

No. 82687-1

SUPREME COURT
OF THE STATE OF WASHINGTON

HUMPHREY INDUSTRIES, LTD.,

Appellant

v.

CLAY STREET ASSOCIATES LLC, et al.,

Respondents

PETITIONER'S
APPELLANT'S REVISED SUPPLEMENTAL BRIEF

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I. INTRODUCTION

This appeal concerns whether respondents Clay Street Associates et al. (“Clay Street”) violated the Washington Limited Liability Company Act, Chapter 25.15 RCW (“Act”) by failing to tender payment for a dissenting member’s interest within 30 days after the member’s initial demand for payment. Clay Street elected to merge the company into a new LLC that would allow Clay Street to sell its only asset (commercial property) without appellant Humphrey’s consent. Humphrey dissented from the merger. Pursuant to RCW 25.15.460, Clay Street was required to tender payment for Humphrey’s interest in the company 30 days. If Clay Street was not able to tender Humphrey’s interest as the statute required, it had other options. Yet, in direct violation of the statute, Clay Street chose to proceed with the merger without tendering payment for Humphrey’s interest.

The Court of Appeals erroneously held that respondents “substantially complied” with the deadline imposed by the statute even though, as the Court of Appeals conceded, “Clay Street violated the LLC Act by paying its estimate of the fair value of Humphrey’s share **more than five months** after the date of the merger, in violation of the 30 day limit imposed by RCW 25.15.460.” *Opinion* at 9 (emphasis added). The

Court claimed that the “legislature’s objective ... was not compromised” by this extraordinary violation of the statutory deadline. *Id.* at 10.

In fact, the delay violates many of the statute’s objectives. As the Court of Appeals observed, the purpose of the statute is to ensure that the dissenting member will have immediate use of the money. *Id.* at 9, n.19. Moreover, the Court’s holding violates a long line of Washington cases which hold that the doctrine of substantial compliance does not apply to statutory deadlines. “It is impossible to substantially comply with a statutory time limit.... It is either complied with or it is not.” *Cont’l Sports Corp. v. Dep’t of Labor and Indus.*, 128 Wn.2d 594, 603, 910 P.2d 1284 (1996). The *Opinion* is erroneous and must be reversed.

The Act provides that the court may assess attorney fees and expenses against the LLC and in favor of a dissenter “if the court finds that the limited liability company did not substantially comply with comply with the requirements” of the statute. RCW 25.15.480(2)(a). Because both lower courts erred as a matter of law in finding substantial compliance, not only did they not assess fees against the LLC but, remarkably, they assessed fees against the appellant, Humphrey. This error, too, must be reversed, and the case must be remanded with instructions to allow the trial court to consider awarding fees against the LLC for failing to substantially comply with the requirements of statute.

II. STATEMENT OF THE CASE

Humphrey is a member of Clay Street Associates LLC (“Clay Street”), formed in 1997 to develop commercial real estate for long-term investment.¹ The company agreement contained two ADR provisions and expressly prevented the sale of company property unless there was unanimous consent by the members. CP 52-60 (Company Agreement).

Some of the other members sought to liquidate Clay Street’s sole asset. Instead of seeking unanimous consent of all of the members or seeking judicial dissolution, the company sent a notice of a plan of merger and notice of dissenters’ rights.² Pursuant to the terms of the merger, Humphrey was the only member to receive non-voting shares.³ Humphrey dissented from the merger and exercised his statutory right to demand payment.⁴

It is undisputed that: (1) Clay Street made the mandatory payment to Humphrey four months after the statutory deadline⁵ and seven months

¹ See generally CP 41-49 (Decl. of George Humphrey in Supp. of Plf.’s Mot. for Injunctive Relief and for Summ. J. at 8:8-16:25 (“Humphrey Decl.”)).

² Clay Street’s lawyer explained that the contractual unanimous consent requirement could be avoided “most quickly through a merger procedure which eliminates the dissenting vote” rather than a judicial dissolution which was expected to be lengthy and expensive. CP 62-63 (Aug. 24, 2004 letter).

³ CP 44 (Humphrey Decl. at 11:3-12).

⁴ CP 44 (Humphrey Decl. at 11:22-24).

