75108-5



No. 75108-5-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

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BULK FR8, LLC,

Respondent,

vs.

MATTHEW SCHULER, an individual,
DEREK BROWN, an individual, and
TOTAL CONNECTION LOGISTIC SERVICES, INC.,
a New Jersey Corporation,

Appellants.



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# APPELLANTS' REPLY BRIEF

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## I. INTRODUCTION

Respondent Bulk FR8, LLC initiated this suit in an effort to restrain lawful competition and punish its former employees, Appellants Matt Schuler and Derek Brown. Schuler and Brown, together with their new employer Total Connection (collectively, "Employees"), defended against Respondent Bulk FR8, LLC's allegations and averments, ultimately convincing the court to deny Bulk FR8's motions for preliminary injunction and reconsideration. After this, Bulk FR8 began filings its motions *ex parte* and without notice to Employees, in violation of local rules. Employees were about to take the deposition of Wayne Levinson, president and sole owner of Bulk FR8. Rather than submit its president, Wayne Levinson, to a potentially incriminating deposition, Bulk FR8 failed to attend Levinson's deposition and filed without notice an *ex parte* motion for voluntary dismissal that same day. This left Employees without any recourse for their wrongful injunction.

The trial court acquiesced to Bulk FR8's strategy, granting Bulk FR8's motion to release its security and its motion for voluntary dismissal. The court thereby deprived Employees of the opportunity to argue whether they had been wrongfully enjoined. The court also released the bond from which Employees might have recovered. Finally, when Employees moved

for costs and fees, the court refused to recognize Employees as the prevailing parties and denied their fees.

Employees explained in their opening brief the ways in which the trial court erred in releasing Bulk FR8's security bond, granting Bulk FR8's motion for voluntary dismissal *ex parte*, and denying Employees their attorney's fees and costs. In its response, Bulk FR8 blurs both the facts and the law in an attempt to justify the trial court's erroneous decisions. Importantly, **Bulk FR8 does not contest that the trial court erred in granting its motion to release its bond.**

Employees will correct Bulk FR8's misstatements about the facts so that the Court has a full and accurate understanding of the record. Employees will then address Bulk FR8's legal arguments, demonstrating that Bulk FR8's authorities do not support its arguments. Once Employees have established the correct facts and law, the Court should either (1) reverse the trial court's decision denying Employees' motion for attorney's fees and remand for a decision granting those fees; or (2) vacate the orders granting Bulk FR8's voluntary dismissal and return of bond and remand this case to the trial court for a determination of whether Employees were wrongfully enjoined.

## II. ARGUMENTS

### A. Corrections to Bulk FR8's Statements of Facts

Many of the statements in Bulk FR8's brief are misrepresentations or mischaracterizations of the facts and evidence in this case. Employees[1] will attempt to rectify the incorrect statements most relevant to this appeal.

#### 1. Bulk FR8 stole its so-called trade secrets, according to non-party witnesses.

This case began as an effort by Bulk FR8 to prevent Employees from misappropriating its alleged confidential information and trade secrets. (CP 59–62.) Despite Bulk FR8's claims, Bulk FR8 did not have any protectable trade secrets or other confidential information. Most of the information Bulk FR8 used in its business was publicly available. (CP 85–87, 93–94, 101, 104, 110, 112.) The rest of the information was apparently stolen by Wayne Levinson, president of Bulk FR8, from his previous employers. (CP 86, 94, 99, 101–02, 105, 108, 110, 112.) This has been corroborated by seven non-party witnesses. (CP 98–113.) Bulk FR8's only support for the existence of this alleged confidential information is the

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[1] Bulk FR8 criticizes Schuler, Brown, and Total Connection for referring to themselves as "Employees." (Resp. Br. 34.) Employees did this in order to comply with RAP 10.4(e) (encouraging reference to parties with designations other than "appellant" and "respondent").

self-serving testimony of its president, Wayne Levinson. (CP 129–30, 359–62.)

Bulk FR8 continues to mention its alleged trade secrets and confidential information in its response brief. (Resp. Br. 8–10, 12–16.) Bulk FR8 has failed, however, to identify any actual trade secrets or confidential information requiring protection. This brings the factual and legal bases of Bulk FR8's claims into question.

