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No. 75108-5-I

SUPREME COURT
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.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

BULK FR8, LLC, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Petitioner respectfully requests that this Court review the part of the decision of the Court of Appeals, filed March 20, 2017, that reversed the trial court's discretionary denial of fees pursuant to RCW 4.28.185(5).

C. ISSUES PRESENTED FOR REVIEW

1. Whether RCW 4.28.185(5) Awards Are Discretionary.
2. Whether the Standard of Review Was Improperly Applied.

D. STATEMENT OF THE CASE

The trial court in this case presided over few motions concerning a Washington business, BULK FR8, suing to restrain two of its former employees from transferring to an out-of-state business, Total Connection, its clients, trade secrets and employees. Total Connection, a direct competitor of BULK FR8, allegedly stole these valuable assets vis-a-vis BULK FR8's former employees and funded their defense, but neglected to file an answer to BULK FR8's complaint. Total Connection had employees and a registered agent in Washington. CP 7 & 10. Total Connection did not challenge personal jurisdiction, service of process or venue. CP 64-77 (opposition to preliminary injunction), CP 137-147 (opposition to motion

for reconsideration), CP 191-95 (response to motion to release bond), & CP 235-243 (motion for costs and attorney fees).

After losing its motion for a preliminary injunction of its two in-state former employees, BULK FR8 moved to exonerate its $50,000 cash bond and to voluntarily dismiss its action to avoid disclosing more trade secrets before the first requested discovery action: an improperly noted deposition of BULK FR8's president.

Appellants brought motions for attorney fees. CP 235-243. One basis of those motions for attorneys' fees was RCW 4.28.185(5). CP 239-40.

The trial court denied the request for attorneys' fees based on the long-arm statute and that the action was not frivolous (CP 338), as well as granted an exoneration of the bond and the voluntary dismissal. Id. Appellants appealed.

The decision of the Court of Appeals, filed March 20, 2017, affirmed the trial court's rulings, but reversed the trial court's denial of attorney fees based on the long-arm statute, and remanded to the trial court for findings on the amount of attorney fees due to Total Connection as an out-of-state party based on the long-arm statute. Appendix A, Appellate Opinion, p. 15.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The Washington Supreme Court should accept review per RAP 13.4(b) because: The decision of the Court of Appeals is in conflict with decisions

of this Supreme Court and other published decisions of the Court of Appeals by mandating that less than full victory on the merits for plaintiffs equates to a full fee award for all out-of-state defendants; And, the decision raises a significant question of law under the Equal Protection Clause of the Constitution of the United States that involves an issue of substantial public interest that should be determined by the Supreme Court where the decision mandates that all resident plaintiffs pay a defendant's reasonable attorney fees simply without requiring a jurisdictional challenge but solely because such defendant was personally served outside the state on causes of action enumerated in the RCW 4.28.185 thereby arbitrarily depriving Washington residents the benefit of the American Rule that prevailing litigants may not recover attorney's fees from losing litigants.

1. RCW 4.28.185 Awards Are Discretionary

a. The Plain Text of RCW 4.28.185

An award of attorney's fees is not mandatory under RCW 4.28.815. RCW 4.28.185(5) provides that "... 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." [Emphasis added.] The Legislature's use of the word "may" clearly indicates that the award of fees under RCW 4.28.185(5) is permissive, rather than mandatory. *State v. O'Connell (O'Connell I)*, 83 Wn.2d 797, 844, 523 P.2d 872 (1974),

overruled in part by Scott Fetzer Co. v. Weeks, 114 Wn. 2d 109, 786 P.2d 265 (1990). Specifically, the Washington Supreme Court provided:

> The trial court was of the opinion that this provision is discretionary and not mandatory. We think that is the proper interpretation to be placed upon it. *See Andersen v. Gold Seal Vineyards, Inc.*, 81 Wn.2d 863, 505 P.2d 790 (1973). That being the case, this court will not set the trial court's ruling aside in the absence of a clear showing of abuse of discretion. We do not find that such a showing has been made.
> *O'Connell I*, 83 Wn.2d at 844.

Later, in *Fetzer*, the Washington Supreme Court sought to clarify that even if a defendant prevailed in challenging Washington jurisdiction, and not on the merits of the case, attorney fees under RCW 4.28.185 may be awarded, and specifically provided that:

> ...reference to "the action on the merits", we meant only to distinguish the defendants' success in the principal action from their failure to win an award of fees incurred at trial. O'Connell says nothing to suggest that the fees statute authorizes fees awards only when the defendant prevails on the merits of the principal action.
> *Fetzer*, 114 Wn.2d at 113.

Thus, prevailing on the merits is not the only criterion for awarding attorney fees under RCW 4.28.185, but may include cases where improper long-arm jurisdiction is challenged by a defendant and followed by a plaintiff's nonsuit, as in *Andersen v. Gold Seal Vineyards, Inc.*, 81 Wn.2d 863. This increased possibility of awards under RCW 4.28.185, however, does not necessarily deprive the trial court of discretion and mandate

attorney fees in every instance, as the Court of Appeals concluded here.

