No. 30553-8-III,
No. 30592-9-III, and
No. 308375-III

COURT OF APPEALS OF THE STATE OF

WASHINGTON, DIVISION III

SENTINELC3, INC., a Washington corporation,
Respondent.

v.

CHRIS J. HUNT and CARMEN HUNT; MICHAEL BLOOD and JANAE BLOOD,
Appellants.

Appeal from the Superior Court for Spokane County
Cause No. CV 2011-02-00467-2

SENTINELC3, INC.'S RESPONSE BRIEF

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I. SUMMARY OF ARGUMENT

Sometimes business partners need to go their separate ways. Where those business partners are shareholders in a corporation, they may disagree about the value of shares they hold in a common enterprise. Washington law foresaw this dilemma and provided a procedure to follow in such cases, outlined in the dissenters' rights statute found at RCW 23B.13.010, *et seq.*

That is what happened here. Appellants, dissatisfied with the offers they received for their shares in Respondent SentinelC3, Inc. ("Sentinel"), triggered a dissenters' rights action, which allows for a judicial determination of the shares' fair value.

As Appellants concede, an appraisal proceeding is the exclusive statutory remedy for shareholders who dissent from corporate actions – such as the reverse stock split that occurred here – that divest them of their shares and believe they have not received fair value for these shares. The only substantive issue in an appraisal proceeding is the fair value of Appellants' shares. The dissenters' rights statute also authorizes attorneys' fees against Appellants if they exercised their dissenters' rights "arbitrarily, vexatiously, or not in good faith." RCW 23B.13.310(1).

Appellants' conduct in this matter is the essence of arbitrariness and lack of good faith. Appellants refused to provide evidence of fair value when they rejected Sentinel's valuation of their

shares – a valuation supported by a detailed expert report ("Kukull Report") provided to Appellants. Appellants then failed to provide evidence of fair value when they presented inflated counter-demands to Sentinel. To avoid paying those inflated and wholly unsupported counter-demands, Sentinel had to file this appraisal action. But throughout nearly a year of litigation, Appellants never produced evidence to rebut Sentinel's professional valuation.

Accordingly, Sentinel moved for summary judgment on the basis of sworn affidavit testimony from its expert as to his fair value opinion and also requested attorneys' fees under the statute given the sheer lack of foundation for Appellants' position. As late as the summary judgment hearing, however, Appellants failed to present the court with admissible evidence of fair value sufficient to raise a genuine issue of material fact to rebut Sentinel's valuation. Appellants Hunts provided an unsworn expert report at the eleventh hour before the hearing, but, with no justification whatsoever, failed to overcome the basic prohibition on hearsay by obtaining a declaration from their expert swearing to the truth of his opinions in his report. Appellants also expressly declined a continuance under CR 56(f).

The trial court's grant of summary judgment was predicated on a straightforward application of CR 56, requiring admissible evidence to defeat summary judgment, and the hearsay rules, which

require that for statements offered for their truth to be admissible, they must be sworn under oath as true. Appellants conceded that, unlike Kukull's opinions, their expert's opinions as to value were not sworn as true. Appellants' own unqualified lay opinions as to share value – unsupported by any evidence in the record – were simply insufficient to raise a genuine issue of fact as to value in the face of Kukull's detailed, reasoned expert report - attested by him to be true.

Therefore, Appellants left the trial court with no choice but to grant Sentinel's summary judgment motion, determining fair value to be the amount set out in Sentinel's expert report and also awarding reasonable costs and attorneys' fees.

Now, Appellants hope this Court will save them from their failure to provide admissible evidence of fair value. But even in a dissenters' rights action, the law does not protect a party that refuses to submit admissible evidence to raise a genuine issue of material fact at summary judgment. Appellants' failure to do so justifies the court's entry of summary judgment in Sentinel's favor.

II. STATEMENT OF THE CASE

This matter is a petition for appraisal of shares Sentinel acquired from Appellants as part of a reverse stock split, a proceeding governed by Washington's dissenters' rights statute, RCW 23B.13.010, *et seq.* The underlying facts in this case follow the procedure set out in this statute.

A. Sentinel followed the procedure set out in RCW 23B.13, but Appellants rejected Sentinel's valuation of their shares.

Appellants are former shareholders of Sentinel: Chris Hunt held 1,000,000 common shares and Michael Blood held 250,000 shares. CP 4, 198-99, 188-92.[1]

On October 6, 2010, Sentinel notified its shareholders—including Appellants—of a special meeting to perform a reverse stock split and purchase fractional shares. CP 6, 188-92, 199. This notification included a notices of dissenters' rights per RCW 23B.13.200. CP 6, 26, 28-32, 188-92, 200.

On October 28, 2010, a shareholders meeting was held to consider the proposed amendment. Although Appellants voted against the reverse stock split, it passed. CP 6, 26-32, 188-92, 200.

On or around October 28, 2010, Sentinel sent Appellants another notice of dissenters' rights per RCW 23B.13.220. CP 6, 8, 34-45, 64-75, 188-92, 200. In response, Appellants provided Sentinel with demands for payment. CP 7, 47-48, 77-78, 198-92, 200. Sentinel made payment to Appellant Hunt of $195,790.92 on December 1, 2010. CP 7, 50-59, 200. Sentinel made payment to Appellant Blood of $48,956.60 on December 3, 2010. CP 7-8, 80-89.

