

Cause No. ~~46138-II~~

(Consolidated for Purposes of Argument with Case No. 45325-8-II)

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

BUSINESS SERVICES OF AMERICA II, INC.,

Appellant,

v.

WAFERTECH LLC,

Respondent.

**APPEAL FROM THE SUPERIOR COURT
FOR CLARK COUNTY
HONORABLE DAVID B. GREGERSON**

BRIEF OF RESPONDENT

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I. INTRODUCTION

In the trial Court, Appellant Business Services of America II, Inc. (“BSA”) twice moved to “correct” Respondent WaferTech LLC’s (“WaferTech”) prevailing party judgment on the grounds that BSA inexplicably misidentified itself on hundreds of pleadings over more than a decade of litigation. Both times, the trial court denied BSA’s motion, leaving WaferTech’s prevailing party judgment intact. BSA now assigns error to the trial court’s decision, asserting that BSA’s inability to correctly identify itself was merely a “misnomer” of no material consequence because “that which we call a rose by any other name would smell as sweet.” (Op. Br. at 1.)

But, as the trial court correctly recognized, this dispute is about much more than a mistaken name. Indeed, BSA’s appeal is its latest move in a long-running and cynical corporate shell game. BSA seeks to use the Washington courts to obtain a recovery against WaferTech, but is hiding behind non-existent and or/defunct entities in an effort to avoid its reciprocal obligations. If BSA prevails in this appeal, it will have succeeded in flouting its corporate obligations and WaferTech will be left holding a worthless \$430,100 judgment against a long-defunct entity that has no employees, officers, directors, assets or revenues of any kind. This

Court should affirm the trial court's decision and reject BSA's shameless and cynical attempt to avoid its corporate obligations.

II. RESTATEMENT OF THE ISSUES PRESENTED FOR APPEAL

1. Did the trial court err in refusing to "correct" a judgment to substitute as plaintiff an entity that lacks standing to maintain an action under the laws of the state in which it is incorporated?

2. Did the trial court err in determining that Business Service America II had failed to prove that it was the assignee of Natkin/Scott's claim?

3. Did the trial court err in determining that Business Service America II had not adequately explained why Business Service America II pursued litigation against WaferTech under the name of a non-existent entity for more than a decade?

III. RESTATEMENT OF THE CASE

The original Plaintiff in this action, Natkin/Scott, was a subcontractor that worked on the construction of WaferTech's semiconductor manufacturing facility in Camas, Washington. Before construction was completed, the prime contractor, Meissner + Wurst ("M+W"), terminated Natkin/Scott for repeated violations of the project's safety rules. (CP 509) Natkin/Scott filed this action in 1998, claiming

that WaferTech and M+W owed Natkin/Scott over \$7.65 million for unpaid work. (CP 3)

In 2001, Natkin/Scott purportedly assigned its claim to BSA. BSA substituted for Natkin/Scott as plaintiff and filed its Second Amended Complaint, which inaccurately described BSA as “a Delaware Corporation.” (CP 689) In reality, as Appellant now admits, BSA has never existed, in any corporate form, in any state. (Appellant’s Br. at 6.) BSA never bothered to correct its misstatement, and WaferTech did not learn of BSA’s non-existence for more than a decade. WaferTech only learned of BSA’s non-existence after WaferTech obtained a \$430,100 prevailing party judgment against BSA in September, 2013. (CP 1188)

In the intervening decade-plus of litigation, this case went through two appeals (in which this Court affirmed the trial court’s decision that limited BSA’s lien claim to a maximum of \$1.5 million and awarded prevailing party fees to WaferTech) and a remand for trial on BSA’s lien claim, as limited by the trial court and on appeal. *Bus. Servs. of Am. II, Inc. v. WaferTech, LLC*, noted at 120 Wn. App. 1042, 2004 WL 444724 (2004).

In 2012, fourteen years after the original complaint in this case was filed, BSA filed a Third Amended Complaint alleging that “at the time of the filing of Plaintiff’s Second Amended Complaint, substituting it as

plaintiff, Business Services of America II, Inc., was a Delaware Corporation.” (CP 307) WaferTech answered that it “lacks sufficient knowledge or information to form a belief as to the truth of [BSA’s status as a Delaware Corporation], and therefore denies the same.” (CP 151)

WaferTech moved for summary judgment against BSA’s Third-Amended Complaint on the grounds that BSA’s \$1.5 million lien claim was offset, in its entirety, by a \$2.4 million settlement BSA had previously obtained from M+W. The trial court granted BSA’s motion for summary judgment, dismissed BSA’s lien claim and awarded WaferTech prevailing party fees and costs of \$430,110. (CP 570, 572, 615, 620).

