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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

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No. 34757-II

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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NATKIN-SCOTT, et al.

Appellant,

v.

M + W ZANDER, U.S. OPERATIONS, INC.

Respondent

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BRIEF OF APPELLANT NATKIN-SCOTT

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## **I. INTRODUCTION**

This case involves a very large construction project to build a silicon manufacturing plant in Camas, Washington. The owner, WaferTech, hired M+W Zander (“M+W”) to build a clean room. M+W subcontracted a portion of the clean room work to Natkin/Scott. Disputes arose on the project involving claims between the owner, M+W and Natkin/Scott. Litigation ensued. M+W and Natkin/Scott settled their disputes. M+W paid Natkin/Scott \$2.4 million and entered into an agreement assigning to Natkin/Scott, M+W’s rights to sue the owner for damages. After this agreement was executed, the remaining litigation continued, and the trial court made various rulings, which both Natkin/Scott and M+W appealed to this Court. This Court ruled that Natkin/Scott could not pursue the assigned M+W claims against the owner because M+W was not properly registered at the time of contracting with the owner. Natkin/Scott then filed an action seeking damages against M+W for assigning unenforceable rights against the owner. The trial court dismissed Natkin/Scott’s claim based upon M+W’s summary judgment motion. This appeal is from that ruling.

## **II. ASSIGNMENTS OF ERROR**

1. The trial court erred in dismissing Natkin/Scott’s complaint by granting summary judgment.
2. The trial court erred in denying Natkin-Scott’s motion for reconsideration.

3. The trial court erred in awarding attorney fees to defendant, M+W.

### **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Whether the trial court erred in ruling that Natkin/Scott released its right to bring a claim for breach of an agreement.

(Assignments of Error No. 1).

2. Whether the trial court erred in failing to rule that defendant, M+W breached its implied warranty that the rights it assigned to Natkin/Scott existed and were not subject to defenses good against M+W. (Assignments of Error No. 1).

3. Whether the trial court erred in failing to address these same issues raised in Natkin/Scott's motion for reconsideration.

(Assignments of Error No. 2).

4. Whether the judgment awarding attorney fees should be reversed since the underlying judgment was in error interpreting the agreement. (Assignments of Error No. 3).

5. Whether this Court should determine that Natkin/Scott is entitled to attorney fees on appeal and in the trial court action based upon the prevailing party provision in the agreement.

### **IV. STATEMENT OF THE CASE**

M+W Zander, U.S. Operations, Inc. ("M+W") entered into a contract with an owner named WaferTech to build a clean room for a silicon manufacturing plant in Camas, Washington ("Project"). CP 295, 384. The contract was signed in September, 1997. CP 296. It stated that

it was effective November 21, 1996. CP 295, 393. M+W registered as a contractor on April 2, 1997. CP 393. M+W subcontracted mechanical work to Natkin/Scott for the Project on April 23, 1997. CP 384.

M+W terminated Natkin/Scott's contract for default on April 22, 1998. CP 385. Natkin/Scott recorded a mechanic's lien for \$7.65 million against the WaferTech property. CP 386. Natkin/Scott initiated an action against M+W for breach of contract, and an action against WaferTech to foreclose its lien. CP 386, 323-28.

In a series of summary judgment rulings, the trial court ruled that M+W wrongfully terminated Natkin/Scott, and that Natkin/Scott was entitled to recover its unpaid reasonable direct costs through the date of termination, plus overhead and profit and reasonable attorneys' fees. CP 347-48, 386. Natkin/Scott claimed its unpaid direct costs at approximately \$6.9 million. CP 355.

On March 19, 2001, Natkin/Scott and M+W entered into an agreement entitled "Severin Agreement for Pursuit of Claims." CP 359-368. ("Severin Agreement"). Appendix 1. The term Severin Agreement is based on *Severin v. United States*, 99 Ct. Cl. 435 (1943), *cert denied*, 322 U.S. 733 (1944), the case establishing the doctrine for "pass-throughs" of subcontractors' claims. A prime contractor may "pass-through" a subcontractor's claim against an owner if the contractor "has reimbursed its subcontractor for the latter's damages or remains liable for such reimbursement in the future." *J.L. Simmons Co. v. United States*, 158

Ct. Cl. 393, 397, 304 F.2d 886, 888 (1962). *See also Business Services of America II, Inc. v. WaferTech, LLC*, No. 2886-9-II (2004), 2004 Wash. App. Lexis 362. CP 383, n.2; CP 387, n.9.

The Severin Agreement stated in pertinent part:

N/S, as assignee, will pass through its claims and causes of actions to WaferTech with counsel to be selected by N/S. In connection herewith, M+W specifically assigns to N/S all of its pass-through rights under said N/S Subcontract to N/S for purposes of asserting its claims and causes of action against WaferTech and such third parties as it may deem advisable to be asserted by Natkin/Scott as assignee in their name.

CP 359.

The parties agreed that Natkin/Scott would be responsible for preparing, presenting, and submitting the assigned claims and causes of action and for the costs of doing so. CP 360. The Severin Agreement also stated at Paragraph 6:

For valuable consideration, receipt and sufficiency of which are hereby acknowledged M+W and N/S, including the separate corporations which constitute N/S, each release, exonerate, acquit, discharge and waive any right or claim each may have against the other arising out of the Project *with the exception of the pursuit of these claims and causes of action against WaferTech by and through this pass-through agreement.*

CP 360. (emphasis added). The parties also agreed in Paragraph 6 that nothing in the agreement would “adversely affect **the validity of the claims and causes of action** of N/S to be pursued against WaferTech herein.” CP 360. (emphasis added).

As part of the settlement, upon execution of the Severin Agreement, M+W paid Natkin/Scott \$2.4 million. CP 49, 387. This payment is not referenced in the Severin Agreement.

In March 2001, M+W and Natkin/Scott entered into a Stipulation and Order entered by the trial court which states in part:

...it appearing that the within matter has been fully settled and compromised as between the two identified parties, including but not limited to all claims asserted by Natkin/Scott against M+W in its First Cause of Action - Breach of Contract, its Second Cause of Action - Wrongful Termination, and its Third Cause of Action - *Quantum Meruit*, as well as the Counterclaims asserted by defendant M+W against Natkin/Scott, plaintiff Natkin/Scott and defendant M+W do hereby stipulate and agree that the within [sic] First Amended Complaint, and all causes of action asserted or which could have been asserted therein by each of the identified parties against the other, be and the same hereby are dismissed with prejudice and without costs or attorney fees to either party. *Nothing herein contained will affect the preservation of the claims and causes of action by that certain Severin Agreement for Pursuit of Claims entered into by these parties this 19<sup>th</sup> day of March, 2001.*

CP 112-13. (emphasis added).

On May 16, 2001, Natkin/Scott filed an Amended Complaint asserting its lien foreclosure claim and its assigned pass-through claims against WaferTech. CP 387, CP 370-376.

WaferTech moved for summary judgment arguing that M+W was not timely registered as a contractor in the State of Washington. The trial court entered summary judgment in favor of M+W, concluding that M+W was timely registered as a matter of law. CP 388, 378-79. The trial court also ruled that Natkin/Scott's pass-through claim was limited to the \$2.4

million paid by M+W to Natkin/Scott based upon Natkin/Scott's settlement with M+W. CP 388.

At the start of trial M+W and WaferTech settled the remaining claims against each other. The remaining issues were Natkin/Scott's lien foreclosure claim and pass-through claims limited to \$2.4 million. CP 388. The trial court ruled that Natkin/Scott's lien foreclosure claims were limited to work completed after January 31, 1988 based upon lien waivers. Natkin/Scott and WaferTech waived their rights to a jury on Natkin/Scott's remaining quantum meruit and lien foreclosure claims. After hearing testimony, the trial court determined that Natkin/Scott was not validly registered as a Washington contractor at the time it subcontracted with M+W and therefore was barred from bringing its remaining actions and dismissed them. CP 389.

Both Natkin/Scott and WaferTech filed appeals to this Court. CP 390. This Court issued an unpublished opinion, affirming the trial court in part and reversing in part. *Business Services of America II, Inc. v. WaferTech, LLC*, No. 2888b-9-11 (2004), 2004 Wash. App. LEXIS 362. CP 382-99. This Court ruled that M+W was not properly registered:

Because M+W and WaferTech agreed that they entered into their contract on November 21, 1996, and because M+W was not validly registered until April 2, 1997, we hold that Natkin/Scott cannot assert that its claims pass through an unregistered contractor. *Young v. Am. Can Co.*, 131 Wash. 374, 376, 230 P. 147 (1924) (an assignor's rights cannot be of greater interest in the contract, than the assignor possesses).

CP 393. Appendix 4.

This Court also ruled that the trial court improperly found that Natkin/Scott was not properly registered as a contractor, finding that there was substantial compliance with the registration statute. CP 392.

Natkin/Scott then filed the present complaint on February 28, 2005, which is the subject of this appeal, alleging that:

(1) By assigning its rights to sue WaferTech, M+W impliedly warranted that it had the right to sue WaferTech.

(2) Natkin/Scott had been damaged by M+W's breach of its implied warranty, as the Washington Court of Appeals had ruled Natkin/Scott could not pursue pass-through claims against WaferTech due to M+W not being a registered contractor.

(3) M+W was obligated under the Severin Agreement to assign enforceable contractual privity rights against WaferTech to plaintiffs.

(4) M+W breached the Severin Agreement by failing to assign enforceable contractual rights against WaferTech to plaintiffs.

CP 354-56.

M+W filed a motion for summary judgment on January 6, 2006 seeking to dismiss Natkin/Scott's complaint on various grounds. CP 1-47. Natkin/Scott opposed M+W's motion. CP 273-91.

The trial court, the Honorable Diane M. Woolard, heard oral argument on March 24, 2006, and issued a letter ruling dated March 30, 2006 granting M+W's motion. CP 414-5. The court stated in pertinent part in its letter ruling:

It is, I believe, the understanding of all parties, that the only issue is the Severin Agreement for which defendant has moved for summary judgment.

