

FILED  
COURT OF APPEALS  
DIVISION II

10 MAY 27 PM 12:40

No. -II

STATE OF WASHINGTON

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

---

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

Appellant,

v.

WAFERTECH, L.L.C.,

Respondent.

---

**APPELLANT'S REPLY BRIEF**

---

Eric R. Hultman, WSBA #17414  
Hultman Law Office  
611 Market St., Suite 4  
Kirkland, WA 98033  
(425) 943-0649

Attorney for Appellant Business  
Services of America II, Inc.

TABLE OF CONTENTS

I. SUMMARY ..... 1

II. REPLY TO WAFERTECH’S STATEMENT OF THE CASE ..... 2

III. REPLY TO WAFERTECH’S ARGUMENT ..... 4

A. The trial court had no discretion to ignore CR 41(b)(1) when deciding whether it could dismiss for want of prosecution after remand..... 4

1. Washington courts have ruled that issues may be “joined” many times in the same action for the purpose of beginning the one-year tolling period under CR 41(b)(a). ..... 8

2. BSA never acquiesced in closure of case (it was never closed) and did nothing beyond delaying its prosecution of its claim. .... 10

3. If the trial court had discretion to dismiss for lack of prosecution (it did not), it abused that discretion..... 13

B. The trial court provided no basis for determining if or how it exercised its discretion in awarding attorney fees. .... 15

C. WaferTech provides no authority to support its argument that remand to a different judge is not warranted.. .... 16

D. WaferTech will not be prevailing party on appeal if this court reverses the trial court’s dismissal..... 17

IV. CONCLUSION..... 17

## TABLE OF AUTHORITIES

### Washington Cases

<i>Foss Maritime Co. v. Seattle</i> , 107 Wn.App. 669, 27 P.3d 1228 (2001)	6, 7
<i>Gott v. Woody</i> , 11 Wn.App. 504, 524 P.2d 452 (1974)	5, 10, 11
<i>Mahler v. Szucs</i> , 135 Wn.2d 398, 957 P.2d 632 (1998)	15
<i>Mayer v. City of Seattle</i> , 102 Wn.App. 66, 10 P.3d 408 (2000)	13
<i>Plouffe v. Root</i> , 135 Wn.App. 628, 147 P.3d 596 (2006)	12
<i>Snohomish County v. Thorp Meats</i> , 110 Wn.2d 163, 750 P.2d 1251 (1988)	4-7, 11
<i>State ex. rel. Goodnow v. O'Phelan</i> , 6 Wn.2d 146, 150-2, 106 P.2d 1073 (1940)	8
<i>State ex. rel. Wash. Water Power Co. v. Superior Court for Chelan Co.</i> , 41 Wn.2d 484, 250 P.2d 536 (1952)	8, 9
<i>Wallace v. Evans</i> , 131 Wn.2d 572, 934 P.2d 662 (1996)	6, 7
<i>Warnock v. Seattle Times</i> , 48 Wn.2d 450, 294 P.2d 646 (1956)	8

### Rules

CR 40	7
CR 41(b)(1)	1, 4-10, 13, 17
CR 41(b)(2)	12
Rule 3	8, 9

### Statutes

RCW 60.04.181	4
---------------	---

## **I. SUMMARY**

Appellant Business Services of America (“BSA”) is seeking to foreclose its mechanic’s lien, as directed by this court in its decision in the prior appeal in this matter. Rather than adjudicate that lien claim, the trial court dismissed the action for want of prosecution, relying upon its purported inherent authority to do so, ignoring CR 41 and prior case law interpreting CR 41(b)(1) to limit a trial court’s inherent authority to dismiss for want of prosecution.

WaferTech’s opposition ignores that prior case law. WaferTech asserts, without support, that there is an exception to CR 41(b)(1) for actions after remand.

WaferTech also asserts, again without any support, that mere inaction by BSA should be deemed something more nefarious when it is accompanied by the trial court’s destruction, without notice to BSA, of the trial court’s copies of exhibits from the prior trial.

