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
PETITION FOR DISCRETIONARY REVIEW

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I. IDENTITY OF PETITIONER

Petitioner is SentinelC3, Inc., a Washington Corporation, referred to herein as "Sentinel."

II. CITATION TO COURT OF APPEALS DECISION

The Court of Appeals decision is published as *SentinelC3, Inc. v. Chris Hunt, et. al.*, No. 305538, 2013 Wash. App. LEXIS 1932 (Div. 3, Aug. 15, 2103). A true and correct copy of the decision is provided as Appendix A and is referred to herein as the "Opinion."

III. ISSUES PRESENTED FOR REVIEW

1. In a dissenters' rights case under RCW 23B.13.010 *et. seq.* where the sole issue is the value of a corporation's closely-held stock, can dissenting shareholders survive summary judgment based solely on self-serving allegations unsupported by admissible evidence?

2. May unsworn allegations in a party's pleading or inadmissible hearsay create a genuine issue of fact to defeat summary judgment?

3. Does the trial court abuse its discretion under RCW 23B.13.310 by awarding reasonable attorneys' fees and costs to a corporation where the dissenting shareholders necessitated the litigation with unsubstantiated demands to be paid double and triple the fair value of their stock, and, after nearly a year of litigation, failed to present any admissible evidence to rebut the corporation's expert fair value opinion?

IV. STATEMENT OF THE CASE

A. Factual Background.

This matter involves the fair value appraisal of shares Sentinel acquired from Respondents Hunts and Bloods ("Respondents") as part of a

reverse stock split, a proceeding governed by Washington's dissenters' rights statute, RCW 23B.13.010, *et seq.* (attached as Appendix B).

Respondents[1] are former shareholders of Sentinel, a closely-held corporation. Of 4,500,000 total Sentinel shares, Hunt held 1,000,000 common shares (22%) and Blood held 250,000 shares (5.5%). CP 4, 198-99, 188-92. On October 28, 2010, the shareholders holding all 4,500,000 Sentinel shares met to vote on a proposed stock split and re-purchase of fractional shares; although Hunt and Blood voted against the reverse stock split, it passed. CP 6, 26-32, 188-92, 199-200.

Respondents demanded payment of the fair value of their shares, and Sentinel timely paid Hunt $195,790.92 and Blood $48,956.60, representing a fair value per share of $0.1952, plus interest. CP 6-8, 28-59, 64-78, 80-89, 188-92, 200. The fair value per share was established by an appraisal by James Kukull, CPA, ASA, ABV, a business valuation expert. Sentinel provided Mr. Kukull's appraisal report and supporting documentation to Respondents. CP 7-8, 10, 97-184, 186-87, 203.

Respondents disagreed with Sentinel's fair value determination. Hunt demanded more than double at $0.51204 per share, and Blood

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

demanded more than triple at $0.6443 per share. CP 7, 61-62, 201, 322, 327-30, 332-45. They both relied on an alleged "professional" valuation than has never been disclosed. CP 61-62, 327-30, 333-36, 349, 352, 481-95, 574-78; 10/21/2011 VRP 3:20-25.

Hunt then inflated his demand an additional 20% based on his unsubstantiated "belief" that Sentinel was contemplating its sale to a "strategic buyer." CP 7, 61-62, 201. Hunt's belief was pure speculation, and in nearly a year of litigation, he produced no evidence to support this belief. *Id.*; CP 563. In fact, no sale was contemplated. CP 300.

Blood inflated his per-share demand even higher than Hunt's. He believed his 250,000 shares should be valued as a percentage of 2,980,000 shares outstanding, not 4,500,000, because he believed that, at the time of the stock split vote, some shareholders intended to sell 1,520,000 shares back to Sentinel. CP 327-30. Blood's belief is false. All 4,500,000 shares were voted and were outstanding just prior to the stock split. CP 6, 26-32, 188-92, 200.[2] Blood admitted this. CP 327 ("In this meeting all Sentinel shareholders were present..."). Yet, Blood ignored his own admission and the statute's mandate that fair value be measured "immediately before the effective date" of the reverse stock split. CP 327-29; RCW 23B.13.010(3).

[2] The repurchase of shares by Sentinel, including Respondents' shares, was part and parcel of the stock split transaction on which the shareholders voted. *Id.*

Understandably, Sentinel refused to pay Respondents' inflated and unsupported demands. CP 11.

B. Procedural History.

On January 31, 2011, Sentinel filed its Petition for Determination of Fair Value of Shares of Dissenting Shareholder ("Petition"), which was legally required to avoid payment of the inflated demands. CP 3; RCW 23B.13.300(1).[3] The only issue to be decided is fair value. *Sound Infiniti, Inc. v. Snyder*, 169 Wn.2d 199, 209-10, 237 P.3d 241 (2010).

By August 9, 2011, Respondents had produced no credible fair value evidence and Sentinel moved for summary judgment. CP 452-54. Sentinel offered Kukull's affidavit, attaching and swearing to the truth of his detailed 87-page expert report and his supplemental report confirming the validity of his valuation as of October 31, 2010. CP 226-320. Based on Respondents' arbitrary failure to support their counter-demands, Sentinel's motion also requested an award of its reasonable attorneys' fees and costs, pursuant to RCW 23B.13.310(2)(b). CP 449-50.

On October 18, 2011, just three days before the summary judgment hearing, Hunt filed a new fair value report prepared by Jerry Hecker ("Hecker Report"). CP 597-672. Mr. Hecker had not sworn to the truth of

[3] Importantly, Sentinel complied with all statutory requirements with regard to dissenters' rights proscribed in RCW 23B.13.010 *et. seq.* Respondents do not contend otherwise. *See generally* Brief of Appellants Hunt, Oct. 8, 2012 (hereafter "Hunt. Br."), which Bloods joined for the appeal to Division III. Bloods' Notice of Joinder, Oct. 22, 2012.

his opinions. CP 597. Sentinel objected to the admissibility of the Hecker Report as hearsay inadmissible to rebut Mr. Kukull's valuation. CP 588, n. 2; 10/21/2011 VRP 25:10-34, 26:16-22.

At the October 21, 2011 summary judgment hearing, the Trial Court agreed that the unsworn Hecker Report was hearsay and inadmissible to refute Kukull's sworn opinion. CP 569-73; 10/21/2011 VRP 16:18-20, 17:6-14, 28:24-29:24.[4] All that remained to refute Kukull's opinion was 1) Hunt's self-serving declaration 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. CP 560-64, 574-78. Although the Court of Appeals' Opinion repeatedly references an "affidavit" by Blood, no such document exists. *Id.* Respondents conceded they are not experts on stock valuation. 10/21/2011 VRP 15:7-8, 21:22-23:2. The Trial Court found that that Respondents' lay witness beliefs were 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.

Based on Respondents' failure to produce admissible evidence to refute Kukull's opinion, the Trial Court granted summary judgment in Sentinel's favor, determining fair value to be $0.1952 per share, and

[4] Respondents expressly waived their request under CR 56(f) for a continuance of the hearing to conduct additional discovery and, thus, elected instead to rely on the evidence they had presented as of the hearing date. 10/21/2011 VRP 4:6-4:25.

awarding Sentinel its reasonable attorneys' fees and costs. 10/21/2011 VRP 16:11-17:9; 18:4-22; 19:11-16; 28:18-29:24; CP 450, 677-82. In support of this decision, the Trial Court found it "troublesome" that the fair value dispute had been pending for nearly a year, and, yet, Respondents lacked admissible evidence sufficient to create an issue of fact. 10/21/2011 VRP 28:9-23. The Trial Court then denied Respondents' motion for reconsideration and their belated attempt to introduce an affidavit by Mr. Hecker. CP 793-95; 879-80.