The defendant has moved for enforcement of the Severin Agreement with the plaintiff arguing that it is not enforceable for various reasons. This instant cause of action apparently arose after Division II Court of Appeals ruled that M+W Zander was not a licensed contractor. The Severin Agreement was signed some time before the Court of Appeals rendered its opinion in BSA, Wafertech, M+W Zander Case No. 28886-9 II.

The parties bargained for the Severin Agreement that they placed into effect prior to the Court of Appeal decision.

Therefore, there being not issue [sic] of fact, this court grants as a matter of law the defendant's motion for summary judgment and cross claim.

(Emphasis added). CP 414-5. Appendix 2.

On April 14, 2006, Judge Woolard entered an order directing the Clerk to enter a final judgment order. CP 425-27. By order dated April 18, 2006 (Appendix 3), the trial court issued a final judgment order granting M+W's motion for summary judgment, CP 429-30, stating in pertinent part as follows:

The Plaintiffs admitted in their Opposition on the record in open court that the current action is exclusively based upon an alleged breach of the Severin Agreement for Pursuit of Claims ("Severin Agreement") and not an attempt to revive or reassert any cause of action based upon the underlying subcontract agreement executed between the parties arising out of the construction project previously at issue.

The parties also agreed on the record at the hearing that none of the individuals representing either of the parties or their attorneys discussed or contemplated the issue of either M+W's or Natkin/Scott's contractor registration status or the effects of such registration (or lack thereof) on M+W's assignment of pass-through rights to Plaintiffs at the time the Severin Agreement was negotiated and executed. The parties bargained for the Severin Agreement and the Severin Agreement, along with the releases contained therein, are fully enforceable and have not been breached by M+W.

Natkin/Scott filed a timely notice of appeal. CP 453-54.

Natkin/Scott filed a timely motion for reconsideration, CP 416-22, which the trial court denied by letter dated June 19, 2006. CP 522. An order consistent with therewith was filed on June 21, 2006. CP 523-24.

**V. ARGUMENT**

**A. Summary of Argument.**

The trial court's letter opinion wrongly states that Natkin/Scott argued that the Severin Agreement was "not enforceable for various reasons." CP 414. Rather, Natkin/Scott argued that M+W had breached the agreement by failing to assign enforceable rights against the Project owner, WaferTech. CP 280.

Natkin/Scott may bring an independent cause of action for breach of the Severin Agreement. Both the Severin Agreement and the dismissal of the underlying cause of action specifically reserved Natkin/Scott's right to bring an action for breach of the Severin Agreement.

Once this Court found that M+W had no right to sue WaferTech because of its failure to timely register as a contractor, M+W breached its implied warranty to Natkin/Scott that the rights it assigned actually existed and were not subject to a defense. This implied warranty is recognized by the RESTATEMENT (SECOND) OF CONTRACTS, § 333(1). The implied warranty places the risk that the rights being assigned are not enforceable upon the assignor – not the assignee. The trial court erred by failing to apply this implied warranty.

Since its underlying ruling was in error, the trial court's award of attorney fees and costs was also erroneous. Natkin/Scott is entitled to recover its attorney fees on this appeal under the prevailing party provision of the Severin Agreement.

**B. Standard of Review.**

All of the issues on appeal concern the interpretation of a contract, i.e., the Severin Agreement. The standard of review for summary judgment and contract interpretation is *de novo*. This Court considers all facts and reasonable inferences from them in favor of the nonmoving party. *Cascade Auto Glass, Inc. v. Progressive Cas. Ins. Co.*, 145 P.3d 1253, 1255 (Wash. App. 2006).

**C. Natkin/Scott's Did Not Release M+W From A Claim For Breach Of The Severin Agreement.**

The Severin Agreement specifically allows the parties to bring a claim for breach of the agreement:

For valuable consideration, receipt and sufficiency of which are hereby acknowledged M+W and N/S, including the separate corporations which constitute N/S, each release, exonerate, acquit, discharge and waive any right or claim each may have against the other arising out of the Project *with the exception of the pursuit of these claims and causes of action against WaferTech by and through this pass-through agreement.*

CP 360. (emphasis added).

The Stipulation and Order dismissing the first Natkin/Scott cause of action states:

Nothing herein contained will affect the preservation of the claims and causes of actions by that certain Severin

Agreement for pursuit of claims entered by these parties  
this 19<sup>th</sup> date of March, 2001.

CP 112-13. These reservations of rights were pointed out during summary  
judgment oral argument. RP (3/24/06:20-21).

The trial court's opinion letter wrongly states that Natkin/Scott  
argued that the Severin Agreement was "not enforceable for various  
reasons". CP 414. Natkin/Scott argued:

No party disputes the existence and validity of the  
Agreement. M+W clearly breached its agreement with  
Natkin/Scott by failing to provide assignable rights to  
pursue the pass-through claims directly against WaferTech.

CP 280.

In its motion for reconsideration, Natkin/Scott pointed out this  
error to no avail. CP 417, 419. The trial court clearly erred in ruling that  
Natkin/Scott released M+W from any cause of action for breach of the  
Severin Agreement.

**D. M+W Breached Its Implied Warranty To Natkin/Scott  
That The Rights It Had To Sue M+W Actually Existed  
And Were Not Subject To Defenses Against M+W.**

**1. The Trial Court Failed To Apply The Implied  
Warranty That The Rights Being Assigned Exist  
And Are Not Subject To Defenses Good Against  
The Assignor.**

In addition to erroneously ruling that Natkin/Scott had released its  
rights, the trial court erred in failing to recognize the implied warranty in  
an assignment that the rights being assigned exist and are not subject to  
defenses against the assignor. The trial court did not address this implied  
warranty in its letter opinion or judgment order.

RESTATEMENT (SECOND) OF CONTRACTS, § 333(1) provides in part:

Unless a contrary intention is manifested, one **who assigns or purports to assign a right ... for value warrants** to the assignee

(a) that he will do nothing to defeat or impair the value of the assignment and **has knowledge of any fact** which would do so;

(b) **that the right, as assigned, actually exists** and is **subject to no limitations or defenses good against the assignor other than those stated or apparent** at the time of the assignment;

RESTATEMENT (SECOND) OF CONTRACTS, § 333(1), (emphasis added) *cited with approval in Lonsdale v. Chesterfield*, 99 Wn.2d 353, 357, 662 P.2d 385, 388 (1983). “One who assigns for value a chose in action impliedly warrants in the absence of a manifestation of a contrary intention that the claim is genuine and legally enforceable to the amount, if any specified in the assignment.” *State v. Phillips*, 42 Wn.2d 137, 253 P.2d 919 (1953) *citing* 2 Williston on Contracts, Rev.Ed., 1291, § 445.

During the summary judgment hearing, M+W argued that the *Lonsdale* case had nothing to do with the RESTATEMENT section upon which Natkin/Scott relied RP (3/24/06:33). Yet the *Lonsdale* decision quotes the very same section. (99 Wn.2d at 357). M+W offered no explanation at the trial court as to why this section of the RESTATEMENT is not the law in this state after the Washington Supreme Court adopted it in *Lonsdale*.

**2. M+W's Contractor Registration Issue Was Not Apparent To The Parties.**

At the trial court, M+W argued that the implied warranty did not exist because M+W's registration status should have been apparent to Natkin/Scott. CP 39. Natkin/Scott had challenged this factual assertion in an affidavit. CP 410-11. However, the trial court recognized the parties' agreement that neither party had reason to know or contemplate that M+W's registration status would void Natkin/Scott's rights to sue the owner:

The parties also agreed on the record that none of the individuals representing either of the parties or their attorneys discussed or contemplated the issue of either M+W's or Natkin/Scott's contractor registration status or the effects of such registration (or lack thereof) on M+W's assignment of pass-through rights to plaintiffs at the time the Severin Agreement was negotiated and executed.

CP 430.

**3. The Implied Warranty Applies To Future Events Not Known To The Parties.**

The trial court's letter opinion notes that the registration status of M+W became an issue after the Severin Agreement was executed. CP 414-15. The fact that M+W's contractor registration status became an issue after the Severin Agreement was signed does not mean that the § 333(1) warranty does not apply. The whole purpose of a warranty is to protect a party against future events. A roof warranty exists if there is no leak at the time the warranty is given. The warranty applies to leaks given after the warranty has been supplied. As the Washington Supreme Court noted in *Lonsdale*:

We interpret this section [§ 333] to mean that by the mere fact of the assignment the assignor impliedly guarantees that he will not thereafter interfere with the thing assigned or do anything to defeat or impair the value of the assignment...

99 Wn.2d at 358. (emphasis added).

This warranty imposed upon M+W the risk to pay damages if the right it assigned to Natkin/Scott to sue WaferTech became invalid after the assignment was executed. The purpose of a warranty is to protect against future events the parties are not yet aware of. Illustration 3 to § 333 of the RESTATEMENT (SECOND) fits our fact pattern:

3. A reasonably and in good faith believes he has a right against B, and assigns it to C for value as an actual right. In fact the right does not exist. C can recover damages from A.

M+W in good faith believed it had a right to sue WaferTech. M+W assigned it to Natkin/Scott. As the Court of Appeals later determined, M+W did not have a right to sue WaferTech. M+W's good faith does not void the implied warranty imposed by the law. Subsection d of the RESTATEMENT at § 333(1) states that "When a warranty of an assignor is broken, the assignee is entitled to the usual remedies for breach of contract."

**4. Natkin/Scott Bargained For The Right To Sue Wafertech.**

Similarly, the trial court's logic that "The parties bargained for the Severin Agreement...", CP 414, misses the point that Natkin/Scott bargained for the right to sue WaferTech as an assignee of M+W. Natkin/Scott did not bargain for an unenforceable right to sue the owner.

Natkin/Scott was denied the benefit of its bargain with M+W. The trial court erred in failing to apply the implied warranty imposed by the common law as expressed in RESTATEMENT (SECOND) OF CONTRACTS, § 333(1)(b).

**5. M+W Did Not Disclaim The Implied Warranty In The Severin Agreement.**

M+W argued below, CP 41, that the Severin Agreement effectively disclaimed any implied warranty in Paragraph 12 which states:

This Agreement contains the entire understanding and agreement amount the parties with respect to the matters referred to herein. No other representations, covenants, undertakings or other prior or contemporaneous agreements, oral or written, respecting such matters, which are not specifically incorporated shall be deemed in any way to exist or bind any of the parties.

