WaferTech's objection to BSofA's capacity, the Court of Appeals was required to address whether WaferTech waived its objection to BSofA's capacity.

BSA II has the same right to justice from the courts as any individual person. Corporations have the same powers as individuals to maintain suit. RCW 23B.03.020(2)(a). Foreign corporations are treated the same as Washington corporations when it comes to access to courts. RCW 23B.15.010.

Denying BSA II a review on the merits of the summary judgment entered in 2013 on the basis of WaferTech's objection to BSA II's capacity, when capacity is a pleading technicality to which WaferTech clearly waived its objection, would be a denial of BSA II's right to access to the appellate courts.

WaferTech only cites *Doyle*, 31 Wn.App. at 130-1, in support of BSA II's supposed waiver. There, the CR 15 motion after summary judgment was an attempt to overcome the summary judgment just granted, disrupting the proceedings. In contrast, BSA II's CR 15 motion did not attempt to subvert or overcome the summary judgment; it was merely to correct the name of the plaintiff in the judgment being appealed. It would not disrupt the proceedings; it facilitated review of the merits of the summary judgment.

The relationship of *Doyle* to the present action is that the plaintiff's untimely CR 15 motion in *Doyle*, after summary judgment, is analogous to WaferTech's untimely objection to BSofA's capacity, after a trial in 2002 and after a remand and summary judgment in 2013, in an attempt to prevent review of the summary judgment.

## IV. Conclusion

The Court of Appeals did not fulfill its duty under RAP 1.2(a) and RAP 2.2(a) to address all the issues raised in BSA II's appeal, leading it to

terminate review without addressing the merits of the properly appealed summary judgment in 2013. The decision contradicts *stare decisis* and court rules on objections to capacity. It also works an injustice on BSA II, denying it any recovery under a statutory remedy to protect contractors who perform work on construction projects.

WaferTech's Answer ignores the deficiencies in the Court of Appeals' decision, and instead seeks to justify that decision on other bases. Those other bases do not support the Court of Appeals' decision. BSA II asks that this court accept review to determine that the Court of Appeals failed to complete its work, remanding the matter to decide all necessary issues.

DATED this 14th day of March, 2017.

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

Prof. Bradley Shannon, WSB #18370
Florida Coastal School of Law
8787 Baypine Road
Jacksonville, FL 32256

Attorneys for Petitioner Business Service America II, Inc.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document has been served by email, by agreement of counsel, on the 14th day of March, 2017, to:

James T. McDermott
Ball Janik LLP
One Main Place
101 SW Main St., Suite 1100
Portland, OR 97204
*jmcdermott@balljanik.com*

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

/s/ Eric Hultman
Eric R. Hultman

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

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| Business Services of America II, Appellant, v. Wafertech, LLC., Respondent. | ) No. 45325-8 (Anchor Case) ) Clark County Superior ) Court No. 98-2-02045-1 ) No. 46138-2 (Consolidated) ) |

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SELECTED EXCERPTS OF ARGUMENT BEFORE THE COURT

The Honorable Lisa Worswick, Bradley A. Maxa

and Linda CJ Lee Presiding

September 12, 2014

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TRANSCRIBED BY: Marjorie Jackson, CETD

Reed Jackson Watkins, LLC

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206.624.3005

A P P E A R A N C E S

FOR THE APPELLANT:
ERIC HULTMAN
Hultman Law Office
218 Main Street
No. 477
Kirkland, Washington 98033

FOR THE RESPONDENT:
JAMES MCDERMOTT
GABRIEL WEAVER
Ball Janik, LLP
101 SW Main Street
Suite 1100
Portland, Oregon 97204-3219

HOWARD GOODFRIEND
Smith Goodfriend PS
1619 - 8th Ave North
Seattle, Washington 98109-3007

September 12, 2014

(15:00)

JUDGE WORSWICK: Did you get real money when the judgment was satisfied?

MR. McDERMOTT: We did. We got it from the bonding company.

JUDGE WORSWICK: Well, and the bond was posted by?

MR. McDERMOTT: We don't know who the bond was posted -- I mean, the bond --

JUDGE WORSWICK: You honestly don't know who the bond was posted by?

MR. McDERMOTT: Well, the bond was posted by --

JUDGE WORSWICK: That would surprise me.

MR. McDERMOTT: Well, the bond was posted by St. Paul and Traveler's Insurance Company. We got paid $800,000 as prevailing party attorneys' fees in 2004. After we filed a motion in the trial court to get paid, we got paid. So I presume the bond was posted by the named plaintiff at that time, Business Services of America II, but it was also guaranteed by the principals, because I know there has been litigation in California by the bonding company chasing Mr. Guglielmo and his partner for the bond because they personally guaranteed it. That's a matter of public record. I don't know a lot about it, but that's --

JUDGE WORSWICK: Well, who guarantees it is different than whose name is on it.

MR. McDERMOTT: Correct.

JUDGE WORSWICK: And you don't know whose name is on it?

MR. McDERMOTT: I don't remember. I don't have any reason to doubt it was the named plaintiff at the time, Business Services of America II.

JUDGE WORSWICK: Well, okay. And that's in the -- is evidence of that -- isn't that important evidence of whether or not it's a real entity?

MR. McDERMOTT: Well, the --

JUDGE WORSWICK: Just like me, I'm a real entity most of the time.

MR. McDERMOTT: I don't know if it's evidence that it's a real entity, but it's evidence that some entity was satisfactorily named to the bonding company. The problem was Mr. Guglielmo at the time of the assignment gave a declaration that said: This is who the assignee is.

We believed him at that time and we continued to believe it because a bond was posted. We didn't trust they would pay the prevailing party fees if we prevailed the first time around, so we got a bond posted.

Ultimately, the bonding company paid. And then, when we had our prevailing party fee award in this case of

$430,000, we said we need a bond posted. And they, this time, to our surprise, refused. So we commenced collection efforts and this is how this was all uncovered. We didn't know this until we started post-judgment and collection efforts.

And that's the irony of the whole factual process, but when you -- when they go back to Judge Gregerson under CR 60(A) and they try to correct the misnomer -- they don't do it, by the way, under Rule of Appellate Procedure 7.2, which is a vehicle they could have used as well.

(17:27)

(18:36)

JUDGE MAXA: So what about the Entranco case that your opposition cites?

MR. McDERMOTT: Yeah.

JUDGE MAXA: Where they did allow the change of name when the wrong party was named.

MR. McDERMOTT: Again, the change was allowed because the correct party was actually a valid legal entity.

JUDGE MAXA: So that's what you're basing your argument on, so if BSA II was currently fully registered in Delaware, you think it would be an abuse of discretion to deny it in that situation?

MR. McDERMOTT: I do, I agree with that. If it was an active, validly licensed, going-concern company, we wouldn't have opposed it, but they were trying to -- the key difference is they're trying to correct in a void entity, void since 2003, defunct since 2006. And I wanted -- so that's one procedural complete roadblock for them.

(19:30)

(Conclusion of requested excerpts.)

C E R T I F I C A T E

STATE OF WASHINGTON )
)
COUNTY OF SNOHOMISH )

I, the undersigned, do hereby certify that the foregoing recorded statements, hearings and/or interviews were transcribed under my direction as a transcriptionist; and that the transcript is true and accurate to the best of my knowledge and ability; that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially interested in its outcome.

IN WITNESS WHEREOF, I have hereunto set my hand this 29th day of June, 2015


Marjorie Jackson, CETD