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CLERK OF THE SUPREME COURT  
STATE OF WASHINGTON  
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No. \_\_\_\_\_

SUPREME COURT  
OF THE STATE OF WASHINGTON

No. 39921-1-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

WAFERTECH LLC,

Petitioner,

v.

BUSINESS SERVICES OF AMERICA II, INC.,

Respondent.

FILED  
COURT OF APPEALS  
DIVISION II  
11 FEB 17 PM 4:19  
STATE OF WASHINGTON  
BY *af*  
DEPUTY

PETITION FOR REVIEW

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**I. IDENTITY OF PETITIONER**

The Petitioner is WaferTech, LLC, defendant in the trial court and respondent in the Court of Appeals.

**II. COURT OF APPEALS DECISION**

The Court of Appeals, Division II, issued its published decision on January 19, 2011 (“Court of Appeals Decision”) attached as Appendix (“App.”) A.

**III. ISSUE PRESENTED FOR REVIEW**

Does a trial court retain its inherent authority to dismiss a case four years after return of the appellate court’s mandate, after the plaintiff allows the trial court to destroy all exhibits, and after the plaintiff communicates to the trial court that its case is concluded?

**IV. STATEMENT OF THE CASE**

**A. Initial Trial Court Litigation of BSA’s Claim**

In May 1998, BSA’s predecessor brought suit against WaferTech to foreclose a \$7.65 million construction lien in Clark County Superior Court. CP 24; 28. Before trial, in February 2001, the trial court granted WaferTech’s motion to substantially reduce BSA’s lien and limited BSA’s maximum recovery to \$1.5 million. CP 28-29. Also in 2001, BSA obtained the right to assert the prime contractor’s “pass-through” claims against WaferTech. CP 29-30.

After two weeks of trial before a jury on BSA's lien foreclosure and pass-through claims, the trial court ruled as a matter of law for WaferTech on BSA's pass-through claims. CP 31. Upon the parties' joint request, the trial court then dismissed the jury and held a bench trial regarding BSA's contractor registration status. CP 31. The trial court determined that BSA was not validly registered and thus was barred from bringing suit. CP 31. At that point, all of BSA's claims were dismissed and judgment for WaferTech issued on May 22, 2002. CP 32. The trial court awarded WaferTech more than \$800,000 in prevailing party attorney fees. CP 32.

**B. First Appeal of Judgment for WaferTech**

BSA appealed. In a 2004 unpublished decision, Division Two upheld the trial court in all respects except allowing BSA to seek, on remand, up to \$1.5 million of BSA's original \$7.65 million lien claim. CP 29-30; 35, 37. The Court of Appeals affirmed the trial court's award of more than \$800,000 in prevailing party attorney fees to WaferTech. CP 37-40. The Court of Appeals issued its appellate mandate on February 10, 2005. CP 22.

**C. Post Remand Activities**

**1) WaferTech collects its prevailing party attorney fees and the trial court enters a satisfaction of judgment.**

In March 2005, WaferTech collected its prevailing party attorney fees (App. D-2 (Dkt. Nos. 998-1002). With post-judgment interest, WaferTech collected over \$1 million. The trial court entered a satisfaction of judgment on April 11, 2005. App. D-2 (Dkt. No. 1004).

**2) BSA communicates to the trial court that the case has been “dismissed” and the trial court closes its file.**

On July 5, 2006, more than one year after issuance of the appellate mandate, the trial court filed a “Stipulation and Order for Return of Exhibits” (containing the names of BSA’s present and former counsel) allowing the court to destroy all trial exhibits. CP 58. BSA did not object or otherwise respond to this court order. On May 16, 2008, over three years after the appellate mandate, BSA’s former counsel filed a Notice of Intent to Withdraw stating that: “No trial date is set. This case has been dismissed and judgment entered thereon against Plaintiffs.” CP 42-43. At some point, the trial court clerk’s office closed its file. CP 55.

**3) Four years after the appellate mandate, BSA attempts to reopen the case.**

On January 13, 2009, BSA’s counsel contacted the clerk’s office and was informed that the file had been closed. CP 55. On January 15, 2009, BSA’s counsel filed a Notice of Appearance. CP 45-46.

WaferTech's counsel promptly advised BSA's counsel that WaferTech would oppose BSA's efforts to reopen the closed case. CP 90.

**4) The trial court rejects BSA's belated effort to re-open the case.**

Another six months passed until June 15, 2009, when BSA actually noted the lien foreclosure claim for trial. CP 47-48. WaferTech moved to dismiss BSA's claim on August 6, 2009, arguing that the trial court should exercise its discretion to dismiss the stale claim. CP 60-70. The trial court reserved ruling in order to study the parties' briefing, but stated at oral argument that BSA's conduct had made it "next to impossible" to resurrect the trial court's record:

You know, this situation kind of epitomizes why we have standards in terms of getting cases resolved. And standards for keeping cases going because situations like this arise where all of the original parties, and everything else are gone.

That files – for us to resurrect the files in this case is going to be next to impossible. They are on microfiche. We don't have one piece of paper left with regard to files, and I just got a few off the computer that I thought I might be needing. So – that creates a hardship on both the Court as well as the parties in the case.

Verbatim Report of Proceedings 8/26/09 ("RP") at 13 (App. B).

In an August 28, 2009 letter ruling, the trial court rejected BSA's argument that the trial court was constrained by CR 41(b)(1) and held that it would exercise its discretion to dismiss BSA's remaining claim based on

the parties' briefing and arguments. App. E. The trial court filed its order of dismissal on September 15, 2009, and its amended final judgment for WaferTech on September 21, 2009. CP 97-101; 155-57. The trial court awarded WaferTech its fees and costs and filed a supplemental judgment awarding attorney fees, including findings of fact and conclusions of law, on October 22, 2009. CP 148-50.