CP 361. In addition, M+W argued, CP 30, that under Paragraph 15 of the Severin Agreement, Natkin/Scott assumed the risk that the assigned rights were not enforceable. Paragraph 15 states:

The parties further declare that they voluntarily accept the Agreement for the purpose of making a full compromise, adjustment and settlement of the claims released under this agreement, and each assumes any mistake of fact or law in connection with the execution hereof.

CP 362. Neither of these paragraphs meet the requirement to clearly disclaim the implied warranty that the rights being assigned are not subject to defenses good against the assignor. Section b of the RESTATEMENT (SECOND) OF CONTRACTS § 333 states:

b. Express warranties and disclaimers. The rules stated in this Section can be varied by express or implied agreement. Express warranties are created in the same ways as express warranties in the transfer of goods; and implied warranties

maybe excluded or modified in the same ways. See Uniform Commercial Code §§ 2-312, 2-313, 2-316, 2-317. (emphasis added).

UCC § 2-316(3)(a) states:

Unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like “as is”, “with all faults” or other language *which in common understanding calls the buyer’s attention to the exclusion of warranties and makes plain that there is no implied warranty...*

(Emphasis added).

There is no language in the Severin Agreement which refers to implied warranties generally. More importantly, there is no language in the agreement that states the rights being assigned to Natkin/Scott may not be enforceable against the Project owner, WaferTech. Rather, Section 6 of the Severin Agreement states in pertinent part:

Nothing herein contained will adversely affect the validity of the claims and causes of action of N/S to be pursued against WaferTech herein.

CP 360. M+W’s implied warranty disclaimer arguments fail to meet the RESTATEMENT’S adoption of the UCC rule that an implied warranty disclaimer is to be plainly brought to a buyer’s attention. M+W’s argument also ignore the express representation in Paragraph 6 that nothing in the agreement will adversely affect the assignment of the claims.

**E. The Trial Court’s Award Of Attorney Fees And Costs Is In Error.**

The trial court’s judgment ruled that M+W could recover attorney fees as a prevailing party under the Severin Agreement. CP 431. While

M+W filed a motion to recover them, CP 447, and Natkin/Scott opposed that motion, CP 476, the trial court did not rule on the amount. Since the trial court's determination on the summary judgment motion is in error, the award of attorney fees should also be reversed.

**F. Natkin/Scott Is Entitled To Recover Its Attorney Fees For This Appeal.**

The Severin Agreement states at ¶ 9:

In any proceeding to enforce this Agreement, the prevailing party, in addition to any other remedy, shall be entitled to reasonable litigation costs, including attorneys' fees incurred in the enforcement of this Agreement.

Pursuant to RAP 18.1(b), Natkin/Scott requests this Court to rule that Natkin/Scott is entitled to recover its attorney fees in pursuing this appeal.

**VI. CONCLUSION**

Natkin/Scott requests this Court to reverse the trial court's judgment on summary judgment in its entirety and rule that: (1) Natkin/Scott did not release its rights to sue for breach of the Severin Agreement; and (2) WaferTech breached its implied warranty in the Severin Agreement that the rights it assigned to Natkin/Scott to sue WaferTech existed and were not subject to defenses good against the assignor; and (3) M+W is not entitled to recover attorney fees.

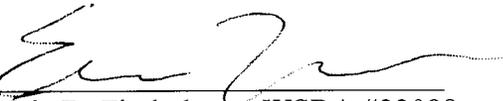
Natkin/Scott is entitled to a trial on the merits. It is further entitled to recover its attorney fees and costs for this appeal.

Dated this 14<sup>th</sup> day of December, 2006.

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## **VII. APPENDIX**

1. Severin Agreement for Pursuit of Claims
2. Judge Woolard's 3/29/06 Motion for Summary Judgment Decision
3. Order Granting Defendant M+W Zander, U.S. Operations, Inc.'s Motion for Summary Judgment
4. Unpublished Opinion in Business Services of America II, Inc.

## SEVERIN AGREEMENT FOR PURSUIT OF CLAIMS

THIS AGREEMENT, entered into this 19<sup>th</sup> day of March, 2001, by and between M+W ZANDER, U.S. OPERATIONS, INC., formerly known as Meissner+Wurst, U.S. Operations, Inc. ("M+W") and NATKIN-SCOTT, a Joint Venture, consisting of SCOTT CO. OF CALIFORNIA, a California corporation, and NATKIN CONTRACTING LLC, a limited liability company (collectively "N/S"), together with BUSINESS SERVICES AMERICA II, INC., a Delaware corporation ("Business Services"), with respect to the WaferTech Fabrication Facility in Camas, Washington, a facility owned by WaferTech, L.L.C. ("WaferTech").

### RECITALS:

WHEREAS, on or about November 21, 1996, WaferTech, by and through its agent ADP/Fluor Daniel, Inc. ("ADP"), entered into a written contract with M+W whereby M+W agreed to furnish certain work described generally as the cleanroom, contract #961620-3-F-019 ("Cleanroom Contract") for construction of WaferTech's new wafer fabrication facility in Camas, Washington (the "Project");

WHEREAS, in connection therewith, M+W, in turn, subcontracted a portion of its work under the Cleanroom Contract to N/S by Letter of Intent dated April 23, 1997 and Subcontract Agreement dated September 16, 1997, and executed by N/S on December 18, 1997 ("N/S Subcontract");

WHEREAS, on or about May 11, 1998, N/S filed a lawsuit against M+W and WaferTech, asserting claims for breach of contract, wrongful termination, *quantum meruit* and a construction lien foreclosure (collectively "N/S claims") in a cause entitled and captioned, Natkin/Scott, a Joint Venture, Plaintiff, v. Meissner+Wurst, U.S. Operations, Inc., and WaferTech L.L.C., Defendants, Clark County, Washington Superior Court Cause No. 98 2 01752-2 [Consolidated Cases No. 98 2 02045-1] ("Litigation");

WHEREAS, N/S considers it in its best interests that N/S's claims be pursued directly against WaferTech by assignment hereunder;

WHEREAS, the parties are desirous of fully and finally resolving all claims each has against the other and reducing their agreement to writing;

NOW, THEREFORE, it is agreed as follows:

1. N/S, as assignee, will pass through its claims and causes of action to WaferTech with counsel to be selected by N/S. In connection herewith, M+W specifically assigns to N/S all of its pass-through rights under said N/S Subcontract to N/S for purposes of asserting its claims and causes of action against WaferTech and such third parties as it may deem advisable to be asserted by Natkin/Scott as assignee in their name.

2. N/S will be fully responsible for preparing and submitting its claims and causes of action in accordance with the dispute resolution procedures of both the Cleanroom Contract and the N/S Subcontract.

3. In connection with the pursuit of said claims and causes of action, N/S will be responsible for the accumulation, preparation and presentation of its entitlement in connection therewith.

4. N/S will bear all expenses and costs related to the prosecution of said claims and causes of action, including consultants' fees, costs and attorneys' fees attendant to the preparation, prosecution, mediation and arbitration or litigation of said matter. The parties agree to the prosecution of the claims and causes of action under this Agreement and will make their respective employees available for interview, deposition and testimony as may be required. N/S will bear the full expense of the costs of all witnesses, both current and former employees, including any charges for transportation, lodging and meals, and costs for time incurred in assisting and testifying concerning the subject matter of this Agreement. Subject to the provisions of the Joint Defense Agreement between WaferTech and M+W dated September 10, 1999, N/S is authorized to contact M+W's consultants, who are free to be engaged in their discretion.

5. N/S will be entitled to receive for its claims and causes of action only such amounts as are received for N/S's claims directly from WaferTech and any third parties.

6. For valuable consideration, receipt and sufficiency of which are hereby acknowledged, M+W and N/S, including the separate corporations which constitute N/S, each release, exonerate, acquit, discharge and waive any right or claim each may have against the other arising out of this Project with the exception of the pursuit of these claims and causes of action against WaferTech by and through this pass-through agreement. Nothing herein contained will adversely affect the validity of the claims and causes of action of N/S to be pursued against WaferTech herein. This Release will not affect the rights and obligations of these parties under the N/S Subcontract now existing with respect to warranties, guarantees and the indemnity obligations of N/S under paragraphs 4.5, 6, 8.4, and 9 thereof. N/S agrees to indemnify, hold harmless and defend M+W, its officers, directors, shareholders, employees, successors and assigns, of and from any and all loss, cost, damage, expense or claims made or threatened to be made by WaferTech or ADP, their respective officers, directors, shareholders, employees, successors and assigns, arising out of or in response to any claims made or threatened by N/S against WaferTech and/or ADP. It is understood and agreed that nothing in this Agreement will prevent or bar M+W from asserting any claim or claims against WaferTech arising out of this Agreement, and nothing herein is intended to or will adversely affect M+W's rights against WaferTech reserved in that certain Settlement and Release Agreement dated February 8, 1999 ("WaferTech Agreement"). However, the above indemnity obligations of N/S will not encompass any claim made or threatened against M+W arising solely out of M+W's exercise of its independent rights provided hereunder and by virtue of said WaferTech Agreement.

7. The parties have specifically contemplated the Severin Doctrine in the negotiation of this Agreement, which agreement is not intended to be a complete release for the purpose of said Doctrine. In the event any court should make a contrary construction of this Agreement, then this Agreement is retroactively null and void.

8. The parties represent and warrant that they have not assigned or transferred or purported to assign or transfer to any person, corporation, trustee or other entity any claim or cause of action released hereunder, and further agree to defend, indemnify and hold harmless each other against any liability, loss, damage, suit, claim, cost or expense, including attorneys' fees, arising out of or related to any breach of this representation and warranty. In particular, one of the signers of this Agreement will be Business Services America II, Inc., which may have some claim in connection with this litigation and by execution hereafter expressly releases, exonerates, acquits and discharges M+W, its officers, directors, employees, shareholders, successors and assigns from any right or claim which it may contend it currently possesses as against M+W with respect to the subject matter of this Agreement, and to the extent set forth herein.

