No. 89317-9

SUPREME COURT OF THE
STATE OF WASHINGTON

SENTINEL C3, INC., a Washington Corporation,

Petitioner,

v.

CHRIS J. HUNT, an individual and the marital community, if any, comprised of CHRIS J. HUNT and CARMEN HUNT; MICHAEL BLOOD, an individual and the marital community, if any, comprised of MICHAEL BLOOD and JANAE BLOOD,

Respondent.

ANSWER TO PETITION FOR DISCRETIONARY REVIEW BY RESPONDENTS CHRIS & CARMEN HUNT

Vicki L. Mitchell, WSBA # 31259
Paine Hamblen LLP
717 West Sprague Avenue, Suite 1200
Spokane, WA 9920-3505
(509) 455-6000

Attorneys for Respondents Chris & Carmen Hunt

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Respondents Chris and Carmen Hunt [the Hunts], through their undersigned counsel of record, hereby provide their Answer to Petitioner Sentinel C3, Inc.'s Petition for Discretionary Review.

I. INTRODUCTION

This case arises out of a summary judgment proceeding where the parties presented conflicting evidence – and the trial court nonetheless granted summary judgment. The Court of Appeals, Div. III, reversed this decision by the trial court based on the extensive and well-settled law establishing summary judgment is inappropriate when there are disputed issues of material fact, i.e. conflicting evidence.

Petitioner Sentinel C3, Inc. [Sentinel C3] does not agree with this decision by the Court of Appeals and wants to argue the weight of the conflicting evidence yet again. Such ongoing argument over the weight of the evidence by Sentinel C3 underscores the inappropriate nature of summary judgment in this matter.

However, what Sentinel C3 has failed to do is establish that it is entitled to review pursuant to RAP 13.4(b). The only grounds for review Sentinel C3 has raised is "substantial public interest" pursuant to RAP 13.4(b)(4) – but Sentinel C3 has not identified or argued any public interest issue or concern in this case that has not already been addressed by the legislature in the statutory scheme at issue.

Specifically, Sentinel C3 argues that the decision of the Court of Appeals should be reviewed by the Supreme Court because it encourages

unfounded, arbitrary demands by dissenting stock holders. This concern or issue is already addressed by the statute itself – which provides penalties and repercussions for such behavior. RCW 23B.13.310.

Thus, the "substantial public interest" Sentinel C3 has raised and argued in support of review pursuant to RAP 13.4(b) has already been contemplated and addressed by the legislature. Review by the Washington Supreme Court is not warranted and Sentinel C3's petition should be denied

II. STATEMENT OF THE CASE

There are several significant omissions from Sentinel C3's statement of the case, both factually and procedurally. For purposes of discretionary review, the procedural omissions are the most significant and therefore will be addressed herein.[1]

In support of its "substantial public interest" argument, Sentinel C3 makes several blanket assertions that are unsupported by the full procedural record. First and foremost, Sentinel C3 repeatedly characterizes its evidence on summary judgment as "admissible" and "verified," while referring to the evidence submitted by the Hunts as "inadmissible" and "unverified hearsay". Such labels constitute a mischaracterization of the evidence on record and perpetuates the

[1] For a more complete recitation of the facts leading up to the lawsuit, Respondents Hunt would refer to and incorporate herein by reference the Facts in the Court of Appeals' decision – which ultimately have not been disputed or challenged by Petitioner. *See Appendix A to Petitioner Sentinel C3, Inc.'s Petition for Discretionary Review* (hereafter App. A), pp. A-1 to A-5.

confusion that lead to the trial court's erroneous decision and reversal by the Court of Appeals.

A. Evidence Before the Trial Court.

Procedurally, Sentinel C3 filed its motion for summary judgment with an accompanying Affidavit by its expert, James Kukull. CP 226-227. However, said Affidavit did not contain any opinions or testimony by Mr. Kukull regarding the value of the stock at issue; all Mr. Kukull did in the Affidavit was certify that the attached hearsay report was true and correct to the best of his knowledge. Id., p. 227. Thus, Mr. Kukull *authenticated* his report, but he did not testify as to the opinions therein or even incorporate them into his own affidavit – and they remained *inadmissible hearsay*. ER 801, 802, & 901.

