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CLERK OF COURT
STATE OF WASHINGTON

COURT OF APPEALS, STATE OF WASHINGTON,
DIVISION III

SENTINELC3, INC., a Washington Corporation,

Respondent,

v.

CHRIS J. HUNT, an individual and the marital community, if any,
comprised of CHRIS J. HUNT and CARMEN HUNT; MICHAEL
BLOOD, an individual and the marital community, if any, comprised of
MICHAEL BLOOD and JANA E BLOOD,

Appellants.

BRIEF OF APPELLANTS HUNT

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Attorneys for Appellants Chris & Carmen
Hunt

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I. INTRODUCTION

This is an action seeking determination of the fair market value for shares under the Dissenters' Rights statute, RCW Chapter 23B.13. Appellants Chris and Carmen Hunt [the Hunts] and Michael and Janae Blood [the Bloods] were the Dissenters under the statute and Respondent Sentinel C3, Inc. [Sentinel C3] was the corporation that initiated this action.

On summary judgment initiated by Sentinel C3, the parties presented evidence of conflicting experts with different opinions regarding the valuation of shares. Thus, the requirements for summary judgment under CR 56 were not met.

Nonetheless, the trial court granted summary judgment in favor of Sentinel C3 and its expert, and against the Hunts and Bloods and their expert. Such decision was unsupported by either the law or record before the trial court and thus should be reversed on appeal.

After erroneously granting summary judgment to the corporation, the trial court also awarded attorney fees and costs against the dissenting shareholders for essentially exercising their dissenters' rights and for delays during the litigation caused by Sentinel C3 – not the dissenters. The trial court then entered a Judgment on the fees and cost award that failed

to articulate the method used to calculate the award or how the court determined the award to be reasonable and equitable, as required by the fee statute and case law.

Thus, the subsequent attorney fees award and entry of Judgment by the trial court was also contrary to controlling law and should be reversed on review.

II. ASSIGNMENTS OF ERROR

Pursuant to RAP 10.3(a)(3), Appellants Chris and Carmen Hunt assign error to the following actions by the trial court:

1. The trial court committed error in granting summary judgment without making a substantive determination on the merits of "fair value" for the shares at issue and as required by RCW 23B.13.300.
2. The trial court committed error in granting summary judgment when, taking the evidence and inferences therefrom in the light most favorable to the Hunts as the non-moving party, the court failed to find the Hunts met their burden of production to establish disputed issues of material fact regarding "fair value" for their shares.
3. The trial court committed error by granting summary judgment based on admission of the corporation's expert's report but

exclusion of the dissenters' expert's report based on misapplication of the hearsay and authentication Rules of Evidence.

4. The trial court committed error by awarding attorney fees against the Hunts contrary to controlling law and based on untenable grounds and reasons.
5. The trial court committed error by entering a Judgment that failed to establish the method used to calculate the amount of the award or that it was reasonable and equitable, as required by the fee award statute.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether "fair value" can be determined on the merits by the trial court, as required by the dissenters' rights statute RCW 23B.13.300, without the trial court impermissibly weighing the evidence and assessing the witnesses as prohibited by CR 56 and controlling law on summary judgment.
2. Whether the Hunts met their burden of production on summary judgment and produced sufficient admissible evidence to create a disputed issue of material fact regarding "fair value" for their shares.

3. Whether the valuation reports of the parties' experts were both properly authenticated and admissible under the Rules of Evidence.
4. Whether the record supported the trial court's award of attorney fees against the Hunts based on a determination that the Hunts acted arbitrarily, vexatiously, or not in good faith.
5. Whether the Judgment entered was calculated using a proper method and found by the trial court to be reasonable and equitable as required by the fee statute, RCW 23B.13.310.

IV. STATEMENT OF THE CASE

The Hunts seek review of the trial court's decision granting summary judgment and awarding attorney fees against them in this dissenters' rights action. Based on the following facts and evidence establishing a dispute over the "fair value" for their shares, summary judgment was inappropriate. Thus, the trial court's decisions should be reversed on appeal.

A. UNDERLYING STOCK VALUATION DISPUTE.

The Hunts have owned stock in Sentinel C3 and its predecessors since 2004 or before. CP 5. As of the end of 2009/beginning of 2010, the

Hunts owned 1,000,000 shares of Sentinel C3, which equated to approximately a 22.22% ownership in the corporation. CP 5, 560-561.

However, at that time Chris Hunt had a suspicion that the corporate officers and directors of Sentinel C3 were trying to find a way to push him out of the company. CP 561. Chris felt Sentinel C3's officers and directors were less responsive to his questions and concerns and that he was being treated with animosity. CP 561.

1. INITIAL OFFER – 4/19/2010.

Chris's suspicions were confirmed on or about April 19, 2010, when he received an offer from Sentinel C3 to purchase all of his shares. CP 560-61. The offer was for \$107,200.00 or \$0.1072 per share and was based on a Valuation Engagement Report [VER] that accompanied the offer. CP 560-561.

The VER was prepared on April 9, 2010 by James W. Kukull, CPA, ASA and provided two estimated values for 22.22% of common stock of Sentinel C3 as of December 31, 2009. CP 231. At that time, the Hunts were the only shareholders who owned 22.22% of Sentinel C3's common stock. CP 561. Thus, while the VER did not name the Hunts therein, it did specify that it had been prepared solely and exclusively to

assist management for Sentinel C3 in acquisition of the 22.22% common stock interest from a current stockholder. CP 236.

The VER also specified that two valuations had been provided – one on the minority, nonmarketable basis and one on the control, marketable basis – at the request of Sentinel C3's management. CP 237. It further equated the fair market value on the control, marketable basis with "fair value" as defined for dissenting shareholders purposes. CP 237.

The VER gave a value of \$107,200.00 (\$0.1072 per share) on the minority, nonmarketable basis and a value of \$195,200.00 (0.1952 per share) on the control, marketable basis. CP 231. Thus, the offer the Hunts received on April 19, 2010 for their 1,000,000 shares was the lesser value of \$107,200.00 and was less than the VER appraisal of "fair value" as provided and intended by RCW Chapter 23B, the Dissenter's Rights statute. CP 237, 560-61.

The Hunts declined Sentinel C3's low-ball offer to buy their shares and relations did not improve.

2. SPECIAL MEETING – 10/28/2010.

Six months later, the Hunts received a notice from Sentinel C3 dated October 6, 2010, notifying shareholders of a special meeting to consider a proposed amendment to the Articles of Incorporation to allow a

reverse stock split. CP 14. The notice also gave shareholders notice of and provided documents, statutes, and sample forms for exercising dissenter's rights under RCW Chapter 23B.13. CP 14-24.

The special meeting was held on October 28, 2010 and Chris Hunt participated by telephone. CP 26. A vote was held on the proposed reverse stock split and purchase and it was passed; Chris Hunt and Michael Blood were the only shareholders who voted against the reverse stock split and purchase. CP 26.

After the vote, Chris learned for the first time that he and Mr. Blood would receive non-negotiable cash buyouts of their shares – but the other shareholders would receive promissory notes. CP 561. Chris asked why he and Mr. Blood were being treated differently, but did not receive a direct response. CP 561. The end result, though, was that the Hunts were being squeezed out of the company, as Chris had feared earlier that year. CP 561. After the October 28, 2010 special meeting and vote, the Hunts were no longer considered shareholders by Sentinel C3. CP 562.