**D. The Second Court of Appeals Decision**

On January 19, 2011, the Court of Appeals issued its published decision reversing the trial court, and remanding for further proceedings. App. A. While noting BSA's "unprofessionalism in bringing a claim after a delay of more than four years," the Court of Appeals held that the trial court had no discretion to dismiss BSA's case. *Id.* at n.5, 7.

**V. ARGUMENT WHY REVIEW SHOULD BE GRANTED**

The Court of Appeals published Decision infringes upon the trial courts' long-recognized authority to dismiss a case for failure to prosecute when a party has engaged in more than "mere inaction." Washington courts have repeatedly affirmed that trial courts have the inherent authority to manage their dockets and dismiss cases when parties do more than just let a case sit. Here, BSA's counsel both expressly stated that the case had concluded in a notice of intent to withdraw [CP 42-43], and BSA allowed the trial court to destroy all trial exhibits [CP 58]. The Court of Appeals

Decision mischaracterizes BSA's post-remand active affirmation that the case was over as "mere inaction" under CR 41. Instead, the Court of Appeals should have properly characterized BSA's post-remand conduct as "unacceptable litigation practices," which authorized the exercise of the trial court's inherent authority to dismiss the case under this Court's decisions in *Thorp Meats* and *Wallace v. Evans*, and the Court of Appeals' decisions in *Gott v. Woody* and *Foss Maritime Co.* RAP 13.4(b)(1), (2).

The Court of Appeals Decision also interferes with the ability of trial courts to efficiently administer their dockets. In this era of tightening budgets, overworked judges, and an overloaded judicial system, the trial courts' efficient administration of their dockets is an issue of substantial public importance. RAP 13.4(b)(4). As the trial court said, when a party leads the trial court to believe that a complex case has concluded and then later attempts to reopen that case, it "creates a hardship on both the Court as well as the parties." RP 8/26/09 at 13 (App. B).

Accordingly, WaferTech urges this Court to accept review and to reverse the Court of Appeals.

- A. The Court of Appeals Decision unduly limits a trial court's inherent authority to dismiss a case for want of prosecution when a plaintiff affirmatively communicates to the court that it is no longer prosecuting its case.**

This Court has repeatedly affirmed the trial courts' inherent

authority to manage their dockets and dismiss cases for want of prosecution unless a particular rule or statute applies to limit such authority. As this Court explained in *Snohomish County v. Thorp Meats*, “[a] court of general jurisdiction has the inherent power to dismiss actions for lack of prosecution, but only when no court rule or statute governs the circumstances presented.” 110 Wn.2d 163, 166-67, 750 P.2d 1251, 1253 (1988); *see also Stickney v. Port of Olympia*, 35 Wn.2d 239, 241, 212 P.2d 821 (1949).

CR 41(b)(1)<sup>1</sup> carves out a limited exception to the trial courts’ well-established inherent authority, but only in cases of “mere inaction.” Washington courts have consistently reaffirmed the trial courts’ inherent authority to dismiss an action for want of prosecution where “dilatatoriness of a type not described by CR 41(b)(1) is involved.” *See, e.g., Thorp Meats*, 110 Wn.2d at 169. As the Court of Appeals explained in *Foss Maritime Co. v. City of Seattle*:

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<sup>1</sup> CR 41(b)(1) states, in full:

Want of Prosecution on Motion of Party. Any civil action shall be dismissed, without prejudice, for want of prosecution whenever the plaintiff, counterclaimant, cross claimant, or third party plaintiff 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. Such motion to dismiss shall come on for hearing only after 10 days’ notice to the adverse party. If the case is noted for trial before the hearing on the motion, the action shall not be dismissed.

“Dilatoriness of a type not described by CR 41(b)(1)” refers to unacceptable litigation practices *other than mere inaction*.

107 Wn.App. 669, 674, 27 P.3d 1228 (2001) (emphasis added).

While the Court of Appeals in the present case cited this very language as authoritative, its misapplication of this standard unduly restricts the trial courts’ inherent authority to manage their dockets. *See* App. A at 7 (“‘Dilatoriness of a type not described by CR 41(b)(1)’ refers to unacceptable litigation practices other than mere inaction.”) (citation omitted). Because one of the purposes of CR 41 is to protect litigants from dilatory tactics, in each case in which this Court or the Court of Appeals has reversed orders of dismissal, the dismissed party failed to do *anything* while the case sat dormant. Here, BSA’s case was dismissed because of BSA’s affirmative communications to the trial court that the case was over, not because of BSA’s “mere inaction.”

Decisions from this Court and the Court of Appeals confirm that the trial court below correctly determined that BSA engaged in more than “mere inaction.” In *Wallace v. Evans*, this Court rejected the petitioners’ argument that “respondents’ failure to prosecute for a period longer than the applicable statute of limitations” amounted to dilatoriness of a type not described by CR 41(b)(1). 131 Wn.2d 572, 577, 934 P.2d 662 (1997).

In *Gott v. Woody*, Division Two likewise addressed whether the mere passage of time could support a trial court's dismissal for failure to prosecute. 11 Wn.App. 504, 504-05, 524 P.2d 452 (1974). Given the lack of any affirmative conduct by the dismissed party, the Court of Appeals held that "where mere inaction of a party gives rise to a motion to dismiss for want of prosecution by the adversary, CR 41(b)(1) limits the discretionary authority of the court to dismiss on that ground." In *Foss Maritime Co.*, Division One likewise held that a party's mere inaction for a period of two years was not enough to support a trial court's dismissal for failure to prosecute. 107 Wn.App. at 674.