Fetzer itself reaffirmed that there were circumstances where an out-of-state defendant had more than minimum contacts in Washington, and thus attorney fees were not warranted under RCW 4.28.185. The *Fetzer* Court explained:

> Our decisions in *O'Connell* and in *Chemical Bank v. WPPSS*, 104 Wn.2d 98, 104, 702 P.2d 128 (1985) have similar effect. In both cases we justified a conclusion that fees awards were not warranted by observing: "This is not a case where the defendant has had only minimum contacts with the state in which he is asked to defend an action." *O'Connell I*, 83 Wn.2d at 607; *see also Chemical Bank*, 104 Wn.2d *supra* at 104. By contrast, a foreign defendant over whom long-arm jurisdiction is improperly asserted determinedly has had *less* than minimal contacts with the state. As a direct result of the plaintiff's resort to the long-arm statute, however, the defendant suddenly finds himself in need of Washington counsel and responsible for abiding Washington laws and court rules -- "burdens and inconveniences which would have been avoided had the trial been conducted at the place of his domicile". *O'Connell I*, 83 Wn.2d at 606.
> *Fetzer*, 114 Wn.2d at 113-14.

By citing approvingly to *O'Connell* and *Chemical Bank*, both cases in which the defendants had more than minimum contacts in Washington, and thus "fee awards were not warranted," the Washington Supreme Court confirmed that fee awards are not mandatory under RCW 4.28.185. *Fetzer*, 114 Wn.2d at 113-14.

The Appellants made no showing of burdens to Total Connection,

nor of improper jurisdiction, nor a showing of how trial might have been more properly conducted in New Jersey. Total Connection did not challenge jurisdiction because it is expanding its business into Washington.

b. The Dual Purpose of RCW 4.28.185

One purpose of the statute is to "compensate defendants for the added expense caused them by plaintiffs' assertions of long-arm jurisdiction." *Perkumpulan Inv'r Crisis Ctr. Dressel--WBG v. Wong*, No. C09-1786-JCC, 2014 WL 3738629 at 2 (W.D. Wash., July 29, 2014). Here, Total Connection had more than minimum contacts where it had a registered agent, employees and had an office in Washington. CP 7 & 10.

Another purpose of the fee-shifting provision is it seeks to prevent plaintiffs from invoking Washington's long-arm statute as a means to harass foreign defendants, and to promote the full exercise of Washington's long-arm jurisdiction. *Id.* Here, Total Connection did not challenge Washington's jurisdiction. CP 64-77, CP 137-147, CP 191-95, & CP 235-243. The trial court found that BULK FR8's case was not frivolous. CP 338. BULK FR8 supported its claims by posting and risking its own $50,000 cash bond, reflecting that its own genuine commitment to the case exceeded a mere intent to harass. CP 190. This case was not meant to harass, but to protect a Washington business.

Without serving the dual purposes for which the statute was

founded, an award of attorney fees under RCW 4.28.185 to Total Connection would be arbitrary and unconstitutional. In *Mahnkey v. King,* 5 Wn. App 555, 557, 489 P.2d 361, 363 (1971), the court considered the balance of relative convenience and burdens placed upon both the plaintiff and defendant in litigating the cause of action in Washington under RCW 4.28.185. *Id.* It then stated that the burden on foreign defendants was lessened by the statutory award of attorney's fees if they prevailed in the action. *Id.* at 558-59. The court declared that the legislature delineated out-of-state defendants as a specific class to bring the statute within the ambit of the principles of "fair play and substantial justice" advanced in *International Shoe Co. v. Washington,* 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945).

Other Washington decisions, some of which preceded *Mahnkey*, contributed to weaving RCW 4.28.185(5) into the fabric of "minimum contacts" analysis under the long arm statute. *See* Comment, Valner L. Johnson, *The Award of Attorney's Fees to Prevailing Defendants Under the Washington Long Arm Statute*, 63 Wash. L. Rev. 125, 140 (1988). In at least two cases, the Washington courts noted that in balancing the relative convenience and burdens placed upon the plaintiff and nonresident defendant, the ability of prevailing defendants to obtain an award of attorney's fees fixed by the court lightened their burden. *See Smith v. York*

Food Mach. Co., 81 Wn.2d 719, 725, 504 P.2d 782, 787 (1972); *see also Omstead v. Brader Heaters, Inc.*, 5 Wn. App. 258, 264, 487, P.2d 234, 242 (1971). The provision is also seen as a shield protecting defendants from harassment. *See Werner v. Werner*, 84 Wn.2d 360, 371, 526 P.2d 370, 378 (1974). It buttressed this conclusion with the observation that the different burdens placed upon nonresident defendants, especially the added expenses of cross-country travel and bringing expert witnesses from out of state, were the basis for the legislature's allowance of attorney's fee awards to nonresident defendants. *Mahnkey*, 5 Wn. App at 558-59. Here, no such findings regarding harassment or added expense were made by the Court of Appeals here, making its fee-shifting arbitrary and potentially unconstitutional.

The Washington Supreme Court has upheld the purpose developed in *Mahnkey. State v. O'Connell, (O'Connell II)* 84 Wn.2d 602, 528 P.2d 988 (1974). In *O'Connell II* and *Marketing Unlimited v. Chemical Co.*, 90 Wn.2d 410, 583 P.2d 630 (1978), the Supreme Court made section 4.28.185(5) a component of *International Shoe.* The court also sustained the *Mahnkey* court's theory that the distinctive treatment afforded nonresident defendants counterbalanced the expenses of travel and witness procurement. *O'Connell II*, 84 Wn.2d at 606. However, no such findings of expenses were made here where an out-of-state defendant rushed forward

to defend its in-state employees who were being sued for stealing clients and trade secrets from their in-state former employer.