9. In any proceeding to enforce this Agreement, the prevailing party, in addition to any other remedy, shall be entitled to reasonable litigation costs, including attorneys' fees incurred in the enforcement of this Agreement.

10. Venue for enforcement proceedings shall be exclusively in Clark County Superior Court, Vancouver, Clark County, Washington.

11. This Agreement may not be modified or amended except in a writing executed by all parties.

12. This Agreement contains the entire understanding and agreement among the parties with respect to the matters referred to herein. No other representations, covenants, undertakings or other prior or contemporaneous agreements, oral or written, respecting such matters, which are not specifically incorporated shall be deemed in any way to exist or bind any of the parties.

13. This Agreement shall not be construed against the party preparing it but shall be construed as if all parties, and each of them, jointly prepared it, and any uncertainty or ambiguity shall not be interpreted against any one party. This Agreement is solely for the benefit of the parties signatory hereto and shall not create rights in any third party. This Agreement is a compromise of disputed claims, and nothing herein contained may be construed as an admission of fault or liability of any party or person released herein, all of which parties and persons expressly deny fault and liability.

14. This Agreement may be executed in one or more counterparts, each of which shall be deemed to be an original and all of which shall constitute one and the same agreement. A true and correct photocopy of this Agreement, as executed by the parties, may be used in lieu of the original for all purposes.

15. The parties declare and acknowledge that they have been represented in the negotiations of this Agreement by legal counsel of their own choice, and that they have read and fully understand the terms of this Agreement. The parties further declare that they voluntarily accept the Agreement for the purposes of making a full compromise, adjustment and settlement of the claims released under this agreement, and each assumes any mistake of fact or law in connection with the execution hereof. This Agreement shall be binding upon and inure to the benefit of the parties and their respective predecessors, insurers, agents, attorneys, heirs, directors, officers, employees, shareholders, successors, transferees, assigns and/or other representatives of any kind.

16. This Agreement shall be construed under the laws of the State of Washington as of the date of this Agreement.

17. The parties agree to take all steps and execute all documents necessary to effectuate the purposes of this Agreement.

18. The parties represent that the individuals signing below are authorized to execute this Agreement and that they have the authority to bind the entities on whose behalf they sign.

**M+W ZANDER, U.S. OPERATIONS, INC.**

By Timothy H Ramsey  
Its: Chairman/CEO

**NATKIN-SCOTT, A JOINT VENTURE**

SCOTT CO. OF CALIFORNIA, a California Corporation

By \_\_\_\_\_  
Its: \_\_\_\_\_

**NATKIN CONTRACTING LLC, a \_\_\_\_\_**  
Limited Liability Company

By \_\_\_\_\_  
Its: \_\_\_\_\_

**BUSINESS SERVICES AMERICA II, INC.**

By \_\_\_\_\_  
Its: \_\_\_\_\_

15. The parties declare and acknowledge that they have been represented in the negotiations of this Agreement by legal counsel of their own choice, and that they have read and fully understand the terms of this Agreement. The parties further declare that they voluntarily accept the Agreement for the purposes of making a full compromise, adjustment and settlement of the claims released under this agreement, and each assumes any mistake of fact or law in connection with the execution hereof. This Agreement shall be binding upon and inure to the benefit of the parties and their respective predecessors, insurers, agents, attorneys, heirs, directors, officers, employees, shareholders, successors, transferees, assigns and/or other representatives of any kind.

16. This Agreement shall be construed under the laws of the State of Washington as of the date of this Agreement.

17. The parties agree to take all steps and execute all documents necessary to effectuate the purposes of this Agreement.

18. The parties represent that the individuals signing below are authorized to execute this Agreement and that they have the authority to bind the entities on whose behalf they sign.

**M+W ZANDER, U.S. OPERATIONS, INC.**

By \_\_\_\_\_  
Its: \_\_\_\_\_

**NATKIN-SCOTT, A JOINT VENTURE**

**SCOTT CO. OF CALIFORNIA, a California Corporation**

By \_\_\_\_\_  
Its: \_\_\_\_\_

**NATKIN CONTRACTING LLC, a \_\_\_\_\_  
Limited Liability Company**

By *[Signature]*  
Its: *[Signature]*

**BUSINESS SERVICES AMERICA II, INC.**

By \_\_\_\_\_  
Its: \_\_\_\_\_



STATE OF WASHINGTON TEXAS  
COUNTY OF Collin ) SS

On this 16<sup>th</sup> day of March, 2001, before me, the undersigned, a Notary Public in and for the State of ~~Washington~~ TEXAS, duly commissioned and sworn, personally appeared Timothy H. Ramsey, to me known to be the CEO/Chairman of M+W ZANDER, U.S. OPERATIONS, INC., the corporation that executed the foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that he/she was authorized to execute the said instrument.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.



L. Fontenot  
Notary Public in and for the State  
of Washington, residing at TEXAS  
My appointment expires: 2-1-04

STATE OF WASHINGTON )  
COUNTY OF \_\_\_\_\_ ) SS

On this \_\_\_\_\_ day of March, 2001, before me, the undersigned, a Notary Public in and for the State of Washington, duly commissioned and sworn, personally appeared \_\_\_\_\_, to me known to be the \_\_\_\_\_ of SCOTT CO. OF CALIFORNIA, the corporation that executed the foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that he/she was authorized to execute the said instrument.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

\_\_\_\_\_  
Notary Public in and for the State  
of Washington, residing at \_\_\_\_\_  
My appointment expires: \_\_\_\_\_

STATE OF WASHINGTON )  
 ) SS  
COUNTY OF KING )

On this 20th day of March, 2001, before me, the undersigned, a Notary Public in and for the State of Washington, duly commissioned and sworn, personally appeared Doug Ludolph, to me known to be the President/CEO of NATKIN CONTRACTING LLC, the limited liability company that executed the foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said limited liability company, for the uses and purposes therein mentioned, and on oath stated that he/she was authorized to execute the said instrument.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

RHONDA J. HINMAN  
STATE OF WASHINGTON  
NOTARY --- PUBLIC  
MY COMMISSION EXPIRES 10-07-03

Rhonda J. Hinman  
Notary Public in and for the State  
of Washington, residing at Renton  
My appointment expires: 10-7-03

STATE OF WASHINGTON )  
 ) SS  
COUNTY OF \_\_\_\_\_ )

On this \_\_\_\_\_ day of March, 2001, before me, the undersigned, a Notary Public in and for the State of Washington, duly commissioned and sworn, personally appeared \_\_\_\_\_, to me known to be the \_\_\_\_\_ of BUSINESS SERVICES AMERICA II, INC., the corporation that executed the foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that he/she was authorized to execute the said instrument.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

\_\_\_\_\_  
Notary Public in and for the State  
of Washington, residing at \_\_\_\_\_  
My appointment expires: \_\_\_\_\_

STATE OF WASHINGTON )  
 ) SS  
COUNTY OF \_\_\_\_\_ )

On this \_\_\_\_\_ day of March, 2001, before me, the undersigned, a Notary Public in and for the State of Washington, duly commissioned and sworn, personally appeared \_\_\_\_\_, to me known to be the \_\_\_\_\_ of M+W ZANDER, U.S. OPERATIONS, INC., the corporation that executed the foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that he/she was authorized to execute the said instrument.

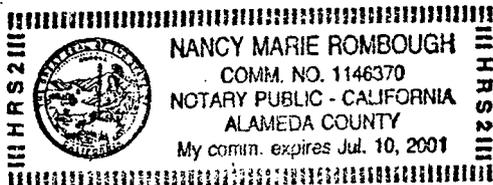
IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

\_\_\_\_\_  
Notary Public in and for the State  
of Washington, residing at \_\_\_\_\_  
My appointment expires: \_\_\_\_\_

~~STATE OF WASHINGTON~~ )  
~~WASHINGTON~~ ) SS  
COUNTY OF ALAMEDA )

On this 21 day of March, 2001, before me, the undersigned, a Notary Public in and for the State of ~~Washington~~ <sup>CALIFORNIA</sup>, duly commissioned and sworn, personally appeared J.A. GUGLIEMO, to me known to be the PRESIDENT of SCOTT CO. OF CALIFORNIA, the corporation that executed the foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that he/she was authorized to execute the said instrument.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.



Nancy Marie Rombough  
Notary Public in and for the State  
of ~~Washington~~ <sup>CALIFORNIA</sup>, residing at Alameda County  
My appointment expires: 7/10/01

STATE OF WASHINGTON )  
 ) SS  
COUNTY OF \_\_\_\_\_ )

On this \_\_\_\_\_ day of March, 2001, before me, the undersigned, a Notary Public in and for the State of Washington, duly commissioned and sworn, personally appeared \_\_\_\_\_, to me known to be the \_\_\_\_\_ of NATKIN CONTRACTING LLC, the limited liability company that executed the foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said limited liability company, for the uses and purposes therein mentioned, and on oath stated that he/she was authorized to execute the said instrument.

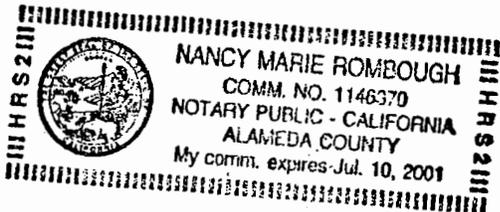
IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

\_\_\_\_\_  
Notary Public in and for the State  
of Washington, residing at \_\_\_\_\_  
My appointment expires: \_\_\_\_\_

*CALIFORNIA*  
STATE OF ~~WASHINGTON~~ )  
 ) SS  
COUNTY OF ALAMEDA )

On this 21 day of March, 2001, before me, the undersigned, a Notary Public in and for the State of ~~Washington~~ <sup>CALIFORNIA</sup>, duly commissioned and sworn, personally appeared J.A. GUGLIELMO, to me known to be the PRESIDENT of BUSINESS SERVICES AMERICA II, INC., the corporation that executed the foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that he/she was authorized to execute the said instrument.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.



