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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.

SUPPLEMENTAL BRIEF OF PETITIONER WAFERTECH, LLC

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I. INTRODUCTION

Trial courts retain the discretion to dismiss a claim for want of prosecution where, as here, a plaintiff's conduct goes beyond mere inaction, and prejudicially affects the trial court's ability to manage its affairs and fairly administer justice. CR 41(b)(1), which allows a plaintiff to avoid dismissal by noting a matter for trial, provides only a narrow limit on this fundamental aspect of a trial court's inherent authority to manage its docket. Because CR 41(b)(1)'s safe harbor is in derogation of the common law, it must be narrowly construed. CR 41(b)(1) is inapplicable here, following a remand from the appellate court, where all issues of law and fact were previously "joined," and the plaintiff has already had trial. Moreover, CR 41(b)(1) can apply only when the mere passage of time is the sole basis for finding that the plaintiff has abandoned its claim.

The trial court correctly exercised its discretion to dismiss this case for want of prosecution after finding that BSA's conduct resulted in the trial court destroying its file. During the four years that followed the return of the appellate mandate, it is undisputed that BSA (1) was informed about – and failed to object to – the destruction of the 1,551 trial exhibits, and (2) communicated to the trial court that the case had concluded. WaferTech asks this Court to reverse the Court of Appeals'

decision and reinstate the trial court's dismissal of this action for want of prosecution.

II. SUPPLEMENTAL STATEMENT OF ISSUE

Did the trial court abuse its discretion in dismissing this action for want of prosecution four years after return of the appellate court's mandate, where the plaintiff allowed the trial court to destroy all trial exhibits and communicated to the trial court plaintiff's intent not to further pursue its action?

III. SUPPLEMENTAL STATEMENT OF THE CASE

As the trial court in this case explained, BSA engaged in litigation practices that would have resulted in substantial costs and hardship to the trial court had the remaining fragment of BSA's stale case been allowed to proceed toward a second trial. This finding of costs and hardship led the trial court to dismiss BSA's one remaining claim. The trial court's dismissal should be upheld under an abuse of discretion standard.

A. The Court Of Appeals Affirmed The Dismissal After A Jury Trial Of All But A Portion Of One Of BSA's Claims.

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. In 2002, after a multi-week jury trial, during which the parties marked 1,551 exhibits, the trial court dismissed all of BSA's

claims. CP 31. The trial court then awarded nearly $1 million in prevailing party attorney fees to WaferTech. CP 32.

BSA appealed the trial court's dismissal of its claims. In a 2004 unpublished decision, Division Two upheld the trial court in all respects, with one exception – it remanded one claim for a new trial in which BSA could seek up to a maximum of $1.5 million of BSA's original $7.65 million lien claim. CP 29-30; 35; 37. Division Two affirmed the trial court's award of nearly $1 million in attorney fees to WaferTech as the prevailing party in superior court. CP 37-40. The Court of Appeals issued its mandate on February 10, 2005. CP 22.

B. After Return Of The Mandate, BSA Allowed The Trial Court To Destroy Its Exhibits And Then Stated Its Intent To Not Further Pursue The Case. The Trial Court Closed Its File.

BSA did nothing for over one year following remand. BSA then communicated to the trial court on two separate occasions that it did not intend to further pursue the remaining portion of its one claim. First, on July 5, 2006, almost 16 months after issuance of the appellate mandate, the trial court issued 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. Despite being informed that the

trial court was about to destroy all of the exhibits, BSA did not object or otherwise respond to this court order.[2]

Second, on May 16, 2008, over three years after the appellate mandate, BSA's 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 thereafter, the trial court clerk's office closed its file. CP 55.

In early 2009, BSA tried to resuscitate the remaining portion of its one claim. On January 13, 2009, BSA's counsel contacted the superior court clerk's office, but was informed that the file had been closed. CP 55.

C. Over Four Years After Remand, The Trial Court Dismissed BSA's Case Due To The Hardship And Expense Caused By BSA's Actions.

Another six months passed. On June 15, 2009, BSA 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. At oral

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[2] In its January 19, 2011 Published Decision, the Court of Appeals states that "without notice to the parties, the trial court entered an order for the return of the exhibits pursuant to a 2002 stipulation by the parties." App. A, p. 2. The trial court may not have given the parties notice that it was going to enter the order, but the order itself was notice to the parties that the trial court was about to destroy its exhibits. At no point in this litigation has BSA disputed that it received a copy of the order notifying the parties that the court was about to destroy the trial exhibits.

argument, the trial court noted that BSA's conduct had made it "next to impossible" to resurrect the trial court's record, resulting in substantial costs and hardship for the trial court:

> 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, supported by findings of fact and conclusions of law, on October 22, 2009. CP 148-50.