The Hunts then filed a response opposing summary judgment and in support thereof filed the Response Declaration of Christopher J. Hunt. CP 560-563. Mr. Hunt's Declaration detailed not only what he thought the value of his shares should be and why, but also the issues and problems he had with Mr. Kukull's valuation. Id. This Declaration by Mr. Hunt was both *authenticated* and *admissible* evidence that challenged the testimony and valuation of Mr. Kukull; it also did not contain any hearsay. Id.; ER 801,802 & 901.

Dissenter Michael Blood also filed a Response opposing summary judgment and offered extensive explanation and argument therein as to how he had valued his shares and why he thought Mr. Kukull's valuation was inaccurate. CP 574-577. Mr. Blood, who appeared *pro se*, essentially

presented his own testimony in the context of his response brief and not in an affidavit or declaration, but his pleading was never challenged by Sentinel C3. Mr. Blood's testimony in his brief and the valuation he presented therein was characterized by the Court of Appeals as hearsay. App. A, p. A-11.

Finally, discovery responses by the Hunts and Bloods were also part of the record before the trial court on summary judgment – indicating that they had hired a consulting expert who provided the basis for Mr. Hunt's demand and valuation of the shares, and that a testifying expert for trial had been hired to challenge the valuation provided by Mr. Kukull. CP 333-335, 348-349, 500-501. No challenge was made to this evidence at summary judgment; in fact, Sentinel C3 submitted part of it with its original motion. CP 333-335, 348-349.

Thus, there was admissible, verified or authenticated evidence opposing summary judgment on record before the trial court – contrary to Sentinel C3's assertions otherwise. While some of said evidence may have been hearsay, as recognized by the Court of Appeals, it was not challenged or excluded by the trial court. Thus, as argued below and held by the Court of Appeals, the trial court had an obligation to consider and recognize such evidence in making its determination.

B. Mr. Hecker's Valuation Report.

In addition to the above evidence, the Hunts filed a copy of the valuation opinion and report of their expert, Jerry Hecker, before the summary judgment hearing. CP 597-671. Mr. Hecker's report was

attached to a Declaration by counsel for the Hunts, which *authenticated* the report but did not (and could not) testify or adopt any of the opinions therein. Id., at 597-598. Thus, as with Mr. Kukull's report, Mr. Hecker's report and opinions therein were properly *authenticated* but still *inadmissible hearsay* – if "offered in evidence to prove the truth of the matter asserted." ER 801, 802 & 901.

This confusion between *authentication* and *admissibility* has been an ongoing problem ever since. Procedurally, after the trial court made its decision granting summary judgment in favor of Sentinel C3, the Hunts re-submitted Mr. Hecker's report with a Declaration by Mr. Hecker both authenticating his report AND testifying as to his opinions. CP 683-685. However, as the Court of Appeals recognized, the trial court declined to alter its decision despite this properly *authenticated* and *admissible* evidence on reconsideration. App. A, A-5.

Sentinel C3 continues to want to argue this authentication vs. admissibility issue over Mr. Hecker's report (but not Mr. Kukull's). However, the Court of Appeals expressly stated that, in light of its disposition, it did not address the exclusion of the valuation. App. A, p. A-5. Thus, this admissibility/hearsay/Hecker valuation issue was not addressed or decided by the Court of Appeals or its decision. Id.

C. Bad Faith Conduct or Delay.

Finally, Sentinel C3's argument that this case raises a "substantial public interest" is based on several allegations of arbitrary, vexatious or bad faith behavior by the Hunts and Blood – both before litigation began

and after. Clarifying this matter procedurally, the Hunts and Bloods consulted with an expert before making their demands – as testified to in their Declaration and responsive pleadings discussed above. Thus, their demands and valuations were based on more than just arbitrary "belief" or wishful thinking, as Sentinel C3 insists. Correspondingly, the trial court concluded that neither dissenter engaged in arbitrary, vexatious or bad faith behavior in making their initial demand. 10/21/11 VRP 30:13-17.[2]

Once litigation commenced, Sentinel C3 immediately served discovery demands for this consulting expert's name and opinions. The Hunts disclosed the expert, but identified her as a consulting expert and objected to production of her opinions pursuant to CR 26(b)(5)(B). CP 348-349. Sentinel C3 has been characterizing this as bad faith ever since.

