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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 JANA E 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)

SUPPLEMENTAL BRIEF OF PETITIONER SENTINELC3, INC.

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

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Petitioner SentinelC3, Inc., a Washington corporation (“Sentinel”) hereby provides its Supplemental Brief as follows:

I. INTRODUCTION

This Court should reverse the Court of Appeals’ opinion¹ (“Opinion”) and reinstate the summary judgment entered by the Trial Court. To hold otherwise, eviscerates the letter and purpose of this State’s summary judgment proceedings under Civil Rule 56.

The Opinion effectively eliminated summary judgment as a procedural tool for the efficient resolution of dissenters’ rights cases, under RCW 23B.13.300. The Opinion informs dissenting shareholders that to survive summary judgment, they need only object to the corporation’s expert stock valuation and pick whatever higher dollar value they want to create an “issue of fact” as to fair value: a mere “belief” that the value is higher is sufficient on its own to force the corporation to trial.

The Opinion relieves dissenters of their burden of production under CR 56(e), which requires competent affidavit testimony setting forth facts admissible in evidence to create a genuine issue of material fact. In contradiction of CR 56(e) and established precedent, the Opinion holds that hearsay, unsworn and self-serving assertions, and unqualified lay witness testimony on an expert issue - the valuation of closely-held stock -

¹ The Court of Appeals’ decision is published as *SentinelC3, Inc. v. Chris Hunt, et. al.*, No. 305538, 176 Wn. App. 152 (Div. III 2013).

are sufficient to survive summary judgment. The adverse ramifications are far reaching, as this holding is not limited to dissenter's rights cases, thereby providing all civil litigants with an end run around CR 56(e).

Moreover, the Opinion not only allows dissenters to force a corporation to trial solely on unsupported "belief," but it provides dissenters impunity for doing so. The dissenters' rights statute requires more than disagreement, it requires a reasonable (*i.e.* non-arbitrary) basis to support the alternative value. The Opinion strips the Trial Court of its discretion to award reasonable attorneys' fees under RCW 23B.13.310 against dissenters who arbitrarily force corporations through costly litigation without providing competent, admissible testimony to support an alternate stock value. The Opinion thwarts the purpose of this attorneys' fee statute: to encourage good faith and the efficient resolution of disputes.

For these reasons explained more fully below, the Court should reverse the Court of Appeals and reinstate the Trial Court's judgment.

II. ASSIGNMENTS OF ERROR

1. Did the Court of Appeals err in holding that dissenting shareholders, in a dissenters' rights case under RCW 23B.13.300, may survive summary judgment under CR 56 solely with inadmissible evidence and unsupported assertions?
2. Where CR 56(e) requires competent testimony, did the Court of Appeals err by allowing non-expert lay opinions on fair value of closely-held stock as a substitute for expert testimony?

3. Did the Court of Appeals err in requiring the Trial Court to consider “evidence” that does not comply with CR 56(e) in determining fair value under RCW 23B.13.300?
4. Did the Court of Appeals err in holding that the Trial Court abused its discretion under RCW 23B.13.310 by awarding attorneys’ fees and costs to Sentinel where the dissenting shareholders necessitated the litigation with unsubstantiated demands, and, after nearly a year of litigation, arbitrarily failed to present any admissible evidence to rebut Sentinel’s expert fair value opinion?

III. 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, and is governed by Washington’s dissenters’ rights statute, RCW 23B.13.010, *et seq.* Respondents² 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 voted on a proposed reverse stock split and re-purchase of fractional shares; Hunt and Blood voted against the proposal, but it passed. CP 6, 26-32, 188-92, 199-200.

Respondents demanded payment of the fair value of their shares,

² 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.

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 was established by an appraisal by James Kukull, CPA, ASA, ABV, a business valuation expert. CP 7-8, 10, 97-184, 186-87, 203. Sentinel provided Mr. Kukull's appraisal report and supporting documentation to Respondents. *Id.*

Respondents disputed Sentinel's fair value determination. Hunt demanded more than double at \$0.51204 per share, and Blood 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 they never 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 a 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, based on the false premise that he owned a larger percentage of Sentinel than he actually did: Blood wanted to ignore nearly one quarter of the outstanding shares that the other shareholders *intended* to sell back to

Sentinel as part of the stock split. CP 327-30. As Blood admits, however, all 4,500,00 shares were voted prior to the stock split. CP 6, 26-32, 188-92, 200, 327-29. 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." RCW 23B.13.010(3).

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"), required to avoid payment of Respondents' 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. Respondents did not object to the admissibility of Mr. Kukull's valuation.

