IN THE SUPREME COURT OF MISSISSIPPI

NO. 2008-CA-00250

BLUEWATER LOGISTICS, LLC, BLUEWATER BAY, LLC, PATRICIA L. MOSSER, MARQUETTA SMITH AND MICHAEL J. FLOYD — APPELLANTS/CROSS-APPELLEES

vs.

JAMES STEWART WILLIFORD, JR. — APPELLEE/CROSS-APPELLANT

APPEAL AND CROSS-APPEAL FROM THE CHANCERY COURT OF FORREST COUNTY, MISSISSIPPI

BRIEF OF APPELLEE/CROSS-APPELLANT

ORAL ARGUMENT REQUESTED

L. Clark Hicks, Jr., [redacted]
Gunn, Hicks, & Bennett PLLC
211 South 29th Avenue, Suite 201 39401
Post Office Box 18350
Hattiesburg, MS 39404-8350
Telephone: (601) 544-6770
Facsimile: (601) 544-6775
Email: clark@gunnandhicks.com
Attorney for Appellee/Cross-Appellant,
James Stewart Williford, Jr.

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Bluewater Logistics, LLC - Appellant/Cross-Appellee.
2. Bluewater Bay, LLC - Appellant/Cross-Appellee.
3. Patricia L. Mosser - Appellant/Cross-Appellee.
4. Marquetta Smith - Appellant/Cross-Appellee.
5. Michael J. Floyd - Appellant/Cross-Appellee.
6. Robert R. Marshall and Erik M Lowrey PA - Counsel for Appellants/Cross-Appellees.
7. James Stewart Williford, Jr. - Appellee/Cross-Appellant.
8. L. Clark Hicks, Jr. and Gunn, Hicks & Bennett PLLC - Counsel for Appellee/Cross-Appellant.

Clark Hicks

L. Clark Hicks, Jr.
Attorney for Appellee/Cross-Appellant,
James Stewart Williford, Jr.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. CASES:

II. STATUTES:

III. OTHER LEGAL AUTHORITIES:

STATEMENT REGARDING ORAL ARGUMENT

The chancery judge enforced a redemption clause of a shareholders agreement among four individuals and awarded one shareholder, Stewart Williford, his 25% interest in the company. The lower court made this decision following a formal vote and resolution by the majority shareholders to pay Williford his 25% interest in the company.

The majority shareholders have not paid Williford his financial interest because they have squandered all of the company assets. During the litigation, the majority shareholders pocketed corporate monies in direct violation of numerous orders of the trial judge.

Before suit was filed, the majority shareholders changed the locks on the business, permanently removed Williford from the premises, blocked him from any access to company records and ex-communicated him from any and all connections with the business. At trial, the Bluewater defendants acted as though majority shareholders could do as they wish, a theme recurrent in their brief on this appeal.

In the *Fought v. Morris* decision, this Court emphasized the need for majority shareholders to act in good faith and deal fairly with minority shareholders. *Fought v. Morris*, 543 So. 2d 167 (Miss. 1989). The trial judge was not only justified in awarding Williford his share of the business, though now possibly uncollectible, but he should have awarded Williford his attorney's fees due to the wilful misconduct by the majority.

Williford seeks oral argument to assure that the principles enunciated in *Fought v. Morris* are confirmed.

STATEMENT OF ISSUES

I. Whether the trial court correctly ruled Williford's Complaint pled the relief awarded?

II. Whether the trial court properly determined the evidence and law justified payment to Williford of his interest in the limited liability companies?

III. Whether the trial court found sufficient evidence to support a judgment against the individual defendants?

IV. Whether the trial court erred by not awarding Williford his attorney's fees due to the Defendants' intentional breach of contract and wilful misconduct?

STATEMENT OF THE CASE

I. Nature of the Case, Course of Proceedings, and Disposition in the Court Below.

Stewart Williford initiated this suit after majority shareholders formally voted and resolved to remove him as a minority shareholder and pay him his 25% interest in two limited liability companies known as Bluewater.[1] Williford asked that the court either determine the majority shareholders did not have the power to remove him or, alternatively, award him his properly adjudicated compensatory damages, including his fair market interest in the companies. (R. Vol. 1, 10-18). He sued Bluewater Logistics, LLC and Bluewater Bay, LLC ("Bluewater"), the two limited liability companies of which he was a minority shareholder. He also named Patricia L. Mosser, Marquetta Smith, and Michael J. Floyd, the individual majority shareholders. Each shareholder owned 25% of the companies.

The Complaint alleged breach of contract, breach of fiduciary duty, violation of the Mississippi Limited Liability Company Act, negligence, negligent infliction of emotional distress, intentional infliction of emotional distress, gross negligence, and the intentional and wilful breach of contract, resulting from the vote to oust Williford as a member. (R. Vol. 1, 10-18). In the relief portions of the Complaint, Williford sought injunctive and declaratory relief against the defendants, including a declaration that the attempted vote was illegal and an injunction preventing his removal as a member. Alternatively, he sought compensatory damages as a result of the decision, including enforcement of statutory appraisal rights and court oversight of an accepted method for determining the fair market value of the Bluewater entities and his 25% interest. Miss. Code Ann. § 79-29-214. (R. Vol. 1, 10-18).

