

No. 66115-9-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

SNOPAC PRODUCTS, INC., a Washington corporation,

Appellant,

v.

LESLIE BLAKEY SPENCER, a single woman; and
TAMMY S. BLAKEY, a single woman,

Respondents.

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

This appeal concerns a straight-forward dissenter's rights lawsuit filed in strict adherence to the Washington Business Corporations Act, RCW 23B.13.010 *et seq.* The Appellant is Snopac Products, Inc. ("Snopac") which on May 26, 2008, redeemed the stock of Respondents Tammie Spencer ("Spencer") and Leslie Blakey ("Blakey") for \$20,133.47. Exhibit 203. Snopac set the redemption price after it received a certified appraisal by Moss Adams, LLC, which valued the Respondents stock at zero. *Id.*

Respondents rejected the redemption at \$20,133.47 and thereafter sought their own appraisal of the Snopac stock from Kevin Grambush at Bruggeman Johnson Yeanpolis, PLLC ("Grambush"). Exhibit 206. Grambush valued Respondents' shares of Snopac stock at \$495,000 and Respondents submitted a demand that Snopac redeem their shares at that price. Exhibit 206, 207-208.

As required by RCW 23B.13.010 *et seq.*, Snopac filed the underlying lawsuit to allow the court to determine the fair value of Respondents' stock. CP 3-28. Pursuant to RCW 23B.13.300, the trial court retained its own independent appraiser, Robert Duffy ("Duffy"), to provide an opinion of value for Snopac stock. CP 206-209. The independent appraiser spent over 160 hours (at a cost of over \$36,000)

preparing his opinion of value. Exhibit 278. The trial court's independent appraiser concluded, consistent with Snopac's original appraisal, that the fair value of Respondents' shares of Snopac stock were worth zero. Exhibit 277. Respondents refused to accept the opinion of value by the trial court's independent appraiser, and the case proceeded to a 10 day trial between April 5 and May 3, 2010. At the conclusion of trial, the trial court rejected its own independent expert's analysis and entered Findings of Fact and Conclusions of Law concluding that fair value of the Snopac stock was \$350,706.¹ CP 664-694. The trial court subsequently awarded Respondents their attorney fees and costs and both prejudgment and postjudgment interest at 12%. CP 776-777.

This appeal timely followed.

II. ASSIGNMENTS OF ERROR

- A. The Trial Court Erred by Considering the Opinion Testimony by Marine Surveyor Timothy Vincent in Violation of ER 702 and ER 703.
- B. The Trial Court Erred When It Entered Findings of Fact Which Are Not Supported by the Record.
- C. The Trial Court Erred by Failing to Arrive at Fair Value Using Customary and Current Valuation Concepts and Techniques Generally Employed for Similar Businesses in the Context of the Transaction Requiring the Appraisal.

¹ As explained in this appeal, it does not appear that the trial court actually intended \$350,706 as fair value despite its finding to that effect.

- D. The Trial Court Erred in Awarding Attorney Fees and Costs in the Absence of Arbitrary, Vexatious, or Bad Faith Conduct.
- E. The Trial Court Erred in Awarding Attorney Fees and Costs without Supporting Findings of Fact or Conclusions of Law.
- F. The Trial Court Erred in Awarding Respondents Prejudgment and Postjudgment Interest at 12% per annum.

III. STATEMENT OF THE CASE

Except where expressly noted, the following facts of the case are drawn entirely from the trial court's Findings of Fact and Conclusions of Law. CP 664-694.

A. History Of Snopac

1. Snopac Products, Inc.

Snopac is a fish and crab processing company that operates in Alaska and has its principal headquarters in Seattle, King County. CP 665, FF 1². Snopac's primary processing operation in Alaska is onboard a floating processing vessel known as the P/V Snopac Innovator (the "Innovator"). CP 668, FF 9.

Snopac has always been a family owned and operated company. CP 665, FF 2. Bruce Blakey started Snopac in 1983, and his son, Greg Blakey, has managed the company's business affairs since inception. FF 2; FF 9. Three years after formation of the company, in 1986, Greg

² In this Brief, the trial court's Findings of Fact are cited as "FF" and Conclusions of Law as "CL".

Blakey purchased a 49% ownership interest in Snopac from his father.³ See Exhibit 2; Exhibit 5. In 1989, Bruce Blakey divested his remaining 51% ownership interest in his four children as follows: Greg – 21%, Glenda – 10%, Tammy – 10%, Leslie 10%. FF 2. As a result of the transfers, Greg Blakey became the 70% controlling shareholder in Snopac with each of this three sisters holding a minority 10% interest in the company. *Id.* Greg Blakey continued to manage Snopac’s operations and his “sisters became passive shareholders, who did not participate in management of the business.” *Id.* 2008 marked Greg Blakey’s 25th consecutive year managing Snopac’s operations.

2. Successes and Failures of Snopac

In the 1980’s and 1990’s, Snopac had very profitable years, annually distributing to Respondents hundreds of thousands of dollars for their passive interest. CP 666, FF 5; CP 671, FF 15. However, in the late 1990’s, the industry changed dramatically with the increase of farmed fish dropping the market value of wild Alaska salmon and the passage of the American Fisheries Act in 1998 which gave the large processing companies a competitive advantage over Snopac. FF 5. Snopac saw further misfortune as a result of the collapse of the Bering Sea Opilio crab quota after the 1999 season, and a large storm in 2002 which destroyed the

³ FF 2 to the contrary is in err, but the error is harmless.

man-made harbor on the Island of St. George. CP 667, FF 6, 7. The storm in St. George not only made Snopac's multi-million dollar land based investment valueless, but a liability as it was incumbent upon Snopac to remove all of the deteriorating buildings. *Id.* The large passive distributions which Respondents had become used to receiving disappeared. CP 671, FF 15.

3. Business Decision to Invest in New Processing Vessel.

In 2004, Snopac was at a crossroads, either to dramatically increase the company's processing capacity so that increased volumes of scale could allow for eventual profitability, or, in the alternative, to shut the company down. CP 669, FF 11. Snopac chose to "double-down" by buying the P/V Costal Star from Icycle Seafoods for \$2.25 million and renaming it the Innovator. CP 669, FF 11-12. However, the Innovator required a significant investment to enable it do what Snopac needed to compete with other companies at that time in late 2004. *Id.*

Snopac's first upgrade to the Innovator in 2004 was improperly installed and as a result had to be torn out. CP 670, FF 13. A second upgrade was required in 2006. FF 13. Snopac ultimately invested over \$9 million in the purchase and renovation of the Innovator. *Id.*; CP 673 FF 20. The majority of the debt was financed (either directly or indirectly) by Greg Blakey and his father, Bruce Blakey. FF 13. The business decision

to purchase and renovate the Innovator was made by Greg Blakey without support or approval of Respondents. CP 670-671, FF 14-15.

4. Business Decision to Invest In New Land Based Plant

Even though Snopac was significantly in debt, Greg Blakey made another business decision that further increased the debt-load of Snopac. In January 2008, just five months before redemption of the Respondents' stock, Snopac entered into an agreement to purchase a non-functioning fish processing plant in Dillingham, Alaska for \$1.1 million. CP 679, FF 38. Thereafter, between January and April, 2008, Snopac invested approximately \$1.6 to \$1.7 million to upgrade and equip the Dillingham plant to make it operational. CP 680, FF 39. The total amount spent by Snopac to purchase and renovate the Dillingham plant in the first five months of 2008 was approximately \$2.8 million. FF 39.

