75108-5

No. 75108-5-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

BULK FR8, LLC

Respondent,

v.

MATTHEW SCHULER, an individual,

DEREK BROWN, an individual,

TOTAL CONNECTION LOGISTIC SERVICES, INC.,
A New Jersey Corporation,

Appellants.

APPEAL from the Superior Court of King County

BRIEF OF RESPONDENT

ORAL ARGUMENT REQUESTED

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I. INTRODUCTION

Respondent provided substantial evidence in support of its legitimate claims. (CP 3-58, 116-136, 182-, 213-230, 358-371) Parties agree that Schuler and Brown were employees. (CP 5) The Parties agree that they signed a non-compete and non-disclosure agreements. (CP 22-24, 26-28) Appellants did not dispute that they took at least one client who was listed in Respondent's client list and trade secrets. (CP 159) Respondent sued alleging multiple claims for damages, arising from breach of contract, violation of the Washington Uniform Trade Secrets Act, and intentional interference with business relations, which claims included requests for injunctive relief. (CP 13-7)

However, in light of Appellants' allegations and evidence of independent contractor termination followed by re-hiring as an employee, marijuana use and other scandalous matters (CP 67-8, 73-4, 76-7), the trial court declined to issue Respondent a TRO and found: "substantial issues of enforceability...." (CP 115) Clarifying its denial of injunctive relief, the trial court stated that Respondent was free to pursue its claims for damages. *Id.*

After its motion for reconsideration, Respondent moved for release of its bond and served Appellants with copies of the note, motion and order twice. (CP 382, 385-6, 388).

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I. INTRODUCTION

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After its motion for reconsideration, Respondent moved for release of its bond and served Appellants with copies of the note, motion and order twice. (CP 382, 385-6, 388).

Appellants responded arguing wrongful injunction (CP 191-5) and

failed to allege damages. (CP 213-4)

The trial court considered Appellants' response in opposition to release of the bond. (CP 231). The bond was released with no finding of wrongful injunction. *Id.*

Respondent sought to protect themselves from further disclosure of confidential information and trade secrets by proposing a stipulated protective order which they sent to Appellants by messenger on 1/29/16. (CP 317) At the same time, Respondent served interrogatories on its former employees, but Appellants never responded. *Id.*

Appellants then issued a subpoena to the owner of Respondent. (CP 311-4) Respondent issued written objections to the subpoena. (CP 317)

Counsel for Appellants did not respond as to whether the proposed protective order was agreeable or needed further discussion. (CP 315 & 318) Respondent made multiple attempts to communicate with counsel for Appellants about the proposed protective order and the subpoena, but counsel for Appellants was out of town in the days leading up to the deposition and was unavailable. (CP 315, 318, 322) The trial court was contacted, but responded that it was unavailable. Respondent had insufficient time to move for a protective order.

Respondent voluntarily dismissed its claims against all Appellants (CP 232-234) instead of risking additional loss of trade secrets via an

improper videotaped-deposition without a protective order.

Appellants moved to vacate the dismissal, or for attorney fees and costs based on the voluntary dismissal and for discovery violations. (CP 235-243) The trial court denied the motions for vacation of the dismissal and for attorney fees and costs. (CP 388-9)

The trial court issued discovery sanctions for costs in the amount of $620.45 against Respondent for not appearing at his deposition. (CP 339)

Appellants appeal Respondent's voluntary dismissal, and the denial of their request for attorney fees. (CP 340-347)

II. RESTATEMENT ISSUES

A. Whether Dismissal was Proper.

B. Whether Denial of Attorney Fees Was Proper.

III. RESTATEMENT OF FACTS

A. Substantive Facts

1. Protectable Trade Secrets under RCW 19.108.010

Respondent has trade secrets in the form of management systems, sales processes, client lists, client preferences, vendor lists, vendor preferences, marketing strategies, research and development strategies and investment strategies which qualify as a trade secret under RCW 19.108.010(4). (CP 4, 183)

Respondent has invested extensive time and resources to developing its brokerage business, and has taken reasonable steps to protect this information. (CP 4-5) Dissemination of this information to a competitor would cause Respondent irreparable competitive harm. (CP 5)

2. Working Relationship With Schuler and Brown.

Respondent entered into an independent contractor agreement with Schuler in February 2013 and with Brown in April 2013. (CP 5, 359)

In January 2014, Respondent adopted a plan to better protect its Trade Secrets by converting its independent contractors to full-time employees. (CP 359) Part of the plan included terminating independent contractors and having managerial employees sign non-disclosure/non-compete agreements. *Id.*

As part of this protection plan, Respondent drafted resignation letters for Schuler and Brown. (CP 360) These letters were presented to them during dinner on Saturday, 3/1/14. (CP 360-1) Schuler and Brown individually signed their voluntary letters of resignation on 3/1/14. (CP 366-7)

Also during the 3/1/14 dinner, Schuler and Brown were each presented with an employment offer (CP 361, 368-9). Respondent discussed their promotions, and the addition of a generous base salary, plus commission. (CP 360-1) The increased compensation was substantial where

Schuler would receive a base salary of $100,000.00 and Brown would receive a base salary of $80,000.00, in addition to their commissions. (CP 361, 365-6, CP 370-1) Respondent also presented non-disclosure/non-compete agreements at the dinner on 3/1/14. (CP 361) Upon reviewing the non-disclosure/non-compete agreement, Schuler requested a revision to the contract, specifically the reference to California law. (CP 361) Respondent revised the agreement as requested. *Id.* The employment offers presented to Schuler and Brown clearly noted that the acceptance of employment was contingent on acceptance of Respondent's non-disclosure/non-compete agreement. (CP 368-9).