D. The Court Of Appeals Reversed The Trial Court's Dismissal Of The Remaining Portion Of BSA's Case.

On January 19, 2011, the Court of Appeals issued a 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 nevertheless held that the trial court had no discretion to dismiss BSA's case. *Id.* at n.4.

IV. ARGUMENT

A. CR 41(b)(1) Provides A Limited Exception To A Trial Court's Inherent Authority To Dismiss A Case For Want Of Prosecution And Must Be Narrowly Construed.

CR 41(b)(1)[1] carves out a limited exception to a trial court's well-established inherent authority to dismiss a case for want of prosecution. CR 41(b)(1) provides plaintiff with a "safe harbor" from dismissal for want of prosecution by allowing the plaintiff at any time before a hearing on the defendant's motion to "note the action for trial or hearing within 1 year after any issue of law or fact has been joined. . ." CR 41(b)(1). That

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[1] 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.

safe harbor is a narrow limitation on a trial court's broad inherent authority to manage its docket.

Before the adoption of the Civil Rules in 1967, a trial court had the mandatory obligation to dismiss an action for want of prosecution under Rule of Pleading, Practice and Procedure 3, 193 Wash. 40-a (1938), and then RPPP 41.04W, 54 Wn.2d lviii (1960), where the plaintiff failed to note the action for trial within one year after issues were joined by the filing of the defendant's answer. *See Snohomish County v. Thorp Meats*, 110 Wn.2d 163, 167, 750 P.2d 1251, 1253 (1988) ("the only way to avoid dismissal for want of prosecution under the predecessor of CR 41(b)(1) was to note the action for trial within 1 year after issues were joined."); *State ex rel. Dawson v. Superior Court of Kittitas County,* 16 Wn.2d 300, 304, 133 P.2d 285, 287 (1943) ("Under this rule, the court has no discretion, but must dismiss the action if it has been pending for one year after any issue of law or fact has been joined.").

The safe harbor provision was added to the Civil Rules in 1967 because of the severity of the non-discretionary duty of a trial court to dismiss an inactive case under former RPPP 3. The safe harbor exception must thus be viewed as a "limitation upon the otherwise inherent discretionary power of the court to dismiss, upon the motion of a party, for

failure to bring a case on for trial in a timely fashion." *Gott v. Woody*, 11 Wn. App. 504, 507, 524 P.2d 452 (1974).

As this Court has long held, the inherent power to dismiss a case for want of prosecution was well established under the common law:

> [A] court of general jurisdiction has the inherent power to dismiss pending actions if not diligently prosecuted[,] the exercise of such power, in the absence of statute or rule of court, being in the discretion of the court.

Stickney v. Port of Olympia, 35 Wn.2d 239, 241, 212 P.2d 821, 822 (1949). Because CR 41(b)(1)'s rule limiting the superior court's inherent authority is in derogation of the common law, it is narrowly, not liberally, construed. *See State v. ANW Seed Corp.*, 116 Wn.2d 39, 45, 805 P.2d 1353 (1991) (applying principle that statutes in derogation of common law are strictly construed to interpretation of court rule).

As discussed below, neither the language, structure, nor policy behind CR 41(b) supports the Court of Appeals holding that a plaintiff who has already had a trial may communicate that its case is closed, stand by while the trial court destroys exhibits, and then when the file has been closed four years following return of the mandate, attempt to resuscitate what remains of its action. The trial court found that the plaintiff's conduct prejudiced its ability to effectively administer justice. Because that finding was not an abuse of discretion, and is supported by its

common law inherent authority to manage its docket, this Court should reinstate the judgment of dismissal for want of prosecution.

B. CR 41(b)(1) Does Not By Its Terms Apply After An Action Has Been Previously Tried And Remanded From The Appellate Court.