B. Sibling Disagreement and Redemption of Shares.

1. Growing Distrust By Respondents

Unlike their brother, Respondents had no personal financial investment in Snopac. However, without the customary yearly distributions, by 2006 Respondents grew suspicious and began to question Greg Blakey's business practices. CP 671, FF 15, 16. The complained of business practices which lead to the Respondents' suspicion and distrust of

their brother included the following business decisions made by Greg

Blakey:

- Business Decision to Purchase and Refurbish the P/V Snopac Innovator. CP 670-71, FF 13, 14.
- Greg Blakey's separate investment in two separate business ventures involving two fishing tenders (the Eastern Hunter and Western Hunter.) CP 671-72, FF 17.
- Snopac's payment to "the widow of [Greg Blakey's] right hand man, Charles (Chick) Perkins, a salary of four years up into 2006 to honor a death bed promise he had given." CP 674, FF 25.
- Snopac was "too generous in providing bonuses to [its] employees and that those monies should have been distributed to the shareholders as profits." CP 675, FF 27.
- Greg Blakey's passive investment in a fish processing operation in Massachusetts known as Northern Pelagic Group, Inc. CP 675, FF 28.
- Snopac's decision to invest in Silver Bay Seafoods over Respondents' objection. FF 30. (The business decision to invest in Silver Bay was a profitable one for Snopac.) CP 676, FF 30.

At trial each of the foregoing business decisions were adequately explained to the satisfaction of the trial court, and the trial court concluded:

Respondents' claims of self dealing and improper diversion of corporate assets by Petitioner are not supported in the record. Greg Blakey acted with good intentions; however, he did so without informing the Respondents in a timely or predictable manner but only after Respondents were forced to make inquiry.

CP 691, CL 7. However, the trial court found that Greg Blakey's unilateral business decisions fueled the Respondents' suspicions. *Id.* Distrust prevailed and "[t]he family dynamic escalated into a volatile emotionally charged relationship between [Greg Blakey] and the respondents." CP 665, FF 3.

2. Redemption of Respondents' Shares.

In 2007, the siblings father, Bruce Blakey suggested that an independent appraiser be retained to value the company so that the sisters' shares could be bought out in a business-like manner. CP 676-77, FF 31. "Petitioner (Snopac) hired Mr. Owen Dahl ["Dahl"] of Moss Adams to value the company to facilitate a voluntary sale." *Id.* "Unfortunately Owen Dahl's initial work product opinion on valuation was haphazard, incomplete and inaccurate, even down to the stated stock value in the body of the letter being different from the stated stock value on its attachment." *Id.* The most troubling aspect of the valuation was that "the company's primary asset, the Innovator, was listed at book value, which is not normally a good indicator of fair market value and which, in this case, seemed too high." CP 676, FF 32. "The ship had been carried at a book value of \$9.1 million, but because it had lost money over the past five years, it seemed to Dahl unrealistic that an arm's length investor would pay \$9 million for that asset, even assuming optimistic future projections."

Id. Dahl therefore “requested that Snopac retain a professional marine surveyor to appraise the actual current fair market of the M/V Snopac Innovator.” *Id.*

Snopac hired a professional marine surveyor, Capt. Erling E. Jacobsen, B.Sc, M.Sc., Surveyor and Consultant (“Jacobsen”) to determine the fair market value of the Innovator. CP 678, FF 33. Using a 2005 survey of the vessel by Timothy Vincent (“Vincent”) to understand the specific details of the vessel, Jacobsen opined that the market value of the Innovator, *including its machinery and equipment*, was \$3 million dollars. FF 33. In April 2008, Dahl re-ran his report using Jacobsen’s \$3 million value for the Innovator and concluded that the shares of Snopac were worth zero. CP 679, FF 35.

On May 26, 2008, Snopac redeemed the shares of the minority owners for \$20,133.47. CP 682, FF 45. At the time of the redemption, “Snopac was a severely economically distressed company.” CP 665-66, FF 3. It had established a five-year history of overall unprofitability and was subject to over \$17.6 million in debts with the first \$10.53 million secured debt owed to its primary lender Banner Bank. *Id.* Approximately \$7 million of the remaining debt was privately financed by Greg Blakey and his father, Bruce Blakey. Banner Bank had recently reclassified Snopac into its “Special Credits” division based on concerns that Snopac

may not be able to repay even its secured debts from its irregular cash flows. *Id.*

C. Lawsuit to Determine Fair Value of Shares

Respondents rejected Snopac's redemption price and obtained their own appraisal of Snopac's stock. Kevin Grambush provided Respondents with a preliminary report stating that the value of each of their respective 10% ownership interest in Snopac was just over \$495,000. CP 683, FF 49,⁴ Exhibit 206. Respondents demanded that Snopac redeem their shares at \$495,000 each. Exhibits 207, 208.

As required by RCW 23B.13.010 *et seq.*, Snopac filed the underlying lawsuit to allow the court to determine the fair value of Respondents' stock. CP 003-028. Pursuant to RCW 23B.13.300, the trial court retained its own independent appraiser, Duffy, to provide an opinion of value of Respondents' Snopac stock. CP 206-209. In performance of his role:

Duffy analyzed all the considerable evidence proffered to him by the parties and did his own independent investigations as he deemed necessary or appropriate in order to recommend fair value even reconsidering assumptions and conclusions based upon objections and submissions of additional evidence by both Petitioner and Respondents, then subsequently hired a sub-expert, Captain

⁴ The statement in FF 49 that Grambush's July 30, 2008, report was based on an asset approach is in error. The report is based on an income approach: discounted cash flow method. See Exhibit 206.

Tommy Laing, to value Snopac's largest asset, the M/V Snopac Innovator.

CP 690, CL 4. Duffy spent over 160 hours (at a cost of over \$36,000) preparing his opinion of value. Exhibit 278. Duffy ultimately concluded that the fair value of Respondents' shares of Snopac stock were worth zero. CP 690, CL 4; Exhibit 277.

Respondents refused to accept the value opined by the trial court's independent appraiser and this case proceeded to trial.

1. Expert Testimony Regarding Stock Valuation

At trial, the trial court reviewed the deposition transcripts and took testimony from each of the three valuation experts: Dahl (Snopac), Grambush (Respondents), and Duffy (trial court). The testimony of each expert is summarized in their respective expert reports, admitted into evidence, as follows:

a. Owen Dahl. (RP 837-928; Exhibit 173) Dahl considered the market, income, and asset approach to valuing the shares of Snopac Stock. Exhibit 173, p. 7. Dahl rejected the market approach because there are no comparable sales for shares of privately held stock in similar seafood companies. Exhibit 177, p. 11; CP 579, FF 34. Dahl performed an income valuation of Snopac but found that the income

approach produced a “grossly negative” value for the company. Exhibit 177, p. 11. *Id.*, FF 35.

Dahl ultimately arrived at fair value for Snopac stock using an asset approach: offsetting the Snopac assets against its liabilities and arriving at essentially a liquidation value for the company. CP 679, FF 35. However, Dahl did not consider himself qualified to provide an opinion of fair value for Snopac’s primary asset, the Innovator. RP 856-857. After receiving an opinion of value for the Innovator from Jacobsen at \$3 million dollars, Dahl inserted that dollar value into the balance sheet and arrived at an asset value for Snopac’s stock at zero. *Id.*, FF 35; Exhibit 177; Exhibit 11.⁵ See also Dahl Report, Exhibit 173.

b. Kevin Grambush. (RP 1404-1556; Exhibits 358, 359) Consistent with generally accepted valuation practices Grambush also considered the market, income, and asset approach to valuing the shares of Snopac Stock. Grambush also rejected the market approach for the same reason as Dahl. Exhibit 357, p. 5. However, utilizing different assumptions than Dahl, Grambush performed an income valuation of Snopac which produced a positive value for the Snopac. Exhibits 358-359. At trial, Grambush advocated an income approach and valued the stock of Snopac at \$552,000. Exhibit 359. RP 1429-1464.

⁵ In the asset calculation (Exhibit 11) Mr. Dahl inserts into the balance sheet a total value of \$3 million for the vessel and its equipment.

