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DIVISION II
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STATE OF WASHINGTON
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No. 47316-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

BUSINESS SERVICES OF AMERICA II, INC.,

Appellant,

v.

WAFERTECH LLC,

Respondent.

APPELLANT'S OPENING BRIEF

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A. Introduction

This appeal addresses the issue of whether a mechanic's lien claimant (plaintiff Business Service America II, Inc., referred to as "BSA II") may obtain a recovery for work valued at over $1.1 million. The owner (defendant WaferTech LLC) understandably does not want to pay. WaferTech obtained two prior dismissals from the trial court, both of which this court unanimously reversed.

The current appeal arose out of a summary judgment on WaferTech's affirmative defense of setoff. WaferTech bases its setoff defense on a $2.4 million recovery BSA II obtained from another defendant. However, that defendant was potentially liable for $3.5 million in damages that BSA II cannot recover from WaferTech. Our Supreme Court has repeatedly stated that setoff is only available to prevent a plaintiff from a double recovery of the same damages. *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 675, 15 P.3d 115 (2000); *Puget Sound Energy, Inc. v. Alba General Ins. Co.*, 149 Wn.2d 135, 142, 68 P.3d 1061 (2003). The $2.4 million BSA II recovered from the settling defendant partially compensated it for the $3.5 million in damages for which WaferTech is not liable, so there will be no double recovery of the same damages to which setoff would apply.

The remaining issues have to do with a misnomer of BSA II and attorney's fees. The misnomer did not prejudice WaferTech, so it can be corrected. The trial court's award of attorney fees to WaferTech will be vacated by a reversal of the summary judgment on setoff, and if not, the amount was excessive, as the trial court failed to exclude fees for unproductive work.

B. Assignments of Error

Assignments of Error

1. The trial court erred when it granted summary judgment to WaferTech and denied BSA II's motion for summary judgment, both on WaferTech's affirmative defense of setoff.

2. The trial court erred when it entered a final judgment in favor of WaferTech.

3. The trial court erred when it awarded WaferTech $430,000 in fees as the prevailing party under RCW 60.04.181(3).

4. The trial court erred when it entered an order to show cause requiring BSA II to show cause regarding the existence of BSofA.

5. The trial court erred when it denied BSA II's request to require WaferTech to show cause regarding its knowledge that BSofA was a misnomer that had no effect on WaferTech.

6. The trial court erred when it denied BSA II's motion under CR 15, 25, and 60(a), to correct its name from BSofA to BSA II.

7. The trial court erred when it entered findings regarding BSofA, concluded that BSofA had no capacity to sue or be sued, and ruled that BSofA had no legal existence.

8. The trial court erred when it imposed attorney's fees of $300 as sanctions against BSA II.

Issues Pertaining to Assignments of Error

1. What is the standard of review of the granting of summary judgment and denial of motions based solely upon documentary evidence? (Assignments of Error Nos. 1, 2, and 4-7)

2. Is the plaintiff's recovery of $2.4 million from the first defendant, at a time when the first defendant is potentially liable for at least $3.5 million in damages not recoverable from the second defendant, setoff against the second defendant's liability to the plaintiff? (Assignment of Error No. 1)

3. Can a trial court resolve disputed issues of fact to adjudicate the amount of a lien claim as part of a motion to reduce a lien under RCW 60.04.081? (Assignment of Error No. 2)

4. Is the misnomer of a party an error which can be corrected under CR 15, 25 and 60(a)? (Assignments of Error Nos. 4-7)

5. Does a trial court abuse its discretion when it does not enter findings in support of its award and awards attorney's fees to a prevailing party for unproductive work, and awards fees as sanctions for a mistake that did not adversely affect the opposing party? (Assignments of Error Nos. 3 and 8)

6. Is the prevailing party on appeal in a lien foreclosure entitled to attorney fees on appeal? (Assignments of Error Nos. 1-8)

C. Statement of the Case

1. The project out of which action arises.

WaferTech is the owner of a semiconductor plant in Clark County. CP 1. WaferTech contracted with M+W to construct the cleanroom portion of the plant. *Id.* M+W subcontracted certain work to Natkin/Scott. *Id.*

M+W wrongfully terminated Natkin/Scott in April 1998. CP 103. Natkin/Scott recorded a lien for amounts it claimed it was owed, and initiated this action against M+W and WaferTech in Clark County Superior Court to recover amounts owed under its subcontract with M+W and to foreclose its lien against the WaferTech property. CP 1.