Nancy Marie Rombough  
Notary Public in and for the State  
of ~~Washington~~ <sup>CALIFORNIA</sup>, residing at Alameda County  
My appointment expires: 7/10/01

SUPERIOR COURT OF  
THE STATE OF WASHINGTON FOR CLARK COUNTY  
DEPARTMENT NO. 8  
PO BOX 5000  
VANCOUVER, WA 98666-5000



DIANE M. WOOLARD  
JUDGE

TELEPHONE (360) 397-2068  
FAX (360) 397-6078  
TDD (360) 397-6172

March 29, 2006

John Stewart  
Attorney at Law  
2300 SW First Avenue, Suite 200  
Portland, OR 97201-5047

Wade Dann  
Attorney at Law  
2014 E. Madison Street, Suite 100  
Seattle, WA 98122-2965

Re: Natkin-Scott, et al v. M+W Zander, et al  
Case No. 05-2-01018-9

Counsel:

The defendant's summary judgment motion was well briefed and argued by all parties. The court appreciates your accommodating its time and schedule.

It is, I believe, the understanding of all parties, that the only issue is the Severin Agreement for which defendant has moved for summary judgment.

The defendant has moved for enforcement of the Severin Agreement with the plaintiff arguing that it is not enforceable for various reasons. This instant cause of action apparently arose after Division II Court of Appeals ruled that M+W Zander was not a licensed contractor. The Severin Agreement was signed some time before the Court of Appeals rendered its opinion in BSA, Wafertech, M+W Zander Case No. 28886-9 II.

The parties bargained for the Severin Agreement that they placed into effect prior to the Court of Appeal decision.

APPENDIX 2

**March 29, 2006**

**Page 2**

**Therefore, there being not issue of fact, this court grants as a matter of law the defendant's motion for summary judgment and cross claim.**

**The prevailing party will prepare findings and conclusion based on the record, argument and authorities cited.**

**Sincerely,**

A handwritten signature in cursive script, appearing to read "Diane M. Woolard".

**Diane M. Woolard  
JUDGE**

**DMW:dr**

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Honorable Diane M. Woolard, Dept. 8

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**APR 18 2006**

JoAnne McBride, Clark, Clark Co.

**RECEIVED**

**APR 20 2006**

**STEWART, SOKOL & GRAY**

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR THE COUNTY OF CLARK

NATKIN-SCOTT, a Joint Venture, consisting )  
of SCOTT CO. OF CALIFORNIA, a )  
California corporation, and NATKIN )  
CONTRACTING LLC, a limited liability )  
company; and BUSINESS SERVICES )  
AMERICA II, INC., a Delaware corporation, )  
Plaintiffs, )  
v. )  
M+W ZANDER, U.S. OPERATIONS, INC., )  
formerly known as Meissner+Wurst, U.S. )  
Operations, Inc., a corporation, )  
Defendant. )

Case No. 05 2 01018 9

**ORDER GRANTING  
DEFENDANT M+W ZANDER,  
U.S. OPERATIONS, INC.'S  
MOTION FOR SUMMARY  
JUDGMENT**

**ORDER**

This matter came before the Court on the motion of Defendant M+W Zander, U.S. Operations, Inc. ("M+W"). The Court, having considered the pleadings on file herein, M+W's Motion for Summary Judgment with accompanying points and authorities, the Declaration of Thomas A. Larkin in support thereof, Plaintiffs' Opposition to Defendant's Motion and supporting Declarations of Eric B. Zimbelman and Joseph Guglielmo, M+W's Rebuttal, and the oral arguments presented at the hearing on March 24, 2006, finds as follows:

1 The Plaintiffs admitted in their Opposition and on the record in open court that  
2 the current action is exclusively based upon an alleged breach of the Severin  
3 Agreement for Pursuit of Claims ("Severin Agreement") and not an attempt to revive or  
4 reassert any cause of action based upon the underlying subcontract agreement  
5 executed between the parties arising out of the construction project previously at issue.

6 The parties also agreed on the record at the hearing that none of the individuals  
7 representing either of the parties or their attorneys discussed or contemplated the issue  
8 of either M+W's or Natkin-Scott's contractor registration status or the effects of such  
9 registration (or lack thereof) on M+W's assignment of pass-through rights to Plaintiffs at  
10 the time the Severin Agreement was negotiated and executed. The parties bargained  
11 for the Severin Agreement and the Severin Agreement, along with the releases  
12 contained therein, are fully enforceable and have not been breached by M+W.

13 There are no genuine issues as to any material fact with respect to either of  
14 Plaintiffs' Claims for Relief or with respect to M+W's Second Counterclaim and M+W is  
15 entitled to judgment thereon as a matter of law. Now, therefore, it is:

16 ORDERED AND ADJUDGED that M+W's Motion for Summary Judgment is  
17 GRANTED and M+W is awarded judgment in its favor as follows:

- 18 (1) dismissing with prejudice Plaintiffs' First Claim for Relief for breach of  
19 contract;  
20 (2) dismissing with prejudice Plaintiffs' Second Claim for Relief for breach  
of the Severin Agreement and breach of warranty; and

21 ///

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1 (3) on M+W's Second Counterclaim, for judgment against Plaintiffs  
 2 awarding M+W its reasonable attorney fees and costs incurred, based  
 3 upon the attorney fees provision of the Severin Agreement, in an  
 amount to be determined pursuant to CR 54 and RCW 4.84.010 et  
seq.

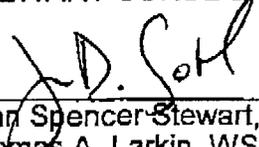
4 DATED this 10 day of April, 2006.

6 **/s/ DIANE M. WOOLARD**

7 \_\_\_\_\_  
 Judge Diane M. Woolard

8 **PRESENTED BY:**

9 STEWART SOKOL & GRAY LLC

10   
 11 \_\_\_\_\_  
 12 John Spencer Stewart, WSBA #15887  
 Thomas A. Larkin, WSBA #24515  
 Of Attorneys for M+W  
 Zander U.S. Operations, Inc.

14 **APPROVED AS TO FORM AND  
 NOTICE OF PRESENTATION WAIVED:**

15 PEEL BRIMLEY LLP

16  
 17 \_\_\_\_\_  
 Wade R. Dann, WSBA #7552  
 18 Eric R. Hultman, WSBA #17414  
 Of Attorneys for Natkin-Scott, Scott Co. of  
 19 California, Natkin Contracting, LLC and  
 Business Services America II, Inc.

20 W:\Work\Clients K-MM+W Zander\Natkin-Scott JV vs\TJS\Pleadings\Summary Judgment- order.wpd

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CERTIFICATE OF SERVICE

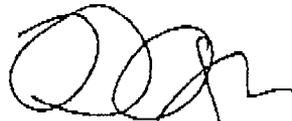
I hereby certify that I served the foregoing **ORDER GRANTING DEFENDANT M+W ZANDER, U.S. OPERATIONS, INC.'S MOTION FOR SUMMARY JUDGMENT** on:

Wade R. Dann  
Eric R. Hultman  
PEEL BRIMLEY,LLP  
2014 East Madison Street, Suite 100  
Seattle, WA 98122-2965  
Facsimile No. 206-770-3490  
Attorneys for Natkin-Scott, et al.

by the following indicated method or methods:

- by **mailing** a full, true and correct copy thereof in a sealed, first-class postage-paid envelope, and addressed to the attorney as shown above, the last-known office address of the attorney, and deposited with the United States Postal Service at Portland, Oregon on the date set forth below.
- by causing a full, true and correct copy thereof to be **hand-delivered** to the attorney at the attorney's last-known office address listed above on the date set forth below.
- by sending a full, true and correct copy thereof via **overnight courier** in a sealed, prepaid envelope, addressed to the attorney as shown above, the last-known office address of the attorney, on the date set forth below.
- by **faxing** a full, true and correct copy thereof to the attorney at the fax number shown above, which is the last-known fax number for the attorney's office, on the date set forth below.

Dated this 7th day of April, 2006.



Thomas A. Larkin, WSBA #24515  
Of Attorneys for M+W Zander,  
U.S. Operations, Inc.

FILED  
COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
BY \_\_\_\_\_

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

BUSINESS SERVICES OF AMERICA II,  
INC.,

Appellant and  
Cross Respondent,

v.

WAFERTECH LLC,

Respondent and  
Cross Appellant.

---

WAFERTECH LLC,

Third Party Plaintiff,

v.

M+W ZANDER, US OPERATIONS, INC.,  
Formerly known as Meissner+Wurst, US  
Operations, Inc.

Third Party Defendant.

No. 28886-9-II

UNPUBLISHED OPINION

HOUGHTON, J. -- WaferTech, L.L.C. entered into a prime construction contract with Meissner + Wurst Zander, U.S. Operations, Inc. (M+W). M+W subcontracted with Natkin/Scott, a Joint Venture<sup>1</sup> for some specialized work. Natkin/Scott also entered into prime contracts with WaferTech for other parts of the project.

M+W terminated its subcontract with Natkin/Scott based on safety violations. Natkin/Scott sued M+W. Natkin/Scott also sued WaferTech directly, through a construction lien

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<sup>1</sup> Natkin/Scott assigned its rights to Business Services of America, an entity created to pursue Natkin/Scott claims. For clarity, we refer to the appellant as Natkin/Scott.

No. 28886-9-II

foreclosure action, and under M+W's "pass-through rights."<sup>2</sup> The trial court allowed Natkin/Scott to pursue its pass-through claims against WaferTech because it found that M+W was a validly registered Washington contractor. But it limited Natkin/Scott to \$2.4 million of any pass-through recovery against WaferTech, based on an agreement between M+W and Natkin/Scott.

The trial court also found that Natkin/Scott had waived and released some of its construction lien claims and it limited Natkin/Scott's remaining claims against WaferTech to \$1.5 million. The trial court further dismissed some of Natkin/Scott's claims as barred after finding that it was not a validly registered Washington contractor when it entered into its subcontract with M+W.

Natkin/Scott appeals a trial court order barring and limiting its claims. Natkin/Scott also appeals the trial court's award of more than \$800,000 in attorney fees and costs incurred by WaferTech in defending the lien claim. WaferTech cross-appeals the trial court's ruling that M+W was a validly registered contractor. We affirm in part, reverse in part, and remand for further proceedings.