---

[1]The two companies are Bluewater Logistics, LLC and Bluewater Bay, LLC. Bluewater Logistics, LLC received substantial income during its existence and provided the net worth which was the subject of the corporate dispute. Bluewater Bay, LLC never acquired any significant assets.

The record reflects the judge granted partial relief sought by Williford at the preliminary injunction hearing. (R. Vol. 1, 64-66). Chancery Judge Johnnie Williams imposed restrictions on the operation of the business, similar to a receivership. He ordered that all expenditures made by the companies were to be overseen by a court appointed accountant. No members were to be reimbursed or otherwise paid monies out of the company accounts without court approval. Any expenses out of the ordinary were to be approved by the CPA. (R. Vol. 1, 64-66).

At the preliminary injunction hearing, the majority shareholders stated that they would not, under any circumstances, ever allow Williford to return to the business or have any connection with it. (R. Vol. 4, 75). By their formal vote and resolution, they proposed that the company accountant, John Havard, be designated to determine Williford's 25% interest in the company. (See formal corporate resolutions, R. Vol. 1, 28-31). In the order granting the injunction, in part, Judge Williams authorized Havard to be named as the accountant, and Havard proceeded to determine the companies' fair market value. (R. Vol. 1, 64-66).

During the course of the litigation, the majority shareholders repeatedly failed to provide critical financial information to the accountant and the court. (R. Vol. 1, 75-94). The court subsequently appointed Nancy Carpenter, an independent CPA, in place of John Havard. (R. Vol. 1, 80). By his order, it was Carpenter's task to determine the fair market value of the companies as of the date of Williford's removal so that the court could assess the proper 25% of Williford's share. Not only were the defendants on notice of the relief sought by Williford in his Complaint, they repeatedly advised the Court of their intent to pay Williford his share. (R. Vol. 1, 60-62, 70; Vol. 4, 4-7, 50-55, 83). Further, the orders of the court and course of proceedings placed them on notice that Williford, at a minimum, was to be paid his representative share in the companies. Counsel for the Defendants signed an order acknowledging that an "agreement

has been reached regarding the procedure for appraisal of the fair market value of the Bluewater companies." (R. Vol. 2, 183).

The case went through the ordinary course of discovery and trial. The trial convened on July 18, 2007. At trial, the court heard expert testimony that there were a number of financial discrepancies in the corporate books which occurred after Williford's ouster. The expert accountant testified that the majority shareholders had not been forthcoming with information. (R. Vol. 5, 127-134). A number of large expenditures could not be accounted for as well as what should have been a transparent flow of funds through the Bluewater companies. At trial, the defendants never provided an adequate answer or explained to the court what happened to more than a million dollars, which apparently was collected by the Bluewater entities but not ever shown on their books. (R. Vol. 5, 215-216).

The court heard the testimony of the majority shareholders who repeatedly stated that it was their intent to pay Williford his 25% share. (R. Vol. 6, 272, 286-315). The court heard the testimony of court appointed experts who testified regarding Williford's 25% ownership and the value. (R. Vol. 5, 195-244; Vol. 6, 245-259). The court had the opportunity to award Williford a larger sum, but erring on the side of caution, and awarded him a more conservative figure provided by the expert accounting testimony. (R. Vol. 2, 298). He awarded a conservative interest rate on the principal in the amount 5%, simple interest. (R.E. 297-298).

After the trial and entry of final judgment, the Bluewater defendants filed post trial motions, including for a new trial (M.R.C.P. 59(a)), to alter or amend (M.R.C.P. 59(e)), and for general relief under M.R.C.P. 60. The Defendants also asked for more detailed findings under M.R.C.P. 52(a). On January 8, 2008, the court denied all post trial motions and entered an amended final judgment, reaffirming his decision with inclusion of findings of facts and

conclusions of law, and denied all other relief sought by the defendants. (R. Vol. 3, 319-327 and R.E. 297-298).

On January 14, 2008, the Defendants filed another motion requesting permission to submit their own proposed findings. (R. Vol. 3, 328-330). This motion did not fall into any category of post trial motions which would stay an appeal, as all these motions had been previously denied. (R. Vol. 3, 319-327). See M.R.A.P. 4(d).

On February 6, 2008, within thirty (30) days of the amended final judgment, the Bluewater defendants timely filed their notice of appeal to this court. (R. Vol. 3, 358-359). Not surprisingly, the Defendants did not post a bond or other security to delay execution on the judgment. Judgment debtor examinations revealed the shareholders claim virtually no ability to pay, despite the millions received only two years ago. On February 15, 2008, Williford timely filed his notice of cross-appeal, arguing that the judge should have awarded, at a minimum, Williford's reasonably attorney's fees. (R. Vol. 3, 371-372).