The plain language of CR 41(b)(1) does not support the Court of Appeals decision that a plaintiff may oppose dismissal for want of prosecution where plaintiff has communicated its understanding that the case is concluded and allowed the trial court to destroy original exhibits years after issuance of the appellate court's mandate. A plaintiff who has a portion of its claim reinstated following dismissal at trial and reversal on appeal has an obligation to not interefere with the efficient administration of justice. The trial court correctly exercised its discretion because CR 41(b)(1) does not provide a plaintiff who has already had a trial the right to extend, in perpetuity, the time for concluding its case.

CR 41(b)(1), by its terms, applies only where no action has been taken for over one year "after any issue of law or fact has been joined." CR 41(b)(1).[3] The rule has no application once an *entire* action has already been "joined" by filing of an answer, and then noted for trial, as

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[3] In the usual civil case, such as this one, an issue is "joined" upon service of the defendant's answer, though specialized statutes might compel a different result in certain cases." Tegland, *4 Washington Practice 52* (5th Ed. 2008) *See, e.g., State Ex rel Washington Water Power v. Superior Court for Chelan County*, 41 Wn.2d 484, 490-91 250 P.3d 536 (1953) (second phase of eminent domain proceeding fixing amount of award is "joined" when decree of

this case was in 2001. No court has applied CR 41(b)(1) to limit a trial court's inherent authority to dismiss a case for want of prosecution after remand following trial and appeal, and to do so under these circumstances would contravene sound policy.[4]

Once a trial has already occurred, witnesses have testified, and exhibits have been taken into evidence, the purpose of the rule has been served. The plaintiff should not be able to perpetually delay resolution of a case once the matter has already been adjudicated and remanded for further proceedings. Any other interpretation of CR 41(b)(1) would allow parties to delay the administration of justice, not just once, but again upon remand.

BSA's case had already been heard once by the trial court. BSA had its day or, in this case, weeks in court. BSA was not entitled to invoke the safe harbor of CR 41(b)(1) after (1) BSA failed to respond to the trial court's destruction notice, and (2) BSA informed the trial court that "[t]his

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public use became final, under prior RPPP 3.)

[4] This Court held under former RPPP 3 that an issue was "joined" upon return of the appellate court's remittitur. *See, e.g., In re: Ellern*, 29 Wn.2d 527, 529, 188 P.2d 146 (1947). But there was no safe harbor provision in RPPP 3, and the rule made dismissal mandatory when no action was taken after one year. Thus RPPP 3 required a court to dismiss a case if no action had been taken for more than a year as the case progressed and "issues of law or issues of fact are raised and decided," thereby preventing the very type of serial delay that BSA advocates in the instant case. *See Warnock v. Seattle Times*, 48 Wn.2d 450, 453-54, 294 P.2d 646 (1956).

case has been dismissed and judgment entered thereon against Plaintiffs." CP 42-43.

C. Trial Courts Have The Discretion To Dismiss An Action For Want Of Prosecution Where The Plaintiff Has Engaged In Dilatory Conduct That Prejudices The Effective Administration Of Justice.

Because CR 41(b)(1) is only a narrow limitation on the trial court's common law authority to manage its docket, Washington courts have consistently stated that trial courts retain the inherent authority to dismiss an action for want of prosecution where "dilatoriness of a type not described by CR 41(b)(1) is involved." *See, e.g., Snohomish County v. Thorp Meats*, 110 Wn.2d 163, 169, 750 P.2d 1251 (1988). Thus, CR 41(b)(1) limits this inherent authority to dismiss for want of prosecution where the only basis for dismissal is the mere passage of time:

> "[D]ilatoriness of a type not described by CR 41(b)(1)" refers to unacceptable litigation practices *other than mere inaction.*

Foss Maritime Co. v. City of Seattle, 107 Wn. App. 669, 674, 27 P.3d 1228 (2001) (emphasis added).

This Court recognized in *Thorp Meats* that the provisions of CR 41(b)(1) control only in the limited circumstance of mere "inaction" and that the "first paragraph of Subdivision (b)[5] authorizes dismissal for other

[5] "For failure of the plaintiff to prosecute or to comply with these rules or any order of the court, a defendant may move for dismissal of an action of any claim against him or her." CR 41(b).

types of failure to prosecute, such as abandonment at trial, or failure to attend on the trial date." 110 Wn.2d at 169, *quoting* 4 L. Orland Wash. Pract. § 5502 at 241 (3rd Ed. 1983). For instance, in *Jewell v. City of Kirkland*, 50 Wn. App. 813, 750 P.2d 1307 (1986), Division One affirmed the trial court's dismissal of a certiorari review of a land use decision under CR 41(b), after the petitioner failed to promptly perfect the administrative record. Noting the costs of judicial delay the Court of Appeals emphasized the trial court's inherent authority to manage its docket and enforce compliance with scheduling orders:

> The administration of justice will best be served by a policy of treating orders as meaning what they say and requiring strict compliance therewith.

