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DIVISION ONE
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No. 75108-5-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

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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COURT OF APPEALS DIV I
STATE OF WASHINGTON
2016 JUL -5 PM 3: 13

APPELLANTS' OPENING BRIEF

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I. INTRODUCTION

In this employment case, Bulk FR8, LLC temporarily enjoined its former employees, Matt Schuler and Derek Brown, from working for their new employer, Total Connection Logistics Services, Inc. The injunction was a two-week temporary restraining order (TRO) obtained *ex parte*. Bulk FR8 also sought a preliminary injunction and damages against Schuler, Brown, and Total Connection (collectively, "Employees"). The trial court denied Bulk FR8's motion for preliminary injunction and its motion for reconsideration.

After being denied reconsideration, Bulk FR8 moved *ex parte* and without notice for return of its security bond, posted in support of its TRO. This bond was meant to be kept until the court determined whether Employees had been wrongfully enjoined. Although the court had not considered the issue of whether Employees had been wrongfully enjoined, it granted Bulk FR8's motion and returned its $50,000 security.

Bulk FR8 then moved *ex parte* for voluntary dismissal of its case. Once again, the court considered and granted the motion without notice to Employees. After the case was dismissed, Employees moved for an order granting its fees and costs for defending Bulk FR8's complaint, or else vacating Bulk FR8's voluntary dismissal. The trial court denied both these requests based on incorrect application of relevant statutes and civil rules.

During this litigation, a pattern emerged where Bulk FR8 would receive the relief it requested if and only if it moved *ex parte* and without giving notice to Employees. When the case started to go against Bulk FR8, Bulk FR8 dropped its claims and prevented the court from addressing whether Employees had been wrongfully enjoined. The trial court allowed Bulk FR8 to bypass the safeguards of TROs and voluntary dismissals, thereby prejudicing Employees.

Employees ask this Court to reverse the trial court's order denying their motion for attorney's fees and costs incurred defending against Bulk FR8's claims and motions practice. The trial court should have granted Employees' fees and costs under multiple statutory provisions. If the Court does not grant Employees their fee and costs, it should reverse the orders granting voluntarily dismissal and release of bond and allow this matter to continue to trial. Statutes and civil rules prohibited the trial court from granting these motions, and the court must still address whether Employees were wrongfully enjoined by the TRO. If they were, Bulk FR8 should pay them from the security it originally posted.

II. ASSIGNMENTS OF ERROR

The trial court erred in denying Employees' motion for fees and costs. The trial court also erred in granting Bulk FR8's motion for voluntary dismissal. Finally, the trial court erred in granting Bulk FR8's

motion to return the security bond it posted pursuant to its TRO against Employees.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Whether the trial court erred in granting Employees' motion for attorney's fees and costs when (1) Total Connection was entitled to fees and costs as the prevailing party under the Washington long-arm statute, and (2) Employees were entitled to fees and costs by statute as prevailing parties against frivolous claims;

B. Whether the trial court erred in granting Bulk FR8's motion for voluntary dismissal when Bulk FR8 violated local rules by (1) failing to give notice to Employees and (2) making the motion *ex parte*; and

C. Whether the trial court erred in granting Bulk FR8's motion for release of its security when the court had not yet addressed whether the TRO wrongfully enjoined Employees, as required by the applicable civil rule.

IV. STATEMENT OF THE CASE

A. Schuler and Brown's Employment with Bulk FR8

Bulk FR8, LLC is a bulk liquid freight transportation brokerage firm working in the United States and Canada. (CP 4.) Wayne Levinson is

the president of Bulk FR8. (CP 128.) Matthew Schuler began working for Bulk FR8 in February 2013 and (CP 5) Derek Brown began working for Bulk FR8 in April 2013 (CP 5). Bulk FR8 moved to Seattle around September 2013, and Schuler and Brown moved with it. (CP 83–84, CP 91–92.) When Schuler and Brown first moved to Seattle, they were living in a temporary house with Levinson that doubled as the Bulk FR8 office. *Id.*

1. Schuler and Brown's Noncompete Agreements

One evening after work, Wayne Levinson brought Schuler and Brown to a restaurant (CP 84, 92) along with other Bulk FR8 employees (CP 99, 107). They believed they were going to dinner as friends. (CP 108.) Levinson provided Schuler and Brown with marijuana before the dinner and bought them drinks at dinner. (CP 84, 92, 108.)