⁵ CP 278-80 (May 27, 2005 letter enclosing payment).

after receiving the demand for payment,⁶ (2) the company did not promptly engage an appraiser after the demand was received, and (3) Clay Street paid Humphrey 50% less than the other members and after the other members were paid.⁷

28 days after receiving the substantially lesser sum, Humphrey filed this lawsuit for a judicial appraisal of fair value. CP 1. Over a month later, Clay Street filed a separate suit, later consolidated with this suit. CP 302-304. Judge Hayden granted partial summary judgment ruling that the company violated the statutory deadline for payment,⁸ and he also appointed an appraiser,⁹ who made a recommendation on fair value. Humphrey filed a motion to adopt that value,¹⁰ while Clay Street opposed the motion.¹¹ The court declined the pretrial motion to adopt the

⁶ CP 274 (October 3, 2004 demand for payment). The merger actually became effective on CP 69 (December 7, 2005. Mot. for Partial Summ. J. and Other Relief at 3:7-10), although the Notice of Dissenters' Rights stated "The Plan of Merger was duly approved and . . . effective as of September 5, 2005." CP 44 (Humphrey Decl. at 11:3-10).

⁷ Compare CP 276 (settlement statement showing payments of \$277,013 to others, with \$3.3 million value) with CP 278 (\$181,192 payment to Humphrey, with a \$2.5 million value).

⁸ CP 346-47 (Order Granting in Part and Denying in Part Mot. for Partial Summ. J.).

⁹ CP 420 (Mot. of Clay Str. LLC for Order Regarding Appraisal at 2:2-14).

¹⁰ CP 567-71 (Mot. to Adopt the Report of the Court-Appointed Appraiser).

¹¹ CP 696-705 (Clay Str. Assocs. LLC's Opp'n to Humphrey Indus.' Mot. to Adopt the Report of the Court-Appointed Appraiser).

appraiser's recommendation.¹² Almost two years after the suit was filed, the court-appointed appraiser produced his final report.¹³

When Judge Hayden was reassigned to other cases, the suit was reassigned to Judge McCarthy for trial.¹⁴ At trial, the court adopted the valuation opinion of the appraiser retained by Clay Street and not the valuation opinion of the two appraisers appointed by Judge Hayden.¹⁵ The court also granted fees to Clay Street, relying exclusively on the inadmissible Civil Rule 68 offer of judgment. CP 2381 (FOF (3) and (4)). A more detailed statement of background facts may be found in the *Petition for Review* at 2-8.

III. STANDARDS OF REVIEW

The meaning of a statute is a question of law reviewed de novo.¹⁶ Similarly, a "trial court decision awarding or refusing to award attorney fees is an issue of law, which we review de novo."¹⁷ In addition, "an

¹² CP 829 (Order Denying Mot. to Adopt the Report of the Court Appointed Appraiser without Further Hearing).

¹³ CP 1381 (Humphrey's Trial Br. at 30:9-11).

¹⁴ See, e.g., CP 1396-97 (Order Granting Continuance of Trial).

¹⁵ CP 2363-66 (Findings of Fact and Conclusions of Law at 8:17-9:24, 10::26-11:8).

¹⁶ *Smith v. Moran, Windes & Wong*, 145 Wn. App. 459, 464, 187 P.3d 275 (2008); *Sound Infiniti, Inc. v. Snyder*, 145 Wn. App. 333, 343, 186 P.3d 1107 (2008) (statutory construction reviewed de novo).

¹⁷ *Boules v. Gull Indus., Inc.*, 133 Wn. App. 85, 88, 134 P.3d 1195 (2006); *Ethridge v. Hwang*, 105 Wn. App. 447, 460, 20 P.3d 958 (2001) (entitlement to fees is an issue of law which is reviewed de novo).

attorney fee award, if any, must be based on proper grounds."¹⁸ "The process of applying the law to the facts ... is a question of law and is subject to de novo review."¹⁹ Error is prejudicial and reversible if "it affects, or presumptively affects, the outcome of the trial."²⁰

IV. ARGUMENT

The dissenters' rights statute, Chapter 25.15 RCW, sets forth two separate standards for awards of counsel fees against the company.

(2) The court may also assess the fees . . . in amounts the court finds equitable:

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

(b) Against either the limited liability company or a dissenter, in favor of any other party, if the court finds that the party against whom the fees and expenses are assessed acted arbitrarily, veraciously, or not in good faith with respect to the rights provided by this article.

¹⁸ *Just Dirt, Inc. v. Knight Excavating, Inc.*, 138 Wn. App. 409, 416, 157 P.3d 431 (2007). Two out-of-state decisions construe similar statutes and are very instructive. *Sec. State Bank v. Ziegeldorf*, 554 N.W.2d 884, 892 (Iowa 1996) (reversing denial of fees to dissenters and remanding for a determination of reasonable fees and expenses for dissenter, using a two-tier standard of review); *Roemmich v. Eagle Eye Dev., LLC*, 526 F.3d 343, 355-54 (8th Cir. 2008) (requiring de novo review of "the legal issues related to the award of fees and costs").

¹⁹ *Tapper v. State Employ. Sec. Dep't*, 122 Wn.2d 397, 403, 858 P.2d 494 (1993).

