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NO. 54134-3

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

ROBERT CHARLES JUSTUS,

Appellant,

v.

STATE FARM FIRE AND CASUALTY COMPANY,

Respondent.

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**RESPONDENT STATE FARM FIRE AND  
CASUALTY COMPANY'S RESPONSE BRIEF**

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## I. STATEMENT OF ISSUE

Whether CR 41(b)(1) mandated that the trial court dismiss Justus's action for want of prosecution when he failed to note the case for hearing within one year after remand.

## II. STATEMENT OF THE CASE

This case is one of two arising out of a firearm incident. This case presented insurance coverage and insurance tort issues. The other case presented issues of the insureds' liability for the firearm incident.

The respective roles of the parties and other involved persons are as follows: party plaintiff State Farm insured the Morgans, and William Morgan allegedly injured Joey Tobeck and party defendant Robert Justus. Prior to dismissal below, the only remaining unadjudicated claims were those by Justus against State Farm, which were assigned by the Morgans to Justus.

In the other Pierce County action, defendant Justus sued William and Donna Morgan on June 26, 2012 for his injuries after William<sup>1</sup> detained Justus at gunpoint on June 9, 2010. *State Farm Fire & Cas. Co. v. Justus*, 199 Wn. App. 435, 442, 398 P.3d 1258, 1261 (2017). Plaintiff State Farm agreed to provide a defense to the Morgans pursuant to their

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<sup>1</sup> Defendants are referred to by their first names throughout this motion for the same reasons the Court of Appeals lists in footnote 2 of the Mandate issued on December 6, 2017.

liability insurance. *Id.* at 443. Eventually, Justus entered into a covenant judgment settlement with the Morgans with respect to his claims against William Morgan. *Id.* The covenant judgment settlement included the following provisions: (1) the Morgans stipulated to a judgment in favor of Justus; (2) Justus agreed not to execute the stipulated judgment against the Morgans; and (3) the Morgans assigned all of their claims (both coverage and extracontractual) against plaintiff State Farm to Justus. *Id.* at 444.

State Farm intervened to oppose a reasonableness hearing on the grounds that the wrongful detention claim was time barred under the two-year statute of limitations for intentional torts. *Id.* The settlement court approved the covenant judgment settlement as reasonable, but stated it would make no findings with respect to disputed facts that were critical to the disposition of State Farm's pending declaratory judgment action. *Id.*

State Farm had also filed this separate action seeking declaratory judgment that the Morgans' liability insurance provided no coverage for William's unlawful acts toward Justus. *Id.* After obtaining an assignment from the Morgans, Justus in turn filed counterclaims alleging that State Farm had acted in bad faith and violated both the Consumer Protection Act (CPA) and the Insurance Fair Conduct Act (IFCA) by denying coverage under the Morgans' umbrella policy. *Id.* at 444-45.

The trial court then bifurcated the case into one segment addressing the coverage issues and a second segment addressing the extracontractual counterclaims brought by Justus. *Id.* at 445. With respect to the coverage issue, after trial, the trial court ruled that State Farm’s policy did not provide coverage for William’s intentional torts. *Id.* With respect to the extracontractual claims, Justus moved for an order compelling the Morgans to waive privilege over the State Farm claim file, and an order compelling production of that file. *Id.* at 446. The trial court concluded it could not compel the Morgans to waive privilege because no discovery request had ever been filed and accordingly denied both motions. *Id.* at 447. The trial court then granted summary judgment to State Farm on the extracontractual claims because Justus had no facts to support an action under the CPA or the IFCA as a matter of law. *Id.* Justus appealed the trial court’s rulings on both the coverage and extracontractual claims. *Id.*

The Court of Appeals affirmed the trial court’s ruling on the coverage issue, holding that William’s actions could not be merely “negligent” as a matter of law.<sup>2</sup> *Id.* at 454-55. However, the Court of Appeals reversed the trial court’s ruling denying the motion to compel

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<sup>2</sup> The Court of Appeals disagreed with Justus that the settlement court’s findings collaterally estopped the trial court from ruling that William’s actions were intentional as a matter of law.

production of the claim file, and accordingly reversed the summary judgment ruling, then remanded to the trial court with instructions to conduct *in camera* review of the claim file to determine whether it contained any information protected by the Morgans' attorney-client privilege. *Id.* at 457. Finally, the Court of Appeals instructed the trial court on remand to determine whether anything disclosed in the claim file created an issue of material fact with respect to the extracontractual claims that would preclude granting summary judgment to State Farm. *Id.* at 458-59.