Although he did not ultimately rely on it, Grambush also performed an asset valuation of Snopac. RP 1454; Exhibit 358, Schedule 1. However, while his learned colleagues retained a separate certified marine surveyor to provide an opinion of the asset value of the Innovator, Grambush (with no appreciable knowledge of the vessel) formed his own opinion. *Id.* For purpose of valuing the Innovator, Grambush simply depreciated Snopac's \$9.1 million investment in the Innovator based on a 15 year operating life and arrived at a value of approximately \$7.8 million. RP 1451-54.

c. Robert Duffy. (RP 480-593; Exhibit 277.) Like his colleagues, the trial court's independent appraiser, Duffy, also considered the market, income, and asset approach to valuing the shares of Snopac stock. RP 484. For the same reason as his colleagues, Duffy also rejected the market approach. Exhibit 277, p. 5. Duffy also rejected the income approach after his analysis using that approach produced a negative number.

Duffy ultimately arrived at fair value for Snopac stock based on an asset approach. Exhibit 277; CP 684, FF 54; CP 690, CL 4. Duffy retained his own independent marine surveyor, Thomas Laing ("Laing"), to provide him with an opinion of value for the Innovator. CL 4. Duffy used a \$2.5 million value provided by Thomas Laing in his balance sheet

of Snopac's assets and liabilities, and independently arrived at the conclusion that Snopac's stock was worth zero. Exhibit 277, Schedule 6.

2. Expert Testimony Regarding the Value of Innovator

Snopac's single most valuable asset is the Innovator, and its value was the subject of much contention between Snopac and Respondents. In addition to listening to the testimony of the three valuation experts, the trial court considered the opinion of three separate marine surveyors with respect to the value of the Innovator. The opinion testimony by each of the three marine surveyors offered is summarized as follows:

a. Captain Erling E. Jacobsen, B. Sc., M. SC. (RP 651-790, Exhibit 168.) Jacobsen was the only marine surveyor who had a strong understanding of the then current market conditions for the purchase and sale of large processing vessels. RP 673-74, RP 678-690. Based on his knowledge of the market for the listing and sale of comparator vessels, Jacobsen opined that the market value of the Innovator as of May 28, 2008, was \$3 million. Exhibit 168. This market value for the Innovator *included the processing machinery and equipment on board the processing vessel.* Exhibit 168, RP 679.

Despite his knowledge of the market, the trial court did not find Jacobsen's opinion of fair value credible because Jacobsen only spent two hours surveying the vessel. CP 680-81, FF 41. However, Jacobsen relied

on the detailed 26 page survey of the vessel performed by marine surveyor Vincent to understand the specific details of the Innovator. Exhibit 168, CP 678, FF 33. Consequently, surveyors Jacobsen and Vincent were working with the exact same knowledge and information about the Innovator when arriving at their respective opinions fair value.

b. Timothy Vincent. In 2005, Vincent spent 4-5 days surveying the Innovator for insurance purposes. CP 680, FF 41; RP 1148; Exhibit 15. His work product is the detailed 26 page survey which Jacobsen relied upon to understand the vessel and its operating equipment. Exhibit 168; CP 678, FF 33. Like Jacobsen, when assessing the fair value of the Innovator, marine surveyor Vincent *included the processing machinery and equipment on board the vessel as part of the fair value of the vessel*. Exhibit 15, p. 3; RP 158-70, 1176. Using his own unique methodology for arriving at market value, Vincent opined that the value of the Innovator was \$9.1 million in 2005, and \$16.7 million in 2009 (as compared to Jacobsen's value at \$3 million). RP 1178, RP 1230.

The distinction between the scope of knowledge of surveyors Jacobsen and Vincent is that Vincent admittedly had no market data for comparable sales to provide a realistic opinion of value. Vincent's opinion of market value is derived solely from comparing the Innovator against his own database of prior surveys. He used his own unique methodology which he himself developed and relies on. Vincent

confirmed in deposition that his methodology is not generally accepted by other marine experts in the industry.

c. Thomas Laing. The trial court's independent expert, retained marine surveyor, Thomas Laing to provide an independent assessment of value for the Innovator. Laing provided Duffy with a value of the Innovator at 2.5 million which Duffy used in his report. Exhibit 277, Schedule 6. The trial court entered five separate findings of fact with respect to Mr. Laing (FF 58-62), but those findings are not substantiated in the record.⁶ Consequently, Snopac challenges that FF 58-62 were made by the trial court in error. In any event, the trial court found that "because of erroneous assumptions made in his report, the court cannot afford any weight to Captain Laing's valuation of the Innovator." CP 687, FF 62.

3. Decision by Trial Court

At the conclusion of the trial, the trial court rejected its own independent expert's analysis and awarded Judgment to Respondents based on a fair value of \$350,706. CP 690, CL 4; 694, Exhibit A. Without explanation in the record the trial court simply concluded that the value of the Innovator was \$6.25 million and asked the Respondents' expert, Grambush, to "recalculate the value of the shares using a \$6.25

⁶ Although there was considerable discussion at trial regarding Thomas Laing's valuation of the Innovator, the record does not contain any testimony by Laing (either via live testimony or deposition) and his report was not admitted into evidence.

million value of the Innovator using the asset approach and assign a value to each of the respondent's 10% share of stock." CP 691, CL 6. However, when Grambush provided his asset calculation of Snopac for the trial court, he separated the Innovator's machinery and equipment from the remainder of the vessel, listing it as a separate asset worth \$790,818 and effectively raising the value of the asset from \$6.25 million to \$7,040,818. CP 694, Exhibit A. After subsequent briefing, the trial court awarded Respondents their attorney fees, costs, and both prejudgment and postjudgment interest at 12%. CP 776-77.

IV. ARGUMENT

The single most important and contentious factor in arriving at fair value of Snopac's stock was the determination of the fair value of the Innovator. Since Respondents each held 10% of the ownership in the Snopac stock, every additional one dollar (\$1.0) in fair value attributed to the Innovator represents ten cents (\$.10) in additional value to each of Respondents' ownership interest in Snopac. In simple math, \$3 million dollars of additional fair value attributed to the Innovator, represents \$300,000 to each to the Respondents. Despite the importance in valuing this asset, the trial court arrived at a fair value of \$6.25 million for the Innovator based on inadmissible evidence, erroneous facts, and a

misapplication of the law. The trial court's finding of fair value must be reversed and remanded for a new trial.

A. The Trial Court Erred by Relying on Inadmissible Evidence to Arrive at Fair Value of the Innovator in Violation of Evidence Rule 702 and 703.

Before trial, Snopac filed a motion in-limine to prevent Vincent from providing opinion testimony as to the fair value of the Innovator. CP 780-794.⁷ Snopac's motion was denied, and over Snopac's objection the trial court admitted and considered Vincent's opinion testimony. RP 1165-1166. Vincent's testimony was improperly admitted in violation of ER 702 and ER 703, and trial court relied Vincent's inadmissible opinion evidence determining fair value to Snopac's detriment.

1. Standard Of Review.

A trial court's decision to admit expert testimony is reviewed for abuse of discretion. *State v. Stenson*, 132 Wn.2d 668, 715, 940 P.2d 1239 (1997). A court abuses its discretion when its decision is based on untenable grounds or is manifestly or unreasonable or arbitrary. *Id.*

2. The Evidence Rules.

a. Evidence Rule 702.

Evidence Rule 702, provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to

⁷ Anticipated based on Supplemental Designation of Clerk's Papers.

determine a fact at issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise.