In *Wallace* and the other cases cited by the Court of Appeals, conduct beyond "mere inaction" was simply not present. Here, by contrast, BSA affirmatively communicated to the trial court that its case had ended. The Court of Appeals Decision cannot be squared with this Court's holding that CR 41(b)(1) does not apply where "unacceptable litigation practices other than mere inaction" are involved.

**B. The Court of Appeals Decision creates uncertainty regarding trial courts' inherent authority to dismiss in cases of more than mere inaction.**

The Court of Appeals Decision confuses the standard of what constitutes "dilatatoriness of a type not described by CR 41(b)(1)." While Washington courts have unanimously held that CR 41(b)(1) does not limit

a trial court's inherent authority where a party is guilty of unacceptable litigation practices other than mere inaction, this Court has never defined the types of unacceptable litigation practices that trigger a trial court's inherent authority to dismiss. In *dicta*, this Court in *Wallace v. Evans* listed "abandonment at trial or failure to attend on the trial date" as an example of "unacceptable litigation practices other than mere inaction" sufficient to invoke the trial court's inherent authority to dismiss. 131 Wn.2d at 577-78. But neither this Court nor the appellate courts have otherwise enumerated upon what constitutes conduct beyond "mere inaction." This Court should accept review and provide litigants and the trial courts with much needed guidance as to what constitutes "unacceptable litigation practices."

Rather than clarify this important issue, the published Court of Appeals Decision has obscured it. The Court of Appeals agreed that CR 41(b)(1) does not limit a trial court's inherent authority when a party has engaged in more than "mere inaction." But the Court of Appeals did not explain how BSA's words and actions—communicating that this case had ended—somehow constitute "mere inaction."

The Court of Appeals recites *some* of BSA's conduct, including BSA counsel's notice of withdrawal, but omits withdrawing counsel's affirmation that "[t]his case has been dismissed and judgment entered

thereon against Plaintiffs.” App. A at 7. The Court of Appeals then concludes, with little explanation, that BSA’s conduct and the other evidence before the trial court did not show more than “mere inaction.”

[BSA’s words and actions] related to the affirmed judgments against BSA, not to the outstanding lien claim, and therefore do not evidence dilatoriness beyond mere inaction.

Court of Appeals Decision, p. 7 (App. A). The Court of Appeals Decision is puzzling because BSA’s counsel withdrew from BSA’s entire case, and nothing in the notice limited counsel’s withdrawal or the dismissal of BSA’s “case” to any one component of it.

This Court should accept review and hold that “mere inaction” means precisely that. This Court should clarify – for litigants, their counsel, and the superior courts of this state – the narrow limitation under CR 41 on the court’s inherent authority to manage its docket. Words or actions that communicate to the trial court that a case has ended cannot be labeled “mere inaction.” When a party, like BSA here, actually *communicates* to the trial court that a case has been dismissed, the trial court must be able to exercise its inherent authority to dismiss.

**C. The trial courts’ inherent authority to dismiss a case when a party engages in more than “mere inaction” is essential to the efficient administration of justice.**

In this era of overloaded court dockets and strained budgetary resources, the trial courts’ authority to efficiently manage their dockets is

essential to the continued effective administration of justice. The Court of Appeals Decision impinges upon the trial courts' inherent authority to efficiently manage their dockets and exacerbates the difficulties faced by an already over-taxed judicial system.

In her 2011 State of the Judiciary Speech, Chief Justice Madsen made the following remarks regarding the difficulties faced by Washington trial courts in the current economic environment.

Since becoming Chief Justice, I have been talking to trial judges about the impacts of local budget cuts. Our survey of the judges paints a very bleak picture:

- Courts are losing line staff, cutting hours of operations and eliminating all "real person" phone services;
- ...
- Couples are living with temporary orders in dissolution cases because they can't get trial dates; and they can't move forward;
- ...
- Court clerks struggle to update court records in a timely and accurate manner; and
- Some superior courts are experiencing significant and increasing delays in civil trials; in a stunning example of this, 23 attorneys in Yakima formed a panel last year to donate their time as pro se judges to help the superior court reduce an increasing backlog of cases.

Chief Judge Barbara Madsen, January 12, 2011 State of the Judiciary

Address (available at <http://www.courts.wa.gov/newsinfo/content/>)

stateofjudiciary/january2011.pdf). It is these very concerns about the burden BSA's conduct placed upon the trial court that motivated the trial court's dismissal here, after BSA allowed the trial court to destroy all exhibits and affirmatively informed the trial court and the parties that BSA's case had concluded. RP 8/26/09 at 13 (App. B).

The concerns raised by Chief Justice Madsen provide a compelling basis for this Court to accept review and hold that when a party, either by words or actions, leads the trial court to believe that a case has concluded, the trial court retains its inherent authority to remove such stale, long-neglected cases from their already overcrowded dockets.

## VI. CONCLUSION

For the forgoing reasons, this Court should grant WaferTech's Petition for Review, reverse the Court of Appeals, and reinstate the trial court's judgment.

Dated this 17th day of February, 2011.

EDWARDS, SIEL, SMITH  
& GOODFRIEND, P.S.