**2. Jeff Bossen did not send the Coal City Cob email.**

Bulk FR8 argues that the Declaration of Jeff Bossen shows that Bulk FR8 did not unethically acquire the alleged email from Coal City Cob. (Resp. Br. 14–15.) Mr. Bossen, Vice President of Operations at Total Connection, actually declared:

> That [email] is similar to, but different from an email I sent. The [email] does not accurately reflect an unaltered forwarding of my email. I sent an email similar to that and blind carbon copied (bcc) roughly 100 carriers .... I do not believe I emailed k.bulot@cccob.com. I looked through my address book and distribution list, and I do not see that email address.

(CP 159–60.) Furthermore, Stephen Barnish, the Chief Financial Officer for Coal City Cob, declared:

> I have been shown a copy of an email string purporting to forward from Kevin Bulot at email k.bulot@cccob.com to Wayne Levinson dated December 21, 2015 at 4:04pm. I do not know how Mr. Bulot could have obtained this email from our email account as it looks like the last time he

> signed into his email account was in August 2015 (back when he had our permission).
>
> If Mr. Bulot or Mr. Levinson has accessed or in any way received email through their cccob.com accounts since [September 2015], it has been without our knowledge or consent.

(CP 179.) These are only some of the bases for Employees' argument that the email in question was manipulated and obtained unethically. (CP 139–41, 148–50, 159–60, 178–81.) This information casts further doubt on the legal and factual foundations of Bulk FR8's claims against Employees.

**3. No other Bulk FR8 employees were given noncompete agreements.**

Bulk FR8 claims that part of its plan to protect its alleged trade secrets was to terminate independent contractors and have managerial employees sign noncompete agreements. (Resp. Br. 10.) Bulk FR8 did not, however, require any employees besides Schuler or Brown to sign noncompete agreements. (CP 98–99, 101, 103–05, 107, 109–12.) Seven nonparty witnesses attested to this. *Id.* These other employees also had access to the same information as Schuler and Brown. *Id.*

**4. Bulk FR8 forced Schuler and Brown to sign noncompete agreements.**

Bulk FR8 argues that Schuler and Brown were not forced to sign their noncompete agreements at dinner on March 1, 2014. (Resp. Br. 11.) Although Schuler and Brown did sign the noncompete agreements on

March 3, 2014, Wayne Levinson presented the agreements to them at dinner on March 1. (CP 84–85, 92–93, 99, 108.) The only reason Schuler and Brown did not sign their noncompete agreements on March 1 was because Schuler pointed out to Levinson that the noncompete agreements were written under California law. (CP 85, 93, 361.)

Uncontested evidence shows that Bulk FR8 had Schuler and Brown sign resignation documents at dinner on the night of March 1, 2014. (CP 84, 92, 99, 108, 366–67.) Bulk FR8 would only re-hire Schuler and Brown if they signed the new employment agreements and noncompete agreements. (CP 84, 92, 99, 108.) Schuler and Brown's responsibilities and access to information did not change when they signed these new employment agreements. (CP 84, 92.)

**5. Brown did not make the alleged Zip file.**

Bulk FR8 alleges that Brown created a Zip file containing Bulk FR8's confidential information. (Resp. Br. 13.) Bulk FR8's support for these claims are blurry screen shots of a computer folder with other folders in it. (CP 134–35.) Bulk FR8 has provided no additional foundation or evidence (other than self-serving testimony) that Brown made a Zip file, that the folder in the exhibit was on Brown's computer, or when the folder in the exhibit was created. (CP 129–30, 134–35.) Brown denies making or using this Zip file. (CP 95.)

### 6. Total Connection hired Schuler more than 18 months after his resignation from Bulk FR8.

Bulk FR8 claims that Schuler was employed by Total Connection Logistics Services, Inc., shortly after his resignation from Bulk FR8. (Resp. Br. 13.) In reality, Total Connection hired both Schuler and Brown shortly before Bulk FR8 initiated this lawsuit. (CP 78.) This was over a year and a half after Schuler left Bulk FR8. (CP 7.) Despite Bulk FR8's implication, Schuler did not run straight from Bulk FR8 to Total Connection.

### 7. The trial court denied Bulk FR8's preliminary injunction.

Bulk FR8 claims that the trial court granted it a preliminary injunction. (Resp. Br. 16.) In fact, the court only granted Bulk FR8 an *ex parte* temporary restraining order (TRO). (CP 59–62.) The trial court denied Bulk FR8's motion for a preliminary injunction (CP 115) and then denied Bulk FR8's motion for reconsideration of the preliminary injunction (CP 189). The trial court made these decisions after Employees filed opposing briefs to Bulk FR8's motions. (CP 64–77, 137–147.)

