No. 89317-9

SUPREME COURT
OF THE STATE OF WASHINGTON

SENTINELC3, 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,

Respondents.

Appeal from the Court of Appeals, Division III
of the State of Washington
Cause No. 30553-8-III
(consolidated with 30592-9-III; 30837-5-III; 30881-2-III)

PETITIONER SENTINELC3, INC.'s REPLY TO ANSWER TO PETITION FOR DISCRETIONARY REVIEW BY RESPONDENTS CHRIS AND CARMEN HUNT

Kjirstin J. Graham, WSBA # 40328
Thomas T. Bassett, WSBA # 7244
K&L GATES LLP
Attorneys for Petitioner
618 West Riverside Avenue, Suite 300
Spokane, WA 99201-0602
Telephone: (509) 624-2100
Facsimile: (509) 456-0146
kjirstin.graham@klgates.com
tom.bassett@klgates.com

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Petitioner SentinelC3, Inc., a Washington Corporation, referred to herein as "Sentinel," through its undersigned counsel of record, hereby provides its Reply to the Answer to Petition for Discretionary Review by Respondents Chris and Carmen Hunt ("Respondents")[1] as follows:

I. ARGUMENT

Respondents' Answer to the Petition shows exactly why this appeal directly affects substantial public interests and should be decided by this Court pursuant to RAP 13.4(b)(4). The Answer raises six new issues in an attempt to cloud the erroneous and harmful implications of the Court of Appeals' Opinion: that dissenters' rights cases under RCW 23B.13.010 *et. seq.* are exempt from the requirements of Civil Rule ("CR") 56 because summary judgment can be defeated solely on the basis of hearsay and self-serving assertions. This Court should accept review and reverse the Opinion based on the following new issues raised in Respondents' Answer.

A. Sentinel's Sworn Expert Opinions Were Not Hearsay, And Respondents Belatedly Argue This Only to Distract From Their Own Lack of Expert Testimony.

Respondents assert a belated and meritless hearsay objection to Sentinel's sworn expert testimony by James Kukull, to distract from

[1] Respondents Michael and Janae Blood did not file an Answer to the Petition and, as they have throughout this litigation and appeal, presumably will rely on the arguments raised by Hunts. Accordingly, this Reply refers to Hunts and Bloods collectively as "Respondents."

Respondents' admitted lack of sworn expert testimony as to fair value. Answer, p. 13. Contrary to Respondents' assertion, Mr. Kukull *did* testify under oath in his affidavit as to the truth of his opinions set forth in his 87-page expert report, which was attached to and specifically referenced in his affidavit. CP 226-320. Respondents cite no authority requiring Mr. Kukull to regurgitate those opinions in his affidavit. Answer, p. 3. In any event, Respondents never raised an objection to Mr. Kukull's affidavit at summary judgment, so it is waived. *Meadows v. Grant's Auto Brokers, Inc.*, 71 Wn.2d 874, 881, 431 P.2d 216 (1967).

In stark contrast, Respondents' "expert," Jerry Hecker, submitted no affidavit or declaration attesting to the truth of the opinions in his report. CP 597-672.[2] The critical distinction between Mr. Kukull's sworn expert opinions and Mr. Hecker's unsworn report has nothing to do with authentication - only with the basic rule against hearsay.

The Trial Court grasped this critical distinction: Sentinel had sworn expert testimony from Mr. Kukull as to fair value, including his sworn, detailed analysis and basis for that opinion; Respondents had

[2] Respondents falsely assert that certain discovery delays led to a delay in the completion of Mr. Hecker's report and this somehow excuses their lack of expert testimony from him. Answer, pp. 5-7. As an initial matter, Respondents' expressly waived any claim that they needed more discovery time before the summary judgment hearing. 10/21/11 VRP 4:6-25. Moreover, the argument is irrelevant because Respondents lost summary judgment due to the inadmissibility of Mr. Hecker's report, not the timing of its completion. *Id.* at 28:9--29:7; 30:8-12.

unsworn, out-of-court statements by Mr. Hecker that amounted to nothing more than inadmissible hearsay. ER 801, 802; 10/21/2011 VRP 16:18-20, 17:6-14, 28:24-29:24. Because CR 56(e) requires admissible evidence to defeat summary judgment, Respondents could not offer the unsworn Hecker report for its truth: to establish that fair value was something other than what Mr. Kukull testified that it was. *Id.*

The public interest is substantially affected if dissenters can defeat summary judgment and force a corporation to trial on what is essentially Respondents' absurd theory: "Sentinel may have sworn expert testimony establishing value, but I hired someone who told me he's an expert and that the value is something different." This does not even come close to compliance with Washington's summary judgment standards, specifically, the requirement in CR 56(e) that affidavits shall be made on personal knowledge and set forth facts admissible in evidence.