II. Statement of Facts.

On September 22, 2004, James Stewart Williford, Jr., Patricia L. Mosser, Marquetta Smith, and Michael J. Floyd signed and entered into the First Amended and Restated Limited Liability Company Agreement of Bluewater Logistics, LLC,[2] with each person owning a one-quarter interest in the company. (R. Vol. 1, 19-27). The agreement contains numerous terms and provisions relating to the rights and obligations of each of the individual members. All of the members contributed time, effort, and capital to the overall creation, production, and success of Bluewater, which resulted in the execution of lucrative contracts for business in Harahan and Jennings, Louisiana, and significant profit. The contracts provided for Bluewater to coordinate

[2]They had an identical agreement with Bluewater Bay, LLC, an organized but inactive company.

housing arrangements and other logistics for workers who were helping with the massive relief effort following Hurricane Katrina.

Included among the many terms and provisions in the two LLC agreements is a provision for the right of redemption of a member's interest in Bluewater. (R. Vol. 1, 24). That provision reads, in pertinent part:

> Notwithstanding anything else in this Agreement to the contrary, the Company and the Members agree that the Company may, by a 75% Super Majority Vote of the Members, redeem any Member's Interest for its then fair market value if the company determines, in its sole and absolute discretion, that the Member has either committed a felony or under any other circumstance that would jeopardize the Company's status as an approved government contractor. For this purpose, the fair market value of the departing Member's Interest shall be determined by the Company's CPA or, if there is none, by a CPA selected by the Company for this purpose. The purchase price for said Membership Interest shall be paid in cash on the closing date selected by the Company.

(R. Vol. 1, 24).

On January 31, 2006, Mosser, Smith, and Floyd met secretly and without Williford. (R. Vol. 4, 26). The purpose of this meeting was to remove Williford as a member and employee of Bluewater. In the clandestine meeting, Mosser, Smith, and Floyd formally voted to remove Williford as a shareholder and to redeem his interest in the companies. To evidence the decision, the shareholders signed a document titled "Action by Unanimous Consent by Members of Bluewater Logistics, LLC." (R. Vol. 1, 28-29). The members entered into an identical document on behalf of Bluewater Bay, LLC. (R. Vol. 1, 30-31). These actions by the members of Bluewater memorialized the members' vote to remove Williford as a partner of Bluewater and provided that "[a] fair market value will be assigned to all current assets of [Bluewater] by the company accountant John C. Havard of Donnell & Associates, P.A. One quarter of that fair market value **will** be paid to James Stewart Williford, Jr. as compensation for his [shares of

Bluewater]." (R. Vol.1, 28-31)(emphasis added).[3]

When Williford showed up for work the first week of February, the locks were changed. The shareholders handed him their written decision and advised Williford that he was prohibited from any further contact with them or dealings on their behalf. He was completely cutoff from the Bluewater office, corporate papers, business decisions, finances, and all other aspects of the companies. (R. Vol. 4, 23-35). Williford's sole source of income came to an abrupt end. (R. Vol. 4, 21).

The LLC Agreement stated Williford remained a member until a closing date occurred and contained no authorization for an abrupt severing of a member from all connections to the business. (R. Vol. 1, 24). Aggrieved, Williford filed his Complaint for Preliminary and Permanent Injunction and Damages. (R. Vol. 1, 10-31). He sought, among other items of relief, to invoke his statutory appraisal rights and damages, including fair market value of his interest. (R. Vol. 1, 17). Following a full hearing, the trial court granted Williford's preliminary injunction, in part, and ordered the Defendants to refrain from physically verbalizing or suggesting Williford was not a current member of Bluewater; John Havard CPA was appointed to oversee the financial affairs of Bluewater and approve any expenditures out of the ordinary of operations; and no disbursements or reimbursements of any kind were to be made without court approval. Upon the request of the Defendants, the court denied Williford access to Bluewaters' office, with the exception of one visit for retrieval of personal items. (R. Vol. 1, 64-66).

During the litigation, the court entered several orders touching upon appraisal of the

---

[3]The reasons for his ouster, like in many partnership disagreements, were never entirely clear. The majority shareholders believed Williford was an unreliable member of the team and was too abrasive with clients, among other things. (R. Vol. 4, 73-84).

Bluewater companies and substituted Nancy Carpenter CPA in place of Havard.[4] Specifically, he ordered Carpenter to determine a fair market value of the companies for determination of Williford's share. (R. Vol. 1, 88).

The case came on for trial on July 18, 2007. Williford presented extensive evidence, including expert testimony, regarding his one-quarter interest in the business. The majority shareholders admitted they intended to pay Williford. At trial, with prodding from counsel, the shareholders announced they no longer wished to redeem Williford's shares. Marquetta Smith, one of the shareholders, had confessed at the earlier injunction hearing that Williford was entitled to his money. (R. Vol. 4, 83). (See the testimony of Floyd, Smith and Mosser, R. Vol. 6, 272, 292, 308). The shareholders did not revoke their decision that Williford would have no access to the company, no dealings with the company on its behalf and no relationship of any kind other than being a "member." Despite the Defendants' testimony regarding their misguided attempts to withdraw Williford's ouster, the court stated "there are no actions by the three remaining partners to withdraw the termination in any official or recognizable form that would be recognized by this Court." (R. Vol. 5, 207). The court noted the inequity of such a result as over one million dollars was unaccounted for, and Williford had been barred from the premises for almost two years. The court found no equity in allowing heavy heated tactics by the majority and stressed that the law allows for a minority shareholder's rights to be protected. (R. Vol. 6, 317).

