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No. 60923-8-I

SUPREME COURT  
OF THE STATE OF WASHINGTON

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HUMPHREY INDUSTRIES, LTD.,

Plaintiffs-Appellant

v.

CLAY STREET ASSOCIATES LLC, et al.,

Defendant-Respondents

ON APPEAL FROM KING COUNTY SUPERIOR COURT  
(Hon. Harry McCarthy)

APPELLANT'S PETITION FOR REVIEW

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ORIGINAL

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<sup>1</sup> Accord, Columbia Pictures Indus., Inc. v. Professional Real Estate Investors, Inc., 944 F.2d 1525,1531 (9th Cir. 1991) (first amendment right to petition as basis for sham exception to Noerr Pennington line of cases); Carter v. Univ. of Wash., 85 Wn.2d 391, 396-902 (1975) (constitutional right to access to courts); U.S. Const, Amdt 1, ("to petition the Government for a redress of grievances" and freedom speech); Wash. Const. Art. I, § § 4-5 (the right of petition and to speak freely, being responsible for the abuse of that right).

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A. IDENTITY OF PETITIONER

Appellant Humphrey Industries, Ltd. (“Humphrey”) asks this court to accept review of the court of appeals’ decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Humphrey asks for review of parts of the December 8, 2008 decision, a copy of which is Appendix A at pages A-1 through A-16. The parts of the decision that are requested to be reviewed are: (1) the affirmance of the trial court’s ruling that the company’s violation of the statutory deadline for the fair value payment to a dissenter and other conduct constituted substantial compliance with the dissenters’ rights statute and (2) after ruling that the trial court improperly granted a fee award against Humphrey on the basis for a Civil Rule 68 offer, the affirmance on the alternative ground that there was an adequate record that Humphrey acted vexatiously.<sup>2</sup> Appendix B at pages B-1 through B-13 are the trial court’s findings and conclusions in support of the fee awards against Humphrey.<sup>3</sup> If the court of appeals denies the pending reconsideration motion, then Humphrey will also ask for review of that decision.

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<sup>2</sup> Opinion at 14-16, App. A to the petition.

<sup>3</sup> Order Regarding Attorney’s Fees and Expenses, CP 2372-2384, App. B to the petition.

C. ISSUES PRESENTED FOR REVIEW

1. Did the court of appeals err, when it ruled that a company's violation of the dissenters' rights statutory deadline for the immediate payment of fair value constituted substantial compliance with the requirements of the statute?

2. After correctly ruling that the trial court erred as a matter of law when it found that Humphrey's rejection of a Civil Rule 68 offer was vexatious, did the court of appeals err, when it affirmed the trial court's vexatiousness ruling on alternative grounds that are not supported by substantial evidence and not "adequately supported in the record"<sup>4</sup>?

3. In such a case, when the trial court predicated its ruling on such an egregious error and relied on inadmissible evidence, is the proper resolution a remand to permit "a full and fair opportunity to develop facts"<sup>5</sup> relevant to the decision on vexatiousness?

D. STATEMENT OF THE CASE

1. Background: The complaint sought a judicial appraisal of fair value concerning Clay Street. The complaint properly named the companies' members as parties, because the companies were inactive, had disbursed their assets, and Humphrey was making both derivative and direct claims.

Humphrey filed this lawsuit seeking the appointment of an

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<sup>4</sup> State v. Costich, 152 Wn.2d 463, 477, 98 P.2d 795 (2004).

<sup>5</sup> Bernal v. American Honda Motor Co., 87 Wn.2d 406, 414, 553 P.2d 107 (1976).

appraiser, a judicial appraisal, and other relief to remedy Clay Street Associates LLC's violation of the statutory dissenters' rights that accrued, when the company effectuated a merger.<sup>6</sup> When Humphrey filed suit, Clay Street's status was inactive,<sup>7</sup> the proceeds from the sale of the company's sole asset appeared to have been fully disbursed to the members, and Humphrey's ability to trace the assets was being hindered.<sup>8</sup> For these reasons, Humphrey joined the company's other members as parties to his derivative claim<sup>9</sup> and "to the extent that they may have received assets from a particular company that no longer has any assets."<sup>10</sup>

In addition to the claim for the judicial appraisal of Clay Street, Humphrey's complaint asserted claims concerning two other companies whose property was also managed by Scott Rogel,<sup>11</sup> the co-manager of Clay Street. On appeal, these other claims and their disposition are relevant to refuting the court of appeals' new ruling on appeal that Humphrey acted vexatiously in this and other lawsuits.<sup>12</sup> In the complaint, Humphrey sought the distribution of funds to Humphrey from the sale

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<sup>6</sup> Complaint at 1:20-2:12, 5:23-8:10, CP 17-18, 21-24.

<sup>7</sup> Complaint at 7:8-9, CP 23.

<sup>8</sup> Complaint at 8:1-10, CP 24.

<sup>9</sup> Complaint at 1:21-2:12, CP 17-18.

<sup>10</sup> Complaint at 10:15-17, CP 26.

<sup>11</sup> Complaint at 2:19-21, CP 18.

<sup>12</sup> Unpublished Opinion at 14-15, App. A to the petition.

Clay Street Associates Phase II, LLC's sole asset,<sup>13</sup> and those claims were arbitrated by retired judge Steven Scott and resulted in an award of funds to Humphrey.<sup>14</sup> In the complaint, Humphrey also asserted a claim against Scott Rogel and his father, Joseph Rogel, for the unauthorized sale of property in the violation of a company agreement concerning 615 Commerce Street LLC,<sup>15</sup> and early in the case, Judge Hayden granted summary judgment that dismissed the claim but also denied a Civil Rule 11 motion Joseph and Ann Lee Rogels.<sup>16</sup> He also granted an order that compelled arbitration of all claims except for judicial appraisal of Clay Street.<sup>17</sup>

2. Judge Hayden granted partial summary judgment ruling Clay Street violated the dissenters' rights immediate payment statute and appointed an appraiser.

As to Clay Street, the Washington Limited Liability Company

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<sup>13</sup> Complaint at 8:11-9:2, CP 24-25.

<sup>14</sup> Order Approving Final Accounting and Disbursement Related to Clay Street Associates Phase II, LLC, CP 2346-2350.

<sup>15</sup> Complaint at 1:20-2:18, 5:1-22, CP 17-18, 21.

<sup>16</sup> Humphrey's Opp'n to Rogel Fee Motion at 6:7-7 quoting from (Proposed) Order Granting CR 11 Sanctions at 1:25-2:4, CP1998; See Revised Resp. to CR 11 Motion and Cross-Motion for Partial Summ. J., CP 366-379; Revised Decl. in Supp. of Resp. to CR 11 Motion and Cross-Motion for Reconsideration, CP 380-404; Revised Decl. of Alan Bornstein in Supp. of Attorneys' Fees and Litigation Expenses in Favor of Joseph & Ann Lee Rogel at 2 (confirming Judge Hayden had not granted their CR 11 motion), CP 3370.

<sup>17</sup> Order Granting Motion to Stay Arbitration of Appraisal Righ[t]s and Granting Motion to Compel Arbitration of Other Claims Relating to Clay Street, CP 342-245 Humphrey asserted a tort claim against Scott Rogel. Complaint at 9:3-22, CP 25.

Act<sup>18</sup> has provisions that protect the rights of dissenters. (Article XII, Dissenters' Rights, RCW 25.15.425-.480). It is undisputed that: (1) Clay Street made a delinquent fair value payment to Humphrey five months after the statutory deadline and (2) Clay Street paid Humphrey less than the amount ultimately awarded by the trial court.

Four months after Humphrey filed this suit, Judge Hayden granted partial summary judgment ruling that the company violated statutory deadline for payment.<sup>19</sup> Judge Hayden also requested Clay Street provide additional evidence as to its compliance with other statutory requirements concerning the fair value payment.<sup>20</sup> He also appointed pursuant to RCW 25.15.475(5) an appraiser.<sup>21</sup> Seven months later, once the court-appointed appraiser made a recommendation on fair value, Humphrey stipulated to that value and filed a motion for the adoption of that value,<sup>22</sup> while Clay Street objected to the recommendation and requested discovery and that the appraiser perform additional work.<sup>23</sup> Judge Hayden declined the

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<sup>18</sup> RCW 25.15.901 (stating statute may be cited as the "Washington Limited Liability Company Act.").

<sup>19</sup> Order Granting in Part and Denying in Part Motion for Partial Summ. J., CP 346-47.

<sup>20</sup> Motion to Adopt the Report of the Court-Appointed Appraiser at 3:3-9 & Attach. D (Oct. 31, 2005 letter), CP 569, 691-2.

<sup>21</sup> Motion of Clay Str. Assocs. LLC for Order Regarding Appraisal at 2:2-14, CP 420.

<sup>22</sup> Motion to Adopt the Report of the Court-Appointed Appraiser, CP 567-571.

<sup>23</sup> Clay Str. Assocs. LLC's Opp'n to Humphrey Indus.' Motion to Adopt the Report of the Court-Appointed Appraiser, CP 696-705.

pretrial motion to adopt the recommendation by the court-appointed appraiser.<sup>24</sup> When the appraiser's health prevented him from completing additional work requested by Clay Street, Judge Hayden appointed the appraiser's partner as the successor appraiser. Almost two years after the suit was filed, the second-court appointed appraiser produced his report.<sup>25</sup>

3. However, Judge McCarthy later adopted the valuation by Clay Street's appraiser and not the higher ones by the court-appointed appraisers. He also made a fee award to Clay Street and the Rogels on the basis that Humphrey acted vexatiously when it rejected a CR 68 offer and failed to dismiss the stayed claims against the Rogels.

When Judge Hayden was reassigned to the criminal calendar, this lawsuit was reassigned to Judge McCarthy.<sup>26</sup> At trial, Judge McCarthy adopted the valuation opinion of the appraiser retained by Clay Street and not the valuation opinion of the two appraisers appointed by Judge Hayden.<sup>27</sup> Judge McCarthy also exercised his discretion to deduct transaction costs from the fair value.<sup>28</sup> In addition, he ruled that Clay Street substantially complied with the statutory requirements (despite the prior summary judgment that the company had violated the statute) and

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<sup>24</sup> Order Denying Motion to Adopt the Report of the Court Appointed Appraiser without Further Hearing, CP 829.