The Washington Supreme Court sought to develop a more explicit test to guide trial courts in exercising their discretion. *Id.* at 606. The *O'Connell* test has appeared in many subsequent decisions concerning section 4.28.185(5), (*see*, e.g., *Marketing*, 90 Wn.2d at 413; *Chemical Bank*, 104 Wn.2d at 101-02) while also creating a second purpose for an award of attorney's fees: the plaintiff's misconduct. Under the *O'Connell II* test, a trial court first determines if the plaintiff's action was frivolous and brought only to harass the prevailing defendant. If this is the case, then an award of attorney's fees is appropriate. *O'Connell II*, 84 Wn.2d at 606. Here, the trial court found specifically that the action was not frivolous. CP 338. Rather than a finding that the action was brought only to harass the defendant, the trial court permitted the case to proceed to trial to prove damages. CP 338.

If the plaintiff is not guilty of misconduct in litigation, the second prong of the *O'Connell II* test grants prevailing defendants fee awards if they were subjected to burdens and inconveniences by defending the action in Washington. *O'Connell II*, 84 Wn.2d at 606. Fee awards are appropriate only when trial courts find three things: (1) The burdens would have been avoided if the trial was conducted at the defendant's domicile; (2) The burdens are not balanced by conveniences to the defendant resulting from

the trial of the action in Washington; and (3) The burdens are sufficiently severe to justify the trial court's conclusion that notions of fair play and substantial justice will be violated absent an award of fees. *Id.* None of these factors were established by the out-of-state defendant because the out-of-state defendant did nothing to defend itself: No answer was filed, nor challenge made to personal jurisdiction, personal service or venue. CP 64-77; 137-47; 191-95; 235-43. According to the decision of the Court of Appeals, dated March 20, 2017, anything short of a full victory on the merits for a plaintiff equates to a situation in which the defendant "prevails" and is entitled to a full fee award. Other non-precedential courts find that position to go beyond the common meaning of "prevail." *See Perkumpulan*, 2014 WL 3738629 at 3. Here, the defendants did not obtain dismissal on the merits, jurisdictional dismissal, or negotiate a voluntary dismissal with BULK FR8, and were not a prevailing party according to the trial court.

c. Long-Arm Statutory Attorney Fees Are Improper Without Motion Or Pleading Challenging Long-Arm Jurisdiction

In *O'Connell II*, 84 Wn.2d at 605, *Chemical Bank*, 104 Wn.2d at 104, and *Silvaris*, 2008 U.S. Dist. LEXIS 52810 at 1, 2008 WL 2697186 at 1, fees were not authorized where defendants did not successfully challenge personal jurisdiction or otherwise offer a legitimate basis for dismissal with prejudice.

In *Mahnkey,* the Washington Court of Appeals decided that section 4.28.185(5) may be constitutional insofar as it reduces the burden on defendants to litigate in Washington. *Mahnkey*, 5 Wash. App at 557. The plaintiff in *Mahnkey* challenged the constitutionality of the attorney's fee provision of the long arm statute on equal protection grounds claiming that no reasonable basis existed for making a distinction between resident and out-of-state defendants. *Id.* at 558. The plaintiff argued, persons subject to the jurisdiction of Washington courts were unreasonably divided into two classes: plaintiffs who lose to Washington defendants and plaintiffs who lose to out-of-state defendants. *Id.*

Given the subject Order of the Court of Appeals, the statutory classification becomes arbitrary and unconstitutional where every out-of-state defendant gets its attorneys' fees paid for by every in-state plaintiff. Rather, this motion for reconsideration requests examination of the positions of the parties relative to each other, and if their relative positions have not changed (because Plaintiff remains able to re-file without prejudice) and there has been no success on the merits or nor success in challenging the exercise of Washington jurisdiction, then no attorney fees may be awarded based on RCW 4.28.185. The sole distinguishing factor here appears to be that one party is in-state, and another party is out-of-state, and therefore entitled to attorney fees on that basis alone, which would

and therefore entitled to attorney fees on that basis alone, which would create a bright line unequal application of the law on attorney fees depending on whether the parties were in-state or out-of-state residents, regardless of how much of a presence or how many "minimum contacts" those out-of-state residents may have in the state of Washington. Thus, the Court of Appeals ordering Plaintiff to pay Total Connection's attorney fees under RCW 4.28.185(5) is an arbitrary and unconstitutional fee-shifting that violates the Equal Protection Clause of the United States Constitution.

2. The Standard of Review Was Improperly Applied

a. The Standard of Review is Abuse of Discretion

The awarding of attorney fees pursuant to a statute or contract is a matter of discretion with the trial court that will not be disturbed absent a clear showing of an abuse of that discretion. *Culinary Workers & Bartenders Union, Local 596 v. Gateway Cafe, Inc.*, 91 Wn.2d 353, 372, 588 P.2d 1334, 1346 (1979), *amended*, 642 P.2d 403(1981), *cert. denied*, 459 U.S. 839, 103 S. Ct. 87, 74 L. Ed. 2d 81 (1982). Such a showing has not been made.