The Court of Appeals opinion filed on June 27, 2017 became final on December 6, 2017, when the court issued its Mandate terminating review and instructing the trial court to conduct further proceedings in accordance with its instructions. *See* Appellant's Exhibit A. On December 6, 2017, no further action was required from the Court of Appeals, the time had expired for the parties to seek discretionary review and neither State Farm nor the trial court prevented Justus from proceeding with prosecuting his case.

Justus neither noted the case for hearing, nor took any other action to pursue his extracontractual claims against State Farm for nearly two years after the case was remanded. Accordingly, the trial court dismissed the case for want of prosecution under CR 41(b)(1) on November 1, 2019.

Order Granting Plaintiff State Farm Fire & Casualty Company's Motion to Dismiss Counterclaims for Want of Prosecution, Pierce County Superior Court, Cause No. 12-2-07091-7. Justus's counsel appealed, and continues to argue that the duty to take action to keep his client's case pending rested not on him, but rather on State Farm and/or the trial court.

Justus's apparent disinterest in pursuing this appeal demonstrates that he is either unwilling or unable to pursue his client's case. Notice of Appeal was filed on November 4, 2019. Docket at 3. On May 11, 2020, Justus's counsel filed a motion to extend the deadline to file his opening brief, which this Court granted. *Id.* at 2. No brief was filed by the new deadline of June 22, 2020. *Id.* Instead, Justus's counsel called this Court on June 22 to state that he would be filing a second motion to extend the deadline to file his opening brief. *Id.* More than a month later — and more than thirty months since this Court remanded Justus's case to the trial court — Justus had filed neither the second motion to extend nor an opening brief. *Id.* Respondent State Farm moved this Court to dismiss the appeal for want of prosecution pursuant to RAP 18.9 (c)(1). *Id.* at 3. In its order denying State Farm's motion to dismiss, this Court expressly stated that “[t]he remand proceedings in the trial court are not pertinent to the merits of this appeal.” Nevertheless, appellant's counsel continues, in his opening brief, to do nothing but insist that the trial court failed to do its

job, first by not treating his client’s civil matter as a criminal case and proactively noting it for hearing on the docket, and second by dismissing his client’s case when he failed to take any action to do so.

### **III. SUMMARY OF ARGUMENT**

The plain language of CR 41 (b)(1) clearly and unambiguously *directs* the trial court to dismiss any civil matter for want of prosecution when the party who has the burden of prosecuting its case fails to note the case for hearing within one year after any issue of law or fact has been joined. It is patent from the record that appellant failed to note the case for hearing within one year after it was remanded by the Court of Appeals, the event which started the one-year clock for appellant to continue prosecuting his case. Accordingly, this Court must affirm the ruling of the trial court dismissing appellant’s case for want of prosecution.

### **IV. ARGUMENT**

#### **A. Standard of Review**

“[C]ourt rules are interpreted as though they were drafted by the legislature and are construed consistent with their purpose.” *State v. Wittenberger*, 124 Wn.2d 467, 484, 880 P.2d 517 (1994). “[T]he application of a court rule to a particular set of facts is a question of law reviewed de novo.” *Id.*; *Kim v. Pham*, 95 Wn. App. 439, 441, 975 P.2d 544, *review denied*, 139 Wn.2d 1009, 994 P.2d 844 (1999). Because

dismissal under CR 41(b)(1) is mandatory, not discretionary, a trial court's dismissal of an action for want of prosecution under CR 41(b)(1) is subject to de novo review. *State ex. rel. Heyes v. Superior Court for Whatcom Cy.*, 12 Wn.2d 430,433, 121 P.2d 960 (1942) (“Whether a trial court properly dismissed an action for want of prosecution under CR 41(b)(1) is a question of law, reviewed de novo.”);<sup>3</sup> *Wiley v. Rehak*, 143 Wn.2d 339, 343, 20 P.3d 404 (2001)).

