

No. 72644-7-I

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COURT OF APPEALS, DIVISION I,  
OF THE STATE OF WASHINGTON

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EAGLEVIEW TECHNOLOGIES, INC.,

Respondent,

v.

YURI PIKOVER, an individual; and 37 TECHNOLOGY  
VENTURES, LLC, a Delaware limited liability corporation,

Appellants.

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REPLY BRIEF OF APPELLANTS

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FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
2015 JUL 17 PM 1:40

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## A. INTRODUCTION

The brief of respondent Eagleview Technologies, Inc. ("EagleView") is remarkable for its willingness to disregard the purpose of Washington's law on the rights of minority shareholders like Yuri Pikover and 37 Technology Ventures LLC ("37 TV") and its disregard of the facts in this case.

As noted in Pikover/37 TV's opening brief, the trial court erred in failing to conduct an independent valuation proceeding confined to the fair value of EagleView's shares, as it was required to do by RCW 23B.13.300 when it merely adopted one valuation expert's opinion *in toto*, without analysis. Instead it was swayed by irrelevant, inflammatory evidence and argument by EagleView regarding Pikover's ouster from its board, his conduct while on the board, his alleged revenge motivation for asserting his statutory dissenter rights, and even his net worth. EagleView cannot explain how this deliberately inflammatory evidence was in *any* way relevant to *valuation* of its corporate shares.

Similarly, the trial court erred in refusing to award attorney fees to Pikover/37 TV under RCW 23B.13.310 where they were successful in prompting an increase in EagleView's initial valuation of the dissenter shares by invoking their dissenter rights. Unspoken in EagleView's brief on this issue is the fact that EagleView possessed a higher valuation of

shares from Alvarez & Marsal, its valuation expert's firm, when it *initially* set the low value of the dissenters' shares. EagleView only increased the value paid for the dissenter shares when it was forced to do so when Pikover/37 TV sued it and the opinion of its expert, Neil Beaton, was revealed in discovery.

This Court should reverse the trial court's valuation and fee decisions.

#### B. STATEMENT OF THE CASE

EagleView's statement of the case, br. of resp't at 4-14 is argumentative, contrary to RAP 10.3(a)(5),<sup>1</sup> and essentially parrots the findings of fact and conclusions of law it prepared for the trial court's signature.<sup>2</sup>

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<sup>1</sup> RAP 10.3(a)(5) requires that a statement of the case contain a "fair statement of the facts and procedure relevant to the issues, without argument." Beginning with the various argumentative captions in the statement of the case and proceeding to its text, EagleView's statement fails to satisfy RAP 10.3(a)(5)'s directive. Perhaps the most blatant example of EagleView "loading up" its factual statements with argument is found in its brief at 8-9 where it makes an unvarnished argument it does not even bother to anchor in a record cite. This Court should disregard EagleView's statement of the case.

<sup>2</sup> EagleView spends much of its responsive brief trumpeting the "facts" it persuaded the trial court to adopt, when the gravamen of the issues in Pikover/37 TV's opening brief was legal in nature. Its only answer to the authority set forth in the Pikover/37 TV brief at 2 n.1 that trial court findings prepared by EagleView are suspect is that the trial court "primarily agreed" with what its counsel prepared. Br. of Resp't at 14 n.5. EagleView is being generous; the trial court generally adopted its counsel's findings/conclusions.

Similarly, EagleView complains in its brief at 15 n.6 that Pikover/37 TV did not explain in detail why certain trial court findings were erroneous. EagleView failed to note the point set forth in Pikover/37 TV's opening brief at 2 n.1, that they assigned error to a "wide swath" of trial court findings tainted by the illicit evidence of Pikover's alleged

Ultimately, however, EagleView does not seriously dispute certain core factual points at issue in this appeal. EagleView does not deny that it introduced extraneous, prejudicial evidence obviously designed to color the trial court's perception of Pikover in the valuation phase of the case.

It does not deny the following independent indicia of value for its stock:

- The last 409A valuation performed by Marsal & Alvarez, its own valuation expert's firm, as of December 31, 2011, and issued in June 2012 only six months before the merger and before Pikover/37 TV's assertion of dissenter's rights, valued EagleView at \$198.2 million, or an undiscounted value of \$9.03 per share of common stock. Ex. 262; CP 67 (FF 27).
- During the first half of 2012, nine private equity firms and potential strategic partners interested in acquiring or investing in EagleView placed values on EagleView ranging from \$150 million to \$350 million, with a midpoint of these values substantially over \$200 million. Exs. 219, 221.
- Pictometry, EagleView's merger partner, valued EagleView during mid-2012 at \$250 million, Ex. 246; Ex. 221, and was still valuing EagleView at \$200 million or more in December 2012. RP 507-09.
- Four weeks before the merger closed, Houlihan Lokey delivered a valuation associated with its fairness opinion to Pictometry in which it valued EagleView at \$187 million to \$294 million, with a midpoint of \$239 million. Ex. 345. In addition, Houlihan Lokey