An award of attorney fees under RCW 4.28.185(5) rests within the sound discretion of the trial court. *Lundberg v. Coleman*, 115 Wn. App. 172, 180-81, 60 P.3d 595 (Div. 1, 2002). The trial court considered all the facts in the matter and exercised sound discretion in denying attorney fees under RCW 4.28.185. The trial court's order should have remained

in conflict with decisions of the Washington Supreme Court. *See Chemical Bank*, 104 Wn.2d at 101-02; *O'Connell I*, 83 Wn.2d at 844.

b. Denying Fees Is within the Trial Court's Discretion

A case similar to the case at hand, but non-precedential, highlights the discretionary nature of an attorney fee award under RCW 4.28.185 where the United States District Court for the Western District of Washington declined to award attorney fees. *Silvaris Corp. v. Brissa Lumber Corp.*, No. C07-0196 MJP, 2008 WL 2697186, at 1. The Court in *Silvaris* concluded that RCW 4.28.185(5) was inapplicable because the defendants did not challenge personal jurisdiction. Here, Total Connection did not challenge jurisdiction.

Later, BULK FR8 filed for voluntary dismissal as a matter of right to protect itself from further unfair competition by its out-of-state competitor who had allegedly stolen its trade-secrets in a case where the trial court had denied a protection order of those same trade secrets and the Defendants had noted his deposition which could have required disclosure of additional trade secrets belonging to BULK FR8 by its out-of-state competitor pursuant to rules of discovery. This dismissal was a protective measure in a court reluctant to enforce non-compete agreements against former employees or to protect a resident-business's trade secrets.

Voluntary dismissals are encouraged, not discouraged under the court

Voluntary dismissals are encouraged, not discouraged under the court rule, CR 41(a)(1)(b), which does not contemplate the award of costs or attorney fees when there has been a voluntary dismissal. *Id.* A voluntary dismissal without prejudice is not a "final judgment" and therefore does not entitle a party to attorney fees under CR 41. *See Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 492; 200 P.3d 683 (2009). In ordinary usage, a "final judgment" is "[a] court's last action that settles the rights of the parties and disposes of all issues in controversy ..." BLACK'S LAW DICTIONARY 859 (8th ed. 2004). By this well-accepted definition, a "voluntary dismissal" is not a final judgment. A voluntary dismissal leaves the parties as if the action had never been brought. *State v. Taylor*, 150 Wn.2d 599, 602, 80 P.3d 605 (2003).

When Total Connection brought a motion for attorney fees under RCW 4.28.185(5) after plaintiff's voluntary nonsuit (CP 235-43), the trial court denied the request for attorney fees based on the long-arm jurisdictional statute and its awareness of the facts of the case and circumstances of the parties. CP 338. The trial court was in the best position to make such a ruling, and ruled that Total Connection was not a prevailing party. CP 338. The trial court stated in its March 9, 2016 order that it "does not find that defendants were the prevailing party in this action and therefore not entitled to payment of costs and attorney's fees by plaintiff." CP 338.

that have explored the mistaken "general" rule that "if a plaintiff voluntarily dismisses its entire action under CR 41, the Defendant is considered to be the prevailing party for purposes of attorney fees under RCW 4.28.185." *See Andersen*, 81 Wn.2d 863. Absolutist reasoning based on *Andersen* is flawed. *Andersen* is used to support the proposition that a defendant prevails when a plaintiff voluntarily dismisses a claim by virtue of the fact that the plaintiff "failed to prove his claim" after several days at trial. *Id.* 868. *Andersen* reaffirmed that under the long-arm jurisdictional statute, a prevailing party includes more than prevailing on the merits and includes: One who prevails on the merits; One who prevails on jurisdictional grounds; And, a party who successfully defended against a case through several days of trial until the plaintiff moved for a voluntary nonsuit. *Id.* None of these definitions apply to the case at hand where plaintiff nonsuited near the out-set of the case and prior to the defendants filing any answer or challenge to jurisdiction.

Andersen did not mandate attorney fees in all cases where a plaintiff's voluntary nonsuits without prejudice was granted so that it is free to re-file. Here, no substantive issues were resolved. BULK FR8 may refile the suit.

The Court of Appeals decision seems to imply that because RCW 4.28.185(5) empowers the trial court with discretion to award attorney fees, that Total Connection is entitled to such fees under *Andersen* without

4.28.185(5) empowers the trial court with discretion to award attorney fees, that Total Connection is entitled to such fees under *Andersen* without having made the required showing of harassment or additional expense caused by plaintiff under *O'Connell II* and other cases.

The Court's decision whether to grant or deny a request for attorneys' fees under section 4.28.185(5) is "wholly within the discretion of the trial court." *Perkumpulan*, No. C09-1786-JCC, 2014 WL 3738629 at 3. Here, the Court of Appeals substitutes its judgment for that of the trial court, as if the trial court's ruling were under more stringent scrutiny than an abuse of discretion standard of review. In *Perkumpulan*, the Court denied fees under RCW 4.28.185(5) where plaintiff's "jurisdictional arguments were neither frivolous nor incapable of substantiation." *Id.* at 4. Here, Total Connection requested costs for opposing frivolous actions. CP 241-41. The trial court found that BULK FR8's lawsuit was not frivolous and did not award costs. CP 338. There were similarly no findings that BULK FR8 brought this action in bad faith or with intent to harass.

F. CONCLUSION

This Court should accept review for the reasons indicated in Part E and reverse the part of the decision of the Court of Appeals, filed March 20, 2017, that reversed the trial court's denial of attorney fees pursuant to RCW 4.28.185(5) leaving the decision of the trial court undisturbed.