Respondents try to confuse these evidentiary issues to distract from their unjustified failure to follow basic evidence rules and requirements of CR 56(e). Corporations in dissenters' rights cases should be permitted to move for summary judgment based on sworn expert opinions as to fair value. Correspondingly, dissenters should not be able to force the corporation to trial by raising belated, baseless objections. To hold otherwise, encourages unwarranted litigation and undermines the purpose

of summary judgment - the efficient resolution of cases. *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986) (purpose of a summary judgment "is to avoid a useless trial when there is no genuine issue of any material fact").

B. Respondents Falsely Assert that Sentinel Never Challenged Mr. Blood's Unsworn Opposition Brief and Would Nullify CR 56 By Requiring a Trial Court to Consider It As "Testimony" Sufficient to Raise a Genuine Issue of Fact.

The Court of Appeals based its Opinion, in part, on its erroneous assumption that Mr. Blood submitted an "affidavit," when, in fact, no such affidavit exists. Opinion, pp. 11, 12. Mr. Blood submitted only arguments, not evidence, in his brief in opposition to Sentinel's motion. CP 574-78. Respondents perpetuate that error by asserting that Mr. Blood "essentially presented his own testimony in the context of his response brief," which was "never challenged by Sentinel." Answer, pp. 3, 4.

First, it is a fallacy to pretend that an unsworn opposition brief is "testimony" to be considered on summary judgment. This argument, again, highlights Respondents' failure to comply with CR 56 and the substantial public interest harmed by the Court of Appeals' willingness to let them do so. CR 56(e) provides that a non-moving party on summary judgment "may not rest upon the mere allegations or denials of his pleading." That is exactly what Blood did. He presented no facts "as

would be admissible in evidence" as required by CR 56(e) to create a genuine issue of fact and defeat summary judgment. Accepting arguments in a response brief as "evidence" sufficient to survive summary judgment eviscerates CR 56 and the policy behind it. If accepted as a new standard, summary judgment will never be granted.

Second, Respondents misrepresent the record by contending that Sentinel never challenged Blood's opposition brief. *Cf.* Answer, p. 4 *with* CP 590-595 (Sentinel's reply to Blood's brief stating: Blood has "zero evidentiary support" and his allegations "are not made in an affidavit as CR 56 requires").[3] In any event, an opposition brief is not "evidence" to be "challenged" because it does not create a genuine issue of fact. *Seven Gables Corp.*, 106 Wn.2d at 13 (1986) (nonmoving party may not rely on argumentative assertions that unresolved factual issues remain, or having its affidavits accepted at face value); *Heath v. Uraga*, 106 Wn. App. 506, 512-13, 24 P.3d 413 (2001) (same); 14A Wa. Prac. 25:6 (2d. ed. 2013) ("When responding to a motion for summary judgment, a party may not rest upon mere allegations or denials in his or her pleadings. The responding party must submit additional supporting materials

[3] At the summary judgment hearing, Sentinel further argued: "As an initial matter, [Blood] has not submitted any affidavits or declarations in response to the summary judgment motion. For this reason alone under CR 56 summary judgment should be entered against him." 10/21/2011 VRP 7:15-18.

demonstrating the existence of a material issue of fact, or risk the entry of a summary judgment.") (citing CR 56).

A substantial public interest is affected by this issue, because the Court of Appeals' Opinion effectively nullifies the requirements of CR 56(e). The Opinion does so by allowing litigants to defeat a properly supported summary judgment motion with nothing more than unsworn assertions. Opinion, pp. 16-17.

C. Respondents' Discovery Responses Do Not Create a Genuine Issue of Fact Simply By Repeating the Same Unfounded, Self-Serving Assertions Found in Hunt's Declaration and Blood's Opposition Brief.

Repeating the same thing twice does not amount to "more" evidence. But that is what Respondents would have this Court believe. A substantial public interest is affected if dissenters merely had to repeat the same unfounded assertions in their discovery responses to defeat summary judgment.