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[1] Hunts' and Bloods' marital communities were named as respondents to Sentinel's Petition. CP 3. References to Appellants Hunts' Answer (CP 198-207) demonstrate Hunts admissions to pertinent facts alleged in the Petition. Appellants Bloods' Answer does not specifically deny the allegations of Sentinel's Petition and, under CR 8(d), failure to deny is an admission. *See generally* CP 188-92.

Sentinel based the amount of these payments on an expert appraisal of $0.1952 per share provided by James Kukull, CPA, ASA, ABV, a business valuation expert, along with payment for interest as provided by RCW 23B.13.250. Sentinel provided Mr. Kukull's appraisal report, including supporting documentation, to Appellants. CP 7-8, 10, 97-184, 186-87, 203.[2]

Appellants disagreed with Sentinel's fair value determination. In a December 27, 2010 letter, Appellant Hunt argued that the per share fair value for his Sentinel shares was $0.51204 – thus demanding payment of more than double Sentinel's valuation. CP 7, 61-62, 201. In a separate letter delivered to Sentinel on February 2, 2011, Appellant Blood argued that the per share value for his Sentinel shares was $0.6443 – thus demanding payment of more than triple Sentinel's valuation. CP 322, 327-30, 332-45.

The varying estimates resulted in wildly different valuations of Appellants' total shares in Sentinel. Sentinel determined the fair value of Appellant Hunt's shares to total $195,200, but Hunt argued the value of his shares totaled $512,040. CP 50-62. Sentinel determined the fair value of Blood's shares to total $48,956.60, but Blood argued that the value of his shares totaled $161,075. CP 80-89, 327-30.

[2] Mr. Kukull submitted an affidavit at summary judgment attaching both his report and correspondence he sent to Sentinel on January 17, 2011 confirming that the valuation in his report was valid as of October 31, 2010. CP 226-320

Appellants claimed to rely on an undisclosed professional fair valuation opinion to support their estimates. CP 61-62, 327-30. Oddly, while Hunt's and Blood's estimates of the per share value vary widely from each other, they are purportedly based on this same alleged professional opinion, which each Appellant then inflated for different reasons to arrive at their respective estimates. *Id.* Appellants, however, refused to produce the alleged professional opinion in discovery and it was never introduced into evidence. CP 334-36, 349, 352, 481-95, 574-78; 10/21/2011 VRP 3:20-25.

On January 31, 2011, Sentinel filed its Petition for Determination of Fair Value of Shares of Dissenting Shareholder ("Petition"). CP 3. Filing the Petition was legally required to avoid paying Appellants' inflated demands. RCW 23B.13.300(1).[3] As Appellants concede, the only issue to be decided in a dissenters' rights action is fair value. Hunt Br., p. 21. There is no "fault" to apportion (*id.*), so coloring the corporation's conduct with moral undertones is both irrelevant and inappropriate.[4]

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[3] Importantly, Sentinel complied with all statutory requirements with regard to dissenter's rights proscribed in RCW 23B.13.010 *et. seq.* and Appellants do not contend otherwise. *See generally* Brief of Appellants Hunt (hereafter "Hunt. Br."), which Appellants Bloods joined for purposes of this appeal. Bloods' Notice of Joinder, Oct. 22, 2012. The only issue in the proceeding below was the fair value of Sentinel's shares. Hunt. Br., p. 21.

[4] *See Sound Infiniti, Inc. v. Snyder*, 169 Wn.2d 199, 209-10, 237 P.3d 241 (2010) (appraisal proceeding is the "exclusive remedy" for dissenting shareholders who are squeezed out of a corporation; "Washington clearly does not consider a reverse stock split to be an inherently fraudulent transaction.").

B. Sentinel moved for summary judgment and the court held that Appellants failed to raise a genuine issue of material fact.

On August 9, 2011, Sentinel moved for summary judgment. CP 452-54. Sentinel's summary judgment motion was predicated on a stark contrast in the parties' production of evidence. Despite the passage of nearly a year since Appellants made their inflated counter-demands, and despite months of discovery and Sentinel's production of over 5,000 documents, Appellants had offered no evidence of fair value. CP 322, 334-36, 349, 352; CP 442-43, 565. In contrast, Sentinel had offered an affidavit by its expert, James Kukull, attaching his detailed 87-page expert report and his supplemental report confirming the validity of his valuation as of October 31, 2010 (the time of the reverse stock split). CP 226-320; RCW 23B.13.010(3) (fair value determined at time of corporate action at issue). Notably, Mr. Kukull's affidavit attested under penalty of perjury that his opinions were true and correct. CP 226-28.

On September 29, 2011, the parties stipulated to a two-week continuance of the summary judgment hearing "to allow time for additional discovery." CP 565-566.

On October 18, 2011, after Sentinel had filed its motion and just three days before the continued summary judgment hearing, Appellants filed a new fair value report prepared by Jerry Hecker ("Hecker Report"). CP 597-672. Rather than being attached to a

declaration by Hecker, the Hecker Report was attached to a declaration by Appellants' counsel. CP 597-98. Unlike Kukull's affidavit, counsel's declaration did not address, much less affirm, the veracity or accuracy of the opinions contained in Hecker's report. *Id.* Sentinel objected to the admissibility of the Hecker Report in its reply brief. CP 588, n. 2.[5]

On October 21, 2011, the court heard argument on Sentinel's summary judgment motion. CP 569-73. At that time, Appellants expressly waived their request for a continuance under CR 56(f) for further discovery. 10/21/2011 VRP 4:6-4:25. During the hearing, Sentinel again pointed out that, because the Hecker Report was not sworn as true by Mr. Hecker, it was hearsay and inadmissible to rebut the sworn Kukull Report. 10/21/2011 VRP 25:10-34.