DATED this 18th day of April, 2017.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

BULK FR8, LLC, Respondent, v. MATTHEW SCHULER; DEREK BROWN; and TOTAL CONNECTION LOGISTIC SERVICES, INC., a New Jersey corporation, Appellants.	)	No. 75108-5-I DIVISION ONE UNPUBLISHED FILED: March 20, 2017

Cox, J. — Matthew Schuler, Derek Brown, and Total Connection Logistic Systems Inc. (collectively "Schuler") appeal three orders. They include the trial court's grant of voluntary dismissal to Bulk FR8 LLC, the exoneration of the bond for the TRO posted by that company, and the denial of attorney fees.

The court did not abuse its discretion in dismissing this action. Likewise, it did not abuse its discretion in exonerating the bond for the TRO. There was no abuse of discretion in denying attorney fees based on the frivolous action statute. But the court erred by not awarding fees to Total Connection based on the long-arm statute. We affirm in part, reverse in part, and remand.

Matthew Schuler and Derek Brown are former employees of Bulk FR8 LLC, a transportation firm. Originally independent contractors, the two later became employees of the firm. Upon becoming employees, they both signed noncompete agreements.

Eventually both left Bulk FR8 and went to work for Total Connection, a New Jersey based competitor to Bulk FR8. Soon after, Bulk FR8 began contacting Matthew Schuler and Derek Brown, claiming their new employment violated the noncompete agreements they had signed.

Bulk FR8 followed upon these communications by bringing this action against Schuler. It simultaneously moved for a temporary restraining order. The court granted the TRO, enjoining Matthew Schuler and Derek Brown from working for Total Connection and set a return date for the preliminary injunction hearing to follow. The trial court conditioned the TRO upon Bulk FR8 posting a $50,000 security bond. Bulk FR8 duly posted a cash bond in this amount.

On December 21, 2015, the trial court denied Bulk FR8's request for a preliminary injunction. In its order, the court stated that "substantial issues exist as to the legal enforceability of the 'Noncompete/Nondisclosure' agreement and, therefore, the court cannot find that plaintiff has demonstrated a clear legal or equitable right as required to obtain a preliminary injunction."[1] Accordingly, a criterion for the issuance of an injunction was not met.

[1] Clerk's Papers at 115.

Thereafter, Bulk FR8 moved for an order exonerating the bond it posted for the TRO. The court considered "the motion, the response, and the reply."[2] Based on the record then before it, the court entered an order on February 19, 2016 to exonerate the bond.

Bulk FR8 then moved for voluntary dismissal of its action. It did so without providing Schuler notice of its motion. On March 1, 2016, a court commissioner of the ex parte department of the court granted the motion and dismissed the case.

After receiving notice of the dismissal of the action, Schuler moved for costs, attorney fees, and discovery sanctions.[3] In the alternative, it sought vacation of the order of dismissal.[4]

On March 29, 2016, the court entered its order on this motion. It denied attorney fees based on its conclusion that Schuler was not a "prevailing party."[5] It also stated that "plaintiff failed to give defendants ***required*** notice of its motion for voluntary dismissal," but that Schuler was "not denied any substantial right under the circumstances."[6] Finally, the court imposed discovery sanctions on Bulk FR8 for its officer's failure to attend a scheduled deposition.

Schuler appeals.

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[2] Id. at 231.

[3] Id. at 235.

[4] Id.

[5] Id. at 338.

[6] Id. (emphasis added).

VOLUNTARY DISMISSAL

Schuler argues that Bulk FR8's motion for voluntary dismissal should not have been granted. We hold that the trial court did not abuse its discretion in granting the motion for voluntary dismissal.

CR 41 controls this question. In relevant part, it states:

> **(a) Voluntary Dismissal.**
> (1) ***Mandatory.*** . . . 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 plaintiff's opening case.***
> . . . .
> (3) ***Counterclaim.*** If a counterclaim has been pleaded by a defendant prior to the service upon the defendant 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.[7]

There are two threshold questions. The first is whether Bulk FR8 was required to give notice of its motion for voluntary dismissal to Schuler. The second is whether the superior court ex parte department properly dismissed the action.

We review de novo the trial court's application of court rules.[8]

Notice of Motion

Relying on the supreme court's decision in McKay v. McKay,[9] Schuler argues that it was entitled to notice of the motion to voluntarily dismiss the action.

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[7] (Emphasis added.)

[8] Spokane County v. Specialty Auto and Truck Painting, Inc., 119 Wn. App. 391, 396, 79 P.3d 448 (2003).

[9] 47 Wn.2d 301, 287 P.2d 330 (1955).

Bulk FR8, relying on language in Greenlaw v. Renn,[10] argues to the contrary. Specifically, it relies on the following language in that Division Two case:

> Although CR 41 does not speak to notice, the fact that the motion can be made at any time before the plaintiff 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.[11]

We need not resolve this aspect of the dispute between the parties. In this case, the trial court expressly acknowledged in the order that it entered on March 29, 2016 that Bulk FR8 "failed to give [Schuler] ***required*** notice of its motion for voluntary dismissal . . . ."[12] The court went on to conclude that granting the dismissal did not deny "any substantial right under the circumstances" to Schuler.[13] We agree with this conclusion.

Assuming, as we do, that the trial court correctly stated that notice of the motion was required, the issue is whether Schuler was denied any substantial right under the circumstances. Schuler fails to identify any such right.