WaferTech appears to be making contradictory arguments. It argues that the trial court had discretion to dismiss BSA’s claim in September 2009, four years after this court’s remand. It then goes on to argue that the action had already been effectively dismissed when BSA attempted to resuscitate it in 2009, but cannot identify when such a drastic action occurred.

## **II. REPLY TO WAFERTECH'S STATEMENT OF THE CASE**

While placing the trial court's dismissal of BSA's lien claim "in context," WaferTech raises all sorts of irrelevant aspects of this litigation, specifically the proceedings which led to the prior appeal and mandate to the trial court in 2005 to adjudicate BSA's lien claim. WaferTech characterizes a lien claim reduced to \$1.5 million as a "fragment."

WaferTech lists three things that happened after remand and prior to BSA noting the matter for trial in 2009, none of which show anything but inaction by BSA. First is the satisfaction of judgment, which shows BSA paid the prior judgment for attorney fees. Second is the trial court's destruction of its copies of proposed exhibits the parties lodged with the trial court in 2002 prior to the first trial, without notice to the parties and pursuant to a stipulation signed by all counsel in 2002. Third was the withdrawal by BSA's prior counsel in May 2008, which indicates there was an action pending from which to withdraw at least three years after the mandate in March 2005.

Missing from WaferTech's list of actions is anything WaferTech did to move the case along, encourage or force BSA to do anything, or even inquire of BSA what BSA intended to do regarding the claim. Also missing is anything WaferTech did showing it considered the matter resolved, such as destroying its files or seeking to remove BSA's lien from WaferTech's property.

WaferTech then goes on to assert the clerk's office "closed" its file, in contradiction to the document cited by WaferTech as supposed support. The trial court's docket never mentions "closing" the file or doing anything to the file. The only thing even related to that is the entry on January 15, 2009, "Returned to Active."

In describing the trial court's exercise of its supposed "discretion" to dismiss BSA's lien claim, WaferTech quotes the trial court during oral argument. WaferTech must do that, because the trial court entered absolutely no findings of fact on which it supposedly rested its exercise of discretion. There was no finding of prejudice to WaferTech. There was no finding that BSA disobeyed any court orders or frustrated the proceedings. Nothing.

The trial court commented that it did not have paper copies of the files, implying that this would somehow hamper adjudication of BSA's claim. The trial court made no finding that, or reference to the fact that, the parties do not have paper copies of every single document filed with the trial court and proposed trial exhibit submitted to the trial court.

The trial court's comments regarding BSA's potential \$1 million in fees reflect its prejudice towards BSA, which supports remand to a different judge. The trial court assumed, without any basis, that BSA "probably would spend about a million dollars pursuing the claim," as a reason not to allow BSA to pursue its claim. The trial court has no idea what BSA's agreement with its counsel regarding fees is. Even if it were accurate, given WaferTech's characterization of BSA's claim as being one

for \$1.5 million, spending \$1 million makes economic sense for BSA. Plus, under RCW 60.04.181, if BSA were the prevailing party on its lien claim, it would be entitled to recover reasonable attorney fees. The trial court's comments show its disregard for BSA.

That is the factual statement of the case upon which WaferTech relies to argue the trial court properly exercised its discretion (assuming it had any, which it did not) to dismiss BSA's lien claim.

### **III. REPLY TO WAFERTECH'S ARGUMENT**

#### **A The trial court had no discretion to ignore CR 41(b)(1) when deciding whether it could dismiss for want of prosecution after remand.**

Contrary to WaferTech's assertion, it is not well-settled that a trial court has discretion to dismiss for want of prosecution as part of its authority to manage its docket. It is just the opposite. CR 41(b)(1) limits the trial court's authority to dismiss for want of prosecution.

WaferTech relies upon *Snohomish County v. Thorp Meats*, 110 Wn.2d 163, 750 P.2d 1251 (1988) for its interpretation of CR 41(b)(1), but ignores the subsequent case law explaining the decision in *Thorp Meats* and applying it in various situations.