#### FACTS

WaferTech planned to build a \$1.2 billion silicon wafer manufacturing plant in Camas. WaferTech contracted with ADP/Fluor Daniel (the project manager) to design and manage the project. The work was let through more than 30 prime contracts.

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<sup>2</sup> Pass-through claims are those in which a subcontractor's claims, the subcontractor not having contractual privity with the owner, are "passed-through" the prime contractor who has contractual privity to initiate a suit against the owner. *Howard Contracting, Inc. v. G.A. MacDonald Constr. Co.*, 71 Cal. App. 4th 38, 83 Cal. Rptr. 2d 590, 602 (1998).

M+W had knowledge and experience in constructing wafer manufacturing facilities, including impurity-free "cleanrooms." II Report of Proceedings (RP) at 15. WaferTech contracted with M+W to act as the cleanroom prime contractor.<sup>3</sup>

M+W then subcontracted with Natkin/Scott to install the cleanroom plumbing and piping system (the 403 contract).<sup>4</sup> Natkin/Scott also entered into prime contracts with WaferTech for

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<sup>3</sup> Because M+W's contractor registration status bears on issues here, a timeline of its contractor registration status and its contract negotiations with WaferTech helps illuminate the facts:

**August 20, 1996:** WaferTech sent a letter of intent to award the cleanroom contract to M+W. Clerk's Papers (CP) at 1301.

**November 21, 1996:** M+W and WaferTech agree to enter the cleanroom construction contract. Exhibit 659; CP at 2032 (M+W's Procurement manager declaration); M+W repeats this contract entry date in its cross-claim. CP at 2093. M+W and WaferTech recite this contract entry date in their February 8, 1999 Settlement Agreement. Exh. 662.

**February 25, 1997:** The project manager sends a second letter of intent, as written confirmation, awarding M+W the \$37 million cleanroom prime contract. CP at 1306-07; Exh. 68.

**March 4, 1997:** M+W signs and returns the February 25, 1997 letter of intent. CP at 1306-07.

**March 19, 1997:** M+W first applies for Washington contractor registration.

**April 2, 1997:** M+W registers as a Washington contractor. CP at 1326.

**September 25, 1997:** The formal contract signed by WaferTech and M+W begins: "THIS CONTRACT IS entered into, effective as of November 21, 1996 . . ." CP at 1303-04.

<sup>4</sup> Because Natkin/Scott's contractor registration status also bears on issues here, a timeline of its contractor registration status and its contract negotiations with M+W also further illuminates the facts:

**December 13, 1996:** Natkin/Scott submits bid to M+W, who does not accept the bid.

Negotiations continue between the two companies. CP at 426.

**February 21, 1997:** Joint Venture Agreement creates Natkin/Scott from Natkin Contracting L.L.C. and Scott Company of California. CP at 427.

**April 14, 1997:** Natkin/Scott applies for Washington contractor registration with the Department of Labor and Industries (L&I). By April 24, L&I rejects application for failing to have a valid bond. Exh. 637. The bond specified that it was effective from March 20, 1997 to March 20, 1997. Exh. 637.

**April 23, 1997:** Natkin/Scott revises bid to M+W. CP at 426-27. M+W sends letter of intent to award \$6.58 million cleanroom plumbing and piping contract to Natkin/Scott. CP at 427; Exh. 645.

**April 28, 1997:** The bonding company sends letter to L&I specifying the effective bond period is from March 20, 1997 to March 20, 1998, not March 20, 1997 to March 20, 1997. Exh. 637.

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other parts of the plant project (the 401 and 402 contracts).<sup>5</sup>

In late 1997, when Natkin/Scott's work exceeded that anticipated by the 401, 402, and 403 contracts, it notified WaferTech, the project manager, and M+W of its additional work claims. In December 1997 and January 1998, Natkin/Scott signed several lien waivers and claims releases for M+W so that Natkin/Scott could receive progress payments for work completed through January 31, 1998. But these releases did not expressly reserve Natkin/Scott's claims for additional compensation. After January 31, 1998, Natkin/Scott submitted releases that expressly reserved the right to additional compensation.

On March 30, 1998, WaferTech notified M+W that Natkin/Scott's safety violations constituted default of M+W's prime contract with WaferTech. On April 17, 1998, the project manager, on behalf of WaferTech, directed M+W to terminate Natkin/Scott's contract. The project manager also advised M+W that WaferTech would terminate its contract with M+W if M+W did not terminate Natkin/Scott.

On April 22, 1998, M+W terminated Natkin/Scott. The same day, M+W notified WaferTech that it would hold WaferTech liable for M+W's increased project costs arising from terminating Natkin/Scott.

According to the WaferTech and M+W contract, WaferTech retained authority to direct M+W to terminate a subcontractor for breach of contract based on safety violations. But according to the M+W and Natkin/Scott subcontract, M+W had to give Natkin/Scott "forty-eight

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**April 29, 1997:** Natkin/Scott signs and mails back the April 23, 1997 letter of intent. CP at 427.  
**May 1, 1997:** Natkin/Scott validly registers as a Washington contractor. CP at 427; Exh. 637.

<sup>5</sup> Natkin/Scott sued WaferTech under the 401 and 402 contracts. The parties settled, and the 401 and 402 contracts are not at issue on appeal. The trial court entitled these claims the "Track B" litigation. The dispute at issue here concerns the 403 cleanroom plumbing and piping contract, which the trial court entitled the "Track A" litigation. II RP at 19.

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hours” to cure the safety violations before terminating the subcontract. Clerk’s Papers at 23-24. M+W did not do so.

On April 28, 1998, Natkin/Scott filed and recorded a \$7.65 million construction lien on WaferTech’s Camas property. In May 1998, Natkin/Scott filed a lawsuit against M+W, alleging claims based on breach of the subcontract, wrongful termination, and quantum meruit, and against WaferTech, asserting a foreclosure claim on its construction lien.<sup>6</sup>

M+W and WaferTech disagreed as to which entity was responsible for increased project costs associated with Natkin/Scott’s termination. Exhibits 463, 945. On February 8, 1999, M+W and WaferTech settled and dismissed their claims, expressly reserving their rights against each other as to Natkin/Scott’s litigation claims. Exh. 662.

On March 25, 1999, M+W filed a cross-claim against WaferTech for its additional costs and any costs associated with Natkin/Scott’s termination.<sup>7</sup>

On July 21, 1999, Natkin/Scott moved for partial summary judgment, arguing that M+W breached the subcontract when it failed to give Natkin/Scott its contractually-specified 48 hours to cure safety violations. The trial court granted the motion. Natkin/Scott could then recover from M+W its unpaid direct costs, overhead, and profit for work completed under the subcontract.

WaferTech moved for partial summary judgment seeking to reduce Natkin/Scott’s lien from \$7.65 million to \$1.5 million.<sup>8</sup> On February 27, 2001, the trial court determined that

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<sup>6</sup> This is the Track A litigation referred to in footnote 5.

<sup>7</sup> M+W voluntarily dismissed its cross-claims against WaferTech on March 29, 1999.

<sup>8</sup> \$1.5 million represents the trial court’s valuation of Natkin/Scott’s post-January 31, 1998 lien claims.

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Natkin/Scott waived and released its lien claims through January 31, 1998, when it failed to properly reserve them. The trial court granted WaferTech's motion and accordingly reduced the lien to \$1.5 million for post-January 31 claims.

On March 19, 2001, M+W agreed to settle Natkin/Scott's claims against it and entered into a "*Severin Agreement for Pursuit of Claims.*"<sup>9</sup> Exh. 1354. Under it, M+W assigned its pass-through rights to Natkin/Scott, allowing Natkin/Scott to pursue M+W's claims directly against WaferTech. Natkin/Scott also received \$2.4 million from M+W to settle. On March 26, 2001, the trial court granted M+W and Natkin/Scott's joint motion to dismiss their claims and counterclaims with prejudice.

On May 16, 2001, Natkin/Scott filed a second amended complaint, asserting its lien foreclosure claim against WaferTech and also its pass-through claims against WaferTech based on breach of contract, wrongful termination, and quantum meruit. In response, WaferTech impleaded M+W and asserted third party claims against it.

WaferTech then moved for partial summary judgment on Natkin/Scott's pass-through claims. WaferTech argued that Natkin/Scott had expressly released its claims for work through January 31, 1998, and its claims passing through M+W could not revive them. The court denied the motion.

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<sup>9</sup> The *Severin* doctrine generally applies to "contract claims against the federal government." *Frank Briscoe Co. v. County of Clark*, 772 F. Supp. 513, 516-17 n.7 (D. Nev. 1991); see *Severin v. United States*, 99 Ct. Cl. 435 (1943), *cert. denied*, 322 U.S. 733 (1944). Nevertheless, M+W and Natkin/Scott entered into a so-called *Severin Agreement* to specify Natkin/Scott's pass-through claims. Under the *Severin* doctrine, the prime contractor can recoup damages on behalf of the subcontractor if the prime contractor suffers actual damages. *Frank Briscoe*, 772 F. Supp. at 516. Actual damages to the prime contractor are (1) reimbursing the subcontractor for the subcontractor's damages or (2) the prime contractor remaining liable for reimbursing the subcontractor for such damages in the future. *Frank Briscoe*, 772 F. Supp. at 517.

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WaferTech moved for partial summary judgment on M+W's counterclaims, arguing that M+W was not a validly registered contractor when it entered into its contract with WaferTech. The trial court denied WaferTech's motion, instead ruling as a matter of law that M+W was a properly registered contractor.

The trial court certified the contractor registration issue to this court under CR 54(b). We declined to take review, in part because the trial court did not commit obvious or probable error. RAP 2.3(b)(1); COA No. 28020-5-II. After we denied review, the trial court then noted,

I think the registration [M+W] issue is a matter of law, Counsel, now that I look at it. Again, I think I should have -- maybe I should have made a different ruling on M+W. Again, I sort of dodged my responsibility there, thinking the appellate court would take care of it, if I had erred. I think I did. But then, that's something that will go up.