The trial court grasped this fundamental but critical distinction between the parties' expert evidence. In response to questioning by the trial court, Appellants conceded that for the Hecker Report to be considered by the court, "[i]t would have to be admissible" and to be admissible for the purposes of summary judgment, the report must have been "in the form of a sworn report, a sworn opinion of an expert." 10/21/2011 VRP 16:18-20, 17:10-14. Appellants also

[5] Although Sentinel had received Hecker's report on October 13, 2012, Appellants had not offered the Hecker report into evidence as of the time Sentinel filed its reply brief on October 17, 2011 and the time for briefing had closed. 10/21/2011 VRP 26:16-22.

conceded that the Hecker Report was "not sworn." 10/21/2011 VRP 17:6-9. When Appellants attempted to fall back on the argument that the discovery deadline had not yet passed, the trial court succinctly reminded Appellants that they had just waived further discovery for the purposes of the motion, stating, "today was the day of reckoning." 10/21/2011 VRP 18:9-22.

The trial court reasoned that the only evidence submitted that might have created a genuine issue of fact was the Hecker Report, but only if it had been supported by a declaration from Hecker swearing to the truth of his opinions. 10/21/2011 VRP 28:24-29:7. Because, as Appellants conceded, only Hecker could swear to the truth of his opinions, the report was not admissible in evidence to refute Sentinel's expert evidence as to share value. 10/21/2011 VRP 28:24-29:24.

Without admissible expert testimony from Appellants, all that remained to refute Kukull's valuation was 1) Chris Hunt's affidavit setting forth his beliefs as to why Kukull's valuation was allegedly incorrect and 2) Blood's arguments about the share value in his response brief – none of which were referenced, let alone supported by, any evidence in the record. CP 560-64, 574-78. Hunt and Blood both conceded they are not experts on stock valuation. 10/21/2011 VRP 15:7-8, 21:22-23:2. The trial court noted that Appellants' lay witness beliefs amounted to nothing more than argument, unsupported

by documented facts or by a witness qualified to render opinions on stock valuation. 10/21/2011 VRP 28:18-23; 30:8-12. To defeat summary judgment, Appellants needed to present more than argument; they had to provide the "umph supporting it." 10/21/2011 VRP 28:18-23.

The trial court further found it was "troublesome" that the parties' dispute over fair value had been pending for nearly a year, and that despite the ongoing dispute, a notice of summary judgment, and a continuance of the hearing, Appellants lacked reliable evidence in an admissible form sufficient to create an issue of fact. 10/21/2011 VRP 28:9-23.

Noting Appellants' lack of admissible expert evidence on the issue of fair value, the court granted summary judgment in Sentinel's favor, determining fair value to be $0.1952 per share as established by Mr. Kukull and awarding Sentinel its reasonable attorneys' fees. 10/21/2011 VRP 16:11-17:9; 18:4-22; 19:11-16; 28:18-29:24; CP 450, 677-82.

On November 18, 2011, Appellants filed a motion for reconsideration of the court's grant of summary judgment. CP 793-95. On January 6, 2012, the court denied the motion for reconsideration. CP 879-80.

Appellants' lack of admissible evidence as to fair value was not due to any improper delay or the vagaries of the schedule for

conducting discovery. Specifically, 1) Sentinel agreed to postpone the summary judgment hearing for two weeks to allow for additional discovery, 2) Appellants do not allege any impropriety or bad faith conduct by Sentinel in discovery, 3) the protective order entered in this matter was stipulated, and 4) despite their present complaints as to discovery delays, Appellants expressly waived their request to continue summary judgment under CR 56(f) at the hearing. CP 471-80, 569-73; 10/21/2011 VRP 4:6-4:25.

On January 13, 2012, Sentinel submitted a proposed judgment, supported by a declaration from its counsel, the parties then briefed the reasonableness of the requested attorneys' fee award, and on January 25, 2012, Sentinel submitted an amended proposed judgment for a total of $79,286.64 to account for additional accrued attorney's fees. CP 898-936-948, 981-83, 991-93, 997-1016. On February 1, 2012, the trial court informed the parties that it was taking the proposed judgment under advisement pending completion of the appellate process. CP 1062. Sentinel then moved for entry of judgment, or alternatively to set bond pending appeal. CP 1024-26. During oral argument on March 30, 2012, the court granted that motion,[6] and, on April 5, 2012, entered judgment for Sentinel, awarding it costs, expert fees, and attorneys' fees totaling $77,186.66.

[6] Appellants have not appealed the trial court's decision to grant Sentinel's motion for entry of judgment rather than deferring entry of judgment as the court had previously indicated its intention to do in its February 1st letter. *See* CP 1080-88.

CP 1076-79.

Appellants seek a wholesale reversal of their fortunes on appeal, contesting the entry of summary judgment for Sentinel and the judgment setting out Sentinel's attorneys' fees award. *See generally* Hunts Br.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether, as a matter of law, a party that fails to furnish admissible evidence of fair value prior to issuance of an order granting summary judgment is nevertheless always entitled to a trial in an appraisal proceeding under RCW 23B.13.300.

2. Whether evidence showing that there is a dispute between the parties and nothing more raises a genuine issue of material fact at summary judgment.