²⁰ *Thomas v. French*, 99 Wn.2d 95, 104, 659 P.2d 1097 (1983); *Keller v. City of Spokane*, 104 Wn. App. 545, 551, 17 P.3d 661 (2001) ("[a]n erroneous statement of the applicable law is reversible error if it prejudices a party.").

RCW 25.15.480(2)(a)-(b). The first standard applies only to the company and is triggered by the company's failure to "substantially" comply with statutory "requirements." *Id.* at (2)(a) (adding underline). It enforces the basic purpose of the statute, which is to ensure dissenters' rights whenever a company has violated the statutory requirements. The low threshold is consistent with the policy to "not chill" dissenter's willingness to use the appraisal remedy after having to comply with a short deadline to perfect its right and given the lack of information that the dissenter has at the early stage. CP 1941:19-1942; CP 1984 (Principles of Corporate Governance § 7.23 cmt. c at 340).

In contrast, the second standard considers a company's actions "with respect to rights provided by" the statute. *Id.* at (2)(b) (adding underline). While "good faith" and arbitrary actions are relevant to the determination with respect "rights" under the second standard, under the first standard good faith is not a factor—the company either substantially complied with the statute or did not, and if it did not it is liable for fees. *Id.* at 2(a) (expressly omitting the "not in good faith" term present in subsection (2)(b)). The lower courts erroneously applied both provisions, denying fees to Humphrey and awarding fees to Clay Street and the Rogels. Both rulings were based on the erroneous conclusion that Clay Street could "substantially comply" with the 30-day deadline in RCW

25.15.460 where Clay Street exceeded that deadline by many months.

Both rulings must be reversed.

A. The lower courts erroneously ruled that Clay Street substantially complied with the statutory requirements. Clay Street’s four month delay in meeting the statutory deadline for the immediate payment to the dissenter cannot constitute substantial compliance with the statutory requirements.

1. The structure and objectives of the Act.

The Court of Appeals based its “substantial compliance” holding on a misreading of “the objectives” of the Act. *Opinion* at 9-10. The Court essentially held that Clay Street had no alternative under the Act than to violate the statutory deadline.²¹ But this completely misreads both the structure and purposes of the Act Washington Limited Liability Company Act, Chapter 25.15 RCW. Under it, Clay Street had numerous alternatives to a merger—it simply elected not to use them, and then forced Humphrey to pay the price for its decision.

Clay Street had three alternatives for addressing a deadlock among its owners. First, it could seek a judicial dissolution under RCW 25.15.275. Second, the company agreement required binding arbitration, created an appraisal remedy to acquire the interest of a deceased member,

²¹ “The deadlines are premised upon the assumption that the LLC has (or can acquire) funds to pay the dissenter. Where a corporation has only one liquid asset, such that sale of that asset is the only source of payment, compliance with the deadline may be objectively impossible.” *Opinion* at 9.

and included a provision requiring an award of attorney's fees to the prevailing party.²² Third, the company could pursue with another company a merger that triggers statutory dissenters' rights under Article XII of RCW chapter 25.15.

Clay Street considered the three alternatives²³ and elected the merger that triggered the Act dissenters' rights provisions. If it were "objectively impossible" (*Opinion* at 9) for Clay Street to comply with the dissenters' rights provisions of the Act, including the deadlines for payment, then Clay Street should not have elected the merger. Forcing Humphrey to pay the price for this election by essentially impounding his assets for six months and denying him appreciation violates both the provisions and the objectives of the Act.

The dissenters' rights provisions in this and similar statutes require the company to make the fair value payment within 30 days from the effective date of the merger. *See* RCW 25.15.460(1) ("Within thirty days of the later of the date the proposed merger becomes effective, or the payment demand is received, the limited liability company shall pay each

²² CP 56-58 (Limited Liability Agreement of Clay Street Associates, LLC §XII (Disputes), § XIV (Death), § XX (Arbitration), § XXI (Attorneys)).

²³ Ex. 21 (Jan. 8, 2004 representation agreement for judicial dissolution or arbitration); CP 1686 (Oct. 18, 2004 arbitration demand by Humphrey); CP 1688-89 (Nov. 15, 2004 demand by Humphrey).

dissenter”). Statutes requiring immediate payment have a very specific objective.

Proposed section 13.25 changes the relative balance between corporation and dissenting shareholders by requiring payment by the corporation within 30 days of . . . the effective date of the proposed corporation action . . . **The corporation may not wait for a final agreement on value before making payment** . . .

This obligation to make immediate payment is based on the view that since a person’s rights as a shareholder are terminated with the transaction, the shareholder should have immediate use of the money to which the corporation agrees it has no further claim. A difference of opinion over the total amount to be paid should not delay payment of the amount that is undisputed.