On January 25, 2012, Sentinel submitted a proposed judgment for a total of $79,286.64 and the parties briefed the reasonableness of the attorneys' fee award. CP 898-936-948, 981-83, 991-93, 997-1016. On April 5, 2012, the Trial Court entered judgment for Sentinel, awarding it costs and attorneys' fees totaling $77,186.66. CP 1076-79. Respondents appealed the summary judgment and the fee award. The Court of Appeals heard oral argument on May 1, 2013.

On August 15, 2013, the Court of Appeals reversed the Trial Court. It held that the Trial Court improperly "weighed" the evidence on summary judgment by failing to consider the following: 1) the "hearsay" opinion of Respondents' consulting "expert," 2) Hunt's "belief" that the value was higher because a "sale was in the offing," and 3) Blood's "belief" that his shares were worth more because a quarter of the shares

were to be sold back to Sentinel. Opinion, pp. 12-13.[5] The Court of Appeals ignored CR 56(e)'s admissible evidence requirement, cited no evidence that supported Respondents' "beliefs," and failed to address how Respondents, as admitted non-experts, were competent to opine as to the share value. *See generally id.*

Given its reversal of the summary judgment, the Court of Appeals reversed the attorneys' fee award. It further found that Respondents had not engaged in any arbitrary, vexatious or bad faith conduct by making excessive demands, and by failing to present admissible expert testimony, despite their "negligence" in doing so. Opinion, pp. 16-18.

V. LAW AND ARGUMENT

The Court of Appeals' Opinion raises issues of substantial public interest that warrant review under RAP 13.4(b)(4). By requiring the Trial Court to consider bald assertions and inadmissible hearsay, the Opinion contradicts CR 56 and established precedent requiring summary judgment to be entered where the non-moving party fails to create a genuine issue of material fact with competent affidavit testimony setting forth facts admissible in evidence. The Opinion also promotes unwarranted litigation and undermines the purpose of the attorneys' fee provision of RCW 23B.13.310, which is to promote the parties' good faith. The Opinion

[5] The Court of Appeals declined to address the exclusion of the Hecker Report. *Id.*, p. 5.

permits dissenters to force a corporation to trial for ill motives, because they have nothing to lose. They do not need admissible evidence, only a "belief" that fair value is higher than the corporation's expert valuation - no matter how unfounded, unqualified, or illogical that belief.

Given these public policy considerations and the serious errors in the Court of Appeals' published Opinion, Sentinel respectfully requests that this Court review and reverse the Opinion.

A. The Court of Appeals Erred in Holding That Respondents' "Beliefs" as to Value Were Sufficient to Create a Genuine Issue as to the Share Value.

The Court of Appeals held that "the dissenters' valuations, even without the evidence from their trial expert Hecker, raised a question of fact... [which] did not allow the court to determine fair value at summary judgment." Opinion, p. 12. This pronouncement is wrong in light of the clearly established summary judgment standards under CR 56.

1. Respondents' "Beliefs" as to Value Were Bare Allegations Unsupported by Any Evidence.

In response to Sentinel's motion supported by Kukull's detailed, sworn valuation, Respondents, as the non-moving parties, were not entitled to "rest upon the mere allegations or denials," but were required to "set forth specific facts showing there is a genuine issue for trial." CR 56(e). Furthermore, the affidavits they submitted had to be "made on

personal knowledge, shall set forth facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." *Id.* Summary judgment under CR 56 is permissible in dissenters' rights actions. *See Matthew G. Norton Co. v. Smyth*, 112 Wn. App. 865, 51 P.3d 159 (2002) (granting partial summary judgment in dissenters' rights action); *see also* CR 1 (the Civil Rules "govern the procedure in the trial court in all suits of a civil nature").

As this Court has held, at summary judgment, self-serving affidavits and declarations are "not accepted at face value." *Heath v. Uraga*, 106 Wn. App. 506, 512-13, 24 P.3d 413 (2001). 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.

Meissner v. Simpson Timber Co., 69 Wn.2d 949, 955-56, 421 P.2d 674 (1966) (citation omitted). When the allegations in an opposing affidavit have no evidentiary support, reasonable minds can reach only one conclusion and summary judgment is proper. *Id.* at 957.

Contrary to this Court's holdings in *Heath* and *Meissner*, the Court of Appeals accepted Respondents' "beliefs" and allegations at face value.

Hunt's declaration was barely four pages in length and relied up on an alleged consultant valuation that Respondents refused to disclose. CP 560-64; 10/21/11 VRP 3:20-25. Contrary to the Court of Appeals' assertion (Opinion p. 11), the alleged valuation was never before the Trial Court. 10/21/11 VRP 3:20-25. The consultant Hunt relied upon never testified, Respondents never offered a report or analysis to support the alleged opinion, and, as the Court of Appeals agreed, it was mere hearsay. *Id.*; CP 560-64; ER 801, 802. Despite acknowledging its inadmissibility, the Court of Appeals erroneously credits the alleged consultant opinion as "unchallenged" (Opinion, p. 11), ignoring Kukull's sworn report, which directly controverts the unverified hearsay opinion. CP 226-317.

The Court of Appeals noted that Hunt then increased his demand "due to his belief that a sale was in the offing." Opinion, p. 11. The declaration and the Opinion, however, cite zero evidence in support of this belief. *Id.*; CP 560-64. Rather, the record showed that Hunt's "belief" was false. He never identified the "certain language" in the Kukull Report that supposedly led to this belief, and the Kukull Report explicitly stated that no merger or acquisition was contemplated. CP 300, 563.

Rather than admissible evidence, Blood relied solely on unsworn arguments in his opposition brief. CP 574-78. Regardless, the Court of Appeals, operating under the erroneous assumption that Blood had

supplied an "affidavit," blindly accepted Blood's "belief" that the value of his shares was higher because "the company had an agreement to buy nearly one-quarter of its shares back from some of the other stockholders." Opinion, p. 11. Again, the Court of Appeals cited zero evidence to support this "belief," which is based on Blood's false premise that he owned a much larger percentage of Sentinel than he did at the time of the stock split vote. CP 328-29. The statute requires fair value to be measured at that time. RCW 23B.13.010(3). The Opinion wholly fails to address this glaring flaw in Blood's argument. Opinion, p. 11.

Despite the lack of admissible evidence to support Respondents' varying estimates, the Court of Appeals failed to pierce their assertions and determine whether the questions they raised were, actually, genuine. CR 56(b). Contrary to this Court's precedent, the Court of Appeals is content to let those bare assertions carry Respondents to trial. This error must be rectified.

2. The Court of Appeals Accepted Respondents' Beliefs Without Addressing the Trial Court's Finding that They Lacked the Requisite Competence to Opine as to the Value of Closely-Held Stock.

The Court of Appeals also ignored Respondents' lack of competence to testify as to the value of closely-held stock. CR 56(e) requires that affidavits "shall show affirmatively that the affiant is

competent to testify to the matters stated therein." (emphasis added). Respondents not only failed to show their qualifications, they admitted they are not experts on stock valuation. 10/21/11 VRP 15:7-8, 21:22--23:2. One of the bases for the Trial Court's rejection of Respondents' beliefs was their lack of relevant expertise. 10/21/2011 VRP 28:18-23; 30:8-12. The parties then specifically addressed this issue on appeal. The Opinion, however, fails to address whether Respondents established the competence requirement. Here, again, the Court of Appeals erred.

The valuation of closely-held stock, such as Sentinel's, requires expert testimony. Sentinel has been unable to find any other Washington State precedent accepting non-expert testimony as probative of the value of closely-held stock. RCW 23B.13.300(5) contemplates the necessity of expert testimony, by permitting the trial court to appoint an appraiser to assist it. Respondents also concede that the valuation is an expert issue by attempting to rely on the unsworn Hecker Report. Closely-held stock, by its nature, and unlike other property, has no market, and its valuation requires skilled judgment and experience. *Suther v. Suther*, 28 Wn. App. 838, 842-43, 627 P.2d 110, 112 (1981). Kukull's value opinion included an 87-page sworn report with detailed analysis and citation to substantial, supporting evidence. CP 230-317. As indicated by Kukull's multiple

accreditations and considerable professional experience, business valuation is a recognized area of professional expertise. CP 316-17.