3. Whether an expert report opining on fair value that is authenticated by an attorney's declaration—but the contents of which are not sworn to be true, correct, or accurate—may be considered evidence of fair value at summary judgment.

4. Whether an expert report attached to the expert's affidavit—which also swears under oath that the opinions in the report as to fair value are true and correct—may be considered evidence of fair value at summary judgment.

5. Whether the award of attorneys' fees is supported by the record when Appellants unreasonably and arbitrarily failed to support

their dissenting valuations with admissible evidence of fair value, even at summary judgment.

6. Whether an attorneys' fee judgment that is based on the lodestar method and the reasonableness of which is supported by the record should be affirmed.

IV. LEGAL ARGUMENT

The lower court properly entered judgment against Appellants and awarded Sentinel attorneys' fees. Appellants argue that the court did not properly enter summary judgment because summary judgment cannot be entered in dissenters' rights actions as a matter of law, but this novel argument—improperly raised for the first time on appeal—is not only waived on appeal, but is baseless. As for the award of attorneys' fees, the record amply supports both the award of attorney's fees and the amount awarded.

A. Appellants lose on the merits due to their failure to offer evidence raising a genuine issue of material fact regarding fair value.

Appellants raise three arguments to show they should have defeated Sentinel's summary judgment motion, but each is unpersuasive. First, Appellants argue that summary judgment was improper because summary judgment should never be entered in an appraisal action like this one, but cite no legal authority for this sweeping, erroneous assertion. Second, Appellants argue that their own declarations, coupled with the fact that they retained an expert,

required denial of Sentinel's summary judgment, but this evidence fails to create a genuine issue of material fact as to Sentinel's fair value. Finally, they argue that Sentinel's expert report is inadmissible at summary judgment to determine fair value. But this argument, raised for the first time *after* entry of the summary judgment order, is waived, and, in any event, fundamentally misconstrues the interplay between authentication, hearsay, and CR 56.

1. Summary judgment is an appropriate tool for appraisal actions like this dissenters' rights action.

As Appellants correctly note, this is a dissenters' rights action, where the lower court determines the fair value of shares in Sentinel. From this, Appellants take a leap of logic to conclude that such an action cannot ever be decided at summary judgment. Hunt Br., pp. 22, 24.

Appellants cite no support for this novel contention. *See generally* Hunts Br. This is no surprise; neither CR 56 nor the dissenters' rights statute expressly excludes the application of CR 56 to dissenters' rights actions. To the contrary, the dissenters' rights statute gives courts "plenary" power; it does not hamstring courts by deleting CR 56. RCW 23B.13.300(5).

Washington case law also supports the use of summary judgment in valuation proceedings. While dissenters' rights actions are not common, Washington courts have used summary judgment to

resolve dissenters' rights cases at least once. *See Matthew G. Norton Co. v. Smyth*, 112 Wn. App. 865, 51 P.3d 159 (2002). Other Washington cases involving valuations have also been decided at summary judgment. For example, the Supreme Court twice affirmed an entry of summary judgment finding the fair value of real estate. *Folsom v. County of Spokane*, 111 Wn.2d 256, 258-60, 759 P.2d 1196 (1988). There is nothing about valuation proceedings that protects a party that fails to raise a genuine issue of material fact at summary judgment.

In making this argument, Appellants also ignore CR 1, which states that the Civil Rules "govern the procedure in the trial court in all suits of a civil nature whether cognizable as cases at law or in equity." CR 1 (emphasis added).

Appellants' argument that summary judgment is never appropriate in dissenters' rights actions is not only wrong on the merits—it must also be rejected on procedural grounds. It should be rejected under RAP 2.5(a), because Appellants raise this argument for the first time on review and did not raise it below. Appellants had the opportunity to argue that CR 56 never applies in dissenters' rights actions as a matter of law before the trial court but failed to do so. *See* CP 481-95, 574-78, 674-76, 772-92, 860-77; 10/21/2011 VRP; 3/30/2012 VRP. They should not be allowed to do so now.

Finally, even if this Court were free to decide for the first time

to bar the use of CR 56 in dissenter's rights actions—and it is not—policy concerns weigh against such a decision. Summary judgment provides for an efficient resolution when there is no genuine dispute in the evidence. In dissenters' rights actions—which take up judicial resources even though the court does not adjudicate liability, culpability, or fault – quickly determining fair value is paramount. In fact, reaching a decision on fair value in dissenters' rights actions – whether by agreement or summary judgment – is so important that the dissenters' right statute allows the court to impose attorneys' fees against unreasonable parties who may otherwise seek to drag out costly and time-consuming litigation. CP 434-35 (Official Comment to Model Business Corporations Act, "The purpose of all these grants of discretion with respect to costs and counsel fees is to increase the incentives of both sides to proceed in good faith ... to resolve their disagreement."); *Matthew G. Norton Co.*, 112 Wn.App. at 874 (Model Business Corporations Act is persuasive authority). Giving either party a free pass on summary judgment decreases the incentives for the parties to substantiate their positions with admissible evidence and work together in good faith. This counteracts the statutory attorneys' fees provision and potentially squanders resources of the judicial system and the parties.

2. The trial court correctly applied the standard for granting summary judgment, because Sentinel provided admissible expert affidavit testimony as to fair value and Appellants' unsworn expert report was not admissible to create a genuine issue of material fact as to fair value.