In its briefing on appeal, the sole "right" it identifies is to a decision by the trial court whether there was a wrongful injunction that entitled it to damages.[14] On this record, however, Schuler failed to make out its claim in its response below to Bulk FR8's motion for release of bond. In short, there is no showing of

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[10] 64 Wn. App. 499, 824 P.2d 1263 (1992).

[11] Id. at 503-04.

[12] Clerk's Papers at 338 (emphasis added).

[13] Id.

[14] Appellants' Opening Brief at 18.

any damages or other charges that could have been made against the bond. Thus, it is difficult to see why the exoneration of the bond was prejudicial to Schuler at the time the order was entered. Schuler has failed to convincingly argue otherwise.

Ex Parte Rules

A related argument is Schuler's claim that the King County Local Civil Rules did not permit the superior court's ex parte department to decide the motion to dismiss. We need not answer this question either.

The March 29, 2016 order, fairly read, also addressed this point. As stated, this order recognized the requirement for notice. In so concluding, the trial court implied that the ex parte department was the improper place for filing.

But, again, the issue is whether there was any prejudice to Schuler under the circumstances of this case to such a filing. Schuler fails to make any such showing. The motion to dismiss was properly granted, and there is no showing of prejudice under the circumstances of this case.

Our decision in this case should not be taken as authority for the proposition either to not give notice of motions, as required, or to file motions in an improper department. Rather, we decide this case on its facts and conclude there was no prejudice to Schuler, as did the trial court.

Mandatory Dismissal

The final question is whether dismissal was mandated in this case. The plain words of CR 41 require that we answer that question in the affirmative.

The rule states that voluntary dismissals "shall" be granted on condition that other provisions of the rule are satisfied.[15] The word "shall" is mandatory.[16]

One of these conditions is that the motion is made "***any time before plaintiff rests at the conclusion of plaintiff's opening case.***"[17] It is undisputed that this condition was met in this case.

The other condition arises where a counterclaim exists.[18] It is also undisputed that there was no counterclaim at the time of the motion in this case.

In sum, the trial court did not abuse its discretion in granting the voluntary dismissal in this case.

EXONERATION OF BOND

Schuler argues that the trial court abused its discretion in exonerating the bond Bulk FR8 posted as security for the TRO. We disagree.

CR 65(c) requires the posting of a bond as a condition to issuance of a TRO. The bond serves as a "remedy to the restrained party if it is later determined restraint was erroneous in the sense that it would not have been ordered had the court been presented all the facts."[19] Specifically, its purpose is

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[15] CR 41(a)(1).

[16] Matter of K.J.B., __ Wn.2d __, 387 P.3d 1072, 1077-78 (2017).

[17] CR 41(a)(1)(B) (emphasis added).

[18] CR 41(a)(3).

[19] Swiss Baco Skyline Logging Co. v. Haliewicz, 14 Wn. App. 343, 345, 541 P.2d 1014 (1975).

to provide "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."[20]

We review de novo the trial court's application of court rules.[21]

Schuler cites to Swiss Baco Skyline Logging Co. v. Haliewicz,[22] but that case does not help his position. Swiss Baco Skyline Logging Co. (Swiss Baco) had sued Emil Haliewicz and others for conversion of corporate assets.[23] It moved for a TRO to enjoin Haliewicz from dealing with the relevant assets pending a hearing for a prejudgment writ of attachment.[24] Swiss Baco appropriately posted a security bond.[25]

The trial court later authorized the prejudgment attachment sought, conditioned on Swiss Baco posting a larger bond.[26] Swiss Baco failed to do so and the trial court dissolved the earlier TRO.[27] Swiss Baco then moved for exoneration of its original security bond.[28] Haliewicz opposed exoneration and moved for the trial court to determine whether Swiss Baco had wrongfully

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[20] CR 65(c).

[21] Specialty Auto and Truck Painting, Inc., 119 Wn. App. at 396.

[22] 14 Wn. App. 343, 345, 541 P.2d 1014 (1975).

[23] Id. at 344.

[24] Id.

[25] Id.

[26] Id. at 345.

[27] Id.

[28] Id.

procured the TRO and to assess any appropriate damages.[29] But the trial court granted Swiss Baco's motion.[30]

Division Two of this court reversed the exoneration.[31] It explained that the trial court should have determined the propriety of the TRO before releasing the security bond.[32] By failing to do so, the trial court had "deprived Haliewicz of the remedy contemplated by the rule in the event he was subsequently found to have been wrongfully restrained."[33] In effect, the trial court had "destroyed Haliewicz's cause of action against the security before it ever arose."[34]

The facts in this case are different. Schuler opposed the motion to exonerate the bond, with full opportunity to make his claim against it. That effort failed.

Bulk FR8 moved to release the bond on January 25, 2016. Schuler filed a response to that motion on February 16, 2016, arguing that release was improper until the trial court determined whether the TRO was wrongful. But Schuler neither made any argument that the TRO was wrongful nor identified any damages. Bulk FR8 identified this shortcoming in its reply by arguing that Schuler could not show the TRO caused him damages.

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[29] Id.

[30] Id.

[31] Id. at 347.

[32] Id. at 346-47.

[33] Id. at 347.

[34] Id.

In its order exonerating the bond on February 19, 2016, the trial court noted that it had considered these pleadings. In the absence of any showing of damages from the TRO, the trial court was fully justified in exonerating the bond. There was no abuse of discretion.

