No. 85654-1

MADSEN, C.J. (dissenting)—Dismissals for want of prosecution protect litigants from dilatory conduct and prevent unresolved and inactive prosecution from cluttering court records. *Franks v. Douglas*, 57 Wn.2d 583, 585, 358 P.2d 969 (1961). Unfortunately, the majority applies CR 41(b)(1) to hold that the trial court erred in granting defendant WaferTech LLC's motion for dismissal for want of prosecution. But the rule does not apply because plaintiff Business Services of America II, Inc. (BSA) engaged in unacceptable litigation practices, taking this case outside of CR 41(b)(1).

Dismissal is within the trial court's inherent discretion when there is no applicable court rule or statute that creates and guides the power to dismiss an action. *Snohomish County v. Thorp Meats*, 110 Wn.2d 163, 167, 750 P.2d 1251 (1988). Here, the trial court properly exercised its inherent discretion to grant defendant WaferTech's motion to dismiss. Therefore, the Court of Appeals should be reversed and the trial court's order dismissing the action should be reinstated. Accordingly, I dissent from the majority opinion.

But even if CR 41(b)(1) did apply, the majority is wrong to place fault with WaferTech for failing to take some action toward an earlier resolution of the case. CR 41(b)(1) does not permit evaluation of the *defendant's* conduct unless the failure to prosecute was caused by the defendant, which did not occur here. The burden of moving the case forward is on the *plaintiff*. The majority therefore inappropriately blames WaferTech for failing to move to dismiss the claim for want of prosecution at an earlier time and failing itself to respond to the trial court's notice regarding destruction of trial exhibits. WaferTech had no obligation to do either.

Discussion

CR 41(b)(1) Does Not Apply; Inherent Authority

CR 41(b)(1) addresses motions for dismissal on the ground that the plaintiff has failed to prosecute the action. This provision requires dismissal of the suit on defendant's motion when the plaintiff has failed to note the case for trial within a year after an issue of fact or law has been joined, provided that the defendant is not responsible for the delay. CR 41(b)(1); *Thorp Meats*, 110 Wn.2d at 167. If the plaintiff notes the case for trial prior to the hearing on a motion for dismissal, then the rule provides that the case "shall not be dismissed." CR 41(b)(1).

However, the rule does not apply when the plaintiff engages in unacceptable litigation practices beyond mere inaction because this is not the type of dilatoriness that is contemplated by the rule. Rather, the trial court's inherent authority to dismiss an action for want of prosecution remains when the plaintiff has engaged in unacceptable litigation

practices. *Wallace v. Evans*, 131 Wn.2d 572, 577, 934 P.2d 662 (1997); *Thorp Meats*, 110 Wn.2d at 168-69 (citing *Gott v. Woody*, 11 Wn. App. 504, 508, 524 P.2d 452 (1974)).

Failure to prosecute does not fall within CR 41(b)(1), for example, when the plaintiff fails to prosecute the action by failing to appear at trial. *Wallace*, 131 Wn.2d at 578 (citing *Wagner v. McDonald*, 10 Wn. App. 213, 516 P.2d 1051 (1973)). Such dilatoriness also occurs, for example, when there is a failure to appear at a pretrial conference in combination with general dilatoriness. *Id.* (citing *Link v. Wabash R.R.*, 370 U.S. 626, 82 S. Ct. 1386, 8 L. Ed. 2d 734 (1962)). These circumstances invoke the trial court's inherent authority to dismiss.

Here, too, the plaintiff engaged in unacceptable litigation practices. BSA did nothing for four years. During this time BSA tacitly accepted, without objection, the trial court's July 5, 2006, stipulation and order for return of exhibits, more than a year after the Court of Appeals' mandate. The failure to correct the trial court's apparent belief that the case was over led to the court's destruction of 1,551 trial exhibits. On May 16, 2008, the belief that the case was closed was reinforced when BSA filed a notice of intent to withdraw that expressly stated that no trial had been set because the case had been dismissed and judgment entered against the plaintiff. BSA thus affirmatively led WaferTech and the trial court to believe that the case was at an end—certainly so far as BSA was concerned. This would not have surprised either the court or WaferTech, given that the events occurred long after extensive, lengthy litigation and resolution in the

defendant's favor of all but one of the claims originally asserted. At some point after these events, the trial court's clerk's office closed its file on the case. Then, on January 13, 2009, BSA at last contacted the superior court's office. BSA noted the matter for trial on June 15, 2009.