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.

CP 481-95; CP 574-78. 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 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 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 unsworn response brief. CP 560-64, 574-78.

Hunt's declaration referred to an alleged "professional" consultant valuation that Respondents never disclosed. It, like Hecker's report, was

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.

inadmissible hearsay. 10/21/11 VRP 3:20-25; ER 801, 802. Moreover, although the Court of Appeals' Opinion repeatedly references an "affidavit" by Blood, no such document exists. CP 574-78. Blood's "opinion" was found only in the unsworn arguments made in his brief. Respondents conceded they are not experts on stock valuation. 10/21/2011 VRP 15:7-8, 21:22-23:2. The Trial Court correctly found 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.

Due to the lack of admissible, competent testimony contradicting Mr. Kukull's valuation, the Trial Court granted summary judgment in Sentinel's favor, determining fair value to be \$0.1952 per share, and 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. 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 denied Respondents' subsequent 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.

On August 15, 2013, the Court of Appeals reversed the Trial Court, holding that the Trial Court improperly "weighed" the evidence 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. The Court of Appeals ignored CR 56(e)'s admissible evidence requirement, cited no evidence to support 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 also 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.

IV. ARGUMENT

A. **Under CR 56(e), Dissenting Shareholders Cannot Create an Issue of Fact As to Fair Value Solely With Inadmissible Evidence and Unsupported Assertions.**

This Court reviews a summary judgment order *de novo*, and performs the same inquiry as the Trial Court. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300-301, 45 P.3d 1068 (2002) (citation omitted). CR 56 mandates summary judgment if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.*

Here, Sentinel moved for summary judgment as to the stock value, supported by the affidavit of Mr. Kukull, an accredited expert on stock valuation, with 87 pages of analysis. CP 230-17, CP 452-54. To defeat this motion, CR 56(e) required Respondents to “set forth specific facts showing there is a genuine issue for trial.” Any affidavits they submitted had to be “made on personal knowledge [and] set forth facts as would be admissible in evidence, and [show] affirmatively that the affiant is competent to testify to the matters stated therein.” CR 56(e). (emphasis added). Respondents were not entitled to rely on speculation, argumentative assertions, or having affidavits accepted at face value. *Heath v. Uraga*, 106 Wn. App. 506, 512-13, 24 P.3d 413 (2001).

Respondents failed these basic requirements. In opposing summary judgment, Respondents relied on inadmissible “evidence” and

failed to demonstrate their competence regarding their self-serving “testimony.” Respondents erroneously contend that the following “evidence” was sufficient to defeat summary judgment: 1) Mr. Hecker’s unsworn report (CP 597-672), 2) Hunt’s declaration (CP 560-64), 3) Blood’s brief in opposition to Sentinel’s motion (CP 574-78), and 4) Respondents’ discovery responses (CP 333-35; 348-49). *See* Hunt’s Answer to Petition for Discretionary Review, dated October 14, 2013 (“Answer”), pp. 3-5. None of this satisfies the requirements of CR 56(e) and the Trial Court was required to enter summary judgment for Sentinel.

1. The Unsworn Hecker Report Was Inadmissible Hearsay, While Mr. Kukull’s Affidavit Testimony Was Properly Admitted to Establish the Stock Value.

Respondents offered the unsworn Hecker Report to establish the truth of what it asserted: that the stock value was something other than what Mr. Kukull testified that it was. CP 597-672. Because Mr. Hecker’s out-of-court statements were not sworn under penalty of perjury to be true, they are inadmissible hearsay. ER 801, 802. Therefore, the Trial Court properly excluded the Hecker Report as evidence. *Id.*; 10/21/2011 VRP 16:18-20, 17:6-14, 28:24-29:24.⁵

While the Court of Appeals declined to address the Trial Court’s

⁵ Respondents offered an affidavit from Mr. Hecker with their motion for reconsideration, but they failed to provide any explanation as to why they did not submit his affidavit earlier at summary judgment. Answer, p. 5. The late-filed Hecker affidavit is not justification to reverse the summary judgment, as parties do not get a second bite at the apple to correct their earlier failure to abide by basic evidence rules. CR 60(b).

exclusion of the Hecker Report (Opinion, p. 5), Respondents continue to assert that the Trial Court should not have rejected the Hecker Report while admitting Mr. Kukull's valuation. Answer, p. 3. Respondents fail to grasp the critical distinction between Mr. Hecker's unsworn, hearsay report and Mr. Kukull's affidavit, which swore to the truth of the report attached to and specifically referenced in his affidavit, including the detailed analysis and basis for his opinion. CP 226-317.