The day of the special meeting or shortly thereafter, Sentinel C3 sent the Hunts notice of their dissenter's rights under RCW Chapter 23B.13. Pursuant to RCW 23B.13.230, the Hunts timely

surrendered their shares and made a demand for payment thereon on November 2, 2010. CP 34,47.

3. INITIAL PAYMENT – 12/01/2010.

Sentinel C3 timely responded on December 1, 2010 by providing the Hunts a payment for their shares of \$195,790.92. CP 561. The payment was based on the same VER by Mr. Kukull, prepared in April of 2010 and valuing the Hunts' 22.22% interest as of December 31, 2009 – almost a year before. CP 561. This time, however, Sentinel C3 based the payment on the higher value by Mr. Kukull of \$195,200.00, plus \$590.92 in interest from November 1, 2010. CP 561.

In addition to the payment draft and April 2010 VER by Mr. Kukull, Sentinel C3 also provided the Hunts with the statutorily required business records for Sentinel C3. CP 50. Based on these business records and the date and content of the VER, the Hunts believed that the \$195,790.92 payment was less than the fair value of their shares. CP 562-563. Specifically:

- Chris Hunt felt that certain factors in the VER were weighted more heavily than others in an effort to suppress or reduce the estimate for fair value. CP 562.

- In addition, the business records Sentinel C3 provided for 2010 showed that certain assumptions and information in the VER – which was based on December 31, 2009 – were incorrect and outdated. CP 562. Most significantly, the VER projected and assumed minimal to no growth for Sentinel C3 in 2010, but the financial records showed much more substantial growth of approximately 9%. CP 562.

- Certain language in the VER also led Chris to believe the Sentinel C3 corporate officers and directors were considering a merger or acquisition in the future, which would also impact future growth but was not further discussed or accounted for in the VER. CP 563. However, this led Chris to believe that some sort of merger or acquisition was being contemplated by Sentinel C3 and was imminent. CP 62, 350, 562.

- Finally, the VER itself stated that the appraisal was provided solely for the purposes of purchasing the 22.22% interest of a current shareholder and was of Sentinel C3 as an Idaho subchapter S corporation as of December 31, 2009. CP 236. However, by December 1, 2010 none of these factors were still accurate. The VER was being used by Sentinel C3 for the reverse stock split/purchase and resulting dissenters' action, the Idaho corporation had been merged into and now was a Washington corporation, and it was almost a full fiscal year later. CP 5, 28-30, 562.

Despite these changes, nothing was provided to the Hunts in December of 2010 to show that Mr. Kukull had validated his report and the estimates therein at any time since April 9, 2010 or that he still felt they were accurate. CP 562-563.

4. DISSENTER'S ESTIMATE – 12/27/2010.

After consideration of all of the foregoing information and consulting briefly with a CPA regarding fair value for their shares, the Hunts notified Sentinel C3 by letter dated December 27, 2010 that they were dissatisfied with payment and made a demand for payment based on their own estimate of fair value, pursuant to RCW 23B.13.280. CP 61, 348, 562-563.

Based on the limited information available to them at that time, the Hunts initially estimated that their shares were worth \$0.4267 per share. CP 61-62. In addition, the CPA they had consulted with had indicated that if a sale or merger was imminent – which they believed from Mr. Kukull's VER – then the value should be increased by an additional 20%. CP 62, 350, 563.

Thus, the Hunts' December 27, 2010 demand for payment estimated the shares were worth \$0.51204 per share (\$0.4267 plus 20%) or \$512,040.00 for their 1,000,000 shares. CP 62. They acknowledged partial

payment already of the \$195,790.92 and thus demanded payment of the remaining difference, or \$317,799.23. CP 62, 563.

Sentinel C3 responded by filing this lawsuit and seeking to have the court determine fair value, pursuant to RCW 23B.13.300.

B. PROCEDURAL HISTORY.

In addition to the facts detailed above, the procedural history and timeline is significant with respect to the trial court's determination that the Hunts acted arbitrarily, vexatiously or not in good faith pursuant to RCW 23B.13.310:

- Sentinel C3 commenced this action in Spokane County Superior Court on January 31, 2011, seeking a determination of fair value for the Hunts' shares. CP 1-187. The Hunts filed their Answer on April 7, 2011. CP 198-207.
- On May 6, 2011 the parties appeared before the trial court at a mandatory status conference and the trial court issued a Civil Case Schedule Order setting a February 27, 2012 trial date for the matter. The Scheduling Order also set other discovery and pre-trial deadlines. CP 208; LAR 0.4.1(d).
- The parties also commenced and engaged in discovery. Sentinel C3 served the Hunts with initial discovery requests and the Hunts made

their responses on April 1, 2011. CP 322, 347-357. The Hunts, in turn, served their initial discovery requests to Sentinel C3 on May 17, 2011 and received Sentinel C3's responses on June 17, 2011. CP 322, 359-378.

- Unfortunately, Sentinel C3 objected and declined to provide answers and/or documents in response to several of the Hunts' discovery requests. CP 359-378. These and other discovery issues were discussed between counsel for Sentinel C3 and the Hunts on June 15, 2011. CP 359, 427-428.
- Based on the June 15, 2011 discussion and subsequent discussions, on July 5, 2011 Sentinel C3 finally supplemented three of its prior discovery responses and produced a small portion (335 pages) of the total documents sought by the Hunts' discovery requests. CP 380-386. This was in addition to the 830 pages previously produced and constituted approximately one fifth (1/5) of the total business records that would eventually be produced by Sentinel C3 in response to the Hunts' discovery requests. CP 322.
- However, Sentinel C3 continued to insist on entry of a protective order before producing the bulk of relevant business and other documents requested by the Hunts in their discovery requests. Eventually, all of the parties were able to stipulate to a protective order. CP 209-225.

- Sentinel C3 submitted the stipulated protective order for entry by the Court on August 5, 2011. CP 214-225. In anticipation of the protective order being signed, Sentinel C3 finally produced over 4,000 pages of requested business documents on August 8, 2011. CP 322.
- The next day, August 9, 2011, Sentinel C3 filed its motion for summary judgment. CP 452-454. The motion sought two items of relief. First, it asked the trial court to determine that the VER valuation provided by Mr. Kukull in April of 2010 was the fair value for the shares under RCW 23B.13.300 because the Hunts had no basis for and no expert valuation to support their own estimate and demand for their shares. CP 444-448. Second, it asked the trial court to find that the Hunts had acted arbitrarily, vexatiously, or in bad faith and award Sentinel C3 its attorney fees and costs under RCW 23B.13.310 – again, because the Hunts did not have a basis for their estimate or expert valuation yet. CP 448-450.
- When Sentinel C3 filed its motion on August 9, 2011, the Scheduling Order provided the Hunts another two months – until October 10, 2011 – to retain and disclose their valuation expert, and another two months after that until the December 9, 2011 discovery deadline. CP 208. Trial was over six months away, in February of 2012. CP 208.