Both Schuler and Brown signed their employment offers two days later on Monday, 3/3/14, with Schuler accepting the position of Operations Manager and Brown accepting the position of National Sales Manager. (CP 368)

Both Schuler and Brown signed their respective non-disclosure/non-compete agreements two days later, on 3/3/14. (CP 22-24, 26-28) Contrary to the statements made by Appellants, (App. Br. 4, CP 67) Schuler and Brown were not forced to sign the agreement the day the proposed agreements were presented (CP 360-2)

Incorrectly, Appellants claim that they were presented with resignation documents and non-compete agreements to sign during dinner

with Respondent on 3/3/14 (CP 67). They offer as proof unsigned copies of their resignation letters. (CP 90, 97) Respondent provided copies of the signed voluntary resignation letters, signed at the dinner, which are dated Saturday, 3/1/14. (CP 366-7) This is in contradiction of Appellants' statements.

Appellants further allege that Respondent said they would not have jobs the next day if they did not sign the non-disclosure/non-compete agreement. (CP 85, 92-3) Respondent states that at no time were they threatened. (CP 361) Appellants also allege that Respondent threated to withhold pay. (CP 85, 92-93) They were just paid the day before (CP 364-5), therefore, there was no pay to "withhold."

Schuler's and Brown's new positions increased their scope of responsibility which, in turn, required that they have greater access to Respondent's Confidential Information and Trade Secrets in order to effectively fulfill their duties. (CP 362) Schuler and Brown also acquired additional access to Respondent's transportation management system, which is only granted to those employees who have signed non-disclosure/non-compete agreements. *Id.*

Schuler's and Brown's agreements provide for a remedy of injunctive relief as the proper method of enforcing the non-competition and non-disclosure provisions. (CP 7, 9)

Schuler resigned in April 2014 and shortly thereafter became employed by Respondent's direct competitor in the liquid freight logistics industry, Total Connection Logistics Services, Inc. (CP 7)

In July 2015, Respondent terminated Brown's employment for performance issues including consistent tardiness and insubordination. (CP 10, 362)

While working with Total Connection, Schuler and Brown have solicited business in the liquid freight logistics industry with Respondent's current, prospective and former clients, employees and vendors. (CP 8, 10, 129-32)

3. Respondents Provided Supporting Documentation of Misappropriation of Trade Secrets by Appellants.

On the same day as Brown's termination, Respondent inspected the company computer Brown used in his normal course of business. The inspection revealed the creation of a Zip File (a compressed archive file) on Brown's computer which included numerous documents with Respondent's Confidential Information and Trade Secrets. (CP 10)

Among the folders within the Zip File were those pertaining to the Mendota account. (CP 134-5) A true and accurate copy of a screenshot of the Zip File contains the Mendota account folder. *Id.*

Respondent sent Brown a letter reminding him of his post-

employment contractual duties. (CP 30-34) Brown then went to work for Total Connection Logistics Services. (CP 10)

After finding out that Schuler and Brown were using Respondent's Confidential Information for the benefit and financial gain of Total Connection, Respondent sent one letter to Schuler (CP 36-37) and one to Brown (CP 48-49) via Federal Express to remind them of their obligations under their non-compete/non-disclosure agreements. (CP 11-2) Schuler's letter was returned to Respondent stating that he had moved. (CP 11) Respondent reissued the letter. (CP 43-44) Brown's letter was delivered and refused. (CP 11). Respondent reissued it. (CP 53-55)

On December 21, 2015, Respondent received a copy of an email from vendor, Coal City Cob ("CCC") showing Brown's current employer, Total Connection, soliciting business with Respondent's current customer, Mendota. (CP 129-130)

Mendota was a current customer of Respondent and during the time that Respondent employed Appellant Derek Brown, Brown was responsible for the Mendota account and also had access to Respondent's confidential information and trade secrets concerning that account. (CP 129)

Appellant's inference that the email was unethically obtained is scandalous and irrelevant (Appel. Br. 8-9) in light of the corroborating testimony found in the Declaration of Jeff Bossen provided by the

Appellants which unequivocally states that he "sent an email similar to" the one attached to Levinson's Declaration. (CP 159-60)

Prior to employing Brown, Total Connection had not shipped liquid bulk freight on behalf of Mendota. (CP 129-130)

Brown's theft of Respondent's Confidential Information and Trade Secrets during his employment, and disclosure to Total Connection intentionally interfered with Respondent's current and future business relations, including the Mendota account. *Id.*

B. Procedural Facts

1. Respondent Brought Claims for Damages Against Appellants

Upon discovery of Schuler's and Brown's use of their Confidential Information and Trade Secrets for the benefit of a competitor, Respondent initiated a suit on 12/9/15 (CP 1-58) against Appellants which included claims of material breach of contract, misappropriation of trade secrets, and intentional interference with business expectancy and a request for a preliminary injunction. (CP 13-15)

2. Preliminary Injunction

Respondent initiated their suit against Appellant's based on the grounds that Schuler and Brown materially breached their non-disclosure/non-compete agreements and misappropriated Respondent's Trade Secrets to competitors. (CP 13-15)

Respondent moved for a temporary restraining order against its former employees based on Schuler and Brown's intimate knowledge of Respondent's confidential information and trade secrets and their employment with competitor, Total Connection, (CP 60), causing Respondent immediate, substantial, and irreparable harm, in the form of loss and use by a competitor of its trade secrets and good will. *Id.* Respondent was granted a temporary restraining order ("TRO") and preliminary injunction against Schuler and Brown on 12/9/15 (CP 59-62) and set a hearing for oral argument for 12/21/15. (CP 61)

Following the issuance of the TRO, Schuler and Browns evaded service so the injunction was unable to be served until counsel for Appellants agreed to acceptance of service at 11:53 am on 12/17/15 for the service of the Summons and Complaint (CP 348-350) which was issued on 12/9/15. The Court hearing for oral argument took place one-and-a-half business days later. (CP 61).