The Hunts also sent out their own discovery requests, seeking the financial documents necessary from Sentinel C3 for their own testifying or trial expert to complete his valuation and opinions. Sentinel initially refused to produce the bulk of the documents requested without an agreed protective order in place. CP 363-369. Such protective order was finally entered September 7, 2011 – almost a full month *after* Sentinel C3's motion for summary judgment had been filed. CP 452-453, 471-478. Pursuant to the terms of the protective order, the Hunts could not provide any documents from Sentinel C3 to their valuation expert until after the protective order was entered. Id., at 471-478.

[2] There are two verbatim reports of proceeding [VRP] in the record; they are therefore identified by the date of the hearing contained therein.

Thus, any delay in the Hunts retaining and obtaining their trial expert's opinions was due to the protective order Sentinel C3 required. The protective order was entered September 7, 2011 and Mr. Hecker's report was completed less than a month later and provided to counsel for Sentinel C3 on October 13, 2011 – before the summary judgment hearing. CP. 471, 597-600. Sentinel C3 even argued Mr. Hecker's report and opinions in their Reply brief on summary judgment. CP 583-589.

Accordingly, the procedural facts do not support Sentinel C3's ongoing mischaracterization of either the Hunt's demand or their "failure" to timely produce an expert valuation as bad faith, arbitrary, or vexatious.

With these clarified procedural facts, the Hunts now address Sentinel C3's arguments.

III. ARGUMENTS

Sentinel C3's petition for discretionary review should be denied because the only grounds for review raised by Sentinel C3 – a substantial public interest in preventing misconduct by dissenting shareholders – is already addressed in the controlling statute, RCW Chapter 23B.13.

Accordingly, review by the Washington Supreme Court is not warranted and Sentinel C3's petition should be denied. RAP 13.4(b).

A. The Standard for Review Has Not Been Met.

RAP 13.4(b) expressly provides that a petition for review by the Washington Supreme Court will only be accepted if the decision of the Court of Appeals conflicts with a decision of another Washington court, if there is a significant question of law under the Washington and/or Federal

Constitutions, or if the petition involves an issue of substantial public interest to be determined by the Supreme Court. RAP 14.3(b)(1-4).

The only grounds for review Sentinel C3 has argued is the "substantial public interest" requirement. RAP 13.4(b)(4). Under this requirement, Sentinel C3 has argued that the decision of the Court of Appeals has created an issue of substantial public interest regarding misconduct by dissenting shareholders generally and specifically under the dissenter's right statute, RCW Chapter 23B.13.

However, the dissenter's rights statute already contains provisions for addressing and discouraging misconduct by *all* parties, not just the dissenters. Specifically, RCW 23B.13.310 provides the court can award attorneys fees and costs against a party for any of the various reasons identified therein – including but not limited to any arbitrary, vexatious or bad faith conduct by the dissenters in making their initial demands or for their conduct generally under the statute and its proceedings. RCW 23B.13.310(1) & (2)(b).

Thus, the only issue of substantial public interest raised by Sentinel C3 has already been addressed by the legislature – and does not need to be addressed by the Washington Supreme Court. Id. Review is therefore not warranted under the requirements of RAP 13.4(b) and Sentinel C3's petition should be denied.

The rest of Sentinel C3's petition for review is dedicated to re-arguing the same issues and arguments already decided by the Court of Appeals. Essentially, these are arguments regarding how the Court of

Appeals allegedly erred, and not arguments for why review by the Supreme Court is warranted per RAP 13.4(b). Such alleged error by the Court of Appeals alone is insufficient to warrant review by the Washington Supreme Court. RAP 13.4(b). However, the Hunts make the following responses to these arguments raised by Sentinel C3's petition.

B. Summary Judgment Was Inappropriate Under RCW Chapter 23B.13 and the Disputed Evidence.

The Court of Appeals properly concluded that the Declaration of Chris Hunt, the unchallenged responsive pleading of Mr. Blood, and the discovery responses on record before the trial court created a disputed issue of material fact regarding the proper valuation of the shares at issue – and thus summary judgment was inappropriate. CR 56(c).

This is especially true under RCW 23B.13.300, which requires the trial court to make a determination of what fair value is for the shares of dissenting shareholders. RCW 23B.13.300(1). As the Court of Appeals noted, such determination of fair value does not require the trial court to automatically adopt or accept an appraiser's report on value; this is underscored by the statute itself, which authorizes the court to appoint "one or more" appraisers to "recommend decisions" on the question of fair value – but ultimately leaves determination up to the court. RCW 23B.13.300(5).