No expert opinion is admissible over objection unless the witness has been qualified by showing that he has sufficient expertise to state a helpful and meaningful opinion. *Sehlin v. Chicago, Milwaukee, St. Paul and Pacific R. Co.*, 38 Wn. App. 125, 686 P.2d 492 (1984). “The admissibility of expert testimony under this rule depends on three factors: whether (1) the witness qualifies as an expert, (2) the opinion is based upon an explanatory theory generally accepted in the scientific community, and (3) the expert testimony would be helpful to the trier of fact.” *See State v. Ciske*, 110 Wn.2d 263, 751 P.2d 1165 (1988). An expert’s testimony should not exceed the limits of the underlying science or art, such that the expert’s theory or method must be one which is generally accepted in the scientific community. This is commonly known as the Frye Rule which continues to be adhered to in Washington civil cases. *See In re Marriage of Parker*, 91 Wn. App. 219, 957 P.2d 256 (1998).

b. Evidence Rule 703.

Evidence Rule 703 states:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon

the subject, the facts or data need not be admissible as evidence.

The courts employ a two part test for admitting expert testimony under ER 703. See *State v. Nation*, 110 Wn. App. 651, 41 P.3d 1204 (2002). First, the court must find that the underlying data is of a kind reasonably relied upon by experts in the particular field in reaching conclusions. Second, the court should not allow the opinion if (1) the expert can show that only **he** customarily relies upon such material, and (2) the data are relied upon only in preparing of litigation. *Id.* It is the expert's responsibility to establish that he as well as others would act upon the information for purposes other than to testify in a lawsuit. *Id.*, citing Comment to ER 703.

3. Application of the Evidence Rules to the Facts.

Three separate marine surveyors testified in this case concerning the fair market value of the Innovator as follows:

Captain Jacobsen ('08):	\$ 3.0 million (Exhibit 168)
Captain Laing ('09):	\$ 2.5 million (Exhibit 277) ⁸
Captain Vincent ('05):	\$ 9.1 million (Exhibit 15)

While the opinions of Jacobsen and Laing are within \$.5 million, Vincent's opinion of market value is more than **three** times that of his colleagues. The reason for this discrepancy is easy to assess. Jacobsen and Laing assessed market value to the Innovator based on comparable sales *in the market*, including specifically the sale of a comparator vessel

⁸ Duffy's report, Schedule 6.

(the “Stellar Sea”) which sold in October 2008 for \$5 million. Vincent’s opinion of value is, on the other hand, not based on comparable sales in the market, but rather on a comparison against his own database of 31 previous surveys he had done. During his deposition, Vincent admitted that his methodology is something he developed himself and is not generally used in the marine industry.

Vincent dep., pp. 63-64, Ex. 4.⁹ For comparison purposes Vincent relies on his own database of prior surveys that are not generally accepted or used in the industry.

Despite the fact that both his methodology and his data are not generally accepted in the industry, Vincent was allowed to provide an opinion of value for the Innovator at \$9.1 million (’05) and \$16.7 million dollars (’09.) RP 1179, 1230. To Snopac’s prejudice, the trial court not only considered Vincent’s testimony, but considered it credible as compared to surveyors Jacobsen and Laing because of the time he devoted to the surveys. CP 680, FF 41. However, the trial court failed to recognize that the significant time Vincent spent documenting the vessel is only valuable if he employs a generally accepted methodology (ER 702) using information reasonably relied upon by experts in the field (ER 703) to reach a final opinion of fair value.

⁹ Transmitted to the court of appeals for review in supplemental designation of clerk’s papers.

Vincent's opinion testimony on the market value of the Innovator violates both ER 702 and ER 703. The opinion testimony is offered in direct contravention of ER 702 because the methodology employed by Vincent is not generally accepted in his field. His opinion testimony is offered in direct contravention of ER 703 because the opinion is not based on market data of a kind reasonably relied upon by experts in the valuation community. Snopac respectfully submits that allowing Vincent to provide expert opinion on the fair value of the Innovator was an abuse of the trial court's discretion.

B. The Trial Court Erred when it Determined Fair Value for the Innovator on Erroneous Facts that were Not Supported

In addition to the fact that the trial court relied on inadmissible evidence at arriving at fair value, the trial court also relied on erroneous Findings of Fact which impacted the trial court's final opinion of fair value of the Innovator. The trial court's reliance on the following erroneous facts to support its calculation of fair value warrants reversal of the trial court's finding of fair value.

1. Standard of Review.

Reviewing findings of fact, the Appellant Court applies the "substantial evidence" standard, such that a finding of fact will not be overturned if it is not supported by substantial evidence. See *Miles v. Miles*, 128 Wn. App. 64, 114 P. 3d 671 (2005). Substantial evidence "is

evidence sufficient to persuade a fair-minded, rational person of the finding's truth." *Id.*

2. The Superior Court Erred in Finding that Jacobsen's Opinion of Value was Not Supported by the Record

It is the trial court's duty to weigh the evidence and assess the credibility of the witnesses; however, a finding cannot stand if it is not supported. Here, the trial court's Finding of Fact No. 33, did not weigh the credibility of Jacobsen but, against substantial evidence, found that Jacobsen did not have a basis for his conclusion:

Finding of Fact No. 33. Captain Jacobsen, was retained to determine the actual fair market value of the M/V Snopac Innovator. Jacobsen inspected the vessel condition for approximately two hours, and in doing so he did reference the prior marine survey, which had been done by Captain Vincent in March 2005 for the purpose of obtaining insurance. He checked to see what equipment had been changed and *from his testimony, it is unclear exactly how he reached his \$3 million conclusion.*

CP 678, FF 33. This erroneous finding is partially corrected in Finding of Fact No. 41, which provides in relevant part:

Jacobsen arrived at this \$3 million figure based primarily on a comparison between the Innovator and another fish processing vessel, the "Stellar Sea"....

CP 680, FF 41. The court's FF 41 is supported by the record. See CP 698-780. In fact, Jacobsen testified that his value was based on a comparison of numerous vessels including, but not limited to, Omnisea,

Arctic Enterprise, Royal Aleutian , Western Sea, Woodbine, Yardarm Knot, New West and Stellar Sea. *Id.*

3. The Trial Court Erred in Inaccurately Assuming that the Stellar Sea was Sold in Liquidation.

The trial court also improperly relied in its Finding of Fact No. 61 and 68 that the October 2008 sale of the P/V Stellar Sea was one of liquidation, and therefore “almost meaningless” for market comparison purposes. The trial court’s finding that the sale of the “Stellar Sea” was one of “liquidation” is in direct conflict with the record. The trial court’s Findings of Fact No. 61 and 68 state in relevant part:

Finding of Fact No. 61. ...It is unclear whether the Stellar Sea sold for actual fair market value or whether the sale was forced one or a liquidation sale. This makes the Stellar Sea’s “value” as a comparable almost meaningless, except for comparative value in size and production capacity.

Finding of Fact No. 68....is unclear whether the \$5 million sale figure was an actual fair market value or a liquidation sale. Because of the similarity in appraised values of the Stellar Sea conducted by both Captain Jacobsen (\$10 million) and Captain Laing (\$9 million), it appears the sale of the Stellar Sea was a forced one or liquidation transaction. Therefore, the market approach becomes almost meaningless for purposes of comparing to the valuation of Snopac.

However, there is no evidence in the record that the sale of the Stellar Sea was a forced liquidation transaction. Jacobsen testified at trial that he was the individual responsible for the sale of the Stellar Sea in 2008. RP 698-

700; 751-738. Jacobsen testified that the sale of the Stellar Sea occurred after a nine month extensive international marketing effort which included everything from mailing to prospective buyers, to setting up a website, to purchasing advertising space on other websites, to hiring an international marketing company to promote the vessel internationally. RP 737-738. The vessel was eventually sold using a “closed sealed bid auction process” to in order to obtain the highest value:

Q: Why – why was it set up that way?

A: In fairness to all the parties that wanted to bid, they wouldn't know if they're bidding against each other, and it also – we thought that it would motivate people to bid the highest amount, since they didn't know what there might be a dollar amount that they would have to bid by bidding a dollar or two more than the next lowest bid. They would just have to come up with what they would realistically pay for the vessel. It brought it right to the point.