3. Appellant's Defenses

Appellants presented inconsistent evidence regarding Respondent's "suspect" business practices over Respondent's objections, which evidence contradicts Appellants' other allegations.

They alleged incapacitation by drug use rendered Schuler's and Brown's assent to their non-disclosure/non-compete agreements

unenforceable. *Id.* Respondent denied this. (CP 361) However, if Schuler and Brown were incapacitated by drugs as they alleged (App. Br. 4), then the entire employment and non-compete/non-disclosure agreements would be unenforceable, including any attorney fee provisions.

4. Court Does Not Issue TRO

After the hearing on 12/21/15, the trial denied injunctive relief and stated that Respondent could pursue its claims for damages. (CP 115)

5. Respondent Sought a Protection Order which went unanswered by Appellants.

On 1/29/16, Appellant's counsel received a messengered copy of a Proposed Stipulation to Entry of Protective Order together with Interrogatories from Respondent. (CP 318)

Appellants did not respond despite numerous attempts to negotiate an agreed Protective Order. (CP 315, 317-8)

Schuler and Browns are playing both sides of the fence in regards to their taking of Respondent's trade secrets: They have maintained the claim that they did not take or use the proprietary information or trade secrets of Respondent and that they are not in possession of any Respondent information. (CP 69, 83, 91) Still they refused to consider, discuss or execute a protective order. If, Schuler and Brown did not have any of

Respondent's proprietary information, and they refused to execute a Protective Order, a deposition of Respondent may have forced disclosure of trade secrets Respondent was trying to protect and caused Respondent additional and substantial financial harm. (CP 60)

Respondent tried, on several occasions, to schedule a teleconference with Appellant's counsel to discuss Respondent's objections to the deposition, to obtain the issues to be covered, and address the proposed protection order sent to Appellant's counsel on 1/29/16. (CP 315, 317-8) Counsel's repeated unavailability did not allow Respondent to address their concerns regarding the deposition timing or the absence of the proposed protective order.

On Monday morning, February 29, 2016, Respondent followed up with Appellant's counsel regarding the stipulated protection order requesting a response and signed copy. (CP 315) Respondent did not receive comments and/or a signed protective order.

Respondent contacted Appellant's counsel again at 4:38 pm regarding the receipt of a signed protective order. (CP 317-8) Counsel for Respondent wrote:

> *Dear Mr. Rocke:*
>
> *I emailed you last Thursday, 2/25, in an attempt to set up a teleconference prior to the deposition you served last Tuesday but was notified that you were out of town until*

today. My schedule today has not allowed time to return your call of this morning. This email shall address our objections regarding the deposition scheduled for tomorrow, 3/1.

1. We have not received a response to our request for production or interrogatories delivered by messenger on 1/29/16 which was due today;
2. We have not yet received a signed copy of the proposed protective order sent to you by messenger on 1/29/16;
3. You have not designated any materials to be produced as required by CR30(b)(1);
4. You have not designated the subject for depositions per CR 30(b)(6);
5. The deposition date of 3/1/16, is not in compliance with CR 30(b)(8)(B) which mandates a videotaped deposition cannot be undertaken within 120 days of the filing of the complaint. The Complaint was filed on 12/9/15.

Appellants did not respond.

6. Motion for Return of Bond

After its motion for reconsideration, Respondent moved for release of its bond and served Appellants with copies of the note, motion and order twice. (CP 382, 385-6, 388)

Appellants responded arguing wrongful injunction (CP 191-5) and failed to allege damages. (CP 213-4)

The trial court considered Appellant's response in opposition to release of the bond. (CP 231). The bond was released with no finding of wrongful injunction. *Id.*

7. Improperly Scheduled Deposition by Appellants in violation of

213-230, 358-371) including that Schuler and Brown were employees (CP 368-9), who signed non-compete/non-disclosure agreements (CP 22-4, 26-8) and left to work for a competitor taking at least one client who was listed in Respondent's client list and trade secrets. (CP 131) Respondent only dismissed after the court denied the TRO and Appellants refused to stipulate to a protective order regarding Respondent's trade secrets while improperly subpoenaing him for a deposition during which Respondent may have been forced to disclose more trade secrets to his competitor. (CP 311-4)

We begin with Appellants' argument that the trial court had discretion to deny a motion for voluntary dismissal, and then move through the frivolous lawsuit and prevailing party standards for attorney fees.