During dinner, Levinson unexpectedly handed Schuler and Brown resignation documents and noncompete agreements to sign. (CP 84, 92, 108.) Levinson told Schuler and Brown that they would not have jobs the next day if they did not sign the noncompete agreements. (CP 84, 92, 99, 108.) This sudden demand did not give Schuler or Brown time to review the agreements thoughtfully or seek legal advice. (CP 84–85, 92–93.) Schuler and Brown, fearing for their jobs, signed the noncompete agreements. (CP 24, 28.)

2. Bulk FR8's Suspect Business Practices

Bulk FR8 and Levinson have committed questionable business practices besides improperly inducing Schuler and Brown to sign the noncompete agreements. Levinson bragged in the Bulk FR8 office about how he had stolen trade secrets and customers from the bulk freight companies for which he had previously worked. (CP 86, 93–94, 99, 101–102, 104, 105, 108, 110, 112.) Levinson would hire new employees for Bulk FR8 and fire them once they started to get clients (CP 99.)

Other former Bulk FR8 employees believed Levinson made Schuler and Brown sign the noncompete agreements to specifically restrain Schuler and Brown from leaving Bulk FR8. (CP 107, 112.) None of the other Bulk FR8 employees were asked to sign noncompete agreements. (CP 99, 101, 104, 107, 109, 112), even though all of the Bulk FR8 employees had access to the same information as Schuler and Brown (CP 98–100, 103, 105, 110, 111). The employee who drafted the noncompete agreement for Levinson informed him that the requested parameters were likely unenforceable. (CP 107–08.) Bulk FR8 did not do anything different from any other bulk transport company that would require trade secret protection.[1] (CP 99, 101, 104, 110, 112.)

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[1] Although the topic was briefed and argued multiple times, Bulk FR8 never actually identified the trade secrets which Schuler and Brown had allegedly misappropriated. To

Levinson would regularly take employees out for dinner and drinks, paid for by Bulk FR8. (CP 112.) Levinson also provided marijuana for Bulk FR8 employees at work. (CP 112.) Levinson mailed marijuana and other restricted substances to an out-of-state coworker. (CP 102, 110.) Levinson did this at work and would either mail these substances himself or have other Bulk FR8 employees mail them. (CP 102.)

3. Leaving Bulk FR8 and Joining Total Connection

Schuler resigned from Bulk FR8 in April of 2014. (CP 7, 87.) Brown was terminated in July 2015 (CP 10, 94.) When Brown was terminated, Levinson told him that he was being let go because he was not right for the company. (CP 94.) Despite this, Bulk FR8 later averred that Brown was terminated for "performance issues." (CP 10.)

After leaving Bulk FR8, Schuler and Brown were hired by Total Connection Logistics Services, Inc. (CP 78.) Total Connection is a New Jersey Corporation (CP 3–4) that brokers liquid freight, dry and durable goods worldwide (CP 79). Counsel for Bulk FR8 then sent letters to Schuler and Brown alleging that their employment with Total Connection was in violation of their noncompete agreements. (CP 36–37, 48–50.)

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the extent Bulk FR8 argues that identifying this information would have destroyed its trade secret protection, Schuler and Brown allegedly already had possession of this information. This evasiveness further strengthens Employees' argument that they were wrongfully enjoined.

B. Bulk FR8's Civil Action and Temporary Restraining Order

Not long after sending its cease-and-desist letters, Bulk FR8 sued Schuler, Brown, and Total Connection. (CP 1–3.) Bulk FR8's complaint averred that Schuler and Brown had breached their contracts, misappropriated Bulk FR8's trade secrets, and intentionally interfered with Bulk FR8's business expectancies. (CP 13–16.) Bulk FR8 also averred that Total Connection had intentionally interfered with Bulk FR8's business expectancies. (CP 15–16.)

On the same day it served its summons and complaint, Bulk FR8 moved *ex parte* for a TRO, preliminary injunction, or both. (Dkt. 9.) The court entered a TRO that day, enjoining Schuler and Brown from engaging in the liquid freight logistics business, either on their own, together, or with Total Connection. (CP 59–62.) This order set a hearing date for Bulk FR8's motion for preliminary injunction for December 21, 2015. *Id.* The TRO was conditioned on Bulk FR8 posting security in the amount of $50,000.00. (CP 61.) Bulk FR8 posted a cash bond with the Superior Court on December 10. (CP 63.)