### 8. Bulk FR8 skipped the Levinson deposition in order to move *ex parte* for voluntary dismissal.

Bulk FR8 tries to give some credibility to its cancellation of the deposition of Wayne Levinson by arguing that Employees did not respond promptly to its communications regarding a protective order. (Resp.

Br. 17–21). This argument ignores the several reasonable alternatives Bulk FR8 had at its disposal to avoid disclosing any confidential information, such as moving for a protective order, objecting to questions about the alleged trade secrets, or simply not answering questions about its alleged trade secrets.

Bulk FR8's rationale is also factually inconsistent with the record. First, Bulk FR8 said on the day before the deposition: "This email confirms our conversation this morning regarding the deposition tomorrow morning. Mr. Herschlip [counsel for Bulk FR8] and Wayne Levinson will be in attendance. ... Without an agreed protection order there will be little to discuss." (CP 314.) Then, at 8:46 AM on the day of the 9:00 AM deposition, counsel for Bulk FR8 said: "I apologize for the inconvenience, but we're running late."[2] (CP 316.) Employees waited for Levinson and Bulk FR8's counsel to show up. Finally, at 9:48 AM, counsel for Bulk FR8 said: "Due to unforeseen circumstances, we're going to have to cancel the deposition." (CP 320.) Bulk FR8 acquired its *ex parte* order for voluntary dismissal that same day. (CP 234.) This suggests that Bulk FR8

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[2] Employees incorrectly stated in their opening brief that Bulk FR8 said it was running late on May 1. (Appl. Br. 10.) This should have said **March** 1, the same day as Levinson's scheduled deposition. Employees apologize for this error and do not believe it will affect the Court's decision.

made a panicked decision to avoid a damaging deposition, rather than a calculated choice to protect its alleged confidential information.

**9. Bulk FR8's complaints about the Levinson deposition subpoena are unfounded.**

Bulk FR8 complains that Employees did not subpoena Levinson with five days' notice. (Resp. Br. 20.) The Levinson deposition was scheduled for March 1, 2016. (CP 304.) Levinson was served on February 23, 2016. (Resp. Br. 20; CP 310–11.) Therefore, Employees served Levinson with sufficient time, despite the fact that counsel for Bulk FR8 waited until February 23 to inform Employees that he would not accept service for Levinson. (CP 308.)

Bulk FR8 complains that Employees incorrectly noted the subpoena for a video deposition. (Resp. Br. 20.) Employees had already informed Bulk FR8 that, if it was correct about the rules on a video deposition, Employees would send the videographer home and take the deposition without video. (CP 316.)

Finally, Bulk FR8 complains that Employees did not comply with CR 30(b)(6), which governs the deposition of corporations and organizations. (Resp. Br. 19–20.) Employees subpoenaed the deposition of Wayne Levinson the individual, not Bulk FR8 the organization. (CP 304–06.) Therefore, Employees were not required to comply with CR 30(b)(6).

### 10. Employees believe that the noncompete agreements are unenforceable.

Bulk Fr8 argues that Employees presented inconsistent evidence regarding Bulk FR8's actions. (Resp. Br. 16–17.) In their opening brief, Employees stated that Levinson provided Schuler and Brown with alcohol and marijuana before unexpectedly handing them the resignation documents, new employment agreements, and noncompete agreements. (Appl. Br. 4.) Employees first argued that the noncompete agreements were unenforceable in their opposition to Bulk FR8's motion for preliminary injunction. (CP 72–76.)

## B. The Court should review the trial court's holdings *de novo*.

The assignments of error made by Employees all involve the trial court's interpretation of statutes or civil rules. (Appl. Br. 2–3.) Therefore, as explained below, the Court reviews these decisions *de novo*.

### 1. Holding that Employees Were Not Prevailing Parties

When reviewing an award of attorney fees, the relevant inquiry is first, whether the prevailing party was entitled to attorney fees. *North Coast Elec. Co. v. Selig*, 136 Wn. App. 636, 642–43 (Div. I 2007). Whether a party is entitled to attorney fees is an issue of law, which is reviewed *de novo*. *Id.* at 643. The court reviews *de novo* whether a party is the "prevailing party" under Washington statutes because the meaning of a

statute is a question of law. *See Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 488 (2009).

Here, the court found that Employees were not the prevailing party to this action. (CP 338.) This preliminary decision meant that the court did not apply its discretion in deciding whether to grant Employees' attorney's fees. Since the court's decision was one of statutory interpretation and not one of discretion, this Court should review it *de novo*.