Thus, determining fair value is ultimately a question of weight – the weight to be given to the evidence by the judge, including any appraiser reports or recommendations and any other evidence before the

court. RCW 23B.13.300; see Richey & Gilbert Co. v. Nw. Natural Gas Corp., 16 Wn.2d 631, 134 P.2d 444 (1943) (discussing weight to be given opinions by those familiar with a subject, but recognizing the same are not to be blindly received); see also In re Marriage of Pilant, 42 Wn. App. 173, 709 P.2d 1241 (1985) (recognizing court's decision is based on its own fair judgment, assisted by experts if appropriate, but court is not required to accept opinion testimony of experts); accord Suther v. Suther, 28 Wn. App. 838, 627 P.2d 110 (1981) (upholding trial court's independent determination of value for corporate stock).

Such weighing of the evidence is inappropriate on summary judgment. Ingersol v. Seattle-First Natl. Bank, 63 Wn.2d 354, 358, 387 P.2d 538 (1963) (citing Wicklund v. Allraum, 122 Wn. 546, 211 P. 760 (1922)); cited in Worthington v. Worthington, 73 Wn.2d 759, 763, 440 P.2d 478 (1968); State v. Hammond, 6 Wn. App. 459, 461, 493 P.2d 1249 (1972). On summary judgment, the court must only "pass on whether a burden of production has been met, not whether evidence produced is persuasive." Renz v. Spokane Eye Clinic, 114 Wn. App. 611, 623, 60 P.3d 106 (2002); quoted in Baker v. Advanced Silicon, 131 Wn. App. 616, 624, 128 P.3d 633 (2006); accord Dalton v. State, 130 Wn. App. 653, 661 fn 3, 124 P.3d 305 (2005).

As noted above, the Declaration of Chris Hunt, the unchallenged response pleading of Mr. Blood, and the discovery responses were admissible evidence before the court regarding whether Mr. Kukull's valuation represented fair value and whether some other value constituted

fair value. Sentinel C3 continues to argue this evidence should have been disregarded because it was just the parties' self-serving, arbitrary "belief" as to value, unsupported by any evidence. This argument disregards both the content of the pleadings and the rules of evidence.

First, for the Hunts, Chris Hunt's declaration by itself *was* admissible evidence. It contained no hearsay, detailed the basis for his valuation and how he arrived at the amount, and detailed the questions and problems he had with Mr. Kukull's valuation. CP 560-563. Contrary to Sentinel C3's assertions, Mr. Hunt did not have to provide *more* evidence to support his declaration – the declaration itself was evidence sufficient to create a disputed issue of material fact regarding valuation and defeat summary judgment. CR 56(c)(e).

Plaintiff contends otherwise, attempting to classify Mr. Hunt's Declaration as consisting of bare allegations or self serving conclusory statements insufficient to defeat summary judgment. Plaintiff relies upon two cases that hold such unsupported testimony is insufficient to defeat summary judgment. Heath v. Uraga, 106 Wn. App. 506, 24 P.3d 413 (2001); Meissner v. Simpson Timber Co., 69 Wn.2d 949, 421 P.2d 674 (1966).

However, in each of those cases the declarations at issue consisted of conclusory statements, meant to defeat summary judgment, that had no additional testimony explaining or supporting the statements themselves. Id. That is not the case with Mr. Hunt's Declaration; Mr. Hunt did not testify conclusively that Mr. Kukull's value was wrong and his own value

right, with nothing more. Instead, he provided detailed testimony and discussion regarding both the challenges he had to Mr. Kukull's valuation – i.e., the facts underlying his concerns – and the facts he relied upon in reaching his own valuation amount. CP 560-563.

These specific facts and testimony were not bare allegations or self serving conclusory statements as prohibited by Heath and Meissner. The same is true for the assertions contained in Mr. Blood's responsive pleading – which was unchallenged hearsay and thus admitted before and considered by the court. CP 574-577. Thus, the evidence at issue here is factually distinct from the declarations in Heath, Meissner and those cases do not apply.

Sentinel C3 also persists in arguing both Hunt and Blood were not qualified to give opinions on valuation and that an expert must testify to value. This position is contradicted by the controlling law in Washington.