1. Denial of Bulk FR8's Preliminary Injunction and Motion for Reconsideration

Employees filed an opposition to Bulk FR8's motion for preliminary injunction. (CP 64–77.) In it, they argued that Schuler and Brown's noncompete agreements were unsupported by consideration,

unsupported by a legitimate business interest, signed under undue influence, and acquired with unclean hands. (CP 73–76.) Employees also argued that Bulk FR8 did not actually have any trade secrets to protect. (CP 76–77). Employees supported their motion with the declarations of seven former Bulk FR8 employees. (CP 98–113). The TRO expired soon thereafter.

After oral arguments, the court denied Bulk FR8's motion for preliminary injunction. (CP 115.) The court found that substantial issues existed as to the legal enforceability of the noncompete agreements and therefore could not find that Bulk FR8 had demonstrated a clear legal or equitable right as required to obtain a preliminary injunction. *Id.* Furthermore, the court held that Bulk FR8 could still be adequately compensated by an award of damages. *Id.*

Bulk FR8 quickly moved for reconsideration of the order denying its motion for preliminary injunction. (CP 116–127.) In the alternative, Bulk FR8 asked the court to reform Schuler and Brown's noncompete agreements, if necessary, so that they were enforceable. (CP 117.) As support for its motion, Bulk FR8 relied upon an email allegedly showing that Brown had misappropriated Bulk FR8's alleged trade secrets. (CP 117–18, 131–33.) Employees explained in their opposition that this email was clearly manipulated and could only have been obtained

unethically. (CP 137–41, 159–61, 179–81.) The trial court denied Bulk FR8's motion for reconsideration. (CP 189.)

2. Bulk FR8's Motion for Return of Bond

Bulk FR8 filed a motion *ex parte* requesting that the court release the bond it posted as security for its TRO. (CP 190.) Up until this point, the court had not addressed or decided whether the TRO had wrongfully enjoined Employees. Employees contacted Bulk FR8 and indicated as much to it, asking it to strike its motion. (CP 212.) When Bulk FR8 did not reply, Employees filed a response brief making this same argument. (CP 191–95.)

Although the court had not yet addressed whether Employees had been wrongfully enjoined, it granted Bulk FR8's motion to return its security bond. (CP 231.) *See* Appendix A. The court did not provide any explanation or rationale for its decision to grant the motion. *Id.*

C. Last-Minute Cancellation of Levinson's Deposition

On February 2, 2016, Employees served Bulk FR8 with notice of Wayne Levinson's video deposition. (CP 304–06.) The deposition was set for 9:00 AM on March 1, 2016. (CP 304.) Bulk FR8 did not make any initial response to Employees' notice. In order to confirm that service had been made, Employees contacted Bulk FR8 and asked if it was authorized to accept service for Mr. Levinson. (CP 308.) Bulk FR8 responded in the

negative. *Id.* Employees then subpoenaed Mr. Levinson to appear for the deposition. (CP 310–12.)

On February 29, 2016, Bulk FR8 confirmed that Mr. Levinson would be present at his deposition the next day. (CP 314.) Then on May 1, 15 minutes before the deposition was scheduled, Bulk FR8 informed Employees that they were running late. (CP 316.) An hour later, Bulk FR8 informed Employees that they were cancelling the deposition. (CP 320.)

D. Bulk FR8's Voluntary Dismissal

On the same day Mr. Levinson was scheduled to be deposed, Bulk FR8 moved *ex parte* for voluntary dismissal of all parties. (CP 232–34.) The *ex parte* department granted an order of voluntary dismissal that same day. *Id.; see* Appendix B. Employees did not receive notice that Bulk FR8 had moved for dismissal until two days later, when they received the signed order of dismissal.

E. Employees' Motion for Costs, Fees, and Sanctions, or to Vacate the Dismissal

After Employees received Bulk FR8's motion, they moved for relief from the court. (CP 235–43.) First, Employees asked the court to order Bulk FR8 to reimburse them for their attorney's fees and costs incurred in defending against Bulk FR8's claims. (CP 235.) Second, Employees asked that the court impose sanctions on Levinson for failing to appear for his deposition. *Id.* Third, Employees asked that, in the

alternative, the court vacate its order of dismissal. *Id.* Employees argued that, by virtue of Bulk FR8's voluntary nonsuit, Employees or Total Connection were the prevailing parties and therefore entitled to fees and costs. (CP 239.)