Official Comments, Washington’s version of the Model Bus. Corp. Act (MBCA)’s § 13.25²⁴ (interpreting identical provision)(emphases added).²⁵

Under the statutory structure, the mandatory immediate payment to the dissenter is a condition precedent to the effectuation of the merger. “A member of a limited liability company who demands payment retains other rights until the proposed merger becomes effective.” RCW 25.15.450(1)(emphasis added). If the company lacks the funds to make the mandatory payment on the date when “the proposed merger becomes effective,” the company’s remedy is to restart the merger process and

²⁴ Humphrey’s Mot. for Fees and Costs at 7, CP 1889. RCW 23B.13.310 and RCW 25.15.425 are identical provisions on costs, fees and expenses in an appraisal suit. A 1999 amendment to the identical MBCA provision adds a new subsection that grants a dissenter who is not timely paid the right to sue and mandates the prevailing dissenter “shall be entitled to recover fees.” MBCA § 13.31(d). Humphrey’s Mot. for Fees and Costs at 8:12-14, CP 1890.

²⁵ See also Principles of Corporate Governance § 7.23(c). CP 1980, 1985.

“send a new dissenters’ notice . . . and repeat the payment demand procedure.” RCW 25.15.465. This “creates no hardship for the corporation, since . . . it may . . . start the process over again at any time.”²⁶ Other than the miniscule transaction cost of resending the notices, the only detriment is that the majority owners must share with the dissenter any appreciation in the company’s value that occurs during the period of delay.

2. Clay Street utterly failed to comply with the Act’s objectives.

The Court of Appeals held that Clay Street’s violation of the statutory deadlines nonetheless somehow mysteriously amounted to substantial compliance because Clay Street was in “actual compliance in respect to the substance essential to every reasonable objective of [the] statute.” *Opinion* at 8 (citation omitted); *id.* at 9-10.

It is undisputed that Clay Street violated the statutory requirements by failing to make the payment within 30 days from the effective date of the merger. RCW 25.15.460(1) . It is also undisputed that the express purpose of RCW 25.15.460(1) is that the dissenter will have the “immediate use of the money”²⁷ once the dissenters’ rights in the company

²⁶ MBCA § 13.28, annot., CP 2040; see also Humphrey’s Reply for Prejudgment Interest at 2:14-3:6, CP 2029-30 (making this argument).

²⁷ *Opinion* at 9, n.19 (“This obligation to make immediate payment is based on
(continued . . .)

are terminated. Such a termination “alter[s] the character of [the shareholders’] investment.”²⁸ It leaves the dissenters “in a twilight zone where the dissenter has lost former rights but has not gained new ones,”²⁹ and yet they are incapable of “recapturing their complete investment.”³⁰ It is undisputed that Clay Street had other alternatives under the Act to break the deadlock—alternatives which it simply elected not to pursue.

How all of this amounts to “actual compliance in respect to the substance essential to every reasonable objective” of the dissenters’ rights statute is a mystery. So too is the Court’s conclusion that the “legislature’s objective, to avoid oppression of the dissenting LLC member by the remaining members, was not compromised.” *Opinion at 10*. Instead of directly finding there was no substantial compliance, the Court engaged in a round-about free-floating evaluation of “the reasons for the delay and the conduct of the parties” and concluded that

(. . . continued)

the view that since the person’s rights as a shareholder are terminated with the completion of the transaction, the shareholder should have immediate use of the money to which the corporation agrees it has no further claim.” [quoting the legislative history of the LLC Act].

²⁸ *China Prods. N. Am., Inc. v. Manewal*, 69 Wn. App. 767, 773, 850 P.2d 565 (1993).

²⁹ CP 1645:2-5 (quoting 2 Senate Journal, 51st Leg., App. A at 3086-87 (defining fair value to include appreciation)). Here, while Humphrey’s rights were terminated the company not only failed to make the immediate payment but also left Humphrey as the guarantor of the company’s debt.

³⁰ *Swope v. Siegel-Robert, Inc.*, 243 F.3d 486, 493-94 (8th Cir.), cert. denied, 534 U.S. 887 (2001).

“Humphrey’s rights were protected to the extent circumstances allowed.” *Opinion* at 9-10. But the point is that his rights were not protected to the extent required by the express terms of the statute. *See, e.g.*, RCW 25.15.480(2)(a)(referring to “the requirements of this article”); RCW 25.15.480(2)(b)(referring to “the rights provided by this article.”) And the “circumstances” were created by Clay Street’s election of the merger option even though it knew it could not comply with the immediate payment requirements.