The summary judgment standard and its application here are straightforward. Summary judgment should be granted if there is no genuine issue as to any material fact and the moving party is entitled to summary judgment as a matter of law. CR 56. After "the moving party submits adequate affidavits, the nonmoving party must set out specific facts sufficiently rebutting the moving party's contentions and disclosing the existence of a material issue of fact. The nonmoving party may not rely on speculation, argumentative assertions that unresolved factual issues remain, or having its affidavits accepted at face value. The court should grant the motion only if, from all the evidence, reasonable minds could reach but one conclusion." *Heath v. Uraga*, 106 Wn. App. 506, 512-13, 24 P.3d 413 (2001) (internal citations omitted).

The trial court properly applied this standard. Sentinel's summary judgment argument was simple – its sworn expert report is the only admissible expert evidence of fair value, so, based on this evidence, the only conclusion reasonable minds can reach is that

Sentinel's valuation is correct.[7] CP 444, 4447.

In support of summary judgment, Sentinel submitted an affidavit from its expert, James Kukull, wherein he attached his expert report and stated that the "statements and opinions therein are true and correct." CP 227.

At this stage, under the summary judgment standard, Appellants were required to set out specific facts challenging this evidence of fair value to raise a genuine issue of material fact. CR 56(e). Appellants did not meet this requirement, failing to offer admissible evidence of fair value at summary judgment.

Instead, Appellants offered a report by their expert, Mr. Hecker, solely for the purpose of showing a "dispute" between the parties. As Appellants explained, the report was offered to establish "not [his] actual opinions or what fair value actually is, but that a dispute exists because Mr. Kukull has an opinion and Mr. Hecker has a different opinion." CP 781. Hecker's report was, in fact, *not* admissible to establish his opinions as to fair value, precisely because Mr. Hecker never attested under oath to the truth of those opinions. 10/21/2011 VRP 17:6-9; 29:11-14.[8]

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[7] Sentinel argued that lay opinion could not properly determine fair value. CP 587-88, 835. As set out more fully below, the trial court concluded that the lay opinions Appellants offered did not raise a genuine issue of material fact. 10/21/2011 VRP 28:9-29:7.

[8] After the court granted summary judgment, Appellants submitted a declaration by Hecker in support of their motion for reconsideration. CP 600-72. Appellants, however, never explained why they were unable to submit such a declaration in

This is a fundamental principle of the hearsay rules. ER 801 defines hearsay as "a statement, other than one made by a declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 802 provides that hearsay is not admissible absent an applicable exemption (Appellants do not contend any exception is applicable, nor is there one). As Appellants concede, the report was only authenticated by an attorney, not Mr. Hecker, and the attorney did not, and could not, attest to the truth or accuracy of the opinions in Mr. Hecker's report. *Id.* Thus, the report was inadmissible hearsay.

Moreover, the mere existence of the Hecker Report—unsworn by Hecker—does not raise a genuine issue of material fact. "A material fact is one upon which the outcome of the litigation depends." *Clements v. Travelers Indemnity Co.*, 121 Wn.2d 243, 249, 850 P.2d 1298 (1993). At summary judgment, "the nonmoving party may not rely on speculation [or] argumentative assertions that unresolved factual issues remain." *Heath*, 106 Wn. App. at 513.

The outcome of this litigation depends on what fair value **is**, not whether it is "in dispute." That fair value is disputed is immaterial, and fails to create a genuine issue of material fact. If a

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time for the summary judgment hearing (CP 772-92) and do not attempt to do so on appeal. *See generally* Hunt Br. The belated production of Hecker's declaration is not grounds to overturn the trial court's decision. *Go2Net, Inc. v. C I Host, Inc.*, 115 Wn. App. 73, 91, 60 P.3d 1245 (2003)

party could survive summary judgment simply by demonstrating that an essential element is disputed, then, contrary to Washington law, "argumentative assertions that unresolved factual issues remain" would defeat summary judgment motion." *Heath*, 106 Wn. App. at 513. They do not. It is no surprise that, as in most litigation, the parties to this case disagree. If value were not in dispute, this litigation never would have occurred. The mere fact that fair value is disputed has no bearing on what fair value actually is. The trial court correctly ruled that the Hecker Report was not admissible for the truth of the mater asserted in that report, *i.e.* that the fair value of Sentinel's shares is other than that stated in the verified Kukull Report.

In their attempt to raise a genuine issue of material fact with the Hecker Report, Appellants make several other evidentiary assertions that are factually and legally incorrect. First, Appellants contend Sentinel offered its expert report not as evidence of fair value, but only to show that Sentinel was the only party with an expert and evaluation. Hunt Br., pp. 30-31. This is not true. Sentinel offered Kukull's affidavit, which attached and verified the Kukull Report under oath, to prove fair value. CP 444, 4447.

Appellants then confuse authentication and hearsay, arguing that the Kukull Report might have been properly authenticated by Kukull, but it was still hearsay, so the court improperly relied on it in determining fair value. Hunt Br., pp. 31-32. As an initial matter,

Appellants waived any objection to the admissibility of the Kukull report by failing to raise such an objection prior to entry of summary judgment. *Meadows v. Grant's Auto Broker's, Inc.*, 71 Wn.2d 874, 881, 431 P.2d 216, 220 (1967) (failure to challenge sufficiency of affidavits "prior to entry of the judgment, waives the deficiency"). It also would have been reversible error for the trial court to reconsider its summary judgment order on the basis of an evidentiary objection that Appellants had clearly waived. *State v. Carlson*, 61 Wn. App. 865, 869, 812 P.2d 885 (1991). For this reason, alone, Appellants are now precluded from challenging the Kukull Report as admissible evidence of fair value.