Where, as here, 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. *See Seybold v. Neu*, 105 Wn. App. 666, 676, 19 P.3d 1068 (2001). The Court of Appeals erred in silently finding that Respondents had the requisite competence to raise a genuine issue as to the value of Sentinel's stock.

3. The Court of Appeals Erred in Holding that the Trial Court Improperly "Weighed" the Evidence.

The Court of Appeals mischaracterized the Trial Court's rejection of Respondents' unsupported, unqualified beliefs as improper "weighing" of the evidence on summary judgment. The Opinion states:

> Given the evidentiary support for Kukull's work, it was reasonable for the court to be persuaded by that valuation. Nonetheless, under these facts, that determination required the court to consider the dissenters' evidence. While it was understandably rejected, the weighing of that evidence at summary judgment was improper and needed to be done at trial. Opinion, p. 12.

The Trial Court does not impermissibly "weigh" the evidence when it applies the standards set out in CR 56 and established summary judgment precedent. *See* CR 56(e) (opposing evidence must be competent and admissible); *Meissner*, 69 Wn.2d at 955-57 (disregarding unsupported affidavit testimony); *Heath*, 106 Wn. App. at 512-13 (courts not to accept

affidavits at face value); *Seybold*, 105 Wn. App. at 676 (expert testimony required to establish material fact beyond expertise of lay person).[6]

But the Opinion effectively abolishes the summary judgment procedure by forbidding the Trial Court from ever testing the non-moving party's evidence under the requirements of our Civil and Evidence Rules. This holding is error and should be reversed.

B. The Court of Appeals Erred In Holding that Inadmissible Evidence Is Sufficient to Defeat Summary Judgment.

The Opinion holds that inadmissible "evidence" must be considered in determining whether there is a genuine issue of fact for trial. Opinion, p. 11. Specifically, the Court of Appeals held that, although the unsworn, undisclosed expert opinion referenced by Respondents "constituted hearsay,...[t]he court had a duty under the statute to consider all of that information in making its determination of fair value." *Id.*, pp. 11, 12. Nothing in the statute, however, creates an exception to the Civil or Evidence Rules. RCW 23B.13.010, *et. seq.* The Court of Appeals also held that the Trial Court was required to consider Mr. Blood's "belief" as to value set forth in his "affidavit," despite the fact

[6] Courts routinely reject such evidence on summary judgment. *See, e.g., Lilly v. Lynch*, 88 Wn. App. 306, 945 P.2d 727 (1997) (expert declaration lacking sufficient foundation properly struck); *Davies v. Holy Family Hospital*, 144 Wn. App. 483, 495-96, 183 P.3d 283 (2008) (summary judgment for defense where plaintiff's expert declaration failed to make sufficient showing of proximate cause); *Lake Chelan Homeowners Ass'n v. St. Paul Fire & Marine Ins. Co.*, 167 Wn. App. 28, 38, 272 P.3d 249 (2012) (summary judgment properly granted for defense where plaintiffs' expert's opinions inadmissible).

that Mr. Blood never submitted an affidavit, declaration or sworn testimony of any kind. *Id.*

Both the unsworn expert opinion and Blood's unsworn arguments were offered to establish the truth of their assertions: that the share value was higher than Mr. Kukull's valuation. As such, they constitute inadmissible hearsay and were properly rejected by the Trial Court. ER 801, 802; 10/21/2011 VRP 17:6-9; 29:11-14.[7] The Opinion, however, reads CR 56(e)'s admissibility requirement right out of the rule by mandating that the Trial Court must still consider those *inadmissible* assertions in determining what fair value is. Relying on the Opinion, non-moving parties could ignore CR 56(e) and defeat summary judgment simply by submitting hearsay or arguments in an opposition brief to show that they dispute the moving party's expert testimony as to value.

As a result, the Trial Court is hamstrung between its duty under CR 56(e) to reject inadmissible evidence as establishing a genuine issue of material fact,[8] and the Court of Appeals' conclusion that such a rejection constitutes improper "weighing" of the evidence. Opinion, p. 12. The Opinion leaves litigants with conflicting messages between our courts and

[7] The Hecker Report was offered for the same purpose and properly excluded for the same reasons.

[8] *See Grimwood v. University of Puget Sound, Inc.*, 110 Wn.2d 355, 359–60, 753 P.2d 517 (1988) (if affidavit fails to set forth material facts that are admissible in evidence, it fails to raise a genuine issue for trial, and summary judgment is appropriate). The Court of Appeals lacks authority to ignore CR 56(e) and overrule this established precedent.

our court rules. Consistent and correct application of the Civil Rules is of substantial public interest under RAP 13.4(b)(4). The Court of Appeals' incorrect application of the Civil Rules warrants review and reversal.

C. **The Opinion Damages Substantial Public Interests.**

The ramifications of the published Opinion are significant and unjust. Dissenting shareholders who are unhappy with a corporation's payment of fair value for their shares can force unwarranted litigation by an unsupported "belief" that the payment should be higher. This result contradicts sound public policy and perverts the purpose of the dissenters' rights statute, which is to incentivize the parties to "proceed in good faith under this chapter to attempt to resolve their disagreement without the need of a formal judicial appraisal of the value of shares." SENATE JOURNAL, 51st leg., 2nd Spec. Sess. ("SENATE JOURNAL"), at 3093 (Wash. 1989). Corporations, however, will be faced with the unfair choice of paying the dissenters' inflated demands - whether or not asserted in good faith with a reasonable basis -- or bearing the time and expense of trial. This is another reason review and reversal is required.

D. **The Court of Appeals Erred in Reversing the Attorneys' Fee and Cost Award.**

The attorneys' fee award is discretionary and is reviewed for abuse of discretion. *Humphrey Indus. v. Clay St. Assocs.*, 170 Wn.2d 495, 506-07, 242 P.3d 846 (2010). The Court of Appeals reversed the Trial Court's

award of attorneys' fees and costs on the basis that 1) Sentinel did not prevail on summary judgment and 2) the award also failed on its merits. Opinion, p. 2. The first basis is error for the reasons established above. The second basis is error because the record shows that the Trial Court was well within its discretion in making the award.

Under RCW 23B.13.310(2)(b), a court has discretion to award attorneys' fees where a party to a dissenters' rights action acts "arbitrarily, vexatiously, or not in good faith" in the exercise of its rights under the statute. The statute does not define these terms. *Id.* 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) (court may employ dictionary definition for word not defined by statute).

The Court of Appeals disagreed that Respondents acted unreasonably. In doing so, the Court of Appeals misconstrued this Court's decision in *Humphrey Indus. v. Clay St. Assoc.*, 176 Wn.2d 662, 670, 295 P.3d 231 (2013) as holding that "the dissenters' actions of declining the corporation's offer and submitting an excessive valuation did not violate the statutory standard." Opinion, p. 15.

Humphrey does not stand for this proposition. In *Humphrey*, in stark contrast to this case, the dissenter won by offering admissible evidence of fair value and successfully persuading the trial court the offer

he received from the corporation was too low. *Humphrey Indus. V. Clay St. Assoc.*, 176 Wn.2d. at 666; *see also Humphrey Indus., Ltd.*, 170 Wn.2d at 500 (involving an earlier appeal in the same case). Thus, it is not surprising that the dissenter's conduct in *Humphrey* was found not to be arbitrary, vexatious or not in good faith. *Id.* Here, not only have the dissenters not shown that Sentinel's valuation was too low, they never bothered to present admissible expert evidence of fair value throughout nearly a year of litigation up to entry of summary judgment.