In *Thorp Meats*, the court stated the rule that a trial court only has inherent authority to dismiss actions for lack of prosecution "when no court rule or statute governs the circumstances presented." 110 Wn.App.

at 166-7. CR 41(b)(1) governed dismissals for want of prosecution. *Id.* at 168-9.

The court in *Thorp Meats* went on to state that where “dilatoriness of a type not *described by* CR 41(b)(1) is involved,” the trial court retains inherent authority to dismiss.” *Id.* at 169 (emphasis added), citing *Gott v. Woody*, 11 Wn.App. 504, 508, 524 P.2d 452 (1974). In *Gott*, examples of conduct which was outside CR 41(b)(1) was (1) plaintiff’s failure to appear at trial, and (2) party’s failure to appear at pretrial conference combined with general dilatoriness. 11 Wn.App. at 508. WaferTech argues these examples imply a broad scope of authority, when they are very narrow, and are nothing like BSA’s conduct here.

Those examples are not limited to actions prior to remand; a party can fail to appear at a pretrial conference or trial both before and after remand. WaferTech seeks a distinction between inaction prior to remand and after remand, but nowhere did the court in *Thorp Meats* state or imply that “want of prosecution” after remand was not “described by CR 41(b)(1).” WaferTech has not cited a single decision from Washington or any other state or federal court that “want of prosecution” after remand is to be treated differently than “want of prosecution” prior to remand.

Not only does the case cited by the court in *Thorp Meats* not support WaferTech’s interpretation, subsequent Washington decisions

explaining the decision (not cited by WaferTech) show that there is no distinction between inaction before remand and after remand, when determining what is meant by “dilatoriness” that is not covered by CR 41(b)(1). In those subsequent decisions, courts considered the arguments WaferTech made in its brief, and rejected those arguments. Such “dilatoriness” means something other than mere inaction; a party must be guilty of impeding the litigation. *Foss Maritime Co. v. Seattle*, 107 Wn.App. 669, 674-5, 27 P.3d 1228 (2001); *Wallace v. Evans*, 131 Wn.2d 572, 575-8, 934 P.2d 662 (1996).

In *Wallace v. Evans, supra*, neither party took any action for six years after the answer was filed. When the defendant moved to dismiss for want of prosecution, the plaintiff noted the matter for trial. The court had no power to dismiss.

The defendant in *Wallace* argued *Thorp Meats* did not diminish the court’s inherent authority to dismiss for “dilatoriness,” relying on the provision of the *Thorp Meats* decision cited by WaferTech. The court rejected the argument.

In *Foss Maritime v. Seattle, supra*, the defendant argued the trial court retained inherent authority to dismiss an action for the plaintiff’s inaction. 107 Wn.App. at 674. The court disagreed, citing *Thorp Meats*

and *Wallace v. Evans*, It explained that such inherent authority to dismiss for “dilatoriness” no longer exists for mere inaction.

In *Foss Maritime*, neither plaintiff nor defendant took any action in the case for two years after it was filed. When the plaintiff finally noted the matter for issuance of a writ of review, the defendant sought dismissal, arguing it was prejudiced by the plaintiff’s delay. The court noted the defendant could have moved for a show cause hearing and/or dismissal, or urged opposing counsel to move the case forward. Having done nothing, “it acquiesced in the deferral of the case.” 107 Wn.App. at 676.

WaferTech accused BSA of inaction, when it acquiesced in such inaction. WaferTech never noted the matter for trial under CR 40 or moved for dismissal under CR 41(b)(1). WaferTech never urged BSA to take any action. WaferTech never inquired of BSA to find out what BSA intended to do in the action. WaferTech did nothing to move this action to a resolution. In essence, WaferTech acquiesced to BSA’s conduct.