**B. Justus Failed to Note His Case for Hearing Within One Year after Remand from this Court**

The plain language of CR 41(b)(1) clearly and unambiguously directs the trial court to dismiss any civil action for want of prosecution when a claimant fails to note the action for hearing within one year “after any issue of law or fact has been joined,” unless the failure to note the hearing was caused by the moving party.<sup>4</sup> Joinder of issues occurs at the point in the litigation when “[t]he duty to bring the case on for trial, or to

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<sup>3</sup> Although *Heyes* was decided prior to the 1967 amendment of the Civil Rules, the Washington Supreme Court has stated that “[t]here is no reason to treat CR 41(b)(1) differently [than Rule 3 of the former Rules of Pleading, Practice and Procedure], and we hold CR 41(b)(1) applies to cases on remand.” *See, e.g., Bus. Servs. of Am. II, Inc. v. WaferTech LLC*, 174 Wn.2d 304, 310 (2012) (applying *State ex rel. Wash. Water Power Co. v. Superior Court*, 41 Wn.2d 484, 490 (1952)).

<sup>4</sup> CR 41(b)(1) provides, in relevant part, that “[a]ny civil action shall be dismissed, without prejudice, for want of prosecution whenever the . . . counterclaimant . . . neglects to note the action for trial or hearing within 1 year after any issue of law or fact has been joined, unless the failure to bring the same on for trial or hearing was caused by the party who makes the motion to dismiss.”

take such other steps as may be available to resolve the issues of law and fact raised by the claim and answer, rests upon the party bringing the action.” *Storey v. Shane*, 62 Wn.2d 640, 642, 384 P.2d 379, 381 (1963). “[T]he obligation of going forward to avoid the operation of the rule always belongs to the plaintiff or cross-complainant . . . and not to the defendant. . . .” *Id.* at 642-43.

CR 41 (b)(1) applies to cases on remand, not only to cases that have not yet been tried. *Bus. Servs. of Am. II, Inc. v. WaferTech LLC*, 174 Wn.2d 304, 310 (2012) (citing *State ex rel. Wash. Water Power Co. v. Superior Court*, 41 Wn.2d 484, 490 (1952)). “[A]n issue of law or fact is joined when, among other circumstances, a case is remanded from an appeal.” *Id.* In other words, remand by an appellate court constitutes a joinder of issues that starts the one-year clock under CR 41(b)(1).

Here, the one-year period within which Justus was supposed to note his remaining extracontractual claims for hearing pursuant to CR 41(b)(1) began on December 6, 2017, when this Court issued its Mandate. Once the Mandate was issued, nothing prevented Justus from proceeding with his counterclaims. It is patent from the record that Justus failed to note the case for hearing by December 6, 2018.

Justus asserts in his brief that CR 41(b)(1) doesn’t apply because State Farm “caused” the failure to bring the matter for hearing when it

“declined to comply with the Court of Appeals direction on remand . . . .” Appellant’s Brief at 13. He asserts, first, that “State Farm failed to produce the claim file to the superior court,” and, second, that “the superior court took no action on the matter, in defiance of the Court of Appeals order on remand . . . .” *Id.* Justus bases his argument on his misinterpretation of the boilerplate language on the cover sheet of this Court’s Mandate, which directs the *sentencing court or criminal presiding judge* to take action consistent with the directive of the Court of Appeals. Appellant’s Brief at 11. In making this argument, appellant again demonstrates his failure to grasp the distinction between civil and criminal proceedings: this Court’s mandate does not constitute an “order” directing State Farm or the superior court to do anything. Neither State Farm nor the superior court had any obligation to proactively note the case for hearing, and no obligation to produce the claim file unless and until Justus requested that the superior court hold a hearing to conduct *in camera* review. Justus, as the party bringing claims against State Farm, had the duty to continue pursuing his case. *See Storey v. Shane* at 642, *supra*. Accordingly, the trial court properly rejected his argument.