Bluewater realized substantial income as a result of the two contracts in Harahan and Jennings. Much of that money has since been unaccounted for, at best, or pilfered at worst. One

---

[4]Havard had trouble getting meaningful information from the majority shareholders. Due to his busy schedule and a desire for independence from the dispute, he asked the parties for the appointment of another accountant. (R. Vol. 1, 83).

majority shareholder, Marquetta Smith, testified that the money collected for work performed on contracts prior to January 31, 2006, was deposited into Bluewater's account and had been used to pay vendors associated with that work. (R. Vol. 6, 296). The court appointed accountant was unable to verify this assertion or otherwise trace the flow of large sums of money after Williford was removed as a member.

After reviewing all assets and liabilities, including accounts payable and receivable, Carpenter, the court appointed accountant gave two alternative evaluation of Bluewater as of January 31, 2006, when the Defendants voted to oust Williford. The alternate values depended on whether a large expense with a certain vendor, Dream Couch, was attributable to the Louisian contracts. If so, the fair market value of Bluewater $1,267,073.01. If not, the fair market value was $2,508,073.01. (R. Vol. 5, 235). Bluewater's own accountant, John Havard, testified his estimation of the fair market value of Bluewater on January 31, 2006, was $1,000,000.00 to $1,200,000.00. (R. Vol. 5, 248). Undisputed is the fact that unaccounted for monies should have been deposited into company accounts. (R. Vol. 5, 215-217). Having heard each witness's testimony, the lower court recognized the discrepancies and stated there was no explanation as to where the money went or no indication Bluewater has any money left. (R. Vol. 6, 341).

At the conclusion of the trial, Judge Williams ruled that the desire of the majority shareholders to reverse their redemption of Williford's share was illogical, inequitable and a thinly disguised attempt to avoid payment to Williford for his share. The court noted that it would be grossly unfair to Williford to say that after the passage of almost two years, that he could suddenly be a member by name with no other rights in the company. The court further noted the fact that over that period of time, well over a million dollars was unaccounted for and that at the time of trial, the company alleged that it was almost penniless. Williford, during that

time, had no involvement with the business and could not be linked to Bluewater's management decisions and day to day business dealings.

The court weighed the extensive expert testimony of two accountants, Nancy Carpenter and John Havard. Both testified that as of January 31, 2006, when Williford was ousted, the fair market value of the business was approximately $1.2 million dollars. The court elected to award Williford the conservative figure provided by Carpenter, who had more in depth data supporting her numbers, a figure which amounted to $1,267,073.01. Williford's one-quarter share amounted to $316,768.25. On this award, the court added five percent (5%) simple interest beginning on January 31, 2006 and awarded Williford court costs and expenses. (R. Vol. 6, 327-329). The court denied Williford's relief for punitive damages and said that he did not know of any basis to award Williford his attorney's fees. (R. Vol. 1 and Vol. 6, 327-329).

Williford contends the misdeeds of the majority shareholders warrant the imposition of attorney's fees and punitive damages. In this appeal, he seeks affirmance of the judgment and remand for imposition of reasonable attorney's fees, not punitive damages.

SUMMARY OF THE ARGUMENT

I. The trial court correctly ruled Williford's Complaint pled the relief awarded.

Williford sued the majority shareholders seeking a broad range of remedies, including an accounting, an inspection of the corporate books, and an appraisal of the fair market value of the company, production of corporate documents and compensatory damages in an amount sufficient to satisfy his losses. (R. Vol. 1, 10-18). The majority shareholders were on notice from the outset of the litigation that the court was to mediate the partners differences and decide a fair market value of the company and Williford's interest.

This corporate dispute was properly before the court. Both sides raised claims and counterclaims with alternative relief requested, and following a full trial on the merits, the court had the authority to award payment to Williford for his fair market interest in the companies.

II. The trial court properly determined the evidence and law justified payment to Williford of his interest in the Bluewater entities.

The Limited Liability Company Agreement among the shareholders provided that upon a super majority vote of three members, a fourth member could be removed as a member and paid his 25% interest in the company. Three shareholders invoked this provisions and by formal vote and written resolution, elected to pay Williford the fair market value of his interest in the Bluewater entities. This decision was consistent with Mississippi law which authorizes payment to a member of the fair market value of his interest, following an appraisal of the business. Miss. Code Ann. § 79-29-214.

The trial court enforced the dictates of the LLC agreement and the Limited Liability Company Act when, after a full trial on the merits, he awarded Williford a conservative estimate of his one-quarter interest in the companies. The shareholders do not complain of the calculations of the accounting experts or the judge's decision to award Williford the smallest

sum presented at trial.