Furthermore, Respondents waived any objection to the admissibility of Mr. Kukull's valuation because they did not raise it at summary judgment. *Meadows v. Grant's Auto Brokers, Inc.*, 71 Wn.2d 874, 881, 431 P.2d 216 (1967). Respondents also have no legal basis to require Mr. Kukull to regurgitate his opinions in the body of his affidavit. *See* Answer, p. 3 (citing none). Respondents' argument on this point merely attempts to distract from their own total lack of expert testimony.

2. Hunt's Declaration Did Not Create a Genuine Issue of Fact as to Value.

Hunt's declaration was barely four pages in length and asserted his "belief" that the value was more than double that of Kukull's. CP 560-64. Hunt relied upon the alleged "professional" consultant valuation that Respondents refused to disclose. *Id.* That consultant never testified regarding the stock's fair value. *Id.* Thus, the consultant valuation was hearsay. ER 801, 802. The Trial Court properly found that it was not

before the court for consideration. 10/21/11 VRP 3:20-25. Even the Court of Appeals agreed it was “hearsay”. Opinion, p. 11. Contrary to the Opinion, however, the Trial Court was not required to consider that hearsay in determining fair value. CR 56(e); *Washington v. Evans Campaign Committee*, 86 Wn.2d 503, 506-07, 546 P.2d 75 (1976) (statements in affidavits based on hearsay carry no weight).

Hunt’s declaration also asserted his “belief that a sale [of Sentinel] was in the offing.” Opinion, p. 11; CP 560-64. Hunt provided no support for this belief and the Court of Appeals cited none. *Id.* His belief was pure speculation, at best, and in reality, a made up “fact.” CP 300, 563 (Kukull’s report: no merger or acquisition contemplated). Hunt was “not justified in relying upon such bare allegations to carry him to trial.” *Meissner v. Simpson Timber Co.*, 69 Wn. 2d 949, 955-56, 421 P.2d 674 (1966) (unsupported assertions in affidavits are insufficient). Under CR 56(e), the Trial Court properly found that Hunt’s declaration failed to create a genuine issue of fact as to fair value.

3. Blood’s Unsworn Arguments in His Opposition Brief Did Not Create a Genuine Issue of Fact as to Value.

For his part, Blood submitted only an unsworn brief in opposition to Sentinel’s summary judgment motion and no affidavit testimony. CP 574-78. The Court of Appeals, however, erroneously assumed Blood had supplied an “affidavit” and held the Trial Court was required to consider

it. Opinion, p. 11. Unsworn allegations in a pleading, like Blood's, are not "evidence" or "testimony" that create an issue of fact. CR 56(e) (nonmoving party "may not rest upon the mere allegations or denials of his pleading"); *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986) (same). Therefore, the Trial Court properly refused to consider Blood's unsworn arguments regarding value.

Perpetuating its error, the Court of Appeals blindly accepted Blood's "belief" that the value of his shares was higher because "the company had an arrangement 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 larger percentage of Sentinel than he actually 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). Thus, even if Blood had sworn to his "belief" (he did not), there was no evidence to support it, and his "belief" contradicted the governing statute. The Trial Court properly rejected Blood's inadmissible and unsupported "belief." CR 56(e); *Meissner*, 69 Wn. 2d at 955-56.

4. Respondents' Discovery Responses Simply Regurgitated the Same Unsupported Assertions.

Respondents' discovery responses repeat the same assertions in Hunt's declaration and Blood's opposition brief, which are based on

unsupported “belief” and inadmissible evidence. *Cf.* 333-338, 348-349 with CP 560-64; CP 574-78. The Trial Court was not required to consider or weigh them because there was nothing to weigh. CR 56(e); *Evans Campaign Committee*, 86 Wn.2d at 506-07 (statements based on inadmissible evidence carry no weight); *Klossner v. San Juan County*, 93 Wn.2d 42, 45, 605 P.2d 330 (1980) (interrogatory answers only considered if they comply with CR 56 and contain admissible material).

Furthermore, Respondents’ identification of Mr. Hecker in the discovery responses as their testifying expert was merely a promise to provide evidence at trial. CP 500-01. At summary judgment, Respondents had to provide admissible evidence creating a genuine issue as to what fair value *is* - not simply the identity of a witness who will testify to what the fair value is at a later date. CR 56(e). To hold otherwise would permit courts and litigants to completely ignore CR 56.