<sup>25</sup> Humphrey's Trial Brief at 30:9-11, CP 1381.

<sup>26</sup> See, e.g., Order Granting Continuance of Trial, CP 1396-97.

<sup>27</sup> Findings of Fact and Conclusions of Law at 8:17-9:24, 10::26-11:8, CP 2363-66.

<sup>28</sup> Findings of Fact and Conclusions of Law at 13:3-20, CP 2368.

also ruled the company did not act arbitrarily, vexatiously or in bad faith.<sup>29</sup> Finally, Judge McCarthy ruled that Humphrey acted vexatiously in failing to accept a Civil Rule 68 offer of judgment and in failing to dismiss the stayed claims against the Rogels and awarded fees to Clay Street<sup>30</sup> and the Rogels<sup>31</sup> pursuant to RCW 25.15.480(2)(b).

4. The court of appeals affirmed the trial court's ruling that the failure to meet the statutory deadline amounts to substantial compliance with the statute ruling but also ruled the trial court erred in shifting fees based on Civil Rule 68. Nevertheless, the trial court affirmed on the alternative ground that Humphrey acted vexatiously.

When the trial court granted fees to Clay Street, it relied exclusively on the inadmissible Civil Rule 68 offer of judgment: “Humphrey had no reasonable or legitimate basis for his refusal to accept the Rule 68 offer and instead, Humphrey’s insistence on litigation and trial after October 27, 2006 [the date of the CR 68 offer] was arbitrary and vexatious.”<sup>32</sup> Civil Rule 68’s terms expressly prohibited the use of the offer to shift fees: “An offer not accepted shall be withdrawn and evidence thereon is not admissible . . . .” Clay Street intentionally violated that

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<sup>29</sup> Order at 7:25-8:5, CP 2378-79, App. B to this petition.

<sup>30</sup> Id. at 8:15-25, 9:18-25, CP 2379-80, App. B to this petition.

<sup>31</sup> Id. at 12:10-12, CP 2383, App. B to this petition.

<sup>32</sup> Id. at 8:22-25, CP 2379:22-25, App. B to this petition.

proscription – its Civil Rule 68 offer improperly claimed to shift fees.<sup>33</sup>

The court of appeals reversed the trial court’s exclusive basis for the fee award: “The court erroneously considered the CR 68 offer in determining whether Humphrey’s behavior with respect to its dissenter’s rights was vexatious.”<sup>34</sup> But instead of reversing the improper fee award, the court of appeals affirmed the trial court’s ruling on other grounds that Humphrey acted vexatiously which it purported to find in the record.<sup>35</sup> Neither the record nor the law supports a ruling that Humphrey acted vexatiously with respect to Clay Street or the Rogels.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. The court of appeals’ construction of the statutory standard of “substantial compliance” conflicts with the decisions of the supreme court and court of appeals ruling that there can be no substantial compliance with a statutory deadline. Furthermore, “substantial compliance . . . with the requirements” of the dissenters’ rights statute is an issue of substantial public interest that should be determined by the supreme court.

The ruling that Clay Street substantially complied with the statutory requirements when it violated the statutory deadline for payment of fair value by four months is an error of law.<sup>36</sup> The ruling conflicts with

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<sup>33</sup> App. A to Appellant’s Revised Reply Br. (quoting the offer of judgment that stated “in the event Humphrey fails to recover a judgment in excess of the amount of this offer, plaintiff will be required to pay pursuant to CR 68 to pay the costs and/or fees incurred in this action” and citing CP 3311. . .”).

<sup>34</sup> Opinion at 14, App. A to this petition.

<sup>35</sup> Opinion at 14, App. A to this petition.

<sup>36</sup> Appellant’s Revised Opening Br. at 13-14; Appellant’s Revised Reply Br. at 6 & Ex. 73.

this court's decision in City of Seattle v. Pub. Employment Relations Comm'n: "It is impossible to substantially comply with a statutory time limit ... It is either complied with or it is not ... failure to comply with a statutorily set time limitation cannot be considered substantial compliance."<sup>37</sup> The ruling in this case also conflicts with other court of appeals decisions that ruled: "Belated compliance is cannot constitute substantial compliance"<sup>38</sup> and "Noncompliance with a statutory mandate is not substantial compliance."<sup>39</sup> Under black-letter Washington law, "substantial compliance" does not apply to statutory deadlines, only to the use of irregular procedures in meeting a deadline.

The company did not provide Humphrey with a prior warning notice that it intended to postpone the "immediate payment" of fair payment and deprive him of the "immediate use" of those funds.<sup>40</sup> Here, the trial court's and court of appeals' construction that creates a "funding defense" (even while the company had equity and other resources)<sup>41</sup> that conflicts with the statute's express purpose: "since the person's rights as a

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<sup>37</sup> City of Seattle v. Pub. Employment Relations Comm'n, 116 Wn.2d 923, 928-29, 809 P.2d 1377 (1991)(citations and internal quotation marks omitted); see Appellant's Revised Opening Br. at 17 & n. 22; Appellant's Revised Reply Br. at 6-7.

<sup>38</sup> Westcott Homes LLC v. Chamness, 146 Wn. App. 728, 735, 192 P.3d 394 (2008).

<sup>39</sup> Petta v. Dep't of Labor & Indus., 68 Wn. App. 406, 409, 842 P.2d 1006 (1992).

<sup>40</sup> Appellant's Revised Opening Br. at 13-14 (citing RCW 25.15.460(1), quoting comments to 1984 Model Business Corporation Act ("MBCA")'s provision concerning "immediate payment" and "immediate use of the money," and arguing the company could have restarted the merger process, complied with the new deadline, and paid Humphrey a higher value).

<sup>41</sup> See, e.g., Appellant's Revised Reply Br. at 7-8 & n. 18.

shareholder are terminated . . . , the shareholder should have immediate use of the money.”<sup>42</sup> The erroneous construction of the statute causes the dissenter to be an involuntary lender to the company, creates a gaping loophole in the statutory framework, and strips the dissenters’ statutorily-conferred rights. The ruling has implications beyond this case and beyond Washington common law concerning substantial compliance with statutory deadlines; the ruling adversely implicates involves similar rights and similar terms in model and uniform statutes.

The Washington Limited Liability Company Act’s<sup>43</sup> dissenters’ rights provisions that track those in the 1984 Revised Model Business Corporate Act (RMBCA) that were adopted in the Washington Business Corporate Act (RCW 23B.13.310) and the Washington Uniform Limited Partnership Act (RCW 25.10.955).<sup>44</sup> These model and uniform laws should be applied and construed to effectuate uniformity on the subjects among the states enacting them.<sup>45</sup> Yet, there is scant decisional law construing either the “substantial compliance” or acted “vexatiously” standards under these statutes. There appears to be no decision law

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<sup>42</sup> CP 1970- 1973, 2 Senate Journal, 51<sup>st</sup> Legis., App. A Comments, Model Bus. Corp. Act § 13.25, Payment. Clay Street’s tardy payment also failed to be accompanied by copies of the financial statements for the most recent fiscal year. Humphrey’s Motion for Fees and Costs at 9:1-10:5, CP 189-92; Spellman Decl. at 11:13-13:2, CP1949-51; Oct. 14, 2005 letter at 2-3, CP 1891-20, Appellant’s Revised Opening Br. at 17-18.

<sup>43</sup> RCW 25.15.901 (stating statute may be cited as the “Washington Limited Liability Company Act.”).

<sup>44</sup> RCW 25.10.630 (short title of Washington Uniform Limited Partnership Act).

<sup>45</sup> RCW 25.10.620 (Washington Uniform Limited Partnership Act stating “This chapter shall be so applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this chapter among states adopting it.”).

deciding the “substantial compliance” standard in context of the dissenters’ rights statute’s immediate payment deadline.

In summary, the petition for review should be granted pursuant to RAP 13.4(b)(1), (2) and (4), because the decisions below conflict with decisions of the supreme court and court of appeals and because the “substantial compliance” standard in the dissenters’ rights statute is an issue of substantial public interest.

2. The construction of the statutory standard of “acted . . . vexatiously . . . with respect to the rights” provided by the dissenters’ rights statute raises an issue of substantial public interest and implicates a significant issue of law under the constitutional right to access courts<sup>46</sup> that should be determined by the supreme court.

The 1984 RMBCA’s standard has two separate and distinct standards for the award of fees and expenses:

(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 limited liability company and in favor of any or all dissenters if the court finds the limited liability company did not substantially comply with the requirements of this article; or

(b) Against either the limited liability company or a dissenter, in favor of any other party, if the court finds that the

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<sup>46</sup> Accord, Columbia Pictures Indus., Inc. v. Professional Real Estate Investors, Inc., 944 F.2d 1525,1531 (9th Cir. 1991) (first amendment right to petition as basis for sham exception to Noerr Pennington line of cases); Carter v. Univ. of Wash., 85 Wn.2d 391, 396-902 (1975) (constitutional right to access to courts); U.S. Const, Amdt 1, (“to petition the Government for a redress of grievances” and freedom speech); Wash. Const. Art. I, § 4-5 (the right of petition and to speak freely, being responsible for the abuse of that right).

party against whom the fees and expenses are assessed acted arbitrarily, vexatiously, or not in good faith with respect to the rights provided by this article.

RCW 25.15.480(2)(a)-(b) (emphases added). While “vexatiously” is used in the alternative fee shifting provision in uniform and model business statutes, there are few Washington decisions construing the term “vexatiously” (or “vexatious”) and apparently no decisions in other jurisdictions that construe the term in the context of the model and uniform acts.