2. Assignment from Natkin/Scott to BSA II (not BSofA).

In 1999, Natkin/Scott assigned its claims in this action, including the lien claim against WaferTech, to BSA II. CP 707. The assignment

documents were provided to WaferTech in 2001. CP 697. The documents included: (1) "Sale and Servicing Agreement" between Natkin/Scott and BSA II; (2) "Promissory Note" from BSA II to Natkin/Scott; and (3) "Overview and Summary of Transaction" identifying Natkin/Scott's assignee as BSA II. *Id.* None of the assignment documents identified the assignee as "Business Services of America II, Inc." ("BSofA"). *Id.* Joe Guglielmo was the president of Scott Co., one of the joint venture partners in Natkin/Scott, and also president of BSA II, a Delaware corporation. CP 707.

WaferTech then deposed Natkin/Scott witnesses regarding the assignment, identifying the Sale and Servicing Agreement as a deposition exhibit. *Id.* During one deposition, WaferTech's counsel referred to the assignee as BSA II. *Id.*

3. The trial court made rulings differentiating the damages the plaintiff could recover from each defendant.

The trial court entered a partial summary judgment providing that Natkin/Scott's damages against M+W would be measured by the reasonable direct costs of its work, plus a reasonable amount for overhead and profit. CP 106. WaferTech's expert calculated the amount of Natkin/Scott's reasonable direct costs, plus overhead and profit, for work through January 31, 1998, at over $3.5 million. CP 534. He calculated

Natkin/Scott's costs for work after January 31, 1998, at $1.1 million. *Id.* Natkin/Scott's expert calculated the post-January 31, 1998 recoverable costs at over $3.2 million. Supp. CP __ (Sub No. 1080).

The trial court limited Natkin/Scott's lien claim to work performed after January 31, 1998, reducing the face amount of the lien to $1.5 million, pursuant to RCW 60.04.081. *Id.*, Ex. 6. The trial court's only finding in support of the reduction was that a lien of $7,654,454 was "clearly excessive," with the exact amount "still to be determined." *Id.*

4. Natkin/Scott and BSA II settled claims against M+W.

Natkin/Scott and BSA II settled the claims against M+W for $2.4 million. *Id.*, Ex. 7. The recovery from M+W was intended to cover claims for which M+W, but not WaferTech, was responsible. CP 548.

BSA II submitted a proposed second amended complaint to WaferTech. CP 697. It incorrectly named the plaintiff/assignee as BSofA. *Id.* WaferTech's counsel objected to several provisions, but not to the name BSofA. *Id.* WaferTech eventually consented to filing of the second amended complaint with the plaintiff/assignee named BSofA. *Id.*

WaferTech's answer to the second amended complaint admitted that the new plaintiff was Natkin/Scott's assignee. CP 319, Ex. 9. It asserted seventeen affirmative defenses, but did not assert that the plaintiff lacked capacity or standing to pursue the claims. *Id.*

WaferTech conducted a CR 30(b)(6) of the plaintiff regarding the settlement with M+W. *Id.*, Ex. 10.

5. WaferTech offered exhibits at trial identifying Natkin/Scott's assignee as BSA II, not BSofA.

Prior to trial in 2002, WaferTech identified Exhibits 899, 1016, and 1021. CP 151. These contained the Sale and Servicing Agreement, Promissory Note, Outline and Summary of Transaction, all identifying the assignee as BSA II. CP 697. These were all included in the clerk's final exhibit list. CP 196.

6. There were two dismissals reversed on appeal.

The 2002 trial ended with a dismissal that was reversed on appeal by this court. *BSofA v. WaferTech, LLC*, 2004 WL 444724 (Wn.App. Div. 2, March 9, 2004. After remand, the trial court dismissed the action on different grounds. Both this court and our Supreme Court reversed the trial court. *BSAofA v. WaferTech, LLC*, 159 Wn.App. 591, 245 P.3d 257 (2011), *aff'd* 174 Wn.2d. 304, 274 P.3d 1025 (2012). BSA II was administratively dissolved in 2006.

7. The trial court entered summary judgment on setoff.

After the second remand, at WaferTech's request, the trial court appointed a referee chosen by WaferTech. CP 562. The referee refused to serve. CP 608.