The objective of the statute is simple. Either the company pays the dissenter by the 30th day in accord with the statutory rights granted the dissenter or the merger does not go forward. If the company cannot protect the dissenters’ rights as required by the statute, then the merger cannot go forward. If Clay Street knew that it did not have the ability to pay Humphrey then it had no right to elect the merger option under the statute.³¹ In any event, Clay Street had other options so that it was not “objectively impossible” for it to comply with Humphrey’s statutory rights as a dissenter.

³¹ *See Chrisp v. Goll*, 126 Wn. App. 18, 29, 104 P.3d 25 (2005)(refusing to apply substantial compliance where “not only did the parties fail to comply with the statute, but [plaintiff] testified she intentionally *avoided* compliance.”), *review denied*, 156 Wn.2d 1004 (2006).

In short, Clay Street's violations of the statutory deadlines were not merely technical non-compliance but instead were out and out violations of the statutory provisions and their underlying objectives.³²

3. Statutory deadlines are not subject to substantial compliance.

The correct interpretation of RCW 25.15.460 is consistent with a long line of Washington cases which hold, in a variety of contexts, that the doctrine of substantial compliance does not apply to statutory deadlines. "It is impossible to substantially comply with a statutory time limit. ... It is either complied with or it is not."³³

The statutory deadlines at issue here were not susceptible to the substantial compliance doctrine, and this Court should so hold. Clay

³² Furthermore, the reasons offered failed to prove substantial compliance with the immediate payment requirement. First, there is no evidence that the company was unable to borrow the funds using the existing \$1.2 million in equity or from the other members. RP 432:1-20 (Ostroff testimony that he personally could have paid, the company must have had equity in it, and avoiding answering question if company had approached bank about a refinance); Ex. 70 (showing over \$1.2 million in equity); *see also* CP 1853:10-15, 1854:11-16, 1855:13-1856:21. See Appellant's Revised Opening Br. at 13-15; Appellant's Revised Reply Br. at 7-8 & n. 18. Second, the company did not provide Humphrey with a prior notice warning that it intended to postpone the "immediate payment" and deprive him of the "immediate use" of those funds and of alternatives, including rescinding the demand for payment, pursuing ADR, and tax planning regarding the delayed payment. RP 437:15-19 (Ostroff testimony that he did not inform Humphrey that he had no intention of paying him until the property sold); Ex. 66 (response to request for distribution of sale proceeds from another company).

³³ *Con'l Sports Corp.*, 128 Wn.2d at 603 (1996)(citation omitted); *City of Seattle v. Pub. Employment Relations Comm'n*, 116 Wn.2d 923, 928-29, 809 P.2d 1377 (1991)("failure to comply with a statutorily set time limitation cannot be considered substantial compliance."); *Westcott Homes LLC v. Calmness*, 146 Wn. App. 728, 735, 192 P.3d 394 (2008)("Belated compliance cannot constitute substantial compliance"); *Peta v. Dep't of Labor & Indus.*, 68 Wn. App. 406, 409, 842 P.2d 1006 (1992)("Noncompliance with a statutory mandate is not substantial compliance.").

Street simply did not comply with the statutory requirement of payment to a dissenter within 30 days. The lower courts' contrary rulings must be reversed and the case remanded for a determination of whether Clay Street owes Humphrey attorney fees and expenses under RCW 25.15.480(2)(a).

B. The trial court's denial of fees to Humphrey must be reversed.

At minimum, the issues of fees should be remanded back to the trial court. The trial court predicated its denial of fees to Humphrey on its erroneous interpretation of "substantial compliance." The Court of Appeals noted that the award of fees is discretionary, and suggested that the court "may decline to award fees even where there is no substantial compliance with the statute." *Opinion* at 8. But the trial court's ruling was based on the erroneous conclusion that Clay Street had substantially complied with the statute, so it saw no need even to address whether Humphrey was entitled to fees. There are no grounds for deferring to a trial court's exercise of discretion in not awarding attorney fees where that decision was based on a misunderstanding of the attorney fee statute. Instead, such decisions are reviewed de novo. *Wachovia SBA Lending v. Kraft*, 138 Wn. App. 854, 858-63, 158 P.3d 1271 (2007). Moreover, where a non-award of fees is based on an error of law, the trial court must be given the opportunity to exercise its discretion based on a correct

understanding of the law. *Council House v. Hawk*, 136 Wn. App. 153, 161-162, 147 P.3d 1305 (2006).

Preferably, the Court should award Humphrey fees based on Clay Street's intentional violation of the statutory requirements. (CP 1853:10-16.) Clay Street not only failed to comply with the 30-day payment requirement, the timely suit filing and the credible payment requirement,³⁴ the company also failed to provide the required financial statements with the tardy payment.³⁵ When the company knew it had no cash reserve, made no effort to raise the funds to pay the dissenter, and yet continued to pursue the merger option, the company violated Humphrey's right to immediate payment under the dissenters' rights statute and therefore should be liable for fees and expenses.