BSA appealed Case No. 45325-8-II. That appeal has been consolidated with this appeal for purposes of argument. WaferTech requested that BSA post a supersedeas bond pursuant to RAP 8.1 to stay execution of WaferTech’s \$430,110 judgment, but BSA refused to do so. (CP 1160, Ex. A) Consequently, WaferTech commenced efforts to collect on its \$430,110 judgment. (CP 1160)

WaferTech soon discovered that no entity named “Business Services of America II” had ever been incorporated in Delaware. The Delaware Division of Corporation had records of entities with names similar to Business Services of America II, but none that were identical. Moreover, each of the similarly-named entities had long been defunct.

One of the similar entities was “Business Service America II, Inc.,” which incepted on July 23, 1999, and was void as of March 1, 2006. (CP 1187)

Stymied in its collection efforts by BSA’s non-existence, WaferTech began supplemental proceedings in the trial court in an effort to obtain information about BSA’s corporate status, assets, and liabilities. On November 22, 2013, BSA’s long-standing counsel of record, Eric Hultman, admitted that BSA had never legally existed. (Declaration of Gabriel Weaver, filed concurrently with WaferTech’s Motion to Dismiss Appeal (“Weaver Decl.”), Ex. 6)

WaferTech moved to dismiss BSA’s appeal on the grounds that BSA is not an “aggrieved party” within the meaning of RAP 3.1. This Court’s clerk denied WaferTech’s motion without prejudice to WaferTech’s right to raise the issue again in the merits brief. Soon after WaferTech filed its motion to dismiss BSA’s appeal, BSA filed a motion in the trial court pursuant to CR 60(a), seeking to change the name of the judgment debtor from BSA to “Business Service America II.” (CP 1179) The trial court denied BSA’s motion to change the name of the judgment debtor to Business Service America II on February 7, 2014. (CP 1189) After the trial court denied its first motion, BSA filed a renewed Motion to Correct Judgments, which the trial court denied. This appeal followed.

On WaferTech's motion, this appeal was consolidated for purposes of argument with Cause No. 45325-II.

IV. SUMMARY OF ARGUMENT

BSA pursued its claim against WaferTech for many years under the name "Business Services of America II," but that entity never had any legal existence. WaferTech did not learn of this deception until more than a decade after BSA interposed itself into the case. But when WaferTech attempted to collect on its \$430,100 prevailing party judgment against BSA in late 2013, WaferTech discovered that BSA did not exist.

At that point, BSA claimed that a different entity—"Business Service America II"—should have been identified as plaintiff all along. However, BSA has never explained how it came to misidentify itself on hundreds of pleadings over more than a decade of litigation. Moreover, the proposed substitute entity, Business Service America II, is itself a void Delaware corporation that lacks the capacity to pursue this litigation against WaferTech under Delaware law. Giving full faith and credit to the Delaware statute, this Court should reach the same conclusion. The trial court's order denying BSA's motion to "correct" judgments should be affirmed and WaferTech should be awarded its fees and costs on this appeal.

V. ARGUMENT

1. BSA Has Not Established Grounds to Modify WaferTech's Judgment.

BSA seeks to amend WaferTech's judgment under CR 60(a). CR 60(a) primarily exists to permit courts to amend judgments in order to correct errors that are clerical in nature, *i.e.*, to correct "language that did not correctly convey the intention of the court or supplies language that was inadvertently omitted from the original judgment." *Presidential Estates Apartment Associates v. Barrett*, 129 Wn.2d 320, 326, 917 P.2d 100 (1996).

The relief that BSA seeks is far broader than that contemplated by the narrow terms of CR 60(a). BSA claims that it was "oversight" for it to incorrectly identify itself on hundreds of pleadings at the trial court and before this court. (Appellant's Op. Br. at 6) But BSA still has not explained why it was mistaken about its own name for so long, and cannot clearly articulate which entity should have been originally named as plaintiff. BSA's counsel and its former president still cannot even agree on the exact name of the assignee of BSA's claim. (Compare Hultman Declaration ¶7 (CP 1201) (identifying assignee as "Business Services America II, Inc.") with Gugliermo Declaration ¶3 (CP 1200) (assignee is "Business Service America II, Inc.").)

Similarly, BSA claims “there is no evidence that the error [in identifying the plaintiff] was made for strategic reasons or that BSA gained an advantage from the error” (Appellant’s Op. Br. at 6), but does not even attempt to explain why it pursued this litigation under the name “Business Services of America II, Inc.” for so many years. *See* Hultman Declaration ¶7 (“I do not recall how I learned that name or if there was a typo, but my intent was to accurately name the assignee.”) In fact, the advantage BSA received is obvious. If Natkin/Scott were plaintiff, WaferTech could collect its \$430,100 prevailing party judgment. WaferTech has little recourse against a void and/or fictitious entity that has no assets and has never been engaged in any business. The only reasonable conclusion is that principals behind BSA elected to pursue with no risk the potential recovery for themselves of Natkin/Scott’s claims while hiding behind the empty shell of a non-existent entity to avoid liability—as evidenced by the BSA’s extraordinary efforts to frustrate WaferTech’s ability to recover its judgment for attorneys’ fees.