The statutory standard’s threshold is, obviously, deliberately high.<sup>47</sup> The fee statute embodies a conspicuous asymmetry. While the company may be subject to fees whenever it violates the Act, the dissenter is subject to fees only in the extreme situation in which the dissenter acts with bad faith or vexatiously—and, for good measure, the second standard encompasses arbitrary, bad faith or vexatious acts on the part of the company, as well.<sup>48</sup>

The higher threshold is inherent in the three terms: “arbitrarily, vexatiously, or not in good faith with respect to the rights provided by this article.” Arbitrary means “manifestly unreasonable” or “outside the acceptable range of choices”<sup>49</sup> or “arising from unrestrained exercise of

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<sup>47</sup> Appellant’s Revised Opening Br. at 12.

<sup>48</sup> Appellant’s Revised Opening Br. at 12.

<sup>49</sup> Appellant’s Revised Reply Br. at 20 n. 47 citing Weyerhaeuser Co. v.  
(continued . . .)

will, caprice or personal preference.”<sup>50</sup> Vexation is defined as: “The injury or damage which is suffered in consequence of the tricks of another.” Black’s Law Dictionary at 1403 (5th ed., 1979).<sup>51</sup> The trickery element is also found in same dictionary’s definition of “vexatious proceeding” as a “[p]roceeding instituted maliciously and without probable cause. . . . When the party bringing the proceeding is not acting bona fide, and merely wishes to annoy or embarrass his opponent, or when it is not calculated to lead to any practical result.”<sup>52</sup> In other words, vexation has an element of bad faith: (1) a frivolous or baseless suit at the

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(. . . continued)

Commercial Union Ins. Co., 142 Wn.2d 654, 683, 15 P.3d 115 (2000) (“A trial court abuses its discretion when it is based on unreasonable grounds or is manifestly unreasonable or arbitrary”); In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997) (“A court’s decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard”).

<sup>50</sup> Appellant’s Revised Reply Br. at 10 n. 26 citing Sec. State Bank v. Ziegeldorf, 554 N.W.2d 884, 892 (Iowa 1996) (quoting and applying the definition). “An arbitrary act ‘is founded on prejudice or preference rather than on reason or fact.’ Black’s Law Dictionary at 112 (8th ed., 2004).” Humphrey’s Motion for Fees and Costs, CP 1893. When there is room for two opinions, a decision is not arbitrary, “if it is honestly made and upon due consideration). Bowers v. Pollution Control Hearings Bd., 103 Wn. App. 587, 596, 13 P.3d 1076 (2000).

<sup>51</sup> Reply Br. at 25 citing CP 1391:22-24 (Trial Br: “Vexation” is defined as: “The injury or damage which is suffered in consequence of the tricks of another.” Black’s Law Dictionary at 1403 (5th Ed. 1979)); see also CP 2420:24-26 (quoting the same definition).

<sup>52</sup> Black’s Law Dictionary at 1403; see Burdick v. Burdick, 148 Wash. 15, 23, 267 P. 767 (1928) (quoting 32 C.J. at 49 which states “Nevertheless, actions are not necessarily vexatious because they are numerous. . . . One may not be enjoined from protecting and enforcing his rights by lawful means, unless his acts to that effect are done or threatened necessarily, not really for the purpose of protecting his rights, but maliciously to vex, annoy, and injure another” and ruling “if appellant had made any showing whatever indicating that the claim . . . was a bona fide suit, that it possessed even a little merit, and that the court was resorted to in good faith, we should not hesitate to hold that such a matter must be tried out in the suit brought for that purpose”).

inception or (2) procedural bad faith (actions in a lawsuit that unnecessarily increase the cost of litigation and cause delay).<sup>53</sup>

The element of bad faith associated with “vexatiously” is reinforced by the next term, “not in good faith.”<sup>54</sup> Not in good faith” is the standard that is implicit in Civil Rule 11(a)’s requirements of “not interposed for any improper purpose, such as to harass or to cause unnecessarily delay or needless increase in the cost of litigation” and is similar to the standards for bad faith conduct in federal court<sup>55</sup> Labeling a party as a vexatious is a stigmatization that should not be lightly conferred.<sup>56</sup> But on appeal, the court of appeals did just that.<sup>57</sup>

An appellate court “may affirm a lower court’s ruling on any grounds” but only if those are “adequately supported in the record.”<sup>58</sup> “[T]he underlying assumption of the general rule permitting affirmance of

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<sup>53</sup> Accord, Rogerson Hiller Corp. v. Port of Angeles, 96 Wn. App. 918, 927-28, 982 P.2d 131 (1999) (discussing federal standard for bad faith).

<sup>54</sup> “Good faith is ‘[a] state of mind consisting in honesty in belief or purpose, (2) faithfulness to one’s duty or obligation, or . . . (4) absence of intention to defraud or seek unconscionable advantage.’ Black’s Law Dictionary at 713 (8th ed., 2004).” Humphrey’s Motion for Fees at 11:25-26, CP 1893.

<sup>55</sup> Rogerson Hiller Corp. v. Port of Angeles, 96 Wn. App. 918, 927-28, 982 P.2d 131 (1999) (discussing three types of bad faith conduct recognized in federal court) discussed in Decl. of David Spellman in Supp. of Humphrey’s Motion for Fees and Costs (to be Supplemented with Amounts) at 6:12-10:1-6 & n. 11, CP 1944-48.

<sup>56</sup> See, e.g., McNeil v. Powers, 123 Wn. App. 577, 591, 97 P.3d 760 (2004) (affirming summary judgment and sanctions concerning a person two bankruptcy courts identified as a vexatious litigant and affirming ruling about a frivolous and baseless action brought solely for the purpose of harassment).

<sup>57</sup> Opinion at 14-16, App. A to the petition.

<sup>58</sup> State v. Costich, 152 Wn.2d 463, 477, 98 P.3d 795 (2004) (emphasis added).

the trial court upon a correct, alternative ground not considered by the trial court ‘is, of course, that the parties had a full and fair opportunity to develop facts relevant to that decision. Where this opportunity has not been available, the proper resolution of the appeal is not affirmance but remand.’ Bernal v. American Honda Motor Co., 87 Wn.2d 406, 414, 553 P.2d 107 (citation omitted).

Here, the court of appeals correctly dismissed the trial court’s sole theory for finding Humphrey was arbitrary or vexatious.<sup>59</sup> But rather than remanding for a factual determination of any remaining grounds for awarding Clay Street or the Rogels attorney fees, and thereby giving Humphrey “full and fair opportunity to develop facts relevant to the decision,” the court of appeals attempted to comb the record for instances of “vexatious conduct.” It concluded there were three alternative grounds for affirming the trial court: (1) that Humphrey objected to sale of the property and the statutory payment, made his own fair value estimate, and failed to act on a settlement offer,<sup>60</sup> (2) that Humphrey was the “source of acrimony and resulting dysfunctional relationships” and (3) that Humphrey’s “litigiousness” and engaging in multiple lawsuits against

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<sup>59</sup> Opinion at 15, App. A to the petition.

<sup>60</sup> Opinion at 14-15, App. A to the petition.

these and other companies and their members was “unreasonable.”<sup>61</sup>

But “vexatious” is a legal term of art, not a description synonymous with a free-floating standard of reasonableness. Each of these three proposed alternative grounds is unsupported by substantial evidence.

The first category of allegedly vexatious action cited by the court of appeals is Humphrey’s objection to the sale of the property, the company’s fair value payment and calculation and a settlement offer.<sup>62</sup> Yet, “the Clay Street Operating Agreement required unanimous consent approval of the members to sell the property.”<sup>63</sup> Humphrey even made arbitration demands pursuant to the terms of the company’s operating agreement before the effectuation of the merger with the shell company.<sup>64</sup> There is also substantial evidence in the record that Humphrey had good cause to object to the Clay Street’s payment and calculation, when the

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<sup>61</sup> Opinion at 14-15, App. A to the petition.

<sup>62</sup> Opinion at 14, App. A to the petition.

<sup>63</sup> Finding No. 9, CP 2308.

<sup>64</sup> Appellant’s Revised Opening Br. at 15 & n. 19 (stating the company had other options besides triggering the dissenters’ rights statute, including declaratory relief, a judicial dissolution and contractual A.D.R. and the LLC’s act express policy of giving maximum effect to freedom of contract would be satisfied by responding to Humphrey’s arbitration demands under the company agreement’s A.D.R. clause); *Id.* at 20 (stating “if Clay Street had filed an early declaratory suit or acceded to Humphrey’s arbitration or mediation demands, the parties would have avoided litigation costs which resulted from the failure to its failure to do so.”); *Id.* at 36 & n. 59 (“When Humphrey sent his fair value calculation, Humphrey had already filed a motion for global mediation that Clay Street opposed and made request for company records and information (Ex. 74), which were not provided with the payment delivered on May 27, 2005 (Ex. 75)” and citing Dec. 3, 2006 Ostroff Dep. Test. at 64:16-65:5, CP 1850; see also *infra* n. 29.

other members received 50% more than Humphrey.<sup>65</sup> At trial, Clay Street's counsel admitted that its fair value estimate was "not particularly reasonable"<sup>66</sup> and its appraiser admitted the value was not consistent with his conclusion<sup>67</sup> Furthermore, the value was substantially lower than purchase offers that Clay Street rejected as too low<sup>68</sup> and lower than the price paid for the property.<sup>69</sup> Meanwhile, Humphrey's own fair value demand was lower than two items of unchallenged data that he had secured,<sup>70</sup> which he provided to the court-appointed appraisers, and other data which caused the court-appointed appraisers to increase their values. Moreover, there is incontestable evidence of Humphrey's good faith,

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<sup>65</sup> Compare May 27, 2007 letter enclosing \$181,192.64 to Humphrey, CP 278 with May 27, 2006 letter enclosing Seller's Settlement Statement showing Scott Rogel, Joe Rogel and ABO Investments each receiving \$266,530 plus \$10,484 at CP 284.

<sup>66</sup> May 27, 2007 letter enclosing \$2,533,459 calculation of fair value less Bank of America mortgage plus interest, CP 280; Appellant's Br. at 21 & n. 30 citing RP 29:23-30:11.

<sup>67</sup> Appellant's Br. at citing RP 576[:9-12][Barnes test.]