IX RP at 18

WaferTech moved for partial summary judgment, seeking to limit Natkin/Scott's direct claims against it to \$2.4 million based on Natkin/Scott's and M+W's settlement. On December 21, 2001, the trial court granted WaferTech's motion, limiting Natkin/Scott's pass-through claim recovery from WaferTech to \$2.4 million. In its initial November 26, 2001, letter ruling, the trial court reasoned that the *Severin* Agreement, along with M+W and WaferTech's agreement to dismiss their claims with prejudice, limited M+W's damages and similarly limited WaferTech's potential liability on the pass-through claims. *Severin v. United States*, 99 Ct. Cl. 435 (1943), *cert. denied*, 322 U.S. 733 (1944).

The matter was set for a jury trial. At the start of trial, M+W and WaferTech settled their claims against each other and the court dismissed them with prejudice. The remaining trial issues revolved around Natkin/Scott's lien foreclosure claim against WaferTech and its pass-through claims for breach of contract, wrongful termination, and quantum meruit.

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At trial, WaferTech renewed its motion for partial summary judgment to limit Natkin/Scott's lien claims to work completed after January 31, 1998. The trial court determined that Natkin/Scott's pre-January 31 lien claim waivers were unambiguous, valid, and enforceable. It granted WaferTech's motion and limited Natkin/Scott's recovery to contractual costs incurred beginning February 1, 1998. The trial court also awarded WaferTech \$66,058.50 in attorney fees and costs in defending the excessive lien claim.<sup>10</sup>

At trial in April 2002, Natkin/Scott asked the court to rule, as a matter of law, on its pass-through rights based on its breach of contract and wrongful termination claims. The trial court dismissed both of these claims because it determined WaferTech did not breach its contract with M+W. The court concluded that the contract between WaferTech and M+W allowed WaferTech to notify M+W that it would terminate its contract if M+W did not terminate Natkin/Scott for safety violations. This ruling deprived Natkin/Scott of pass-through rights on its wrongful termination and breach of contract claims against WaferTech.

Natkin/Scott and WaferTech then waived their right to a jury trial on Natkin/Scott's remaining quantum meruit and lien foreclosure claims. The trial court dismissed the jury.

The trial court then heard testimony regarding Natkin/Scott's contractor registration status. It found that Natkin/Scott was not validly registered as a Washington contractor when it subcontracted with M+W. The trial court concluded that Natkin/Scott was therefore barred from bringing suit against M+W and dismissed Natkin/Scott's remaining quantum meruit and lien foreclosure claims.

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<sup>10</sup> RCW 60.04.081(4), frivolous claim statute, states: "If . . . the court determines that the lien is . . . clearly excessive, the court shall issue an order . . . reducing the lien if clearly excessive, and awarding costs and reasonable attorneys' fees to the applicant to be paid by the lien claimant."

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On May 22, 2002, the trial court entered findings of fact and conclusions of law on its trial rulings. It reaffirmed its earlier letter opinion ruling on April 9, 2001, in favor of WaferTech for \$66,058.50 in attorney fees and costs expended defending the excess lien claim.

WaferTech requested additional fees and costs incurred in defending Natkin/Scott's lien foreclosure claim through May 14, 2001. On September 13, 2002, the trial court awarded WaferTech an additional \$790,701.98 in attorney fees and costs for defending the lien claim.

Natkin/Scott appeals and WaferTech cross-appeals.

#### ANALYSIS

##### Natkin/Scott's Contractor Registration

Unless validly registered under the Registration of Contractors Act, also known as the CRA, a contractor has no standing to seek redress from the courts. RCW 18.27.080; *Bort v. Parker*, 110 Wn. App. 561, 571, 42 P.3d 980, review denied, 147 Wn.2d 1013 (2002). Valid registration requires a contractor to submit an application to the Department of Labor and Industries (L&I), including proof of a current bond and current insurance. RCW 18.27.010, .040, .050, .080.

Natkin/Scott first contends that the trial court erred in finding that it was not validly registered when it entered into its subcontract with M+W. Natkin/Scott asserts that it was validly registered and therefore has standing to sue WaferTech.

We limit our review of the trial court's findings of fact to determine whether substantial evidence supports them and, if so, whether the findings support the conclusions of law. *Scott v. Trans-System, Inc.*, 148 Wn.2d 701, 707-08, 64 P.3d 1 (2003). Substantial evidence exists where there is a sufficient quantum of evidence in the record to persuade a fair-minded, rational person

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of the truth of the finding. *City of Tacoma v. William Rogers Co.*, 148 Wn.2d 169, 191, 60 P.3d 79 (2002).

Here, the trial court found that M+W accepted Natkin/Scott's bid for the WaferTech project and sent a letter of intent to award the contract to Natkin/Scott on April 23, 1997. It further found that Natkin/Scott did not have a valid bond on that date. It then concluded that Natkin/Scott entered into its contract with WaferTech before becoming validly registered on May 1, 1997.

Our review of the record discloses that substantial evidence does not support the trial court's findings. On April 14, 1997, Natkin/Scott applied to L&I for contractor registration. The application included proper proof of insurance through May 1, 1997. But the bond recited March 20, 1997, for both its start and end dates, causing L&I to temporarily reject the application as incomplete.

To correct this deficiency, Natkin/Scott asked the bonding company to correct its typographical error. The bonding company then sent a letter identifying the correct bond termination date as March 20, 1998.<sup>11</sup> On May 1, 1997, after receiving the letter, L&I immediately issued Natkin/Scott its registration. L&I required neither a new application nor additional materials; it merely accepted the bonding company's letter, indicating that L&I believed that Natkin/Scott's application was complete except for the scrivener's error.

Under RCW 18.27.080, a contractor may substantially comply with the CRA and seek redress for its claims through the courts. In deciding whether substantial compliance applies, a court must take "into consideration the length of time during which the contractor did not hold a

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<sup>11</sup> On April 29, Natkin/Scott submitted a second insurance certificate for May 1, 1997-May 1, 1998.

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valid certificate of registration.” RCW 18.27.080. Whether substantial compliance exists is fact dependent on each case. *B.A. Van De Grift, Inc. v. Skagit County*, 59 Wn. App. 545, 549, 800 P.2d 375 (1990). Thus, we must decide whether Natkin/Scott substantially complied with the CRA before contracting with M+W.

The trial court determined that Natkin/Scott entered its contract with M+W on April 23, 1997, and that Natkin/Scott complied with the CRA on May 1, 1997. Here, when Natkin/Scott submitted its application, it had a valid bond (as later explained in the bonding company letter) and insurance. The court found that Natkin/Scott did not properly register as a contractor on May 1, 1997. We disagree. At most, eight days elapsed between Natkin/Scott contracting with M+W and L&I issuing Natkin/Scott’s registration.<sup>12</sup> We reverse the trial court because Natkin/Scott substantially complied with the CRA before entering into its contract with M+W.

#### M+W’s Contractor Registration Status

Because resolution of WaferTech’s cross-appeal on M+W’s contractor registration status disposes of several arguments, we turn next to that issue. WaferTech contends that the trial court erred in deciding *sua sponte*<sup>13</sup> that M+W was a validly registered Washington contractor when it entered into its prime contract with WaferTech. WaferTech asserts that because M+W was not validly registered, the CRA bars Natkin/Scott’s claims passed through M+W.

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<sup>12</sup> Because we hold that Natkin/Scott substantially complied with the CRA, we do not address its other arguments for finding that it was properly registered.

<sup>13</sup> WaferTech seems to argue that the trial court should not have denied its motion for summary judgment on the contractor registration issue and then, *sua sponte*, rule in favor of M+W. We disagree because a court may, on its own, grant summary judgment in favor of the nonmoving party when denying a moving party’s motion for summary judgment. *Health Ins. Pool v. Health Care Auth.*, 129 Wn.2d 504, 507, 919 P.2d 62 (1996).

After denying M+W's motion for summary judgment, the trial court determined, as a matter of law,<sup>14</sup> that M+W was validly registered before entering their contract. The trial court's ruling hinged on its determination that M+W and WaferTech entered into their written contract after M+W registered under the CRA. But a review of the record discloses that M+W and WaferTech believed otherwise.

In three documents, M+W and WaferTech agreed that their contract began on November 21, 1996. On September 25, 1997, M+W and WaferTech signed the cleanroom contract and agreed that the "contract is entered into, effective as of November 21, 1996." Exh. 659. On March 25, 1999, in M+W's cross-claim against WaferTech, it states that the contract was entered into by the parties on November 21, 1996. And on February 8, 1999, M+W's and WaferTech's settlement agreement stipulated that their written cleanroom contract was effective November 21, 1996.

Because M+W and WaferTech agreed that they entered into their contract on November 21, 1996, and because M+W was not validly registered until April 2, 1997, we hold that Natkin/Scott cannot assert that its claims pass through an unregistered contractor. *Young v. Am. Can Co.*, 131 Wash. 374, 376, 230 P. 147 (1924) (an assignor's rights cannot be of greater interest in the contract, than the assignor possesses).<sup>15</sup>

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<sup>14</sup> We review an order on summary judgment de novo, considering all facts and inferences in the light most favorable to the nonmoving party. *Hubbard v. Spokane County*, 146 Wn.2d 699, 706-07, 50 P.3d 602 (2002). Summary judgment will be affirmed if there are no genuine issues of material fact. *Hubbard*, 146 Wn.2d 706-07.

<sup>15</sup> Natkin/Scott also contends that the trial court erred in limiting its pass-through claims against WaferTech to \$2.4 million. Because we hold that M+W was not a validly registered contractor, and Natkin/Scott may not assert any rights through it. We do not further address this argument or Natkin/Scott's argument based on other pass-through claims.

Lien Release/Claims Waivers

Natkin/Scott also contends that the trial court erred in deciding that its pre-January 31, 1998 lien release waivers bar its claims for additional work performed before January 31, 1998. It asserts that the trial court erred in not applying the *Berg* context rule and considering extrinsic evidence regarding execution of the lien releases. *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990). Natkin/Scott argues that it could provide evidence as to why it failed to reserve any rights when it signed the lien releases.<sup>16</sup>

A release is a contract subject to contract interpretation principles. *Del Rosario v. Del Rosario*, 116 Wn. App. 886, 891, 68 P.3d 1130 (2003). Like the trial court, we do not interpret unambiguous language, but rather give it its ordinary meaning. *Martinez v. Kitsap Pub. Servs., Inc.*, 94 Wn. App. 935, 944, 974 P.2d 1261 (1999). And we will not read ambiguity into a contract where it can be reasonably avoided. *Martinez*, 94 Wn. App. at 944.