A. Voluntary Dismissal As A Matter of Right

Respondent was entitled to voluntary dismissal as a matter of right. So long as the Respondent's motion is timely, the court has no discretion to deny a voluntary dismissal. *Goin v. Goin*, 8 Wash. App. 801, 508 P.2d 1405 (Div. 1, 1973) (*citing* CR 41(a)). CR 41(a) states, in relevant part:

> (a) Voluntary Dismissal.
> (1) Mandatory. Subject to the provisions of rules 23(e) and 23.1, any action shall be dismissed by the court:
> . . .
> (B) By plaintiff before resting. Upon motion of the plaintiff at any time before plaintiff rests at the conclusion of his opening case.
> . . . .
> (3) Counterclaim. If a counterclaim has been pleaded by

> a defendant prior to the service upon him of plaintiff's motion for dismissal, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. *CR 41.*

In addition, RCW 4.56.120(1) provides, in pertinent part:

> An action in the superior court may be dismissed by the court and a judgment of nonsuit rendered in the following cases:
> (1) Upon the motion of the plaintiff, (a) when the case is to be or is being tried before a jury, at any time before the court announces its decision in favor of the defendant upon a challenge to the legal sufficiency of the evidence, or before the jury retire to consider their verdict, (b) when the action, whether for legal or equitable relief, is to be or is being tried before the court without a jury, at any time before the court has announced its decision: PROVIDED, That no action shall be dismissed upon the motion of the plaintiff, if the defendant has interposed a setoff as a defense, or seeks affirmative relief growing out of the same transaction, or sets up a counterclaim, either legal or equitable, to the specific property or thing which is the subject matter of the action... *RCW 4.56.120.*

Respondent moved to dismiss its complaint. (CP 232-4) As reflected in the court's docket, Appellants have not filed an answer nor a pleaded a counterclaim in this case. The motion was granted by a commissioner on the ex parte calendar. (CP 234)

Later, upon the Appellants' motions for attorney fees and costs and for vacating the order of dismissal, the trial court found that:

> [T]he court finds that Respondent failed to give Appellants required notice of its motion for voluntary dismissal and filed its motion ex parte. In granting the

> voluntary nonsuit Appellants were not denied any substantial right under the circumstances.
> (CP 338)

1. Standard of Review

This court reviews a decision granting a motion for voluntary dismissal under CR 41(a) for abuse of discretion. *Farmers Ins. Exch. v. Dietz*, 121 Wn. App. 97, 100-101, 87 P.3d 769, 771 (Div. 1, 2004). A trial court does not abuse its discretion unless its ruling is manifestly unreasonable or its discretion is exercised on untenable grounds. *See Escude v. King County Pub. Hosp. Dist. No. 2*, 117 Wn. App. 183, 69 P.3d 895 (2003).

2. Dismissal Was Mandatory under CR 41(a)(1)(B)

In *League of Women Voters v. Elections Servs.*, the court issued a preliminary injunction to the league and then granted the league's voluntary dismissal. *Id* 133 Wn. App. 374, 135 P.3d 385 (Div. 1, 2006). The court affirmed, and held that dismissal of the action was mandatory under CR 41(a)(1)(B). *Id.* The plain reading of "at the conclusion of his opening case" was that it was generally limited to a voluntary dismissal at trial at any time before a Respondent rested following the presentation of his opening case. *Id.* In order to harmonize Rule 41(a)(1)(B) and CR 4.56.120(1), the court concluded that a Plaintiff has the right to a voluntary mandatory dismissal under Wash. Super. Ct. Civ. R. 41(a)(1)(B) any time before he rests at the

conclusion of his opening case during trial. *Id.* Furthermore, in Washington, the filing of an answer did not cut off the league's right to voluntary dismissal. *Id.* Also, the preliminary injunction hearing was not a trial in the sense marking the termination of the right to obtain a mandatory nonsuit under Rule 41(a)(1)(B). *Id.*

Appellants rely on *Escude v. King County Pub. Hosp. Dist. No. 2* 117 Wn. App. 183, 69 P.3d 895, but *Escude* was distinguishable from the case at hand based on the procedural posture where the *Escude* court affirmed the dismissal of claims with prejudice on a motion for dismissal without prejudice, and held that the plaintiff was not entitled to a "dismissal without prejudice" as a matter of right, as opposed to the dismissal with prejudice granted by the trial court. *Escude*, 117 Wn. App. at 187, 69 P.3d at 897.

3. No Prior Written Notice of Nonsuit Required

Here, it would have been reversible error for the trial court to deny Respondent's voluntary dismissal despite the lack of prior written notice noted by the court. (CP 338) *See Greenlaw v. Renn*, 64 Wn. App. 499, 503-504, 824 P.2d 1263, 1266, (Div. 2, 1992). Washington's Division Two Court of Appeals held that:

> Although CR 41 does not speak to notice, the fact that the motion can be made at any time before the Respondent rests his or her case, and then must be granted by the court,

> indicates that prior written notice of the motion is not required. Indeed, motions for voluntary nonsuit are often made orally at trial, without substantial notice. If the trial court relied on lack of notice as a reason for refusing to grant Greenlaw's motion, it erred.
> *Greenlaw,* 64 Wn. App. at 503-504, 824 P.2d at 1266

Appellants cite *McKay* in support of their argument that Plaintiff should have given notice of its motion to dismiss because the "Employees were still awaiting a determination of whether they had been wrongfully enjoined." App. Br. 18. However, *McKay* is distinguishable as its holding was limited to divorce cases. *See McKay v. McKay*, 47 Wn.2d 301, 287 P.2d 330 (1955). Even if it were applicable, *McKay* does not support Appellants' argument as *McKay* reaches the same result as the trial court in this matter, where the dismissal was affirmed despite more extreme facts where the wife was attempting her second dismissal, was under a contempt of court order, and the husband had filed an answer. *Id.*, 47 Wn.2d at 304, 287 P.2d at 332. In *McKay*, the Washington Supreme Court affirmed the dismissal without notice based on a finding that the husband was "not denied any substantial right" as he could bring any of his claims in a separate action. *Id.*, 47 Wn.2d at 306, 287 P.2d at 333.