Respondents raise a new issue by arguing that their discovery responses created a genuine issue of fact, because those responses "provided the basis for their demand" and identified an "expert" they expected to call a trial. Answer, pp. 4, 15. But the "basis" for Respondents' demand set forth in their discovery responses consists of the same bald, self-serving assertions repeated in Hunt's four-page declaration

and Blood's opposition brief. *Cf.* 333-338, 348-340 *with* CP 560-64; CP 574-78. This purported "basis" consists of made up "facts" unsupported by any evidence admitted on the record, and, more importantly, not in compliance with CR 56(e). *Id.*

Respondents' regurgitation of the same unsupported assertions and hearsay consultant opinion[4] both in their discovery responses and opposition to the summary judgment motion does not create "more" evidence to defeat summary judgment. The Trial Court properly disregarded such "evidence" without improperly weighing it because there was nothing to weigh. *See Washington v. Evans Campaign Committee*, 86 Wn.2d 503, 506-07, 546 P.2d 75 (1976) (statements in affidavits based on hearsay carry no weight at summary judgment); *Heath*, 106 Wn. App. at 512-13 (affidavits not accepted at face value); *Meissner v. Simpson Timber Co.*, 69 Wn2d 949, 955-56, 421 P.2d 674 (1966) ("purpose of the

[4] Respondents argue that, because Sentinel only objected to Mr. Hecker's report and the "only evidence excluded by the trial court was Mr. Hecker's report," that the Trial Court was required to consider Mr. Hunt's declaration as evidence creating a genuine issue of fact, including Hunt's reference to a "consultant" opinion that the Court of Appeals found was hearsay. Answer, pp. 15, 16; Opinion, pp. 11, 12. This argument misrepresents the record and the standards on summary judgment. Agreeing with Sentinel, the Trial Court rejected the consultant opinion because Respondents never produced it, other than as hearsay in Hunt's declaration. 10/21/2011 VRP 17:6-9; 29:11-14; CP 586 ("Hunt's Response is devoid of admissible evidence showing his payment demand was not arbitrary"). The Trial Court's ruling on this issue is proper under summary judgment law. *Washington v. Evans Campaign Committee*, 86 Wn.2d 503, 506-07, 546 P.2d 75 (1976) (statements in affidavits based on hearsay carry no weight at summary judgment).

summary judgment rule is to pierce such formal allegations of facts in pleadings when it appears there are no genuine issues").

Furthermore, Respondents' identification of Mr. Hecker in the discovery responses as their testifying expert likewise failed to raise a genuine issue of material fact. CP 500-01. A promise to provide evidence of fair value at trial is not evidence. In response to Sentinel's motion (not at a later date), Respondents had to set forth specific facts, admissible in evidence, showing a genuine issue as to fair value. CR 56(e). To hold otherwise, would undermine the public's substantial interest in assuring that courts and litigants comply with CR 56.

D. CR 56 Would Be Rendered Meaningless By Allowing Respondents to Correct Their Failure to Submit Admissible Expert Testimony on a Motion for Reconsideration.

Respondents assert that the Trial Court should have altered its decision after Hunts submitted a belated declaration by Mr. Hecker with their motion for reconsideration. Answer, p. 5. This would render the summary judgment procedure meaningless by giving litigants unmerited second bites at the proverbial apple, allowing them a practice run with an opportunity to fix errors that warranted summary judgment in the first place. Respondents ask the Court to treat summary judgment as an advisory opinion, pointing litigants to the evidentiary gaps they need to fill

at trial. Respondents have offered no explanation, let alone any justification, as to why they could not have submitted Mr. Hecker's declaration by the summary judgment hearing. *See generally* Answer.

Reversing summary judgment on this basis affects a substantial public interest, because it sets a precedent that dissenters need not comply with basic evidence rules on summary judgment or CR 56(e). This, in turn, undermines judicial economy and encourages unwarranted litigation.

E. Respondents Would Nullify CR 56(e)'s Requirement of Competent Testimony By Allowing Lay Opinions on Fair Value as a Substitute for Expert Testimony Based Solely on the Dissenters' "Ownership" of the Closely-Held Stock.

Respondents contend that their ownership of Sentinel stock, alone, renders them competent to opine as to its fair value. Answer, pp. 13-14. This issue affects a substantial public interest because, under the Opinion, dissenters need not comply with CR 56(e)'s requirement that an affiant show he is competent to testify as to the stock's fair value. Instead, the Opinion allows dissenters to rely upon their own unqualified, lay witness "beliefs" to carry them to trial. Opinion, pp. 12-13.

Prior to this case, no Washington court had ever addressed whether a lay witness is qualified to opine as to the value of closely-held stock, based on their ownership or otherwise. Respondents admitted they are not stock valuation experts. 10/21/11 VRP 15:7-8, 21:22—23:2.

Closely-held stock valuation is an issue that requires expert testimony and Respondents knew it by hiring Mr. Hecker. Unlike other forms of personal property, like a used car or refrigerator, closely-held stock, by its definition, has no market and its valuation requires skilled judgment. *Suther v. Suther*, 28 Wn. App. 838, 842-43, 627 P.2d 110, 112 (1981).