- In addition, under the terms of the protective order the Hunts could not share or provide to their valuation expert any of the over 5,000 pages of business documents or the discovery responses they had received from Sentinel C3 *until after the protective order was signed*. CP 473 (¶ 5).
- Unfortunately, after Sentinel C3's motion was filed the trial court notified the parties that it could not enter the protective order as presented and a hearing regarding the protective order was held on August 17, 2011. CP 458. The protective order was finally resubmitted to the Court on September 2, 2011 and signed by the court on September 7, 2011. CP 458-480. Only then could the Hunts provide the documents produced by Sentinel C3 to their valuation expert, per the terms of the protective order. CP 473, ¶ 5.
- On September 26, 2011 the Hunts supplemented their original discovery responses to identify their valuation expert – Jerry Hecker, CPA, CVA. CP 764-761. The Hunts' Response opposing Sentinel C3's summary judgment motion was timely filed that day as well and included their supplemental discovery responses, verifying they had a valuation expert. CP 481, 496-502, 764-771.
- Mr. Hecker performed and completed his valuation report by October 5, 2011 – less than a month after the protective order was finally

entered and the Hunts could finally provide Sentinel C3's business records to Mr. Hecker. CP 600. Mr. Hecker's valuation report was provided to Sentinel C3 on October 13, 2011 and a copy was also filed with the trial court for the record on the upcoming summary judgment hearing. CP 597-598.

- Sentinel C3's Reply in support of its summary judgment motion also acknowledged and discussed the existence of Mr. Hecker's valuation report. CP 584. However, despite the existence now of two competing valuation experts – and three competing fair values for the shares, including the Hunts original estimate – Sentinel C3 went forward with its arguments on summary judgment.
- The summary judgment motion was argued before the trial judge on Friday, October 21, 2011. CP 673. The trial judge ruled from the bench, granting Sentinel C3's motion in its entirety. CP 673; 10/21/11¹ VRP 30:25-31:4. An Order was entered on November 8, 2011. CP 677-678.
- The Hunts timely moved for reconsideration on November 18, 2011. CP 793-795. After the briefing was completed, the trial court issued

¹ There were two separate hearings in this matter – one on the summary judgment and one on the attorney fees Judgment – and thus two verbatim reports of proceeding prepared. They are referred to in the brief by the date of the hearing, to distinguish between the two.

an Order on Reconsideration on January 6, 2012 and denied the motion for reconsideration. CP 879-880. The Hunts timely filed their Notice of Appeal on January 19, 2012. CP 881-888.

- Meanwhile, Counsel for Sentinel C3 filed a Notice of Presentment and proposed Judgment on the attorney fees and costs award. CP 898-903. The Hunts filed an objection and response to the proposed judgment, and moved on an emergency motion for a stay pending the appeal. CP 937-952.
- On February 1, 2012 the trial court issued a letter decision advising that it was taking the Proposed Judgment under advisement pending completion of the appellate process. CP 897.
- Fifteen days later, on February 16, 2012, Sentinel C3 untimely sought reconsideration of the trial court's February 1, 2012 letter decision – asking that either the Proposed Judgment be entered, or that the trial court set a bond. CP 1024-1025. The Hunts objected to both the untimely motion and to the substantive request therein. CP 1046-1057.
- The matter came on for hearing before the trial court on Friday, March 30, 2012. CP 1076. The trial court granted Sentinel C3's motion to enter Judgment, but reserved entry of the Judgment itself to determine the amount. 3/30/12 VRP 27:21-25; 29:2-10. The Judgment on fees and costs

was entered by the trial court on April 5, 2012. CP 1077. The Judgment failed to include the method by which the amounts had been calculated and or any indication that the court had determined the award was reasonable and equitable, as required by case law and RCW 23B.13.310. CP 1077-1079. Thus, the Hunts timely appealed the Judgment as well. CP 1080-1085.

The Hunts now seek review of both the Order granting Sentinel C3's motion for summary judgment and the Judgment itself. Based on the extensive disputed facts before the trial court, summary judgment was inappropriate and thus the Order and resulting Judgment should be reversed on appeal.

V. LEGAL ARGUMENT

Sentinel C3's motion for summary judgment should have been denied because Sentinel C3 failed to establish that there were no disputed material facts regarding what constituted "fair value" for the Hunts' shares and the trial court itself was prohibited under the controlling law from determining fair value on summary judgment – which it essentially did by granting the motion. Thus, summary judgment was inappropriate and the trial court's Order should be reversed on appeal.

If this decision by the trial court granting summary judgment is reversed, then the subsequent and dependent decision awarding attorney fees under RCW 23B.13.310 and entering Judgment thereon must also be reversed. Specifically, RCW 23B.13.310 only charges the court to determine all costs and fees "of the proceeding" once the proceeding is completed – and if summary judgment is reversed and the case remanded, then the proceeding will proceed.

It is only if the summary judgment as to fair value is upheld – and thus the case is over – that the award and Judgment on attorney fees will need to be reviewed separately.

Thus, the grant of summary judgment will be addressed first and the dependent award and Judgment of attorney fees will be addressed – including recitation of the applicable standard of review – separately and in the alternative.

A. SUMMARY JUDGMENT STANDARD OF REVIEW

The Court of Appeals reviews a summary judgment order de novo, performing the same inquiry as the trial court and considering the facts and reasonable inferences in the light most favorable to the nonmoving party. Jones v. Allstate Ins. Co., 146 Wn.2d 291, 300, 45 P.3d 1068

(2002); Fitzpatrick v. Okanogan Cy, 169 Wn.2d 598, 605, 238 P.3d 1129 (2010).

"The object and function of the summary judgment procedure is to avoid a useless trial; however, a trial is not useless, but is absolutely necessary where there is a genuine issue as to any material fact." Balise v. Underwood, 62 Wn.2d 195, 199, 381 P.2d 966 (1963) (citing Preston v. Duncan, 55 Wn.2d 678, 349 P.2d 605 (1960)); quoted in Lamon v. McDonnell Douglas Corp., 91 Wn.2d 345, 349, 588 P.2d 1346 (1979). Thus, summary judgment "must be employed with caution lest worthwhile causes perish short of a determination of their true merit." Smith v. Acme Paving, 16 Wn. App. 389, 392, 558 P.2d 811 (1976).

In ruling upon such motion, it is the duty of the trial court to consider all evidence and all reasonable inferences therefrom in the light most favorable to the nonmoving party. Morris v. McNicol, 83 Wn.2d 491, 494-95, 519 P.2d 7 (1974); quoted in Lamon, 91 Wn.2d at 349-350; Meissner v. Simpson Timber Co., 69 Wn.2d 949, 421 P.2d 674 (1966); Smith, 16 Wn. App. at 393. "If, from this evidence, reasonable men could reach only one conclusion, the motion should be granted." Smith, 16 Wn. App. at 393; accord Morris, 83 Wn.2d at 494-95.

However, the burden on summary judgment is of *production*, not persuasion, and thus on motion for summary judgment "the trial court does not weigh evidence or assess witness credibility." Barker v. Advanced Silicon, 131 Wn. App. 616, 624, 128 P.3d 633 (2006) (citing Renz v. Spokane Eye Clinic P.S., 114 Wn. App. 611, 623, 60 P.3d 106 (2002)); see also Dalton v. State, 130 Wn. App. 653, 661 fn 3, 124 P.3d 305 (2005) ("In a summary judgment motion, the court does not weigh the evidence. Rather, it decides whether the evidence gives rise to any issue of material fact."); accord Larson v. Nelson, 118 Wn. App. 797, 810 fn 17, 77 P.3d 671 (2003).