Here, the trial court found that "the voluntary nonsuit defendants were not denied any substantial right under the circumstances." (CP 338)

Thus, Appellants' appeal of the dismissal and the denial of the

motion to vacate the dismissal are without basis. Appellants alleged that the court knew they were waiting for a "determination of whether they had been wrongfully enjoined" (App. Br. 18), but their requests for attorney fees and motion to vacate the dismissal were heard by the trial court, and were denied. (CP 338-339) They may be arguing that the court should also have entertained a counterclaim of Appellants that was not pleaded until after the dismissal of the case. (App. Br. 18) It is undisputed that Appellants failed to plead any counterclaim which they could have "pleaded" by solely filing and serving an answer or a counterclaim prior to Respondents' motion to dismiss.

Appellants must serve and file their claims. *Farmers Ins. Exch.*, 121 Wn. App. 97, 87 P.3d 669. "Pleaded" in CR 41(a)(3) as it relates to a counterclaim means "served and filed." *Farmers Ins. Exch.*, 121 Wn. App. at 106, 87 P.3d at 774. *Farmers Ins. Exch.*, involved a case where the plaintiff's voluntary nonsuit was not served until after the defendants filed their counterclaim, the voluntary dismissal was upheld. *Id.* The *Farmers Ins. Exch.* Court explained that:

> ...filing a counterclaim with the court serves another important notice function--advising the court that a counterclaim is at issue. This serves to avoid wasting scarce judicial resources by ensuring that the court is apprised that a party wishes to proceed with a counterclaim and permits the court to focus on the question of whether that counterclaim should be dismissed or allowed to remain for

independent adjudication."
Farmers Ins. Exch., 121 Wn. App. at 104-05, 87 P.3d at 773.

In *Farmers Ins. Exch.* The Court explained that this construction of the rule is consistent with the underlying purpose of construing the rules, "to secure the just, speedy, and inexpensive determination of every action." *Id.*

Appellants may be arguing that they were prejudiced by the dismissal. However, in response to Appellants' motion for attorney fees and costs, and for vacating the order of dismissal, the trial court found no prejudice to Appellants. (CP 338) The mere prospect of a second lawsuit does not constitute the type of prejudice with which the rule is concerned. *Farmers Ins. Exch.*, 121 Wn. App. at 106, 87 P.3d at 773. Appellants make no claim of expiring or expired statute of limitations preventing them from bringing a second lawsuit. Neither party appears to have expended an inordinate amount of time or resources, or effort in the course of this short-lived action. Without articulating some prejudice suffered by Appellants, they provide no basis for their appeal.

4. Nonsuit Was Proper In Ex Parte

Appellants cite LCR 40.1 as another basis for their appeal. KCSC LCR 40.1(a) states:

(1) Ex Parte and Probate Department Presentation of

> Motions and Hearings Manual. The Ex Parte and Probate Department and probate Presentation of Motions and Hearings Manual ("Motions and Hearings Manual") is issued by the Clerk and shall contain a list of all matters that shall be presented to the Ex Parte and Probate Department and specifically indicate which matters shall be heard in person and which shall be submitted in writing, without oral argument, through the Clerk's office. The Motions and Hearings Manual shall contain specific procedural information on how to present matters through the Clerk's office. The Motions and Hearings Manual shall be made available online at www.kingcounty.gov/courts/clerk and in paper form through the Clerk's office and the Ex Parte and Probate Department.

Nothing therein describes notice requirements for a voluntary dismissal, nor prohibit a voluntary dismissal from being brought *ex parte*. Appellants cite no other authority in support of their position. Instead, Appellants repeat their argument that they were entitled to prior written notice without citing to legal authority. (App. Br. 18-19) Appellants argue that: "...only the following matters may be presented to the Ex Parte and Probate Department for King County Superior Court: ***orders that do not require notice to any other party***..." [Emphasis added] (App. Br. 18-19) (*quoting LCR 40.1(3)(A)–(D)*). However, Appellants ignore the express language of LCR 40.1, as well as the many statutes, rules and cases (supra) that clearly establish Respondent's motion for voluntary dismissal did not require prior written notice to any other party, and then illogically argue that Respondent's motion was not properly in *ex parte* because Respondent's

motion "does not fit into any of these categories." (App. Br. 19) The dismissal was properly granted without prior notice in *ex parte*. *See Greenlaw*, 64 Wn. App. 499, 824 P.2d 1263: *and see LCR 40.1.*

The trial court's denial of Appellants' motion to vacate dismissal was proper. (CP 339)

B. No Attorney Fees Awarded for Injunction or Nonsuit

Appellants' appeal the trial court's express finding that, "The court does not find that Appellants were the prevailing party and are therefore not entitled to payment of costs and attorney's fees by Respondent," (CP 338) and argue that they were entitled to attorney fees as the prevailing party for the voluntary nonsuit, under Washington's long-arm statute RCW 4.28.185, under the contract and under the frivolous claims statute, RCW 4.84.185. (App. Br. 12). The trial court considered Appellants' opposition to Respondent's motion for releasing the bond (CP 231) as well.