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misconduct, his motivation in asserting his statutory rights, or his net worth. The trial court's improper consideration of Pikover's alleged "misconduct," motivations for exerting his statutory dissenter rights, or his net worth, matters that even EagleView now agrees did not support a fee award in its favor, improperly colored the trial court's perception of Pikover and rendered suspect any of its findings.

valued Pictometry at a midpoint of \$233 million, *id.*, which is also relevant in determining EagleView's value in a merger of equals.<sup>3</sup>

- Because the transaction between EagleView and Pictometry was a merger of equals, the proposed \$650 million purchase price to be paid by Verisk for EagleView was appropriately divided evenly. Given the modest growth of the combined entity in 2013, Ex. 97, it is unreasonable to believe that EagleView's value grew from \$88.4 million (Beaton's valuation) to \$325 million in merely a year.
- EagleView *admits* that Marsal & Alvarez prepared a "draft" valuation, possessed by its CFO, almost a year prior to its "revised" valuation that valued EagleView's shares at essentially the same value reflected in its revised valuation; its management chose not to employ that valuation in paying Pikover/37 TV because it was allegedly a "draft." Br. of Resp't at 12 n.4. EagleView adopted its revised, increased valuation only because Beaton's expert report, revealed in discovery, reflected roughly the same value for EagleView's shares as that "draft" valuation. Ex. 26.

Further, EagleView does not deny that the trial court simply adopted the valuation opinion of its expert in its entirety to the exclusion of any other testimony on valuation.

### C. ARGUMENT

Instead of addressing Pikover's/37 TV's arguments, EagleView simply retreats to the factual and legal arguments enshrined in the findings of fact and conclusions of law it wrote, repeating them.

For example, it has *no answer* to the articulation of the history of Washington law on dissenter rights that animates the interpretation of the

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<sup>3</sup> Such fairness opinions are less partisan than other expert valuations and deserve greater attention by courts in the valuation process. *See* Br. of Appellants at 9 n.5, 12 n.9, 37-38.

rights of dissenters adopted by the 1989 Legislature and codified in RCW 23B.13, thereby *conceding* the argument advanced by Pikover/37 TV in their opening brief at 19-26.<sup>4</sup> Central to that case law is the fact that the hearing on the valuation of dissenters' shares is confined to an objective valuation of those shares and is not designed to be a platform from which the majority shareholders in the corporation may launch personal attacks on dissenters who invoke their statutory rights.

(1) The Trial Court's Valuation Decision Was Tainted by EagleView's Deliberate and Pervasive Effort to Introduce Irrelevant Evidence on Pikover/37 TV to Taint the Trial Court's Valuation Decision

As noted in Pikover/37 TV's opening brief at 26-32, the trial court permitted EagleView a free hand at attacking Pikover on a very personal level at every turn, even to the point of questioning him on his net worth. RP 1287-88. *All* of this evidence was irrelevant to the objective valuation of the dissenters' EagleView shares of stock. The transparent intent of EagleView's counsel was to demonize Pikover in the trial court's eyes and to prejudice the trial court's treatment of EagleView's shares' valuation.

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<sup>4</sup> In general, the failure to argue an issue, or to cite legal authority on it, waives the issue. *Smith v. King*, 106 Wn.2d 443, 451-52, 722 P.2d 796 (1986); *Puget Sound Plywood, Inc. v. Mester*, 86 Wn.2d 135, 142, 542 P.2d 756 (1975). The failure to respond to specific argument on appeal concedes it. *Washburn v. Beatt Equipment Co.*, 120 Wn.2d 246, 270, 840 P.2d 860 (1992) (failure to respond to description of injuries “concedes the accuracy of the description of the nature, extent, and permanency of the injuries and their support by substantial evidence.”).

EagleView's response to this highly prejudicial tactic is found late in its brief after 37 pages of other argument. EagleView asserts that the evidence was relevant to the issue of attorney fees, that nothing prevents the fee-related evidence from being heard in the trial phase of the case, and that the introduction of the evidence, if error, was harmless. Br. of Resp't at 38-41.

First, EagleView's tactic was clear. It introduced nasty and personal evidence about Pikover in the valuation phase of the trial purely for the purpose of tarnishing his many contributions to EagleView's success, contributions EagleView's management even *conceded*. Ex. 286. Moreover, the trial court discerned and found EagleView's "motive evidence" to be *baseless* and denied it fees. CP 106-07 (CL E).<sup>5</sup>

EagleView *concedes* that the evidence of the dissenters' alleged motivation for invoking their statutory rights or Pikover's net worth was *irrelevant to valuation*. It makes no effort to demonstrate that such evidence had any pertinence to share valuation. Nor could it. If dissenter motivation was a relevant factor in dissenter rights litigation it might chill the invocation of such rights that the Legislature specifically intended for minority shareholders. On the issue of a dissenter's net worth, Division

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<sup>5</sup> EagleView has not appealed that decision, lending further credence to the fact that this evidence was a ploy and never a substantive issue.