<sup>68</sup> Appellant's Br. at 21 & n. 30 citing Ex. 49 (Oct. 29, 2004 offer); Ex. 51 (Ex. Nov. 4, 2004 offer); Appellant's Br. at 41 citing Ex. 227 (\$3.19 million purchase offer).

<sup>69</sup> Appellant's Revised Motion for Reconsideration at 12 citing May 27, 2006 letter enclosing Seller's statement showing \$3.3 million, CP 284.

<sup>70</sup> Humphrey's calculation was lower than value of the mirror-image Park 280 building and lower than the Puget Sound properties spreadsheet. Puget Sound Properties' Kent Valley Industrial Sales Comps 2004 (\$85.96/sq.ft.), CP 683-84, also part of Ex. 113. Appellant's Revised Motion for Reconsideration, App. C (chart); see also Appellant's Revised Opening Br. at 42 (1,200 sq. ft. office space, which the court appointed appraisers concluded was worth \$100,000 and alone while Barnes never looked at the space and never interviewed anyone about it); *Id.* at 20 n. 48; *Id.* at 22 & n. 53 (\$100,000 in office space: "Compare RP 54:19-22 (Shedd Test.); CP 2254:12-21, CP 2255:14-22 (Shedd Test.) with RP at 570:11-21 (Barnes Test.)." Humphrey's estimate was similar to the "cost" basis later used by the second-court appointed appraiser who reviewed Humphrey's costs estimate and increased the cost basis. Compare Shedd's report (cost basis as \$3.4 million), CP 581 with Aug. 1, 2006 letter to Bruce Allen (stating construction costs are low and attaching cost), CP 679, 681-82), Shedd's later appraisal (using \$3.95 million as the cost basis), Ex. 113, Apr. 13, 2007 report at 26.

when he stipulated to the court-appointed appraisers' lower value nine months before trial<sup>71</sup> and reaffirmed this reasonable position in his trial brief.<sup>72</sup> Finally, there is no precedent for comparing the amount of an unfunded settlement offer made by a dissolved company with the amount of a final judgment, when there is statutory framework does not authorize such a comparison (while other statutes do),<sup>73</sup> when the trial court rejected the higher values recommended by the court-appointed appraisers (to which Humphrey stipulated) and when the trial court exercised discretion to determine a lower fair value and to deduct transaction costs.<sup>74</sup>

As for the court of appeals' second and third "alternative grounds" of vexatious behavior (Humphrey as the source of acrimony and engaging in multiple lawsuits), these grounds are not "adequately supported by record."<sup>75</sup> The source of the acrimony was not a litigated issue. The

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<sup>71</sup> CP 567; Proposed Order, CP 694.

<sup>72</sup> Humphrey Trial Br. at 7:14-15 ("Judge Hayden has already appointed appraisers to set the fair value, and the Court should adopt one of the measures in those reports."), CP 1358; *Id.* at 40:7-9 ("Humphrey, furthermore, stipulated to the adoption of the appraiser's first report, while Clay Street opposed the adoption"), CP 1391.

<sup>73</sup> *See, e.g.*, RCW 64.55.160 (authorizing fee shifting based on offers of judgment with proof of ability to pay under the Construction Defects Disputes Act); Appellant's Revised Reply Br. at 16-17 & n. 41; Appellant's Revised Opening Br. at 28-29 & n. 45 (citing statutes).

<sup>74</sup> Appellant's Revised Reply Br. at 23 n. 59 (summarizing the transaction costs). The FAS definition of fair value excludes those costs, and the court had discretion to include or exclude those costs. Appellant's Revised Opening Br. at 48 n. 85 quoting Statement of Financial Accounting Standards No. 157, Fair Value Measurements ¶ 9, CP 1679; Appellant's Revised Opening Br. at 48.

<sup>75</sup> Costich, 152 Wn.2d at 477.

evidence actually points to another primary source of acrimony.”<sup>76</sup> Nor do the multiple lawsuits demonstrate vexatious behavior: “actions are not necessarily vexatious because they are numerous,” were for the purpose of protecting rights, and not to “maliciously to vex, annoy, and injure another.”<sup>77</sup> The irony is when Humphrey sought to consolidate these disputes in A.D.R. – Clay Street opposed the consolidation<sup>78</sup> and filed a second lawsuit which was later consolidated with this one. Furthermore, the rulings in this case that Humphrey did not act frivolously in pursuing the 615 Commerce claim and the denial of fees in the 899 West Main arbitration are unrefuted evidence of Humphrey’s lack of vexatiousness.<sup>79</sup> The other lawsuits/arbitrations do not involve the same claims, and they did not have a trait of rejected offers.<sup>80</sup> The record below is complex,

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<sup>76</sup> See Appellant’s Revised Motion for Reconsideration at 19 citing Decl. of David C. Spellman in Opp’n to Clay Str.’s & Rogel’s Motions for Fees and Expenses at 2:7-13, CP 1935; Decl. of Joseph Rogel at 2:15-17, CP 3829; Decl. of George Humphrey in Supp. of Plf.’s Motion for Injunctive Relief at 2:11-24; Oct. 2003 S. Rogel Dep. Test at 12:16-13:2; Decl. of Stan Beck in Supp. of Humphrey’s Motion for Fees at 2:17-19, CP 2071; Ex 43; see Farrar Test, RP at 700:13-702:15 (admission of Ex. 43).

<sup>77</sup> Burdick 148 Wash. at 22.

<sup>78</sup> Decl. of David Spellman in Supp. of Fees at 7:1-3, 8:6-9:12 (Clay Street’s failure to respond to two arbitration demands consistent with its stated intention “not to negotiate” and refusal to agree to global mediation), CP 1945-47.

<sup>79</sup> Appellant’s Revised Reconsideration Motion at 20-23; Revised Decl. of Alan Bornstein in Supp. of Attorneys’ Fees and Litigation Expenses in Favor of Joseph and Ann Lee Rogel at 2 (confirming denial of CR 11 motion concerning 615 Commerce); July 17, 2005 letter by judge Soukup (each party in 899 West Main prevailed on some issues and denying fee claims).

<sup>80</sup> Opinion at 15, App. A to the petition. Before trial, during trial, and post-trial, Humphrey made repeated objections to the use of settlement offers concerning Clay Street. Revised App. C to Appellant’s Revised Reply Br. Humphrey presented specific evidence that refuted Ostroff’s conclusory statements about settlement offers in other  
(continued . . .)

convoluted, and voluminous. It is far too complex to allow the court of appeals to comb through the record for alternative grounds for supporting a finding of “vexatiousness” against Humphrey.

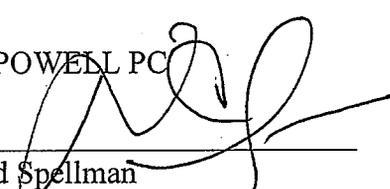
F. CONCLUSION

This court should accept review for the reasons stated in Part E and reverse the rulings that Clay Street substantially complied with RCW 25.15.425-.475’s requirements, that Humphrey acted vexatiously with respect to the rights provided by the dissenters’ rights statutes, and the fee award to Clay Street, and remand for further proceedings consistent with the rulings by this court.

Respectfully submitted this 7<sup>th</sup> day of January, 2009.

LANE POWELL PC

By



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( . . . continued)

cases including ones in which he was not a party. Compare Decl. of David C. Spellman in Opp’n to Clay Str. & Rogels’ Motion for Fees and Expenses at 2:14-4:19, CP 1935-37, with Ostroff Decl. at 2:11-15 (testifying he knew from the Rogels that Humphrey had lost all these other claims and shown an absolute unwillingness to accept any reasonable settlement); Humphrey’s Opp’n to Clay Str.’s Motion for Attorney’s Fees and Expenses at 2:4-8, 2:14-4:22 (moving to strike hearsay portions of Ostroff declaration and irrelevant statements about other proceedings and distinguishing other statutes that expressly permit the consideration of settlement offers in fee shifting), CP 2006-08.

# APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

HUMPHREY INDUSTRIES LTD.,	)	No. 60923-8-1
	)	
Appellant,	)	
	)	
v.	)	
	)	
CLAY STREET ASSOCIATES LLC;	)	UNPUBLISHED OPINION
615 COMMERCE LLC; CLAY	)	
ASSOCIATES PHASE II LLC, SCOTT	)	
ROGEL, LORI GOLDFARB; JOSEPH	)	
ROGEL and LEE ANN ROGEL,	)	
husband and wife; ABO INVESTMENTS	)	
and AVRAM INVESTMENTS,	)	
	)	
Respondents.	)	FILED: December 8, 2008
_____		

ELLINGTON, J. — In this dissenter’s rights suit, the limited liability company (LLC) initially paid the dissenting member less than the fair value of its share. But the trial court found that the LLC had substantially complied with the statute, and assessed fees and costs against the dissenting member for acting arbitrarily, vexatiously, or not in good faith. We affirm.

BACKGROUND

Humphrey Industries LLC, through its principal, George Humphrey (collectively, Humphrey), and business partners Joseph and Ann Lee Rogel, Scott Rogel, and ABO Investments created several limited liability companies. One of those was Clay Street

Associates LLC, which was formed to hold a single real estate asset. Each investor held a one-quarter interest in Clay Street. In the fall of 2004, Clay Street had no significant cash assets, the real estate market was weak, and the property had a high vacancy rate.

The relationship between Humphrey and the other investors became acrimonious. Various issues arose with all the LLCs. As to Clay Street, the members could not agree as to how to go forward. There was no means of liquidating the LLC other than by sale of the property, to which Humphrey would not consent. On the advice of attorney George Cowan, the other three members of Clay Street agreed to merge Clay Street into a new LLC in order to facilitate sale of the property.

The merger was to be effective December 7, 2004. Humphrey dissented from the merger, and on October 1, 2004, demanded payment of the fair value of its interest.

In May 2005, after several months of marketing, Clay Street sold its real property and associated leaseholds to Favro Investments, LLC for \$3.3 million. After the sale, using the income capitalization approach, Cowan calculated the value of Humphrey's share as of December 7, 2004 at \$181,192, including interest, and sent that amount to Humphrey on May 27, 2005. Humphrey rejected Cowan's calculation and demanded an additional \$424,607 based on its estimation of value at \$4.109 million.