The Court of Appeals downplays such conduct, asserting that Respondents simply refused to accept Sentinel's valuation and "instead, sought their own which they then used as the basis for their counterproposal." Opinion, p. 16. Respondents' failure to present admissible expert evidence also is dismissed as "negligence" and a "late stumble in the proceedings." *Id.*, p. 17.

According to the Opinion, Respondents were entitled to object to Sentinel's expert valuation based on their own arbitrary and unqualified critique of Kukull's report, pick whatever higher number they wanted for counter-demands, refuse to produce the alleged "consultant" valuation or any other supporting evidence, and force Sentinel into this costly litigation. *See* CP 61-62, 327-30. Then, they were entitled to

"negligent[ly]," *i.e.* *unreasonably*, disregard court rules, and refuse to substantiate their 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; SENATE JOURNAL, at 3093. Corporations, like Sentinel, should not have to bear the expense of litigation precipitated and perpetuated by arbitrary demands and the dissenters' failure to follow basic Civil and Evidence Rules. The Trial Court specifically noted this "troublesome" lack of evidentiary support in granting Sentinel's motion. 10/21/2011 VRP 28:9-18. Accordingly, the Trial Court did not abuse its discretion in awarding attorneys' fees and the Court of Appeals erred in holding otherwise.

Citing *Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 632 (1998), the Court of Appeals also held there were not sufficient findings to facilitate review of the award. Opinion, p. 16. *Mahler* is not on point. There, the fee award was remanded for more particular findings, because the reasonableness of the fees and the attorneys' hourly rates could not be discerned from the record. *Mahler*, 135 Wn2d at 435.

Here, in contrast, the basis for the reasonableness of the fee amount is evident from the record. Respondents did not contest the lodestar method or the hourly rates set out in Sentinel's counsel's affidavits supporting the requested judgment, only some allegedly

unnecessary time entries. CP 904-36, 940-46, 997-1003. As the Trial Court awarded over 97% of the fees requested, additional findings are not necessary to set out what the record already reflects: that the Trial Court generally adopted as reasonable the facts, figures, reasoning and lodestar methodology espoused in Sentinel's filings. CP 1004-16, 1077-79.

VI. CONCLUSION AND RELIEF SOUGHT

This Court should accept review, reverse the Court of Appeals' decision, and reinstate the summary judgment and attorneys' fee and cost award granted by the Trial Court.

RESPECTFULLY SUBMITTED this 13th day of September, 2013.

K&L GATES LLP

By 

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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of September, 2013, I caused to be served a true and correct copy of the foregoing **PETITIONER SENTINELC3, INC.'s PETITION FOR DISCRETIONARY REVIEW** to the parties below and in the manner indicated:

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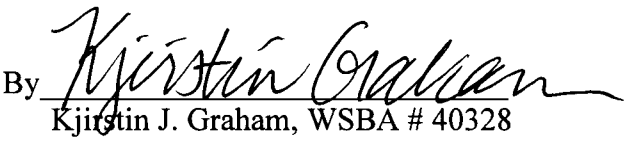
By 
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APPENDIX A

FILED
AUGUST 15, 2013
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

SENTINELC3, INC., a Washington Corporation, Respondent, 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, Appellants.	)	No. 30553-8-III consolidated with 30592-9-III; 30837-5-III; 30881-2-III PUBLISHED OPINION

KORSMO, C.J. — Dissenting shareholders appeal from rulings at summary judgment that valued their shares in accordance with the corporation's offer and imposed penalties and attorney fees for intransigence. We reverse and remand for further proceedings.

FACTS

SentinelC3 (Sentinel) is a closely held corporation that facilitates transactions between health care providers and medical equipment suppliers. It began in 2003 as an

Idaho corporation, but became a Washington corporation in 2010. Its activities that year triggered the actions that resulted in this appeal.

At that time, the biggest single shareholder in the corporation was Chris Hunt with 1,000,000 shares, approximately 22 percent of the corporation's 4,500,000 total shares. Four members of the Owens family owned 3,000,000 shares, while Michael Blood and Ken Moore each owned 250,000 shares (approximately 5.5 percent). Sentinel attempted to buy out Mr. Hunt that April. Its expert, James Kukull, using the corporation's value on December 31, 2009, valued the shares at $107,200 when using a "minority, nonmarketable basis" or at $195,200 on a "control, marketable basis." Mr. Kukull explained that a "control, marketable basis" valuation was the same as "fair value" under the dissenters' rights statute. The company offered the lower value; Mr. Hunt declined to sell.

On October 8, 2010, the company became a Washington corporation. At the same time, it proposed a reverse stock split of 1.5 million to one; those with less than one new share were required to sell their stock. The shareholders voted 5 to 2, with Mr. Hunt and

Mr. Blood[1] dissenting, to adopt the reverse stock split on October 28, 2010. After forcing out the two dissenters, the remaining shareholders instituted a forward stock split that issued them the same number of shares of the new stock as they used to own.

Sentinel paid Mr. Hunt $195,200.00 plus interest in accordance with the greater valuation Mr. Kukull had previously made and paid Mr. Blood $48,956.60 plus interest. Both Hunt and Blood believed Mr. Kukull's valuation to be out of date. Each made counteroffers to Sentinel based on a valuation from an undisclosed professional, subsequently determined to be C&H Group.[2] Hunt revised his valuation upwards 20 percent based on the belief that a buy-out of Sentinel was imminent. Blood's valuation was revised upwards based on his view that there were only approximately 3,000,000 shares of Sentinel (rather than the original 4,500,000 shares) because of an alleged agreement for the company to buy the stock of some of the other shareholders. Kukull expressed the view that because of falling earnings before taxes, Sentinel's value had not significantly changed since his original valuation despite an increase in sales.

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[1] Although both the Blood and Hunt marital communities are parties to this action, we will refer to them in the singular for convenience.

[2] Both men declined to produce the documents supporting the new valuation on the basis that C&H was only a consulting expert.

Sentinel instituted an action January 31, 2011, in the Spokane County Superior Court to establish the fair value of the dissenting shares in accordance with RCW 23B.13.300. Discovery ensued; Mr. Hunt requested that Sentinel provide business records, contracts, and marketing plans going back five years. Sentinel objected on the basis that the records were irrelevant to the valuation process, but agreed to disclose if a protective order could be worked out.[3] Sentinel filed a proposed protective order on August 5, 2011, and filed a motion for summary judgment four days later. The trial court granted the protective order on September 7. A few weeks later Hunt disclosed Jerry Hecker as his expert witness and also filed an answer to the summary judgment motion.[4] Counsel for Mr. Hunt filed a declaration on October 18, 2011, with Mr. Hecker's valuation report attached; Mr. Hecker, however, had not certified his report.

The trial court heard the summary judgment motion on October 21. The court found that Hecker's valuation was not admissible through counsel's declaration and excluded it while noting that it presented genuine issues of fact that would have defeated summary judgment. Both Hunt and Blood had submitted their own affidavits that took

[3] Sentinel indicated a fear that Mr. Hunt might use the information to compete with it.

[4] Blood has proceeded pro se while Hunt has been represented by counsel throughout the action.

issue with some of Kukull's work and referenced their own original demands. The court granted summary judgment and later awarded Sentinel its attorney fees and costs under RCW 23B.13.310.

The dissenters sought reconsideration and Mr. Hunt submitted an admissible copy of Mr. Hecker's report. The court denied reconsideration, commenting only that there was "not sufficient cause shown to alter" its decision. Both Hunt and Blood timely appealed after the denial of reconsideration.

The court subsequently entered a judgment in Sentinel's behalf for attorney fees and costs. Once again, the dissenters individually appealed to this court. The four matters were consolidated.

ANALYSIS

This appeal challenges the court's valuation ruling at summary judgment, the decision to exclude Hecker's valuation, and the award of attorney fees without appropriate findings. We agree with the challenges to the valuation and the attorney fee award; those two matters are discussed in that order. In light of our disposition, we do not address the exclusion of the valuation.

