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SUPREME COURT
OF THE STATE OF WASHINGTON

No. 39921-1-II

CLERK

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

BUSINESS SERVICES OF AMERICA II, INC.,
assignee of Natkin/Scott, a joint venture,

Appellant,

v.

WAFERTECH, L.L.C.,

Respondent.

APPELLANT'S ANSWER TO PETITION FOR REVIEW

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I. SUMMARY

The Court of Appeals' decision applied well-settled Washington case law that CR 41(b)(1) precludes a trial court from dismissing an action for want of prosecution after a party notes the matter for trial. Defendant WaferTech seeks review under RAP 13.4, yet fails to show that any of the grounds listed in RAP 13.4(b) are present. RAP 13.4(b) provides that a "petition for review will be accepted by the Supreme Court *only*" when one of the four listed grounds is present.

WaferTech's petition is grounded in its assertions that the Court of Appeals' decision (1) unduly limits the trial court's inherent authority, (2) creates uncertainty, and (3) hampers the "efficient administration of justice." Even if these assertions were true, they do not justify review by the Supreme Court under RAP 13.4(b).

The Supreme Court is a policy-making court, not a court of errors. The Supreme Court has already stated its policy is that the courts are to provide a just determination of every action, on the merits where possible. CR 1; *Sheldon v. Fettig*, 129 Wn.2d 601, 609, 919 P.2d 1209 (1996). The Court of Appeals decision upholds that policy. There is no basis for review by this Court.

II. STATEMENT OF THE CASE

BSA's claims against WaferTech include a lien claim, which the trial court reduced to \$1.5 million. CP 28-29. BSA also asserted "pass through" claims. CP 29-30. The trial court granted summary judgment on the "pass through" claims. CP 31. The trial court dismissed BSA's lien claim. CP 32. The trial court entered judgment in favor of WaferTech for WaferTech's attorney fees. *Id.*

After BSA appealed, the Court of Appeals affirmed the summary judgment on the "pass through" claims and the judgment for attorney fees. CP 37-40. The Court of Appeals reversed the dismissal of BSA's lien claim and remanded it for further adjudication. *Id.*

BSA paid the judgment for attorney fees. App. D-2 to WaferTech's Pet. for Rev. (Dkt. Nos. 998-1002). WaferTech entered a satisfaction of that judgment. *Id.*, (Dkt. No. 1004).

BSA's counsel withdrew in 2008, stating the "case has been dismissed and judgment entered." CP 42. Neither the trial court nor either party took any action until 2009, when BSA obtained new counsel and noted the lien claim for trial. CP 45, 47. The trial court granted WaferTech's motion to dismiss, relying on its purported inherent authority, ignoring the restrictions on dismissal in CR 41(b)(1). App. E to WaferTech's Pet. for Rev. BSA appealed. CP 153.

WaferTech moved to dismiss BSA's appeal, which the commissioner denied. App. A. WaferTech moved to modify the commissioner's ruling, which the Court of Appeals denied. App. B.

The Court of Appeals reversed the dismissal in a 3-0 decision, ruling that CR 41(b)(1) governed dismissals for inaction, and that BSA's failure to note the matter for trial in 3 ½ years after the mandate was inaction. App. A to WaferTech's Pet. for Rev. The decision noted that the dismissal and judgment referenced in the withdrawal by BSA's counsel in 2008 related to claims other than the lien claim. *Id.*

III. ARGUMENT

A. **There is no conflict between the Court of Appeals decision below and other decisions of the Court of Appeals and/or Supreme Court.**

The Court of Appeals decision does not conflict with any other Court of Appeals decision or a Supreme Court decision, as they all can be harmonized. A decision "conflicts" with another decision when they cannot be harmonized with each other, or there would be a different outcome if the court followed a different decision. *See Lawson v. Pasco*, 168 Wn.2d 675, 682, 230 P.3d 1038 (2010) (dealing with "conflict" between local ordinance and state law); *Seizer v. Sessions*, 132 Wn.2d 642, 648, 940 P.2d 261 (1997) (dealing with "conflict of laws" between two states).

Here, the Court of Appeals' decision can be harmonized with every Court of Appeals and Supreme Court decision cited by WaferTech in its petition. The Court of Appeals applied those decisions in reaching its own decision. All those prior decisions consistently hold that CR 41(b)(1) precludes the trial court from exercising discretion to dismiss for "mere inaction," no matter how long the inaction. *See Snohomish County v. Thorp Meats*, 110 Wn.2d 163, 168-70, 750 P.2d 1251 (1988); *Gott v. Woody*, 11 Wn.App. 504, 508, 524 P.2d 452 (1974); *Foss Maritime Co. v. Seattle*, 107 Wn.App. 669, 674-5, 27 P.3d 1228 (2001); and *Wallace v. Evans*, 131 Wn.2d 572, 577-80, 934 P.2d 662 (1997).