³⁴ Humphrey relies on its briefs in the Court of Appeals with respect to the issues of timely filing and credible fair market value.

³⁵ *E.g.*, CP 48 (Humphrey Decl. at 15:10-18 (company provided an income statement but not other required financial statements); CP 69 (Mot. for Partial Summ. J. at 3:16-18 (same); CP 70-71 (*id.* at 4:16-5:8 (company should immediately produce financial records, communications with appraisers, and valuation records)); CP 230 (Order requiring company to produce records under RCW 25.15.135 within 7 business days)); CP 257:1-7; CP 1393 (Humphrey's Trial Br. at 42:4-8 (company violated statute by failing to provide all financial statements with payment)); CP 1891-92; CP 1943-44, 1950-51 (Decl. at 5:10-6:8, 12:6-13:2 (company failed to comply with prior order); CP 2071-72 (Beck Decl. in Supp. of Fees at 2-3 (refusal to produce Clay Street records, one year before suit)); CP 1819-21 (Humphreys' Decl. in Supp. of Fees at 2-4 of Ex. 105 (Oct. 14, 2005 letter to Judge Hayden)); CP 1823-24 (*id.* at Ex. 106 (Oct. 31, 2005 letter to Judge Hayden)).

C. The conclusion that Humphrey acted “vexatiously” is contrary to law and unsupported by the record.

1. The CR 68 ruling was erroneous.

The court’s sole finding supporting the fee award was “Humphrey had no reasonable or legitimate basis for his refusal to accept the Rule 68 offer and, instead, Humphrey’s insistence of litigation and trial after [the date the offer was made] was arbitrary and vexatious.” CP 2381. The Court of Appeals correctly held this was error based on an inadmissible CR 68 offer.³⁶ But rather than ruling the company forfeited a claim³⁷ or remanding for a factual determination of any remaining grounds for awarding fees— and thereby giving Humphrey “full and fair opportunity to develop facts relevant to the decision”—the Court of Appeals combed the record outside the trial court’s findings for instances of what it considered “vexatious conduct.” It concluded there were three alternative grounds for affirming the trial court. *Opinion* at 14-15.

³⁶ *Opinion* at 14 (“court erroneously considered the CR 68 offer in determining whether Humphrey’s behavior with respect to its dissenter’s rights were vexatious.”).

³⁷ As Humphrey has noted, the impermissible use of the offer constituted a basis for forfeiting a fee claim. *Hansen v. Estell*, 100 Wn. App. 281, 290-91, 997 P.3d 426 (2000) (affirming forfeiture of fee award, when party communicated a RCW 4.84.280 offer to the trier of fact before judgment was entered). The settlement offers were inadmissible, irrelevant, and failed to comply with statute that required payment unlike offer or tender statutes. CP 975, 1388, 1898-99, 1941-43, 1980-90, 2006-08, 2010-12, 3900-052.

2. The factual “background” to the trial court’s fee award is irrelevant and is not substantial evidence supporting a finding of vexatiousness.

The first category of allegedly vexatious action includes Humphrey’s objection to the sale. It was not vexatious because the company agreement required unanimous consent,³⁸ another member was objecting to the sale at that time,³⁹ and Humphrey was compelled to have nine properties sold within a year to comply with the agreement in the divorce of Scott Rogel.⁴⁰ The company’s tardy and lowball payment to Humphrey poisoned the statutory process. The other members received 50% more than Humphrey,⁴¹ their counsel admitted that its fair value estimate was “not particularly reasonable,”⁴² and at trial their appraiser admitted the value was not consistent with his conclusion.⁴³ Furthermore, the value was substantially lower than offers that Clay Street rejected as too low⁴⁴ and lower than the price paid for the property.⁴⁵

³⁸ Finding No. 9, CP 2308:3-4.

³⁹ Ex. 32 (Aug. 24, 2004 Cowan letter); Ex. 34 (Decl. of Scott Rogel in Supp. of Vote to Merge Clay St. Assoc. in arbitration with Goldfarb); Ex. 121 (case docket for Rogel/Goldfarb); CP 42 (Humphrey Decl. at 9:1-9).

⁴⁰ Ex. 29 (Stipulation and Property Settlement Agreement).

⁴¹ Compare May 27, 2007 letter enclosing \$181,192.64 to Humphrey, CP 278 with May 27, 2006 letter enclosing Seller’s Settlement Statement showing Scott Rogel, Joe Rogel and ABO Investments each receiving \$266,530 plus \$10,484 at CP 284.

⁴² May 27, 2007 letter enclosing \$2,533,459 calculation of fair value less Bank of America mortgage plus interest, CP 280; Appellant’s Br. at 21 & n. 30 citing RP 29:23-30:11.