III. The trial court found sufficient evidence to support a judgment against the individual defendants.

The Limited Liability Company Agreement provides that the individual members may be liable to another member for acts of gross negligence or intentional wrongdoing. The Mississippi Limited Liability Company Act allows for the members, within their Agreement, to insert provisions for liability of members to other members.

There was overwhelming evidence of gross negligence and intentional wrongdoing by the shareholders of the companies. Williford filed several motions for contempt and to compel because the individual members were not complying with court orders of injunction, allowing the court appointed accountant access to company records. After multiple hearings, the court entered monetary sanctions against the defendants for failure to comply with the court's previous court orders. The accountant provided evidence to the court before trial that the majority shareholders were not compliant with her requests. At trial, the court appointed accountant testified that over one million dollars passed into company hands after Williford's ouster, yet the shareholders could not account for the monies. Contrary to the accountant's hard evidence, the majority shareholders sheepishly testified the company had few assets at the time of the trial. (R. Vol. 5, 215, 216, 229-230). The evidence revealed delay, contumacious conduct, contempt and conversion of corporate proceeds, all by the majority shareholders. Most of this conduct occurred under the eye of the court.

IV. The trial court erred by not awarding Williford his attorney's fees due to the Defendants' intentional breach of contract and wilful misconduct.

The Limited Liability Company Agreement is silent regarding the award of attorney's fees. Well accepted common law in Mississippi is that attorney's fees may be awarded in a

breach of contract action or for breach of fiduciary duty when there is evidence of gross negligence and intentional wrongdoing.

The court found, in his decision, that the individual members engaged in gross neglect and intentional wrongdoing. A review of the record shows abundant evidence of the shareholders' misconduct. By operation of law, Williford is entitled to recovery of a reasonable attorney's fee.

STANDARD OF REVIEW

Mississippi law is well established that the decision of a Chancery Court will not be disturbed "unless the chancellor's findings were unsupported by substantial evidence and were manifestly wrong or clearly erroneous, or if the chancellor applied an incorrect legal standard." *Balius v. Gaines*, 958 So. 2d 213, 218 (Miss. Ct. App. 2006). Furthermore, the Chancellor "is entitled to substantial deference when his determinations are subjected to attack on appeal and an appellate review searches only for abuse of discretion." *Id.* (quotation omitted). Questions of law are reviewed *de novo*. *Id.*

The Defendants argue that because the lower court adopted proposed findings of facts and conclusions of law submitted by Williford's counsel, the lower court's decision is afforded less deference or should be reviewed *de novo*. They omit that appellate courts will not find reliance on a party's findings in error if evidence exists to support the court's findings. *Thomas v. Scarborough*, 977 So. 2d 393, 396 (Miss. Ct. App. 2007). The lower court's judgment in this matter should be afforded the great deference provided by Mississippi law. *Id.* at 218-219 (stating that if the findings of fact and conclusions of law reflect or memorialize a chancellor's ruling from the bench, the appellate court "need not give the chancellor's judgment less deference."). In this case, the lower court ruled from the bench. The findings of facts and conclusions of law were a memorialization of the court's bench rulings. (R. Vol. 6, 325)(see chancellor directly quoting the court's trial ruling from the bench).

Judge Williams held an injunction hearing, multiple pre-trial hearings and a full trial. He reviewed all the evidence, heard the testimony and judged the credibility of witnesses. He was in the middle of a hotly contested, and at times acrimonious, battle. A chancellor is in a better position, than an appellate court, to determine what is fair and equitable, and he receives greater

deference. *Department of Human Services v. Ray*, 2008 WL 5220535 (Miss. Ct. App. Dec. 16, 2008). For this reason, deference should be given to the chancellor's ruling.

ARGUMENT

I. The trial court correctly ruled Williford's Complaint pled the relief awarded.

When the majority shareholders changed the locks and informed Williford he was no longer a member of the company, he went to court asking for a broad range of remedies, including appraisal rights under the Mississippi Limited Liability Company Act, and an appraisal of the fair market value of the business, an accounting of the corporate records, and all compensatory damages for his losses. Miss. Code Ann. § 79-29-214. (R. Vol. 1, 10-18).

The Act provides for any member to obtain payment of the fair market value of his interest to the extent provided by a limited liability company agreement. Miss. Code Ann. § 79-29-214(2). The Act states that "a court of equity may enforce a limited liability company agreement by injunction or by such other relief that the court in its discretion determines to be fair and appropriate in the circumstances." Miss. Code Ann.
§ 79-29-306(3).

The majority shareholders acknowledged the court's power in a motion to dismiss, arguing that any injury to Williford could be solved at the conclusion of a "trial on the merits by a money judgment award." (R. Vol. 1, 60A). They went on to argue that it should be an accountant who can figure ". . . what the fair market value for Williford's interest in the businesses [sic] are." (R. Vol. 1, 61-62).