The sole basis for WaferTech's contention that there is a "conflict" is that none of the prior decisions dealt with the specific situation where the plaintiff's counsel withdrew during the period of inaction and indicated on the withdrawal that the "case was dismissed." WaferTech asserts that constitutes something other than "inaction." First, WaferTech's admission that none of the other decisions dealt with that situation shows there is no conflict. Second, there is no indication that such a withdrawal would be treated as anything but "inaction" under the prior decisions.

The Court of Appeals' decision addressed WaferTech's argument that BSA was guilty of more than "mere inaction." The decision noted

that all the conduct relied upon by WaferTech, including the withdrawal by BSA's prior counsel stating the case was dismissed, involved judgments on other claims asserted by BSA in the action, which had been affirmed by the Court of Appeals in the prior appeal in this action.

In addition to none of the cases cited by WaferTech supporting WaferTech's contention that the withdrawal by BSA's counsel was conduct that rises above "mere inaction," they can all be harmonized with the decision by the Court of Appeals. In *Gott v. Woody, supra*, the court described conduct that would not be considered "mere inaction," for which a trial court retained inherent authority to dismiss as a sanction. These were (1) plaintiff's failure to appear at trial, and (2) a party's failure to appear at pretrial conference combined with general dilatoriness. 11 Wn.App. at 508. The court stated that the trial court's inherent authority was to assure compliance with the court's rulings and observance of court settings. *Id.* WaferTech does not attempt to argue BSA's conduct is similar to the examples provided in *Gott v. Woody*.

In *Foss Maritime v. Seattle, supra*, neither party took any action for two years. The court noted the defendant could have moved for a show cause hearing and/or dismissal, or urged opposing counsel to move the case forward. Having done nothing, "it acquiesced in the deferral of the case." 107 Wn.App. at 676. The Court of Appeals' decision, in fn. 4,

noted that WaferTech had ample opportunity to move for dismissal during BSA's delay, but did not do so.

In *Wallace v. Evans, supra*, neither party took any action for six years after the answer was filed. When the defendant moved to dismiss for want of prosecution, the plaintiff noted the matter for trial. The court had no power to dismiss. That is consistent with the Court of Appeals' decision. After the Court of Appeals' mandate, neither BSA nor WaferTech took any action to move the action forward until BSA noted it for trial.

In summary, in each case relied upon by WaferTech as purportedly in conflict with the Court of Appeals decision, there is no conflict at all. The criteria for review in RAP 13.4(b)(1) and/or (2) are not met.

The other possible basis for review in WaferTech's petition is that there is a substantial public interest that should be determined by the Supreme Court. There is no public interest in having cases dismissed in contradiction to the court rules, precluding adjudication on the merits.

B. There is no substantial public interest in permitting trial courts to dismiss actions for want of prosecution after a party notes it for trial.

There is no substantial public interest in permitting trial courts to dismiss an action for want of prosecution after a party notes it for trial, regardless of how crowded, overburdened, and/or underfunded the trial

courts may be. The civil rules are to be construed to achieve a just, speedy, and inexpensive resolution of every action. CR 1. They are to be construed to enable the court to reach the merits of the claims. *Sheldon v. Fetting*, 129 Wn.2d 601, 609, 919 P.2d 1209 (1996).

Here, the public interest is in achieving a speedy, just resolution on the merits of BSA's lien claim. There is no public interest in allowing the trial court to dismiss the action because it would be onerous or burdensome to adjudicate.

WaferTech quotes Justice Madsen's remarks regarding burdens on trial courts, but those remarks cannot be fairly construed to support a trial court's power to dismiss actions in violation of CR 41(b)(1). Justice Madsen was speaking of the bleak budget picture for trial courts, but was not proposing that giving trial courts additional authority and discretion to dismiss actions was a solution.

The civil rules provide a mechanism for dealing with supposedly "stale" actions. If a trial court has been led to believe, as WaferTech asserts here, that a "stale" case has "concluded," CR 41(b)(2) provides that the clerk "shall" notify the attorneys of record the court will dismiss for want of prosecution unless some action takes place. The trial court did not do that here. There is no public interest in providing the trial court with

additional authority to dismiss for want of prosecution without the protection for litigants provided in CR 41.