ATTORNEY FEES

The Long-Arm Statute

Schuler argues that Total Connection is entitled to attorney fees under the Washington long-arm statute. We agree.

A court cannot award fees absent a supporting contract, statute, or recognized ground of equity.[35] The long-arm statute, codified at RCW 4.28.185, enables parties to hail into court out-of-state defendants. When an out-of-state defendant "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."[36]

Following voluntary dismissal, a trial court retains the requisite authority to consider a defendant's motion for fees when made under statute.[37] The trial court is to award fees if it "finds that the justice of the case requires it."[38]

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[35] Ino Ino, Inc. v. City of Bellevue, 132 Wn.2d 103, 142-43, 937 P.2d 154 (1997).

[36] RCW 4.28.185(5).

[37] See Andersen v. Gold Seal Vineyards, Inc., 81 Wn.2d 863, 867-68, 505 P.2d 790 (1973); Escude ex rel. Escude v. King County Public Hosp. Dist. No. 2, 117 Wn. App. 183, 192, 69 P.3d 895 (2003).

[38] Andersen, 81 Wn.2d at 868.

We review for abuse of discretion the award of fees under the long-arm statute.[39]

The issue is whether Total Connection was a prevailing party under this statute. In Andersen v. Gold Seal Vineyards, Inc., the supreme court clarified that a party need not succeed on the merits to "prevail[] in the action."[40] In that case, Robert Andersen had sued Gold Seal Vineyards, Inc. ("Gold Seal") after the plastic stopper on a wine bottle struck him in the eye.[41] Gold Seal then brought a third party indemnity action against Sparkletop, the supplier's foreign supplier.[42] But midway into trial, Gold Seal moved for voluntary dismissal of its third party complaint.[43] Sparkletop successfully moved against Gold Seal for the costs and fees incurred in defense.[44]

Gold Seal appealed, arguing Sparkletop was not the prevailing party because the trial court had not entered an affirmative judgment in its favor.[45] The court disagreed, applying the "general rule pertaining to voluntary nonsuits, that the defendant is regarded as having prevailed" under the long-arm statute.[46] Thus, "where a plaintiff voluntarily dismisses his action, the defendant is entitled

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[39] Id. at 867-68.

[40] 81 Wn.2d 863, 864, 505 P.2d 790 (1973) (quoting RCW 4.28.185(5)).

[41] Id. at 864.

[42] Id.

[43] Id. at 864-65.

[44] Id. at 865.

[45] Id.

[46] Id. at 868.

to costs."[47] It further explained this rule applied whether or not the dismissal was with prejudice.[48]

Here, the trial court improperly concluded Total Connection was not a prevailing party for purposes of the long-arm statute. No party disputes that Total Connection was an out-of-state defendant. Andersen dictates that once the trial court granted Bulk FR8's motion for voluntary dismissal, Total Connection became a prevailing party. The trial court improperly concluded otherwise. Thus, Total Connection is entitled to fees under RCW 4.28.185(5).

On the same basis, it is also entitled to attorney fees on appeal.

We remand this matter to the trial court for a determination of the amount of fees for trial and for appeal that Total Connection is entitled to receive.

Bulk FR8 argues that Andersen does not apply. It argues instead that a defendant only prevails under the long-arm statute when it obtains a dismissal for lack of personal jurisdiction. It cites two cases wherein courts awarded fees on this basis.[49] But neither case held that a party could prevail only upon that basis. Examination of each is instructive.

The first case, Scott Fetzer Co., Kirby Co. Division v. Weeks[50] held that a party could prevail in an action for purposes of attorney fees under the long-arm

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[47] Id. at 865.

[48] Id. at 867.

[49] See Scott Fetzer Co., Kirby Co. Div. v. Weeks, 114 Wn.2d 109, 124, 786 P.2d 265 (1990); CTVC of Haw., Co., Ltd. v. Shinawatra, 82 Wn. App. 699, 722, 919 P.2d 1243 (1996).

[50] 114 Wn.2d 109, 124, 786 P.2d 265 (1990).

statute if it successfully challenges personal jurisdiction. In that case, a Washington vacuum manufacturer brought an action for tortious interference against a vacuum retailer domiciled in Texas.[51] The retailer successfully challenged personal jurisdiction and the trial court dismissed claims against it.[52] The trial court also granted attorney fees under the long-arm statute to the retailer.[53] The court of appeals reversed, holding that fees were not available unless the awarded party prevailed on the merits.[54]

Reversing that conclusion, the supreme court held that the long-arm statute has no such "'merits' limitation."[55] In doing so, it noted precedents upholding awards ordered under this statute when the awarded party prevailed on the merits.[56] It did not dispute that a party could "prevail" on the merits but it also concluded that these precedents did not bar a party from prevailing on other grounds.[57] In support of this interpretation, it cited Andersen wherein the trial

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[51] Id. at 111.

[52] Id.

[53] Id.

[54] Id. at 112.

[55] Id.

[56] Id. at 112-16 (citing State v. O'Connell, 84 Wn.2d 602, 528 P.2d 988 (1974), abrogated on other grounds by Scott Fetzer Co., Kirby Co. Div., 114 Wn.2d 109; Chemical Bank v. WPPSS, 104 Wn.2d 98, 702 P.2d 128 (1985), abrogated on other grounds by Scott Fetzer Co., Kirby Co. Div., 114 Wn.2d 109; Mahnkey v. King, 5 Wn. App. 555, 489 P.2d 361 (1971), abrogated on other grounds by Scott Fetzer Co., Kirby Co. Div., 114 Wn.2d 109).