Thus, "disputed opinion testimony, offered by qualified experts, cannot be resolved on summary judgment." Homeowners Ass'n. v. St. Paul Ins., 167 Wn. App. 28, 33-34, 272 P.3d 249 (2011). Instead, the trial court – and the Court of Appeals on review – "is to pass on whether a burden of production has been met, not whether evidence produced is persuasive. That is the [fact finder's] role, once a burden of production has been met." Renz, 114 Wn. App. at 623; quoted in Barker, 131 Wn. App. at 624

Here, the Hunts produced admissible evidence that they and their expert, Mr. Hecker, had their own valuations for the fair value of the

shares AND challenged the VER valuation by Sentinel C3's expert, Mr. Kukull. Based on that production by the Hunts, there were disputed issues of material fact that could not be determined on summary judgment and Sentinel C3's motion should have been denied. The trial court's Order granting Sentinel C3 summary judgment should be reversed overturned on appeal.

B. THE APPLICABLE LAW – RCW 23B.13.300.

It is important to keep in mind that this is a dissenters' rights action – not a typical negligence/personal injury or even contract dispute. This is not a case where the Plaintiff bears the burden of proof and must meet that burden in order to obtain monetary damages.

On the contrary, this is an action solely to determine the fair value of the dissenter's shares. RCW 23B.13.300(1). There is no determination of fault or liability and, correspondingly, no traditional burden of proof for either party – the sole remedy is fair value for the shares. RCW 23B.13.020.

The statute expressly charges the court "to determine the fair value of the shares and accrued interest." Id. Toward this end, "the court may appoint one or more persons as appraisers to receive evidence and recommend decisions on the question of fair value." RCW 23B.13.300(5).

However, it is ultimately the court that is charged with determining fair value. RCW 23B.13.300(1).

Thus, determination of fair value under the dissenter's rights statute is not a test of quantity or quality of evidence between the parties – or a race of who gets to the court first with an expert. It is a determination on the merits by the court of what constitutes fair value and, if necessary, the court can appoint its own expert to reach that determination. RCW 23B.13.300(1) & (5).

Taken one step further, this means that the court must evaluate the reasonableness of ANY valuation presented by any party or their expert and actually determine if that valuation represents fair value – and if it does not or if the court cannot tell from that one valuation, then the court is to appoint its own expert to assist in determining fair value. Id.

This means that an action for determination of fair value under RCW 23B.13.300 inherently does not lend itself to summary judgment *because regardless of what the parties present, the court is charged with determining fair value itself – and can do so in the absence or presence of any party expert by appointing its own expert.*

Thus, Sentinel C3's motion for summary judgment must be examined within the context of the specific requirement and duty created

by RCW 23B.13.300 for the court – namely, to determine fair value on the merits.

1. THE TRIAL COURT'S ORDER GRANTING SUMMARY JUDGMENT SHOULD BE REVERSED BECAUSE THE TRIAL COURT DID NOT DETERMINE FAIR VALUE.

With the express requirement of RCW 23B.13.300 in mind, Sentinel C3's motion for summary judgment should have been denied because the trial court failed to make any determination as to fair value thereunder. That was not the purpose of the motion – or of summary judgment for that matter. CR 56(c).

Instead, Sentinel C3 argued that it was the only party with an expert and the Hunts did not have a basis for their valuation, or an expert, so Sentinel C3 wins the battle of competing evidence and thus should be entitled to summary judgment.

Under the normal burdens of proof in traditional litigation, Sentinel C3's argument is correct. If a party does not have evidence or a basis for its case or position, then it loses. Momentarily putting aside the question of whether the Hunts produced sufficient admissible evidence to "win" their case or position (which they did, as discussed further below), RCW 23B.13.300 does not require or even provide for either party to

prove or win their case. Again, it charges the court to make a determination of fair value – and that is it.

Thus, even if Sentinel C3 was the only party with an expert (which it was not) or even the only party with a valuation (which it was not), the court still had to determine if that expert's valuation constituted fair value. In order to do that, the court had to weigh the evidence and assess the credibility of Sentinel C3's one expert – *and the court cannot do that on summary judgment.* Barker, 131 Wn. App. at 624; Renz, 114 Wn. App. at 623; Smith, 16 Wn. App. at 393 (citing Fleming v. Smith, 64 Wn.2d 181, 390 P.2d 990 (1964)).

Sentinel C3's motion for summary judgment therefore should have been denied because the trial court cannot – and in fact did not – determine fair value without weighing the evidence and assessing witness credibility. RCW 23B.13.300 charges the trial court with making an independent determination of fair value and that cannot be done by just taking Sentinel C3 and/or Mr. Kukull's word for it. The requirements for summary judgment under CR 56(c) and the controlling case law cannot be met because RCW 23B.13.300 requires an actual determination of fair value by the trial court on the merits – not the word of either party or their expert.

Thus, the trial court's Order granting summary judgment should be reversed and Sentinel C3's motion denied because the trial court cannot determine fair value under the evidentiary limitations and restrictions of CR 56(c) and the controlling case law.

2. THE TRIAL COURT'S ORDER GRANTING SUMMARY JUDGMENT SHOULD BE REVERSED BECAUSE THE HUNTS MET THEIR BURDEN OF PRODUCTION.

Sentinel C3's motion for summary judgment also should have been denied under the specific requirements of CR 56(c) and the applicable summary judgment standard – because the Hunts established disputed issues of material fact regarding what "fair value" should be. Thus, Sentinel C3 failed to meet its burden on summary judgment and its motion should have been denied. CR 56(c).

First and foremost, Chris Hunt's Declaration established the factual basis for both his valuation of his own shares AND why he did not agree with Mr. Kukull's valuation. CP 562-563. Specifically, Chris's Declaration detailed that he relied upon Mr. Kukull's own VER, the business records he had received from Sentinel C3, and the inconsistencies therein to formulate his own estimate – and he further detailed those inconsistencies and changes of circumstances that he included in his own estimate. Id. The

Hunts' discovery responses, produced by Sentinel C3 in support of its summary judgment motion, also verified that the Hunts consulted with a CPA in formulating their estimate. CP 348.

Thus, the Hunts produced evidence of the basis for their estimate for the fair value of the shares. Such evidence was admissible, created a disputed issue of material fact regarding "fair value" and met the Hunts' burden of production under summary judgment. CR 56(c) & CR 56(e); Barker, 131 Wn. App. at 624; Renz, 114 Wn. App. at 623.

Further, the trial court was required to consider this evidence and any inferences therefrom in the light most favorable to the Hunts, as the non-moving party. Morris, 83 Wn.2d at 494-95; Lamon, 91 Wn.2d at 349-350; Smith, 16 Wn. App. at 393. Any issues regarding whether or not the Hunts' estimate was reasonable or the sufficiency of their basis for the estimate were issues as to the *weight* of the evidence, not its admissibility or production – and thus were inappropriate for determination on summary judgment. Barker, 131 Wn. App. at 624; Renz, 114 Wn. App. at 623; Smith, 16 Wn. App. at 393.

Second, the Hunts produced admissible evidence that they had an expert who was doing a valuation for them AND doing a critique of Mr. Kukull's VER. The Hunts' supplemented their discovery responses to

disclose their valuation expert, Mr. Hecker, and the scope of his work and opinions – and that disclosure was timely produced to the trial court with their Response opposing Sentinel C3's summary judgment motion. CP 496-501, 764.

This evidence was admissible, created a disputed issue of material fact regarding Sentinel C3's argument that it was the only party with a valuation expert, and met the Hunts burden of production under summary judgment. CR 56(c) & (e); Barker, 131 Wn. App. at 624; Renz, 114 Wn. App. at 623.