Even if Appellants had not waived that challenge, it fails on the merits. Sentinel agrees that authentication is not an exception to the hearsay rule, but the Kukull affidavit did not merely authenticate the Kukull Report—Kukull also swore that the "statements and opinions therein are true and correct." CP 227. Kukull's sworn testimony that the opinions in the Kukull Report attached to his declaration are true and correct does more than simply authenticate the Kukull Report; it allows the court to consider the Kukull Report for its truth and, thus, as evidence of fair value. An affidavit and its attachments must be read together. *See Grimwood v. University of Puget Sound, Inc.*, 110 Wn.2d 355, 360, 753 P.2d 517 (1988). The Civil Rules also expressly allow for attachments to affidavits to be

considered at summary judgment. CR 56(e). Consequently, Kukull was not required to regurgitate his report and insert all of the charts, graphs, and figures from his report into the body of his affidavit. Attaching the Kukull Report to Kukull's affidavit and testifying that its opinions are true suffices to allow the court to consider the Kukull Report as evidence of fair value.

In stark contrast, Appellants did not offer expert testimony admissible for the purpose of determining fair value. But Sentinel's expert, Mr. Kukull, did this for his own report—his testimony that its opinions are true and correct is not hearsay, and it converts the Kukull Report to expert affidavit testimony admissible for determining fair value. Sentinel's expert evidence on fair value was unrebutted, so the court properly entered summary judgment in Sentinel's favor.

3. Appellants' lay opinions were insufficient to create a genuine issue of fact as to fair value.

Appellants also offered a vague declaration from Appellant Hunt. CP 560-64. Hunt, admittedly not a valuation expert, testified that "certain factors appeared to be weighted more heavily than others in an effort to suppress" fair value in the Kukull Report, but Hunt never explained his basis for this conclusion or identified these mysterious factors, much less explained their proper weighting. CP 562. Similarly, Appellant Hunt testified that "certain language" in the Kukull Report led him to conclude Sentinel was in merger talks or

negotiations to be bought out. CP 563. Nowhere in the record does Hunt identify this language, and, to the contrary, the Kukull Report explicitly states that no merger or acquisition is contemplated. CP 300. Additionally, Hunt asserted that Kukull's valuation was out-of-date (CP 562), but he ignored Kukull's expert opinion that his valuation applied as of the time of the reverse stock split in October 2010. CP 319-20. For his part, Blood never even submitted any affidavits, only bare arguments in his response brief. CP 574-78.

At summary judgment, self-serving declarations are "not accepted at face value." *Heath*, 106 Wn. App. at 512-13. Courts are permitted to grant summary judgment in the face of unsupported declarations by the nonmoving party, as the court did, for example, in *Meissner v. Simpson Timber Co.*, 69 Wn.2d 949, 421 P.2d 674 (1966). There, the plaintiff alleged by affidavit that he was "orally promised" by the defendant that he would be paid royalties and argued that this allegation was sufficient to raise a genuine issue of fact as to whether a binding promise was made to him by the defendant. *Id.* at 955. The court rejected this argument, explaining that the nonmoving party on a summary judgment motion is "'not justified in relying upon such bare allegations to carry him to trial... The purpose of the summary judgment rule is to permit the court to pierce such formal allegations of facts in pleadings when it appears there are no genuine issues... Affidavits enjoy no such special

immunity and will be "pierced" under the same circumstances.'" *Id.* at 955-56 (quoting *Reed v. Streib*, 65 Wn.2d 700, 706, 399 P.2d 338 (1965)). Finding that the allegation in the plaintiff's affidavit had no evidentiary support, the court held that reasonable minds could only reach one conclusion and summary judgment against the plaintiff was proper. *Id.* at 957.

Here, the trial court considered Hunt's and Blood's assertions as to value, but concluded that, when compared to the extensive, detailed Kukull Report, Hunt's self-serving lay witness statements and Blood's unsupported argument failed to raise a genuine issue of material fact. 10/21/2011 VRP 28:18-23. The trial court explained that Appellants had to rebut Sentinel's evidence with "facts that are documented...[n]ot just argument," and with a "declaration from an individual who was qualified to render opinions on stock valuation." 10/21/2011 VRP 28:18-23; 30:8-12.

This is hardly surprising given the highly technical nature of valuing shares in a closely-held corporation. *See* 230-317. Sentinel has been unable to find <u>any</u> Washington State case where an expert report is rebutted solely with lay testimony sufficiently for a dissenters' rights action to survive summary judgment. Even if Hunt's declaration had been probative on the issue of fair value—and it was not—expert testimony on share valuation was required to raise a genuine issue of material fact. *See Seybold v. Neu*, 105 Wn. App.

666, 676, 19 P.3d 1068 (2001) (where an essential element in the case is "best established by an opinion that is beyond the expertise of a layperson," a party must offer expert witness testimony to defeat summary judgment); *Suther v. Suther*, 28 Wn. App. 838, 842-43, 627 P.2d 110, 112 (1981) (considering expert testimony on stock valuation and noting that "[v]aluation of the shares of a closely held corporation presents a difficult problem, calling for the careful weighing of relevant facts, and ultimate exercise of reasoned judgment...").

As the only admissible expert evidence of fair value before the court came from Kukull, the only reasonable conclusion to be reached is that his valuation was, as the court found, correct. *Heath*, 106 Wn. App. at 512-13.