The *Berg* context rule is appropriate when interpreting a contract and is used as an aid to ascertain the parties' intent. *W. Wash. Corp of Seventh-Day Adventists v. Ferrellgas, Inc.*, 102 Wn. App. 488, 495, 7 P.3d 861 (2000), *review denied*, 143 Wn.2d 1003 (2201). Although this rule allows extrinsic evidence to show intent, it does not allow evidence of intent that is independent of the contract. *W. Wash. Corp.*, 102 Wn. App. at 495.

From the beginning of the project through January 31, 1998, Natkin/Scott signed lien release waivers in order to secure progress payments. The waivers did not separately reserve any rights to payment for additional work or change orders. Beginning February 1, 1998, Natkin/Scott added express language reserving rights, including “[a]ny and all contract change

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<sup>16</sup> Natkin/Scott offered testimony showing an intention independent of the lien waivers and claim releases. This is not a proper use of extrinsic evidence.

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order modifications not yet issued and not yet billed; and any and all delays, acceleration and/or impact costs resulted by Natkin/Scott.” Exh. 677.

Here, the trial court determined that the earlier releases unambiguously released all claims without reservation. It did not err in doing so and it properly limited Natkin/Scott’s lien claim to costs incurred only after January 31, 1998.

#### Attorney Fees

Natkin/Scott further contends that the trial court improperly awarded WaferTech attorney fees and costs for defending against Natkin/Scott’s lien claim. It asserts that the trial court abused its discretion in (1) failing to review the work time entries to determine whether they supported WaferTech’s billing for motion work; (2) failing to enter findings of fact and conclusions of law; and (3) awarding attorney fees for work not related to defending the construction lien foreclosure.

We review an attorney fee award for an abuse of discretion. *Rettkowski v. Dep’t of Ecology*, 128 Wn.2d 508, 519, 910 P.2d 462 (1996). A court abuses its discretion when it bases its decision on untenable grounds or gives untenable reasons. *Rettkowski*, 128 Wn.2d at 519.

Under RCW 60.04.081(4) (frivolous lien claims), a court “shall” award a prevailing party costs and reasonable attorney fees on determining that the lien is clearly excessive. And under the lodestar method for imposing fees, the prevailing party must provide proof of the fees’ reasonableness and the court must find them nonduplicative, reasonable, and related to defending a particular claim. RPC 1.5;<sup>17</sup> *Mahler v. Szucs*, 135 Wn.2d 398, 433-34, 957 P.2d 632, 966 P.2d 305 (1998).

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<sup>17</sup> A lawyer’s fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

The trial court found that Natkin/Scott's lien claim was excessive and on May 22, 2002, it awarded WaferTech \$66,058.50 in attorney fees. Later, on September 13, 2002, the trial court awarded<sup>18</sup> WaferTech an additional \$581,481.75 in attorney fees and \$65,444.23 in costs related to defending Natkin/Scott's lien claim before May 14, 2001.<sup>19</sup>

Natkin/Scott argues that the trial court did not determine that WaferTech incurred reasonable fees and costs related to defending the lien claim. We disagree. WaferTech submitted detailed entries of its legal work, including the hourly rate of and work performed by whom. The trial court noted that WaferTech's attorney and paralegal hourly fees were reasonable, comparable to other attorney fees, and related to work it performed defending the lien claim.

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(1) The time and labor required, the novelty and difficulty of the questions involved, the skill requisite to perform the legal service properly and the terms of the fee agreement between the lawyer and client;

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) The fee customarily charged in the locality for similar legal services;

(4) The amount involved in the matter on which legal services are rendered and the results obtained;

(5) The time limitations imposed by the client or by the circumstances;

(6) The nature and length of the professional relationship with the client;

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) Whether the fee agreement or confirming writing demonstrates that the client had received a reasonable and fair disclosure of material elements of the fee agreement and of the lawyer's billing practices.

RPC 1.5(a).

<sup>18</sup> Based upon Natkin/Scott's concession, the trial court awarded WaferTech an additional \$143,776 in attorney fees and costs for defending the lien foreclosure after May 14, 2001. WaferTech's total award for defending the lien claim was \$856,760.48

<sup>19</sup> WaferTech asserts that because Natkin/Scott did not file an amended appeal asking us to review the attorney fee award, it waived its right of review. But WaferTech cites former RAP 2.4(g), effective until December 24, 2002. Now a party need not file an amended notice of appeal or an amended notice for discretionary review as previously required by RAP 4.2(g).

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Natkin/Scott also argues that it demonstrated that WaferTech's fees were excessive. At trial, it offered the court its statement of what WaferTech should have incurred in defending the lien. The trial court stated that it found WaferTech's submission more credible, a finding that we do not disturb on appeal. RP (5/22/02) at 24-25. *Gormley v. Robertson*, \_\_ Wn. App. \_\_, \_\_, 83 P.3d 1042 (2004). Natkin/Scott's argument fails.

Natkin/Scott next argues that the trial court failed to enter required findings of fact and conclusions of law regarding its attorney fee award. We agree that the trial court did not initially enter findings on its May 22, 2002,<sup>20</sup> \$66,058.50 award, but it did so later in its September 13, 2002, findings and conclusions. Natkin/Scott's argument fails.

Finally, Natkin/Scott argues that the trial court improperly awarded \$790,701.98<sup>21</sup> in costs and attorney fees to WaferTech, not related to defending the lien claim.

The trial court determined that WaferTech's reasonable attorney fees before May 14, 2001, were \$581,481.75 and its costs \$65,444.23, not including its earlier lien defense claim award for \$66,058.50. The trial court concluded that these fees and costs were all related to defending Natkin/Scott's lien foreclosure claim and were recoverable by WaferTech under RCW 60.04.081.

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<sup>20</sup> In the May 22, 2002 order, the trial court clearly identified that "there is a direct and proximate connection between certain of the attorneys' fees . . . and its [WaferTech] successful reduction of Natkin/Scott's claims of lien"; the "successful motion of partial summary judgment on the line waiver and release issue was crucial to the success of WaferTech's motion to reduce" the lien. And the trial court went on to state that "pursuant to RCW 60.04.081, it is appropriate that WaferTech be awarded its attorney fees directly incurred in its successful motion for partial summary judgment in addition to the . . . fees directly incurred in its motion to reduce" the lien. CP at 2385-86.

<sup>21</sup> This \$790,701.98 award comprises \$716,257.75 in fees and \$74,444.23 in costs.

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And the trial court also determined that WaferTech's continued defense of the foreclosure claim after May 14, 2001, was inextricably intertwined with Natkin/Scott's breach of contract, wrongful termination, and quantum meruit pass-through claims. As such, the trial court concluded that after this date, WaferTech's litigation expenses were not recoverable under RCW 60.04.081. The trial court did, however, award WaferTech \$134,776 in attorney fees and \$9,000 in costs for work completed on the lien foreclosure claim after May 14, 2001, based on Natkin/Scott's concession that WaferTech could recover for some work after May 14, 2001. Natkin/Scott argues that it did not concede the amounts awarded. Natkin/Scott fails to adequately support this argument and we do not otherwise address it. RAP 10.3(a)(5).

The trial court did not abuse its discretion in awarding attorney fees and costs to WaferTech.

#### Prejudgment Interest

Natkin/Scott also contends that the trial court erred in awarding WaferTech prejudgment interest on a \$66,058.50 attorney fee award.<sup>22</sup> It asserts that because attorney fees are discretionary, the trial court cannot base a prejudgment interest award on an attorney fee award. We agree. *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 687-88, 15 P.3d 115 (2000) (attorney fee award is discretionary and not subject to prejudgment interest).

We reverse the prejudgment interest awards and remand to recalculate the judgment.

#### Attorney Fees on Appeal

Both Natkin/Scott and WaferTech seek attorney fees and costs on appeal. Under RAP 18.1, we may award reasonable attorney fees and costs to the prevailing party. Natkin/Scott

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<sup>22</sup> The trial court also awarded prejudgment interest on the September 13, 2002 award for attorney fees for \$716,257.75. Under RAP 2.4(g), we also review this award.

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prevailed on its CRA argument, whereas WaferTech prevailed on its pass-through claims.

WaferTech may also be entitled to fees under RCW 60.04.181(3).<sup>23</sup> Because neither party prevailed on all claims and because an award under RCW 60.04.181 is discretionary, we decline to award fees on appeal to either party.

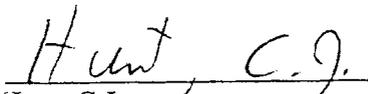
Affirmed in part, reversed in part, and remanded for further proceedings.

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 pursuant to RCW 2.06.040, it is so ordered.

  
Houghton, J.

We concur:

  
Seinfeld, J.

  
Hunt, C.J.

<sup>3</sup> RCW 60.04.181(3) states in part: "The court may allow the prevailing party in the action, whether plaintiff or defendant, as part of the costs of the action, the moneys paid for recording liens of lien, costs of title report, bond costs, and attorneys' fees and necessary expenses incurred by the attorney in the superior court, court of appeals, supreme court, or arbitration, as the court or arbitrator deems reasonable."



**CERTIFICATE OF SERVICE**

The undersigned hereby declares under penalty of perjury under the laws of the State of Washington as follows:

I am an employee of the firm of Peel Brimley LLP. I caused to be filed in the above-entitled Court Brief of Appellant Natkin/Scott. I further caused the same to be placed in the United States Mail, postage paid addressed to the following opposing counsel:

John S. Stewart  
Thomas A. Larkin  
Tyler Storti  
Stewart Sokol & Gray, LLC  
2300 SW First Avenue, Suite 200  
Portland, OR 97201

DATED this 14<sup>th</sup> day of December 2006 at Seattle, Washington.

  
\_\_\_\_\_  
Renee Faulds