At the injunction hearing, the court would not go so far as to allow Williford to rejoin the company. Instead, the court appointed an accountant to oversee the financial affairs of the company pending possible resolution. Following the hearing, the shareholders continued to argue that the court had the power to award damages to them which could be set off from Williford's ". . . interest he would receive at the settlement of this action." (R. Vol. 1, 70).

Counsel for the majority shareholders repeatedly stated to the court that Williford was entitled to his fair market share of the business, and that at a subsequent trial, it was for the court to determine the proper value of Williford's share. (R Vol. 4, 3-7). Counsel signed a court order acknowledging an "agreement has been reached regarding the procedure for appraisal of the fair market value of the Bluewater companies." (R. Vol. 2, 83).

Williford properly pled a wide range of relief, including the right to an appraisal procedure under the Mississippi Limited Liability Company Act and the determination of his fair market value in the company. Mississippi is a notice pleading state, requiring the pleadings only make the Defendant aware of the claims against him. The pleading need only be a short and plain statement of the claim and relief requested. *Crosswhite v. Golmon*, 939 So. 2d 831, 833 (Miss. Ct. App. 2006); *Estate of Stevens v. Wetzel*, 762 So. 2d 293, 295 (Miss. 2000).

M.R.C.P. 8 governs general pleadings. The Court in *Wetzel* noted M.R.C.P. 8 has eliminated the technical forms of pleadings. Notice pleadings place the opposing party on notice of the claim being asserted. No magic words are required by the Rules of Civil Procedure. Under Rule 8 of the Mississippi Rules of Civil Procedure, it is only necessary that the pleadings provide sufficient notice to the defendant of the claims and grounds upon which relief which is sought. *Wetzel*, 762 So. 2d at 285; *Bedford Health Properties, LLC v. Williams ex rel. Hawthorne*, 946 So. 2d 335, 350 (Miss. 2006). A Defendant who is not unfairly prejudiced and is aware of the issues before the court, may not complain of the precise wording of a pleading. Further, alternative pleading is allowed under M.R.C.P. 8(e). A party may not complain that another party asks the court for alternative relief in the event the court refuses to grant the litigant's principal request. *Sperry-New Holland, a division of Sperry Corp. v. Prestage*, 617 So. 2d 248, 261 (Miss. 1993). It is disingenuous for the Defendants to contend Williford never

asked for an appraisal and damages, as the pleadings and litigation were saturated with this issue, a form of relief promised by the majority.

II. The trial court properly determined the evidence and law justified payment to Williford of his interest in the Bluewater entities.

The chancery court, as a court of equity, has broad powers under the Act to do what is fair and equitable. The trial judge did not feel that the case warranted a finding that Williford remain in the business, and the court refused to require the parties to continue to work together. Instead, the court allowed the removal of Williford, the preferred action of the majority shareholders. The court enforced the super majority provision of the limited liability company agreement and ordered that Williford was entitled to his share of the company. (R. Vol. 6, 327-328).

At trial, the witnesses agreed that they did not want Williford working with them; he was to have no contact with the business, and that they had voted to pay him his share of the company. (R. Vol. 6, 272, 286, 315).

The only explanation for not paying Williford was argument that a letter written by defense counsel, in the middle of the litigation, revoked the decision of the shareholders to buy out Williford. Technically, the Limited Liability Company Agreement does not allow for this procedure. (R. Vol. 1, 24). Counsel is not a member of the company and was not authorized by the Agreement or otherwise to engage in company business. Miss. Code Ann. § 79-29-302 (management vested in members). The Defendants have cited five Mississippi cases which discuss an attorney's authority to act on behalf of a client, attempting to argue that counsel's letter was an official action by the Defendants to withdraw their termination of Williford as a member. See, *B.F. Goodrich Rubber Co. v. Holland*, 131 So. 882, 883 (Miss. 1931), *Scarborough v. Harrison Navel Stores Co.*, 52 So. 143, 144 (Miss. 1910), *Sears Roebuck & Co*

v. Devers, 405 So. 2d 898, 900 (Miss. 1991), *Terrain Enterprises, Inc. v. Western Casualty*, 774 F. 2d 1320, 1322 (5th Cir. 1985), and *Fairchild v. GMAC*, 179 So. 2d 185, 187 (Miss. 1965). However, as those cases explained, the attorney's authority pertains to the prosecution or defense of litigation, matters of procedure in litigation, "stipulations or agreements in connection with the conduct of litigation", or the "charge of [a] client's case". *Id.* (citations omitted).

Official corporate acts are not synonymous with counsel's authority as to procedure, the conduct of litigation, or the prosecution or defense of his clients' case. The Defendants have not, to date, taken any official or recognizable action, or any written action equivalent to the actions by unanimous consent and resolution, to withdraw Williford's ouster.

No written resolution or other affirmative vote was presented as support of this purported action. A corporation can act through its records and minutes, such memorialized official action. None was submitted. *His Way, Inc. v. McMullin*, 909 So. 2d 738, 745 (Miss. Ct. App. 2005). Contrary to arguments of counsel, there was an "offer" on the table which could be arbitrarily withdrawn. There was invocation if redemption of Williford's share through formal resolution and action.