III's decision in *RWR Management, Inc. v. Citizens Realty Co.*, 133 Wn. App. 265, 135 P.3d 955 (2006), *review denied*, 159 Wn.2d 1013 (2007) is pertinent. In an action for breach of contract and quantum meruit in connection with a development project, the court upheld the trial court's exclusion of evidence of the plaintiff's principal's personal finances as irrelevant. "The Robideauxs' personal finances do not pertain to whether RPS received unjust enrichment from RWR. Thus, the court had tenable grounds to find evidence relating to the Robideauxs' personal finances was inappropriate and irrelevant." *Id.* at 279. The same is true here except that the trial court abused its discretion in allowing the evidence to be admitted.

Second, recognizing that this evidence was irrelevant and prejudicial to the objective valuation of EagleView shares, EagleView claims that this irrelevant evidence could, nevertheless, be heard at the same time as valuation evidence, citing RCW 23B.13.310 for this proposition. Br. of Resp't at 38-41. But that statute *nowhere* condones permitting evidence relevant to fees to be heard in the trial's valuation phase of dissenter rights proceedings.

Critically, EagleView ignores the express, and contrary, direction in CR 54(d).<sup>6</sup> That rule requires fees to be addressed in proceedings *after* the entry of judgment. The court rule controls over the contrary provisions of a statute in any event. In *Putman v. Wenatchee Valley Medical Center, P.S.*, 166 Wn.2d 974, 216 P.3d 374 (2009), our Supreme Court invalidated the requirement of filing a certificate of merit as a precursor to a medical negligence claim. The Court concluded that such legislation unconstitutionally impaired access to the courts. Critical for the present case, the Court determined that access to the courts included the right to discovery authorized by the civil rules. To the extent that the certificate of merit legislation impinged upon the civil rules for discovery and pleadings, and because the statute could not be harmonized with the rules, the Court held that court rules must prevail over statutes, and thus the certificate of merit statute was unconstitutional.<sup>7</sup>

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<sup>6</sup> EagleView contends that Pikover/37 TV somehow "waived" their objection to the trial court's consideration of the improper evidence it introduced at trial in the valuation phase of the case, citing RAP 2.5. Br. of Resp't at 39-40. Such a contention is baseless. While trial counsel did not specifically mention CR 54(d), counsel *repeatedly* objected to the introduction of such evidence during the valuation phase of the trial, br. of appellants at 16 n.15, a point EagleView nowhere disputes in its brief. CR 54(d) only makes crystal clear the trial court's error in cluttering its valuation with utterly irrelevant evidence of Pikover's alleged misconduct, his motives for invoking the dissenter rights statute, or his net worth, all introduced by EagleView in a calculated effort to taint Pikover in the trial court's mind.

<sup>7</sup> Accord, *Diaz v. State*, 175 Wn.2d 457, 285 P.3d 873 (2012) (statute making evidence of settlements admissible was contrary to ER 408, court rule controlled, and evidence was inadmissible); *Waples v. Yi*, 169 Wn.2d 152, 158-61, 234 P.3d 187 (2010)

Here, CR 54(d) is clear that attorney fees may be considered *only after entry of a judgment on the merits*. This is a procedural rule and not a substantive one so that the court rule must control. *Putman*, 166 Wn.2d at 984. RCW 23B.13.310 does not specify when the proceedings on fees must be heard so that CR 54(d) controls. A harmonious reading of the statute and court rule that avoids an unconstitutional overreach for the statute requires that fees, and evidence pertinent to them, must be addressed only *after* the valuation proceedings conclude.

In sum, the trial court should not have heard evidence irrelevant to valuation that may have touched upon EagleView's alleged right to fees before its decision on the valuation of EagleView's shares. In doing so, the trial court prejudicially tainted its valuation decision, and the decision must be reversed. *Magaña v. Hyundai Motor America*, 123 Wn. App. 306, 316-17, 94 P.3d 987 (2006) (trier of fact considered evidence on dismissed claim without instruction from court to disregard; reversal required because trier of fact was misled as to the evidence that was before it).<sup>8</sup> In fact, the trial court was plainly influenced in its valuation decision

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(statute requiring mandatory mediation of medical negligence claims before filing action violated CR 3 on filing lawsuits).