**2. Holdings on Motion for Voluntary Dismissal and Motion for Return of Bond**

Washington courts of appeal review the application of a court rule to the facts *de novo*. *Malted Mousse, Inc. v. Steinmetz*, 150 Wn.2d 518, 525 (2003). Here, the trial court incorrectly applied CR 41 by allowing Bulk FR8 to move *ex parte* and without giving Employees notice. The trial court also incorrectly applied CR 65 in releasing Bulk FR8's security before determining whether Employees had been wrongfully enjoined. These are issues regarding the implementation of civil rules, not the trial court's discretion. Therefore, the Court should also review these issues *de novo*.

**C. The trial court should have held that Employees were the prevailing party.**

Where there is a dismissal of an action, even where such dismissal is voluntary and without prejudice, the defendant is the prevailing party.

*Andersen v. Gold Seal Vineyards, Inc.*, 81 Wn.2d 863, 867 (1973) (citing 6 J. Moore, Federal Practice 54.70(4), at 1306 (1966, Supp. 1967)). Whether a party is entitled to attorney's fees depends on the specific language and requirements of the invoked statute or contract. *See Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 490–91 (2009). This does not depend on whether the defendant has filed responsive pleadings or has expended funds in preparation for trial, despite Bulk FR8's arguments. (Resp. Br. 32.) The *Andersen* court only used the costs incurred by the defendant in that case as examples of the kinds of expenses that can be recovered by defendants to a voluntary nonsuit. *Andersen*, 81 Wn.2d at 868.

The federal cases cited by Bulk FR8 (Resp. Br. 32) address specific statutory language inapplicable to this case. In *Oscar v. Alaska Dep't of Educ. & Early Dev.*, 541 F.3d 978 (9th Cir. 2008), the Ninth Circuit analyzed whether dismissal of claims under FRCP 12(b)(6) conferred prevailing party status upon the defendant under the federal Individuals with Disabilities Education Act. *Id.* at 981–82. In *Cadkin v. Loose*, 569 F.3d 1142 (9th Cir. 2009), the Ninth Circuit considered whether defendants were the prevailing party under the Copyright Act. *Id.* at 1147–48. Both *Oscar* and *Cadkin* relied on the holding in *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dep't of Health and Human*

*Res.*, 532 U.S. 598 (2001), which addressed attorney's fees under the Fair Housing Amendments Act and the Americans with Disabilities Act. *Id.* at 605. Each statutory provision has its own requirements for granting attorney's fees. None of the cases cited by Bulk FR8 are applicable to the present case. Therefore, these decisions are inapplicable to the issues at hand.

**1. RCW 4.28.185 does not require that the defendant challenge personal jurisdiction.**

Bulk FR8 incorrectly argues that the Washington Supreme Court held in *Scott Fetzer Co., Kirby Co. Div. v. Weeks*, 114 Wn.2d 109 (1990), that a defendant must challenge personal jurisdiction in order to be awarded attorney's fees under RCW 4.28.185(5). (Resp. Br. 33.) *Weeks* does not stand for this proposition. In *Weeks*, the court held that RCW 4.28.185(5) authorizes an award of attorney fees if a foreign defendant prevails on jurisdictional grounds. 114 Wn.2d at 110–11. This is different than requiring that the defendant challenge personal jurisdiction in order to be awarded fees.

The *Weeks* court cited the *Andersen* decision with approval, holding:

> In *Andersen v. Gold Seal Vineyards, Inc.*, 81 Wash.2d 863, 505 P.2d 790 (1973), we held that a fees award to a foreign defendant is authorized by RCW 4.28.185(5) when the plaintiff voluntarily dismisses the action. Nothing in the

> *Andersen* opinion suggests that we regarded the defense victory there as a victory on the merits. To the contrary, we held that a fees award was permissible notwithstanding that the judgment was *not* on the merits ....

*Id.* at 113. Neither *Weeks* nor RCW 4.28.185(5) requires a foreign defendant to challenge personal jurisdiction in order to recover fees—this was simply the situation encountered by the court in *Weeks*. *Id.* at 115.

Likewise, the court in *CTVC of Hawaii, Co. v. Shinawatra*, 82 Wn. App. 699 (Div. I 1996), did not require that all defendants challenge personal jurisdiction in order to be eligible for attorney's fees under RCW 4.28.185(5). This was simply the context in which the court addressed this issue. *Id.* at 722. In *Shinawatra*, the defendant became the prevailing party by successfully challenging personal jurisdiction. *Id.* at 721–22. In the present case, the Employees became the prevailing parties by Bulk FR8's voluntary dismissal of its claims. Despite Bulk FR8s arguments, Employees' status as prevailing parties does not rely on their challenge of personal jurisdiction (Resp. Br. 33–34) or on the amount of relief awarded to Bulk FR8 (Resp. Br. 34–35). Therefore, the trial court should have held that Employees were the prevailing party.