- 1. Washington courts have ruled that issues may be “joined” many times in the same action for the purpose of beginning the one-year tolling period under CR 41(b)(1).**

WaferTech argues the issues in this action were “joined” prior to the first trial, and once the matter was noted for trial, CR 41(b)(1) could no longer apply to the action. However, issues may be “joined” many times

in the same action for the purpose of beginning the one-year tolling period under CR 41(b)(2). *Warnock v. Seattle Times*, 48 Wn.2d 450, 294 P.2d 646 (1956), citing *State ex. rel. Wash. Water Power Co. v. Superior Court for Chelan Co.*, 41 Wn.2d 484, 250 P.2d 536 (1952); *State ex. rel. Goodnow v. O'Phelan*, 6 Wn.2d 146, 150-2, 106 P.2d 1073 (1940).

WaferTech argues, without any support, that the rule from these cases, which is that issues can be joined more than once in the same action for purposes of commencing the one-year period in which they must be noted for trial, no longer applies. The only reason is that these cases applied Rule 3, a rule that has been replaced by CR 41(b)(1). However, Rule 3 was very similar to CR 41(b)(1).

Rule 3 allowed dismissal if a party failed to note an issue for trial that had been outstanding for more than one year. *Wash. Water Power, supra* at 489. CR 41(b)(1) also allows dismissal if a matter is not noted for trial within one year of being joined. Both rules require a determination of when the one-year period commences. The Rule 3 cases are applicable when determining when issues are “joined” under CR 41(b)(1).

In addition to issues being joined more than once for purposes of CR 41(b)(1), they can be joined after an appellate court issues its mandate. *Wash. Water Power, supra*. WaferTech argues that the rule in this case no

longer applies after the 1967 amendments to CR 41(b)(1), as it would give plaintiffs a perpetual safe harbor after remand to pursue fragments of previously tried cases. WaferTech is mistaken. Not applying CR 41(b)(1) to actions after remand would create the potential problem WaferTech fears.

Applying CR 41(b)(1) after remand protects defendants such as WaferTech. Without the rule, defendants would be at the mercy of trial courts after remand, who could, in their discretion, allow cases to linger for years, over defendants' objections, or require trial of some issues while letting others linger. With CR 41(b)(1) applicable, defendants after remand can move to dismiss after one year of inaction, and the trial court would have no discretion but to dismiss if the plaintiff did not note for trial all the issues that were "joined" by the remand.

WaferTech argues the 1967 revision of CR 41(b)(1), adding the provision that the trial court shall not dismiss if the plaintiff notes an issue for trial prior to the hearing on the motion to dismiss, means CR 41(b)(1) could not apply after remand. However, the 1967 was simply another limitation on the trial court's authority to dismiss. Prior to 1967, the trial court was required to dismiss upon motion of a party if an issue was not noted for trial within one year of being joined; it had no discretion to not dismiss. *Gott v. Woody, supra* at 506. After 1967, the trial court was

required *not* to dismiss if the plaintiff noted the issue for trial prior to the hearing on the motion to dismiss; it had no discretion to dismiss. *Id.* at 507. The 1967 revision to CR 41(b)(1) had no effect on when issues were joined and whether the rule applied after remand.

The next issue to be addressed is, assuming CR 41(b)(1) applies after remand, whether BSA's conduct fell outside the scope of mere "inaction." BSA did nothing but fail to prosecute its claim, to which neither WaferTech nor the trial court ever objected.

**2. BSA never acquiesced in closure of case (it was never closed) and did nothing beyond delaying its prosecution of its claim.**

WaferTech argues BSA "acquiesced" in closure of the case, even though the clerk's office never "closed" its file, and BSA never acquiesced to anything of the sort. WaferTech's purported evidence of such acquiescence shows nothing but inaction by BSA. BSA's conduct has no relation to the "dilatatoriness" referenced by courts as a basis to invoke the trial court's inherent authority to dismiss. The "dilatatoriness" referenced by the courts in *Thorp Meats, supra*, and *Gott v. Woody, supra*, the only cases cited by WaferTech, involved a party failing to appear for conferences and trial.

WaferTech points out BSA did not object to entry of the satisfaction of judgment. Why would it? It protects BSA by preventing WaferTech from attempting to further enforce the judgment.

WaferTech points out BSA did not speak up when the trial court destroyed its copies of the trial exhibits. Again, why would it? First, it did not receive notice of the trial court's action. Second, the parties have their own copies, and many of the exhibits relate to the other claims at issue in the first trial that will no longer be at issue in the trial of the lien claim after remand.