After receiving Humphrey's demand, Clay Street hired Ken Barnes, a professional appraiser. Barnes concluded the property's fair value as of December 7, 2004 was \$3.15 million. In an effort to resolve the dispute, Clay Street offered in July 2005 to pay Humphrey an additional \$150,764, a figure based on Barnes' appraisal but

which made no deduction for transaction costs or existing liabilities other than the original loan.

Humphrey rejected the offer and filed this dissenter's rights lawsuit under the Washington Limited Liability Company Act, chapter 25.15 RCW (LLC Act). On July 29, 2005, Clay Street filed a petition seeking judicial determination of Clay Street's value. The court consolidated the two actions.

On October 27, 2006, Clay Street made Humphrey a CR 68 offer in the amount of \$144,183, plus interest at 7.75 percent from December 7, 2004, inclusive of Humphrey's costs and attorney fees. Humphrey rejected the offer.

The trial court heard testimony about the marketing and sale of the property. Expert witnesses Ken Barnes and Darin Shedd, a court-appointed appraiser, testified as to the fair value of Humphrey's share. George Humphrey gave his lay opinion on the property's value. The court found the property was worth \$3.15 million as of the merger date, December 7, 2004. After deducting Humphrey's portion of the transaction costs and Clay Street's outstanding liabilities, the court calculated Humphrey's share to be \$231,947. The court then offset the \$181,192 already paid, added interest, and ruled that Humphrey was due an additional payment of \$60,588.

All parties sought fees and costs. The court found that Humphrey had acted arbitrarily, vexatiously, and not in good faith, and assessed attorney and expert fees against Humphrey under RCW 25.15.480 (2)(b). The court also awarded Clay Street its post-CR 68 offer costs pursuant to that rule. Finding that Clay Street substantially complied with the statute and did not behave arbitrarily, vexatiously, or in bad faith in connection with the litigation, the court denied Humphrey's fees request.

Humphrey contends the court erred in its assessment of the fair value of Humphrey's interest in Clay Street, in denying its request for attorney fees and costs, and in granting Clay Street's and the Rogels' requests for same.

### ANALYSIS

#### *Preliminary Matters*

An appellant must separately assign error to each challenged finding,<sup>1</sup> and the opening brief must include the relevant argument with citations to legal authority and references to relevant parts of the record.<sup>2</sup> Material portions of challenged findings should be quoted in the text or included in an appendix.<sup>3</sup> Unchallenged findings are verities on appeal.<sup>4</sup>

In its opening brief, Humphrey assigned error to "Findings [of Fact] 2, 5, 6, 11, 13, 16–19, 21, 23–24, 26–28, and 35–44,"<sup>5</sup> and attached the findings as an appendix. But most of the relevant argument and references to the record appear not in the 50 page opening brief, but in a 30 page appendix, with the challenged portions of each finding italicized and followed by argument and related references to the record. This not only violated the requirement that the argument appear in the body of the brief,<sup>6</sup> but also effectively violated the 50 page limit.<sup>7</sup>

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<sup>1</sup> RAP 10.3(g).

<sup>2</sup> RAP 10.3(a)(6).

<sup>3</sup> RAP 10.4(c).

<sup>4</sup> State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

<sup>5</sup> Revised Br. of Appellant at 2.

<sup>6</sup> RAP 10.3(a), (g).

<sup>7</sup> RAP 10.4(b).

When challenged on this approach by respondents, Humphrey requested permission to file an overlength brief. We deny this request, and limit our analysis to the issues raised and argued in the body of the opening brief.

*The Fair Value of Humphrey's Interest*

Humphrey attacks the trial court's determination of fair value on several grounds. First, Humphrey challenges the court's refusal to allow George Humphrey to offer expert testimony as to the fair value of the property.

In general, the qualifications of an expert are judged by the trial court, and its determination will not be overturned absent an abuse of discretion.<sup>8</sup> Although Mr. Humphrey has experience with real estate, he is not an appraiser, and his certified public accountant license is inactive. The court allowed him to give his lay opinion of the value of the property. The court did not abuse its broad discretion by refusing to treat him as an expert.

Second, Humphrey faults the court for failing to apply Financial Accounting Standards Board (FASB) methods for assessing fair value. In fact, the trial court made explicit, unchallenged findings that the definition of fair value offered by the two appraisers was consistent with FASB standards.

Next, Humphrey challenges the finding of fair value of the Clay Street property as of December 7, 2004 (\$3,15 million). "[W]here the trial court has weighed the evidence, our review is limited to determining whether substantial evidence supports the

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<sup>8</sup> Seybold v. Neu, 105 Wn. App. 666, 678, 19 P.3d 1068 (2001).

findings.”<sup>9</sup> “‘Substantial evidence’ exists when there is a sufficient quantum of proof to support the trial court's findings of fact.”<sup>10</sup>

RCW 25.15.425(3) does not say how fair value is to be calculated. Humphrey does not challenge the court's conclusion that, in the context of a single-asset LLC owning a parcel of real estate, the fair value is essentially the price for which the property could be sold on the open market between a willing buyer and willing seller, other than in a forced or liquidation sale.

The record shows that in the fall of 2004, Clay Street member Ostroff listed the property at \$3.35 million. The listing generated a \$2.9 million offer in October and a \$3.19 million offer in November. Clay Street countered at \$3.3 million, which both buyers rejected. In December 2004, Favro offered \$3.3 million subject to a rent guarantee, which Clay Street refused. After Clay Street filled its remaining vacancies, Favro agreed to purchase the property for \$3.3 million without a rent guarantee. The sale closed in May 2005.

The court made an unchallenged finding that the transaction was an orderly, fair market sale. Therefore, appraisal standards required that the actual sales price be given substantial weight in determining the property's value. Appraiser Shedd did not consider the sale price, apparently because he was “aware that there were allegations of duress.”<sup>11</sup> Barnes, on the other hand, placed considerable weight on the sale price, concluded it represented the actual value of the property in May 2005, and that the

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<sup>9</sup> Ridgeview Properties v. Starbuck, 96 Wn.2d 716, 719, 638 P.2d 1231 (1982).

<sup>10</sup> Org. to Preserve Agr. Lands v. Adams County, 128 Wn.2d 869, 882, 913 P.2d 793(1996).

<sup>11</sup> RP (June 11, 2007) at 79.

value in December 2004 was \$3.15 million. The court found Barnes' approach persuasive. The evidence supports the court's finding of fair value.

Finally, Humphrey contends the court improperly deducted transaction costs from its one-quarter share. We disagree.

In a different context involving division of marital assets upon dissolution of marriage, the courts have held that an asset's value should be reduced by sales costs if the party receiving it intends an imminent sale and there is evidence regarding the costs of sale.<sup>12</sup> The rationale, that the party to whom the asset is awarded is realizing only its net value when the asset is to be sold immediately, applies even more so here. The sale of the property was not of the remaining members' choosing. Rather, it was the only means to resolve the impasse and satisfy Clay Street's obligations toward Humphrey. The valuation figure does not reflect the transaction costs incurred to unlock the value, so deduction of that amount is necessary to achieve a proportional split. The court did not err.

*Attorney and Expert Fees Under RCW 25.15.480(2)(a)*

Humphrey asserts that Clay Street did not substantially comply with the provisions of the statute, and the court should have awarded fees in his favor pursuant to RCW 25.15.480, which provides:

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

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<sup>12</sup> In re Berg, 47 Wn. App. 754, 759, 737 P.2d 680 (1987); In re Martin, 32 Wn. App. 92, 97, 645 P.2d 1148 (1982); In re Hay, 80 Wn App. 202, 206, 907 P.2d 334 (1995).

(a) Against the limited liability company and in favor of any or all dissenters if the court finds the limited liability company did not substantially comply with the requirements of this article; or

(b) Against either the limited liability company 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 this article.

The court did not err. First, the fees statute is permissive, not mandatory.<sup>13</sup> The court may decline to award fees even where there is no substantial compliance with the statute. Humphrey's argument thus fails.

Second, the statute authorizes a substantial compliance inquiry. Washington courts have defined substantial compliance as "actual compliance in respect to the substance essential to every reasonable objective of [a] statute."<sup>14</sup> Under the substantial compliance doctrine, an appellate court will not reverse for "a merely technical error that does not result in prejudice."<sup>15</sup> Whether a party substantially complied with a statute is a mixed question of law and fact.<sup>16</sup> We review the findings for substantial evidence.<sup>17</sup> The application of law to those facts is subject to de novo review.<sup>18</sup>

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<sup>13</sup> See Nat'l Elec. Contractors Ass'n v. Riveland, 138 Wn.2d 9, 28, 978 P.2d 481 (1999) (the term "may" in a statute has a permissive or discretionary meaning).

<sup>14</sup> City of Seattle v. Public Employment Relations Comm'n, 116 Wn.2d 923, 928, 809 P.2d 1377 (1991) (quoting In re Santore, 28 Wn. App. 319, 327, 623 P.2d 702 (1981)) (alteration in original).

<sup>15</sup> See Black v. Dep't of Labor & Indus., 131 Wn.2d 547, 552-53, 933 P.2d 1025 (1997).

<sup>16</sup> Tapper v. State Employment Sec. Dep't., 122 Wn.2d 397, 403, 858 P.2d 494 (1993) ("a mixed question of law and fact . . . requires the application of legal precepts . . . to factual circumstances")

<sup>17</sup> Ridgeview Properties, 96 Wn.2d at 719.

<sup>18</sup> Tapper, 122 Wn.2d at 403.

Humphrey challenges the court's implicit finding that Clay Street's belated initial payment was its only violation of the LLC Act. Humphrey identifies three other violations, alleging that Clay Street did not provide it with complete financial statements, filed suit after the statutory deadline, and failed to make a credible fair value payment. Humphrey argues that these violations, either by themselves or taken together, defeat the court's conclusion that Clay Street substantially complied with the LLC Act.