Third, the Hunts produced evidence that Mr. Hecker finished his valuation report and that it was provided to Sentinel C3 in record time – via supplemental declaration by counsel that was never challenged.² CP 597-598. Sentinel C3 even acknowledged receipt of Mr. Hecker's valuation report and addressed it in their Reply brief in support of summary judgment. CP 584, 588.

Again, this evidence was admissible, created a disputed issue of material fact regarding Sentinel C3's argument that it was the only party with a valuation expert, and met the Hunts burden of production under

² As discussed further below, the trial court raised the issue of whether the Report attached to counsel's Supplemental Declaration was timely and noted Sentinel C3 did not file or make a motion to strike. 10/21/11 VRP 26:14-22. However, the trial courts also clearly indicated that he had considered everything before him in making his decision. CP 31:9-16.

summary judgment. CR 56(c) & (e); Barker, 131 Wn. App. at 624; Renz, 114 Wn. App. at 623. Sentinel argued in reply that Mr. Hecker's report did not support the Hunts' original estimate³ but, again, such contentions regarding reasonableness and basis for opinions goes to the weight of evidence and thus cannot be determined on summary judgment. Id.

Taken all together, this admissible evidence produced by the Hunts established disputed issues of material fact regarding the allegations in Sentinel C3's motion for summary judgment – and thus the motion should have been denied. The Hunts met their burden of production under CR 56(c) & (e) and the controlling case law and thus the Order granting summary judgment should be reversed and the motion denied on appeal.

3. THE TRIAL COURT'S ORDER GRANTING SUMMARY JUDGMENT SHOULD BE REVERSED BECAUSE MR. HECKER'S REPORT WAS ADMISSIBLE AND PROPERLY AUTHENTICATED.

Finally, Sentinel C3's motion for summary judgment should have been denied because the Hunts also filed Mr. Hecker's valuation report with the court – and thus the record contained the competing valuation opinions of two appraisal experts. The Hunts can find no case or other law supporting summary judgment when two experts have produced two

³ CP 584, 588.

competing opinions, on anything. Instead, as noted above, "disputed opinion testimony, offered by qualified experts, cannot be resolved at summary judgment." Homeowners Ass'n, 167 Wn. App. at 33-34.

Ultimately, Mr. Hecker's report and the trial court's treatment thereof formed the basis for the court's decision to grant summary judgment. It was not an issue briefed or argued by any party prior to the summary judgment hearing and, correspondingly, it resulted in misapplication and confusion between the Rules of Evidence for authentication and hearsay.

Counsel for Sentinel C3 misrepresented to the trial court that Mr. Hecker's report was inadmissible *hearsay* because it was not *authenticated* by Mr. Hecker himself. 10/21/11 VRP 5:3-7, 25:18. Counsel for the Hunts acknowledged that Mr. Hecker did not authenticate the report himself – but then correctly pointed out that the report was properly authenticated by counsel's declaration, which was filed with the court. 10/21/11 VRP 17:3-9, 29:9-14.

Nonetheless, the trial court excluded Mr. Hecker's report as inadmissible hearsay because it was not properly authenticated and then

granted Sentinel C3's motion for summary judgment.⁴ 10/21/11 VRP 28:18-29:24; 30:25-31:4. This decision and the subsequent grant of summary judgment were unsupported by the Rules of Evidence and controlling case law.

"Hearsay" is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered into evidence to prove the truth of the matter asserted." ER 801(c). A statement includes "an oral or written assertion...if it is intended by the person as an assertion." ER 801(a). Hearsay is not admissible *unless* one of the exceptions identified under the rules of evidence applies. ER 802; see ER 803, 804. Authentication is not a recognized exception. Id.

Both Mr. Hecker's and Mr. Kukull's reports are statements made outside of trial and thus hearsay if offered for the truth of the matters asserted therein. ER 801(a) & (c). Neither would be admissible if offered at time of trial and thus both experts would be required to testify. ER 802.

However, the two expert reports were not offered to prove the truth of the matter asserted therein. Sentinel C3 offered Mr. Kukull's report in support of their summary judgment argument that they were the only party

⁴ However, the trial court also indicated it considered everything that was filed and everything before it in making its decision – which, again, begs the question of how summary judgment was granted if the court considered both expert valuation reports. 10/21/11 VRP 31:12-16.

with an expert and a valuation. The Hunts offered Mr. Hecker's report to establish that was not true and thus create a disputed issue of material fact. Thus, both reports were submitted to establish the *existence* of the expert and their opinions, not the *substance* of those opinions – because the latter would have been inadmissible hearsay. ER 802.

The only difference between the two reports procedurally was that Mr. Kukull had signed an affidavit authenticating his report – and counsel for the Hunts signed an affidavit authenticating Mr. Hecker's report. CP 226-227, 597-598. Significantly, Mr. Kukull's affidavit did not actually contain any of his opinions or conclusions from his VER – not even the actual valuation for the shares – and did not even incorporate his opinions by reference. CP 226-227. Thus, the affidavit itself did not contain any admissible opinions or valuation; it just authenticated his report. Id.

At the hearing, Sentinel C3 did not argue or contend that counsel for the Hunts *could not* authenticate Mr. Hecker's report or that Mr. Hecker's report was inadmissible for improper authentication. Instead, counsel for Sentinel C3 first pointed out that Mr. Hecker had not authenticated it himself and then argued that it was inadmissible hearsay. 10/21/11 VRP 5:3-5; 25:18.

The two issues then became inexplicably mixed and the trial court ultimately accepted Mr. Kukull's report as being admissible because Mr. Kukull authenticated it himself, but excluded Mr. Hecker's report as inadmissible hearsay because counsel authenticated it and it was not in the form of a declaration. 10/21/11 VRP 29:19-24. It is important to note that the trial court specifically concluded that in order for Mr. Hecker's report to be sufficient to defeat summary judgment it needed to be in the form of a Declaration – yet Mr. Kukull's Affidavit did not contain any conclusions or opinions from his own report and thus his report was not in the form of a Declaration or Affidavit either. 10/21/11 VRP 29:21-24; CP 226-227.

Thus, the trial court's conclusion and decision – worked out at the hearing and without any chance for the parties to properly brief the law – inconsistently admitted one report but excluded the other as hearsay *based on who authenticated each report*. However, as noted above, the evidence rules on hearsay do not include authentication as an exception to hearsay. ER 801 *et seq.* What is more, evidence rules on authentication do not give more weight to a witness's authentication over an attorney's. ER 901 *et seq.*

All authentication requires is testimony of witness with knowledge that a matter is what it is claimed to be. ER 901(b)(1). The rules of

evidence also specifically state that *testimony by the author or subscriber is not necessary to authenticate a writing*. ER 903. Thus, both the Affidavit of Mr. Kukull and the Declaration of Counsel for the Hunts fulfilled the authentication requirements under the Rules of Evidence and both reports were properly authenticated. ER 901, 903.

Again, this is a separate issue from hearsay and authentication is not a recognized exception to hearsay and does not make either report admissible hearsay – regardless of who authenticated each report. ER 803, 804. The reports are only admissible if they were offered to prove something other than the truth of the matter asserted therein – i.e., the existence of the experts and their opinions, not those opinions themselves.

This was the purpose behind submission of Mr. Hecker's report by the Hunts, to establish conflicting experts with conflicting reports and thus create a disputed issue of material fact to defeat summary judgment. The trial court's determination that Mr. Hecker's report was inadmissible hearsay, while Mr. Kukull's was not, was an error unsupported by the Rules of Evidence. Mr. Hecker's report should have been considered by the trial court as production by the Hunts establishing a disputed issue of material fact and summary judgment should have been denied.