A “prime example” of a “matter involving a substantial public interest” is when a Court of Appeals decision could potentially affect a large number of litigants and created “confusion.” *State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903 (Wash. 2005). There is no reason to believe the issue at hand will arise often, or that trial or appellate courts are or will be confused by a decision affirming that CR 41(b)(1) restricts a trial court’s inherent authority to dismiss for want of prosecution, even after counsel withdraws. The criterion for review in RAP 13.4(d) is not met.

The final issue is whether WaferTech’s Petition for Review is frivolous, filed merely for delay.

C. WaferTech should be sanctioned for using its Petition for Review for the purpose of delay.

Given the lack of substance to support WaferTech’s purported bases for seeking discretionary review, one can infer that WaferTech sought such review for the purpose of delay. That warrants sanctions. The appellate court may sanction a party when the rules are used for the purpose of delay. RAP 18.9.

Here, WaferTech’s frivolous petition for review comports with WaferTech’s pattern of seeking to delay and avoid adjudication of BSA’s

lien claim on the merits by having it dismissed, only to be consistently thwarted by the Court of Appeals. In the trial court, WaferTech obtained dismissal of BSA's lien claim in 2001. In a prior appeal, the Court of Appeals reversed that dismissal and remanded the lien claim to the trial court.

When BSA noted the lien claim for trial, WaferTech obtained another dismissal from the trial court. The Court of Appeals once again reinstated BSA's lien claim.

Prior to addressing BSA's appeal, WaferTech sought to dismiss it. After the commissioner denied WaferTech's motion, WaferTech moved to modify the ruling. The Court of Appeals denied that motion as well.

Now, after the Court of Appeals issued a 3-0 decision applying settled case law interpreting CR 41(b)(1), WaferTech seeks discretionary review. WaferTech cites the criteria of RAP 13.4(b), but does not make meritorious arguments that any of those criteria are met.

WaferTech's appeal seeking discretionary review is frivolous, as there was no reasonable possibility this court would accept review. An appeal is "frivolous if there are no debatable issues upon which reasonable minds might differ, and is so totally devoid of merit that there was no reasonable possibility of reversal." *State v. Chapman*, 140 Wn.2d 436, 454, 998 P.2d 282 (2000).

BSA seeks attorney fees as sanctions against WaferTech and/or its counsel for this frivolous Petition for Review, brought merely for delay.

IV. CONCLUSION

BSA asks that the petition for review be denied and sanctions imposed. There is no basis for accepting review. None of the criteria of RAP 13.4(b) are met. The petition is frivolous, filed only for delay.

DATED this 14th day of March, 2011.

HULTMAN LAW OFFICE

By 

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Attorney for Appellant Business
Services of America II, Inc.

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DECLARATION OF SERVICE

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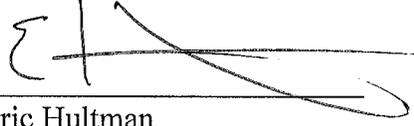
I declare, under penalty of perjury, under the laws of the State of Washington, that I served a copy of the foregoing document by mailing the same, properly addressed and prepaid, on the 14th day of March, 2011, to:

BY RONALD R. CARPENTER
CLERK

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Signed this 14th day of March, 2011, at Kirkland, King County, Washington.


Eric Hultman



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Division Two

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January 22, 2010

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CASE #: 39921-1-II
Business Services of America II, Inc., Appellant v Wafertech LLC, Respondent

Counsel:

On the above date, this court entered the following notation ruling:

A RULING SIGNED BY COMMISSIONER SCHMIDT:

Respondent's motion to dismiss appeal is denied. The final judgment was filed 09/21/09. The appellant attempted to file the notice of appeal on 10/21/09, but that filing was wrongfully rejected by the trial court. The notice of appeal is timely. Respondent's brief remains due 02/03/10.

Very truly yours,

David C. Ponzoha
Court Clerk

App. A

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY [Signature]
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

BUSINESS SERVICES OF AMERICA, II, INC.	Appellant,
v.	
WAFERTECH LLC,	Respondent.

No. 39921-1 II

ORDER DENYING MOTION TO MODIFY

Respondent has filed a motion to modify the Commissioner's ruling that this appeal was timely filed as well as his ruling that February 3, 2010, was the due date for the respondent's brief. Respondent has also filed a motion to extend the time for filing its brief and Appellant has requested sanctions because of the untimely respondent's brief.

After due consideration, this court denies the motion to modify the Commissioner's ruling concerning the timeliness of the appeal. This court also grants Respondent an extension of time to file its brief and denies sanctions so long as the respondent's brief is filed within 30 days of this ruling.

IT IS

SO ORDERED.

Dated this 23rd day of March, 2010.

[Signature: Van Deren, C. J.]
Chief Judge