Putting technicalities aside, the court correctly noted it would be unfair and inequitable to allow the shareholders to argue, by letter of counsel, that Williford was suddenly re-instituted as a member by name with no rights in the company. When the members ex-communicated Williford in January of 2006, they never had contact with him again. He was prohibited from any dealings for or on behalf of the company. He had no access to company records or books. He had no access to the office. He was not allowed to share in any decisions of the company or participate in any manner whatsoever. During the litigation in 2006 and 2007, Bluewater came into large sums of money which are unaccounted for. Williford had no involvement with

Bluewater during that time. Not until the money went missing and likely spent, did the shareholders, through counsel, shamelessly argue to the court that they had reversed their decision.

Counsel would have this court believe that the chancery court is not a court of fairness and equity. The Mississippi Limited Liability Company Act and the Limited Liability Company Agreement breath the principles of fairness and equity.

A closely held corporation is defined as a corporation having fifty or fewer shareholders where the management operates in an informal manner akin to a partnership. *Fought v. Morris*, 543 So. 2d 167, 169 (Miss. 1989). Directors and officers of a corporation stand in a fiduciary relationship to the corporation and its stockholders. *Fought*, 543 So. 2d at 171. Among these are the duties: "to exercise the utmost good faith and loyalty in discharge of the corporate office," *Id.*, "to exercise utmost good faith and loyalty in dealing with corporate property; and to repay the corporation for any illegal diversions of corporate assets for which they may have participated." *Gibson v. Manuel*, 534 So. 2d 199, 201-02 (Miss. 1988). Furthermore, stockholders of close corporations "must bear toward each other the same relationship of trust and confidence which prevails in partnerships, rather than resort to statutory defenses." *Id.*

The case of *Fought v. Morris* is an analogous case. 543 So. 2d 167 (Miss. 1989). In *Fought*, four individuals organized a company, each having 25% shares. *Id.* at 168. As part of the formation, the shareholders entered into a stock redemption agreement which assured that if a shareholder sold his shares, the shares would first be offered to the corporation, or in the alternative, the other shareholders would have the right to purchase a pro-rata share equal to the number of shares that shareholder owns, and then to any other person. *Id.* at 168-169.

Since the Mississippi Supreme had not spoken on the issues of loyalty and good faith

between shareholders, the *Fought* Court reviewed decisions from other jurisdictions. *Id.* at 170-171. Of those discussed, the Court found appropriate the rationale and standard in *Orchard v. Covelli*, 590 F. Supp. 1548 (W.D. Pa. 1984), and adopted its standard. *Id.* at 171. The Court discussed *Orchard* and recognized majority shareholders of a close corporation had acted unfairly toward a minority shareholder. *Id.* at 170. The *Orchard* court held "the controlling interest owes a duty of loyalty and fairness to minority shareholders, [and] stated that where a majority shareholder stands to benefit as a controlling stockholder, the law requires that the majority's action be 'intrinsically fair' to the minority interest." *Id.* The *Orchard* court further stated:

> [T]hat adherence by the majority interest to its fiduciary duty is particularly critical in the context of the closely held corporation, and recognized the acute vulnerability of minority shareholders in such a corporation.

Orchard, 590 F. Supp. at 1557.

The Mississippi Supreme Court adopted the "intrinsically fair" standard and stated "stockholders in close corporations must bear toward each other the same relationship of trust and confidence which prevails in partnerships, rather than resort to statutory defenses." *Id.* at 171. This means that stockholders are required to adhere to corporate statutes, and must not circumvent bylaws, charters, or various agreements, i.e. stock redemption agreements, by blind adherence. *Id.*

In another case, the Mississippi Supreme Court stated that a "[c]orporate freeze out is an intentional tort that is committed with wilful and wanton disregard for the right of the shareholder who is frozen out." *Missala Marine Services, Inc. v. Odom*, 861 So. 2d 290, 295 (Miss. 2003). The Court went on to say that the plaintiff "asserted in her complaint and presented evidence at trial that [the defendant] committed gross negligence by breaching its

fiduciary duty to her as a minority shareholder and not permitting her to participate as a shareholder." *Id.* The Court recognized both of these claims are of the type for which punitive damages can be awarded in Mississippi. *Id.*

Consistent with these principles, the chancery judge in our case determined that Williford had invested time, capital and energy in the fledgling company. He was a member of the company with the same rights as the other members. When the other members removed him, Williford was immediately entitled to his one-quarter interest in the company at the time of his removal.

At the trial 18 months later, the court heard extensive testimony from the company's own accountant, John Havard, and an independent court appointed expert, Nancy Carpenter CPA. Havard testified that based upon his review of the books and knowledge of the workings of the company, the company had a value of approximately $1 million to $2 million dollars and that Williford's one-quarter interest was $250,000.00 to $300,000.00.