50 Wn. App. at 822.

In *Alexander v. Food Services of America*, 76 Wn. App. 425, 429-30, 886 P.2d 231 (1994), the Court of Appeals affirmed the trial court's dismissal of an action after the plaintiff failed to appear at trial. The Court of Appeals held that the trial court had discretion to dismiss because the "failure to attend trial is . . . a failure to prosecute" within the scope of CR 41(b). 76 Wn. App. at 430. *See also Wagner v. MacDonald*, 10 Wn. App. 213, 516 P.2d 1051 (1973) (dismissal with prejudice for failure to appear at trial).

By contrast, in each case where this Court or the Court of Appeals has held that CR 41(b)(1) limited a trial court's inherent authority to dismiss for failure to prosecute, the trial court's dismissal was based solely upon the passage of time and did not turn on the plaintiff's actions or conduct. In *Wallace v. Evans*, 131 Wn.2d 572, 577, 934 P.2d 662 (1997), 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). In *Gott v. Woody*, 11 Wn. App. 504, 504-05, 524 P.2d 452 (1974), Division Two likewise held that the mere passage of time alone could not support a trial court's dismissal for failure to prosecute. In *Foss Maritime Co.*, 107 Wn. App. at 674, Division One likewise held that a party's failure to push a case forward for a period of two years was not enough to support a trial court's dismissal for failure to prosecute. In each of these cases, the trial court's dismissal was based upon the mere passage of time, and not a party's conduct or failure to act when required by court rules or orders.

"Mere inaction" in this context, therefore, does not protect a parties' deliberate failure to act as a reasonable party would under the circumstances in response to court directives or notices. More particularly, CR 41(b)(1) does not protect a party whose failure to act results in prejudice to the trial court that is distinct from the prejudice that

arises from the mere passage of time. For instance, a failure to appear at trial is, literally speaking, inaction, but such conduct puts a substantial burden on the trial court and wastes judicial resources. In *Wallace v. Evans*, this Court explained that "abandonment at trial or failure to attend on the trial date" – a form of inaction – would be "unacceptable litigation practices other than mere inaction, " and therefore CR 41(b)(1) would not limit the a trial court's inherent authority to dismiss. 131 Wn.2d at 577-78. By invoking this example, this Court in *Wallace* made clear that "mere inaction" does not mean dilatory conduct that unduly burdens the superior court's ability to effectively dispense justice.

It is impossible to predict the precise manner in which a party's misconduct might justify a dismissal for want of prosecution, and this Court should be hesitant to limit the trial court's discretion to do so where a party's conduct – whether affirmative action or a failure to respond to a court order – inhibits the trial court's ability to manage its docket.

The trial court's dismissal in the instant case was not based on the plaintiff's failure to appear at trial or at a hearing. However, the conduct at issue here – allowing the clerk to destroy the 1,551 trial exhibits and affirmatively representing that the case was concluded – went well beyond the "mere inaction" that constrains a trial court's inherent authority to dismiss for want of prosecution under CR 41(b)(1). Over a year after

return of the mandate, in 2006, the trial court notified the parties that it intended to destroy all of its trial exhibits, pursuant to a stipulation signed by the parties in 2002. CP 58. At that point, BSA could and should have spoken up to let the trial court know that BSA wished to proceed with the remaining portion of its one claim.[6] By failing to respond to the court's notice that it was going to destroy all the trial exhibits, BSA failed to correct the trial court's apparent belief that the case was over. Later, BSA's counsel even confirmed that this case was over by stating that: "This case has been dismissed and judgment entered thereon against Plaintiffs." CP 42-43. The trial court and the superior court clerk's office reasonably believed that BSA's case was over, closing the court file and allowing the trial exhibits to be destroyed. CP 55.

The trial court specifically found that BSA's conduct placed an undue burden on the trial court's ability to fairly and efficiently manage its affairs and administer justice. As the trial court explained, "for us to resurrect the files in this case is going to be next to impossible. . . . [T]hat 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).

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[6] The Washington Rules of Professional Conduct reflect the general principle that officers of the court have a duty to speak when the court is about to make a clear error. RPC 3.3(a)(3), for example, states that a lawyer shall not "fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel."