The court granted Employees' motion with regard to the imposition of partial sanctions. (CP 338–39.) *See* Appendix C. The court did not, however, award Employees attorney's fees and costs or vacate the order of dismissal. (CP 339.) The court specifically found that Employees were not the prevailing parties and therefore were not entitled to costs or attorney's fees. (CP 338.) The court also found that, although Bulk FR8 failed to give Employees notice of its motion for voluntary dismissal, this lack of notice did not deny Employees any substantial right under the circumstances. *Id.*

V. ARGUMENTS

A. Employees were entitled to attorney's fees and costs.

Employees ask that the Court reverse the trial court's order and allow them to recover their attorney's fees and costs spent defending this action. As a general rule, where a plaintiff voluntarily dismisses his action, the defendant is entitled to costs. *Andersen v. Gold Seal Vineyards, Inc.*, 81 Wn.2d 863, 865, 505 P.2d 790 (1973). There can be a prevailing party even if a final judgment is not entered. *Id.* at 867.

Washington courts look to specific statutory language in determining whether the defendant to a voluntary nonsuit is entitled to attorney's fees and costs. *See Andersen*, 81 Wn.2d 863 (1973) (defendant to voluntary nonsuit considered the "prevailing party" under Washington long-arm statute, RCW 4.28.185); *Walji v. Candyco, Inc.*, 57 Wn. App. 284, 787 P.2d 946 (1990) (prevailing party under bilateral contractual provision); *Escude ex rel. Escude v. King County Public Hosp. Dist. No. 2*, 117 Wn. App. 183, 69 P.3d 895 (2003) (prevailing party under frivolous claims statute, RCW 4.84.185). The trial court should have granted Employees their attorney's fees and costs.

1. Fees and Costs under the Long-Arm Statute

The trial court first should have granted Employees' motion for fees and costs based on Bulk FR8's use of the Washington long-arm statute. Statutory interpretation is a question of law that the court of appeals reviews *de novo*. *State v. Watson*, 146 Wn.2d 947, 954, 51 P.3d 66 (2002). The trial court incorrectly interpreted this statute by failing to find Total Connection as the prevailing party under the long-arm statute.

Any person, whether or not a citizen or resident of Washington, who in person or through an agent transacts any business within Washington, thereby submits said person to the jurisdiction of the courts of Washington as to any cause of action arising from the transaction of

that business. RCW 4.28.185(1)(a). In the event the defendant is personally served outside the state on causes of action enumerated in this section, and prevails in the action, there may be taxed and allowed to the defendant as part of the costs of defending the action a reasonable amount to be fixed by the court as attorneys' fees. RCW 4.28.185(5).

In *Andersen v. Gold Seal Vineyards, Inc.*, 81 Wn.2d 863, 864–65 (1973), a Washington corporation brought a third-party complaint against an out-of-state corporation. The Washington corporation then moved for voluntary dismissal. The Washington Supreme Court affirmed an award of attorney's fees and costs to the foreign corporation, holding:

> We think the general rule pertaining to voluntary nonsuits, that the defendant is regarded as having prevailed, should be applied to cases in which service upon the defendant was obtained under RCW 4.28.185(5). Since that statute was enacted to facilitate service upon out-of-state defendants, the legislature must naturally have had in mind that a defendant who "prevails" is ordinarily one against whom no affirmative judgment is entered. When an action against such a defendant is dismissed, even though that dismissal be upon the motion of the plaintiff, the judgment which is entered shows that the plaintiff failed to prove his claim. We think it was the legislative intent that, at such a point, a defendant who has been served outside this state and has been put to expense in answering the complaint and preparing for trial should be reimbursed by the plaintiff if the court finds that the justice of the case requires it.