Payment Deadline. Clay Street violated the LLC Act by paying its estimate of the fair value of Humphrey's share more than five months after the date of the merger, in violation of the 30 day limit imposed by RCW 25.15.460. The very close deadlines imposed in RCW 25.15.435 emphasize the legislature's concern with protecting the property rights of dissenters.<sup>19</sup>

The deadlines are premised upon the assumption that the LLC has (or can acquire) funds to pay the dissenter. Where a corporation has only one illiquid asset, such that sale of that asset is the only source of payment, compliance with the deadlines may be objectively impossible. Under such circumstances, the reasons for the delay and the conduct of the parties are relevant to a substantial compliance determination.

Here, Clay Street acted swiftly to liquidate its only asset and paid Humphrey immediately upon realizing the proceeds of sale, including interest. Humphrey was thus

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<sup>19</sup> "This obligation to make immediate payment is based on the view that since the person's rights as a shareholder are terminated with the completion of the transaction, the shareholder should have immediate use of the money to which the corporation agrees it has no further claim. A difference of opinion over the total amount to be paid should not delay payment of the amount that is undisputed." 2 SENATE JOURNAL, 51st Leg., Reg. and Spec. Sess., at 3091 (Wash. 1989).

not financially prejudiced. Nor was Humphrey prejudiced by inability to participate in the management of the LLC subsequent to its dissent. The only actions taken thereafter were intended to, and in fact did, enable the LLC to fulfill its statutory obligations toward Humphrey. Humphrey's rights were protected to the extent circumstances allowed. This is what the statute intends.

Also relevant are the genesis of the entire scenario in an irreparable rift among the parties, and the fact that the merger was made necessary by Humphrey's refusal to consent to liquidation.

The legislature's objective, to avoid oppression of the dissenting LLC member by the remaining members, was not compromised. Clay Street's belated payment did not preclude a finding of substantial compliance.

Financial Statements. Humphrey also argues that Clay Street violated the statute by providing only its income statement along with its payment, not the previous year's financial statements as mandated by RCW 25.15.460. Humphrey raises this argument for the first time on appeal. We thus do not address it.<sup>20</sup>

Timely Filing. Humphrey argues that Clay Street violated the LLC Act in a third way by failing to file its suit within 60 days after receiving Humphrey's October 2004 demand for payment. Humphrey relies on language in RCW 25.15.475(1): "If a demand for payment under RCW 25.15.450 remains unsettled, the limited liability company shall commence a proceeding within sixty days after receiving the payment demand and petition the court to determine the fair value of the dissenting member's

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<sup>20</sup> See RAP 2.5(a)(3); State v. Scott, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988).

interest in the limited liability company, and accrued interest.”

But the statutes must be read together. RCW 25.15.460 requires the LLC to pay its estimate of fair value within 30 days of the dissenter’s initial demand. If the dissenter is not content, RCW 25.15.470 provides a further 30 days in which to demand payment according to its own estimate of fair value. The LLC and the dissenter thus have a total of 60 days for this exchange of communications. Under Humphrey’s reading of the 60 day deadline in RCW 25.15.475(1), if each party waited its entire 30 days to act, the LLC would be required to file a petition for judicial determination of value on the day the dissenter makes demand under RCW 25.15.470.

The language “remains unsettled” in RCW 25.15.475(1) suggests that the trigger for the deadline for the petition is the dissenter’s demand of its own estimate of fair value. This is a more sensible reading of the statutes. Clay Street filed its suit within 60 days of Humphrey’s demand for payment of its own estimate<sup>21</sup> and did not violate the LLC Act in this respect.

Credible Fair Value Payment. Humphrey next contends Clay Street violated the LLC Act by failing to make a “credible fair value payment.”<sup>22</sup> We need not decide whether such failure could defeat a finding of substantial compliance, because Clay Street’s payment was credible. Its initial payment (\$181,192) is almost 75 percent of the fair value determined by the court (\$231,947, a one-quarter interest in net value,

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<sup>21</sup> Humphrey informed Clay Street of its own estimate of fair value on June 1, 2005. Clay Street filed its petition for a judicial determination of value on July 29, 2005.

<sup>22</sup> Revised Br. of Appellant at 21.

plus \$9,833 interest for 2.5 years). Humphrey's argument fails.<sup>23</sup>

The court's finding that Clay Street substantially complied with the dissenter's rights statute is supported by the record. Consequently, an award of costs and attorney fees was not available to Humphrey under RCW 25.15.480(2)(a).

In the alternative, Humphrey contends it should have awarded fees pursuant to RCW 25.15.480(2)(b) because Clay Street, not Humphrey, acted arbitrarily, vexatiously, or not in good faith.

Humphrey first argues that Clay Street's initial payment was vexatious because it was intended to start a negotiation process. Humphrey offers no evidence in support of this allegation.

Humphrey next argues the value used by Cowan to calculate the initial payment was arbitrary, pointing out that the \$2.5 million base figure Cowan used matched the valuation for the Clay Street property used by Scott Rogel in his divorce. This observation does not support an argument that the payment amount was arbitrary. Humphrey also contends Cowan used a book value that ignored two rejected offers for \$2.9 and \$3.19 million. But Cowan used the income capitalization approach. This is a valid appraisal approach, and was considered by both trial experts. Further, Cowan's result was reasonably close to the court's final calculation of Humphrey's interest. Humphrey did not show that Clay Street acted arbitrarily in making its initial payment.

---

<sup>23</sup> Compare Spinnaker Software Corp. v. Nicholson, 495 N.W.2d 441, 446 (Minn. App. 1993) (upholding determination that corporation failed to substantially comply with dissenter's rights provisions and award of fees to dissenter, where company paid \$0.90 per share and court concluded minimum fair value would be approximately \$1-5/8 per share).

Lastly, Humphrey challenges the court's finding that Clay Street relied in good faith on the advice of its attorney. He argues the only evidence of advice of counsel was a July 14, 2004 memorandum from attorney Cowan to Ostroff regarding the proposed merger. Humphrey is mistaken. The court also considered Ostroff's testimony and the deposition of Cowan. Humphrey's argument that the advice of counsel defense is not available to a defendant who does not call its counsel as a witness at trial also fails; the case authority Humphrey relies upon does not support its contention,<sup>24</sup> and we have found no case so holding.

The finding that Clay Street did not act arbitrarily, vexatiously, or not in good faith is supported by substantial evidence. That finding precluded an award of attorney's fees and costs to Humphrey under RCW 25.15.480(2)(b). The court did not err in rejecting Humphrey's request for attorney fees.

*Award of Fees to Clay Street and the Rogels Under RCW 45.15.480(2)(b)*

Humphrey challenges the finding<sup>25</sup> that it acted arbitrarily, vexatiously, or not in good faith, and contends the court abused its discretion in awarding fees to Clay Street and to Joseph and Ann Lee Rogel.<sup>26</sup>

---

<sup>24</sup> See Bill Edwards Oldsmobile, Inc. v. Carey, 219 Va. 90, 244 S.E.2d 767, 772 (1978) (holding that the advice of counsel defense to a malicious prosecution action was not available under the facts of the case, where the advice of counsel was based upon incorrect and incomplete information.)

<sup>25</sup> In its order regarding attorney fees and expenses, the court designated its finding that Humphrey acted "arbitrarily, vexatiously, or not in good faith" as a conclusion of law. See Clerk's Papers at 2328, 2331. This is a factual finding and we review it accordingly. Willener v. Sweeting, 107 Wn.2d 388, 394, 730 P.2d 45 (1986).

<sup>26</sup> Humphrey does not challenge the court's award of \$24,961 in costs to Clay Street pursuant to CR 68.

As a preliminary matter, Humphrey raises several evidentiary issues. Humphrey argues the court erred in considering the July 2005 settlement offer because it was “unfunded” and, in any case, inadmissible. Humphrey failed to object to this evidence, however, and cites no authority suggesting it was irrelevant to the question of vexatious behavior.

Humphrey attacks as irrelevant the evidence of several arbitration awards involving the other LLCs in which the members were involved. But the arbitration awards were relevant to understanding the litigation environment here. Those LLCs involved Humphrey and many of the same partners, and suffered a similar fate when relationships deteriorated.

Finally, Humphrey argues the court improperly considered evidence of Clay Street’s CR 68 offer. Humphrey is correct that evidence of a CR 68 offer is not admissible except in a proceeding to determine costs, the award of which is mandatory when the final judgment obtained is less favorable than the offer. The court erroneously considered the CR 68 offer in determining whether Humphrey’s behavior with respect to its dissenter’s rights was vexatious.

We nevertheless uphold the finding that Humphrey acted vexatiously, because the rest of the evidence amply supports it. Humphrey has the right to pursue its interests under the statute, but must act reasonable in doing so.

The LLC was dysfunctional, but Humphrey objected to selling the property. Then Humphrey objected to Clay Street’s initial payment and demanded an additional \$424,607 based on an alleged value of over \$4.1 million, a figure the court ultimately

rejected as unsupported by substantial or credible evidence. Then Humphrey rejected the offer of an additional \$150,764, by which Humphrey would have received \$65,426 more than the other members. The court eventually awarded \$45,524 less than Humphrey had been offered.

Further, the evidence points to Humphrey as the source of the acrimony and resulting dysfunctional relationships. In prior arbitrations involving many of the same investors but different LLCs, arbitrators found Humphrey's conduct wanting. One arbitrator found that Humphrey breached its fiduciary duty and that its conduct left winding up "the only rational solution."<sup>27</sup>

Finally, Humphrey's litigiousness was itself unreasonable. Humphrey engaged in multiple lawsuits against these and other partners. Each of these disputes involved similar circumstances and a similar trail of rejected offers. In each, Humphrey lost. This included actions against Joseph and Ann Lee Rogel, who were retired, passive investors in Clay Street and another LLC in Tacoma known as 615. As to 615, Humphrey's lawsuit against them was twice dismissed. Humphrey refused to dismiss them from this litigation, despite admitting it had no claim that they were involved in any misconduct.