Bulk FR8's arguments that Total Connection's legal bills are "inflated" are disingenuous at best. The only information Bulk FR8 has on Employees' costs and fees is an invoice for the cancellation fee for Mr. Levinson's deposition. (CP 331.) The trial court did not decide on whether Employees' fees and costs were proper. (CP 338–39.) Regardless, the question of the amount of costs and fees awarded to Employees is separate from the question of whether Employees are the prevailing party. The trial court should have found that the Employees were the prevailing parties, then determined the amount of fees to award them.

**2. Bulk FR8's lawsuit, viewed in its entirety, cannot be supported by a rational argument of law or facts.**

The purpose of RCW 4.84.185 is to discourage frivolous lawsuits and to compensate the targets of such lawsuits for fees and expenses incurred in fighting meritless cases. *Kearney v. Kearney*, 95 Wn. App. 405, 416 (Div. II 1999) (citing *Biggs v. Vail*, 119 Wn.2d 129, 137 (1992)). The court in *Kearney* held that the plaintiff's claim was frivolous because a reasonable inquiry into the legal basis for his claim would have shown that such a position was untenable based on existing law. *Id.* at 417.

Here, upon reasonable inquiry, Bulk FR8 should have realized its claims had no basis in existing law. Bulk FR8's claims were premised on unenforceable contracts and nonexistent trade secrets. (Appl. Br. 4–6.) When Employees fought back, Bulk FR8 doubled down with a fabricated email and an indistinguishable screenshot from an unidentified computer folder. (Appl. Br. 8–9; CP 128–36.) These apparently did not provide any additional support to Bulk FR8's argument, as the court denied Bulk FR8's motion for reconsideration. (CP 189.)

Bulk FR8 incorrectly argues that, because Employees could refile their claims following voluntary dismissal, Employees were not the prevailing parties. (Resp. Br. 37.) This is not the standard used by the court in *Escude ex rel. Escude v. King County Public Hosp. Dist. No. 2*, 117 Wn. App. 183 (Div. I 2003), which addressed attorney's fees granted for defending against frivolous claims. In *Escude*, the court held: "Under the general rule of CR 41, a defendant is regarded as having prevailed when the plaintiff obtains a voluntary nonsuit." *Id.* at 193. The court held that the defendant was a prevailing party because the plaintiff, whose claims were frivolous, had obtained a voluntary nonsuit. *Id.*

The court did not engage in any discussion of whether the defendant could have refiled its claim. *Id.*

In the present case, Employees are the prevailing party by virtue of Bulk FR8's voluntary dismissal of its frivolous claims. Therefore, the trial court should have held that Employees were entitled to attorney's fees.

### D. The trial court should have vacated the order granting Bulk FR8's voluntary dismissal.

#### 1. Employees still had a substantial right at stake.

The trial court denied Employees of a substantial right by depriving them of (1) notice of Bulk FR8's motion for voluntary dismissal and (2) the opportunity to oppose that motion. In *McKay v. McKay*, 47 Wn.2d 301 (1955), the Washington Supreme Court held that a grant of voluntary nonsuit, without notice, was not prejudicial to the defendant because he was not denied a "substantial right." *Id.* at 307. The Court held that the defendant had not been deprived of a substantial right even if he had been given notice of the voluntary nonsuit because it appeared that he could not have successfully resisted the plaintiff's motion for voluntary dismissal at the time it was filed. *Id.* at 307. Therefore, the substantial right at issue is whether the nonmoving party has an opportunity to oppose the motion for voluntary nonsuit.

In the present case, Employees could have successfully opposed Bulk FR8's motion by arguing that the court had yet to address whether they had been wrongfully enjoined. By depriving Employees of this opportunity, the trial court denied them of their substantial right to oppose this motion. Employees agree with Bulk FR8 that a defendant may recover attorneys' fees up to the date on which a wrongfully issued restraining order is dissolved. (Resp. Br. 37.)

Bulk FR8 incorrectly argues that the *McKay* Court held that the defendant was not denied any substantial right because he could bring his claims in a separate action. (Resp. Br. 26.) The *McKay* Court, however, considered whether the defendant could bring a separate action in terms of whether a voluntary nonsuit was "manifestly prejudicial" to the defendant. *McKay*, 47 Wn.2d at 304. This is a separate analysis from whether the defendant had the opportunity to oppose the voluntary nonsuit or was denied a substantial right. *Id.* at 307.