Taken altogether, the express requirements and duty to the court under RCW 23B.13.300 and extensive admissible evidence submitted by the Hunts regarding valuation were both sufficient to defeat summary judgment under the applicable requirements and standard. Accordingly, on review the trial court's Order granting Sentinel C3 summary judgment should be reversed and the motion should be denied.

C. ATTORNEY FEES & JUDGMENT

If the Court of Appeals upholds the trial court's grant of summary judgment regarding fair value, the trial court's decision awarding attorney fees against the Hunts pursuant to RCW 23B.13.310 should nonetheless still be overturned for abuse of discretion.

1. STANDARD OF REVIEW.

The Court of Appeals reviews awards of attorney fees – including awards made pursuant to statute such as RCW 23B.13.310 – for abuse of discretion. Humphrey Indu. v. Clay St. Associates, 170 Wn.2d 495 (2010) (citing Noble v. Safe Harbor Family Pres. Trust, 167 Wn.2d 11, 17, 216 P.3d 1007 (2009)). A trial court's decision should be reversed "under this standard only if it 'is manifestly unreasonable, exercised on untenable grounds, or exercised for untenable reasons,' with the last category

including errors of law." Humphrey, 170 Wn.2d at 506 (quoting Noble, 167 Wn.2d at 17).

"When reviewing an award of attorney fees, the relevant inquiry is first, whether the prevailing party was entitled to attorney fees, and second, whether the award of fees is reasonable." McGreevy v. Oregon Mut. Ins. Co., 90 Wn. App. 283, 289, 951 P.2d 798 (1998) (citing Public Util. Dist. 1 v. Int'l Ins. Co., 124 Wn.2d 789, 814, 881 P.2d 1020 (1994)). Washington State follows the American rule in awarding attorney fees and under that rule a court may award fees "only if authorized by 'contract, statute, or recognized ground in equity.'" Bowles v. Dept. of Retirement Sys., 121 Wn.2d 52, 70, 847 P.2d 440 (1993) (quoting Painting & Decorating Contractors, Inc. v. Ellensburg Sch. Dist., 96 Wn.2d 806, 815, 638 P.2d 1220 (1982)); quoted in McGreevy, 90 Wn. App. at 289.

Here, the trial court awarded attorney fees pursuant to RCW 23B.13.310, which provides that the court *may* assess attorney fees and costs, including expenses for experts, against a dissenter if the court finds that the dissenter acted "arbitrarily, vexatiously, or not in good faith with respect to the rights provided by chapter 23B.13 RCW." RCW 23B.13.310(1) & (2)(b).

As the Washington State Supreme Court has recognized, such language is permissive, not mandatory, and thus even if a court finds a dissenter "*did* act arbitrarily, vexatiously, or not in good faith, the opposing party is not automatically *entitled* to an award of attorney fees. Rather, the decision to award attorney fees rests in the discretion of the trial court." Humphrey, 170 Wn.2d at 507 (emphasis in original).

Under this permissive language in RCW 23B.13.310, the trial court's award of attorney fees against the Hunts should be reversed because 1) the Hunts did not behave arbitrarily, vexatiously or not in good faith and 2) the trial court failed to establish that the amount of the award was reasonable or the method used to calculate the award.

2. THE TRIAL COURT'S AWARD OF ATTORNEY FEES SHOULD BE OVERTURNED BECAUSE IT WAS MANIFESTLY UNREASONABLE AND BASED ON UNTENABLE GROUNDS AND REASONS.

Per Sentinel C3's request on summary judgment, the trial court awarded attorney fees against the Hunts and Bloods and for the corporation based on a finding under RCW 23B.13.310 that the dissenters acted arbitrarily, vexatiously or not in good faith. However, based on the disputed facts before the court on the record and the trial court's own conclusion that the Hunts acted reasonably when they made their demand

of payment,⁵ such award by the trial court was manifestly unreasonable and based on untenable grounds and reasons. Thus, it should be overturned on review.

i. The Hunts' Initial Estimate and Demand Was Not Arbitrary or Unreasonable.

First and foremost, this is the issue or allegation that really drives Sentinel C3's motion for summary judgment – that the Hunts were unreasonable and totally out of line by exercising their rights as dissenters and demanding payment based on their own unfounded estimate. Throughout Sentinel C3's original motion and its reply, it continued to harp upon this theme – the Hunts' demand and estimate were unreasonable.

However, the standard for an award of attorney fees under RCW 23B.13.310 is not reasonableness or whether a party acted unreasonably – which is ultimately a negligence standard. Instead, the statute provides the court may award attorney fees and costs against dissenters if it finds they acted arbitrarily, vexatiously, or not in good faith – a standard higher than reasonableness or mere negligence. RCW 23B.13.310.

⁵ 10/21/11 VRP 30:13-17.

Thus, an award of fees against a dissenter for acting "arbitrarily, vexatiously or not in good faith" requires more than just an unreasonable or unfounded estimate by the dissenters – as the Washington State Supreme Court found in Humphrey.⁶

In Humphrey, the corporation offered the dissenting shareholder \$181,192.64 for his shares. Humphrey, 170 Wn.2d at 499. The dissenter timely disputed the valuation and demanded an **additional** \$424,607.00 based on its own estimate of fair value – for a total valuation by the dissenter of \$605,799.64 for its shares. Id. Various settlement offers were made by the corporation and an offer of judgment before trial that would have valued the shares in the \$325,000.00 to \$340,000.00 range, but the dissenter rejected each one. Id. Ultimately, the Court determined fair value for the dissenter's shares was \$241,780.86 and ordered the corporation to pay the additional \$60,588.22 difference. Id. at 500.

The trial court found the dissenter had behaved arbitrarily, vexatiously, or not in good faith and awarded attorney fees against the dissenter – based at least in part on the dissenter's demand and the

⁶ In Humphrey, the court examined an award of attorney fees against a dissenting shareholder under the dissenters' rights statute for **limited liability corporations** – RCW Chapter 25.15. RCW Chapter 23B.13 is the companion dissenter's rights statute for **corporations** and the fee provision under RCW 23B.13.310 is identical to RCW 25.15.480 – with the same requirement that the court find the dissenter acted arbitrarily, vexatiously or not in good faith.

dissenter's rejection of the pre-trial offer of settlement and offer of judgment. Id. at 507-508.

The Washington State Supreme Court reversed this award and decision. Id. at 507, 509. First, the Supreme Court recognized that evidence of the prelitigation settlement negotiations was inadmissible and held the trial court should not have relied on the same. Id. at 508. However, the Supreme Court then held that even if the rejection of the prior offers was admissible, the record did not establish that the dissenter's actions were arbitrary, vexatious, or not in good faith – *despite the fact the dissenter's initial demand was based on an estimate more than three times the corporation's offer and more than twice what the trial court determined to be fair value.* Id.

There was no discussion in Humphrey regarding whether the original demand by the dissenter was reasonable or if it had any basis – let alone a reasonable one. Humphrey, 170 Wn.2d 495. (Given that the trial court ultimately awarded only an addition \$60,588.22 after determining fair value, it would seem logical that the court did not find the basis for the dissenter's \$600,000.00 valuation and demand to be reasonable or fair value.)

Nonetheless, the Supreme Court determined based on that record that the dissenter had not acted arbitrarily, vexatiously or not in good faith and thus overturned the award of attorney fees. Id. Thus, determination of whether a dissenter acted arbitrarily, vexatiously or not in good faith does not turn on the difference between the amount offered, the actual fair value, and/or the amount the dissenter's initial demand. Id.