The evidence amply supports the court's finding that Humphrey acted vexatiously in pursuing its dissenter's rights. The court had discretion to award attorney fees and expenses to Clay Street and the Rogels under RCW 25.15.480(2)(b).

---

<sup>27</sup> Clerk's Papers at 2323.

We affirm the trial court in all respects, and award Clay Street and Joseph and Ann Lee Rogel their reasonable attorney fees on appeal under RAP 18.1 and RCW 25.15.480(2)(b).

Affirmed.

Erington, J.

WE CONCUR:

Schindler, CT

Ayd, J.

# APPENDIX B

RECEIVED

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PLLC

SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

11 HUMPHREY INDUSTRIES LTD., )  
 12 )  
 13 )  
 14 )  
 15 )  
 16 )  
 17 )  
 18 )

PLAINTIFF,

vs.

CLAY STREET ASSOCIATES LLC,  
 Washington Limited Liability Company  
 and JOSEPH and ANN LEE ROGEL,  
 husband and wife, et.al.,  
 DEFENDANTS.

No. 05-2-20201-7 SEA  
 (CONSOLIDATED WITH  
 05-2-24967-6 SEA)  
 ORDER REGARDING  
 ATTORNEY'S FEES AND  
 EXPENSES

19 CLAY STREET ASSOCIATES LLC, a )  
 20 )  
 21 )  
 22 )  
 23 )

limited liability company,  
 PETITIONER,

vs.

HUMPHREY INDUSTRIES, LTD, a  
 Washington corporation,  
 RESPONDENT.

24 THIS MATTER is before the court on the motions of the parties concerning the award of  
 25 attorney's fees and costs. The court has considered the following:

- 26
- 27 (1) Plaintiff Humphrey's Motion for Fees and Costs;
- 28

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 Seattle, WA 98104  
 206-296-9205

- 1 (2) Declaration of Ann S. Humphrey in Support of Humphrey's Motion for Fees and
- 2 Costs;
- 3
- 4 (3) Defendant Clay Street Associates Opposition to Humphrey's Motion for Fees
- 5 and Costs;
- 6
- 7 (4) Declaration of Gregory G. Schwartz in Support of Opposition to Plaintiff's
- 8 Motion for Fees and Costs, with attached Exhibits A-D;
- 9
- 10 (5) Humphrey's Reply in Support of Motion for Fees and Costs;
- 11
- 12 (6) Declaration of Stan Beck in Support of Humphrey's Motion for Fees;
- 13
- 14 (7) Declaration of David C. Spellman with Attorney Invoices through May 30, 2007;
- 15
- 16 (8) Defendant Clay Street's Motion for Award of Costs and Attorney's Fees;
- 17
- 18 (9) Declaration of Gregory J. Hollon regarding Motion for Attorney's Fees;
- 19
- 20 (10) Declaration of Gerald Ostroff in Support of Defendants' Motion for Award of
- 21 Costs and Attorney Fees;
- 22
- 23 (11) Declaration of Gregory G. Schwartz in Support of Defendant Clay Street's
- 24 Motion for Award of Costs and Attorney Fees;
- 25
- 26 (12) Supplemental Declaration of Gregory J. Holland Regarding Motion for Attorney
- 27 Fees;
- 28
- 29 (13) Humphrey's Opposition to Clay Street's Motion for Attorney's Fees and
- Expenses, with attached Exhibits A-D;
- (14) Joseph and Ann Lee Rogel's Motion for Attorney's Fees and Expenses;

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- 1 (15) Declaration of Alan Bornstein in Support of an Award of Attorney's Fees and  
2 Litigation Expenses in Favor of Joseph and Ann Lee Rogel, with Exhibits A and  
3  
4 B;
- 5 (16) Declaration of Alan Bornstein Containing Inadvertently Omitted Exhibits, with  
6 Exhibits A-C;
- 7 (17) Revised Declaration of Alan Bornstein in Support of an Award of Attorney's  
8 Fees and Litigation Expenses in Favor of Joseph and Ann Lee Rogel, with  
9 Exhibit A;
- 10 (18) Humphrey's Opposition to Joseph and Ann Lee Rogel's Motion for Attorney's  
11 Fees and Expenses;
- 12 (19) Reply of Joseph and Ann Lee Rogel in Support of their Motion to Recover  
13 Attorney's Fees and Expenses and
- 14 (20) Court's Findings of Fact and Conclusions of Law entered on August 30, 2007.  
15  
16  
17

18 I  
19 BACKGROUND

20 In order to assess attorney's fees and expenses equitably as authorized by RCW  
21 25.15.480, it is necessary to understand the relevant history relating to the deterioration of the  
22 relationship of the members not only of the Clay Street LLC but other related LLCs. The highly  
23 contentious relationship among the parties ultimately doomed any hope of conducting the  
24 business of Clay Street Associates rationally and in the best financial interest of the LLC's  
25 members. Before Clay Street's operations became paralyzed, there were other LLCs involving  
26 the same parties that suffered the same preventable fate as Clay Street Associates.  
27  
28

29 ORDER

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1 The conduct of Mr. Humphrey involving two other closely related LLCs, 901 Tacoma  
2 Avenue and Westwood Village, foreshadowed the outcome of the Clay Street Associates LLC  
3 trial. On August 3, 2006, arbitrator Thomas J. Brewer dismissed all Humphrey's claims with  
4 prejudice against respondents 901 Tacoma Avenue LLC, Westwood Village Apartments LLC,  
5 ABO Investments, Scott Rogel, Joseph Rogel and Ann Lee Rogel, Lori Goldfarb and Avram  
6 Investments. The evidence presented to Mr. Brewer had similarities to the evidence in the Clay  
7 Street Associates LLC trial. Mr. Brewer found respondents to be the prevailing party and  
8 awarded them attorney's fees of \$220,566.06.

9  
10  
11 A year before the arbitration before Mr. Brewer, another arbitration took place before  
12 retired Judge David Soukup. That arbitration concerned another similar dispute over whether  
13 899 West Main LLC should have been wound up pursuant to RCW 25.15.295(1). That  
14 arbitration, like the 901 Tacoma Avenue LLC and Westwood Village Apartments LLC and like  
15 Clay St. Associates, involved the same parties and was marked by the same extreme animosity  
16 among those parties. Mr. Soukup noted that Humphrey Industries had a number of breaches of  
17 fiduciary duties and had created a situation where not only was there cause to wind up the LLC,  
18 it was "the only rational solution". (Exhibit D to Declaration of Gregory G. Schwartz in  
19 Support of Defendants' Motion for Award of Costs and Attorney Fees). In that case, Mr.  
20 Soukup directed that each party pay their own costs and fees.

21  
22  
23  
24 As he did at trial, Gerald Ostroff summarized the history of the decline of 901 Tacoma  
25 and Westwood Villages LLC. Mr. Ostroff also had been named as a defendant in the earlier  
26 cases. Mr. Ostroff declared that given the history of Mr. Humphrey's conduct of the 901  
27 Tacoma and Westwood Villages LLC litigation, he "decided to offer Humphrey for more than I  
28

29 ORDER

4

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1 believed he would be able to recover in this suit just to avoid the hassle, high attorney fees and  
2 opportunity costs of the litigation, Humphrey rejected all of our offers". Declaration of Gerald  
3 Ostroff in Support of Defendants' Motion for Award of Cost and Attorney Fees.  
4

5  
6 II  
7 DISCUSSION

8 A.  
9 CLAY ST ASSOCIATES LLC  
10 AND HUMPHREY INDUSTRIES LTD.

11 With the foregoing relevant background as prologue, the events causing the Clay St.  
12 LLC failure, as established by the trial evidence and the pleadings, take on added meaning. The  
13 LLC was sold May 25, 2005 for \$3.3million. The court found that the trial evidence showed the  
14 most reasonable appraisal value for the LLC as of the date of the merger, December 7, 2004,  
15 was \$3,150,000. The court also found that Mr. Humphrey's estimate of \$4.1 million was not  
16 based on credible, substantial evidence and was well outside the mainstream of reasonable  
17 valuations (Findings of Fact 39-41).

18 At the closing of the LLC sale, defendants had paid Humphrey \$181,192.64. Humphrey  
19 objected to the payment amount. Defendants then hired an appraiser who appraised the property  
20 at \$3,150,000 and the Defendants then offered an additional \$150,764.00 and did not deduct his  
21 transaction costs which they themselves had already paid. The defendants were willing to  
22 accept a net total of \$216,275.01 in order to settle the case. In effect, the defendants had offered  
23 Humphrey a substantial windfall to resolve the case. Humphrey rejected that offer as well and a  
24 trial followed which resulted in Humphrey being awarded \$60,588.22.

25 In September, 2006, defendants made a CR 68 offer of judgment of \$165,275.59.  
26 Humphrey had previously received \$181,192.64, bringing the total amount he could have  
27  
28

29 ORDER

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1 received 7 months before trial to \$346,469.23. Humphrey refused the Rule 68 offer, an offer  
2 which exceeded the court's award by \$104,688.37.

3  
4 B.  
5 JOSEPH AND ANN LEE ROGEL,  
6 ABO INVESTMENTS AND  
7 HUMPHREY INDUSTRIES LTD.

8 Defendants Joseph and Ann Lee Rogel are a retired couple and members of Clay Street  
9 Associates LLC as passive investors. Mr. & Mrs. Rogel are also the parents of Scott Rogel,  
10 with whom Mr. Humphrey had developed an extremely acrimonious relationship. Scott Rogel  
11 was closely involved in efforts to market the Clay Street LLC and was a witness at trial. He was  
12 also a respondent in the arbitration before Mr. Brewer.