The case Sentinel C3 cites regarding need for expert testimony is a medical malpractice case wherein the court recognized "expert testimony is required to establish the standard of care and most aspects of causation in a medical negligence action." Seybold v. Neu, 105 Wn. App. 666, 678, 19 P.3d 1068 (2001). This is not a medical negligence case and the Seybold court's statement is not controlling here.

Sentinel C3 provides no other authority stating that valuation of stock shares requires an expert opinion. On the contrary and as noted above, the trial court is not required to accept any such expert opinion in

making its own determination of fair value and if the court feels an expert is needed, it can appoint one itself. RCW 23B.13.300(5).

In addition, the Hunts and Bloods are entitled to testify as to the value of their own shares. There is no question under Washington decisional law that the owner of personal property or chattel can testify as to its value without having to qualify as an expert. Cunningham v. Town of Tieton, 60 Wn.2d 434, 436, 374 P.2d 375 (1962); quoted in Port of Seattle v. Equitable Capital, 127 Wn.2d 202, 211, 898 P.2d 275 (1995); accord Ingersol v. Seattle-First Natl. Bank, 63 Wn.2d 354, 387 P.2d 538 (1963); see McCurdy v. Union Pac. R.R. Co., 68 Wn.2d 457, 468-469, 413 P.2d 617 (1966) ("Of course, the owner of a chattel may testify as to its market value without being qualified as an expert in this regard."); see also State v. Hammond, 6 Wn. App. 459, 461, 493 P.2d 1249 (1972) ("The prevailing rule is that the owner of a chattel may testify as to its market value without being qualified as an expert in this regard.") (citing McCurdy, *supra*); relied upon in State v. McPhee, 156 Wn. App. 44, 230 P.3d 284 (2010) and State v. Gerber, 28 Wn. App. 214, 622 P.2d 888 (1981).

What is more, it is well established that stock options and shares are recognized in Washington as personal property or chattel. Marriage of Langham, 153 Wn.2d 553, 564-565, 106 P.3d 212 (2005); see also Suther, 28 Wn. App. 838 (valuing and distributing shares of corporate stock in a divorce proceeding); Marriage of Harrington, 85 Wn. App. 613, 935 P.2d

1357 (1997); Marriage of Brooks, 51 Wn. App. 882, 756 P.2d 161 (1988); Marriage of Berg, 47 Wn. App. 754, 737 P.2d 680 (1987).

Thus, the Hunts and Bloods can testify as to the value of their shares – including disputing Mr. Kukull's valuation of the shares – because such shares are their personal property. Id.; see also Marriage of Gillespie, 89 Wn. App. 390, 948 P.2d 1338 (1997) (considering testimony from owner of stock in valuation of same).

Accordingly, the Court of Appeals did not commit error or create an issue of substantial public interest by following Washington law and recognizing that the admitted testimony by both Mr. Hunt and Mr. Blood regarding the value of their shares, and their concerns with Mr. Kukull's valuation, created a disputed issue of material fact such that summary judgment was inappropriate. Review is unwarranted pursuant to RAP 13.4(b) and Sentinel C3's petition should be denied.

C. Whether Weighing or Disregarding Evidence, Summary Judgment Was Still Inappropriate.

The majority of Sentinel C3's remaining arguments are variations on this same theme – that the evidence was inadmissible and therefore was not weighed or admitted, so Mr. Kukull's opinion was the only evidence before the court and summary judgment was appropriate.

This argument – in any variation – is not supported by the record. The trial court did not hold that Mr. Hunt's declaration or Mr. Blood's responsive pleading were inadmissible; the trial court just held that such

evidence was insufficient to create a disputed issue of material fact on valuation.

As the Court of Appeals correctly noted, whether the trial court found the testimony of Mr. Hunt and Mr. Blood sufficient or not, such evidence still had to be considered, i.e. weighed, and thus summary judgment was inappropriate. Ingersol, 63 Wn.2d at 358; Wicklund, 122 Wn. 546; Worthington, 73 Wn.2d at 763; Hammond, 6 Wn. App. at 461; Renz, 114 Wn. App. at 623; Baker, 131 Wn. App. at 624; Dalton, 130 Wn. App. at 661 fn 3.