Accordingly, Sentinel C3's argument for attorney fees based on the amount of the Hunts' initial demand should have been denied. The difference between what Sentinel C3 offered and the Hunts' initially demanded was significantly less than in Humphrey and thus does not support the trial court's decision that the Hunts acted arbitrarily, vexatiously or not in good faith.

What is more, the Hunts provided evidence on summary judgment that they were having a valuation down by their own expert to supplement their own estimate and further assist the trial court in determining fair value. CP 496-497, 597-598. Sentinel C3 complained that Mr. Hecker's valuation was 20% lower than the Hunts original estimate – and thus further evidence that the Hunts had acted arbitrarily and unreasonably. CP 584. However, the Hunts had increased their original estimate for their shares by 20% because of an imminent sale or merger of the corporation

they thought was indicated by Mr. Kukull's VER. CP 62. Mr. Hecker did not find or include any increase for such imminent sale or merger – and correspondingly his valuation was 20% less than the Hunts' demand, ***actually confirmed their original estimate without the 20% adjustment.*** CP 62, 601,622-629.⁷

Thus, the Hunts' original estimate was not arbitrary or unreasonable and Sentinel C3's demand for attorney's fees under RCW 23B.13.310 should have been denied.

ii. The Hunts Did Not Behave Arbitrarily, Vexatiously or Not in Good Faith During Litigation.

Part of Sentinel C3's argument for attorney fees was also that the Hunts had acted arbitrarily, vexatiously or not in good faith because they did not have a basis or expert to support their demand by the time Sentinel C3 filed its motion for summary judgment. However, as detailed in the procedural timeline above, this was a situation caused and created by Sentinel C3 – not the Hunts.

First, Sentinel C3 participated in limited and incomplete discovery for two or three months while it demanded that a protective order be put in

⁷ Conversely, Mr. Kukull's valuation was over 200% lower than the Hunts' original estimate without the adjustment for sale/merger and Mr. Hecker's valuation – if that is the test for arbitrary conduct, as Sentinel C3 argued.

place. CP 322, 359-376, 427. The protective order was finally filed on August 5, 2011 – three months after the Hunts served their discovery requests – but was not signed and entered by the trial court for another month. CP 214-215, 322, 471-478.

Thus, the Hunts were unable to obtain Sentinel C3's business records and/or provide them to their valuation expert until after September 7, 2011 – due to Sentinel C3's discovery tactics and problems with the protective order beyond the Hunts' control. Yet the trial court found the Hunts behaved arbitrarily, vexatiously and not in good faith.

Meanwhile, four days after originally sending the protective order to be signed (which it was not), Sentinel C3 filed a motion for summary judgment arguing for judgment in its favor and award of attorney fees because the Hunts did not have any basis for their demand – i.e., an expert valuation.⁸ CP 214-215, 437-438 452-453.

At that time, the Hunts still had two months until their disclosure of expert witnesses was due, four months until the discovery cutoff, and

⁸ It is believed by the Hunts that Sentinel C3's summary judgment motion started out as an attempt to flush out any valuation or report done by the CPA the Hunts consulted with prior to making their demand; the Hunts had designated the CPA as a consulting expert who would not testify at trial and thus declined to produce anything by the consulting expert pursuant to CR 26(b)(5)(B). CP 348-349. Thus, even when Mr. Hecker's report was produced Sentinel C3 continued to argue and focus on the allegedly unfounded and unreasonable amount of the initial estimate – trying to get the Hunts to produce their consulting expert's opinions and valuation.

over six months until trial. CP 208. They had just received *the day before* almost 4,000 pages of additional new documents from Sentinel C3 in anticipation of the protective order being signed – but since it was not signed, the Hunts still could not send the over 5,000 pages total of business documents to their valuation expert. CP 322, 473.

Once the protective order was signed, Mr. Hecker finished his review of the thousands of pages of records and produced his opinion and report in less than 30 days – and the Hunts got it to opposing counsel and filed it with the trial court before the hearing on the summary judgment motion. CP 471, 597-600.

Thus, the Hunts had a valuation report by their valuation expert that confirmed their original estimate and demand price for their shares (minus the 20% adjustment for imminent sale/merger) less than 30 days after the protective order was signed and produced it before the summary judgment hearing, before the discovery cutoff and more than four months before trial – but Sentinel C3 still went forward with its motion and the trial court found the Hunts had acted arbitrarily, vexatiously and not in good faith.

As with Humphrey above, this record does not support such finding by the trial court or the award of attorney fees against the Hunts

pursuant to RCW 23B.13.310. If anyone behaved arbitrarily, vexatiously or not in good faith, it was Sentinel C3 by delaying discovery, seeking summary judgment because the Hunts did not have a valuation expert while, *under the terms of the protective order Sentinel C3 demanded*, the Hunts were unable to get a valuation report, and then going forward with its summary judgment motion after the Hunts produced their valuation expert AND his report in record time.

The Hunts were not responsible for and did not cause any of this. The Hunts and the Bloods were driven out of the corporation by an amendment to the corporation's Articles of Incorporation that the other shareholders approved at an emergency meeting that then allowed those same shareholders to initiate a dissenter's rights action and buy out the Hunts and the Bloods. CP 14, 26, 28-30; see also Humphrey, 170 Wn.2d at 508 (noting that if any acts were in bad faith, it was the attempt by the corporation to bypass the dissenter's rights statute and the provisions of its own LLC Agreement).

Since that time, the Hunts have been fighting to get fair value for their shares. The trial court's decision finding they acted arbitrarily, vexatiously or not in good faith in exercising their dissenter's rights and preparing for trial under RCW 23B.13.300 was based on untenable

grounds and/or reasons and constituted a manifest injustice. The resultant award of attorney fees against the Hunts was an abuse of discretion and should be reversed on appeal.

3. THE TRIAL COURT'S AWARD OF ATTORNEY FEES SHOULD BE REVERSED BECAUSE THE COURT FAILED TO ESTABLISH THE AMOUNT WAS REASONABLE OR THE METHOD OF CALCULATION..

The trial court's decision and Judgment awarding attorney fees should also be reversed because the trial court failed to establish that the amount of fees awarded was reasonable or equitable – or even the method used to calculate the amount.

RCW 23B.13.310 expressly states that the court may award attorney fees *in amounts that the court finds equitable*. RCW 23B.13.310(1) & (2). The statute does not provide any definition or guidance for what is equitable, but at the least the provision should comport with the general requirement that the trial court "must independently determine what is a reasonable fee." Steele v. Lundgren, 96 Wn. App. 773, 780, 982 P.2d 619 (1999) (citing Mahler v. Scuzs, 135 Wn.2d 398, 434, 957 P.2d 632 (1998)).

"Washington courts have adopted the lodestar method as the preferred means of determining reasonable attorney fees." Brand, 91 Wn.

App. at 289. The lodestar method determines reasonable attorney fees by multiplying the hours reasonably expended in the litigation by each lawyer's reasonable hourly rate. Steele, 95 Wn. App. at 780. In determining the reasonable hours, "[t]he amount of time actually spent by a prevailing attorney is relevant, but not dispositive." Brand, 91 Wn. App. at 290.