4. The trial court did not impermissibly "weigh" the evidence.

Appellants argue that a court cannot weigh evidence at summary judgment (Hunt Br., p. 24)—which is true—but they ignore a court's obligation to test evidence to determine whether it raises a genuine issue of material fact. CR 56(e) (summary judgment "shall be entered" if a party does not respond with "specific facts showing that there is a genuine issue for trial"). This is all the trial court did here. As set out above, appraisal actions under RCW 23B.13.300 are not excepted from these summary judgment standards.

The consequence of accepting Appellants' position, then, is that a court cannot grant summary judgment on the basis of expert opinion (*i.e.* Kukull's valuation), or determine the sufficiency of the nonmoving party's evidence, without improperly "weighing" the evidence. Hunt Br., p. 24. But Washington courts may, in fact, properly test the evidence like this on summary judgment. For example, at summary judgment a court properly struck part of an expert declaration that lacked sufficient foundation. *Lilly v. Lynch*, 88 Wn. App. 306, 945 P.2d 727 (1997). As noted above, the *Meissner* court disregarded unsupported affidavit testimony in granting summary judgment. *Meissner*, 69 Wn.2d at 956-57. In a medical malpractice action, a court properly entered summary judgment for defendants because the plaintiffs' expert declaration did not contain strong enough language to make a *prima facie* showing of proximate cause. *Davies v. Holy Family Hospital*, 144 Wn. App. 483, 495-96, 183 P.3d 283 (2008).

Even the *St. Paul* case cited by Appellants proves this point. Hunt Br., p. 20. In that case, the trial court concluded that the plaintiffs' expert's opinions were inadmissible, so the court properly granted summary judgment for defendants. *Lake Chelan Homeowners Ass'n v. St. Paul Fire & Marine Ins. Co.*, 167 Wn. App. 28, 38, 272 P.3d 249 (2012). The court below did nothing wrong in accepting Kukull's sworn expert opinions and testing the sufficiency

of Appellants' opposing evidence, instead of simply accepting their affidavits at face value. In testing this evidence, the court properly determined that Appellants failed to raise a genuine issue of material fact as to the fair value of their shares.

B. Appellants' failure to offer admissible evidence of fair value also supported the court's award of attorneys' fees.

In addition to fixing fair value, the court also awarded attorneys' fees to Sentinel under RCW 23B.13.310, which allows a court to award attorneys' fees where a party to a dissenters' rights action acts "arbitrarily, vexatiously, or not in good faith." The statute does not define these terms. *Id.*

Appellants argue—without any citation to authority—that this standard for awarding attorneys' fees is higher than a "reasonableness" standard. Hunt Br., p. 37. While it is certainly true that more egregious, vexatious or bad faith conduct warrants an attorneys' fee award, it is also true that acting "arbitrarily" may warrant an award. Arbitrary means being done "in an unreasonable manner." Black's Law Dictionary (6th ed. West 1990); *Sligar v. Odell*, 156 Wn. App. 720, 727, 233 P.3d 914 (2010) ("To determine the plain meaning of a word not defined by statute, this court may look to its dictionary definition). In other words, acting arbitrarily is synonymous with being unreasonable. Even if Appellants were "just" arbitrary and unreasonable in failing to ever raise a genuine issue of

material fact regarding the fair value of their shares, this would fully support the court's award.

Appellants rest their entire argument on the merits of the attorneys' fee award on one readily distinguishable case, *Humphrey*. Hunt Br., pp. 38-41.[9] *Humphrey* turned on the admissibility and proper uses of evidence of settlement discussions, which are not at issue here. *Humphrey Industries, LTD v. Clay Street Associates, LLC*, 170 Wn.2d 495, 508, 242 P.3d 846 (2010). In *Humphrey*, the corporation at issue also failed to substantially comply with the dissenters' rights statutes, failing to pay the dissenter for his shares in the time required by statute. *Id.* at 506. Here, Sentinel complied with the dissenters' rights statute to the letter – a fact Appellants do not contest. *See generally* Hunt Br. Most importantly, in *Humphrey*, the dissenters won, offering admissible evidence of fair value and successfully persuading the trial court the offer they received was too low. *Id.* at 500.

Here, not only have dissenters not proven that they are entitled to more money than Sentinel offered, but they never bothered to offer admissible expert evidence of fair value, not just in the initial stages of this dispute, but throughout nearly a year of litigation up to entry of summary judgment. The essence of Appellants' argument is that

[9] Among other things, this opinion does not even involve the same dissenters' rights statute.

they were entitled to object to Sentinel's professional valuation based on their own arbitrary and unqualified critique of Mr. Kukull's report, and pick whatever higher number they wanted for counter-demands – without providing any credible supporting evidence – thereby forcing Sentinel into this costly appraisal action. *See* CP 61-62, 327-30 (Appellants' counter-demands).

Not only did Appellants make arbitrary and unsupported counter-demands, but they believe they are entitled –without repercussion – to refuse to substantiate those demands with admissible evidence all the way to trial. The attorneys' fee statute is designed to encourage good faith by dissenters, and thus, also deter this sort of cavalier conduct. CP 434-35.

Appellants alone are responsible for their decision to submit the Hecker Report without an affidavit by Mr. Hecker that would allow it to be considered for the truth of its contents. The glaring absence from Appellants' brief is a lack of any explanation of how they were prevented from obtaining such a declaration until *after* the trial court granted summary judgment. *See generally* Hunt Br.