<sup>8</sup> The holding in *Magaña* applies with equal force to a judge acting as the trier of fact. While appellate courts are often more tolerant of evidentiary errors taking place in a bench trial, that is only because a trial judge is presumed to be able to disregard inadmissible evidence. *E.g., State v. Melton*, 63 Wn. App. 63, 68, 817 P.2d 413 (1991),

by this illicit evidence because *it discussed such evidence in its findings of fact on the valuation decision.* CP 61, 62, 86-90 (FF 2, 8, 95-112). EagleView has *no answer* to *Magaña*, declining to even address it in its brief.

Finally, EagleView asserts that any error was harmless. Br. of Resp't at 40-41. The *Magaña* court *rejected* the proposition that consideration by the trier of fact of extraneous evidence on an issue not properly before it was harmless. 123 Wn. App. at 317-18. As Division II there noted: "...we cannot measure prejudice by counting lines of testimony. Rather, we must examine the entire record, looking at the potential impact of the challenged testimony in context." *Id.* at 318. For EagleView to now assert that any error resulting from its deliberate, repeated efforts throughout the trial on valuation to besmirch Pikover's behavior and motives and to implicitly tell the trial court not to properly value his shares because he is rich rings exceedingly hollow, particularly where, as noted *supra*, the evidence was specifically addressed in the trial court's consideration of value; such improper evidence was plainly linked to share valuation in the court's own valuation of EagleView's stock.

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*review denied*, 118 Wn.2d 1016 (1992). But here, based on its findings, it is clear that the trial court plainly considered improper evidence advanced by EagleView in making its valuation decision.

EagleView deliberately and repeatedly interjected this evidence into the valuation phase of the trial, as recounted in Pikover/37 TV's opening brief at 16-17. EagleView argued the issue in its briefing, in opening statements, and in its closing. *EagleView* itself obviously thought that this evidence would have a prejudicial effect on Pikover's valuation claim. So should this Court.

(2) The Trial Court Failed to Conduct an Independent Valuation of EagleView's Shares as Required by RCW 23B.13

EagleView contends in its brief at 14-38 that the trial court conducted an "independent valuation" of its shares, even though the court adopted the valuation of EagleView's expert on valuation *in toto*. In making this argument, EagleView asserts that the proper standard of review for this Court's decision on valuation is abuse of discretion, citing Delaware authority and ignoring the rich body of *Washington law* pertinent to dissenter shares to valuation decisions.

First, Pikover/37 TV contended in their opening brief at 32 n.34 that this Court should review valuation of dissenter shares under RCW 23B.13 *de novo* in the absence of any controlling authority on the standard of review. There are multiple reasons for such a contention. The statutory purpose of dissenter rights statutes; *not disputed anywhere by EagleView*, is to protect minority shareholders from *majority oppression*. *See, e.g.,*

*China Prods. N. America Inc. v. Manewal*, 69 Wn. App. 767, 771 n.3, 850 P.2d 565 (1993). De novo review better ensures that the courts will protect such dissenter rights. Further, as the case law set forth in *Pikover/37 TV's* opening brief at 19-26, *case law not even addressed by EagleView anywhere in its brief*, Washington courts have scrupulously and aggressively protected minority shareholders' interests under dissenter rights statutes in the courts. Those decisions evidence review decisions that are tantamount to de novo review.

EagleView claims that an abuse of discretion standard of review is appropriate, citing Delaware and Nevada authority. Br. of Resp't at 20. EagleView misstates the holding in *Cede & Co. v. Technicolor, Inc.*, 884 A.2d 26 (Del. 2005). The court there stated that a trial court's valuation decision is entitled to deference so long as the trial court *did not commit legal error*. *Id.* at 35. The issues raised by *Pikover/37 TV* implicate legal issues under RCW 23B.13 – what evidence is relevant in the valuation phase of a trial? What is the nature of a trial court's independent review of value? When is a dissenter entitled to a fee award? *American Ethanol, Inc. v. Cordillera Fund, L.P.*, 252 P.3d 663 (Nev. 2011) is no different where the Nevada court emphasized that review is for an abuse of discretion only *after* a trial court has conducted a truly independent valuation of the minority shares. *Id.* at 667.

This Court should employ a de novo standard of review here to fully honor and uphold the statutory purpose of RCW 23B.13.

Second, EagleView cites several Delaware cases in support of its contention that the trial court could simply adopt Beaton's evaluation *in toto*. In doing so, it ignores Washington law to the contrary. Division III of our Court of Appeals in *Sentinel C3 Inc. v. Hunt*, 176 Wn. App. 152, 160-61, 309 P.3d 582 (2003), *aff'd in part, rev'd in part on other grounds*, 181 Wn.2d 127, 331 P.3d 40 (2014) stated: "We believe this statutory arrangement thus retains the obligation of the trial judge to undertake a de novo review of the evidence and not uncritically accept the appraiser's report." That analysis, unaddressed by EagleView in its brief, is correct.