By:

Howard M. Goodfriend  
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By:

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WSBA No. 30883  
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WSBA No. 34425

Attorneys for Petitioners

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DIVISION II

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STATE OF WASHINGTON

BY \_\_\_\_\_  
DEPUTY

**DECLARATION OF SERVICE**

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on February 17, 2011, I arranged for service of the foregoing **PETITION FOR REVIEW** to the clerk and to counsel for the parties to this action as follows:

Office of Clerk Court of Appeals – Division II 950 Broadway, Suite 300 Tacoma, WA 98402	<input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Electronic Mail
James T. McDermott Ball Janik LLP 101 SW Main Street, Suite 1100 Portland, OR 97204-3219	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail <input checked="" type="checkbox"/> Electronic Mail
Eric R. Hultman Hultman Law Office 611 Market Street, Suite 4 Kirkland, WA 98033	<input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Electronic Mail

**DATED** at Seattle, Washington this 17th day of February, 2011.



Tara D. Friesen

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DIVISION II

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STATE OF WASHINGTON

BY \_\_\_\_\_  
DEPUTY

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

BUSINESS SERVICES OF AMERICA II,  
INC.,

No. 39921-1-II

Appellant,

v.

WAFERTECH LLC,

PUBLISHED OPINION

Respondent.

QUINN-BRINTNALL, J. — Business Services of America II, Inc. (BSA) appeals the dismissal of its mechanic's lien claim against WaferTech LLC. The claim survived its original dismissal by the trial court in 2002 when this court reversed and remanded in 2004. BSA argues that the trial court erred when it found that CR 41(b)(1) did not apply on remand to limit its inherent discretion to dismiss a claim for want of prosecution. Because a trial court's compliance with CR 41(b)(1) is mandatory, its plain language precludes a trial court from dismissing a case once it is noted for trial. Accordingly, we reverse the trial court's dismissal of BSA's lien foreclosure claim, vacate the order awarding WaferTech attorney fees, and remand for trial.

FACTS

In a prior appeal of this case, we held that the trial court erred when it granted summary judgment dismissal of BSA's mechanic's lien claim and remanded for further proceedings. *Bus. Servs. of Am. II, Inc. v. WaferTech, LLC*, noted at 120 Wn. App. 1042, 2004 WL 444724, at \*5-6 (2004). We issued our unpublished opinion on March 9, 2004, and issued our mandate on February 8, 2005. Neither party took any action to move this case forward during the following four years.

On July 5, 2006, without notice to the parties, the trial court entered an order for the return of exhibits pursuant to a 2002 stipulation by the parties. The 2006 order is unsigned by either party and contains a handwritten note which reads "Satisfaction 4-11-05" apparently indicating that the trial court found satisfaction of judgment on April 11, 2005.<sup>1</sup> Clerk's Papers (CP) at 58. Both parties agree that the trial exhibits were subsequently recorded on microfiche

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<sup>1</sup> Satisfaction of judgment was one triggering event allowing the trial court to "return" the trial exhibits. On April 11, 2005, WaferTech requested that the trial court enter a "Full Satisfaction of Judgment" indicating it had received payment for attorney fees awards affirmed by this court. Clerk's Papers (CP) at 170. We note that in handwriting "Satisfaction 4-11-05" on the exhibit return order, the trial court erred in two ways. First, because this court reversed the dismissal of the mechanic's lien claim and remanded for further proceedings in 2004, the trial court failed to recognize that the April 11, 2005 "satisfaction" was only a partial satisfaction of the case and the lien issue remained outstanding. Second, the note "Satisfaction 4-11-05" fails to comply with RCW 4.56.100(1) which requires

[e]very satisfaction of judgment and every partial satisfaction of judgment which provides for the payment of money shall clearly designate the judgment creditor and his or her attorney if any, the judgment debtor, the amount or type of satisfaction, whether the satisfaction is full or partial, the cause number, and the date of entry of the judgment.

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and destroyed. On May 16, 2008, Natkin/Scott<sup>2</sup> and BSA's former counsel filed a notice of intent to withdraw, stating that, "No trial date is set. This case has been dismissed and judgment entered thereon against Plaintiffs." CP at 43.

On January 13, 2009, BSA's new counsel spoke with, and sent a letter to, WaferTech's counsel notifying WaferTech of BSA's intention to pursue the remaining mechanic's lien claim. The letter stated that although WaferTech may have regarded the case as "closed," BSA's lien claim was still subject to adjudication. Two days later, on January 15, BSA filed a notice of appearance with the trial court. And on June 15, 2009, BSA filed a notice to set for trial its lien foreclosure claim.

On August 6, 2009, WaferTech filed a motion to dismiss the lien claim, urging the trial court to exercise its inherent authority to dismiss for want of prosecution and asserting that (1) CR 41(b)(1) did not apply on remand, (2) the four-year delay resulted in unfair prejudice to WaferTech, and (3) the delay created an undue burden on the trial court. BSA argued that the trial court could not dismiss because CR 41(b)(1) prohibited an exercise of discretion to dismiss for want of prosecution once a case had been noted for trial.

The trial court heard the parties on WaferTech's motion on August 26, 2009, and stated,

You know, this situation kind of epitomizes why we have standards in terms of getting cases resolved. And standards for keeping cases going because situations like this arise where all of the original parties, and everything else are gone.

That files—for us to resurrect the files in this case is going to be next to impossible. They are on microfiche. We don't have one piece of paper left with regard to files, and I just got a few off the computer that I thought I might be needing. So—that creates a hardship on both the Court as well as the parties in the case.

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<sup>2</sup> Natkin/Scott assigned its rights to BSA, an entity created to pursue Natkin/Scott claims. For clarity, appellant is referred to only as BSA.

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Report of Proceedings (Aug. 26, 2009) at 13. The trial court found that it was not constrained by CR 41(b)(1) and granted WaferTech's motion to dismiss with prejudice on September 15. On October 9, the trial court heard the parties regarding WaferTech's request for reasonable attorney fees and costs pursuant to RCW 60.04.181<sup>3</sup> and entered a supplemental judgment, awarding WaferTech \$52,014.50 in attorney fees and \$2,133.51 in costs.