RP 730-740. Three international prospective purchasers submitted qualified bids, and the highest bidder was \$5 million. RP 740. The sale of the Stellar Sea was not a “liquidation sale” as the trial court presumed in findings of fact No. 61 and 68, and contrary to the trial court's conclusions this sale was not “meaningless.” It was an accurate comparable vessel which provides detailed insight to marine surveyors (including Jacobsen and Laing) as to the value of the Innovator. The trial court's rejection of the “Stellar Sea” as a comparable vessel in its analysis of fair value was in

error and ultimately lead to the trial court's unrealistic and unsupportable opinion of value.

C. The Superior Court Erred When it Failed to Use Customary and Current Valuation Concepts and Techniques Generally Employed for Similar Businesses in the Context of the Transaction Requiring the Appraisal.

In addition to the fact that the trial court arrived at fair value based on inadmissible evidence and erroneous facts, the trial court also failed to properly apply the law when it valued the Innovator without using "*customary and current valuation concepts and techniques generally employed for similar businesses in the context of the transaction requiring the appraisal.*" See *Matthew G. Norton Co. v. Smyth*, 112 Wn. App. 865, 51 P.3d 159 (2002).

1. Standard of Review.

An appellate court reviews questions of statutory interpretation de novo. *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 708, 153 P.3d 846 (2007).

2. Valuation Pursuant to RCW 23B.13.010 et seq.

RCW 23B.13.300(1) provides:

If a demand for payment under RCW 23B.12.280 remains unsettled, the corporation shall commence a proceeding within sixty days after receiving the payment demand and petition the court to determine the fair value of the shares and accrued interest....

(Emphasis added.) Assessment of the fair value of Snopac's stock as of the redemption date of May 26, 2008, was the single task of the trial court in this case. Fair value is defined by the statute at RCW 23B.13.010 as follows:

“Fair value,” with respect to a dissenter's shares, means the value of the shares immediately before the effective date of the corporate action to which the dissenter objects. . . .

This definition leaves to the parties, and ultimately the court, the details by which fair value is to be determined, giving due consideration to all relevant factors involved in the value of the company. *See Matthew G. Norton Co.*, 112 Wn. App. 865, 51 P.3d 159. In *Matthew G. Norton*, the Court of Appeals provides a comprehensive analysis of how to determine fair value, with the basic concept being that “the stockholder is entitled to be paid for that which has been taken from him, viz., his proportionate interest in a going concern.” *Id.* at 876. The *Matthew G. Norton* court approved the definition of fair value articulated by The Model Business Corporations Act, which states that fair value of a corporation's stock should be determined:

- (i) immediately before the effectuation of the corporate action to which the shareholder objects;
- (ii) *using customary and current valuation concepts and techniques generally employed for similar businesses in the context of the transaction requiring the appraisal*; and
- (iii) without discounting for lack of marketability or

minority status.

Id. at 874-75 (*Emphasis added*). Although the trial court is given latitude to determine the fair value of shares, the fair value must be based one on customary and current valuation concepts and techniques generally employed for similar business in the context of the transaction requiring the appraisal. The trial court recognized this duty in its Conclusion of Law No. 2:

Under the Dissenter's Rights statutes, the Court was required to use the customary and current valuation concepts and techniques generally employed for similar businesses to determine the value of respondents' stock as of the May 26, 2008 redemption date without discounting for lack of marketability or minority status.

CC No. 2, CP. 690.

3. Application of the Law To The Facts

Despite the importance in valuing the Innovator, the trial court failed to make a single Finding of Fact which articulates how it arrived at fair value. The fair value is simply concluded in Conclusion of Law No.

6. as follows:

6. The court accepts the recommendations of Mr. Grambush (Respondents' valuation expert) to a certain degree. *The court concludes and values the Innovator at \$6.25 million.* Mr. Grambush was asked to re-calculate the value of the shares using \$6.25 million value of the Innovator using the asset approach and assign a value to each of the respondents' 10% shares of stock. All three valuation experts utilized an asset approach. Mr.

Grambush concluded that 10% of the shares would equal \$350,706. (See attached.)

CP 691, CL 6. However, without some basis in the record to support the value at \$6.25 million, the trial court's determination of fair value appears to be nothing more than an arbitrary figure selected from thin air. The failure to articulate a basis for value, results in erroneous and unsupported conclusions of value.

4. Failure to Follow Customary Valuation Resulted in a Double Counting of Assets to Snopac's Detriment

The trial court asked Grambush to "recalculate the value of the shares at \$6.25 million value for the Innovator." Without explanation or basis in the record, Grambush submitted and the trial court adopted Exhibit A which included the value of the Innovator at \$6.25 million, but also included a **separate line item** for the "machinery and equipment" on board the vessel at \$790,818.00. CP 694. (This additional \$790,818.00 in value represents an additional \$79,818.00 in fair value to each of the Respondents' share of redeemed Snopac stock).

The inclusion of a separate line item for "machinery and equipment" cannot be supported by the record. Each and every valuation discussed during the trial included the vessel's processing machinery and equipment as part of (not separate from) the vessel itself. Even Grambush himself valued the Innovator inclusive of its processing machinery and

equipment. Exhibit 359, RP 1454. There is no basis anywhere in the record below to support the separation of the machinery and equipment from the vessel itself as was done in Exhibit A. The trial court's failure to properly articulate how it arrived at its value allowed this double counting to occur.

The opinion testimony by each valuation expert in this case makes clear the custom and technique generally employed for valuing a processing vessel includes valuing the machinery and equipment as part of (and not separate from) the vessel itself:

(i) Testimony by Jacobsen. Jacobsen opined that the market value of the Innovator as of May 28, 2008, was \$3 million. This market value for the Innovator included the processing machinery and equipment on board the processing vessel. Exhibit 168, pg. 4; RP 679.

(ii) Testimony by Vincent.¹⁰ Like Jacobsen, when assessing the fair value of the Innovator, Vincent included the processing machinery and equipment on board the vessel as part of the fair value of the vessel. Exhibit 15, p. 3.

(iii) Testimony by Laing. The trial court's independent Marine Surveyor Laing also valued the vessel with the processing machinery and

¹⁰ The valuation technique employed by Vincent is offered here since it was considered by the trial court, but it is made without waiving the objection that Vincent's testimony on fair value violates ER 702 and ER 703.

equipment as part of final value. Although not otherwise a part of the record, the \$2.5 million value by Laing was entered into Duffy's cost analysis in a line item for "vessel and processing equipment." Exhibit 277, Schedule 6.

(iv) Testimony by Grambush. Even though he did not ultimately base his opinion of value on an asset valuation of Snopac, Respondents' expert Grambush conducted his own asset valuation as part of the valuation process. RP 1451-54. Grambush's own valuation of the Innovator at approximately \$7.8 million included both the vessel and the machinery and equipment invested into the vessel. *Id.*, 1454; Exhibit 359, Schedule 1.

Despite the fact that all of the experts (including Grambush) testified to a value of the Innovator with its machinery and equipment included, the trial court adopted Exhibit A and improperly provided a separate line item for "machinery and equipment." By including a separate line value for "machinery and equipment", the trial court deviated from the "customary and current valuation concepts and techniques generally employed" in valuing the processing vessel. This material error exists in the trial court's final valuation of Snopac's stock, thereby wrongly creating to Snopac's detriment an additional \$79,818.00 in fair value to each of the Respondents' share of redeemed Snopac stock.

5. Exhibit A Contains a Second Discrepancy which is Not Supported by the Record.

The \$790,000 discrepancy with respect to “machinery and equipment” is not the only discrepancy in Exhibit A. The value “at cost” of the Dillingham plant is **overstated** by \$423,000.00 resulting in an additional \$43,000 to each Respondent.