Instead of addressing Washington law, EagleView falls back on a tortured reading of Delaware law to support its view. That state's high court has long supported the view that the trial court's determination of the value of minority shareholders' stock must be *independent*. Br. of Appellants at 34-35. In *Gonsalves v. Straight Arrow Publications, Inc.*, 701 A.2d 357 (Del. 1997), the Delaware Supreme Court reversed a trial judge's valuation decision based on his announcement to the parties that he was simply going to adopt one party's expert's value in its entirety. That was not an *independent* valuation of the shares. *Id.* at 360-61. *See also, Montgomery Cellular Holding Co. v. Dobler*, 880 A.2d 206, 221

(Del. 2005) (court not free to accept competing valuation by default). The authority cited by EagleView do not depart from the proposition that the trial court's valuation must be *independent*. In *M.G. Bancorporation, Inc. v. Le Beau*, 737 A.2d 513 (Del. 2000), the Delaware court re-affirmed that viewpoint when it stated that a trial court must act as an "independent appraiser." *Id.* at 526. A trial court's valuation decision may consider the parties' experts' opinions, but it must "carefully consider whether the evidence supports the valuation conclusions advanced by the parties' respective experts." *Id.* Although not required to do so, it may rely on one expert's analysis *in toto*, provided "that valuation is supported by credible evidence and withstands a critical judicial analysis on the record." *Id.*

As noted in Pikover/37 TV's opening brief at 36-44, the trial court's uncritical acceptance of the Beaton valuation<sup>9</sup> did not constitute the independent valuation mandated by RCW 23B.13, particularly when

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<sup>9</sup> EagleView's citation of two Washington cases on the weight to be given an expert's testimony, br. of resp't at 20-21, is somewhat puzzling. *Johnston-Forbes v. Matsunaga*, 177 Wn. App. 402, 211 P.3d 1260 (2013), *aff'd*, 181 Wn.2d 348, 333 P.3d 388 (2014) addresses the qualifications of an expert witness to testify as well as the scope of that expert's opinion given his qualifications. Apart from the fact that his testimony is hardly that of a "disinterested" expert, given his firm's *long* involvement with EagleView, Mr. Beaton's qualifications and the scope of his opinion are not at issue here, only the independence of the trial court's valuation analysis of *all* evidence on valuation.

As for *In re Marriage of Sedlock*, 69 Wn. App. 484, 849 P.2d 1243 (1993), the Court of Appeals there approved of a trial court's decision to exercise its independence – it selected a value for a husband's business assets somewhere between the values testified to by each party's expert. *Id.* at 491. That is precisely what the trial court should have done here.

the court's valuation decision was impermissibly tainted by the extraneous evidence of Pikover's alleged "misconduct," his motives for invoking his statutory rights, and his net worth. The trial court accepted Beaton's analysis *uncritically*, failing to seriously treat Ellen Larson's criticisms of Beaton's approach, something it needed to do if its valuation was truly independent.

(3) Pikover/37 TV Are Entitled to an Award of Fees under RCW 23B.13.310

Pikover/37 TV are entitled to a fee award under RCW 23B.13.310 regardless of whether they prevail on the share valuation issues discussed *supra*.

EagleView asserts that Pikover/37 TV are not entitled to a fee award under either aspect of RCW 23B.13.310 – failure to comply with the requirements of the dissenter rights statute or for arbitrary, vexatious, or bad faith conduct – because it “substantially complied” with the dissenter rights statute and because it can conjure up seemingly plausible justifications for its conduct. Br. of Resp’t at 41-52. That is not enough.

First, in making its argument on fees, EagleView misrepresents the record. It affirmatively asserts that the trial court made “findings” that EagleView substantially complied with the dissenter rights statute and that it did not act arbitrarily, vexatiously, or in bad faith. Br. of Resp’t at 41-

42. The trial court *nowhere* made such “findings,” nor does EagleView cite to anything in the record disclosing that such “findings” exist. The *only* determination on fees was the trial court’s conclusion of law E, CP 106-07, where the trial court addressed the fact that *EagleView* was not entitled to fees. That conclusion is *silent* on *Pikover/37 TV’s* right to fees except in its caption. Conclusion E is devoid of any analysis as to *Pikover/37 TV’s* right to fees.<sup>10</sup>

EagleView then advances the entirely contradictory argument that the trial court was not required to make findings of fact on the fee issue in any event. Br. of Resp’t at 43-44. It attempts to distinguish case law making findings on fee awards compulsory on the basis that they only related to fee *awards* and not the denial of fees. That distinction fails where the trial court made no record on its apparent legal decision to deny *Pikover/37 TV* fees.<sup>11</sup>

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<sup>10</sup> It is presumptuous of EagleView to ascribe findings to the trial court that the court did not expressly make, particularly where EagleView was aggressive in preparing the extensive findings and conclusions for the trial court’s signature.