B. Non-Expert Opinions on the Value of Closely-Held Stock Do Not Satisfy CR 56(e)’s Requirement of Competent Testimony.

CR 56(e) requires that affidavits “show affirmatively that the affiant is competent to testify to the matters stated therein.” A court may determine competency to testify (or lack thereof) on summary judgment. *McKee v. Am. Home Prods. Corp.*, 113 Wn.2d 701, 706, 782 P.2d 1045 (1989) (affirming summary judgment where, contrary to CR 56(e), affiant

not qualified to give expert opinion); *see also* Black's Law Dictionary (9th ed. 2009) ("competence" means "qualification, esp. to testify"). Respondents' lack of competence to opine as to the value of closely-held stock is another reason their "beliefs" fail to raise an issue of fact.

Respondents admit they are not stock valuation experts (10/21/11 VRP 15:7-8, 21:22—23:2), but contend that their ownership of Sentinel stock, alone, renders them competent to opine as to its fair value. Answer, pp. 13-14. Whether a lay witness is competent, *i.e.*, qualified, to opine as to the value of closely-held stock is an issue of first impression for this Court. Closely-held stock valuation requires expert testimony. Respondents knew this and hired Mr. Hecker. The statute likewise contemplates the necessity of expert testimony by permitting the Trial Court to retain its own appraiser. RCW 23B.13.300(5). Unlike other forms of personal property, such as a car, closely-held stock, by definition, has no market and its valuation requires skilled judgment. *Suther v. Suther*, 28 Wn. App. 838, 842-43, 627 P.2d 110 (1981).

Mere "ownership" of the closely-held stock is not a substitute for the requisite experience and skill necessary to analyze and properly weight the complex factors that establish the value of closely-held stock. *See* CP 230-317 (Kukull's detailed report and resume reflecting his professional accreditations in business valuation). None of the cases

Respondents cite held that an owner's lay witness testimony is probative as to the value of closely-held stock. *See* Answer, pp. 13 -14 (citing cases). Rather, Respondents' cited cases show that, in practice, courts have consistently relied on expert testimony for the value of closely-held stock. *Id.* In the one cited case where a court considered an owner's testimony as to value, that owner qualified as an expert witness. *See In re Marriage of Gillepsie*, 89 Wn. App. 390, 397, 948 P.2d 1338 (1997).

Accordingly, even if Respondents had otherwise submitted affidavits that complied with CR 56(e) (which they did not), this Court should reverse the Court of Appeals and find, as the Trial Court did, that Respondents were not qualified to opine as to Sentinel's stock value.

C. A Fair Value Determination Does Not Require the Trial Court to Consider "Evidence" That Does Not Comply with CR 56(e).

RCW 23B.13.300 tasks the Trial Court with determining the fair value of the shares of the dissenting shareholders.⁶ Contrary to Respondents' assertion, the question of fair value is not necessarily one of "weight" that exempts dissenters' rights proceedings from summary judgment. *See* RCW 23B.13.300(5) (giving courts "plenary" power to decide the case); CR 1 (Civil Rules apply to all civil cases). The question of fair value is like any other issue in a civil case subject to summary

⁶ The statute authorizes, but does not require, the Trial Court to appoint its own appraiser, contemplating the case, as here, where a party like Sentinel submits qualified expert testimony that obviates the need for a court-retained appraiser. *Id.*

judgment resolution under CR 56. See *Mathew G. Norton Co. v. Smyth*, 112 Wn. App. 865, 51 P.3d 159 (2002) (partial summary judgment in dissenter's rights case); *Folsom v. County of Spokane*, 111 Wn.2d 256, 258-60, 759 P.2d 1196 (1988) (twice affirming entry of summary judgment finding fair value of real estate).

As such, dissenters' rights cases are subject to the same evidentiary requirements of CR 56(e). The Court of Appeals, however, nullifies CR 56(e) by requiring Trial Courts to consider inadmissible evidence in determining fair value. Opinion, p. 11 (court has duty to consider "hearsay"). Nothing in the dissenters' rights statute creates an exception to the Civil or Evidence Rules. RCW 23B.13.010 *et. seq.* Rather, the Trial Court has a duty under CR 56(e) to reject inadmissible evidence as creating a genuine issue of fact, and doing so is not an impermissible "weighing" of the evidence. Contrast CR 56(e) with Opinion, p. 12.