[57] Id. at 112-14.

court properly ordered an award to a defendant who prevailed on the procedural basis of the plaintiff's voluntary nonsuit.[58]

After concluding that a party could sufficiently prevail on purely jurisdictional grounds, the court examined the "proper scope of fees awards."[59] Its discussion on that scope suggests that a party can prevail on other than jurisdictional grounds. It established two principles to govern that scope:

> First, a prevailing defendant should not recover more than an amount necessary to compensate him for the added litigative burdens resulting from the plaintiff's use of the long-arm statute. ***Second, where the defendant prevails by obtaining a ruling that jurisdiction under the long-arm statute does not properly lie,*** his award should not exceed the amount in attorney fees he would have incurred had he presented his jurisdictional defense as soon as the grounds for the defense became available to him.[60]

Of these two principles, one applies to all fee awards under the long-arm statute, and the other, as emphasized, applies only to those awards ordered to compensate a party prevailing jurisdictionally. This distinction implies that while fee awards may be ordered for jurisdictional success, they are not limited to that context. Precedent, noted above, affirming awards ordered to parties that prevail upon the merits of an action furthers this conclusion.

The second case cited, CVTC of Hawaii, Co., Ltd. v. Shinawatra,[61] applied the principle expounded in Scott Fetzer and affirmed the trial court's fee award to

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[58] Id. at 112.

[59] Id. at 120.

[60] Id. (emphasis added).

[61] 82 Wn. App. 699, 722, 919 P.2d 1243 (1996).

a party who prevailed jurisdictionally. But it did not hold that such an award is unavailable where jurisdiction is not at issue.

The rules in Andersen and Scott Fetzer indicate that fee awards under the long-arm statute are not limited to parties who prevail jurisdictionally. Andersen held that a fee award was authorized for the out-of-state defendant when the plaintiff obtained a voluntary nonsuit. Scott Fetzer pointed to decisions wherein awards were authorized to a party who prevails on the merits but not necessarily on the jurisdictional question. And Scott Fetzer itself, in restricting the scope of possible awards, implied an award might be ordered for a party who prevails other than jurisdictionally. Thus, a party can prevail under the long-arm statute on other than jurisdictional grounds, including when its opponent obtains a voluntary nonsuit.

Bulk FR8 also argues that Andersen does not apply because the defendants there allegedly expended more efforts in litigation than Total Connection has in this case. But that case did not rest its holding on the scale of such efforts. And it recognized the trial court's discretion in determining how justice should affect the size of any award, allowing the trial court to consider the extent of expended effort.[62] Thus, if such a distinction exists, it is irrelevant.

Our decision on fees under the long-arm statute only applies to Total Connection, as the only defendant who is out of state. It is not to be taken as authority for fees for any other defendant.

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[62] Andersen, 81 Wn.2d at 868.

Frivolous Action

Schuler also argues the trial court improperly concluded he was not entitled to fees under the frivolous action statute. We disagree.

Under the frivolous action statute, codified at RCW 4.84.185, the trial court may:

> upon ***written findings*** by the judge that the action, counterclaim, cross-claim, third party claim, or defense was ***frivolous*** and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action, counterclaim, cross-claim, third party claim, or defense.

We review for abuse of discretion a trial court's determination whether an action was frivolous.[63]

As under the long-arm statute, a defendant prevails when the plaintiff obtains a CR 41(a)(1)(B) voluntary dismissal.[64] But even if the trial court finds that a party prevailed, the court must also make written findings that the action was frivolous.[65]

Here, the trial court did not make any findings that the action was frivolous. The absence of a written finding by the proponent of a finding generally means an adverse finding for that proposition.[66] Thus, we conclude the trial court decided that the action was not frivolous. In short, there was no basis

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[63] Escude ex rel. Escude, 117 Wn. App. at 190.

[64] Id. at 193.

[65] RCW 4.84.185.

[66] See Ellerman v. Centerpoint Prepress, Inc., 143 Wn.2d 514, 524, 22 P.3d 795 (2001).

for an award of fees under this statute. There was no abuse of discretion in this respect.

Contract

Schuler also argued in the trial court for contractual attorney fees based on the noncompete agreements. But he has not maintained this argument on appeal. It is thus abandoned.[67]

We affirm the dismissal order, the order exonerating the bond, and the denial of fees based on the frivolous action statute. We reverse the denial of fees to Total Connection based on the long-arm statute and remand for consideration of the amount of fees for trial and appeal to be awarded to that party only.

COX, J.

WE CONCUR:

Mann, J.

Leach, J.

[67] See Park Hill Corp. v. Don Sharp, Inc., Better Homes and Gardens, 60 Wn. App. 283, 287 n.4, 803 P.2d 326 (1991), rev'd on other grounds by Thompson v. Hanson, 168 Wn.2d 738, 239 P.3d 537 (2009).

No. 75108-5-I

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 I caused the foregoing Petition for Review, and this Certificate of Service to be served on the following parties via ABC Legal Messenger Service to the individuals and addresses described below:

CLERK OF THE COURT OF APPEALS
Court of Appeals, Division I
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Seattle, WA 98101

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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 19th day of April, 2017, at Mukilteo, Washington.

Camdyn Joiner, paralegal to Dubs A. T. Herschlip