Appellant’s counsel also asserts he “request[ed]” that State Farm and the superior court take some unspecified action on both August 26, 2019, and December 6, 2019. Appellant’s Brief at 11-12. Appellant

asserts that he formally asked the trial court to “place the matter on the next available calendar, and served the request on opposing counsel,” on August 26, 2019. *Id.* However, Exhibit B, which he cites as evidence of this alleged request, is a 2015 Order Granting State Farm Fire and Casualty Company’s Motion to Realign Parties for Trial, not the “Notice to Counsel” appellant’s counsel lists in his brief.<sup>5</sup> Accordingly, State Farm is not sure what document appellant intended to submit as Exhibit B. Again, though, State Farm points out that it is patent from the record that appellant made no “formal request” that the trial court schedule a hearing to conduct *in camera* review of the claim file.

The other arguments appellant makes in his Opening Brief also miss the mark. First, appellant’s request that this Court “compel” the superior court to act sounds like a request that this Court issue a writ of mandamus to the superior court. Appellant’s opening brief is not the proper method to request a writ of mandamus, and the arguments in this section are directed to the trial court, not State Farm. That said, State Farm notes that appellant’s arguments underscore his confusion between criminal and civil litigation: he cites no case law holding that the superior court is required to proactively note remanded *civil* actions for trial or

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<sup>5</sup> Because appellant cites no clerk’s papers or anything but the erroneous Exhibit B in his brief, State Farm is unable to determine what he is referring to as his formal request to note the case for hearing, and there is no evidence in the record that appellant ever made any such request.

hearing, and the criminal cases he cites are not construing the *civil* rule of procedure CR 41(b)(1).

Second, appellant argues that dismissal of his action is not consistent with the purposes of CR 41(b)(1), namely to “protect litigants from dilatory counsel” and “prevent the cluttering of court records with unresolved and inactive litigation.” *Franks v. Douglas*, 57 Wn.2d 583, 585, 358 P.2d 969, 971 (1961). State Farm submits that appellant’s counsel has indeed been dilatory in not moving the case along, and this inactive case indeed clutters the trial court’s records. But beyond that, appellant’s argument misses the point that dismissal under the rule is *mandatory*, not *discretionary*. The purposes of CR 41(b)(1) he lists are the reasons the rule *was written to require* dismissal, not discretionary factors the court is permitted to weigh in deciding whether to dismiss. Appellant’s discussion of the purposes of CR 41(b)(1) is therefore irrelevant because the plain language of the rule mandates dismissal when a claimant or counter-claimant fails to note the case for trial or hearing within one year.<sup>6</sup>

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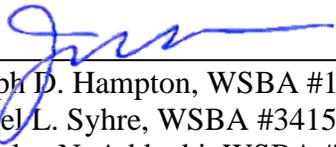
<sup>6</sup> That said, the instant case is precisely the kind of “unresolved and inactive litigation” contemplated by CR 41(b)(1). Defendants appealed this Court’s order denying them access to the claim file and granting summary judgment to plaintiff State Farm, and the Court of Appeals reversed and remanded with instructions to conduct *in camera* review of the claim file to identify which portions should be redacted as privileged. If Justus wanted to pursue his counterclaims, he was required to do nothing more than note the

**V. CONCLUSION**

Dismissal for want of prosecution is mandatory under CR 41(b)(1) where, as here, an issue of law or fact was joined over one year ago when the case was remanded, and the defendant claimant has failed to note the case for hearing or trial or take any other action that would stop the one-year clock that began ticking on December 6, 2017. Accordingly, this Court should AFFIRM the trial court's dismissal for want of prosecution.

RESPECTFULLY SUBMITTED this 2nd day of October, 2020.

BETTS, PATTERSON & MINES, P.S.

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action for hearing. He did not do that, and this matter was “unresolved and inactive” for over 18 months when the superior court dismissed it.

**CERTIFICATE OF SERVICE**

I, Valerie D. Marsh, declare as follows:

1) I am a citizen of the United States and a resident of the State of Washington. I am over the age of 18 years and not a party to the within entitled cause. I am employed by the law firm of Betts, Patterson & Mines, P.S., whose address is One Convention Place, Suite 1400, 701 Pike Street, Seattle, Washington 98101.

2) By the end of the business day on October 2, 2020, I caused to be served upon counsel of record at the addresses and in the manner described below, the following documents:

- **Respondent State Farm Fire And Casualty Company’s Response Brief; and**
- **Certificate of Service.**

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 2nd day of October, 2020.

  
\_\_\_\_\_  
Valerie D. Marsh, Legal Assistant

**BETTS, PATTERSON & MINES, P.S.**

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