Id. at 868. The Supreme Court went on to hold that the trial court was authorized by RCW 4.28.185(5) to award attorney's fees and costs to the foreign corporation. *Id.*

In the present case, Total Connection, a New Jersey corporation, was one of the defendants to Bulk FR8's complaint. Total Connection was harmed by Bulk FR8's TRO. Total Connection had to oppose Bulk FR8's motion for preliminary injunction, motion for rehearing, and motion for disbursement of funds. Total Connection, along with Schuler and Brown, interviewed seven non-party witnesses for their opposition to the preliminary injunction. Employees prepared for Mr. Levinson's deposition, for which he ultimately did not appear. When the trial court granted Bulk FR8's voluntary dismissal, Total Connection became the prevailing party under the long-arm statute. Therefore, Bulk FR8 should be held responsible for the expenses it forced Total Connection to incur.

2. Fees and Costs under the Frivolous Actions Statute

Even if the trial court did not grant Employees' fees and costs under the long-arm statute, it could still grant them based on a finding that Bulk FR8's claims were frivolous. Statutory interpretation is a question of law that the court of appeals reviews *de novo*. *State v. Watson*, 146 Wn.2d 947, 954, 51 P.3d 66 (2002). The trial court also erred in the application of

the statute granting fees and costs to the prevailing party defending against frivolous claims.

In any civil action, the court may, upon findings that the action was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including attorney's fees, incurred in opposing the action. RCW 4.84.185. A frivolous action is one that cannot be supported by any rational argument on the law or facts. *Rhinehart v. Seattle Times*, 59 Wn. App 332, 340, 798 P.2d 1155 (1990). A defendant to a frivolous action that is voluntarily dismissed is a prevailing party within the meaning of RCW 4.84.185. *Escude ex rel. Escude v. King County Public Hosp. Dist. No. 2*, 117 Wn. App. 183, 193 (2003).

In *Escude*, the plaintiff originally believed he had an expert to testify in support of his claims. *Id.* at 194. By the time of motions went before the court, however, the declaration and potential testimony of the expert had been expunged for multiple reasons. *Id.* This all but destroyed plaintiff's case. *Id.* Employees offered to allow plaintiff's case be dismissed without fees and costs, but plaintiff decided to press on. *Id.* The plaintiff later moved to voluntarily dismiss its claims with prejudice, which the trial court granted. *Id.* at 187–90. The trial court also found that

the plaintiff's claims were frivolous and granted defendants their fees and costs. *Id.* The court of appeals affirmed the trial court's holding. *Id.* at 195.

The trial court in the present case should have found that Bulk FR8's claims against Employees were frivolous. Bulk FR8 based its complaint entirely on the noncompete agreements it forced Schuler and Brown to sign. Bulk FR8 knew the noncompete agreements were unenforceable yet still sought enforcement. Employees explained in their opposition that these agreements were unenforceable and the court denied Bulk FR8's preliminary injunction. Bulk FR8 then moved for reconsideration based on an allegedly incriminating email. Employees addressed the dubious nature and source of this evidence in their opposition and the court denied reconsideration. After this, Bulk FR8 began backtracking: Bulk FR8 moved to get its bond back, Mr. Levinson ducked his deposition, and Bulk FR8 moved *ex parte* for voluntary dismissal without notice to Employees.

Despite its best efforts, Bulk FR8 did not have any credible evidence to support its claims. The trial court should have found that Bulk FR8's claims were frivolously raised and granted Employees' attorney's fees and costs under RCW 4.84.185.[2]

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[2] Washington courts have granted five-figure sums of attorney's fees for dismissed frivolous claims. *See Reid v. Dalton*, 124 Wn. App. 113, 100 P.3d 349 (2004) (award of

B. Bulk FR8's voluntary dismissal should not have been granted.

The trial court should not have considered Bulk FR8's motion for voluntary dismissal *ex parte* and should not have granted the motion. If the Court does not allow Employees to collect their attorney's fees and costs, it should vacate the voluntary dismissal and allow this matter to continue to trial. The court of appeals reviews the trial court's interpretation and application of court rules *de novo*. *Spokane County v. Specialty Auto and Truck Painting, Inc.*, 119 Wn. App. 391, 396, 79 P.3d 448 (2003). Therefore, this Court should review *de novo* whether the trial court correctly granted Bulk FR8's motion for voluntary dismissal under CR 41(a)(1)(B) and LCR 40.1.