<sup>11</sup> EagleView cites the *AllianceOne Receivables Management, Inc. v. Lewis*, 180 Wn.2d 389, 325 P.3d (2014) decision and 20 C.J.S. *Costs* § 170 as justification for its position that findings are unnecessary when fees are *denied*. Although detailed findings of fact are not necessary when a court denies an award of attorney fees, the trial court is still obligated to make an adequate record upon which review by this Court can occur. Indeed, cases referenced in the C.J.S. section EagleView cites make this very point. For example, trial court cost-related decisions lacking any explanation constitute an abuse of discretion. *E.g., Wong v. Takeuchi*, 961 P.2d 611, 617 (Hawaii 1998) (reduction of cost request without explanation). Here, the trial court offered *no explanation at all* as to why it denied fees to *Pikover/37 TV* even though in the findings/conclusions EagleView’s counsel drafted, it offered an extensive discussion of why it denied fees to EagleView.

Moreover, EagleView *ignores* our Supreme Court's decision in *Sentinel C3, Inc. v. Hunt*, 181 Wn.2d, 127, 331 P.3d 40 (2014) where the Court reversed a fee award made by the trial court against dissenters for alleged vexatious conduct within the meaning of RCW 23B.13.310(2)(b) because the trial court's fee decision was abbreviated, the court did not make findings of fact/conclusions of law, and it did not explain how it determined the amount of fees. 181 Wn.2d at 145. The trial court's failure to properly address its fee decision as to Pikover/37 TV here similarly merits reversal.

The very purpose of findings/conclusions is to document the trial court's rationale for its fee decision to afford this Court a basis on which to conduct appellate review. This Court cannot review what the trial court does not describe somewhere in writing. Indeed, EagleView's entire contention that the trial court did not abuse its discretion in denying fees to Pikover/37 TV, br. of resp't at 42-43, must fail because this Court has no basis upon which to assess if, or how, the trial court exercised such discretion appropriately, or at all.

(a) EagleView Failed to Comply with RCW 23B.13.200-.280

RCW 23B.13.310(2)(b) authorizes a fee award where a corporation fails to comply with RCW 23B.13.200-.280. RCW 23B.13.250(1) and

RCW 23B.13.280 are of particular importance here. The corporation must make payments of fair value for the minority dissenters' shares within a specific time deadline – 30 days after the effective date of the merger, RCW 23B.13.250(1), or within 60 days of the dissenters' demand for payment. RCW 23B.13.280(1). Plainly, EagleView's higher payment made in December 2013 *long post-dated* the January 7, 2013 merger and the Pikover/ 37 TV payment demand made in their March 29, 2013 letter. Ex. 41.<sup>12</sup>

The facts here are clear:

- From the “draft” Marsal & Alvarez valuation in its possession in early 2013, EagleView knew or should have known its value of \$2.75/\$3.65 per share on February 28, 2013, CP 91 (FF 122); RP 3289-3312, was *too low*.
- Beaton determined that low ball valuation was *too low* and only revealed that conclusion in his December 16, 2013 expert report when compelled to do so in discovery. Ex. 26; CP 93-94 (FF 131); RP 1701.
- EagleView only increased its valuation to \$3.94/\$4.88 upon being compelled to do so by Pikover/37 TV filing this action in which Beaton's expert report revealed. CP 93 (FF 128), 93-94 (FF 131); RP 1701.

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<sup>12</sup> EagleView has the audacity to describe the revised payment to the dissenters compelled by the revelation of Beaton's updated valuation in discovery in the Pikover/37 TV lawsuit as "a slightly higher valuation estimate." Br. of Resp't at 51 n.22. EagleView's February 28, 2013 valuation was \$2.75/share of common stock and \$3.65/share of preferred stock. CP 91 (FF 121-22). In accordance with Beaton's December 16, 2013 opinion revealed in discovery, those values were \$3.94/\$4.88. CP 93 (FF 128-29). The increase in value of the common stock was well over 40%, hardly a "slight" increase.

EagleView did not pay "fair value" to the dissenters on a timely basis, where it effectively *admitted* its February 28, 2013 valuation was not "fair value" for the shares by increasing its valuation of its shares more than 40% after Pikover/37 TV sued it. Absent the Pikover/37 TV lawsuit, EagleView's initial lowball offer would have prevailed. Simply put, EagleView did not pay "fair value" plus accrued interest as directed by RCW 23B.13.250(1) within the time periods set forth in RCW 23B.13.280 until *forced* to do so by Pikover/37 TV. A fee award to Pikover/37 TV under RCW 23B.13.310(2)(b) was *compulsory*.