BSA claims that it is undisputed that Business Service America II was the assignee of Natkin/Scott’s claim, but the evidence suggests otherwise. Business Service America II last filed an annual report and paid its corporate taxes in 2003, *nine* years before filing its Third Amended Complaint purporting to substitute for the non-existent BSA.

Therefore, under Delaware law, Business Service America II has been a “void” corporation since at least March 1, 2006. As a void corporation, Business Service America II has no right to take any corporate action—including pursuit of this litigation—under Delaware law. Even before March, 2006, Business Service America II was an empty shell. In its 2003 corporate tax filing BSA claimed \$0 in gross assets, which means either that: (1) Business Service America II did not possess any claim against WaferTech as of 2003, two years after the Second Amended Complaint was filed; or (2) Business Service America II believed that any such claim against WaferTech had a value of \$0 of the time that Business Service America II filed its taxes. (Appellant’s Op. Br. at Appdx 1). In either case, Business Service America II’s own corporate filings contradict BSA’s contention that Business Service America II was ever the assignee of Natkin/Scott’s claim against WaferTech.

BSA suggests that WaferTech is somehow complicit for the fact that BSA pursued this litigation under a fictitious name since 2001. Appellant’s Op. Br. 4 at 6 (“Both judgments were prepared by WaferTech’s counsel and identified BSA as Business Services of America II.”) This argument shifts the burden of correctly identifying the plaintiff/appellant—which properly lies with BSA itself—to WaferTech. BSA is uniquely aware of its own identity, and its counsel has the burden,

under CR 11, of conducting a reasonable inquiry into the facts underlying his client's pleadings. WaferTech had no obligation to undertake any investigation into whether BSA was actually the assignee of Natkin/Scott's lien claim, and WaferTech has no independent knowledge of the circumstances surrounding the assignment of Natkin/Scott's lien claim. Indeed, as soon as WaferTech uncovered information that BSA was *not*, in fact, the assignee of Natkin/Scott's lien claim (and had never existed at all), WaferTech promptly brought this information to the attention of the Court of Appeals through its motion to dismiss BSA's appeal.

BSA correctly points out that "misnomers" can be corrected under CR 60(a), but BSA interprets the holding in *Entranco Eng'rs v. Envirodyne, Inc.* far too broadly. *Entranco Eng'rs v. Envirodyne, Inc.*, 134 Wn.App. 503, 507, 662 P.2d. 73 (1983). The *Entranco* court held that, under certain limited circumstances, "misnomers" can be corrected pursuant to CR 60(a). *Id.* In *Entranco*, the Court of Appeals modified a default judgment to correct the name of the defendant, in part because the proper party defendant had actual notice of the claim at every relevant time. Here—BSA is not seeking to simply correct an error on a single document—or even a few documents—but to change the name of the plaintiff after more than a decade of litigation and hundreds of pleadings.

BSA also relies on a California case (decided under California law) for the proposition that amendment is permissible when a plaintiff makes a mistake in its own name. (Appellant's Op. Br. at 8, citing *California Central Airlines v. Fritz*, 337 P.2d 531 (Cal. App. 1959). Even if this out-of-state decision was controlling in Washington (which it is not), *California Central Airlines* was decided under circumstances that differ markedly from those present in the instant case. In *California Central Airlines*, the plaintiff inadvertently used the name under which it conducted business, "California Central Airlines" rather than its legal name, "California Coastal Airlines." When this error was uncovered, the plaintiff promptly moved to amend its complaint to substitute California Coastal Airlines as plaintiff. The California Court of Appeals held that it was error to not permit the plaintiff to amend its complaint to correct the error in the name of the party. *California Central Airlines*; 169 Cal. App. at 438. The logic of *California Central Airlines* is inapplicable to the instant case. The key difference between the instant case and *California Central Airlines* is that the *California Central Airlines* plaintiff inadvertently filed the complaint under its fictitious d/b/a name and sought to amend the complaint to pursue the case under its legal name. (*Id.*) The fictitious entity was replaced as plaintiff by a valid entity. In the instant case, BSA proposes to substitute a void entity that does not have capacity

to pursue a claim against WaferTech. BSA should not be permitted to use CR 60(a) to gloss over its lack of capacity to pursue this appeal.

2. BSA Cannot Correct The Defect In Its Corporate Status By Substituting The Void Corporation “Business Service America II” As Plaintiff/Appellant.