Instead, Appellants attempt to distract from this glaring absence by complaining of alleged discovery delays. Hunt Br., pp. 41-44. But if this were really an issue, all Appellants needed to do was to request a continuance of summary judgment. Instead, at the summary judgment hearing, Appellants conceded there was "no need

for a continuance." 10/21/2011 VRP 4:19-25.

Appellants' attempt to manufacture discovery delay is not only irrelevant as a matter of law, but also unpersuasive as a matter of fact. Appellants provide no facts showing that Sentinel acted improperly or asserted unfounded discovery objections. They complain that Sentinel sought a protective order, but do not allege that a protective order was inappropriate in this case and even stipulated to it. CP 788; *see also* Hunt Br., p. 41-44.

Appellants also had ample information well before summary judgment to obtain an expert opinion and, in fact, they did obtain the Hecker Report before the hearing. By July 5, 2011 – over three months before the summary judgment hearing – Sentinel had produced to Appellants its internal financial statements, federal tax returns, company budgets, and documents Mr. Kukull relied on in preparing his report. CP 824-25. The rest of Sentinel's production (mostly correspondence by the parties) was produced on August 8, 2011 – over two months before the hearing—and, in any event, not one of these documents is specifically referenced in Hecker's report. *Id.* Sentinel even agreed to continue the summary judgment hearing for two weeks to accommodate additional discovery. CP 565-66.

Appellants cannot blame the discovery process for their failure to offer admissible evidence of fair value at summary judgment. Their failure was based, not on the documents at their disposal, but on

their decision not to submit a declaration from Mr. Hecker swearing to the truth of the opinions in the Hecker Report. This lack of admissible evidence as to fair value is what the trial court deemed "troublesome" in view of nearly a year of litigation. 10/21/2011 VRP 28:9-18. Appellants forced Sentinel into a costly appraisal action by their unsupported payment demands, but despite ample opportunity, still had no admissible evidence to support those demands. This is the very definition of acting arbitrarily, *i.e.* staking out a position without providing a reasoned basis for that decision. *See* Random House Dictionary 2011 (defining "arbitrary" as "unsupported"). Accordingly, the trial court's grant of attorneys' fees should be affirmed.

C. Remand is not necessary to determine the reasonableness of the attorneys' fees award.

There is ample evidence to support the amount of attorneys' fees awarded in this case, including detailed affidavits submitted by Sentinel attaching billing entries and costs. CP 904-36, 997-1003. As detailed in those affidavits, Sentinel's attorneys' fees were based on reasonable hourly rates multiplied by the number of hours reasonably expended on the matter. *Id.* Appellants agreed that this "lodestar" method of calculating an attorneys' fee award was the proper method for the trial court to apply. CP 939 (citing *McGreevy v. Oregon Mut. Ins. Co.*, 90 Wn. App. 283, 951 P.2d 798 (1998)). Appellants did not

contest the hourly rates of Sentinel's attorneys, only the time entries included in the calculation. CP 940-46.

As Sentinel sought attorneys' fees of $79,286.64 and the court awarded over 97% of the fees requested, the record reflects that the court applied the lodestar method agreed upon by the parties and generally adopted as reasonable the facts, figures, reasoning and methodology espoused in Sentinel's filings supporting its requested judgment. CP 1004-16, 1077-79. Appellants argue that the award should be remanded to provide a more detailed explanation of the court's reasoning, but this is only required when the amount awarded "is substantially less than requested." *Mehlenbacher v. DeMont*, 103 Wn. App. 240, 249, 11 P.3d 871 (2000) (requiring remand only because award was fully one third less than amount requested). As the trial court's award was based on the proper lodestar method and is supported as reasonable by the record, the judgment should be affirmed.

V. COSTS & FEES ON APPEAL

Sentinel respectfully requests an award of costs and attorneys' fees as the prevailing party pursuant to RAP 14.

Sentinel also respectfully requests an award of its reasonable attorneys' fees on appeal pursuant to RCW 23B.13.310 and RAP 18.1. Where a statute provides for attorneys' fees without specifying

the level of review, it supports an award for attorneys' fees expended in appellate litigation. *Granite Falls Library Capital Facility Area v. Taxpayers of Granite Falls Library Capital Facility Area*, 134 Wn.2d 825, 842-43, 953 P.2d 1150 (1998). In this case, RCW 23B.13.310 allows a court to award attorneys' fees where dissenters act arbitrarily or not in good faith. As the trial court ruled in granting Sentinel's summary judgment motion, Appellants acted arbitrarily in failing to submit admissible expert evidence sufficient to raise a genuine issue of material fact at summary judgment. Appellants' perpetuation of this litigation on appeal is also arbitrary and not in good faith.

Therefore, Sentinel should be awarded its reasonable costs and attorneys' fees on appeal both under RAP 14, 18.1 and RCW 23B.13.310.

VI. CONCLUSION

For all these reasons, the trial court's order granting summary judgment and the judgment itself, including its award of attorneys' fees, should be affirmed in their entirety. Additionally, Sentinel should be awarded its reasonable costs and attorneys' fees incurred on appeal as the prevailing party pursuant to RAP 14, 18.1 and RCW 23B.13.310.

DATED this 7th day of November, 2012.

Respectfully submitted,

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By 

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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of November, 2012, I caused to be served a true and correct copy of the foregoing to the following persons as indicated:

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Dated this 7th day of November 2012:

By _____
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