The trial court then entered summary judgment in favor of WaferTech on its affirmative defense of setoff, while denying BSA II's cross-motion on the same defense. CP 572.

WaferTech sought $518,557 in fees as prevailing party under RCW 60.04.181(3). CP 579. WaferTech's counsel submitted a declaration showing it worked 1,443 hours. CP 590. BSA II's counsel worked 442 hours, for work on the same issues, which included a successful appeal reversing the trial court's 2009 dismissal. CP 608.

The trial court signed findings of fact and conclusions of law containing only conclusory findings and perfunctory conclusions regarding WaferTech's fees. CP 611. The trial court signed and filed the amended final judgment for $430,000 in fees on September 20, 2013. CP 616. BSA II timely appealed. CP 604.

8. <u>This court remanded on the issue of the appellant's name.</u>

During the appeal of the summary judgment (Appeal No. 45325-8-II), WaferTech objected to the appeal being pursued in the name of BSofA. WaferTech's Motion to Dismiss Appeal, January 2, 2014. BSA II moved under CR 60(a) to have the trial court correct the misnomer. CP 637, 669. The trial court refused. CP 690. BSA II timely appealed (Appeal No. 46138-2-II). CP 693. The two appeals were consolidated.

During oral argument, WaferTech's counsel conceded that but for BSA II's dissolution while the action was pending, WaferTech would have no basis to object to the amendment of the plaintiff's name from BSofA to BSA II. The colloquy with the court was as follows:

> JUDGE MAXA: So that's what you're basing your argument on, so if BSA II was currently fully registered in Delaware, you think it would be an abuse of discretion to deny it [the CR 60(a) motion to correct the plaintiff's name] in that situation?
>
> Mr. McDermott: I do, I agree with that. If it [BSA II] was an active, validly licensed, going concern company, we wouldn't have opposed it [the CR 60(a) motion], but they were trying to – the key difference is they're trying to correct in a void entity, void since 2003, defunct since 2006.

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

In its decision affirming the CR 60(a) denial, this court noted erroneously that the agreement assigning the lien claim was "never made part of the trial court record." Opinion dated October 21, 2014. It was part of Trial Ex. 899. Without the assignment, there was "a factual issue" as to whether BSofA was a misnomer for the assignee. *Id.* The agreement "could have clarified the issue" as to whether BSofA was a misnomer. *Id.*

This court affirmed the CR 60(a) denial, but remanded for further proceedings. *Id.* This court never ruled on BSA II's appeal of the 2013 summary judgment regarding setoff. *Id.*

Upon remand, BSA II moved under CR 15, 25, and 60(a) to correct the misnomer BSofA to BSA II. CP 732. It cited Trial Exs. 899, 1016, and 1021 regarding the assignment to BSA II, not BSofA. CP 697. Joe Guglielmo, a signatory to the assignment documents, explained under oath that Natkin/Scott assigned the claims to BSA II. CP 707. He was BSA II's president at the time of dissolution in 2006, and stated that BSA II is pursuing this litigation as part of the "winding up of its affairs." *Id.* BSA II's counsel explained how the misnomer occurred inadvertently, with WaferTech's participation. CP 697.

BSA II also requested a show cause order requiring WaferTech to show cause why the trial court should not enter findings regarding (1) WaferTech's knowledge since 2001 that Natkin/Scott's assignee was BSA II, not BSofA, and (2) WaferTech's lack of prejudice from the plaintiff being named BSofA rather than BSA II. CP 725.

The trial court denied the show cause request. CP 763. The trial court entered findings regarding BSofA and denied the CR 15, 25, and 60(a) motions to amend and correct the misnomer. CP 766. BSA II again timely appealed. CP 770.

While the appeal was pending, BSA II moved to expressly include Trial Exs. 899, 1016, and 1021, in the trial court record. Supp. CP __ (Sub No. 1261). Instead of serving the correct motion on WaferTech,

BSA II mistakenly served a copy of a prior motion it had filed in this court to include the exhibits in the record, which had the Court of Appeals' caption. Supp. CP __ (Sub No. 1263A). WaferTech said nothing until the day prior to the hearing, at which point BSA II served the correct motion and postponed the hearing. *Id.* At the hearing, the trial court sanctioned BSA II $300 in attorney's fees for initially serving the wrong motion. Supp. CP __ (Sub. No. 1265).