Under these circumstances, BSA engaged in unacceptable litigation practices, positively communicating to the trial court and WaferTech that it was no longer prosecuting the case and then turning around and renewing the prosecution.

Abuse of Discretion Standard

When the court's inherent power to dismiss for want of prosecution is at issue the trial court's decision is reviewed under the abuse of discretion standard, in contrast to review of the mandatory directives in CR 41(b)(1). *See Thorp Meats*, 110 Wn.2d at 167; *Stickney v. Port of Olympia*, 35 Wn.2d 239, 241, 212 P.2d 821 (1950). A court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *In re Guardianship of Lamb*, 173 Wn.2d 173, 189, 265 P.3d 876 (2011).

In exercising its discretion, it was proper for the trial court to consider both the unacceptable litigation practices of BSA and the burdens that restarting the case would impose on the court and WaferTech after the lengthy delay.[1] These burdens would be considerable. WaferTech explained that many key personnel on the litigated project who

[1] While as explained below these are not appropriate considerations under CR 41(b)(1), they are proper considerations when the court's inherent discretionary power to dismiss an action is involved.

were formerly at WaferTech have left the company, some without known whereabouts. These include the project manager, the director of facilities, the project estimator, the facilities/contract manager, the person responsible for procurement on the project, and the senior mechanical engineer for the project. Several expert witnesses originally retained are no longer available, WaferTech advised the court, and most of the team of attorneys previously representing WaferTech through the trial are no longer available.

The trial court noted the burden that would be placed on the court: "[F]or 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." Transcript of Proceedings (Aug. 26, 2009) at 13. The court stated: "You know, this situation . . . 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." *Id*.

In light of BSA's unacceptable litigation practices and the burdens that would ensue if the case was revived, the trial court properly exercised its inherent power to dismiss the case and its doing so did not contravene the strict construction we have placed on CR 41(b)(1) in light of the fact that the rule should not be applied here.

The majority concludes, however, that the plaintiff's practices were not unacceptable litigation practices justifying dismissal in the discretion of the trial court. Case law demonstrates the contrary is true. As the majority itself says, discretionary dismissals have been allowed for failures to appear and filing late briefs. Majority at 7

(citing *Apostolis v. City of Seattle*, 101 Wn. App. 300, 305, 3 P.3d 198 (2000)). Other cases where failure to appear justified dismissal in the discretion of the trial court are mentioned above. *Wagner*, 10 Wn. App. 213; *Link*, 370 U.S. 626; *see also Alexander v. Food Servs. of Am.*, 76 Wn. App. 425, 429-30, 886 P.2d 231 (1994) (failure to appear is a failure to prosecute; court may exercise discretion to dismiss). Although arising in a somewhat different context, dismissal was also within the trial court's exercise of sound discretion based on failure to comply with an order to post funds required to perfect an administrative record for a trial court's review of a land use decision. *Jewell v. City of Kirkland*, 50 Wn. App. 813, 750 P.2d 1307 (1986). *Jewell* is instructive since the court explained the crucial importance of complying with the trial court's order in a timely manner and the need to "eliminate unnecessary delay" in land use cases. *Id*. at 821-22. Thus, the plaintiffs failed to prosecute their action in a timely fashion.

Certainly if dismissals for these types of conduct are within a trial court's inherent authority to dismiss, then dismissal in the present case was well within the trial court's discretion.

Majority Improperly Faults WaferTech

As explained, CR 41(b)(1) does not control this case. However, even if CR 41(b)(1) were applicable, the majority improperly construes the rule. The majority places considerable emphasis on WaferTech's failure to respond to the trial court's order regarding destruction of the trial exhibits and its failure to move for dismissal of the action at an earlier time, since it knew that the case had not been dismissed in its entirety.

Majority at 8-9. The majority concludes that *WaferTech* had the obligation to move for dismissal if it was concerned that delay would prejudice its case. Majority at 8.