EagleView contends that its initial low ball valuation "substantially complied" with the statute, citing *Humphrey Industries Ltd. v. Clay Street Associates, LLC*, 170 Wn.2d 495, 242 P.3d 846 (2010) and unpublished foreign authority. Br. of Resp't at 46 n.19.<sup>13</sup> *Humphrey Industries* does not support EagleView's position, but instead supports Pikover/37 TV. In that case arising under the analogous LLC statute to RCW 23B.13.310, our Supreme Court held that the LLC's failure to pay the dissenters within 30 days of setting the fair value of the dissenters' shares because it allegedly lacked the resources to pay the full value of the shares, but was

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<sup>13</sup> EagleView does not demonstrate how it was entitled to cite unpublished authority in light of GR 14.1(b). It has not complied with that rule. The Court should disregard these cases. *See Condon v. Condon*, 177 Wn.2d 150, 165, 298 P.3d 66 (2013). Moreover, the cases do not aid EagleView as they do not stand for the proposition that it could disregard the time deadlines in RCW 23B.13.

willing to pay interest while it attempted to secure financing, was not “substantial compliance,” as the trial court had found. *Id.* at 507. The Court emphasized that the “extreme delay” of 6 months, a shorter period than that present here, in paying the dissenters, a delay that exceeded the 30-day period in the statute, was enough to mandate trial court consideration of a fee award to the dissenter on remand. *Id.* It is no different here where the trial court ostensibly gave no apparent consideration to Pikover/37 TV’s fee argument.

EagleView cites *no authority* for the proposition that RCW 23B.13.310(2)(b) contemplates a “substantial compliance” analysis, but certainly a rolling series of time periods during which it amended what it should have paid Pikover/37 TV at the outset – fair value for their EagleView shares--does not meet the statute, given the purpose of RCW 23B.13 to protect dissenters from oppressive conduct by majority shareholders.

(b) EagleView Acted Arbitrarily, Vexatiously, or in Bad Faith on Fair Value of Its Shares

An additional basis for a fee award here was that EagleView acted arbitrarily, vexatiously, or in bad faith on the valuation for its shares it ultimately chose to adopt. RCW 23B.13.310(2)(b). Again, the trial court did not reach this issue at all.

An award on such a basis was supported on numerous grounds:

- EagleView's untimely payment of fair value for its shares that was prompted *only* by Pikover/37 TV's instigation of litigation;
- EagleView had the Alvarez & Marsal 409A valuation, the Houlihan Lokey fairness valuation, and a draft valuation from Alvarez & Marsal<sup>14</sup> documenting that the value it ultimately employed in December 2013 was the value it should have been offered to Pikover/37 TV in February 2013;
- it employed a ridiculously low interest rate on the value of its shares of 0.05%, later corrected by the trial court to 5.75%, a rate that accurately reflected what it actually cost EagleView to borrow money. CP 105-06 (CL D);<sup>15</sup>
- it refused to even respond to Pikover's March 29, 2013 letter on fair value, avoiding any interactive process with the dissenters on fair value as contemplated by RCW 23B.13; and
- it launched a highly vicious personal attack on Pikover for asserting his statutory rights.

EagleView's response to these facts is that it "substantially complied" with the statute and that it had ostensible justifications for what

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<sup>14</sup> This fact is particularly critical. *Unacknowledged by EagleView anywhere in its brief*, is the fact that its management had a "draft" valuation from Alvarez & Marsal, the very same firm that employed Neal Beaton its valuation expert, that placed the valuation of its shares at essentially the same value it was forced to pay in December 2013 when Beaton's valuation report was revealed in discovery. Ex. 211; RP 698-701, 953. EagleView's Polchin decided not to pay that amount because the report was a "draft," CP 92 (FF 123), and EagleView's board never considered the Alvarez & Marsal valuation. CP 84 (FF 89), 92 (FF 123). EagleView also had a June 2013 409A valuation of the minority shares, again from Alvarez & Marsal, that placed the value of its common stock shares at \$3.89, just 6 days before the effective date of the merger. CP 84 (FF 89).

<sup>15</sup> Pikover/37 TV argued aggressively for a more realistic interest rate to the trial court. CP 190-91, 2747-48. EagleView offered no evidence of interest rates on bank loans and deliberately chose the lowest interest rate it could use by analogy -- the interest rate on treasury bills. CP 2748. Again, only their commencement of this action forced EagleView to pay a correct interest rate on the shares' value.