Also, as discussed under the procedural facts above, Mr. Hunt's Declaration, Mr. Blood's responsive pleading, and the discovery pleadings were all admitted and therefore on record before the court; only Mr. Hecker's report was excluded by the trial court. Sentinel C3 persists in calling all of this evidence "inadmissible" but no such determination was made – and Sentinel C3 cannot argue now, for the first time, that the trial court's consideration of the hearsay contained in Mr. Blood's responsive pleading necessitates discretionary review. The only testimony or pleading Sentinel C3 objected to was Mr. Hecker's report. All of Sentinel C3's other arguments regarding Mr. Hunt's declaration and Mr. Blood's response went to weight, not admissibility.

Thus, the decision by the Court of Appeals does not create a substantial public issue with regard to the law of summary judgment by requiring the trial court to consider inadmissible evidence – as Sentinel C3 contends. The only evidence excluded by the trial court was Mr. Hecker's

report and, as the Court of Appeals stated at the outset, its decision did not reach that issue. Instead, based on controlling Washington law and the testimony and evidence that was before the court – and therefore had to be considered by the court – the Court of Appeals properly recognized there was conflicting evidence and summary judgment was inappropriate. Such determination does not warrant review under the requirements of RAP 13.4(b) and thus Sentinel C3's petition should be denied.

D. No Arbitrary, Vexatious or Bad Faith Conduct By Dissenters.

Finally, Sentinel C3 argues the Court of Appeals erred in reversing the award of statutory attorney's fees under RCW 23B.13.310. Sentinel C3 does not provide any argument or assertion, though, that this alleged error meets any of the requirements for discretionary review under RAP 13.4(b). Sentinel C3 just argues it was error, but alleged error alone is not sufficient to establish the need for review by the Washington Supreme Court. Id.

The Court of Appeals properly recognized that the award of attorney's fees failed due to both the reversal of the summary judgment decision and on the merits – both procedurally and substantively. App. A, p. A-12.

Procedurally, the trial court failed to include sufficient findings to support its award and/or calculation of the attorney's fees award. As the Court of Appeals correctly recognized, a failure to provide appropriate findings to support both the award and the specific amount of fees will

normally result in a remand. Mahler v. Szucs, 135 Wn.2d 398, 435, 957 P.2d 632 (1998).

Sentinel C3 argues Mahler should not apply because there was sufficient information in the record to determine what the attorney fees were based on – but that is not the holding or decision in Mahler. Under Mahler, the court awarding the fees is specifically required to include sufficient findings in the order to demonstrate how it arrived at and computed the award. Id. Otherwise, the reviewing court is left speculating as to what in the record the trial court did or did not consider, include, or exclude – just as here. Id.

The amount of the attorney fees award by the trial court here did not coincide or match any amount proposed or calculated by any of the parties, and the final order contained no findings of fact to explain how the trial court arrived at the award or calculated the amount. CP 900-902, 937-946, 1013-1016, 1077-1078. Thus, pursuant to Mahler, the order itself was defective on the merits and subject to remand.

Substantively, the award was also manifestly unreasonable and thus constituted an abuse of discretion. RCW 23B.13.310 permits the trial court to award attorney's fees against the dissenters if the dissenters behavior was arbitrary, vexatious or not in good faith in either making their initial demand or under the statute and its proceedings generally. RCW 23B.13.310(1) & (2)(b).

Sentinel C3 has consistently argued – and continues to argue – that the dissenters acted arbitrarily, vexatiously or in bad faith by: 1) not

accepting Mr. Kukull's valuation and what Sentinel C3 paid in the first place; 2) submitting an allegedly excessive demand of their own; and 3) not producing the opinions of their consulting expert, while taking too long to hire and produce the opinions of their trial expert.

As the Court of Appeals appropriately recognized, none of this alleged conduct by the dissenters constituted arbitrary, vexatious or bad faith behavior as those terms are intended under RCW 23B.13.310 and other virtually identical fee provisions. See Humphrey Indus. v. Clay St. Assocs., 170 Wn.2d 495, 242 P.3d 846 (2010) [Humphrey I]; see also Humphrey Indus. v. Clay St. Assocs., 176 Wn.2d 662, 295 P.3d 231 (2013) [Humphrey II].