1. Bulk FR8 was required to give notice of its motion.

If the privilege of voluntary nonsuit is claimed at any stage of the pleading after an appearance has been made, the plaintiff must give notice to the defendant. *McKay v. McKay*, 47 Wn.2d 301, 305, 287 P.2d 330 (1955). The procedure in bringing a motion for voluntary dismissal is the same as that prescribed by any other motion, and the plaintiff must abide by the local court rules in this as in all other proceedings. *Id.* If the

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$43,875 in fees was not abuse of discretion); *Zink v. City of Mesa*, 137 Wn. App. 271, 152 P.3d 1044 (2007) (award of $30,000 in fees was not abuse of discretion).

plaintiff fails to do so, the defendant may have the order set aside upon a proper showing. *Id.*

In *McKay*, the court of appeals held that the trial court had not erred in granting the plaintiff's voluntary nonsuit, even though the defendant did not receive notice, because the defendant was not denied any substantial right. *Id.* at 307. The same is not true for Employees. As explained below, the trial court had not determined whether Schuler and Brown were wrongfully enjoined by Bulk FR8's TRO. *See infra* Part V.C. The court's overriding responsibility is to interpret the rules in a way that advances the underlying purpose of the rules, which is to reach a just determination in every action. *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 498, 933 P.2d 1036 (1997). The trial court knew that Employees were still awaiting a determination of whether they had been wrongfully enjoined. If Schuler and Brown were wrongfully enjoined, they have a right to recover the wages they were forced to lose by the TRO. Employees were entitled to notice of Bulk FR8's motion for voluntary dismissal.

2. The court should not have heard the motion *ex parte*.

Because Bulk FR8 was required to give Employees notice of its motion for voluntary dismissal, Bulk FR8 should not have been permitted to file its motion *ex parte*. In assigned cases, 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; motions to approve settlement of a claim on behalf of an incapacitated person or minor; judgments on arbitration awards; or emergency restraining orders. LCR 40.1(3)(A)–(D). Bulk FR8's motion for voluntary dismissal does not fit into any of these categories. Therefore, its motion should not have been considered *ex parte*. This Court should vacate the grant of Bulk FR8's motion for voluntary dismissal.

C. The court should have kept Bulk FR8's security until determining whether Employees were wrongfully enjoined.

If the Court vacates the voluntary dismissal, it should also reverse the trial court's grant of Bulk FR8's motion to release its bond posted as security for its TRO. Once again, the Court should review the trial court's application of court rules *de novo*. *Spokane County v. Specialty Auto and Truck Painting, Inc.*, 119 Wn. App. 391, 396, 79 P.3d 448 (2003). Here, the trial court incorrectly applied CR 65.

No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. CR 65(c); *see also* RCW 7.40.080. The purpose of

CR 65(c) is to provide indemnification for parties who are wrongfully restrained or enjoined. *Cedar-Al Products, Inc. v. Chamberlain*, 49 Wn. App. 763, 765, 748 P.2d 235 (1987). The posting of a bond is a condition precedent to the obtaining of a temporary restraining order. *Id.*

CR 65(c) contemplates a judicial inquiry into the propriety of the issuance of an injunctive remedy before a cause of action arises against the security. *Swiss Baco Skyline Logging Co. v. Haliewicz*, 14 Wn. App. 343, 346, 541 P.2d 1014 (1975). The test is not whether the injunction was erroneous on its face, but whether it is *later determined* 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*, 92 Wn.2d 643, 647, 600 P.2d 1257 (1979) (emphasis added).

In *Haliewicz*, a company sued its former president for conversion of corporate assets and obtained a TRO against him. *Id.* at 344. The company posted a bond with the court as security to support the TRO. *Id.* When the TRO was dissolved, the company moved for return of its bond. *Id.* at 345. The trial court granted the company's motion and ordered the security returned. *Id.* The court of appeals held that, by returning the bond and security upon lifting the restraint, the trial court had deprived the former president of the remedy contemplated by CR 65(c) in the event he was subsequently found to have been wrongfully restrained. *Id.* at 347.

The court of appeals held that the bond and security should have been retained until the trial court had determined whether the former president was damaged by the TRO. *Id.* The court of appeals reversed the trial court's order granting release of the security. *Id.*

The present situation is nearly identical to that in *Haliewicz*. In order for Bulk FR8 to acquire a TRO against Schuler and Brown, it had to post security. This security was meant to ensure that Employees would be able to recover if the court later determined that they had been wrongfully enjoined. The trial court had not reached the question of whether Employees were wrongfully enjoined when it released Bulk FR8's bond. This Court should reverse the trial court's grant of Bulk FR8's motion to release its bond and allow this case to continue so that the trial court may determine whether Employees were wrongfully enjoined.