Trial courts must retain broad discretion to determine when a party's conduct rises above "mere inaction" under CR 41(b)(1) and creates enough of a burden to justify resort to its inherent authority to dismiss for want of prosecution. Orders of dismissal under CR 41(b) are typically reviewed for abuse of discretion. *See Johnson v. Horizon Fisheries, LLC*, 148 Wn. App. 628, 636, 201 P.3d 346 (2009) ("We review a trial court's decision to dismiss an action under CR 41(b) for abuse of discretion."); *Stickney*, 35 Wn.2d at 241. This Court and the Court of Appeals have repeatedly held that appellate courts should afford wide latitude to trial courts in managing their courtrooms in order to fairly and efficiently dispense justice without undue expense and delay.[7] As this Court said in *Fisons*, "the abuse of discretion standard again recognizes that deference is owed to the judicial actor who is 'better positioned than another to decide the issue in question.'" *Fisons*, 122 Wn.2d at 339, quoting *Cooter v. Gell & Hartmarx Corp.*, 496 U.S. 384, 403, 110 S.Ct. 2447, 2459, 110 L. Ed. 2d 359 (1990). In the present case, the trial court was in the best

[7] *See, e.g., State v. Aguirre*, 168 Wn.2d 350, 365, 229 P.3d 669 (2010) (trial court's decisions regarding continuance of trial); *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054, 1075 (1993) (sanctioning misconduct); *Marriage of Zigler and Sidwell*, 154 Wn. App. 803, 226 P.3d 202 (2010) (managing conduct of counsel and examination of witnesses); *Nakata v. Blue Bird, Inc.*, 146 Wn. App. 267, 277, 191 P.3d 900 (2008) (management and limitation of discovery); *Woodhead v. Discount Waterbeds, Inc.*, 78 Wn. App. 125, 129, 896 P.2d 66 (1995) (trial court's order dismissing action for noncompliance with court order or rule).

position to weigh the magnitude of the burden and expense caused by BSA.

The trial court properly concluded that BSA's conduct placed this case outside the constraints of CR 41(b)(1). And the trial court did not abuse its discretion by exercising its inherent authority to dismiss. Here, the magnitude of the burden and expense that the trial court would have suffered from having to recreate its records could easily exceed the burden and expense a trial court would suffer from a party failing to appear at trial. In *Wallace,* this Court said that "failure to attend on the trial date: constituted "unacceptable litigation practices" outside of CR41(b)(1)'s safe harbor. 131 Wn.2d 577-78. Here, BSA's conduct in failing to respond to a court destruction notice, and BSA's affirmation that its case was over, amounts to functionally the same "unacceptable litigation practices" described in *Wallace.* Even the Court of Appeals below characterized BSA's post-remand conduct as "unprofessional[]." App. A, n.4.

Over four years after return of the appellate mandate, the trial court properly exercised its discretion by dismissing BSA's case because BSA failed to respond to the trial court's destruction notice *and* BSA informed the trial court that the case was over. This Court should conclude that the

trial court properly found that BSA was not protected from the consequences of its conduct by the safe harbor contained in CR 41(b)(1).

V. CONCLUSION

Trial courts are constrained by CR 41(b)(1) only when a dismissal for want of prosecution is based solely upon the passage of time. CR 41(b)(1) does not apply here, where the plaintiff has had its day in court and later let years pass after the appellate mandate without advancing what remains of its claim on remand toward resolution in the trial court. Where, as here, a plaintiff allows destruction of exhibits and the closing of the court file four years following remand, the trial court retains its inherent discretionary authority to find that the party's conduct prejudicially affects the administration of justice and warrants dismissal.

WaferTech respectfully requests this Court to reverse the Court of Appeals, reinstate the trial court's judgment in its entirety, and award attorney fees in this Court pursuant to the lien statute, RCW 60.04.081(3).

Dated this 8 th day of August, 2011.

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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 August 8, 2011, I arranged for service of the foregoing **SUPPLEMENTAL BRIEF OF PETITIONER WAFERTECH, LLC** to the clerk and to counsel for the parties to this action as follows:

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DATED at Seattle, Washington this 8th day of August, 2011.