Summary judgment rulings are reviewed de novo since an appellate court sits in the same position as the trial court. *Hubbard v. Spokane County*, 146 Wn.2d 699, 706-07, 50 P.3d 602 (2002). Summary judgment is proper when, after viewing the evidence in a light most favorable to the opposing party, there are no issues of material fact and the moving party is entitled to judgment as a matter of law. *Trimble v. Wash. State Univ.*, 140 Wn.2d 88, 93, 993 P.2d 259 (2000). All facts and reasonable inferences are construed in the light most favorable to the nonmoving party. *Id.* Summary judgment should be granted if reasonable persons could reach but one conclusion based on all of the evidence. *Id.*

Valuation of Dissenters' Shares

The parties strenuously debate the propriety of resolving a dissenters' rights valuation case at summary judgment, with the appellants contending that the trial court's obligations under the valuation statute necessitate weighing of evidence and preclude resolution at summary judgment. We need not go that far because we conclude that the appellants did establish material questions of fact that precluded summary judgment.

In a dissenters' rights action, a corporation is required to petition a court to determine the "fair value of the shares and accrued interest." RCW 23B.13.300(1). "Fair value," in turn, is defined as

> the value of the shares immediately before the effective date of the corporate action to which the dissenter objects, excluding any appreciation or depreciation in anticipation of the corporate action unless exclusion would be inequitable.

RCW 23B.13.010(3). These standards are part of the current Washington Business Corporation Act, Title 23B RCW, adopted by LAWS OF 1989, ch. 165.

Prior to the adoption of the current provisions, the former corporations act had required that the trial court "shall, by its decree, determine the value of the shares" held by the dissenters. § 3803-41 Rem. Supp. 1949 (quoted in *In re Nw. Greyhound Lines*, 41 Wn.2d 672, 677, 251 P.2d 607 (1952)).[5] Noting that the legislature had not developed a definition of "value," *Greyhound* defined it as a word that

> contemplates a consideration of all the facts and circumstances pertinent to a particular case in an effort to arrive at a fair and reasonable compromise or arbitration which may in some degree be lacking in mathematical exactness or certitude.

41 Wn.2d at 680.

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[5] This provision subsequently was codified at former RCW 23.01.450(1) and former RCW 23A.24.040.

The legislature in 1965 changed the statute to reflect the need to give "fair value" rather than "value" to the minority shares. LAWS OF 1965, ch. 53 § 83 (repealing LAWS OF 1949, ch. 188). In adopting the current Business Corporation Act in 1989, the legislature noted that the term "fair value" "leaves untouched the accumulated case law." SENATE JOURNAL, 51st Leg., 2nd Spec. Sess., at 2977-3112 (Wash. 1989) (reprinting the Comments on the Washington Business Corporation Act prepared by the Corporate Act Revision Committee of the Washington State Bar Association, §13.01). Since "value" and "fair value" mean the same, our courts have continued to apply *Greyhound* to the valuation of dissenters' shares. *E.g.*, *Matthew G. Norton Co. v. Smyth*, 112 Wn. App. 865, 874, 51 P.3d 159 (2002); *Robblee v. Robblee*, 68 Wn. App. 69, 77-78, 841 P.2d 1289 (1992).

At the time of *Greyhound*, the statutory scheme required the trial court to appoint an appraiser to value the stock. 41 Wn.2d at 676 (citing § 3803-41, Rem. Supp. 1949). The appraiser's valuation was not dispositive; the trial court was to review the valuation de novo. *Id.* at 683, 685. Our current statute permits, but does not require, the court to appoint one or more appraisers to assist it. RCW 23B.13.300(5). The court has "plenary and exclusive" jurisdiction over the case. *Id.* The modern statute "retains the concept of

judicial appraisal as the ultimate means of determining fair value." SENATE JOURNAL, 51st Leg., 2nd Spec. Sess., at 3092-3093 (Wash. 1989) (reprinting the Comments on the Washington Business Corporation Act prepared by the Corporate Act Revision Committee of the Washington State Bar Association, §13.30).

We believe this statutory arrangement thus retains the obligation of the trial judge to undertake a de novo review of the evidence and not uncritically accept the appraiser's report. In this respect the obligation is similar to that imposed in other areas. *E.g.*, *Richey & Gilbert Co. v. Nw. Natural Gas Corp.*, 16 Wn.2d 631, 649-50, 134 P.2d 444 (1943) ("'And, while great weight should always be given to the opinions of those familiar with the subject, they are not to be blindly received, but are to be intelligently examined by the jury in the light of their own general knowledge.'" (quoting *Head v. Hargrave*, 105 U.S. 45, 49, 26 L. Ed. 1028 (1881)); *In re Marriage of Pilant*, 42 Wn. App. 173,178, 709 P.2d 1241 (1985) (court rejected the testimony of the sole expert on a pension valuation issue: "A court is not required to accept the opinion testimony of experts solely because of their special knowledge; rather, the court decides an issue upon its own fair judgment, assisted by the testimony of experts."); *Suther v. Suther*, 28 Wn.

App. 838, 627 P.2d 110 (1981) (court in dissolution proceeding properly valued stock differently than experts).

With this background, we now address the issues presented by the summary judgment ruling. First, the dissenters argue that in light of the court's obligation to find fair value, the court could never resolve a dissenters' rights case at summary judgment because the court must weigh the testimony and determine whether to accept the expert's valuation, actions that are contrary to the standards of a summary judgment hearing. As a categorical matter, we reject the argument while acknowledging that it has some force. This court previously has permitted summary judgment on valuation procedures in a dissenters' rights case. *See Matthew G. Norton Co.*, 112 Wn. App. 865 (partial summary judgment). We can envision valuation fact patterns that would be subject to summary judgment. For instance, if competing experts agreed on the corporation's fair value, but one of them improperly applied a discount that our courts have already rejected, we could see a trial judge accepting the agreed-upon valuation for the corporation since the fact of valuation was not in dispute. The trial court would also, however, have been free to reject the valuation altogether.

Nonetheless, the trial court's duty to find fair value and not blindly accept the expert's opinion has some play in this summary judgment and informs the court on whether a material question of fact exists. Mr. Blood's affidavit, his settlement demand, and interrogatory answers were all put before the court at summary judgment. In them, he explained that the experts he and Mr. Hunt had consulted had evaluated the company at $0.4267 cents per share. He then valued his stock at an even higher rate due to the belief that the company had an agreement to buy nearly one-quarter of its shares back from some of the other stockholders. Mr. Hunt similarly used the consulting expert's valuation as the basis for his request before increasing it due to the belief that a sale was in the offing.

We believe these facts established a genuine issue of material fact that went to the court's duty in this case to determine the fair value of the stock. The court was given a valuation of 42 cents per share attributed to an expert that conflicted with Kukull's valuation of 19 cents per share. Although it constituted hearsay and was set forth without the reasoning supporting the valuation, this unchallenged evidence still suggested that Kukull's valuation was not the sole calculation before the court. The court had a duty under the statute to consider all of that information in making its determination of fair

value. Given the evidentiary support for Kukull's work, it was reasonable for the court to be persuaded by that valuation. Nonetheless, under these facts, that determination required the court to consider the dissenters' evidence. While it was understandably rejected, the weighing of that evidence at summary judgment was improper and needed to be done at trial.[6]

The dissenters' valuations, even without the evidence from their trial expert Hecker, raised a question of fact under the court's statutory duty in this area. The conflicting evidence did not allow the court to determine fair value at summary judgment. Accordingly, we reverse the summary judgment order and remand for further proceedings.

Attorney Fees

In light of our reversal of the summary judgment ruling, the award of attorney fees necessarily falls. The award also failed on its merits.