Respondents, however, would make mere "ownership" of the closely-held stock a substitute on summary judgment for the requisite experience and skill necessary to analyze and properly weight the complex factors that inform the value of closely-held stock. Answer, pp. 13-14; *see also* CP 230-317 (Kukull's detailed report and resume reflecting his professional accreditations in business valuation). None of the cases Appellants cite held that an owner's lay witness testimony is probative as to the value of closely-held stock. *See* Answer, pp. 13 -14 (citing cases). In fact, in each of the cases where closely-held stock is valued, the court relied on expert testimony. *Id.* Respondents fail to inform this Court that, in the one case where a court considered an owner's testimony as to value, that owner was an expert witness. *See In re Marriage of Gillepsie*, 89 Wn. App. 390, 397, 948 P.2d 1338 (1997) (cited in Answer, p. 14).

This is why Respondents knew they needed an expert opinion on value to survive summary judgment. What they arbitrarily failed to do was submit expert opinions admissible in evidence, as required by

CR 56(e). The public interest is substantially affected if dissenters can, like the Opinion has allowed Respondents to do, skate by to trial with a hearsay expert report and their own unfounded, admittedly non-expert beliefs as to value.

F. The Opinion Affects a Substantial Public Interest By Authorizing the Very Type of Arbitrary Conduct the Attorneys' Fee Award Under RCW 23B.13.310 Was Designed to Prevent.

Respondents argue that any public interest is already addressed by the attorneys' fee provision of RCW 23B.13.310, which gives the court discretion to award attorneys' fees against a party who acts arbitrarily, vexatiously or not in good faith. Answer, p. 8. The public's interest is to ensure our courts further the Legislature's purpose to encourage parties to proceed in good faith and avoid unnecessary litigation. CP 434-35; SENATE JOURNAL, 51st let., 2nd Spec. Sess., at 3093 (Wash. 1989). But the Opinion thwarts the purpose of the attorneys' fee statute, because it immunizes the very arbitrary and bad faith conduct it was enacted to deter.

The Opinion encourages unwarranted litigation by giving dissenters a free pass all the way to trial, so long as the dissenters manufacture a "belief" as to the fair value of their shares. Contrary to the purpose and terms of the statute, Trial Courts are stripped of their discretion to award fees to the corporation even if the dissenter's "belief"

is not supported by any admissible evidence, is irrational or lacks good faith. Dissenters can make unreasonable objections to the corporation's value with impunity. For this additional reason, the Court should accept review and reverse the Court of Appeals.

II. CONCLUSION

All of the new issues raised by Respondents show why this case affects a substantial public interest: they aim to further a standard in dissenter's rights cases that exempts dissenters from compliance with CR 56 and effectively prevents trial courts from ever entering summary judgment as to fair value, or awarding expenses against dissenters who stake out arbitrary, *i.e.* unsupported, positions as to fair value. The Opinion does damage to the entire litigation process and rules by essentially eliminating any requirement to abide by CR 56(e).

The negative import of the published Opinion is also significant given that it is the only precedent addressing the sufficiency of a party's fair value evidence on summary judgment in a case under RCW 23B.13.300. In violation of CR 56, the Opinion makes a mere "belief" based on hearsay and unsupported, self-serving assertions sufficient to defeat summary judgment. The Opinion is also the only published opinion addressing an award of attorneys' fees under RCW 23B.13.310, rendering that statute useless to remedy the arbitrary or bad

faith conduct it was designed to address. Accordingly, this Court should accept review under RAP 13.4(b)(4) and reverse the Court of Appeals.

RESPECTFULLY SUBMITTED this 25th day of October, 2013.

K&L GATES LLP

By 

Kjirstin J. Graham, WSBA # 40328
Thomas T. Bassett, WSBA # 7244
Attorneys for Petitioner
SENTINELC3, INC.

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of October, 2013, I caused to be served a true and correct copy of the foregoing **PETITIONER SENTINELC3, INC.'s REPLY TO ANSWER TO PETITION FOR DISCRETIONARY REVIEW BY RESPONDENTS CHRIS AND CARMEN HUNT** to the parties below and in the manner indicated:

Vicki L. Mitchell
Christopher Stephen Crago
Paine Hamblen, LLP
717 W. Sprague Ave., Ste. 1200
Spokane, WA 99201 — ***Via Hand Delivery***

Michael and Janae Blood
3310 Victory View Dr.
Boise, ID 83709 — ***Via Federal Express***

DATED this 25th day of October, 2013.

K&L GATES LLP

By _____
Kjirstin J. Graham, WSBA # 40328
Thomas T. Bassett, WSBA # 7244
Attorneys for Petitioner
SENTINELC3, INC.