Summary judgment must be granted where reasonable minds can reach but one conclusion. *Meissner*, 69 Wn. 2d at 951. The conclusion must be both 1) reasonable (*i.e.* supported) and 2) based on admissible evidence and competent testimony that complies with CR 56(e). *Id.* Here, it was reasonable for the Trial Court to accept Mr. Kukull's testimony as to the stock value and the Trial Court did not do so "blindly," given the detailed, supporting analysis and qualifications Mr. Kukull offered to

support his expert opinion. CP 226-320. As explained above, Mr. Kukull's sworn valuation was also admissible in evidence. There was no admissible, competent testimony refuting Mr. Kukull that allowed the Trial Court to reach any other reasonable conclusion as to the value of Sentinel's closely-held stock. In short, there was nothing against which to "weigh" Mr. Kukull's testimony. Summary judgment was appropriate.

D. The Trial Court Did Not Abuse Its Discretion in Awarding Attorneys' Fees to Sentinel Under RCW 23B.13.310.

The Trial Court's attorneys' fee award is reviewed for abuse of discretion. *Humphrey Indus., Ltd. v. Clay St. Assocs., LLC*, 170 Wn.2d 495, 506, 242 P.3d 846 (2010) (citation omitted). The award should only be reversed if it is "manifestly unreasonable, exercised on untenable grounds, or exercised for untenable reasons." *Id.*

RCW 23B.13.310(2)(b) gives the court discretion to award attorneys' fees against a party who acts arbitrarily, vexatiously or not in good faith. Arbitrary means being done "in an unreasonable manner." Black's Law Dictionary (6th ed. 1990). The Legislature enacted this statute to encourage parties to proceed in good faith and avoid unnecessary litigation. CP 434-35; SENATE JOURNAL, 51st leg., 2nd Spec. Sess., at 3093 (Wash. 1989).

The Trial Court was well within its discretion in awarding attorneys' fees to Sentinel. Respondents' conduct was the essence of arbitrary. They rejected Sentinel's expert valuation and, without any reasonable basis, arbitrarily picked higher numbers to force Sentinel into costly litigation. CP 61-62, 327-30. Then, for nearly a year of litigation, they unreasonably failed to substantiate their counter-demands with evidence of fair value that complied with CR 56(e)'s basic requirements - conduct that the Trial Court found troublesome.⁷ Given this, the Trial Court's award is reasonable and based on tenable grounds.

This is in stark contrast to the *Humphrey Indus. v. Clay St. Assoc.* case that the Court of Appeals relied on to reverse the award. Opinion, p. 15. There, the dissenter won by offering admissible evidence of fair value and successfully persuading the trial court that the offer he received from the company was too low. *Humphrey Indus., Ltd.*, 170 Wn.2d at 500 (related opinion in same case). It is no surprise, then, that the dissenter's conduct was found not to be arbitrary, vexatious or not in good faith. *Id.* at 508.

Unless the Opinion here is reversed, it will immunize the very arbitrary conduct the attorneys' fee provision was enacted to deter. The

⁷ The Trial Court awarded over 97% of the fees Sentinel requested, obviating the need for additional findings of what the record already shows: that the Trial Court generally adopted as reasonable the facts, figures, reasoning and lodestar methodology in Sentinel's filings. CP 904-36, 940-46, 997-1016, 1077-79.

Opinion encourages unwarranted litigation by giving dissenters a free pass all the way to trial, so long as the dissenters manufacture a “belief” as to the fair value of their shares. Contrary to the purpose and terms of the statute, the Court of Appeals stripped Trial Courts of their discretion to award fees to the corporation even if the dissenter’s “belief” is not supported by admissible evidence, is irrational or lacks good faith. The Court should reverse the Opinion and reinstate the attorneys’ fee award.

E. The Court Should Award Sentinel Its Costs on Appeal.

Should Sentinel prevail, the Court should order Respondents to pay Sentinel its costs on appeal, including its reasonable attorneys’ fees, as Respondents have perpetuated their arbitrary position on appeal. RAP 14.2, 14.3; RCW 23B.13.300.

V. CONCLUSION

The Court should reverse the Court of Appeals and reinstate the Trial Court’s summary judgment and attorneys’ fee award.

RESPECTFULLY SUBMITTED this 6th day of March, 2014.

K&L GATES LLP

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

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of March, 2014, I caused to be served a true and correct copy of the foregoing **SUPPLEMENTAL BRIEF OF PETITIONER SENTINELC3, INC.** to the parties below and in the manner indicated:

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

Via Hand Delivery

Michael and Janae Blood
3310 Victory View Dr.
Boise, ID 83709

Via Federal Express

DATED this 10th day of March, 2014.

K&L GATES LLP

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