Bulk FR8 argues that Employees were only enjoined for a few days and did not incur extensive costs. (Resp. Br. 16, 27–28, 32, 37, 40.) Bulk FR8 also argues that Employees did not allege the damages they incurred by being enjoined. (Resp. Br. 7–8, 19.) These issues do not affect whether Employees' enjoinment was in fact wrongful. The test for wrongful enjoinment is whether the court later determines that the restraint

was erroneous in the sense that it would not have been ordered had the court been presented all of the facts. *Knappett v. Locke*, 19 Wn. App. 586, 592 (Div. I 1978). Once the court determines whether Employees were wrongfully enjoined, it can then address the value of the injuries Employees suffered from the injunction.

Finally, Bulk FR8 claims that there was no finding of wrongful injunction by the trial court. (Resp. Br. 8, 19, 37–38.) Bulk FR8 blurs the distinction between (1) the trial court affirmatively deciding that there was no wrongful injunction (which did not happen) and (2) the trial court failing to address whether Employees were wrongfully enjoined (which is what the court here did). Employees still had a substantial right at issue when the court granted Bulk FR8's voluntary dismissal without notice. Therefore, the court erred in denying Employees' motion to vacate the dismissal.

**2. Bulk FR8 was required to give Employees notice.**

As a preliminary matter, the Court should note that the trial court found that Employees had failed to give defendants required notice of its motion. (CP 338.) Requiring Bulk FR8 to give Employees notice is consistent with the Washington Supreme Court's holding in *McKay v. McKay*, 47 Wn.2d 301 (1955).

In *McKay*, the Court held that a motion for voluntary nonsuit during trial differed from such a motion made before trial. *Id.* at 305. The *McKay* court held:

> If the privilege of claiming a voluntary nonsuit is exercised during the trial of an action, the defendant is present and notice is an accomplished fact. If the privilege is claimed at any stage of the pleading after an appearance has been made, the plaintiff must comply with RCW 4.28.210: "After appearance a defendant is entitled to notice of all subsequent proceedings."

*Id.* This part of the *McKay* Court's holding was not limited to the context of divorce proceedings. *Compare id.* at 304 (discussing exception in divorce cases to rule giving plaintiff absolute right to voluntary nonsuit) *with id.* at 305 (requiring plaintiffs claiming voluntary nonsuit outside of trial to comply with RCW 4.28.210). Whether a party brings its motion for voluntary dismissal before trial or during trial affects whether the party must give notice. *Id.* Because Bulk FR8 did not bring its motion for voluntary nonsuit during trial, it was required to give Employees notice under RCW 4.28.210.

In *Greenlaw v. Renn*, 64 Wn. App. 499 (Div. II 1992), Division II of the Washington Court of Appeals failed to address the distinction made in *McKay* between motions for voluntary dismissal brought at trial and those brought before trial. *Id.* at 503–04. Division II should have recognized this distinction in *Greenlaw*, and the trial court should have

recognized this distinction in the present case. Because Bulk FR8 moved before trial, Employees were not put on notice of its motion. Therefore, the trial court should have vacated the order granting voluntary dismissal to Bulk FR8.

#### 3. Bulk FR8 could not make its motion *ex parte*.

Bulk FR8 does not dispute that orders requiring notice cannot be filed *ex parte*. (Resp. Br. 28–30.) Under both the order of the trial court and *McKay*, Bulk FR8 was required to give Employees notice of its motion for voluntary dismissal. 47 Wn.2d 301, 305 (1955). Therefore, Bulk FR8 was prohibited from bringing its motion *ex parte*. This is further grounds for finding that the trial court erred in denying Employees' motion to vacate the order granting Bulk FR8's voluntary dismissal.

### E. The trial court should have denied Bulk FR8's motion for release of bond.

#### 1. Bulk FR8 does not contest that the trial court erred in releasing its bond.

In Employees' opening brief, they argued that the trial court erred in granting Bulk FR8's motion to release its bond posted pursuant to CR 65(c) as security for its TRO. (Appl. Br. 3.) Employees presented case law authority for why this decision was in error. (Appl. Br. 19–21.) Bulk FR8 did not provide any argument to the contrary. (Resp. Br. 21–41.) The

Court should find that the trial court erred in releasing Bulk FR8's security before determining whether Employees were wrongfully enjoined.