In Finding of Fact No. 39, the trial court held as follows:

Between January and April 2008, Snopac invested approximately \$1.6 to \$1.7 million to upgrade and equip the Dillingham plant so that it would become a functioning fish processing facility. The total amount spent by Snopac on the Dillingham plant in the five months prior to the May 26, 2008 redemption of the minority owners' shares [including the purchase price of \$1.1 million] was approximately \$2.8 million.

CP 680 (Emphasis Added). However, in Exhibit A to the Findings and Conclusions (submitted to the Court by Grambush) the trial court attached a balance sheet which values of the Dillingham plant “at cost” as \$3,229,302. CP 694. This figure is not supported by the record and is a \$429,302 **discrepancy** between the written Finding of Fact No. 39 and Exhibit A to the Court’s Findings and Conclusions. The additional \$429,302 in value creates a windfall to the Respondents of almost \$43,000

each.¹¹ Snopac requests that this Court correct the unsupported discrepancy.

D. The Trial Court Erred In Awarding Attorney Fees and Costs Because Snopac Acted in Good Faith with Respect to Respondents' Statutory Rights

In its Findings of Fact and Conclusions of Law, the trial court reserved the award of fees and expenses under RCW 23B.13.310(2)(b). CP 692. After subsequent briefing on the issue, the trial court awarded the Respondents attorney fees and costs. CP 771, 778. Because there is no arbitrary, vexatious, or bad faith conduct, the trial court's award of fees and costs is in error.

1. Standard of Review.

The Court Reviews Application of Facts To Law De Novo. *See Bostain*, 159 Wn.2d at 708, 153 P.3d 846.

2. The Law regarding Attorney Fees.

Washington follows the American Rule that attorney fees are recoverable only when there is a contractual, statutory, or recognized equitable basis. *See Interlake Sporting Association v. Washington State Boundary Review Board of King County*, 138 Wn.2d 545, 146 P.3d 905

¹¹ The \$429,302 in additional value associated with the Dillingham plant is also totally inconsistent with the trial court's findings (No. 18) that the investment in the asset had the effect of reducing equity in the Company.

(2006). The relevant statutory basis for attorney fees and costs in this case is RCW 23B.13.310(2)(b), which provides in relevant part:

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

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

On occasion, reviewing courts have been forced to reverse trial court awards of attorney fees and costs that were entered without adequate findings and conclusion of arbitrary, vexatious, or bad faith conduct. *See Humphrey Indus., Ltd. v. Clay St. Associates, LLC*, 170 Wn. 2d 495, 242 P.3d 846 (2010). However these decisions do not define what conduct constitutes “arbitrary, vexatious, or not in good faith.”

Although there is no case law in Washington directly on point as to what conduct may be considered “arbitrary, vexatious, or not in good faith,” there is an Iowa Supreme Court decision directly on point. The facts of *Seig Co. v. Kelly*, 568 N.W.2d 794, 804-805 (Iowa 1997), are analogous to the circumstances of this case, in that it involves an action by a corporation (Seig Corp.) to resolve the “fair value” of the minority dissenting shareholders' (the Kellys) ownership interest. The court ultimately established a fair value which significantly exceeded the

Corporation's initial value offered to the dissenters. After successfully convincing the court to set a value more than three times higher than initially offered, the Kellys sought attorney fee awards on the alternative bases that: (1) the initial offer made by Seig was arbitrary and not in good faith; and (2) Seig did not act in good faith when it failed to increase its offer in light of subsequent developments.¹² The Iowa Supreme Court affirmed the trial court's denial of attorney fees, and provided a detailed analysis of when an award of attorney fee is appropriate. The court articulated a two-step process:

An award of attorney fees and expenses is a two-step process under section 490.1331 [RCW 23B.13.310]. As a prerequisite for such an award, the trial court must make a factual finding that the corporation did not substantially comply with chapter 490 or acted arbitrarily, vexatiously or not in good faith. If the court finds either fact present, the court then has discretion to award attorney and expert fee and expenses in some amount. [Parenthetical portion added.]

Analyzing the words "arbitrary, vexatious, or not in good faith" the court found the following meaning for dissenter's rights' actions: The word "arbitrary" as used in the statute means: "An unreasoned decision made without regard to law or facts." "Vexatious" has a similar meaning: "Lacking justification and intended to harass." And "good faith" is defined with a subjective focus and for purposes of the statute, the essential

¹² Although Iowa case law is different from Washington's on what conduct may be taken into account in setting "fair value," its statutory provisions governing awards for attorney fees and expenses in dissenter's rights' proceedings are identical to RCW 23B.13.310.

elements are: “In common usage this term is ordinarily used to describe that state of mind denoting honesty of purpose, freedom from intention to defraud, and, generally speaking, means being faithful to ones’ duty or obligation.” *Id.* at 804-805, citing Black’s Law Dictionary (6th ed. 1990) and Webster’s Third New International Dictionary (unabridged ed. 1993). Considering the ordinary meaning of the words, the Iowa Supreme Court concluded that “the Kellys had to prove Seig had no factual or legal basis for its fair-value determination or acted for a purpose other than to honestly pay the dissenters the fair value of their shares, including acting with intent to defraud or to harass the dissenters.” *Id.* at 805.

3. Application of The Law To The Facts.

The only applicable legal basis for an award of fees and costs in this case is RCW 23B.13.310(2)(b). However, the trial court made no Finding of Fact or Conclusion of Law that Snopac somehow acted arbitrary, vexatiously, or in bad faith with respect to the rights provided by chapter 23B.13 RCW. The parties are left to speculate at how the trial court arrived at its award.

The trial court’s failure to make a finding of arbitrary, vexatious, or bad faith conduct, is not simply an oversight. The record in this case is devoid of arbitrary, vexatious, or bad faith conduct. In order to properly redeem Respondents’ ownership interest, Snopac hired professionals,

including (1) lawyers to make sure that the procedural requirements were properly and timely complied with, and (2) certified appraisers to provide a fair market value of Respondents' ownership interest in the company. At the time of redemption of the Respondents' shares, Snopac relied on reasoned professional appraisers for their conclusion that the value of Respondents' shares was zero.

When the Respondents objected to the value and demanded \$495,000 each for the value of their shares, Snopac initiated this proceeding to have the trial court make a fair determination of value. After filing the lawsuit, Snopac moved the trial court to appoint its own independent appraiser to make an independent review of the finances of the company and provide the trial court with an independent opinion of value. Over the Respondents' objection, the trial court retained its own independent appraiser, Duffy. The record reflects that Duffy conducted a thorough and complete appraisal analysis of the Snopac. Duffy, relied on his own sub-appraiser, Laing, to arrive at the value of the Innovator. After investing over 160 hours in the appraisal process, Duffy reached the same conclusion as Dahl that the value of Snopac was zero.

The trial court in this case ultimately rejected the opinions offered by Dahl and Duffy that the value of Snopac' shares were worth zero. However, Snopac reliance on its expert's valuation at zero was **not**

arbitrary (“an unreasoned decision made without regard to law or facts”), vexatious (“lacking justification and intended to harass”), or otherwise in the absence of “good faith” (“that state of mind denoting honesty of purpose, freedom from intention to defraud, and, generally speaking, means being faithful to ones’ duty or obligation.”) The trial court’s own independently retained expert arrived at the same conclusion after 160 hours of analysis! Exhibit 278. There can be no finding of arbitrary, vexatious, or lack of good faith, when Snopac set fair value in excess of the trial court’s own independent expert’s opinion of fair value.

4. Greg Blakey’s Unilateral Decisions are Protected by the Business Judgment Rule and do Not Provide a Basis for an Award of Fees and Costs.