⁴³ Appellant’s Br. at 43 citing RP 576[:9-12][Barnes test.]

⁴⁴ Appellant’s Br. at 21 & n. 30 citing Ex. 49 (Oct. 29, 2004 offer); Ex. 51 (Ex. (continued . . .))

The company's settlement offer was made while the company was refusing to produce records, to which Humphrey was entitled as a member (*see supra* n. 35) and that were necessary to evaluate the settlement offer, which was later retracted, while the lowball value was reaffirmed. Humphrey's demand was lower than two items of unchallenged data that he had secured⁴⁶ and was consistent with Scott Rogel's valuation made two years earlier.⁴⁷ Humphrey's good faith is demonstrated by his stipulation to the court-appointed appraisers' lower value nine months before trial,⁴⁸ and he reaffirmed this reasonable position in his trial brief.⁴⁹

As to the Court of Appeals' second and third categories of vexatious behavior (Humphrey as the source of acrimony and engaging in multiple lawsuits), these grounds are not "adequately supported by

(. . . continued)

Nov. 4, 2004 offer); Appellant's Br. at 41 citing Ex. 227 (\$3.19 million purchase offer).

⁴⁵ Appellant's Revised Mot. for Recons. at 12 citing May 27, 2006 letter enclosing seller's statement showing \$3.3 million, CP 284.

⁴⁶ Shedd's later appraisal (using \$3.95 million as the cost basis), Ex. 113, Apr. 13, 2007 report at 26. Humphrey's calculation was lower than value of the mirror-image Park 280 building and lower than the Puget Sound properties spreadsheet. Puget Sound Properties' Kent Valley Industrial Sales Comps 2004 (\$85.96/sq.ft.), CP 683-84, also part of Ex. 113.

⁴⁷ Ex. 10A (\$3.5 million in 2002).

⁴⁸ CP 567; Proposed Order, CP 694.

⁴⁹ Humphrey Trial Br. at 7:14-15 ("Judge Hayden has already appointed appraisers to set the fair value, and the Court should adopt one of the measures in those reports."), CP 1358; *id.* at 40:7-9 ("Humphrey, furthermore, stipulated to the adoption of the appraiser's first report, while Clay Street opposed the adoption"), CP 1391.

record.”⁵⁰ The other lawsuits/arbitrations do not involve the same claims, and they did not have “a trail of rejected offers.” It was reasonable to join the individual members as parties, when the company admitted most all the funds had been distributed, the company was inactive,⁵¹ and the claim was stayed pending arbitration.⁵²

In short, the record below is complex, convoluted, and voluminous. It was far too complex and fact-intensive to allow the Court of Appeals to randomly comb through the record in an attempt to form an

⁵⁰ *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004). In 901 Tacoma arbitration, Humphrey and Lori Goldfarb’s parents (Robert and Natalie Malin) prosecuted claims against the company for refusing to sell the property to them, the company’s defense was the manager’s had authority to reject the offer and were immune under the business judgment rule, and fees were granted under a prevailing party provision. *Compare* CP 1936:11-1937:2 9 (Decl. of David C. Spellman in Opp’ n to Fees at 3:11-4:2); CP 2880-95 (Final Award in 901 Tacoma, Aug. 3, 2006) *with* CP 3166-67 (Decl. of Gerald Ostroff). The court of appeals erred in ruling that that “Humphrey’s conduct was wanting” (Opinion at 15) and the trial court erred in ruling that the evidence was similar. Order at 4:1-10, App. C-4 for Answer to Pet. In the 899 West Main arbitration, to which Ostroff was not a party, Judge Soukup in October 2004 denied the Rogels’ and Humphrey’s requests for fees under a prevailing party clause. CP 2870-74. In July 2005, after this suit was commenced, he ruled there was a deadlock relating to 899 West Main, ordered a winding up, but again denied each party’s fee request. CP 2875-78. If anyone were vexatious, it was the Rogels who sought to vacate the arbitration awards, while Humphrey prevailed when the arbitrator granted a buyout at Humphrey’s proposed price instead of appointing a receiver and compelling a sale. CP 1937, CP 453-54 (Aug. 15, 2005 award).

⁵¹ Humphrey Decl. at 12:22-25 (company was inactive), 16:4-13, CP 45, 49; Humphrey Decl. at 13:17-14:2 (proceeds directly disbursed to other members, failed to make payment to bank, and appeared to have no funds available for payment), CP 46-47; Decl. of Gerald Ostroff Responding to Mot. for Prelim. Inj. and Other Relief at 3:5-7 (admitting most of the funds had been distributed), CP 251; Order Denying Plf.’s Mot. for Ruling of Waiver of Privilege and for Prelim. Inj. (order requiring company to provide notice before further disbursement of funds), CP 261; Clay Str. Assoc. LLC’s Resp. to Mot. Declaring Waiver of Company Privilege/Immunity and for Prelim. Inj. at 6:17-18 (admitting “nearly all funds have already been disbursed.”), CP 2390.