Tara D. Friesen

APPENDICES

App. A: Court of Appeals January 19, 2011 Published Decision

App. B: Pages 13 to 15 of Verbatim Report of August 26, 2009 Proceedings Before the Trial Court

App. C: Trial Court's Order Granting WaferTech's Motion to Dismiss

App. D: Relevant Portions of Trial Court Docket

App. E: Trial Court's August 28, 2009 Letter Ruling on WaferTech's Motion to Dismiss

FILED
COURT OF APPEALS
DIVISION II
11 JAN 19 AM 10:59
STATE OF WASHINGTON
BY
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 PUBLISHED OPINION

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.[1] Clerk's Papers (CP) at 58. Both parties agree that the trial exhibits were subsequently recorded on microfiche

[1] 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.

and destroyed. On May 16, 2008, Natkin/Scott[2] 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.

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

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[3] 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,

---

[3] 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.

> 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.[4]

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

[4] 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).

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

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).

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).[5]

QUINN-BRINTNALL, J.

We concur:

BRIDGEWATER, J.

PENOYAR, C.J.

[5] 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.

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

TRANSCRIBED FROM ELECTRONIC RECORDING BY:
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GRESHAM, OREGON 97080

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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 pursing 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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1 DECLARATION OF TRANSCRIBER

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13 transcription of the entire record of the proceedings, as
14 requested, to the best of my belief and ability.
15 WITNESS my hand at Gresham, Oregon this 9th day of
16 February, 2010.

17 ANDERSON ASSISTANCE

18

19

20 Robyn Anderson
21 Robyn M. Anderson

22 Official Transcriber

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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

///

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HALL JANIE LLP
1[illegible] Southwest Main Street Suite 1100
Portland Oregon 97204-3219
Telephone 503-226-2[illegible]

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

/s/ DIANE M. WOOLARD

Dated: September 15th, 2009

Superior Court Judge Diane M. Woolard

Presented by:

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

Approved as to form and Notice of Presentation waived:

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Tel: (425) 943-0649
Fax: (206) 203-0338
Attorneys for Plaintiff Business Services of America II, Inc.

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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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	Misc Info
	05-29-1998	$FFR	Filing Fee Received	110.
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	Notice Of Appearance	
		ATD0002	Rodden, Michael Brian	
		ATD0001	Merkle, Alan R.	
		DEF0001	Wafertech L L C	
8	06-19-1998	NTAPR	Notice Of Appearance	
		ATD0003	Ashbaugh, David L.	
		ATD0004	Majerus, Robert P.	
		DEF0002	Adp Marshall Inc	
9	06-26-1998	NTAPR	Notice Of Appearance	
		ATD0001	Merkle, Alan R.	
		ATD0002	Rodden, Michael Brian	
10	06-29-1998	AFSR	Affidavit/declaration Of Service	
11	06-29-1998	NTAPR	Notice Of Appearance	
		DEF0004	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	University 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	Note For Motion Docket	08-21-1998M2
		ACTION	2 P-mt To File Amended Complaint	
25	08-12-1998	MT	Motion For Pretrial Conference And Scheduling Order	

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	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 Exhbts Unopned Depostns	
1006	05-16-2008	NTIWD W3D0001	Notice Of Intent To Withdraw Meacham, Steven D.	
		WTP0001	Meacham, Steven D.	
	01-15-2009	RTA ATP0002	Returned To Active Hultman, Eric Ronald	
		PLA0002	Business Services Of America II	
		ATP0002	Hultman, Eric Ronald	
		PLA0002	Business Services Of America II	
1008	06-15-2009	NTTSNA ACTION	Nt For Trial & Stmnt Of Nonarbitra Respns To Ntc Fld 6-25-09 (d)	06-30-2009N8
		ACTION	Non Jury 4 Days (p)	
		ACTION	Mandate Fld 2-10-05 Ntc 6-15-09	
1009	06-25-2009	RSSNA	Response To St Of Non-arbitrability	
1010	06-25-2009	NTMTDK ACTION	Note For Motion Docket Response To Ntc To Set F/trial 9am	08-21-2009
		ACTION	8 D-construction Lien Claim -	
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	08-26-2009
			Per Dept 8 Frm 7-31 To 8-26	
1013	07-31-2009	HCNTCC ACTION	Hearing Continued:calendar Conflict P-lien Claim Foreclosure	08-26-2009T8
		ACTION	#8 Special Set @ 3:30 Pm	
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
PO BOX 5000
VANCOUVER, WA 98666-5000

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

Diane M. Woolard
Judge