1. Standard of Review

After the voluntary dismissal of an action under CR 41(a), a trial court retains jurisdiction to consider the defendant's motion for expenses if the motion is made pursuant to a statute or a contractual provision. *See Escude*, 117 Wn.App. at 192, 69 P.3d at 899. Whether or not to award the expenses following a voluntary nonsuit is within the discretion of the trial court, in light of the facts and circumstances of the entire case. *Hawk v.*

Branjes, 97 Wn. App. 776, 782-83, 986 P.2d 841 (Div. 1, 1999). The same standard is used when reviewing sanctions imposed under CR 11 and RCW 4.84.185. *Hawk*, 97 Wn. App. at 783-84, 986 P.2d 841 (quoting *Walji v. Candyco*, Inc., 57 Wn. App. 284, 290, 787 P.2d 946 (Div. 1, 1990)). With respect to each of these bases of the award, the standard of review is abuse of discretion. *Loc Thien Truong v. Allstate Prop. & Cas. Ins. Co.*, 151 Wn. App. 195, 207-208, 211 P.3d 430, 436 (Div. 1, 2009)(*citing Skimming v. Boxer*, 119 Wn. App. 748, 82 P.3d 707 (Div. 3, 2004)).

In general, a prevailing party is one who receives an affirmative judgment in his or her favor. *Riss v. Angel*, 131 Wn.2d 612, 633, 934 P.2d 669 (1997). If neither party wholly prevails, then the determination of who is a prevailing party depends upon who is the substantially prevailing party. *Id.* 131 Wn.2d at 633-34. This question depends upon the extent of the relief afforded the parties. *Id.* Whether a party is a prevailing party is a mixed question of law and fact that this court reviews under an error of law standard. *Cornish Coll. of the Arts v. 1000 Va. Ltd. P'ship*, 158 Wn. App. 203, 231, 242 P.3d 1 (Div. 1, 2010).

2. Voluntary Nonsuit

Appellants argue they are entitled to attorney fees because Respondent voluntarily dismissed his action. (App. Br. 11) Appellants cite several authorities that do not support their argument. *Andersen v. Gold*

Seal Vineyards, Inc., is distinguishable because opposing party filed responsive pleadings. *Id.*, 81 Wn.2d 863, 865, 505 P.2d 790, 792 (1973). Further, the defendants in *Anderson* indemnity actions expended funds in preparation for trial, and put to further expense of the trial itself for several days before the motion was made to dismiss. *Id.*, 81 Wn. 2d at 868, 505 P2d at 294. Here, Appellants filed no answer or motion for summary judgment.

Prevailing party status turns on whether there has been a "material alteration of the legal relationship of the parties," *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 604, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001).

The Ninth Circuit has held dismissal without prejudice does not alter the legal relationship of parties for the purposes of entitlement to attorney's fees under a comparable fee shifting statute. *See Oscar v. Alaska Dep't of Educ. & Early Dev.*, 541 F.3d 978, 981 (9th Cir. 2008); *also see Cadkin v. Loose*, 569 F.3d 1142, 1144-1145, (9th Cir., 2009).

A dismissal without prejudice is not representative of adjudication on the merits. *CR 41(a)(4)*. CR 41 does not require an allegation by the moving party of the reason or basis for voluntary dismissal. *Id.* The trial court denied Appellants' motion for attorney's fees based on the dismissal with a finding that "The court does not find that Appellants were the prevailing party in this action and are therefore not entitled to payment of costs and attorney's

fees by Respondent." (CP 338) Thus, there is no basis for the court to infer that, as a result of such dismissal, Appellants had prevailed on its defenses set forth in RCW 4.84.185. Hence, there was no basis to subsequently award fees and statutory damages pursuant to that statute.

3. RCW 4.28.185

RCW 4.28.185 authorizes an award of attorney fees when a foreign defendant, sued under the long-arm statute, obtains a dismissal for want of personal jurisdiction. *Scott Fetzer Co. v. Weeks*, 114 Wn.2d 109, 124, 786 P.2d 265, 274 (1990). An award of attorneys' fees under RCW 4.28.185(5) is discretionary. *Silvaris Corp. v. Brissa Lumber Corp.*, 2008 U.S. Dist. LEXIS 52810, *3, 2008 WL 2697186 (W.D. Wash. July 1, 2008). Here, Appellants did not challenge personal jurisdiction, and the long-arm statute does not apply because Total Connection incurred no involuntary expenses.

Under RCW 4.28.185(5), the Court previously concluded that this provision was inapplicable where Defendants did not challenge personal jurisdiction. *Scott Fetzer Co.,* 114 Wn.2d 109, 786 P.2d 265. Defendants cite no case law that supports their argument that fees are warranted in a situation such as this one, where the defendants have not successfully challenged personal jurisdiction or succeeded on the merits, and defendants offered no legitimate basis for dismissal with prejudice.

Similarly, in *CTVC of Haw., Co. v. Shinawatra*, the Washington

Court of Appeals held that "[t]he trial court may award reasonable attorney fees to a foreign defendant who prevails in an action on the basis that the court lacked personal jurisdiction under the long-arm statute." 82 Wn. App. 699, 722, 919 P.2d 1243 (1996). Neither of these cases applies.