Under CR 41(b)(1), the *defendant* has none of these obligations. In applying the rule that want of prosecution mandates dismissal upon motion of the defendant, it makes no difference whether the defendant could have taken steps to forward the prosecution of the case. *Arthur v. Wash. Water Power Co.*, 42 Wash. 431, 433, 85 P. 28 (1906). "[T]he failure of the defendant to take any steps to bring the cause to trial or hearing is not a ground for denial of the defendant's motion to dismiss the cause for want of prosecution since the obligation in that respect rests upon plaintiff rather than the defendant." *State ex rel. Lyle v. Superior Court*, 3 Wn.2d 702, 707, 102 P.2d 246 (1940) (predecessor version of the rule). The burden of going forward to escape operation of the rule providing for dismissal for want of prosecution always belongs to the plaintiff and not to the defendant. *McDowell v. Burke*, 57 Wn.2d 794, 796, 359 P.2d (1961) (predecessor rule); *State ex rel. Wash. Water Power Co. v. Superior Court*, 41 Wn.2d 484, 489, 250 P.2d 536 (1952) (same). The duty of seeing that diligence is exercised in prosecutions of civil actions rests particularly on the plaintiff. *State ex rel. Goodnow v. O'Phelan*, 6 Wn.2d 146, 153, 106 P.2d 1073 (1940) (quoting *Arthur*, 42 Wash. at 433); *see also Callahan v. Caldwell*, 30 Wn.2d 430, 437, 191 P.2d 708 (1948) ("'a defendant is under no obligation to speed the trial, and cannot be charged with neglect if he maintains his position on the defensive, and simply meets issues of law or of fact as the plaintiff regularly calls them up for hearing'" (quoting *State ex rel. Phillips v. Hall*, 6 Wn.2d 531,

537, 108 P.2d 339 (1940))).[2]

Accordingly, in applying CR 41(b)(1) the majority improperly faults WaferTech for doing nothing itself to move the case forward and improperly places the burden on WaferTech to have moved for dismissal. CR 41 does not require that a defendant do so and this court's cases have long been to the contrary.

Under CR 41 "'every reasonable opportunity should be afforded to permit the parties to reach the merits.'" *Thorp Meats*, 110 Wn.2d at 168 (quoting *Yellam v. Woerner*, 77 Wn.2d 604, 608, 464 P.2d 947 (1970) (decided under predecessor rule)); *see Landberg v. State*, 36 Wn. App. 675, 676-77, 676 P.2d 1027 (1984). However, it is not reasonable to allow the plaintiff to sit idle for four years, pay no attention to the order about exhibits, notify the court and the defendant of its own attorney's intent to withdraw on the basis that the action is at an end, and then pick up where it left off and note the case for trial after a motion for dismissal. In the face of this conduct, which as a whole constitutes unacceptable litigation practices, the majority unfortunately applies CR 41(b)(1) so as to afford BSA an unreasonable opportunity to breathe new life into its old case.

[2] Moreover, in applying a rule governing mandatory dismissal for want of prosecution, "the court cannot consider the merits of the case nor the hardship which its application may bring." *State ex rel. Wash. Water Power Co.*, 41 Wn.2d at 489 (predecessor rule); *accord Thorp Meats*, 110 Wn.2d at 167 (CR 41(b)(1)); *State ex rel. Lyle*, 3 Wn.2d at 706 (predecessor rule). "[G]ood faith and honest intentions . . . are immaterial to the result required by rule . . . unless the *failure* to bring it on was caused by the party seeking dismissal." *State ex rel. Woodworth & Cornell v. Superior Court*, 9 Wn.2d 37, 42, 113 P.2d 527 (1941) (predecessor rule).

Conclusion

I would hold that this case does not come within the ambit of CR 41(b)(1). Instead, because the plaintiff engaged in unacceptable litigation practices the rule does not control. Accordingly, the trial court's decision was an exercise of its inherent power to dismiss for want of prosecution, reviewable under the abuse of discretion standard. Under this standard, the court acted within its sound discretion and properly dismissed the action.

I would reverse the Court of Appeals and reinstate the trial court's order dismissing this case.

AUTHOR:
Chief Justice Barbara A. Madsen

WE CONCUR:

Justice Charles W. Johnson