Instead, the court's determination of what constitutes reasonable time should include consideration of such factors as the novelty and complexity of the issues and the amount of time spent on unsuccessful claims, duplicated effort, or otherwise unproductive time. Steele, 96 Wn. App. at 780; see also Absher Constr. Co. v. Kent Sch. Dist., 79 Wn. App. 841, 905 P.2d 1229 (1995) (finding the total amount of fees requested "is not reasonable under the circumstances of this case and therefore award[ing] a lesser amount.") Also, attorney fees should include only time spent on substantive legal work – as opposed to clerical or file work – and any time for a non-attorney such as a paralegal must meet strict criteria regarding supervision, qualifications, training, and the nature of the work. Absher, 79 Wn. App. 841. Time for future work should also be excluded from any attorney fee award. N. Coast Elec. Co. v. Selig, 136 Wn. App. 636, 151 P.3d 211 (2007).

However – and most important of all – an attorney fee award "is not sustainable if the court used an improper method of calculation or the record fails to contain a description of the method the trial court used to perform its calculation." Brand v. Dep't of Labor & Indus., 91 Wn. App. 280, 288, 959 P.2d 133 (1998); accord Steele, 96 Wn. App. 780 ("A case, however, may be remanded if the record is not sufficient to review a fee award.") (citing Mahler, 135 Wn.2d at 435). Thus, the trial court's award must detail how it arrived at the amount, what it included or excluded, and how it determined the amount awarded was reasonable. Id.

Sentinel C3 filed a proposed Judgment seeking \$71,015.00 in attorney fees and an accompanying Declaration of Counsel with billing records in support of such Judgment. CP 898-936. The Hunts timely objected to the amount of the fee as unreasonable and unsupported by the billing record generally and specifically to time spent on such things as duplicate effort, unqualified non-attorney time, non-substantive legal work, etc. CP 937-947. Sentinel C3 replied by filing an Amended Judgment with further supporting documents and Declaration of Counsel, seeking attorney fees of \$74,519.50. CP 1004-1013.

The trial court eventually entered Judgment including an attorney fees award of \$72,419.50 – an amount different from either requested by

Sentinel C3 and higher than the amount the Hunts determined was reasonable in their objection/response pleading. CP 1077. However, the trial court failed to provide any explanation of the method it used to arrive at this amount or how it determined the amount was reasonable – let alone "equitable" as required by RCW 23B.13.310. CP 1078-1079.

Thus, the award cannot be sustained on review because the trial court failed to articulate whether it took into account the nature of the case; any duplicative, unnecessary, or non-legal time; the fees customarily charged for similar services; the amount at stake; or any other relevant factors. Brand, 91 Wn. App. at 293 (citing Scott Fetzer Co. v. Weeks, 114 Wn.2d 109, 124, 786 P.2d 265 (1990); Nordstrom, Inc. v. Tampourlos, 107 Wn.2d 735, 744, 733 P.2d 208 (1987); Bowers v. Transamerica Title Ins. Co., 100 Wn.2d at 581, 597, 675 P.2d 193 (1983)).

Accordingly, the trial court's award of attorney fees should be reversed and remanded – first because the Hunts did not act arbitrarily, vexatiously, or not in good faith and thus Sentinel C3 was not entitled to the award; and second because the Judgment does not establish the amount awarded was equitable or reasonable, or how it was calculated and arrived at.

VI. CONCLUSION

For the reasons argued herein, the trial court's Order granting summary judgment and awarding attorney fees, and the attorney fees Judgment itself, should be reversed on appeal and remanded back to the trial court for entry of an order denying the summary judgment motion.

VII. COSTS & FEES ON APPEAL

Should the trial court's summary judgment and/or award of attorney fees decision be reversed on appeal, the Hunts respectfully request an award of costs and attorney fees to them as the prevailing party pursuant to RAP 14 and the Washington State Supreme Court's decision in Humphrey, 170 Wn.2d at 509.

DATED this 8th day of October, 2012.

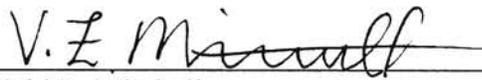
PAINE HAMBLEN LLP

By: V. L. Mitchell
Vicki L. Mitchell, WSBA 31259
Attorneys for Appellants
Chris & Carmen Hunt

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of October, 2012, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

Thomas T. Bassett Kjirstin J. Graham K&L Gates, LLP 618 West Riverside Ave., Suite 300 Spokane, WA 99201 Attorneys for SentinelC3, Inc.	<input checked="" type="checkbox"/> HAND DELIVERY <input type="checkbox"/> U. S. MAIL <input type="checkbox"/> OVERNIGHT MAIL <input type="checkbox"/> VIA FACSIMILE -
Michael and Janae Blood 3310 West Victory View Drive Boise, ID 83709	<input type="checkbox"/> HAND DELIVERY <input type="checkbox"/> U. S. MAIL <input checked="" type="checkbox"/> OVERNIGHT MAIL <input type="checkbox"/> VIA FACSIMILE



Vicki L. Mitchell

FILED

OCT 22 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

Case Numbers: 305538, 305929, 308375

COURT OF APPEALS, STATE OF WASHINGTON, DIVISION III

SENTINELC3, INC., a Washington Corporation,

Respondent,

v.

CHRIS J. HUNT, and individual and the marital community, if any, comprised of CHRIS J. HUNT and CARMEN HUNT; MICHAEL BLOOD, and individual and the marital community, if any, comprised of MICHAEL BLOOD and JANAЕ BLOOD,

Appellants

Notice of Joinder Re: BRIEF OF APPELLANTS HUNT

Michael and Janae Blood
3310 Victory View Dr.
Boise, Idaho 83709
(208) 639-6053

Pro Se

COMES NOW the Appellants, Michael and Janae Blood, personally, and hereby provide NOTICE of their joinder in Appellants Hunt's BRIEF OF APPELLANT HUNTS ("BRIEF"), timely filed with the Court on 10/08/2012 per RAP 10.1(g)(1). Bloods and Hunts appellate cases have been consolidated by this court in a letter from this court on May 8, 2012. This joinder is to officially state that the Bloods agree with and, fully support, and also take as their own position and statements, the aforementioned BRIEF OF APPELLANT HUNTS.

In BRIEF, Hunts carefully and accurately lay out the history of the case and make arguments for why the trial court's decisions should be reversed. While some dates mentioned in BRIEF and actions by Hunts described in the brief do not directly correspond to dates and actions made by the Bloods, the decisions made by the trial court and outcome of those decisions are the same for Bloods and Hunts and Bloods join in Hunt's BRIEF fully as it shows that the trial court made an error in awarding summary judgment. Also, that the court made an error in assessing fees for a proceeding which Appellants moved forward following the RCW 23B.13 statute in good faith.

Bloods join and adopt the statements, argument and evidence submitted relative to Hunt's BRIEF and also request this court reverse on appeal, the trial court's Orders granting summary judgment, awarding fees and the attorney fees Judgment itself and remand back to the trial court, for an order denying the summary judgment motion. Bloods also join in Hunt's BRIEF and request reimbursement for fees and costs should the trial court's decision be reversed.

Respectfully submitted this 22nd day of
October, 2012.



Michael Blood



Janae Blood

CERTIFICATE OF SERVICE

I, [Signature], do hereby certify that on or before the 22nd day of October, 2012 an original and a true and correct copy of the foregoing was served on and delivered to the following in the manner indicated:

VIA FAX:
Kjirsten Graham
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Executed this 22nd day of October 2012

By [Signature]

Address 3310 Victory View Dr

City/State/Zip Boise/ID/83709