Here, Total Connection did not defend against the jurisdiction of Washington. Instead, Total Connection rushed forward to fund the defense of Respondent's former employees. Total Connection chose to aggressively litigate against its competitor, but did not participate in the form of, answering the complaint or being subjected to discovery. The TRO was not even against Total Connection. (CP 61) Appellant's brief is misleading in its attempt to group the Appellants together as "employees" (App. Br. 1) including Total Connection Logistic Services, Inc., though it was not restrained. (CP 61) Further, Appellants were not awarded significant relief to be deemed a prevailing party. (CP 338-9) Without being required to participate, it is hard to justify Respondent paying Total Connection's inflated legal bill. (CP 331) Such inflation is reflected by Appellants promise to cancel the video deposition per Respondent's objection (CP 317), but still charged the cost to Respondent. (CP 331)

Simply because one party is not afforded as much relief as is originally sought, does not mean that the opposing party has obtained relief. *Silverdale Hotel Assocs. v. Lomas & Nettleton Co.*, 36 Wn. App. 762, 774,

677 P.2d 773 (Div. 2, 1984). Here, simply because Respondent lost its motion for injunctive relief does not mean that Appellants were the prevailing party.

4. The Contract

A party that never intended to form a contract with an opponent may not avail itself of a provision from the proposed agreement that it rejected in order to capitalize on the reciprocal fee shifting provision authorized by RCW 4.84.330. *Pub. Util. Dist. No. 2 of Pacific County v. Comcast of Wash. IV, Inc.*, 184 Wn. App. 24, 34, 336 P.3d 65, 70 (Div. 1, 2014). Here, the Appellants argued against enforceability of the contract based on lack of capacity and that they never intended to form the non-disclosure/non-compete agreements, but were coerced into signing in the underlying lawsuit, and should not be able to claim attorney fees under the same unenforceable contract.

The trial court denied the Respondent's motion for a preliminary injunction finding that the non-compete/non-disclosure agreement may not be enforceable. (CP 115) The trial provided, in part: "The court finds that substantial issues exist as to the legal enforceability of the 'noncompete/nondisclosure' agreement..." *Id.* At that time, the trial court did not award attorney fees to Appellants. The Appellants who argued against enforceability in the underlying lawsuit (CP 85, 93) cannot claim

attorney's fees under the same alleged unenforceable contract. (CP 241)

After the dismissal, Appellants brought a motion for attorney fees and costs, which was also denied based on a finding that they were not the prevailing parties.

5. RCW 4.84.185

Appellants raise the claim of this being a frivolous lawsuit for the first time on appeal. Unless the action as a whole was frivolous, then Appellants were not entitled to an attorney fee award in the trial court under RCW 4.84.185 or in the Court of Appeals under RAP 18.9(a). *Biggs v. Vail*, 119 Wn.2d 129, 131, 830 P.2d 350, 351 (1992). An award of fees under RCW 4.84.185 may be made against a party when the action, viewed in its entirety, cannot be supported by any rational argument on the law or facts. *Loc Thien Truon*g, 151 Wn. App. at 207-208, 211 P.3d at 436.

Here, Respondent provided a rationale argument that it had trade secrets, acted to protect them through agreements with employees, whom stole those secrets and clients to the economic harm of Respondent. *See Copies Specialists v. Gillen*, 76 Wn. App. 771, 887 P2d 919 (Div. 3, 1995).

The statute allows for recovery of attorney fees and costs for the prevailing party where the lawsuit is found to be frivolous. *See Escude*, 117 Wn. App. at 192-93 (*citing RCW 4.84.185*). The statute also requires written findings by the judge indicating that the action was frivolous and

advanced without reasonable cause. *Id.* Here, the trial court made no such finding.

Much like the case at bar, in *Escude*, the statutory basis argued below for the award of expenses to Appellants from Respondent was RCW 4.84.185. *See Escude*, 117 Wn. App. at 192-93. Here, the trial court held that Appellants were not prevailing parties. (CP 338) Because Respondent remained free to refile its claims following its voluntary dismissal, Appellants were not prevailing parties. (CP 338) Thus, Appellants were not entitled to attorney's fees.

6. The Injunction

The equitable rule allowing attorneys' fees for dissolving a temporary restraining order does not entitle a successful defendant to recover all fees incurred in defending against injunctive relief. *Ritchie v. Markley*, 23 Wn. App. 569, 575, 597 P.2d 449 (1979), *overruled on other grounds in Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 823, 828 P.2d 549 (1992). A defendant may recover attorneys' fees up to the date on which a wrongfully issued restraining order is dissolved. *Id.* (citing *Talbot v. Gray*, 11 Wn. App. 807, 812, 525 P.2d 801 (1974), review denied, 85 Wn.2d 1001 (1975)); *Kelly v. Schorzman*, 3 Wn. App. 908, 914, 478 P.2d 769 (1970); *Berne v. Maxham*, 82 Wash. 235, 144 P. 23 (1914)).

Here, there was no finding that the TRO was wrongfully issued, and even if there was such a finding the TRO (CP 62) only restrained former employees, Schuler and Brown (not the out-of-state corporation), and was only effective for one-and-a-half business days from the date of stipulated acceptance of service at 11:53 am on Thursday, 12/17/15, (CP 348-350) until the hearing at 9:00 a.m. on Monday, 12/21/15, when the motion for a preliminary injunction was denied. (CP 115) Thus, Schuler and Brown were restrained less than two business days, and suffered no harm.