#### ANALYSIS

##### DISMISSAL FOR WANT OF PROSECUTION

Whether CR 41(b)(1) applies on remand to preclude dismissal of a claim for want of prosecution once it is noted for trial requires interpretation of a court rule which is a question of law we review *de novo*. *Nevers v. Fireside, Inc.*, 133 Wn.2d 804, 809, 947 P.2d 721 (1997). In determining the meaning of a court rule, we apply the same principles used to determine the meaning of a statute. *City of Bellevue v. Hellenthal*, 144 Wn.2d 425, 431, 28 P.3d 744 (2001). Foremost, we consider the plain language of the rule and construe the rule in accord with the drafter's intent. *See Hellenthal*, 144 Wn.2d at 431. If the rule's meaning is plain on its face, we give effect to that plain meaning as an expression of intent. *Arborwood Idaho, LLC v. City of Kennewick*, 151 Wn.2d 359, 367, 89 P.3d 217 (2004).

CR 41(b) provides for involuntary dismissal of an action or any claim against a defendant for failure of the plaintiff to timely prosecute. CR 41(b)(1) states,

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<sup>3</sup> RCW 60.04.181(3) states,

The court may allow the prevailing party in the action, whether plaintiff or defendant, as part of the costs of the action, the moneys paid for recording the claim of lien, costs of title report, bond costs, and attorneys' fees and necessary expenses incurred by the attorney in the superior court, court of appeals, supreme court, or arbitration, as the court or arbitrator deems reasonable. Such costs shall have the priority of the class of lien to which they are related, as established by subsection (1) of this section.

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Any civil action shall be dismissed, without prejudice, for want of prosecution whenever the plaintiff . . . 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. . . . *If the case is noted for trial before the hearing on the motion, the action shall not be dismissed.*

(Emphasis added.) CR 41(b)(1) does not distinguish between the procedural posture of an action. It states clearly a trial court cannot dismiss an action if it is noted for trial prior to a hearing on a motion for dismissal for want of prosecution.

Here, BSA's mechanic's lien claim was "joined" for purposes of the rule when this court issued its mandate on February 8, 2005, and authorized the trial court to proceed on the issue of the lien claim. *State ex rel. Wash. Water Power Co. v. Superior Court for Chelan Cnty.*, 41 Wn.2d 484, 489-91, 250 P.2d 536 (1952) (for purposes of Rule 3, CR 41(b)'s predecessor, an issue of law or fact is joined whenever in the process of a legal action it becomes necessary and proper to decide a question of law or a question of fact). BSA noted the case for trial four years later in June 2009.<sup>4</sup>

Without citing to authority, WaferTech asserts that CR 41(b)(1) does not apply after trial and appellate remand. In other words, WaferTech's contention is that CR 41(b)(1) only applies until a case is *first* noted for trial and never again thereafter. But neither Washington law nor the plain language of the rule supports WaferTech's interpretation. The court rules "govern the procedure in the superior court in all suits of a civil nature whether cognizable as cases at law or in equity." CR 1. No separate court rules exist for a civil case before a trial court on remand. Thus, because no authority is cited and nothing in the plain language of CR 41(b)(1) suggests

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<sup>4</sup> While we are mindful of the unprofessionalism in bringing a claim after a delay of more than four years, we note that WaferTech, itself, also had ample opportunity over a three-year period to move for dismissal of the lien claim under CR 41(b)(1).

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that it would not apply to a case on remand, and BSA's case was properly joined and noted for trial before the hearing on WaferTech's motion to dismiss, the trial court lacked inherent authority to dismiss the claim on remand. *Water Power*, 41 Wn.2d at 491.

Moreover, as our Supreme Court held in *Snohomish County v. Thorp Meats*, 110 Wn.2d 163, 168-69, 750 P.2d 1251 (1988),

[T]he final sentence of CR 41(b)(1) means precisely what it says, a case shall *not* be dismissed for want of prosecution if it is noted for trial before the hearing on the motion to dismiss. The rule . . . limits the power of the trial court to dismiss for failure to prosecute after the issue is joined and the case noted for trial.

And because the language is mandatory, “[i]t follows that in ruling on a motion to dismiss pursuant to CR 41, the trial court may not generally consider the merits of the case nor the hardship which application of the rule may bring.” *Foss Mar. Co. v. City of Seattle*, 107 Wn. App. 669, 675, 27 P.3d 1228 (2001) (alteration in original) (quoting *Thorp Meats*, 110 Wn.2d at 167); *Gott v. Woody*, 11 Wn. App. 504, 507, 524 P.2d 452 (1974) (CR 41(b)(1) operates as a limitation on the otherwise discretionary authority of trial courts to dismiss actions for want of prosecution). The final sentence in CR 41(b)(1) “was promulgated to encourage cases to be heard on the merits, the courts recognizing that involuntary dismissal for want of prosecution is punitive or administrative in nature and every reasonable opportunity should be afforded to permit the parties to reach the merits of the controversy.” *Foss Mar.*, 107 Wn. App. at 675 (internal quotation marks omitted) (quoting *Thorp Meats*, 110 Wn.2d at 168).

Alternatively, WaferTech argues that the July 2006 order indicating a “satisfaction” in April 2005, when viewed together with BSA's former counsel's May 2008 notice of intent to withdraw, evidence BSA's dilatoriness removing the present case from the confines of CR 41(b)(1). We disagree. A court of general jurisdiction has the inherent power to dismiss actions

No. 39921-1-II

for lack of prosecution, but only when no court rule or statute governs the circumstances presented. *Foss Mar.*, 107 Wn. App. at 674 (quoting *Thorp Meats*, 110 Wn.2d at 166-67). In *Thorp Meats*, our Supreme Court explained that where CR 41(b)(1) applies, a trial court has inherent authority to dismiss an action for want of prosecution only “[w]here dilatoriness of a type not described by CR 41(b)(1) is involved.” 110 Wn.2d at 169. “Dilatoriness of a type not described by CR 41(b)(1)’ refers to unacceptable litigation practices *other than mere inaction*, whatever the duration.” *Wallace v. Evans*, 131 Wn.2d 572, 577, 934 P.2d 662 (1997) (emphasis added). Here, the partial satisfaction, order for return of exhibits, and notice of intent to withdraw are all related to the affirmed judgments against BSA, not to the outstanding lien claim, and therefore do not evidence dilatoriness beyond mere inaction.