D. Summary of Argument

WaferTech is not entitled to setoff the $2.4 million BSA II recovered from M+W against WaferTech's liability to BSA II. BSA II recovered different damages from M+W than BSA II can recover from WaferTech. Setoff is only applied to prevent a double recovery of the same damages.

Even if WaferTech was entitled a setoff, it was not entitled to summary judgment on BSA II's claim, given the factual dispute whether BSA II's claim exceeds the amount of the setoff.

The misnomer for BSA II is a pleading error which has not prejudiced WaferTech, so BSA II may correct it pursuant to CR 15, 25, and 60(a). BSA II, despite its dissolution, retains capacity to be a party.

Finally, even if these rulings stand, the trial court abused its discretion when it awarded attorney's fees to WaferTech for unproductive work.

E. Argument

1. This court reviews *de novo* the trial court decisions granting summary judgment and denying amendment, giving no deference to the trial court.

This court gives no deference to the trial court's summary judgment decisions on setoff. In reviewing a summary judgment decision, the appellate court engages in the same inquiry as the trial court. *Roger Crane & Ass. v. Felice*, 74 Wn.App. 769, 773, 875 P.2d. 705 (1994). The court is obligated to accept the truth of the non-moving party's evidence and draw all reasonable favorable inferences in favor of that party. *Queen City Farms, Inc. v. Central Nat'l Ins. Co. of Omaha*, 126 Wn.2d 50, 98, 882 P.2d 703, 891 P.2d 718 (1994).

This court reviews *de novo* the trial court decisions related to the misnomer, which were all based solely on documentary evidence. Trial court decisions based on documentary evidence are reviewed *de novo*. *In re Rosier*, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986); *Limstrom v. Ladenburg*, 136 Wn.2d 595, 612, 612 P.2d 869 (1998).

2. There is no setoff where BSA II's recovery from M+W was for different damages than BSA II will recover from WaferTech.

The difference in the damages BSA II recovered from M+W and the damages BSA II may recover from WaferTech preclude any setoff. Equitable setoff is only imposed to prevent the plaintiff from a double-recovery of the same damages from two defendants. *Weyerhaeuser Co. v. Commercial Union Ins. Co., supra*; *Puget Sound Energy, Inc. v. Alba General Ins. Co., supra.*

Here, BSA II recovered $2.4 million from M+W for damages arising out of Natkin/Scott's work throughout the WaferTech project. Those damages included $3.5 million in damages for work prior to January 31, 1998. In contrast, BSA II's damages for its lien claim against WaferTech are limited to work after January 31, 1998.

There can be no setoff in favor of WaferTech. Under setoff law, BSA II's entire $2.4 million recovery from M+W compensates it for the $3.5 million in damages for work prior to January 31, 1998, leaving nothing for setoff.

Our Supreme Court's application of setoff principles in *Weyerhaeuser* and *Puget Sound Energy* illuminates how to apply setoff to the present case. In *Weyerhaeuser*, a plaintiff obtained settlement funds from several insurers to cover environmental cleanup costs at several sites,

which it did not allocate to specific sites. A non-settling insurer obligated to pay for cleanup at certain sites sought to setoff the settlement funds against its liability. 142 Wn.2d at 672. The burden was on the non-settling insurer to prove that the plaintiff had been made whole prior to any setoff. *Id.* at 675. The court held the non-settling insurer failed to show the plaintiff was "fully compensated" by the prior settlement, so there was no setoff. *Id.*

Similarly, in *Puget Sound Energy*, *supra*, a plaintiff was also seeking recovery from several insurers for cleanup costs at various sites, and had obtained settlements from some insurers, which was not allocated to particular sites. Non-settling insurers sought to setoff the recovery from other insurers from their own liability. The Court of Appeals ruled that if the plaintiff allocated the settlement proceeds to sites for which the non-settling insurers were not liable, the burden would shift to the insurers to prove that the plaintiff had been fully compensated. *Puget Sound Energy v. Alba*, 109 Wn.App. 683, 695, 10 P.3d 445 (2000).