it did on fair value and interest. Br. of Resp't at 44-49. Again, there is no authority in Washington law, nor is there any authority cited by EagleView for the proposition that "substantial compliance" is enough for a corporation to avoid a fee award under RCW 23B.13.310. EagleView even goes so far as to contend that there is "no evidence in the record that demonstrates...[it] 'knew' that the values calculated by its experts were 'wrong' and vexatiously 'forced' [Pikover/37 TV] to litigate this matter." *Id.* at 52-53. That statement is *demonstrably false*. The value adopted in Beaton's December 2013 report, and disclosed in discovery only after litigation had been initiated, virtually mirrored the value expressed in the Alvarez & Marsal (Beaton's own firm) draft report that was in CFO Polchin's possession in February 2013 (CP 92; FF 123) when it initially set its low ball share value. EagleView has *no answer* to this fact. It should have paid the dissenters the fair value it ultimately set in December 2013 in February of that year. Pikover/37 TV would not have been paid the fair value EagleView ultimately was compelled to pay, but for this lawsuit.<sup>16</sup>

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<sup>16</sup> Of course, this Court cannot know from its findings and conclusions the trial court's rationale for not determining that EagleView acted arbitrarily, vexatiously, or in bad faith because those findings, drafted by EagleView's counsel, neglect to even address this issue.

Pikover/37 TV were entitled to a fee award. This Court should reverse the trial court's fee decision. Further, as requested in their opening brief, Pikover/37 TV are entitled to fees on appeal. RAP 18.1(a).

D. CONCLUSION

Nothing presented in EagleView's brief should sway this Court from determining that the trial court erred in its valuation of the dissenters' interest in EagleView. The trial court allowed its valuation opinion to be colored improperly by EagleView's evidence designed to impugn Pikover and to address his alleged motivations for invoking his statutory dissenters' rights, motivations that the trial court concluded did not even justify a fee award to EagleView under RCW 23B.13.310(2)(b). It did not conduct the independent determination of EagleView's value commanded by RCW 23B.13.300.

The trial court erred in failing to award Pikover/37 TV their fees under RCW 23B.13.310(2) where it is undisputed that their invocation of their statutory rights forced EagleView to increase the value of their shares.

This Court should reverse the trial court's judgment and award a new trial<sup>17</sup> or, alternatively, the Court should remand the case to the trial

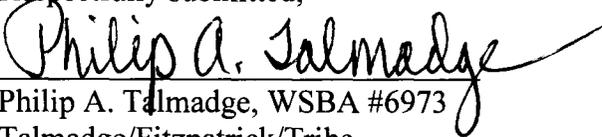
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<sup>17</sup> EagleView does not address the assertion in Pikover/37 TV's opening brief at 51 n.50 that any remand here should be to a different trial judge, and thereby *concedes*

court for an award of fees to Pikover/37 TV. Costs on appeal, including reasonable attorney fees, should be awarded to Pikover/37 TV.

DATED this 17th day of July, 2015.

Respectfully submitted,



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the propriety of such a remand. *Smith, supra*. See also, *GMAC v. Everett Chevrolet, Inc.*, 179 Wn. App. 153-54, 317 P.3d 1014, review denied, 181 Wn.2d 1008 (2014).

# APPENDIX

RCW 23B.13.250:

- (1) Except as provided in RCW 23B.13.270, within thirty days of the later of the effective date of the proposed corporate action, or the date the payment demand is received, the corporation shall pay each dissenter who complied with RCW 23B.13.230 the amount the corporation estimates to be the fair value of the shareholder's shares, plus accrued interest.
- (2) The payment must be accompanied by:
  - (a) The corporation's balance sheet as of the end of a fiscal year ending not more than sixteen months before the date of payment, an income statement for that year, a statement of changes in shareholders' equity for that year, and the latest available interim financial statements, if any;
  - (b) An explanation of how the corporation estimated the fair value of the shares;
  - (c) An explanation of how the interest was calculated;
  - (d) A statement of the dissenter's right to demand payment under RCW 23B.13.280; and
  - (e) A copy of this chapter.

RCW 23B.13.280:

- (1) A dissenter may deliver a notice of the corporation informing the corporation of the dissenter's own estimate of the fair value of the dissenter's shares and amount of interest due, and demand payment of the dissenter's estimate, less any payment under RCW 23B.13.250, or reject the corporation's offer under RCW 23B.13.270 and demand payment of the dissenter's estimate of the fair value of the dissenter's shares and interest due, if:
  - (a) The dissenter believes that the amount paid under RCW 23B.13.250 or offered under RCW 23B.13.270 is less than the fair

value of the dissenter's shares or that the interest due is incorrectly calculated;

(b) The corporation fails to make payment under RCW 23B.13.250 within sixty days after the date set for demanding payment; or

(c) The corporation does not effect the proposed corporate action and does not return the deposited certificates or releases the transfer restrictions imposed or uncertificated shares within sixty days after the date set for demanding payment.

RCW 23B.13.310(2):

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

(a) Against the corporation and in favor of any or all dissenters if the court finds the corporation did not substantially comply with the requirements of RCW 23B.13.200 through 23B.13.280; or

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