The Washington Supreme Court has allowed recovery for attorneys' fees incurred at the appellate level only when appeal was necessary to dissolve a currently effective temporary restraining order. *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 144-145, 937 P.2d 154, 177, (1997)(*citing Alderwood Assocs. v. Environmental Council*, 96 Wn.2d 230, 247, 635 P.2d 108 (1981) (allowing fees on appeal because the wrongfully issued temporary restraining order had not been dissolved previously by trial, motion, or hearing); also *see Seattle Firefighters No. 27 v. Hollister*, 48 Wn. App. 129, 138, 737 P.2d 1302, *review denied*, 108 Wn.2d 1033 (1987) (allowing fees on appeal because the defendant incurred the fees in order to dissolve temporary injunctions which were still effective prior to appeal); also *see Federal Way Family Physicians, Inc. v. Tacoma Stands Up For Life*, 106 Wn.2d 261, 268-69, 721 P.2d 946 (1986) (allowing fees incurred

on appeal to dissolve a temporary restraining order that was still effective prior to appeal, conditioned on the trial court's decision to deny a permanent injunction after a hearing on the merits).

In contrast to the cases cited above, the trial court in this case dissolved the TRO prior to appeal after a hearing on the merits. (CP 115, 189) The Appellants did not file a motion for reconsideration or appeal after opposing and losing the bond release motion. *See court docket.* This appeal is taken from a voluntary dismissal taken approximately two months after dissolution of the two-day TRO. (CP 340-347) Thus, this appeal for attorney fees is unfounded.

Further, the trial court ruled that the Appellants were not the prevailing party and were not entitled to attorney fees and costs. (CP 338) The trial court provided, in part: "The court does not find that Appellants were the prevailing party in this action and are therefore not entitled to payment of costs and attorney's fees by Respondent...Appellants were not denied any substantial right under the circumstances." (CP 338) Therefore, the purpose of discouraging parties from seeking relief prior to a hearing on the merits is inapplicable on this appeal. The Appellants thus may not recover attorneys' fees incurred on appeal despite their success in defending against injunctive relief at the trial court level.

Further, damages from an injunction are not appropriate in a case

where the injunction is only incidental to the other claims. The Washington Supreme Court has held that:

> [T]he true test with regard to the allowance of counsel fees as damages would seem to be, that if they are necessarily incurred in procuring the dissolution of the injunction, when that is the sole relief sought by the action, they may be recovered; but if the injunction is only ancillary to the principal object of the action and the liability for counsel fees is incurred in defending the action generally, the dissolution of the injunction being only incidental to that result, then such fees cannot be recovered.
> *Cecil v. Dominy*, 69 Wn.2d 289, 292, 418 P.2d 233, 234 (1966).

Here, Respondent's claims included claims for damages estimated to be at least $50,000 for the purpose of the bond, in addition to the injunctive relief requested. (CP 115) The trial court denied the Respondent's motion for a preliminary injunction finding that damages may be a more appropriate remedy. *Id.* The trial provided, in part: "...the court is not persuaded that Respondent could not be adequately compensated by an award of damages if Respondent prevails." *Id.* Later, the trial court released the bond and denied the Appellants' request for recovery from the bond. (CP 231) Then, this case was exclusively about damages, and only for two business days was it about injunctive relief.

6. CR 11

CR 11 "is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories." *Bryant v. Joseph Tree, Inc.*, 119

Wn.2d 210, 219, 829 P.2d 1099 (1992). An award of fees under CR 11 may be made against an attorney or party for filing pleadings that are not grounded in fact or warranted by law or are filed in bad faith for an improper purpose. *Loc Thien Truong*, 151 Wn. App. at 207-208, 211 P.3d at 436. Because CR 11 sanctions have a potentially chilling effect, the trial court should impose sanctions only when it is patently clear that a claim has absolutely no chance of success. *Id.* The fact that a complaint does not prevail on its merits is not enough. *Id.*

Here, the Respondent presented substantial evidence. (CP 3-58, 116-136, 182-, 213-230, 358-371)

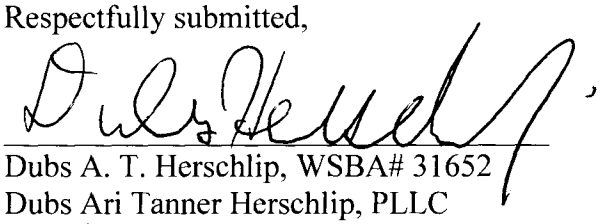
The frivolous lawsuit standard to dispel some of the confusion created by Appellants. Though Respondent lost his motion for a preliminary injunction, the standard for preliminary injunction is not the same as motion for summary judgment.

VI. CONCLUSION

Respondent respectfully requests this Court affirm the trial court, and award Respondent its reasonable attorney fees and costs on appeal, pursuant to RAP 18.1(a) as the prevailing party in this frivolous appeal.

DATED this ~~5th~~ 4th day of August, 2016.

Respectfully submitted,



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COURT OF APPEALS DIVISION I
OF THE STATE OF WASHINGTON

Matthew Schuler, et al.	)	
	)	CERTIFICATE OF SERVICE
Appellants,	)	
v.	)	
Bulk FR8, LLC,	)	
Respondent.	)	

I certify that on August 4, 2016, I caused the BRIEF OF RESPONDENT, and this CERTIFICATE OF SERVICE, to be served on the following parties via standard mail and email addressed as follows:

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I declare under penalty of perjury of the laws of the state of Washington that the foregoing is true and correct.

SIGNED this 4th day of August, 2016, at Mukilteo, Washington.

Camdyn Jomer, Paralegal to Dubs Herschlip