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[6] The parties do not address, and we do not consider, whether moving the company from Idaho to Washington changed its tax burdens or other costs in a manner that would have impacted the valuation of the corporation. The change was effective prior to the reverse stock split and thus was a relevant consideration, although the record does not indicate if the change had any significance.

RCW 23B.13.310 governs the award of costs and attorney fees in these actions, which provides:

> (1) The court in a proceeding commenced under RCW 23B.13.300 shall determine all costs of the proceeding, including the reasonable compensation and expenses of appraisers appointed by the court. The court shall assess the costs against the corporation, except that the court may assess the costs against all or some of the dissenters, in amounts the court finds equitable, to the extent the court finds the dissenters acted arbitrarily, vexatiously, or not in good faith in demanding payment under RCW 23B.13.280.
>
> (2) The court may also assess the fees and expenses of counsel and experts for the respective parties, in amounts the court finds equitable:
>
> (a) Against the corporation and in favor of any or all dissenters if the court finds the corporation did not substantially comply with the requirements of RCW 23B.13.200 through 23B.13.280; or
>
> (b) Against either the corporation or a dissenter, in favor of any other party, if the court finds that the party against whom the fees and expenses are assessed acted arbitrarily, vexatiously, or not in good faith with respect to the rights provided by chapter 23B.13 RCW.
>
> (3) If the court finds that the services of counsel for any dissenter were of substantial benefit to other dissenters similarly situated, and that the fees for those services should not be assessed against the corporation, the court may award to these counsel reasonable fees to be paid out of the amounts awarded the dissenters who were benefited.

Subsections (1) and (2) set forth the general principles at issue in this action. The corporation will normally bear the costs, including those of appraisal, unless the court finds that some of the dissenters acted "arbitrarily, vexatiously, or not in good faith" with respect to the payment demand. RCW 23B.13.310(1). The court can award attorney

fees, as well as expert fees, against the corporation if it does not substantially comply with the statute's dissenters' rights processes. RCW 23B.13.310(2)(a). The court can assess attorney and expert fees against any party that acts "arbitrarily, vexatiously, or not in good faith" under the statute. RCW 23B.13.310(2)(b). The amount of the award of attorney and expert fees must be "equitable." RCW 23B.13.310(2).

RCW 23B.13.310 appears directed toward intransigence and unreasonable behavior. The legislature expressed the intent of this provision:

> Proposed section 13.31 provides that generally the costs of the appraisal proceeding should be assessed against the corporation. But the court is authorized to assess these costs, in whole or in part, against the dissenters if it concludes they acted arbitrarily, vexatiously, or not in good faith in making the Proposed section 13.28 demand for additional payment. Similarly, counsel fees may be charged against the corporation or against dissenters upon a finding of a failure to comply in good faith with the requirements of this chapter. Individual dissenters, in turn, can be called upon to pay counsel fees for other dissenters if the court finds that the services were of substantial benefit to the other dissenters.
>
> The purpose of these grants of discretion with respect to costs and counsel fees is to increase the incentives of both sides to proceed in good faith under this chapter to attempt to resolve their disagreement without the need of a formal judicial appraisal of the value of shares.

SENATE JOURNAL, 51st Leg., 2nd Spec. Sess., at 3093 (Wash. 1989) (reprinting the Comments on the Washington Business Corporation Act prepared by the Corporate Act Revision Committee of the Washington State Bar Association, §13.31).

In a pair of opinions on the same case, the Washington Supreme Court recently dealt with the virtually identical fee provisions of RCW 25.15.480 that govern limited liability companies.[7] It stated the standards of review in the first opinion: an award under the statute is not mandatory, but is discretionary with the trial court and is reviewed on appeal for abuse of that discretion. *Humphrey Indus. v. Clay St. Assocs.*, 170 Wn.2d 495, 506-07, 242 P.3d 846 (2010) (*Humphrey* I). In the second opinion, the court clarified its holding in the first case with respect to the behavior and standards governing fee awards. As provided in the statute, fees are available only if a party acted "arbitrarily, vexatiously, and not in good faith." *Humphrey Indus. v. Clay St. Assocs.*, 176 Wn.2d 662, 670, 295 P.3d 231 (2013) (*Humphrey* II). The court also clarified that the dissenters' actions of declining the corporation's offer and submitting an excessive valuation did not violate the statutory standard. *Id.*

Neither *Humphrey* I nor *Humphrey* II addresses the trial court's obligations in addressing a fee request. We believe that consistent with the standards in other attorney fee award situations, the trial court is obligated to enter findings of fact and conclusions

[7] The events in this case, including the appellate briefing, occurred between the two *Humphrey* opinions, so the trial court and the parties did not have the benefit of *Humphrey* II.

of law that support its determination that a party acted "arbitrarily, vexatiously, or not in good faith" under the statute. *See generally*, *Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 632 (1998) (requiring trial court to apply lodestar formula and enter written findings to facilitate review). The failure to enter appropriate findings will normally result in a remand. *Id.*

Application of these principles to this case requires that we reverse the attorney fee award. The absence of a record explaining the basis for the fee award at minimum would require a remand. *Id.* However, in light of *Humphrey* II, nothing in the record of this case supports a determination of arbitrary, vexatious, or bad faith litigation. The dissenters did not accept Sentinel's valuation and, instead, sought their own which they then used as the basis for their counterproposals. Litigation ensued when Sentinel did not accept the counterproposals. The record does not suggest that either side instigated the litigation by behaving improperly, nor does it show that either side engaged in litigation conduct that would trigger fees under the statute.

Sentinel argues that the failure to admit Hecker's report (or any expert opinion) at the summary judgment hearing justified the award. For two reasons, it did not. First, the failure to admit evidence is not the same as a failure to obtain a valuation. At worst,

assuming some sort of duty even existed, the failure to properly authenticate the report only hurt the dissenters and was negligence, not intransigence or arbitrary conduct.[8] The dissenters had evidence to support their position and had made the evidence known to Sentinel, but they simply did not present it in admissible form at the hearing.

Second, even if the dissenters had behaved vexatiously at the summary judgment hearing, such action would not have retroactively made the entire proceedings arbitrary or vexatious. An award of fees to address vexatious behavior is proper under the statute. Nothing in the statute should be read, however, to shift the entire costs of the litigation to one party just because of a late stumble in the proceedings. Instead, we read the statute as attempting to discourage bad faith and arbitrary behavior by providing a remedy to the nonoffending party for all costs associated with the bad behavior. Properly and perfectly conducted pretrial litigation does not become vexatious merely because of arbitrary conduct during the ensuing trial. As noted in the legislative history, arbitrary or vexatious behavior that triggers litigation may properly shift the cost of the entire case because it causes the ensuing litigation. However, the remedy for later occurring

[8] It appears that the problem arose in the rush to get the report completed and filed before the summary judgment hearing. With the benefit of hindsight, it would have been better to have continued the hearing, but the failure to do so was not arbitrary conduct that harmed Sentinel.

improper behavior should only reach the consequences of the offending conduct; it does not address earlier proper conduct.

For the reasons noted, the award of attorney fees is reversed. Both parties seek attorney fees for this appeal. We exercise our discretion under the statute to decline their requests. Appellants, as prevailing parties, are entitled to solely their statutory costs and fees in this action. RAP 14.1, et seq.

Reversed and remanded.

Korsmo, C.J.

WE CONCUR:

Brown, J.

Kulik, J.

APPENDIX B

Chapter 23B.13 RCW
DISSENTERS' RIGHTS

RCW Sections

23B.13.010
Definitions.

As used in this chapter:

(1) "Corporation" means the issuer of the shares held by a dissenter before the corporate action, or the surviving or acquiring corporation by merger or share exchange of that issuer.

(2) "Dissenter" means a shareholder who is entitled to dissent from corporate action under RCW 23B.13.020 and who exercises that right when and in the manner required by RCW 23B.13.200 through 23B.13.280.