Accordingly, we hold that the trial court had no discretion to dismiss the case irrespective of the merits of WaferTech’s prejudice argument or any hardship that the trial court may experience as a result of the delay. Because we hold that the trial court erred when it found CR 41(b)(1) did not apply on remand and dismissed the case with prejudice, we vacate the order awarding WaferTech attorney fees and costs as the prevailing party under RCW 60.04.181(3).

#### JUDICIAL BIAS

A trial court is presumed to perform its functions regularly and properly without bias or prejudice. *In re Marriage of Meredith*, 148 Wn. App. 887, 903, 201 P.3d 1056 (citing *Wolfkill Feed & Fertilizer Corp. v. Martin*, 103 Wn. App. 836, 841, 14 P.3d 877 (2000)), *review denied*, 167 Wn.2d 1002 (2009). The test for determining whether a judge’s impartiality might reasonably be questioned is an objective one that assumes the reasonable person knows and understands all the relevant facts. *Sherman v. State*, 128 Wn.2d 164, 206, 905 P.2d 355 (1995).

No. 39921-1-II

The party claiming bias or prejudice must support the claim with evidence of the trial court's actual or potential bias. *State v. Dominguez*, 81 Wn. App. 325, 328-29, 914 P.2d 141 (1996).

BSA contends that the trial court finding that CR 41(b)(1) did not apply on remand and subsequent dismissal of its lien claim created an appearance of bias or unfairness. We disagree. That the trial court found CR 41(b)(1) inapplicable and awarded WaferTech attorney fees is not evidence of the trial judge's actual or potential bias, only of an error in applying the law. Accordingly, we decline to order that the case be remanded to a different trial judge.

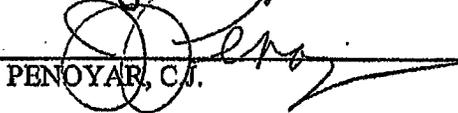
ATTORNEY FEES ON APPEAL

Both BSA and WaferTech request attorney fees pursuant to RCW 60.04.181(3). BSA would only be entitled to attorney fees if it is successful on remand. WaferTech is not the prevailing party on appeal. Accordingly, neither party is awarded attorney fees until further proceedings reveal which is the prevailing party under RCW 60.04.181(3).<sup>5</sup>

  
QUINN-BRINTNALL, J.

We concur:

  
BRIDGEWATER, J.

  
PENOYAR, C.J.

<sup>5</sup> Natkin/Scott requests we hold that it may be entitled to recover attorney fees pursuant to RAP 18.1 if it prevails on remand and is awarded attorney fees by the trial court. Because neither BSA nor WaferTech is entitled to attorney fees on appeal, we also deny Natkin/Scott any potential future award of attorney fees for this appeal.

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SUPERIOR COURT OF WASHINGTON FOR CLARK COUNTY

BUSINESS SERVICES OF AMERICA II, INC.,	)	No. 98-2-02045-1
	)	
Plaintiff,	)	
v.	)	
WAFERTECH, LLC.,	)	
	)	
Defendant.	)	

TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED that the above-entitled matter came on for hearing before the Honorable Diane M. Woolard, Judge of the Circuit Court for the County of Clark, State of Washington, commencing on the 26th day of August, 2009.

**Appearances:**

Appearing in behalf of the Plaintiff  
Eric R. Hultman, Attorney at Law

Appearing in behalf of the Defendant  
James T. McDermott, Attorney at Law

<b>TRANSCRIBED FROM ELECTRONIC RECORDING BY:</b>	<b>ANDERSON ASSISTANCE</b>
ROBYN M. ANDERSON	OFFICIAL TRANSCRIBER
3351 SW REDFERN PLACE	
GRESHAM, OREGON 97080	(503) 618-9938

1 | ambit of the rule thing. The rule is not limited, you  
2 | know, your authority is not limited simply to a remand  
3 | situation as Mr. Hultman is trying to argue. It's limited  
4 | once and only once there has been a case that's noted for  
5 | trial. There are no new pleadings in this case after the  
6 | remand. The pleadings were set way back in 2000 and  
7 | 2001, so there is nothing new that's happened other than a  
8 | Court of Appeals' decision.

9 |           THE COURT: You know, this situation kind of  
10 | epitomizes why we have standards in terms of getting cases  
11 | resolved. And standards for keeping cases going because  
12 | situations like this arise where all of the original  
13 | parties, and everything else are gone.

14 |           That files -- for us to resurrect the files in  
15 | this case is going to be next to impossible. They are on  
16 | microfiche. We don't have one piece of paper left with  
17 | regard to files, and I just got a few off the computer  
18 | that I thought I might be needing. So -- that creates a  
19 | hardship on both the Court as well as the parties in the  
20 | case.

21 |           And I'm sure that the Court of Appeals would  
22 | have some issues should they have to look at a case  
23 | that's, you know, that's five years old or whatever.

24 |           I'm going to look at the new case because I  
25 | haven't even had a chance to read it, you know, in all

1 fairness to everybody and I will get you out a letter  
2 opinion within probably the next week. Okay.