**2. If Employees were wrongfully enjoined, they were entitled to recover from Bulk FR8's security bond.**

A court may grant recovery from a TRO security after the plaintiff files a notice of voluntary dismissal. *U.S. D.I.D. Corp. v. Windstream Communications, Inc.*, 775 F.3d 128, 131 (2nd Cir. 2014). Recovery from a TRO security requires only a determination that the defendant was wrongfully restrained, and not necessarily a final adjudication on the merits. *Id.* Federal courts have consistently held that the voluntary dismissal of an injunction suit by a plaintiff without the consent of the defendant is a determination of the merits of a controversy so as to render the plaintiff and his sureties liable on the injunction bond. *Middlewest Motor Freight Bureau v. United States*, 433 F.2d 212, 243 (8th Cir. 1970) (citing Dismissal of Injunction Action or Bill without Prejudice as Breach of Injunction Bond, 91 A.L.R.2d 1312 (1963)); *see also Janssen v. Shown*, 53 F.2d 608 (9th Cir. 1931). This is exactly the reason the court should not have granted Bulk FR8's motion for release of bond. Now that Bulk FR8 has been granted voluntary dismissal, there is not bond on which Employees can recover. If the Court remands this case for a decision that

the Employees were wrongfully enjoined, it must also reverse the order granting Bulk FR8's release of bond so that the Employees may recover.

## III. CONCLUSION

Bulk FR8 misconstrues the facts of this case in order to obfuscate the errors of the trial court. Employees have clarified the record in order to assist the court in its *de novo* review. Employees need not have challenged personal jurisdiction in order to be rightly declared the prevailing parties under the Washington long arm statute. Employees are also the prevailing parties for having defended against Bulk FR8's frivolous claims. Employees had a substantial right at stake when the trial court granted Bulk FR8's motion for voluntary dismissal. The trial court improperly allowed Bulk FR8 to make its motion *ex parte* and with notice. Bulk FR8 does not contest that the trial court erred in releasing the security that Bulk FR8 posted for its TRO. Employees were entitled to recover from the security bond for the damages incurred by being enjoined.

Bulk FR8 engaged in a pattern of moving *ex parte* and without notice in order to acquire relief unopposed by Employees. This prevented Employees from addressing whether they had been wrongfully enjoined. Furthermore, Employees were denied prevailing party status, even though they were entitled to this status by statutes. The results of this case would

stand to encourage the sort of clandestine practices Bulk FR8 used to escape responsibility for its wrongful injunction and voluntary nonsuit.

The Court should reverse the trial court's denial of Employees' motion for attorney's fees and remand for a decision granting Employees' fees. In the alternative, the Court should vacate the order granting Bulk FR8's voluntary dismissal, vacate the order returning Bulk FR8's bond, and remand this case so that the trial court may determine whether Employees were wrongfully enjoined.

DATED this 6 day of September, 2016.

Respectfully submitted,

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Attorneys for Appellants

# APPENDIX D

## Peter Montine

**From:** Camdyn Joiner <camdyn@mukilteolawfirm.com>
**Sent:** Monday, February 29, 2016 11:06 AM
**To:** Aaron Rocke
**Cc:** Sarah Borsic; Dubs Herschlip
**Subject:** Bulk FR8 v Schuler, Brown, and Total Connection

Hello Mr. Rocke,

This email confirms our conversation this morning regarding the deposition tomorrow morning. Mr. Herschlip and Wayne Levinson will be in attendance. We sent you a Stipulated Protection order on 1/29/16 and have not yet received a signed copy back from you. Without an agreed protection order there will be little to discuss.

We look forward to receiving a signed copy of the Stipulated Protection Order at your earliest convenience.

Thank you,

*Camdyn Joiner*
Paralegal
Law Offices of Dubs A. T. Herschlip
**DATH PLLC | MUKILTEO LAW FIRM**
627-5th St, Ste 203
Mukilteo, WA 98275
425-209-0221

# APPENDIX E

## Aaron Rocke

**From:** Dubs Herschlip <dubs@mukilteolawfirm.com>
**Sent:** Tuesday, March 1, 2016 8:46 AM
**To:** Aaron Rocke; Jennifer Miller
**Cc:** Camdyn Joiner
**Subject:** Re: WL Depo 2-29-16

Dear Aaron,

I apologize for the inconvenience, but we're running late.

Dubs A. T. Herschlip
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Fax 425-298-3918
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P.S. I will endeavor to receive and respond to emails every business day from 12 p.m. to 1 p.m. Outside of those hours, this email inbox may be unattended.