(3) "Fair value," with respect to a dissenter's shares, means the value of the shares immediately before the effective date of the corporate action to which the dissenter objects, excluding any appreciation or depreciation in anticipation of the corporate action unless exclusion would be inequitable.

(4) "Interest" means interest from the effective date of the corporate action until the date of payment, at the average rate currently paid by the corporation on its principal bank loans or, if none, at a rate that is fair and equitable under all the circumstances.

(5) "Record shareholder" means the person in whose name shares are registered in the records of a corporation or the beneficial owner of shares to the extent of the rights granted by a nominee certificate on file with a corporation.

(6) "Beneficial shareholder" means the person who is a beneficial owner of shares held in a voting trust

or by a nominee as the record shareholder.

(7) "Shareholder" means the record shareholder or the beneficial shareholder.

[1989 c 165 § 140.]

23B.13.020
Right to dissent.

***** CHANGE IN 2013 *** (SEE 1148.SL) *****

(1) A shareholder is entitled to dissent from, and obtain payment of the fair value of the shareholder's shares in the event of, any of the following corporate actions:

(a) A plan of merger, which has become effective, to which the corporation is a party (i) if shareholder approval was required for the merger by RCW 23B.11.030, 23B.11.080, or the articles of incorporation, and the shareholder was entitled to vote on the merger, or (ii) if the corporation was a subsidiary that has been merged with its parent under RCW 23B.11.040;

(b) A plan of share exchange, which has become effective, to which the corporation is a party as the corporation whose shares have been acquired, if the shareholder was entitled to vote on the plan;

(c) A sale or exchange, which has become effective, of all, or substantially all, of the property of the corporation other than in the usual and regular course of business, if the shareholder was entitled to vote on the sale or exchange, including a sale in dissolution, but not including a sale pursuant to court order or a sale for cash pursuant to a plan by which all or substantially all of the net proceeds of the sale will be distributed to the shareholders within one year after the date of sale;

(d) An amendment of the articles of incorporation, whether or not the shareholder was entitled to vote on the amendment, if the amendment effects a redemption or cancellation of all of the shareholder's shares in exchange for cash or other consideration other than shares of the corporation; or

(e) Any corporate action approved pursuant to a shareholder vote to the extent the articles of incorporation, bylaws, or a resolution of the board of directors provides that voting or nonvoting shareholders are entitled to dissent and obtain payment for their shares.

(2) A shareholder entitled to dissent and obtain payment for the shareholder's shares under this chapter may not challenge the corporate action creating the shareholder's entitlement unless the action fails to comply with the procedural requirements imposed by this title, RCW 25.10.831 through 25.10.886, the articles of incorporation, or the bylaws, or is fraudulent with respect to the shareholder or the corporation.

(3) The right of a dissenting shareholder to obtain payment of the fair value of the shareholder's shares shall terminate upon the occurrence of any one of the following events:

(a) The proposed corporate action is abandoned or rescinded;

(b) A court having jurisdiction permanently enjoins or sets aside the corporate action; or

(c) The shareholder's demand for payment is withdrawn with the written consent of the corporation.

[2009 c 189 § 41; 2009 c 188 § 1404; 2003 c 35 § 9; 1991 c 269 § 37; 1989 c 165 § 141.]

Notes:

Reviser's note: This section was amended by 2009 c 188 § 1404 and by 2009 c 189 § 41, each without reference to the other. Both amendments are incorporated in the publication of this section under RCW 1.12.025(2). For rule of construction, see RCW 1.12.025(1).

Effective date -- 2009 c 188: See note following RCW 23B.11.080.

23B.13.030
Dissent by nominees and beneficial owners.

(1) A record shareholder may assert dissenters' rights as to fewer than all the shares registered in the shareholder's name only if the shareholder dissents with respect to all shares beneficially owned by any one person and delivers to the corporation a notice of the name and address of each person on whose behalf the shareholder asserts dissenters' rights. The rights of a partial dissenter under this subsection are determined as if the shares as to which the dissenter dissents and the dissenter's other shares were registered in the names of different shareholders.

(2) A beneficial shareholder may assert dissenters' rights as to shares held on the beneficial shareholder's behalf only if:

(a) The beneficial shareholder submits to the corporation the record shareholder's consent to the dissent not later than the time the beneficial shareholder asserts dissenters' rights, which consent shall be set forth either (i) in a record or (ii) if the corporation has designated an address, location, or system to which the consent may be electronically transmitted and the consent is electronically transmitted to the designated address, location, or system, in an electronically transmitted record; and

(b) The beneficial shareholder does so with respect to all shares of which such shareholder is the beneficial shareholder or over which such shareholder has power to direct the vote.

[2002 c 297 § 35; 1989 c 165 § 142.]

23B.13.200
Notice of dissenters' rights.

(1) If proposed corporate action creating dissenters' rights under RCW 23B.13.020 is submitted for approval by a vote at a shareholders' meeting, the meeting notice must state that shareholders are or may be entitled to assert dissenters' rights under this chapter and be accompanied by a copy of this chapter.

(2) If corporate action creating dissenters' rights under RCW 23B.13.020 is submitted for approval without a vote of shareholders in accordance with RCW 23B.07.040, the shareholder consent described in RCW 23B.07.040(1)(b) and the notice described in RCW 23B.07.040(3)(a) must include a statement that shareholders are or may be entitled to assert dissenters' rights under this chapter and be accompanied by a copy of this chapter.

[2009 c 189 § 42; 2002 c 297 § 36; 1989 c 165 § 143.]

23B.13.210
Notice of intent to demand payment.

(1) If proposed corporate action creating dissenters' rights under RCW 23B.13.020 is submitted to a vote at a shareholders' meeting, a shareholder who wishes to assert dissenters' rights must (a) deliver to the corporation before the vote is taken notice of the shareholder's intent to demand payment for the shareholder's shares if the proposed corporate action is effected, and (b) not vote such shares in favor of the proposed corporate action.

(2) If proposed corporate action creating dissenters' rights under RCW 23B.13.020 is submitted for approval without a vote of shareholders in accordance with RCW 23B.07.040, a shareholder who wishes to assert dissenters' rights must not execute the consent or otherwise vote such shares in favor of the proposed corporate action.

(3) A shareholder who does not satisfy the requirements of subsection (1) or (2) of this section is not entitled to payment for the shareholder's shares under this chapter.

[2009 c 189 § 43; 2002 c 297 § 37; 1989 c 165 § 144.]

23B.13.220
Dissenters' rights — Notice.

***** CHANGE IN 2013 *** (SEE 1148.SL) *****

(1) If proposed corporate action creating dissenters' rights under RCW 23B.13.020 is approved at a shareholders' meeting, the corporation shall within ten days after the effective date of the corporate action deliver to all shareholders who satisfied the requirements of RCW 23B.13.210(1) a notice in compliance with subsection (3) of this section.

(2) If proposed corporate action creating dissenters' rights under RCW 23B.13.020 is approved without a vote of shareholders in accordance with RCW 23B.07.040, the notice delivered pursuant to RCW 23B.07.040(3)(b) to shareholders who satisfied the requirements of RCW 23B.13.210(2) shall comply with subsection (3) of this section.

(3) Any notice under subsection (1) or (2) of this section must:

(a) State where the payment demand must be sent and where and when certificates for certificated shares must be deposited;

(b) Inform holders of uncertificated shares to what extent transfer of the shares will be restricted after the payment demand is received;

(c) Supply a form for demanding payment that includes the date of the first announcement to news media or to shareholders of the terms of the proposed corporate action and requires that the person asserting dissenters' rights certify whether or not the person acquired beneficial ownership of the shares before that date;

(d) Set a date by which the corporation must receive the payment demand, which date may not be fewer than thirty nor more than sixty days after the date the notice in subsection (1) or (2) of this section is delivered; and

(e) Be accompanied by a copy of this chapter.

[2009 c 189 § 44; 2002 c 297 § 38; 1989 c 165 § 145.]