Finally, WaferTech relies on a statement in the withdrawal by BSA's prior counsel that the case has been dismissed. This statement is misleading, as only portions of the case had been dismissed (actually all of it had, but the summary judgment on the lien claim had been reversed and the lien claim remanded). There is no indication WaferTech and/or the trial court relied on this statement. If they had, such reliance would not have been reasonable, as they knew it was inaccurate, plus it was not a statement attributable to BSA, as withdrawing counsel was no longer acting as BSA's agent to bind BSA.

Finally, WaferTech asserts the trial court closed the case and destroyed its files. First, there is no evidence the trial court did either of

these things, and if it did, that it did them after BSA's former counsel withdrew. The misstatement in the withdrawal had no effect on the action.

If the clerk's office had "closed" the file, that would be a *de facto* dismissal without notice. Such a dismissal would be improper. Dismissal without notice is improper; the party is entitled to reinstatement. *Plouffe v. Root*, 135 Wn.App. 628, 635, 147 P.3d 596 (2006).

If the clerk's office intended to close the file, there is a procedure for doing so. It requires notice to the parties prior to the dismissal. CR 41(b)(2) allows dismissal by the clerk's office for want of prosecution. The clerk "shall notify the attorneys of record that the court will dismiss for want of prosecution." CR 41(b)(2)(A). A party who does not receive the clerk's notice "shall be entitled to reinstatement of the case." CR 41(b)(2)(B).

WaferTech relies on the trial court's statement that it would have "to resurrect the files," which would be next to impossible. There is no logical support for such a statement. BSA, as the plaintiff, bears the burden of proof on its lien claim after remand. If it cannot meet that burden, it will not prevail. The trial court need not do anything but sit back and wait for BSA to attempt to prove its claim. Any problems created by BSA's inaction can be addressed as they arise. A preemptive

dismissal before BSA is even allowed to try was not warranted, and not supported by any court rule or case law.

WaferTech next argues that if BSA's inaction after remand was sufficient to take the case outside the scope of CR 41(b)(1), BSA cannot challenge the trial court's exercise of discretion in dismissing BSA's lien claim, even though BSA argued the "sanction of dismissal for BSA's inaction was not proper, either under CR 41(b)(1) or as an exercise of discretion." Brief of Appellant, p. 19.

**3. If the trial court had discretion to dismiss for lack of prosecution (it did not), it abused that discretion.**

WaferTech asserts BSA did not support its argument that it would be an abuse of discretion (assuming the trial court had any) to dismiss BSA's \$1.5 million lien claim for the inaction here. This is despite BSA's citation to federal law showing that when a trial court has discretion to dismiss, it is an extremely harsh sanction reserved for only the most egregious misconduct. *Id.*

The exercise of discretion must be manifestly reasonable and requires tenable grounds. *Mayer v. City of Seattle*, 102 Wn.App. 66, 79, 10 P.3d 408 (2000). WaferTech cites no authority upholding the discretionary imposition of a harsh sanction, dismissal or something else,

for mere inaction by a party. There is no tenable basis for the harsh sanction of dismissal.

WaferTech cites its own Motion to Dismiss in the trial court as providing a basis for the trial court's exercise of discretion, but the trial court made no reference to the reasons in WaferTech's motion.

WaferTech asserts the trial court explained the significant hardship to the trial court and parties by BSA's inaction, citing the trial court's statement it would have to resurrect its files. There is no reason for the trial court to resurrect its files. BSA has the burden of proof.

Finally, WaferTech asserts the trial court did not abuse its discretion because it balanced the relevant factors after "expressly considering the pleadings and arguments." This is merely a conclusory statement not supported by anything the trial court said or wrote.

If the trial court had discretion to dismiss BSA's claim for inaction, it abused that discretion by not showing it or WaferTech was prejudiced by BSA's inaction. The next issue to be addressed is the trial court's award of over \$50,000 in fees and costs supported by only conclusory findings the fees and costs were reasonable.