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**From:** Aaron Rocke <Aaron@rockelaw.com>
**Date:** Monday, February 29, 2016 at 5:05 PM
**To:** Dubs Herschlip <dubs@mukilteolawfirm.com>, Jennifer Miller <millerlawgroup@outlook.com>
**Cc:** Camdyn Joiner <camdyn@mukilteolawfirm.com>
**Subject:** RE: WL Depo 2-29-16

I'll review your citations. If you're right, I'll send the videographer home and take the deposition without video. I'll comment on your proposed order tonight. Do I have a Word version already?

**From:** Dubs Herschlip [mailto:dubs@mukilteolawfirm.com]
**Sent:** Monday, February 29, 2016 4:38 PM
**To:** Aaron Rocke <Aaron@rockelaw.com>; Jennifer Miller <millerlawgroup@outlook.com>
**Cc:** Camdyn Joiner <camdyn@mukilteolawfirm.com>
**Subject:** Re: WL Depo 2-29-16

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.

Dubs A. T. Herschlip
Attorney
DATH PLLC | MUKILTEO LAW FIRM
627-5th St, Ste 203
Mukilteo, WA 98275
425-903-3505
Fax 425-298-3918
Mukilteolawfirm.com

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**From:** Aaron Rocke <Aaron@rockelaw.com>
**Date:** Monday, February 29, 2016 at 11:06 AM
**To:** Dubs Herschlip <dubs@mukilteolawfirm.com>, Jennifer Miller <millerlawgroup@outlook.com>
**Subject:** WL Depo 2-29-16

Dear Dubs and Jennifer,

I'm sorry we've had a hard time reaching each other by phone. As another lawyer from my office relayed to you, I was out of town Thursday and Friday. I'm back today. I tried calling a few times, but you were not available.

I've got someone flying in to participate, so I wanted to confirm the deposition with you and sort out the protective order. After you refused to accept service, we paid to have Mr. Levinson personally served with a subpoena. So, I expected we would remain on track for tomorrow. A paralegal from your office, Camdyn I believe, confirmed you were set for the deposition tomorrow, so I'll have that person travel to get here.

I'll email you some thoughts on the proposed protective order and work on finalizing our discovery responses. Please call if that would be helpful.

Regards,

Aaron V. Rocke
Rocke Law Group, PLLC
101 Yesler Way, Suite 603
Seattle, WA 98104
(206) 652-8670

# APPENDIX F

## Aaron Rocke

**From:** Dubs Herschlip <dubs@mukilteolawfirm.com>
**Sent:** Tuesday, March 1, 2016 9:48 AM
**To:** Aaron Rocke; Jennifer Miller
**Cc:** Camdyn Joiner
**Subject:** Re: WL Depo 2-29-16

Aaron,

Due to unforeseen circumstances, we're going to have to cancel the deposition.

I apologize for any inconvenience this may have caused you.

Dubs A. T. Herschlip
Attorney
DATH PLLC | MUKILTEO LAW FIRM
627-5th St, Ste 203
Mukilteo, WA 98275
425-903-3505
Fax 425-298-3918
Mukilteolawfirm.com

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**From:** Aaron Rocke <Aaron@rockelaw.com>
**Date:** Monday, February 29, 2016 at 5:05 PM
**To:** Dubs Herschlip <dubs@mukilteolawfirm.com>, Jennifer Miller <millerlawgroup@outlook.com>
**Cc:** Camdyn Joiner <camdyn@mukilteolawfirm.com>
**Subject:** RE: WL Depo 2-29-16

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**From:** Dubs Herschlip [mailto:dubs@mukilteolawfirm.com]
**Sent:** Monday, February 29, 2016 4:38 PM
**To:** Aaron Rocke <Aaron@rockelaw.com>; Jennifer Miller <millerlawgroup@outlook.com>
**Cc:** Camdyn Joiner <camdyn@mukilteolawfirm.com>
**Subject:** Re: WL Depo 2-29-16

Dear Mr. Rocke:

## DECLARATION OF SERVICE

I caused a copy of the foregoing Appellants' Reply Brief to be served to the following in the manner indicated:

**Via E-Mail and U.S. Mail to:**

Dubs A. T. Herschlip
Dubs Ari Tanner Herschlip, PLLC
627 5th St., Suite 203
Mukilteo, WA 98275
dubs@mukilteolawfirm.com

On today's date.

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

Signed and dated this 6th day of September, 2016, in Seattle, Washington.

Leah VanHoeve, Legal Assistant