23B.13.230
Duty to demand payment.

***** CHANGE IN 2013 *** (SEE 1148.SL) *****

(1) A shareholder sent a notice described in RCW 23B.13.220 must demand payment, certify whether the shareholder acquired beneficial ownership of the shares before the date required to be set forth in the notice pursuant to *RCW 23B.13.220(2)(c), and deposit the shareholder's certificates, all in accordance with the terms of the notice.

(2) The shareholder who demands payment and deposits the shareholder's share certificates under subsection (1) of this section retains all other rights of a shareholder until the proposed corporate action is effected.

(3) A shareholder who does not demand payment or deposit the shareholder's share certificates where required, each by the date set in the notice, is not entitled to payment for the shareholder's shares under this chapter.

[2002 c 297 § 39; 1989 c 165 § 146.]

Notes:

***Reviser's note:** RCW 23B.13.220 was amended by 2009 c 189 § 44, changing subsection (2)(c) to subsection (3)(c).

23B.13.240
Share restrictions.

(1) The corporation may restrict the transfer of uncertificated shares from the date the demand for payment under RCW 23B.13.230 is received until the proposed corporate action is effected or the restriction is released under RCW 23B.13.260.

(2) The person for whom dissenters' rights are asserted as to uncertificated shares retains all other rights of a shareholder until the effective date of the proposed corporate action.

[2009 c 189 § 45; 1989 c 165 § 147.]

23B.13.250
Payment.

(1) Except as provided in RCW 23B.13.270, within thirty days of the later of the effective date of the proposed corporate action, or the date the payment demand is received, the corporation shall pay each dissenter who complied with RCW 23B.13.230 the amount the corporation estimates to be the fair value of the shareholder's shares, plus accrued interest.

(2) The payment must be accompanied by:

(a) The corporation's balance sheet as of the end of a fiscal year ending not more than sixteen months before the date of payment, an income statement for that year, a statement of changes in shareholders' equity for that year, and the latest available interim financial statements, if any;

(b) An explanation of how the corporation estimated the fair value of the shares;

(c) An explanation of how the interest was calculated;

(d) A statement of the dissenter's right to demand payment under RCW 23B.13.280; and

(e) A copy of this chapter.

[1989 c 165 § 148.]

23B.13.260
Failure to take corporate action.

(1) If the corporation does not effect the proposed corporate action within sixty days after the date set for demanding payment and depositing share certificates, the corporation shall return the deposited certificates and release any transfer restrictions imposed on uncertificated shares.

(2) If after returning deposited certificates and releasing transfer restrictions, the corporation wishes to effect the proposed corporate action, it must send a new dissenters' notice under RCW 23B.13.220 and repeat the payment demand procedure.

[2009 c 189 § 46; 1989 c 165 § 149.]

23B.13.270
After-acquired shares.

(1) A corporation may elect to withhold payment required by RCW 23B.13.250 from a dissenter unless the dissenter was the beneficial owner of the shares before the date set forth in the dissenters' notice as the date of the first announcement to news media or to shareholders of the terms of the proposed corporate action.

(2) To the extent the corporation elects to withhold payment under subsection (1) of this section, after the effective date of the proposed corporate action, it shall estimate the fair value of the shares, plus accrued interest, and shall pay this amount to each dissenter who agrees to accept it in full satisfaction of

the dissenter's demand. The corporation shall send with its offer an explanation of how it estimated the fair value of the shares, an explanation of how the interest was calculated, and a statement of the dissenter's right to demand payment under RCW 23B.13.280.

[2009 c 189 § 47; 1989 c 165 § 150.]

23B.13.280
Procedure if shareholder dissatisfied with payment or offer.

(1) A dissenter may deliver a notice to the corporation informing the corporation of the dissenter's own estimate of the fair value of the dissenter's shares and amount of interest due, and demand payment of the dissenter's estimate, less any payment under RCW 23B.13.250, or reject the corporation's offer under RCW 23B.13.270 and demand payment of the dissenter's estimate of the fair value of the dissenter's shares and interest due, if:

(a) The dissenter believes that the amount paid under RCW 23B.13.250 or offered under RCW 23B.13.270 is less than the fair value of the dissenter's shares or that the interest due is incorrectly calculated;

(b) The corporation fails to make payment under RCW 23B.13.250 within sixty days after the date set for demanding payment; or

(c) The corporation does not effect the proposed corporate action and does not return the deposited certificates or release the transfer restrictions imposed on uncertificated shares within sixty days after the date set for demanding payment.

(2) A dissenter waives the right to demand payment under this section unless the dissenter notifies the corporation of the dissenter's demand under subsection (1) of this section within thirty days after the corporation made or offered payment for the dissenter's shares.

[2009 c 189 § 48; 2002 c 297 § 40; 1989 c 165 § 151.]

23B.13.300
Court action.

(1) If a demand for payment under RCW 23B.13.280 remains unsettled, the corporation shall commence a proceeding within sixty days after receiving the payment demand and petition the court to determine the fair value of the shares and accrued interest. If the corporation does not commence the proceeding within the sixty-day period, it shall pay each dissenter whose demand remains unsettled the amount demanded.

(2) The corporation shall commence the proceeding in the superior court of the county where a corporation's principal office, or, if none in this state, its registered office, is located. If the corporation is a foreign corporation without a registered office in this state, it shall commence the proceeding in the county in this state where the registered office of the domestic corporation merged with or whose shares were acquired by the foreign corporation was located.

(3) The corporation shall make all dissenters, whether or not residents of this state, whose demands remain unsettled, parties to the proceeding as in an action against their shares and all parties must be

served with a copy of the petition. Nonresidents may be served by registered or certified mail or by publication as provided by law.

(4) The corporation may join as a party to the proceeding any shareholder who claims to be a dissenter but who has not, in the opinion of the corporation, complied with the provisions of this chapter. If the court determines that such shareholder has not complied with the provisions of this chapter, the shareholder shall be dismissed as a party.

(5) The jurisdiction of the court in which the proceeding is commenced under subsection (2) of this section is plenary and exclusive. The court may appoint one or more persons as appraisers to receive evidence and recommend decision on the question of fair value. The appraisers have the powers described in the order appointing them, or in any amendment to it. The dissenters are entitled to the same discovery rights as parties in other civil proceedings.

(6) Each dissenter made a party to the proceeding is entitled to judgment (a) for the amount, if any, by which the court finds the fair value of the dissenter's shares, plus interest, exceeds the amount paid by the corporation, or (b) for the fair value, plus accrued interest, of the dissenter's after-acquired shares for which the corporation elected to withhold payment under RCW 23B.13.270.

[1989 c 165 § 152.]

23B.13.310
Court costs and counsel fees.

(1) The court in a proceeding commenced under RCW 23B.13.300 shall determine all costs of the proceeding, including the reasonable compensation and expenses of appraisers appointed by the court. The court shall assess the costs against the corporation, except that the court may assess the costs against all or some of the dissenters, in amounts the court finds equitable, to the extent the court finds the dissenters acted arbitrarily, vexatiously, or not in good faith in demanding payment under RCW 23B.13.280.

(2) The court may also assess the fees and expenses of counsel and experts for the respective parties, in amounts the court finds equitable:

(a) Against the corporation and in favor of any or all dissenters if the court finds the corporation did not substantially comply with the requirements of RCW 23B.13.200 through 23B.13.280; or

(b) Against either the corporation or a dissenter, in favor of any other party, if the court finds that the party against whom the fees and expenses are assessed acted arbitrarily, vexatiously, or not in good faith with respect to the rights provided by chapter 23B.13 RCW.

(3) If the court finds that the services of counsel for any dissenter were of substantial benefit to other dissenters similarly situated, and that the fees for those services should not be assessed against the corporation, the court may award to these counsel reasonable fees to be paid out of the amounts awarded the dissenters who were benefited.

[1989 c 165 § 153.]