In the Findings of Fact, the trial court appears to have fundamentally misunderstood the nature of this dispute it presided over, and this misunderstanding may have contributed to the erroneous award of attorney fees and costs. In obvious error, the trial court’s findings repeatedly and consistently identify Greg Blakey (the owner of Snopac) as the Petitioner in this case. (CP 664-694; FF 2, 3, 4, 9, 13, 14, 15, 17, 22, 25, 27, 29, 31, 42, 46, CL Nos. 7 and 9.) However, Greg Blakey is not even a party to this lawsuit. The Petitioner in this case is the company, Snopac, which filed this lawsuit pursuant to RCW 23B.13.010 *et seq.* in response to the Respondents’ demand for payment of their shares.

Not only did the trial court misidentify Greg Blakey as the petitioner in this case, but it also spent considerable effort articulating “unilateral business decisions” by Greg Blakey which led to Snopac’s precarious financial position. CP 664-694; FF 13, 14, 15, 38, CL 7. Although the parties are left to speculate as to whether those “unilateral business decisions” served as the basis for the trial court’s award of attorney fees and costs, if they did factor into the equation it was in error. Greg Blakey’s business decisions on behalf of Snopac are protected by the Business Judgment Rule. See *Scott v. Trans-Sys., Inc.*, 148 Wn.2d 701, 709, 64 P.3d 1 (2003) Under the “business judgment rule,” corporate management is immunized from liability in a corporate transaction where (1) the decision to undertake the transaction is within the power of the corporation and the authority of management, and (2) there is a reasonable basis to indicate that the transaction was made in good faith).

5. The Trial Court Erred in Finding that Snopac Reduced Its Equity Position just Prior to the Redemption Date.

Alternatively, Snopac speculates that the trial court may have awarded the Respondents attorney fees and costs based on its erroneous Finding of Fact that Greg Blakey improperly “reduced Snopac’s equity just prior to redemption of the Snopac stock.” See CP 691, CL 9. However, this Finding of Fact is a fallacy that is not supported by the record.

In Finding of Fact No. 18, the trial court makes an accurate finding, but then makes an inappropriate conclusory assumption that is not supported by substantial evidence. The finding states in relevant part:

Curiously the most significant increase in debt occurred near the date of redemption, May 26, 2008. Snopac's total debt of \$17,565,356 at this time had a commensurate influence reducing its' equity.

CP 672, FF 18. In Conclusion of Law No. 9, the trial court uses this erroneous assumption as the basis of finding misconduct by the Petitioner:

Respondents' exclusive remedy for the breaches of fiduciary duty, misuse of corporate funds and oppression of minority shareholders is provided within the stock appraisal process of RCW 23B.13.010 et seq., and in that context the Respondents had to prove that the misconduct reduced the value of their stock as of May 26, 2008, a burden of proof, which they met, in large part because of Petitioner's unilateral business decisions that resulted in the highest debt-load in Snopac's history one month prior to the redemption date.

(Emphasis Added.) CP 691, CL 9. The “unilateral business decision” referenced above is Snopac’s business decision to make a significant financial investment in the land based Dillingham plant in the five months leading up to the May 28, 2008, redemption of Respondents’ stock. CP 679-80, FF 38-39.

The inaccuracy made in Finding of Fact No. 18 and woven into Conclusion of Law No. 9 is that the “unilateral business decision that resulted in the highest debt-load in Snopac’s history one month prior to the

redemption date” somehow “reduced the value of [Respondents] stock.” This finding is not supported by substantial evidence. To the contrary, the additional debt incurred by Snopac **did not** have a commensurate influence in reducing Snopac’s equity. For asset valuation purposes the investment in the Dillingham plant in the five months leading up to the May 28 redemption of Respondents stock should be a zero-sum-gain. On the balance sheet, the increase in liability associated the newly acquired Dillingham plant is immediately offset dollar-for-dollar on the balance sheet by the newly acquired asset. In fact, as discussed above, the trial court mistakenly manufactured equity as a result of the acquisition of the Dillingham plant by valuing the plant at \$3,229,000 against a cost of \$2.8 million. See Section C.(5) above.

The idea that Greg Blakey somehow increased Snopac’s debt load to reduce its equity position just prior to the redemption of Respondents’ shares is false. Snopac did take on additional debt, but it also received an asset of equal value. There was no “reduction in equity” as wrongly relied upon by the trial court.

6. The Trial Court Erred in Finding that Snopac Failed to Properly Disclose the Insurance Valuations Performed by Vincent.

The only other alternative findings on which Snopac can speculate that the trial court may have awarded attorney fees and costs are those

erroneous findings in the record that Snopac failed to properly disclose relevant documents in the course of the proceeding. CP 664-94, FF 46, 48, 55, 56, and 57. The trial court's findings that Snopac somehow failed to properly disclose the existence of the Vincent surveys in the course of this case are not supported by the record.

Contrary to Findings of Fact No. 46, and 55, Snopac was transparent with the Vincent surveys from the start. In fact, Jacobsen used the 2005 Vincent survey to understand the details of the Innovator. See Exhibit 168. Further, in the course of the litigation, Respondents own expert confirmed the existence of the Vincent Survey in his October 15, 2009, letter assessment of the Moss Adams evaluation:

“The February 2008 valuation analysis indicates that the vessel was not surveyed as part of the appraisal, but based on a survey conducted in March 2005, prior to all of the improvements and changes which have been made to the vessel.”

Exhibit 236. The Respondents were always aware of the existence of the survey, but because they were advocating for a valuation based on the income approach (as opposed to an asset approach) they did not consider the survey valuable information.

On December 15, 2009, Greg Blakey had his deposition taken by Respondents' counsel. At the deposition, in response to direct questioning Greg Blakey answers as follows:

Q. When was the last time you had the boat surveyed for financing purposes? I'm speaking of the Innovator.

A. A couple years ago, I think. A year and a half ago, two years ago....

Q. All right, Who did that survey that you spoke of?

A. Tim Vincent. I think it's called Vincent Maritime....

Q. Tim Vincent's local?

A. Somewhere in the Seattle area or up north.

Blakey Dep Transcript, p. 130, 131.¹³ This testimony dispels the trial court's erroneous Finding of Fact No. 56, in which the court mistakenly found:

On December 15, 2009, Mr. Blakey was deposed in this case. *When asked whether there were other appraisals of the Innovator other than the Captain Jacobsen appraisal of \$3 million, he said there were not any.* Mr. Blakey so testified only about six months after using the May 2009, Vincent appraisal of the Innovator at \$16.7 million to obtain financing for the business of Snopac and the insurance for the Innovator.

CP 685, FF 56. Again, despite direct knowledge of the Vincent survey from the deposition testimony, the Respondents were not interested. It was not until very late in the litigation, after Duffy had produced his report

¹³ Transmitted to Court Appeals in Supplemental Designation of Clerk's Papers.

and Respondents changed counsel that the Vincent Surveys suddenly became important.

When Respondents eventually requested a copy of the Survey from Snopac, it was immediately produced. Transmittal correspondence from Snopac is in the record and the actual trial exhibits bear on them date stamp numbers showing that production occurred via Snopac. See Exhibit 15, Exhibit 264-66. Finding of Fact No. 57, that the Respondents obtained the Vincent surveys “from Snopac’s insurance broker, ABD” is also without support in the record and in error. CP 685, FF 57. The idea that Snopac somehow failed to properly disclose the existence of the Vincent survey is an error by the trial court that must be reversed.

E. The Trial court Erred in Awarding Attorney Fees and Costs Without Supporting Findings of Fact or Conclusions of Law.

In addition to the fact that there is no viable basis for an award of attorney fees and costs in this case, the trial court failed to establish any record for the reasonableness of its award of attorney fees and costs to Respondents.