On the contrary, the Washington Supreme Court has specifically held that declining a corporations offer – and thus its valuation – and submitting an excessive valuation does not constitute bad faith, arbitrary or vexatious conduct under these statutory fee provisions. Humphrey II, 176 Wn.2d at 670. Sentinel C3 attempts to distinguish Humphrey II by noting in that action the dissenter prevailed at trial – but the court did not base or tie determination of whether conduct was arbitrary or vexatious on who prevailed at trial. Id. (Also, following that logic and argument, if the dissenters have prevailed on appeal then they cannot have been arbitrary and vexatious, and thus the award would still need to be reversed on appeal.)

In addition, the trial court itself found that the Hunts and Bloods acted reasonably when they made their demands for payment. 10/21/11

VRP 30:13-17. Thus, despite Sentinel C3's assertions to the contrary, there was insufficient law or evidence to support an award of attorney's fees based on any alleged bad faith, arbitrary, or vexatious conduct by the dissenters for rejecting Sentinel C3's initial valuation and offer or making their own demand. Id.; Humphrey II, 176 Wn.2d at 670.

After the litigation commenced, the Hunts and Bloods had no obligation to disclose the opinions of their consulting experts – and the trial court did not hold or find otherwise. CR 26(b)(5)(B). Also, as discussed in the procedural facts above, any delay in producing the report and opinions of the dissenters' trial expert, Mr. Hecker, was due to the corresponding delay by Sentinel C3 in getting the protective order signed by the Court and filed. The trial court also did not determine that this delay constituted arbitrary, vexatious or bad faith behavior – by anyone.

Ultimately, the trial court's award of fees against the dissenters was based on the alleged inadmissibility of Mr. Hecker's report – which, as discussed above, was a problem based on the trial court's confusion over *authentication* and *admissibility*.

The trial court's decision that this single evidentiary issue constituted arbitrary, vexatious or bad faith behavior under the entire dissenter's rights statute and procedures was manifestly unreasonable and thus constituted an abuse of discretion. Noble v. Safe Harbor Trust, 167 Wn.2d 11, 17, 216 P.3d 1007; quoted in Humphrey Indus. v. Clay St. Assocs, 170 Wn.2d 495, 242 P.3d 846 (2010). Sentinel C3 has failed to argue, let alone establish, how such determination by the Court of Appeals

warrants review under the requirements of RAP 13.4(b). Accordingly, Sentinel C3's petition should be denied.

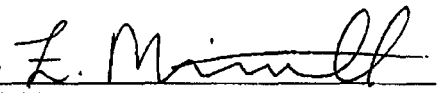
IV. CONCLUSION

Sentinel C3's petition for discretionary review should be denied because the only issue of substantial public interest raised by Sentinel C3 is already addressed and determined under the legislative provisions of RCW Chapter 23B.13. Specifically, Sentinel C3 argues that the decision of the Court of Appeals will cause or result in misconduct by dissenting shareholders – but RCW 23B.13.310 already provides penalties and repercussions for any such misconduct. Thus, the legislature has already decided this public policy issue and there is nothing for the Supreme Court to determine or address.

Sentinel C3 has failed to argue or establish any of the other grounds for review under RAP 13.4(b) apply, and thus has failed to establish review is warranted. Accordingly, its petition should be denied.

DATED this 14th day of October, 2013.

PAINE HAMBLEN LLP

By: 

Vicki L. Mitchell, WSBA 31259
Attorneys for Respondents
Chris & Carmen Hunt

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of October, 2013, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

Thomas T. Bassett Kjirstin J. Graham K&L Gates, LLP 618 West Riverside Ave., Suite 300 Spokane, WA 99201 Attorneys for SentinelC3, Inc.	X HAND DELIVERY ___ U. S. MAIL ___ OVERNIGHT MAIL ___ VIA FACSIMILE
Michael and Jenae Blood 3310 West Victory View Drive Boise, ID 83709	___ HAND DELIVERY X U. S. MAIL ___ OVERNIGHT MAIL ___ VIA FACSIMILE

V. L. Mitchell

Vicki L. Mitchell

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Case No.: 89317-9
Document: Answer to Petition for Discretionary Review by Respondent Hunt
Atty Info: Vicki L. Mitchell, WSBA #31259
Phone: 509-455-6000
Email: Vicki.mitchell@painehamblen.com

Terry L. Strothman, Paralegal
PAINE HAMBLEN
717 W. Sprague, Suite 1200
Spokane, WA 99201
Phone: 509-455-5181
Fax: 509-838-0007
E-mail: terry.strothman@painehamblen.com