BSA’s proposed replacement, “Business Service America II” was organized under the laws of the state of Delaware. In Delaware, a corporation’s failure to pay taxes owed for one year voids its corporate charter and renders inoperative all powers conferred upon it by law. Del. Code Ann. Tit. 8 § 510. A void charter deprives a Delaware corporation of “any standing to appeal and be heard.” *Transpolymer Indus., Inc. v. Chapel Main Corp.*, 582 A.2d 936 (Del. 1990). A Delaware court would not permit Business Service America II to take BSA’s place in order to pursue this appeal against WaferTech, under Delaware law. Giving full faith and credit to the Delaware statute, this Court should reach the same result. *See Chandler v. Miller*, 168 Wash. 563, 569, 13 P.2d 22 (1932) (another state’s determination of capacity entitled to full faith and credit).

BSA argues that it can continue to pursue this appeal because it is merely “winding up” BSA’s affairs. (Appellant’s Op. Br. at 7) But, in advancing this argument, BSA misinterprets the controlling Delaware statute. Delaware law permits void corporations to take certain actions, but the powers of such entities are sharply limited. Del. Code Ann. Tit. 8

§ 278 (“Section 278”). Void corporations may wind up their affairs, which can include proceedings begun by or against the corporation within three years of dissolution. *Id.* However, nothing in the statute allows a void corporation to substitute as plaintiff or appellant in an existing case after the expiration of the three-year runoff period. *See id.* As a void corporation that is long-past Section 278’s three-year runoff period, Business Service America II does not have the capacity to substitute for BSA as plaintiff or appellant.

In another critical limitation, Section 278 also prohibits void corporations from taking any corporate action “for the purpose of continuing the business for which the corporation was organized.” *Id.* Here, controlling Delaware law bars Business Service America II from pursuing this appeal because the lawsuit/appeal is a mere continuation of the business for which Business Service America II was formed. Business Service America II was specifically formed to acquire and pursue Natkin/Scott’s claims.¹ This is exactly what Business Service America II is doing with this lawsuit and appeal against WaferTech. Business Service

¹ On November 22, 2013, WaferTech took the deposition of BSA’s longtime counsel, Mr. Hultman, in supplemental proceedings ordered by the trial court. Mr. Hultman testified as follows:

Q: “At the time that you filed the Second Amended Complaint, did you have an understanding about what business BSA II was in”

A: No, other - - other than in the business of purchasing claims.” Deposition of Eric Hultman, November 22, 2013, pg. 36:7-11)

America II has never been engaged in any sort of business other than prosecution of this claim against WaferTech. Therefore, this case is not a “winding up” of Business Service America II’s affairs within the meaning of the Delaware statute.

A Delaware court would not permit Business Service America II to pursue this appeal against WaferTech. This Court, giving full faith and credit to the Delaware statute, should not allow BSA to “correct” WaferTech’s judgment to name Business Service America II as a plaintiff/appellant/judgment debtor.

3. This Court Should Award WaferTech Prevailing Party Attorney Fees On Appeal Pursuant to RCW 60.04.081(3).

Because WaferTech prevailed in the trial court, a decision in WaferTech’s favor in this consolidated appeal means that the case is over (barring further appeal) and that WaferTech is the prevailing party. As prevailing party, WaferTech is entitled to its fees and costs on appeal. *See* RAP 18.1(b); RCW 60.04.081(3) (“The court may allow the prevailing party . . . as part of the costs of the action, . . . attorneys’ fees and necessary expenses incurred by the attorney in the . . . court of appeals”). This Court should either award fees pursuant to RAP 18.1 or direct the trial court to determine the reasonable fees incurred on appeal

upon return of the mandate. *See Hedlund v. Vitale*, 110 Wn. App.183, 189 n.6, 39 P.3d 358 (2002).

BSA, however, is not entitled to recover fees even if this Court reverses the trial court's decision. RCW 60.04.081(3) provides for an award of fees to the "prevailing party *in the action*." Only if this Court remanded the case for trial, and BSA ultimately prevailed at any trial, would BSA be entitled to recover fees for this appeal.

VI. CONCLUSION

The trial court properly denied BSA's motion to correct judgments. BSA has not established that Business Service America II is the assignee of Natkin Scott's claim. BSA has provided no explanation or justification for Business Service America II's failure to properly identify itself for so long. Moreover, Business Service America II lacks capacity to stand in for BSA because it is void and defunct under Delaware law. Accordingly,

this Court should affirm the trial court and award WaferTech its fees on appeal.

DATED: July 7, 2014.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Gabriel M. Weaver", written over a horizontal line.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document has been served by email, by agreement of counsel, and by First Class Mail on the 7th day of July, 2014, to:

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