⁵² CP 342-245.

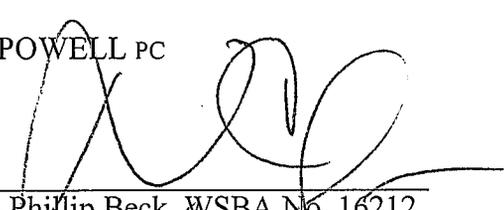
impression of alternative grounds supporting a finding of “vexatiousness” against Humphrey. The trial court’s only two findings supporting “vexatiousness” were predicated on inadmissible evidence. CP 2381 (FOF #3 and #4). As the Court of Appeals recognized, that was an error of law. This Court must reverse that error, and remand to the trial court for a determination on “vexatiousness” not predicated on legal error.

V. CONCLUSION

This Court must reverse the Court of Appeals, and remand (i) for an award of fees against Clay Street for its violation of the statute’s requirements, (ii) for factual determinations regarding Humphrey’s alleged vexatiousness not tainted by the inadmissible CR 68 offer and other errors, and (iii) with instructions that good faith pursuit of statutory rights is not vexatiousness.

DATED this 10 day of August 2009.

LANE POWELL PC

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Appellant is submitting a Revised Supplemental Brief that corrects the items listed in this Errata for Appellant's Supplemental Brief mailed on August 7, 2009.

<u>Page No.</u>	<u>Description</u>
1	Line 19, delete "25.15.40" and insert "25.15.460."
2	Lines, 8 and nine, abbreviate, " <i>Continental</i> " and " <i>Industries.</i> "
3	Line 2, delete "s" from "Streets."
4	N. 10, delete "CP 567-57" and replace with "CP 567-71."
5	Delete comma after "Review." N. 15, delete extra colon. N. 17, remove italics from "reviewed."
9	N. 22, insert parentheses around CP cite. n. 22, delete "arbitration" and insert "Ex. 21 (Jan. 8, 2004 representation agreement for judicial dissolution or arbitration."
10	N. 25, delete "American Law Institute, Governing" and insert "of Corporate Governance" after Principles.
11	N. 26, abbreviate "annotation."
12	Lines 7 and 8, delete ' and insert ". N. 27, insert period. N. 28, delete " <i>China Products N. Amer. v. Manual</i> " and insert " <i>China Prods. N. Am., Inc. v. Manewal.</i> "
13	N. 31, delete " <i>Chris</i> " and insert " <i>Chrisp</i> " and " <i>review denied</i> , 156 Wn.2d 1004 (2006).
14	N. 14, insert "CP 1853:10-15, 1854:11-16, 1855:13-1856:21" after second sentence and before citation to "Appellant's Revised

Opening Br. at 13-15.” Last line delete extra parenthesis and insert “Ex. 66 (request for interim distribution from another company).” N. 33, abbreviate “Continental.”

15 Line 18, add pinpoint cite to “858-63.”

16 Line 4, at the end of the sentence, insert “(CP 1853:10-16.)” N. 35, delete “financial” from first parenthetical and delete second parenthetical.

17 N. 36, add period. N. 37, remove extra period. Insert “The settlement offers were inadmissible, irrelevant, and failed to comply with the statute that required payment unlike other offer or tender statutes. CP 975, 1388, 1388-89, 1941-43, 1980-90, 2006-08, 2010-12.”

18 First full paragraph, delete “he was compelled to sell nine properties a year to comply” and insert “Humphrey was compelled to have sold within a year nine properties” and delete “property settlement.” Line seven, insert “statutory” before “process.” N. 39, delete “Ex. 33” and the related parenthetical and insert “Ex. 34 (Decl. of Scott Rogel in Supp. of Vote to Merger Clay St. Assoc.); Ex. 121 (case docket for Rogel/Goldfarb dissolution).”

19 N. 45, abbreviate, “Motion” and “Reconsideration.” N. 46, delete “Shed” and insert “Shedd.” N. 47, delete, “2004” and insert “2002.” N. 48, remove underline from “id.” and replace with italics.

20 N. 50, delete “*Caustic*” and insert “*Costich*.” Second sentence, after “prosecute claims” delete “for” and insert “against.” Correct formatting and spelling of “Decl.,” “Ostroff,” and “Soukup.” Abbreviate “Petition.” Insert at the end of the last sentence, “instead of appointing a receiver

and compelling a sale.” CP 453-54 (Aug.
15, 2005 award).”

21

Insert “and other errors” after “CR 68 offer.”