VI. CONCLUSION

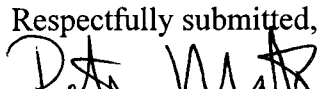
Bulk FR8 knowingly brought baseless claims against Employees. When Bulk FR8 started losing its case, it decided to cash out and drop the case. The trial court obliged, granting Bulk FR8's *ex parte* motions to release its security and dismiss its claims. Bulk FR8 only received relief from the court when it moved *ex parte* and without giving Employees notice. After Bulk FR8 dismissed its case, the court denied Employees'

motion for attorney's fees and costs. Now Employees are stuck bearing the costs of Bulk FR8's frivolous actions.

Employees respectfully request that this Court reverse the trial court's denial of their motion for fees and costs. This will reimburse Employees for the expenses they spent defending against Bulk FR8's claims. In the alternative, Employees ask the Court to vacate the voluntary dismissal and reverse the order releasing Bulk FR8's bond. This will allow the court to determine whether Employees were wrongfully enjoined. Whichever course of action the Court chooses, it should ensure that Employees are not forced to pay the price for Bulk FR8's actions.

DATED this 5th day of July, 2016.

Respectfully submitted,



Aaron V. Rocke, WSBA No. 31525
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Attorneys for Appellants

APPENDIX A

Superior Court of Washington
County of King

BULK FR8, LLC, Plaintiff, v Matthew Schuler, Derek Brown, and Total Connection Logistic Services Inc, Defendants.	No. 15-2-29943-3 SEA ORDER OF THE COURT CLERK'S ACTION REQUIRED

Plaintiff, by and through his attorneys, requested that the court return money previously given to the clerk's office under this case number. The court considered the motion, the response and the reply.

The court order that the $50,000 previously posted with the clerk's office as a cash bond in this case be returned to him. It orders the clerk's office to create a check or money order without delay and to have it ready for pick up, and to notify counsel when it is ready for such pick up.

Dated this 19th day of February, 2016

Honorable Judge Jeffrey Ramsdell

MILLER LAW GROUP LLC
810 3rd Ave Suite 308 * Seattle, WA 9810
Ph (206) 963-0760 * Fax (206) 933-2686
millerlawgroup@outlook.com

APPENDIX B

FILED
KING COUNTY, WASHINGTON

EXP07

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DEPARTMENT OF
JUDICIAL ADMINISTRATION

EXP07

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

BULK FR8, LLC Plaintiff, **MATTHEW SCHULER, DEREK BROWN, AND TOTAL CONNECTION LOGISTIC SERVICES, INC**, a New Jersey Corporation, Defendants.	No. **15-2-29943-3 SEA** **MOTION AND ORDER FOR VOLUNTARY DISMISSAL OF ALL PARTIES** **[CLERK'S ACTION REQUIRED]**

COMES NOW Plaintiff, BULK FR8, LLC, by and through counsel, and pursuant to Civil Rule 41(a)(1)(B) and RCW 41.56.120, moves the Court for an order of voluntary dismissal—dismissing all Plaintiff's claims against all the Defendants above-named.

RCW 41.56.120(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

Original

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> equitable, to the specific property or thing which is the subject matter of the action...

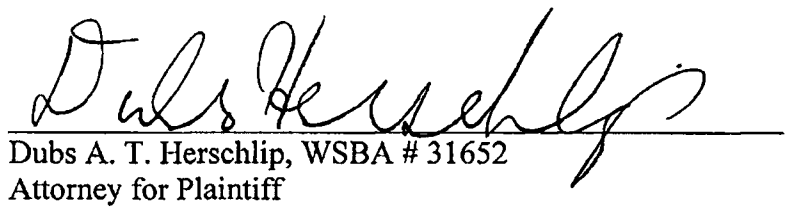
As reflected in the court's docket, Defendants have not filed an answer or a pleaded counterclaim in this case.

Voluntary dismissal is available as a matter of right. So long as the plaintiff'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 (1973). The Plaintiff may take a voluntary dismissal without giving advance notice to the defendant. *Greenlaw v. Renn*, 64 Wash. App. 499, 824 P.2d 1263 (1992).

Therefore, Plaintiff hereby respectfully requests this Court enter an Order dismissing without prejudice all claims against all Defendant herein, without costs to any party.

