SMITH FREED EBERHARD

# WASHINGTON CASE UPDATE

case in point...

## Participating in Litigation May Constitute Waiver of Certain Arguments

**From the desk of Kyle Riley:** It seems obvious that a nonexistent party cannot participate in litigation. But where a party is misnamed in the case caption and the parties participate in litigation despite the error, can a court dismiss the case or enter judgment for the correctly named party on the ground that one of the parties is nonexistent? Read on to learn more.

**Claims Pointer:** In this procedurally dense case arising out of a dispute between a contractor and a subcontractor, the Washington Supreme Court held that the correctly named party waived any right to protest the error in the caption by participating in years of litigation under the erroneous caption. The case is a reminder to insurers and their lawyers to pay careful attention to grounds for technical arguments like these early in the case, because participating in litigation will likely constitute waiver of those arguments.

Business Services of America II, Inc. v. WaferTech, LLC, No. 94088-6, Washington Supreme Court (July 27, 2017)

In the mid-1990s, WaferTech, LLC ("WaferTech") built a large industrial facility in Camas, Washington. It hired Meissner Wurst Zander, U.S. Operations Inc. ("Meissner") as its general contractor, and Meissner in turn hired Natkin/Scott ("Natkin") to handle a specialized aspect of the project. Meissner later terminated Natkin for alleged safety violations, and Natkin responded by filing a lien on the property for $7.6 million for furnished labor, material, and equipment. Natkin then assigned its rights and claims to Business Service America II, Inc. ("BSA"), an entity apparently created solely to pursue the Natkin claims.

BSA filed an amended complaint that listed the plaintiff as "Business Services of America II, Inc." rather than BSA's correct incorporated name, "Business Service America II Inc." The parties litigated, and the trial court eventually entered judgment for WaferTech. In 2004, the Court of Appeals affirmed the trial court on all matters save a lien foreclosure claim. The case then went dormant for a period of time, but in 2009, BSA noted the case for trial on the lien claim. BSA filed a third amended complaint, asserting only its sole remaining claim for lien foreclosure. The amended complaint again listed the plaintiff as "Business Services of America II, Inc." WaferTech moved for summary judgment, arguing that a previous settlement between Meissner and Natkin completely offset the lien claim. In 2013, the trial court granted WaferTech's motion and dismissed the third amended complaint, awarding costs and attorneys' fees to WaferTech. BSA filed a notice of appeal.

WaferTech moved in the Court of Appeals to dismiss the appeal on the grounds that there was no record that a company named "Business Services of America II, Inc." ever existed, and thus, BSA was not entitled to appeal under Washington's Rules of Appellate Procedure. BSA subsequently moved to amend the pleading or substitute a party, acknowledging that the complaint had been incorrectly titled years prior and that the correct name of the corporation was "Business Service America II," not "Services of." The trial court denied the motion, and BSA appealed. The Court of Appeals consolidated the appeals and affirmed the trial court's denial of BSA's motion to amend its pleading. However, the Court of Appeals also held that WaferTech's assertion that the listed plaintiff did not have the capacity to sue could not be determined on the appellate record, and it remanded for a factual determination of the named plaintiff's legal status and its ability to pursue an appeal against WaferTech. BSA admitted to the trial court that the misnamed company did not exist, so the trial court entered factual findings that the named plaintiff was a nonentity with no legal standing and dismissed the complaint. The Court of Appeals affirmed, and BSA sought review by the Supreme Court.

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Generally, any objection to the capacity of a business to bring suit based solely on the identity of the named plaintiff must be raised in a preliminary pleading or by answer or the objection is deemed waived. Where the parties have appeared in court and significantly participated in the litigation without making an objection, it is likely that a court will determine the parties have waived any objection.

For the Washington Supreme Court, this case was no different. The Court explained that the parties have known each other and litigated the case for many years, meeting in superior court, multiple appeals in the Court of Appeals, and in a fully briefed and argued review before the Supreme Court. Throughout the litigation, the case caption consistently identified "Business Services of America II," and WaferTech did not object. The Court pointed out that WaferTech had won judgments against BSA for attorneys' fees and had apparently already collected payment from BSA on some of those judgments. Under these circumstances, the Court held that WaferTech waived any objection to the misnomer in the captioning. The trial court therefore erred in denying BSA's request to correct the caption so it could proceed with the appeal. The Court of Appeals was reversed, and the matter was remanded to the Court of Appeals with instructions to reverse the trial court's denial of BSA's motion to correct the caption and to address BSA's substantive challenges to the 2013 summary judgment and attorneys' fees award.

View full opinion at: https://www.courts.wa.gov/opinions/pdf/940886.pdf

*Case updates are intended to inform our clients and others about legal matters of current interest. They are not intended as legal advice. Readers should not act upon the information contained in this article without seeking professional counsel.*

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