Our Supreme Court held that placing an allocation burden on the plaintiff was too onerous. *Puget Sound Energy v. Alba*, 149 Wn.2d at 141-2. It noted that in its decision in *Weyerhaeuser* it clarified that the non-settling defendant has the burden of showing the plaintiff has been made whole by prior settlement. *Id.* The plaintiff merely needed to show

"that the settlement proceeds at issue were secured by releasing risks broader than those at issue" in the action against the non-settling defendant. *Id.* at 142. The court held that as in *Weyerhaeuser*, the non-settling defendant failed to show the plaintiff had been made whole by prior settlement, so there was no setoff. *Id.*

Our Supreme Court, in both *Weyerhaeuser* and *Puget Sound Energy*, made it clear that equitable setoff is not to be used to reduce a plaintiff's recovery until the plaintiff has been made whole. BSA II was not made whole by the recovery of $2.4 million, as that only partially compensated BSA II for the $3.5 million in damages for work prior to January 31, 1998. WaferTech was not entitled to any setoff.

In seeking setoff, WaferTech misconstrued the decision in *Eagle Point Condo. Owners Ass'n v. Coy*, 102 Wn.App. 697, 9 P.3d 898 (2000). There, a portion of settlement proceeds were setoff against the non-settling defendant's liability "to assure that [the plaintiffs] did not recover from both [the settling defendant] and [the non-settling defendant] for the same damage." 102 Wn.App. 702.

The manner in which the *Eagle Point* court differentiated between the portion of the $65,000 settlement which for which the non-settling defendant was entitled to a setoff ($55,000), and the portion for which setoff was not available ($10,000), shows WaferTech is not entitled to a

setoff. The $2.4 million BSA II recovered from M+W is comparable to the $10,000 portion of the settlement proceeds in *Eagle Point* not available for setoff.

In *Eagle Point*, a condominium homeowners association and an individual unit owner sued both the developer and the contractor who constructed the condominiums. The plaintiffs settled with the contractor for $65,000, which included $10,000 in damages the plaintiffs could only recover from the contractor. The court imposed a $55,000 setoff against the damages the plaintiffs proved at trial against the developer, as there was no way to allocate any of the $55,000 to damages for which only the contractor was liable. 102 Wn.App. at 702-3.

Applying *Eagle Point* to the present action results in no setoff. In *Eagle Point*, the potential setoff was $65,000, the settlement amount, while here the potential setoff is $2.4 million. In *Eagle Point*, there were $10,000 in damages for which the plaintiffs obtained recovery from the settling defendant but could not recover from the non-settling defendant, while here there were $3.5 million in such damages (for work prior to January 31, 1998). In *Eagle Point*, the potential $65,000 setoff was reduced by $10,000, leaving $55,000 for setoff, while here the potential $2.4 million setoff must be reduced by $3.5 million, leaving nothing for setoff.

The following chart summarizes the above analysis:

	Eagle Point	*BSA II v. WaferTech*
Settlement Amount	$65,000	$2.4 million
Less damages for which the non-settling defendant is not liable	($10,000)	($3.5 million)
Amount available for setoff	$55,000	$0

There is no basis to impose a setoff. BSA II, not WaferTech, was entitled to summary judgment on WaferTech's affirmative defense of equitable setoff.

3. WaferTech was not entitled to a final judgment.

Even if WaferTech was entitled to a setoff, it was not entitled to a final judgment. The basis for the final judgment was that BSA II's lien claim was for $1.5 million. The only basis for valuing BSA II's lien claim at $1.5 million was the order under RCW 60.04.081 reducing the face amount of the lien to $1.5 million.

The order under RCW 60.04.081 was not a final adjudication of the amount BSA II could recover under its lien, as the amount recoverable was in dispute. RCW 60.04.081 provides a summary procedure for reducing clearly excessive liens, but is not intended to be an adjudication when there is a dispute regarding the amount of the lien. *Williams v. Athletic Field, Inc.*, 155 Wn.App. 434, 446, *rev'd on other grounds*, 172 Wn.2d 683, 697, 261 P.3d 109 (2011).

The trial court's 2001 order reducing the lien provides that the lien covers the amount recoverable for work after January 31, 1998. It contains no findings as to the amount of recoverable costs for such work. It states the total amount recoverable under the lien was still to be determined. This shows it was not a final adjudication as to the maximum amount BSA II could recover under its lien claim.

BSA II's accounting expert calculated the recoverable costs for BSA II's work after January 31, 1998, at over $3.2 million. WaferTech's accounting expert calculated those costs as approximately $1.1 million. That factual dispute precludes a final adjudication under the summary procedures of RCW 60.04.081 of the amount BSA II may ultimately recover under the lien claim.

Under RCW 60.04.091, the amount of a lien claim can be amended, if the amount recoverable under the lien claim was greater than the amount stated in the recorded lien. *CKP, Inc. v. GRS Const. Co.*, 63 Wn.App. 601, 610, 821 P.2d 63 (1991). The recorded lien is treated as a pleading, and can be amended in the same manner as a pleading under CR 15. *Id.*

In *CKP*, the lien claimant proved at trial that its damages were $29,000 more than the face amount of its lien. It was allowed to amend its lien to reflect that higher amount. This shows BSA II is entitled to amend

its lien to match the amount it proves at trial it is entitled to recover for work after January 31, 1998. Given that, even if there is a setoff, final judgment was not proper.

4. BSA II is permitted to amend the plaintiff's name to correct the misnomer.

BSA II was entitled to amend to correct the misnomer BSofA in captions, pleadings, and judgments since 2001. WaferTech has shown no prejudice from the misnomer, nor is BSA II's dissolution a bar to amendment.

a. CR 15 and 60(a) allow amending a party's name.

BSA II was entitled to amend the name BSofA in the caption, pleadings, and judgment. BSofA is a misnomer that did not prejudice WaferTech. Misnomers that do not prejudice an opponent may be amended under CR 15. *Professional Marine Co. v. Underwriters at Lloyds's*, 118 Wn.App. 694, 705, 77 P.3d 658 (2003). Misnomers in judgments that do not prejudice an opposing party may be amended under CR 60(a). *Entranco Engineers v. Envirodyne, Inc.*, 34 Wn.App. 503, 507, 662 P.2d 73 (1983).

In *Professional Marine*, *supra*, the plaintiff misnamed a party in the complaint, but the opposing party had notice of the claim against it and was not prejudiced in its defense, so amendment was permitted. In

Entranco, *supra*, the plaintiff incorrectly named the defendant "Envirodyne, Inc." when defendant's name was "Envirodyne Engineers, Inc.," so the Court of Appeals ordered amendment after the trial court refused.

While the above cases involve a misnomer for a defendant by a plaintiff, amendment is allowed when a plaintiff misnames itself. Under F.R.C.P. 15(c),which is similar to CR 15(c), a plaintiff could amend its complaint to correct an error in its name to omit a "II" erroneously included. *SMS Financial, LLC v. ABCO Homes, Inc.,* 167 F.3d 235, 245 (5th Cir. 1999). The court deemed the mistake "an insignificant error." *Id.*

Here, there was a misnomer. The assignment documents identified the assignee as BSA II, not BSofA. Joe Guglielmo, a signatory of the assignment documents, stated under oath that BSA II was the assignee. There is no evidence an entity named BSofA ever existed.

Leave to amend "shall be freely given when justice so requires." CR 15(a). The requirement of justice here is to facilitate a decision on the merits. Facilitating a decision on the merits is a primary purpose of the Civil Rules. *Fox v. Sackman*, 22 Wn.App. 707, 709, 591 P.2d 855 (1979).

The only reason to deny amendment of the misnomer would be if WaferTech would be prejudiced. The prejudice necessary to deny a motion to amend to change a plaintiff is that it has or will hinder the

defendant's ability to present a defense. *Beal v. City of Seattle*, 134 Wn2d 769, 780, 954 P.2d 237 (1998).

WaferTech can show no such prejudice. It has had the assignment documents since 2001. It deposed plaintiff's witnesses about the documents. It has known since 2001 it was being sued by Natkin/Scott's assignee. After amendment, WaferTech will be defending against the same lien claim it has been defending against since 2001. WaferTech's defense will not change.

BSA II sought a show cause order regarding (1) WaferTech's knowledge of the misnomer and (2) lack of prejudice, both relevant to a motion to amend. Rather than enter such relevant findings, the trial court entered findings regarding the non-existence of an entity named BSofA, which is not relevant to whether there was a misnomer. Whether an entity named BSofA ever existed, it would not be a party to the action, as it was not Natkin/Scott's assignee.

This court can order that BSA II be allowed to amend the name of the plaintiff from BSofA to BSA II. The appellate court has authority to order amendments of misnomers. *Entranco*, *supra* at 508.

The amendment of a misnomer for a party is not a substitution of a party. See C. Wright & A. Miller, *Fed. Prac. & Proc.* § 1498.2 (2008). WaferTech contended that it was, so BSA II included CR 25 in its motion

to correct the misnomer out of caution. A substitution of the real party in interest as the plaintiff is permitted so long as the defendant is not prejudiced and the defendant had notice of the action. *Beal*, *supra* at 780.

Even without amendment of the name from BSofA to BSA II, BSA II is bound by the results of the action. An assignee is bound by the results of the action, whether named as a party or not. *Stella Sales, Inc. v. Johnson*, 97 Wn.App. 11, 17-8, 985 P.2d 291 (1999).

The plaintiff being named BSofA is a misnomer that can be amended, with no effect on the action.

b. The amendment relates back to 2001.

The amendment of the plaintiff's name will relate back to 2001, as the lien claim will be unchanged. Whenever the claim in the amended pleading arises out of the same "conduct, transaction, or occurrence" as in the prior pleading, it relates back to that pleading. CR 15(c). A substitution of the real party in interest also relates back. *Beal*, *supra*.

The relation back of the amendment to 2001, prior to BSA II's dissolution in 2006, makes that dissolution moot. BSA II is deemed to have been the named plaintiff since 2001, when it was an active Delaware corporation. Even if the amendment did not relate back, BSA II's dissolution would have no effect on its capacity to be a party.

c. BSA II's dissolution is not a bar to amendment.

WaferTech's counsel conceded in 2014 that BSA II's dissolution in 2006 was the basis for WaferTech's opposition to changing the name of the plaintiff from BSofA to BSA II in the 2013 judgment under appeal, as BSA II was "void." Such a dissolution has no effect on BSA II's capacity, as a Delaware corporation, to be a party. A dissolved Delaware corporation "remains a viable entity authorized to ... sue and be sued incident to the winding up of its affairs." *City Investing Co. Liq. Trust v. Continental Casualty Co.*, 624 A.2d 1191, 1195 (Del. 1993).

BSA II's dissolution does not render it void. A dissolved Delaware corporation continues in existence to pursue its claims as long as the action to pursue the claim was commenced within three years of the dissolution. Del. Code Ann. Tit. 8 § 278. That statute provides:

> All corporations, whether they expire by their own limitation or are otherwise dissolved, shall nevertheless be continued, for the term of 3 years from such expiration or dissolution ... bodies corporate for the purpose of prosecuting and defending suits, whether civil, criminal or administrative, by or against them, ... but not for the purpose of continuing the business for which the corporation was organized. *With respect to any action, suit or proceeding begun by or against the corporation either prior to or within 3 years after the date of its expiration or dissolution, the action shall not abate by reason of the dissolution of the corporation*; the corporation shall, solely for the purpose of such action, suit or proceeding, be continued as a body corporate beyond the 3-year period and

> until any judgments, orders or decrees therein shall be fully executed, ... (emphasis added)

This statute was applied by the Delaware Supreme Court in *City Investing Co. Liq. Trust v. Continental Casualty Co.*, *supra*, with the court stating:

> By its terms, Section 278 provides an automatic extension of corporate existence for three years. ... A further period of implicit corporate existence, of indefinite duration, is imparted by the statutory directive that *no action for* or against *the corporation shall abate* by reason of the dissolution of the corporation, *the corporation's existence being extended until the execution of all judgments or decrees affecting the corporation.* (emphasis added)

624 A.2d at 1195.

This action was pending at the time BSA II was dissolved. Under *City Investing*, BSA II's existence continues for purposes of this action "until the execution of all judgments or decrees affecting [BSA II]."

City Investing is not an outlier in holding that a dissolved corporation retains standing to pursue litigation. "[I]t has long been the law that a Delaware corporation is not dead for all purposes following forfeiture of its charter," as "§ 278 keeps a dissolved corporation alive for three years for purposes of suit." *Frederic G. Krapf & Son, Inc. v. Gorson*, 243 A.2d 713, 715 (Del. 1968). A corporation's existence continues after three years to conclude pending litigation. *In re RegO Co.*, 623 A.2d 92, 96 (Del.Ch. 1992). A dissolved corporation may pursue

claims in existence within three years of dissolution. *U.S. Virgin Islands v. Goldman, Sachs & Co.*, 937 A.2d 760, 788 (Del.Ch. 2007).

BSA II's dissolution in 2006, which WaferTech concedes is the only bar to correcting the plaintiff's name, has no effect on BSA II's capacity to be a party in this action. BSA II's corporate life continues for the purpose of pursuing the claims in this action pending at the time of dissolution.

By conceding that but for BSA II's dissolution the plaintiff's name could be amended from BSofA to BSA II, WaferTech conceded a lot. It necessarily implies that (1) BSA II was Natkin/Scott's assignee, (2) BSofA was a misnomer for BSA II, so the existence or non-existence of an entity named BSofA was irrelevant, (3) BSA II could have amended the misnomer before 2006, and (4) WaferTech was not prejudiced by the misnomer.

BSA II's dissolution prior to amendment has not affected WaferTech in its defense. If the plaintiff's name had been amended to BSA II prior to 2006, BSA II still could have dissolved in 2006, leaving the plaintiff a dissolved corporation. With the plaintiff's name amended to BSA II in 2015, after BSA II's dissolution, the plaintiff is a dissolved corporation. What's the difference to WaferTech? Nothing.

4. WaferTech was not entitled to fees for unproductive work.

Reversal of the summary judgment in favor of WaferTech would mean WaferTech was no longer the prevailing party, so it would not be entitled to the $430,000 in attorney's fees the trial court awarded to WaferTech as the prevailing party under RCW 60.04.181(3). Only the "prevailing party in the action" may recover fees, and WaferTech will not have yet prevailed. Even if reversal of the summary judgment does not occur, this court should reverse the award of $430,000 in attorney's fees as unreasonable.

The trial court's award of attorney's fees include substantial fees for unproductive work, with the court only entering conclusory findings. In awarding attorney's fees to the prevailing party, the trial court must avoid (1) entering only conclusory findings, (2) including hours spent on unproductive tasks, and (3) accepting excessive hours for various tasks. *Berryman v. Metcalf*, 177 Wn.App. 644, 659, 662-3, 312 P.3d 745 (2013).

Here, the trial court erroneously awarded over $165,000 in fees for work between 2009 and the remand in early 2012, and $264,000 for work after the remand.[1] The work between 2009 and the remand in early 2012

[1] The court awarded a lump sum of $430,000, 83% of the fees requested by WaferTech. WaferTech sought approximately $199,000 for work prior to the remand. $199,000 x 83% = $165,170. WaferTech sought approximately $319,000 for work after the remand. $319,000 x 83% = $264,770

was all unproductive work, as it was all devoted to WaferTech's futile and failed dismissal motion.

After remand, WaferTech's work on the referee motion was unproductive, as WaferTech sought a referee who refused to serve. The only other work was the cross-motions for summary judgment on setoff. The amount sought by WaferTech was unreasonable, especially given that BSA II's counsel, doing comparable work, billed 30% of the hours claimed by WaferTech's counsel.

The trial court abused its discretion in awarding fees. BSA II asks that the award of attorney fees under RCW 60.04.181(3) be reversed.

In addition, the trial court's award of $300 in fees as a sanction while granting BSA II's motion related to the record was without any basis. BSA II made a mistake which only hurt BSA II, as it required postponing a hearing, but did not affect WaferTech. There was no reason for the trial court to sanction BSA II and WaferTech suffered no damage for which compensation was needed.

5. BSA II seeks its attorney fees on appeal.

In the event BSA II is successful in this appeal, and then is the prevailing party in the trial court on remand, BSA II will be entitled to an award of attorney fees from the trial court, pursuant to RCW 60.04.181(3).

BSA II seeks to recover its attorney fees in this appeal pursuant to RAP 18.1, as part of a subsequent award of attorney fees by the trial court.

F. Conclusion

BSA II asks that the court (1) reverse the summary judgment in favor of WaferTech on its defense of setoff, and instead enter summary judgment in favor of BSA II, (2) vacate the award of attorney's fees and costs to WaferTech, and (3) grant leave to BSA II to change the plaintiff's name from BSofA to BSA II.

DATED this __1st__ day of September, 2015.

HULTMAN LAW OFFICE

By _____
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document has been served by email, by agreement of counsel, on the _1st___ day of September, 2015, to:

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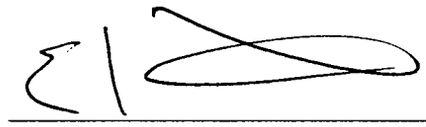

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