13 Humphrey Industries, Ltd. included Mr. and Mrs. Rogel in a complaint in June 2005,  
14 alleging that the Rogels were involved in an unlawful sale of a property located at 615  
15 Commerce Street, Tacoma, Washington, another LLC known as "615". That suit against the  
16 Rogels was dismissed with prejudice in the Spring of 2005 by Judge Lum and was later  
17 dismissed a second time by Judge Hayden. Although the Rogels were never active members of  
18 Clay Street, Humphrey refused to dismiss them and they were therefore required to prepare for  
19 trial and to participate in trial. In his opposition to the Rogel's Motion for Attorney's Fees and  
20 Expenses, at page 4, Humphrey referred to his response to the Rogels Motion for Definite  
21 Statement, stating that "[a]lthough [Joe Rogel] was not a managing member of the company, he  
22 may have acted in concert with the two managing members, his son and Gerry Ostroff."  
23 Humphrey also stated that "[d]epending upon the extent of his involvement in Clay Street's  
24 misconduct, Joe Rogel may have some direct liability for the breaches. Id.

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29 ORDER

6

B. 6

1 No evidence was admitted at trial showing the Rogels acted in concert with any officer  
2 of Clay Street, including their son. Neither was any evidence admitted at trial showing that the  
3 Rogels had any involvement in any alleged misconduct by the Clay Street LLC. Humphrey  
4 further stated that the Rogels were merely incidental defendants who held funds in trust from the  
5 sale of Clay Street and against whom Humphrey had no claim. Id. at 9. However, when the  
6 opportunity was presented to dismiss them from the suit, he refused and required Mr. and Mrs.  
7 Rogel to defend a case that really did not involve them nor did it require their presence at trial.  
8  
9

10 C.  
11 RCW 25.15.480

12 RCW 25.15.480 provides in pertinent part:

13 (1) The court in a proceeding commenced under RCW 25.15.475 shall determine  
14 all costs of the proceeding, including the reasonable compensation and expenses  
15 of appraisers appointed by the court. The court shall assess the costs against the  
16 limited liability company except that the court may assess the costs against all or  
17 some of the dissenters, in amounts the court finds equitable, to the extent the  
18 court finds the dissenters acted arbitrarily, vexatiously, or not in good faith in  
19 demanding payment.

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

- 22 (a) Against the limited liability company and in favor of any or all  
23 dissenters if the court finds the limited liability company did not  
24 substantially comply with the requirements of this article, or  
25 (b) Against either the limited liability company or a dissenter, in favor  
26 of any other party, if the court finds that the party against whom  
27 the fees and expenses are assessed acted arbitrarily, vexatiously,  
28 or not in good faith with respect to the rights provided by this  
29 article.

30 The court has previously found in Finding of Fact No. 43 that Clay Street, despite having  
31 erred in the timing of its payment to Humphrey and in certain other respects, was in substantial  
32 compliance with RCW 25. The late payment by Clay Street to Humphrey was caused by a lack

33 ORDER

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35 B.7

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1 of funds by the LLC at the time and did not ultimately result in financial prejudice to  
2 Humphrey. It does not appear to the court that any member of Clay Street Associates acted  
3 arbitrarily, vexatiously or in bad faith in its conduct toward Humphrey Industries, Ltd.  
4 Therefore, fees and expenses are not assessed against Clay Street.  
5

6 III  
7 ATTORNEY'S FEES AND COSTS  
8 CLAY ST. ASSOCIATES

9 A.  
10 FINDINGS OF FACT

- 11 (1) The court incorporates by reference the Findings of Fact and Conclusions of Law  
12 entered on August 30, 2007.
- 13 (2) The court finds that the real amount in controversy in this case was between  
14 \$50,000 to \$85,000.
- 15 (3) The court further finds that Clay Street's Rule 68 offer would have given  
16 Humphrey nearly \$80,000 more than any other LLC member received from the  
17 sale of the property, far more than the amount actually in controversy, and nearly  
18 three times the actual award of this court.
- 19 (4) The court also finds that Humphrey had no reasonable or legitimate basis for his  
20 refusal to accept the Rule 68 offer and, instead, Humphrey's insistence on  
21 litigation and trial after October 27, 2006 was arbitrary and vexatious.
- 22 (5) The court further finds that after October 27, 2006, Clay Street reasonably  
23 incurred expert fees of \$3,375 and reasonably incurred attorney fees of \$184,343.  
24 In making these findings, the court has applied the lodestar analysis, pursuant to  
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29

ORDER

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- 1 (2) Based on these findings of fact, the court hereby concludes and ORDERS that  
2 Clay Street is awarded reasonably incurred expert fees of \$3,375 and reasonably  
3 incurred attorney fees of \$184,343 pursuant to RCW 25.15.480(2)(b).  
4
- 5 (3) In addition, Clay Street Associates is entitled to its costs of \$24,961.55  
6 subsequent to October 27, 2006, pursuant to CR68.  
7

8 IV  
9 ATTORNEY FEES  
10 AND COSTS  
11 JOSEPH AND ANN LEE ROGEL

12 A.  
13 FINDINGS OF FACT

- 14 (1) The court incorporates by reference the Findings of Fact and Conclusions of Law  
15 entered on August 30, 2007.
- 16 (2) The court also incorporates by reference herein the Findings of Fact and  
17 Conclusions of Law concerning Clay St. Associates in Part III, A and B supra.
- 18 (3) Defendants Joseph & Ann Lee Rogel were retired, passive investors of Clay  
19 Street Associates, LLC.
- 20 (4) Plaintiff Humphrey Industries, Ltd., owned and operated by George Humphrey,  
21 was the dissenter in this dissenter's rights valuation case.
- 22 (5) In Humphrey Industries, Ltds. Dissenter's rights valuation case, Humphrey  
23 Industries named Joseph & Ann Lee Rogel as defendants. In September and  
24 October 2006, Joseph & Ann Lee Rogel demanded that they be dismissed from  
25 the dissenter's rights case, but Humphrey Industries refused to dismiss them as  
26 parties.  
27  
28

29 ORDER

10

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- 1 (6) The court finds that Humphrey Industries named Joseph & Ann Lee as  
2 defendants involving the allegedly improper sale of real property located at 615  
3 Commerce Street ("615") in Tacoma, Washington in which Joseph & Ann Lee  
4 and Humphrey Industries were members.  
5
- 6 (7) Judge Lum dismissed all disputes related to "615", during Spring 2005, with  
7 prejudice.  
8
- 9 (8) Judge Hayden dismissed, by summary judgment order, Humphrey Industries'  
10 "615" claims against Joseph & Ann Lee Rogel, with prejudice in October 2005.  
11
- 12 (9) Alan Bornstein of the Seattle law firm of Jameson Babbit Stites & Lombard  
13 represented Joseph & Ann Lee Rogel throughout this dissenter's right lawsuit.  
14 This court finds that the time spent by attorney Alan Bornstein to defend Joseph  
15 & Ann Lee Rogel in this dissenter's rights case has been segregated from other  
16 time defending Joseph & Ann Lee Rogel from other Humphrey Industries, Ltd.'s  
17 claims.  
18
- 19 (10) The court further finds that Joseph & Ann Lee Rogel has segregated out time  
20 spent on particular defense activities, including the discovery (written discovery  
21 propounded and answered; deposition preparation and examination), appraiser  
22 selection, valuation of the company (legal research; review documents in support  
23 of fair-market -value sale and sales efforts plus witness lists and court filings),  
24 mediation (before mediator-attorney Gregory Bertram), and trial.  
25
- 26 (11) Joseph & Ann Lee Rogel claim that the total fees incurred for the defense of  
27 Humphrey Industries Ltd.'s dissenter's right case equals \$38,241.25.  
28
- 29

ORDER

11

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1 (12) In making these findings, this court finds that the rates charged by Mr. Bornstein  
2 are reasonable and are their normal hourly billing rates and are the rates actually  
3 charged to Joseph & Ann Lee Rogel.  
4

5 (13) The court finds that the reasonable amount of litigation expenses incurred from  
6 August 1, 2003 to the present equals \$292.70.  
7

8 B.  
9 CONCLUSIONS OF LAW

10 This court adopts the following Conclusions of Law:

11 (1) The court concludes that Humphrey Industries acted "arbitrarily, vexatiously, or  
12 not in good faith" in pursuing its dissenter's rights claim against Joseph & Ann Lee  
13 Rogel. RCW 25.15.480(2)(b).

14 (2) Joseph & Ann Lee Rogel are entitled to an award of attorney's fees and litigation  
15 expenses against dissenter Humphrey Industries, Ltd. pursuant to RCW 25.15.480(2)(b).

16 (3) The hours and rates charged by Joseph & Ann Lee Rogel's attorney are  
17 reasonable rates as used in the lodestar calculation, as adjusted.  
18

19 (4) The lodestar fee of \$38,241.25 is the sum of the annual hours multiplied by the  
20 annual hourly rates in each year against Humphrey Industries pursuant to RCW  
21 25.15.480(2)(b).  
22

23 (5) The court deducts \$5,000.00 from \$38,241.25 in attorney's fees associated with  
24 counsel's trial participation at trial, leaving a balance of \$33,241.25 This adjustment is  
25 appropriate because counsel for Joseph and Ann Lee Rogel, while exhibiting  
26 professional advocacy skills at trial in representing his clients, relied primarily on the  
27  
28  
29

ORDER

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1 presentation of evidence at trial by counsel for Clay Street Associates. Counsel for the  
2 Rogels assumed a more secondary role at trial.

3- (6) The \$292.70 of reasonable litigation expenses are recoverable under RCW  
4 25.15.480 (2)(b) and are awarded to Joseph & Ann Lee Rogel against Humphrey  
5 Industries, Ltd.  
6

7  
8 V  
9 SUMMARY OF AWARD OF  
10 ATTORNEY'S FEES AND COSTS

11	A. Clay Street Associates LLC	
12	1. Attorney's Fees and	\$184,343.00
13	Expert Fees	3,375.00
14	2. <u>Costs CR 68</u>	<u>24,961.55</u>
15	Subtotal	\$212,679.55
16	B. Joseph and Ann Lee Rogal	
17	1. Attorney's Fees	\$33,241.25
18	2. <u>Expenses</u>	<u>292.70</u>
19	Subtotal	\$33,533.95
20	C. Total Attorney's Fees and Costs	<u>\$246,213.50</u>

21 DATED this 17 day of October, 2007  
22  
23

24  
25  
26  
27  
28   
29 Harry J. McCarthy, Judge

ORDER

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