**B. The trial court provided no basis for determining if or how it exercised its discretion in awarding attorney fees.**

The trial court awarded 100% of the attorney fees and costs sought by WaferTech as prevailing party after the dismissal. WaferTech argues that was proper, citing what a different trial court judge did in the action in 2002.

Findings of fact are required to support an award of attorney fees. *Mahler v. Szucs*, 135 Wn.2d 398, 433-5, 957 P.2d 632 (1998). Trial courts must look beyond the assertions by counsel and make their own determinations that the number of hours was reasonable. *Id.*

The trial court here only made conclusory findings regarding the reasonableness of WaferTech's fees and costs. There is no indication the trial court looked beyond the assertions of WaferTech's counsel.

WaferTech does not address the requirements of *Mahler* that the trial court take an active role in reviewing attorney fee requests, when by all indications, the trial court merely rubber-stamped WaferTech's request. Instead, WaferTech cites, without support, that the trial court's fee award was consistent with what a different judge did in 2002 in a different situation. In addition, even if the two situations are similar, WaferTech provides no legal authority that the trial court need not comply with the requirements for fee awards in 2009.

The trial court abused its discretion in awarding 100% of WaferTech's fees and costs, supported by only perfunctory findings. This further supports BSA's position on its final issue, which is remand to a different judge.

**C. WaferTech provides no authority to support its argument that remand to a different judge is not warranted.**

WaferTech correctly asserts there is no specific authority for remanding to a different judge merely because the trial court judge was wrong, as that is not the same as *ex parte* communications and other misconduct which occurred in the cases cited by BSA. However, when a judge has ignored binding authority that precludes her from exercising discretion, and then abused whatever discretion she purported to have, to improperly dismiss BSA's claim, that at least gives the appearance that judge will not be fair or impartial to BSA.

In addition, the judge that dismissed BSA's claim has no unique familiarity with the issues in the case. She did not handle the case prior to the first appeal and remand. She dismissed it after remand on the initial motion brought before her, which did not address any substantive issues related to BSA's lien claim. A new trial court judge will be just as prepared to handle this matter after remand as the judge who improperly dismissed it.

**D. WaferTech will not be prevailing party on appeal if this court reverses the trial court's dismissal.**

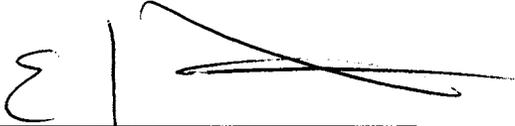
WaferTech will not be the prevailing party on appeal if this court reverses the trial court's dismissal, so it will not recover its attorney fees.

**IV. CONCLUSION**

The trial court acted without authority to dismiss BSA's lien claim. CR 41(b)(1) and all case law interpreting it show that a trial court may not dismiss an action for inaction after the plaintiff notes it for trial. BSA noted it for trial prior to the dismissal. WaferTech's opposition mischaracterizes the record and provides no legal authority to support the trial court's actions.

DATED this 26<sup>th</sup> day of May, 2010.

HULTMAN LAW OFFICE

By 

Eric R. Hultman, WSBA #17414  
Attorney for Appellant Business  
Services of America II, Inc.

**DECLARATION OF SERVICE**

I declare, under penalty of perjury, under the laws of the State of Washington, that I served a copy of the foregoing document by mailing the same, properly addressed and prepaid, on the 26<sup>th</sup> day of May, 2010, to:

James T. McDermott  
Ball Janik L.L.P.  
One Main Place  
101 S.W. Main Street, Suite 1000  
Portland, OR 97204-3219  
Attorneys for Respondent  
WaferTech

Howard M. Goodfriend, Esq.  
Edwards, Sieh et al.  
701 Fifth Ave., Suite 7170  
Seattle, WA 98104  
Attorneys for Respondent  
WaferTech

Signed this 26<sup>th</sup> day of May, 2010, at Kirkland, King County, Washington.

  
Eric Hultman

FILED  
COURT OF APPEALS  
10 MAY 27 PM 12:40  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY