No. 82687-1

CHAMBERS, J. (dissenting) — I find the majority's resolution puzzling. The statute controlling dissenters' rights contemplates that those rights may be satisfied by substantial compliance. In fact, the statute specifically authorizes a substantial compliance inquiry. RCW 25.15.480.[1] Notwithstanding this clear directive from the legislature, the majority concludes that the statutory requirement that payment to the dissenter be tendered within 30 days can be satisfied only by strict compliance. Majority at 10. That is the puzzling part. The majority ignores the trial court's careful findings of substantial compliance and flouts the legislature's clear directive that only substantial compliance is required. The majority is wrong. I respectfully dissent.

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[1] (1) . . . The court shall assess the *costs* against the limited liability company, except that the court may assess the costs against all or some of the dissenters, in amounts the court finds equitable, to the extent the court finds the dissenters acted arbitrarily, vexatiously, or not in good faith in demanding payment.

(2) The court may also assess the fees and expenses of counsel and experts for the respective parties, 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, vexatiously, or not in good faith with respect to the rights provided by this article.

RCW 25.15.480 (emphasis added).

Although the parties had other business relations, relevant here is that Humphrey Industries, Ltd., by means of its principal, George Humphrey (Humphrey), joined Joseph and Ann Lee Rogel, Scott Rogel, and ABO Investments, by means of its principal, Gerald Ostroff, to create Clay Street Associates, LLC, for the purpose of acquiring and managing real estate. Importantly, the company purchased and owned only one piece of real estate. One of the Rogels decided to divorce and sought to liquidate his interest. Humphrey refused. Following a statutorily permissible merger procedure, the Rogels and Ostroff formed WXYZ, LLC. Humphrey was given notice of his dissenter's rights, formally dissented, and on October 1, 2004, demanded payment for his interest. Under the statutory scheme, Humphrey was entitled to payment within 30 days of his demand. The problem was that the single asset of the company, a commercial warehouse, could not be marketed so quickly. The parties disagreed on values; the relationship between Humphrey and the other investors became acrimonious, and numerous legal actions followed.

Ultimately, a trial judge determined the value of the property as of the date of merger to be $3.15 million, with Humphrey's share to be $231,947 plus interest of $60,588, and offset by the $181,192 he had already been paid. The trial court also found that the remaining investors had substantially complied with the statutory requirements of the merger procedure and that Humphrey had acted arbitrarily, vexatiously, and not in good faith, and thus

assessed attorney fees against Humphrey.

First, under the plain words of the statute, courts are required to conduct a substantial compliance inquiry in awarding attorney fees for dissenters' rights disputes. RCW 25.15.480. The inquiry "depend[s] on the facts of each particular case," and the facts of this case support the conclusion that Clay Street "generally satisfied" the purpose of the requirement. *In re Habeas Corpus of Santore*, 28 Wn. App. 319, 327, 623 P.2d 702 (1981); *Crosby v. County of Spokane*, 137 Wn.2d 296, 303, 971 P.2d 32 (1999) (finding substantial compliance with a statutory requirement where "generally the purpose of the requirement will be satisfied"). While the legislature clearly wanted to protect dissenters' rights and assure prompt payment, the legislature was also mindful that 30 days is a very short time frame in which to accomplish a merger and the often resulting requirements of accounting, apportionment, appraisal, sale, settlement and other potential steps in the transfer of property, assets, debts, and liabilities associated with the process. There is nothing in the statute to suggest that the legislature intended to punish the remaining investors in a single asset by forcing a fire sale at a very unfavorable price.[2] Instead, the legislature provided for the escape valve of "substantial compliance." As described by the Court of Appeals, Washington courts have defined "substantial compliance" as "'"actual compliance in

[2] Given the realities of securing financing and the attendant appraisals, review of ecological, zoning, floodplain, insurance, and other related matters, 30 days is not a practical time limit for any transaction requiring the sale of commercial real estate.

respect to the substance essential to every reasonable objective of [a] statute."'" *Humphry Indus. Ltd. v. Clay St. Assocs. LLC,* noted at 147 Wn. App. 1045, 2008 WL 5182026, at *4 (alteration in the original) (quoting *City of Seattle v. Pub. Employment Relations Comm'n*, 116 Wn.2d 923, 928, 809 P.2d 1377 (1991) (quoting *Santore,* 28 Wn. App. at 327)).

Second, the statute contemplates a dispute resolution process that would take the parties far beyond the 30-day payment window. RCW 25.15.475(1).

Third, we have held that under this statute, the attorney fees are permissive, not mandatory. *Nat'l Elec. Contractors Ass'n v. Riveland*, 138 Wn.2d 9, 28, 978 P.2d 481 (1999) ("the term 'may' in a statute has a permissive or discretionary meaning" (citing *Yakima County (W. Valley) Fire Prot. Dist. No. 12 v. City of Yakima,* 122 Wn.2d 371, 381, 858 P.2d 245 (1993))). Given the facts of this case and the discretion vested in the trial judge's hands by this statute, the trial court did not err in refusing to award attorney fees to Humphrey. According to the trial court's findings, the merger resulted from Humphrey's unwillingness to liquidate a dysfunctional enterprise, and Clay Street paid out as soon as it obtained the money, with interest. Furthermore, Clay Street attempted to avoid litigation by making an offer well in excess of the eventual judgment, which Humphrey refused.

The courts below had sufficient ground to find that Clay Street substantially complied with the statute, and I would thus affirm their denial of

Humphrey's request for attorney fees.

Finally, the majority concludes that, in finding that Humphrey acted arbitrarily, vexatiously, or not in good faith, the courts below improperly considered Humphrey's rejection of a prelitigation offer well in excess of the eventual judgment. Majority at 18 (citing ER 408). By its very terms, however, the rule cited does not exclude evidence of conduct in settlement negotiations if offered for a purpose other than proving or denying liability.[3] Here, the evidence was properly admitted as relevant to state of mind. *Bulaich v. AT&T Info. Sys.*, 113 Wn.2d 254, 263-64, 778 P.2d 1031 (1989) (allowing admission of prelitigation negotiations for the purpose of establishing intent). In fact, this court has specifically approved the use of such evidence to show good faith. *Matteson v. Ziebarth*, 40 Wn.2d 286, 294, 242 P.2d 1025 (1952). Excluding evidence so clearly relevant to lack of good faith would defeat the express purpose of giving the courts discretion to award attorney fees under the dissenters' rights statute, namely, to encourage

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[3] In a civil case, evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible *to prove liability for or invalidity of the claim or its amount*. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. *This rule also does not require exclusion when the evidence is offered for another purpose*, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

ER 408 (emphasis added).

good faith efforts to settle disputes out of court. *See* 2 Senate Journal, 51st Leg., Reg. Sess., at 3092-93 (Wash. 1989) (quoting app. A cmts. to Washington Business Corporation Act §§ 13.28, .31).

In sum, I would affirm the Court of Appeals in all respects.

AUTHOR:
Justice Tom Chambers

WE CONCUR:

Justice Susan Owens

Justice Charles W. Johnson

Justice Mary E. Fairhurst