1. A Record is Required to Award Attorney Fees.

In all cases in which attorney’s fees are allowed, the Court is to fix an amount it deems reasonable. *Singleton*, 108 Wn.2d 723, 742 P.2d 1224 (1987) *Olsen Media v. Energy Science, Inc.*, 32 Wn. App. 579, 586, 648 P.2d 493 (1982). The law is clear that an award of attorney fees and costs

cannot be sustained in the absence of an adequate record. See *Mahler v. Szucs*, 135 Wn.2d 398, 957 P.2d 632 (1998)(Findings of fact and conclusions of law are required to establish a record for the award of attorney fees and costs).

The trial court made no such findings.

2. There is no Sufficient Basis in the Record for Attorney Fees.

The trial court awarded attorney fees and costs in favor of Respondents without a single Finding of Fact or Conclusion of Law to support such an award. The Order on Respondents' Award For Fees And Costs is a two page document with the following ORDER:

That respondents' are awarded their costs incurred in these proceedings, as well as their reasonable attorneys fees and expenses of experts. These awards are as follows:

- | | |
|------------------------------|-----------|
| 1. Costs of Proceedings: | \$27,433 |
| 2. Attorney Fees: | \$162,482 |
| 3. Expert Fees and Expenses: | \$103,352 |

CP 776-777. This is an insufficient basis for award of attorney fees and costs. Snopac respectfully request that this Court reverse the trial court's un-supported award of attorney fees and costs in favor of Respondents.

E. The Trial Court Erred On Awarding Respondents Prejudgment and Postjudgment Interest on Their Award at 12% Per Annum.

Under the Washington Business Corporations Act, Respondents are entitled to interest at the average rate currently paid by Snopac on its principal bank loans "from the effective date of the corporate action until

the date of payment.” RCW 23B.13.010(4). It is undisputed that Snopac’s interest rate is 5.5% per annum, not 12% per annum.

I. Law Concerning Interest

Generally, a party is entitled to prejudgment interest where the amount due is “liquidated.” See *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 685, 15 P.3d 115 (2000). However, there was no Finding or Conclusion that the amount due was liquidated.

Even if the claim is not “liquidated,” in dissenter’s rights cases filed under the Washington Business Corporations Act, a party is allowed prejudgment interest pursuant by statute:

(6) Each dissenter made a party to the proceeding is entitled to judgment (a) for the amount, if any, by which the court finds the fair value of the dissenter's shares, *plus interest*, exceeds the amount paid by the corporation. . . .

RCW 23B.13.300(6). However, the allowable interest rate is also defined by the applicable statute at RCW 23B.13.010(4):

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

This definition encompasses **both** prejudgment and post-judgment interest as it defines the relevant time frame “from the effective date of the corporate action *until the date of payment.*” RCW 23B.13.010(4)

(emphasis added).

Although there is no Washington case law directly on point in the context of the Washington Business Corporations Act, the cases of *Safeway, Inc. v. Department of Revenue*, 96 Wn. App. 156 (1999) and *Medical Consultants Northwest, Inc. v. State*, 89 Wn. App. 39, 947 P.2d 784 (1997) are appropriately applied by analogy. In these two cases the Court of Appeals resolved a conflict over the applicable interest rate as between RCW 4.56.110 (general interest rate statute) and RCW 82.32.060(5) (specific interest applicable in taxpayer refund actions). Applying the basic tenant of statutory construction that the specific prevails over the general, the Court of Appeals held that the specific interest definition provided in RCW 82.32.060(5) prevailed over the general interest definition provided in RCW 4.56.110. See *Medical Consultants Northwest*, 89 Wn. App. 39, 947 P.2d 784. Citing the specific language of the statute, the courts applied the interest rate in RCW 82.32.060(5) to both prejudgment and postjudgment interest. See *Safeway*, 96 Wn. App. 156, 97 P.2d 559.

2. The Trial Court Applied the Wrong Interest Rate

The judgment entered in this case is not liquidated as it entirely dependent on the opinion and discretion of the trial court in determining the “fair value” of Snopac’s stock. Ordinarily prejudgment interest would

not be allowed. However, interest is allowed in this case as provided for in RCW 23B.13.300(6). That interest is to be calculated “at the average rate currently paid by the corporation on its principal bank loans.” The record below is uncontroverted that the average rate paid by Snopac on its principal bank loans was 5.5%. CP 761-764. Snopac had only two principal bank loans, both with Columbia Bank and both with a current interest rate then at 5.5%. The interest of 5.5% should accrue “from the effective date of the corporate action *until the date of payment*” without compounding the interest on the date of judgment. Respondents should not obtain post-judgment on pre-judgment interest.

Despite the fact that interest was only allowable pursuant to RCW 23B.13.300(6), the trial court improperly awarded Respondents both prejudgment and postjudgment interest at a rate of 12%.¹⁴ CP 777. Further, in its Final Judgment, the trial court mistakenly doubled and then compounded the per diem interest awarded to each Respondent as follows:

2. Snopac shall pay Ms. Spenser pre-judgment interest on the amount of \$330,572.53 from May 26, 2009 to the date of this judgment at the rate of 12% per annum (*\$217.36 per day*).

4. Snopac shall pay Ms. Blakey pre-judgment interest on the amount of \$330,572.53 from May 26, 2009 to the

¹⁴ Although the trial court failed to articulate a basis for awarding 12% interest, it is presumed that the trial court simply applied the general interest rate allowable to post-judgment interest under RCW 4.56.110.

date of this judgment at the rate of 12% per annum
(\$217.36 per day).

8. Snopac shall pay Ms. Spencer and Ms. Blakey post-judgment interest on the total amount of this judgment from the date of this judgment until paid in full at the rate of 12% per annum.

Superior Court Judgment dated November 5, 2010.¹⁵ However 12% per diem interest on \$330,572.53 is \$108.68 per day, not \$217.36 per day. Furthermore, this Final Judgment created a compound of prejudgment interest as of the date of judgment such that the Respondents were awarded postjudgment interest on prejudgment interest. This creates an effective postjudgment interest rate on the original \$330,572.53 of 19%, despite the express language of the statute that a single, un compounded interest rate is applicable “from the effective date of the corporate action *until the date of payment.*”

The only basis for awarding prejudgment interest is pursuant to RCW 23B.13.300(6) and 23B.13.010(4). By their express terms, these two statutes are also applicable to the calculation of postjudgment interest. See *Safeway*, 96 Wn. App. 156, 97 P.2d 559. The applicable interest rate in this case is 5.5% from the effective date of the corporate action until the date of payment. Snopac respectfully request that the court reverse the trial court’s award of (1) prejudgment at 12%, (2) compounding of

¹⁵ Transmitted to Superior Court with Supplemental Designation of Clerk’s Papers.

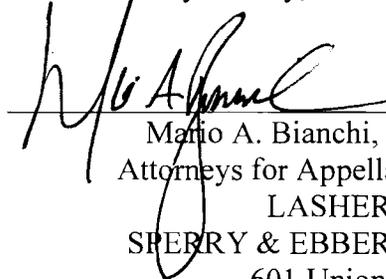
prejudgment on the date of judgment, and (3) postjudgment interest at the rate of 12%.

VI. CONCLUSION

The single task of the trial court in this case was to assess the fair value of Snopac's stock as of the redemption date of May 26, 2008. Appellant submits that the trial court erred in that task by (1) considering inadmissible evidence, (2) considering erroneous facts which are not supported by the record, and (3) misapplying the law. The appellant further submits that the trial court erred in awarding respondents their attorney fees and costs in the absence of arbitrary, vexatious, or bad faith conduct and without making an adequate record. Finally, the appellant submits that the trial court erred in awarding respondents prejudgment and postjudgment interest at 12% per annum.

The appellant, Snopac Products, Inc., respectfully requests remand of this case for a new trial.

Respectfully submitted this 23rd day of May, 2011.



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CERTIFICATE OF SERVICE

I certify that on May 23, 2011, I caused a copy of the foregoing document to be served via legal messenger/mailed via first class U.S. mail, postage prepaid, to the following counsel of record for respondent:

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Cheryl A. Khudsen

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