DATED this 1st day of March, 2016

LAW OFFICE OF DUBS ARI TANNER HERSCHLIP PLLC



Dubs A. T. Herschlip, WSBA # 31652
Attorney for Plaintiff

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PROPOSED ORDER OF DISMISSAL OF ALL PARTIES WITHOUT PREJUDICE

THIS MATTER having come on before the Court upon the motion of Plaintiff for voluntary dismissal, the Court having reviewed Plaintiff's motion, and Defendant's docket finding no answer or counterclaims, and otherwise being fully advised, now therefore, orders as follows:

That this matter be, and hereby is, dismissed without prejudice against the Defendant herein, without costs to any party.

ORDERED this _____ day of 3/11, 2016.

The Honorable Judge/Commissioner

PRESENTED BY:

LAW OFFICE OF DUBS ARI TANNER HERSCHLIP PLLC

Dubs A. T. Herschlip, WSBA# 31652
Attorney for Plaintiff
627 – 5th St., Ste. 203
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APPENDIX C

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KING COUNTY
SUPERIOR COURT

Hon. Jeffrey Ramsdell

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
COUNTY OF KING

BULK FR8, LLC, Plaintiff, vs. MATTHEW SCHULER, et al., Defendants.	Case No.: 15-2-29943-3 SEA ~~[Proposed]~~ ORDER ~~GRANTING~~ on DEFENDANTS' MOTION (1) FOR COSTS, ATTORNEY'S FEES, AND DISCOVERY SANCTIONS; OR (2) VACATING THE ORDER OF DISMISSAL

THIS MATTER comes before the court on Defendants' Motion for Costs and Attorney's Fees. The court has considered defendants' motion, plaintiff's response (~~if any~~), defendants' reply (~~if any~~), and all supporting documentation.

The court ~~finds~~ does not find that defendants were the prevailing party in this action and are therefore not entitled to payment of costs and attorney's fees by plaintiff. The court ~~also~~ finds that Mr. Levinson, owner of Bulk FR8, failed to attend his deposition, as required by defendants' subpoena. Finally, the court finds that plaintiff failed to give defendants required notice of its motion for voluntary dismissal and ~~incorrectly~~ filed its motion *ex parte*. The motion was granted by a commissioner on the ex parte calendar. In granting ~~Under the circumstances,~~ a CR 26(i) conference was ~~unnecessary. Lesser sanctions would not sufficiently punish and educate the offending person.~~ unnecessary. The voluntary nonsuit defendants were not denied any substantial right under the circumstances.

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101 Yesler Way, Suite 603
Seattle, WA 98104

IT IS ORDERED:

1. ~~Defendants are awarded attorney's fees in an amount to be determined by a subsequent motion to be made within 20 days. Plaintiff will make payment~~ to ~~defendants in this amount plus any costs incurred in this case~~.

2. Sanctions in the amount of $620.45 will be paid to defendants for Mr. Levinson's failure to attend his deposition. If this amount is not paid to defendants by March 21, 2016, Mr. Levinson must show cause why he should not be held in contempt.

3. ~~The court makes the following~~ adverse inferences:

   - ~~Mr. Levinson unduly influenced Schuler and Brown's signing of~~ their ~~noncompete agreements;~~
   - ~~Bulk FR8 did not have trade secrets that Schuler and Brown could have misappropriated; and~~
   - ~~Mr. Levinson acquired the email cited in his motion for reconsideration through illegitimate means.~~

4. ~~[In the alternative] [The court vacates its Order of Dismissal of All Parties Without Prejudice.]~~

SO ORDERED this 29th day of March, 2016.

THE HONORABLE JEFFREY RAMSDELL
KING COUNTY SUPERIOR COURT

Presented by:

ROCKE | LAW Group, PLLC

Peter Montine, WSBA No. 49815
Attorney for Defendants

ROCKE | LAW Group, PLLC
101 Yesler Way, Suite 603
Seattle, WA 98104

DECLARATION OF SERVICE

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

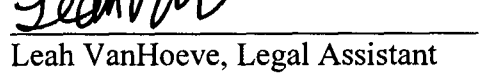
Via E-Mail and U.S. Mail to:

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 5th day of July, 2016, in Seattle, Washington.



Leah VanHoeve, Legal Assistant