3 And thank you for all for putting up with our  
4 situation for today.

5 MR. MCDERMOTT: Thank you, Your Honor.

6 THE COURT: Let me ask you a question while we  
7 are still on the record.

8 Why is that you are so interested in  
9 resurrecting this issue after having it set for so many  
10 years?

11 MR. HULTMAN: Well, because it's a million and a  
12 half dollar claim. The party who is now in control of the  
13 claim, Joe Gogiyamo, was the president of Scott Company.

14 THE COURT: Mm-hmm.

15 MR. HULTMAN: He didn't have control of this  
16 claim for three years because the Scott Company went into  
17 receivership, and an investor bought the claim, they  
18 didn't pursue it; but Joe Gogiyamo, it's his company  
19 claim, he believes it's a valid claim, the Court of  
20 Appeals thought it was a valid claim, at least to be  
21 tried, and he hasn't had an opportunity to pursue it until  
22 now.

23 THE COURT: It's a lot of permutation for that  
24 claim to go through. And at the rate that I observed,  
25 probably would spend about a million dollars pursuing the

1 claim, so it's kind of a diminishing return.

2 MR. HULTMAN: Well, that's -- you know, that's  
3 Joe's call.

4 THE COURT: All right.

5 MR. HULTMAN: It certainly would have been  
6 better if someone had pursued this three years ago, but no  
7 one did.

8 THE COURT: Okay. Thank you.

9 MR. HULTMAN: Okay.

10 (adjourned)

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**SEP 15 2009**

*Sherry W. Parker, Clerk, Clark Co.*

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SUPERIOR COURT OF WASHINGTON FOR CLARK COUNTY

BUSINESS SERVICES OF AMERICA II,  
INC.,

Plaintiff,

v.

WAFERTECH, LLC,

Defendant.

CASE NO. 98-2-02045-1  
(CONSOLIDATED CASES)  
TRACK A

**ORDER GRANTING WAFERTECH'S  
MOTION TO DISMISS**

JUDGE: DIANE M. WOOLARD

This matter came before this Court on WaferTech's Motion to Dismiss came on August 26, 2009. Eric R. Hultman appeared for plaintiff Business Services of America II, Inc. ("BSA") and James T. McDermott appeared for defendant WaferTech, LLC ("WaferTech").

This Court heard oral argument of counsel and, having considered the pleadings, the parties' briefs, and all other matters presented to the Court, and for good cause appearing, this Court finds and orders:

1 This Court is not constrained by CR 41(b)(1) in deciding WaferTech's Motion to Dismiss, and the decision whether to grant the motion is within this Court's discretion;

2 Under this Court's discretion, IT IS HEREBY ORDERED that WaferTech's Motion to Dismiss is GRANTED; and

///

1 3. BSA's remaining lien claim against WaferTech in this matter is hereby  
2 DISMISSED WITH PREJUDICE.

/s/ DIANE M. WOOLARD

3 Dated: September 19<sup>th</sup>, 2009

4 \_\_\_\_\_  
Superior Court Judge Diane M. Woolard

5 Presented by:

6   
7 \_\_\_\_\_  
8 James T. McDermott, WSBA 30883  
9 Dwain M. Clifford, WSBA 39911  
10 Ball Janik LLP  
11 101 SW Main St., Ste. 1100  
12 Portland, OR 97204  
13 Tel: (503) 228-2525  
14 Fax: (503) 226-3910  
Attorneys for Defendant WaferTech, LLC

15 Approved as to form and Notice of Presentation waived:

16   
17 \_\_\_\_\_  
18 Eric R. Hultman, WSBA 17414  
19 Hultman Law Office  
20 611 Market Street, Suite 4  
21 Kirkland, WA 98033  
22 Tel: (425) 943-0649  
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Attorneys for Plaintiff Business Services of America II, Inc.

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**CERTIFICATE OF SERVICE**

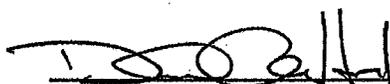
I certify that, on September 14, 2009, the foregoing **Order Granting WaferTech's Motion to Dismiss** was served on the following parties at the addresses below:

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erh@hultmanlaw.com  
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Kirkland, WA 98033  
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Fax: (206) 587-2343  
Attorneys for Plaintiff Business Services of America II, Inc.

by electronic mail (as agreed to by the parties in writing).

Dated: September 14, 2009

  
\_\_\_\_\_  
James T. McDermott, WSBA 30883  
Dwain M. Clifford, WSBA 39911  
Attorneys for Defendant WaferTech, LLC



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Superior Court Case Summary

Court: Clark Superior  
Case Number: 98-2-02045-1

Sub	Docket Date	Docket Code	Docket Description
	05-29-1998	\$FFR	Filing Fee Received
1	05-29-1998	CICS	Case Information Cover Sheet
2	05-29-1998	SMCMP	Summons & Complaint
3	06-11-1998	AFSR	Affidavit/declaration Of Service
4	06-11-1998	AFSR	Affidavit/declaration Of Service
5	06-11-1998	AFSR	Affidavit/declaration Of Service
6	06-11-1998	AFSR	Affidavit/declaration Of Service
7	06-11-1998	NTAPR ATD0002	Notice Of Appearance Rodden, Michael Brian
		ATD0001	Merkle, Alan R.
		DEF0001	Wafertech L L C
8	06-19-1998	NTAPR ATD0003	Notice Of Appearance Ashbaugh, David L.
		ATD0004	Majerus, Robert P.
		DEF0002	Adp Marshall Inc
9	06-26-1998	NTAPR ATD0001	Notice Of Appearance Merkle, Alan R.
		ATD0002	Rodden, Michael Brian
10	06-29-1998	AFSR	Affidavit/declaration Of Service
11	06-29-1998	NTAPR DEF0004	Notice Of Appearance Bet Plant Services Inc
		ATD0005	Turnbow, William R.
12	07-20-1998	CR	Certificate Of Delivery
13	07-20-1998	ANAFDF	Answer & Affirmative Defense & Counterclaim Of Wafertech Llc
13A	07-20-1998	ORDSMS	Order Of Dismissal - Stipulated As To
		DEF0003	Unlversity Mechanical Only Sgd Jdg Harris
14	07-22-1998	ANCC	Answer & Counter Claims & Cross-claims/bet Plant Services
15	08-05-1998	ANSC	Answer To Counterclaim
16	08-05-1998	SM	Summons
17	08-05-1998	AFSR	Affidavit/declaration Of Service
18	08-05-1998	SM	Summons
19	08-05-1998	AFSR	Affidavit/declaration Of Service
20	08-10-1998	SM	Summons
21	08-10-1998	SM	Summons
22	08-10-1998	ACSR	Acceptance Of Service
23	08-12-1998	MT	Motion & Declaration For Leave To File First Amended Complaint
24	08-12-1998	NTMTDK ACTION	Note For Motion Docket 2 P-mt To File Amended Complaint
25	08-12-1998	MT	Motion For Pretrial Conference And Scheduling Order

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110.

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08-21-1998M2

	07-23-2004	HSTKPA	Cancelled: Plaintiff/pros Requested	
993	08-02-2004	OR	Order On Motion To Increase Bond *stip* Sgn Judge Bennett	
994	08-13-2004	DCLR	Declaration Of Eric Hultman	
995	08-13-2004	AFSR	Affidavit/declaration Of Service	
996	02-10-2005	RCP	Receipt Exhibits Recvd F/coa ** See Receipt For Listing **	
997	02-10-2005	MND	Mandate & Unpublished Opinion Coa # 28886-9-II	
998	03-28-2005	MT	Motion To Enforce Fees & Bond	
999	03-28-2005	DCLR	Declaration Of James Mcdermott	
1000	03-31-2005	LTR	Letter To Clerk Fm Ball Janik Llp	
1001	03-31-2005	TRLC	Transmittal Letter - Copy Filed	
	03-31-2005	DCLRM	Declaration Of Mailing By Clerk	
1002	03-31-2005	CIT ACTION	Citation 8 D-mtn To Enforce & Bond	04-08- 2005
	04-04-2005	HSTKPA	Cancelled: Plaintiff/pros Requested Per Atty Mcdermott For 4-8-05	
1003	04-06-2005	RTRCM	Return Receipt - Certified Mail	
1004	04-11-2005	STFJG	Satisfaction Of Judgment 02-9-02710-4	
1005	07-05-2006	STPORE	Stip&or Ret Exhibts Unopned Depostns	
1006	05-16-2008	NTIWD W3D0001 WTP0001	Notice Of Intent To Withdraw Meacham, Steven D. Meacham, Steven D.	
	01-15-2009	RTA ATP0002 PLA0002 ATP0002 PLA0002	Returned To Active Hultman, Eric Ronald Business Services Of America II Hultman, Eric Ronald Business Services Of America II	
1008	06-15-2009	NTTSNA ACTION ACTION ACTION	Nt For Trial & Stmt Of Nonarbitra Respsns To Ntc Fid 6-25-09 (d) Non Jury 4 Days (p) Mandate Fid 2-10-05 Ntc 6-15-09	06-30- 2009N8
1009	06-25-2009	RSSNA	Response To St Of Non-arbitrability	
1010	06-25-2009	NTMTDK ACTION ACTION	Note For Motion Docket Response To Ntc To Set F/trial 9am 8 D-construction Lien Claim -	08-21- 2009
1011	07-10-2009	NTASCC ATP0003	Notice Of Association Of Counsel Lawrence, Kerry C.	
	07-22-2009	HSTKPA	Cancelled: Plaintiff/pros Requested Per Atty Mcdermott For 08-21-09	
1012	07-22-2009	NTMTDK ACTION	Note For Motion Docket 8 P-lien Claim Foreclose 9am	07-31- 2009M8
	07-28-2009	HCNTCC ACTION	Hearing Continued:calendar Conflict 8 P-lien Claim Foreclose 9am Per Dept 8 Frm 7-31 To 8-26	08-26- 2009
1013	07-31-2009	HCNTCC ACTION ACTION	Hearing Continued:calendar Conflict P-lien Claim Foreclosure #8 Special Set @ 3:30 Pm	08-26- 2009T8
1014	08-06-2009	DCLR	Declaration Of Spencer Leese	
1015	08-06-2009	DCLR	Declaration Of James Mcdermott	
1016	08-06-2009	MTDSM	Motion To Dismiss	
1017	08-06-2009	NTMTDK ACTION	Note For Motion Docket 8 D-construction Lien Claim 3:30pm	08-26- 2009T8
1018	08-20-2009	DCLR	Declaration Of Eric R Hultman	
1019	08-20-2009	OB	Objection / Opposition To Motion	

SUPERIOR COURT OF  
THE STATE OF WASHINGTON FOR CLARK COUNTY  
DEPARTMENT NO. 8  
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DIANE M. WOOLARD  
JUDGE

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August 28, 2009

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**Re: 98-2-02045-1 Business Services of America v. Wafertech**

Dear Counsel,

After having reviewed the pleadings and having heard the argument of counsel, I am finding that this court is not constrained by CR 41(b)(1) and am using my discretion to grant defendants Motion to Dismiss. Thus there will be no trial setting.

Prevailing party will please prepare appropriate pleadings.

Sincerely,

Diane M. Woolard  
Judge