Nancy Carpenter provided a more detailed analysis of the company and her working papers were attached as exhibits at the trial. (See Exhibit 2). There were a large number of accounts receivables showing on the books and numerous discrepancies. Carpenter noted that over a million dollars had been allegedly received by the company but not shown on the books. Notwithstanding this, she determined that the fair market value of the company was either $2,508,073.01 or $1,267,073.01, depending on whether a purported expense, Dream Coach, was attributable to the Louisiana contracts. Willford's share would either be $627,018.25 or $316,768.25, adjusting for the Dream Coach expense. (Exhibit 1).

The court heard all of this testimony and elected to choose the most conservative figure of $316,768.25. On top of that, the court awarded a conservative interest of 5%, calculated from

January 31, 2006, in the amount of $23,999.99. The total judgment was $340,760.24. (R. Vol. 2, 298).

There was sufficient evidence to support the court's award in favor of Williford. This ruling is consistent with the Mississippi Limited Liability Company Act and the shareholders' own Limited Liability Company Agreement and Omnibus Resolution.

III. The trial court found sufficient evidence to support a judgment against the individual defendants.

The Limited Liability Company Agreement provided in Paragraph 15 that a member could be liable in damages to another member for acts of gross negligence or intentional wrongdoing. (R. Vol. 1, 25). The Mississippi Limited Liability Company Act allows for members of a limited liability company to establish provisions concerning liability among the members. Miss. Code Ann. § 79-29-403.

There was abundant evidence of intentional wrongdoing and gross neglect by the majority shareholders.

On February 2, 2006, the majority shareholders voted to pay Williford his one quarter interest in the company. They voted for an appraisal to be done of the company. Yet, the shareholders did not fulfill this pledge and as of the time of a trial, a year and a half later, the shareholders had not tendered to Williford his interest in the company. In fact, the shareholders did not require or even ask for an appraisal to be done.

During the course of the litigation, Williford had to file multiple motions to compel and for contempt. (R. Vol. 1, 75, 90, 198). The defendant shareholders would not comply with discovery and, they would not comply with the requests of the court appointed independent accountant for information. After multiple hearings, the court finally entered a monetary sanction against the defendants for failure to provide the expert with the corporate records and

accounting books necessary to determine an appraisal of the company. (R. Vol. 2, 229). At trial, the accountant, Nancy Carpenter, testified that there were numerous unexplained discrepancies in the corporate books. After suit was filed, the steady stream of income into the Bluewater entities suddenly stopped. The individual shareholders admitted that over a million dollars had been received after suit was filed, but there was no indication of deposits having been made in the corporate accounts. The individual shareholders had no explanation for where the money went, and it was apparent to the court that the money may have been diverted and possibly converted for the shareholders' own benefit. Counsel for the majority shareholders admitted to the court he did not "know where the money is." (R. Vol. 6, 318). The court, exasperated with the defendants, stated he did not see "good faith" and was deeply concerned about the unexplained financial discrepancies, most of which occurred during his injunctions. (R. Vol. 6, 327-328).

The court had entered multiple orders prohibiting the shareholders from making distributions to themselves out of the company proceeds. Notwithstanding these orders, at trial the members admitted that they repeatedly made payments to themselves. (R. Vol. 6, 275, 287). Exhibits 7 and 9 are copies of Bluewater bank statements containing examples of checks written by shareholders to themselves in direct contravention of the judge's orders. On the other hand, Williford had no connection with the company whatsoever and received no compensation or other remuneration.

When the trial concluded, the court was confronted with these undeniable facts: (1) Shortly before Williford's ouster, the majority shareholders came into large sums of money in a very short period of time. These sums were in excess of $2 million dollars; (2) After Williford was terminated and filed suit, the shareholders continued to collect money, in excess of $1

million dollars, but they could not account for where it went; (3) The shareholders made payments to themselves out of company accounts contrary to court orders; (4) The shareholders never fully complied with the requests of the accountant to provide complete, truthful and unfiltered information; (5) The company alleged that it had virtually no money left to pay Williford though it had collected more than $1 million dollars from the time he filed suit, and the company had virtually no overhead as the shareholders worked out of a small office with no employees; (6) The shareholder attempted to renege the redemption decision notwithstanding the gross malfeasance listed above; and (7) The shareholders callously offered no explanation for their conduct.

There was sufficient evidence to support an award against the individual shareholder defendants.

IV. The trial court erred by not awarding Williford his attorney's fees due to the Defendants' intentional breach of contract and wilful misconduct.

Williford cross-appeals the failure of the judge to award reasonable attorney's fees. Because the shareholders engaged in intentional wrongdoing and were grossly negligent, the court's findings supported an award of a reasonable attorney's fee.

The Limited Liability Company Agreement is silent regarding the award of attorney's fees. The Limited Liability Company Act does not prohibit the award of attorney's fees in cases of gross malfeasance. Common law on this subject provides that in cases of intentional breach of contract and wilful breach of fiduciary duties, attorney's fees are awardable. *Barnes, Broome, Dallas & McLeod, PLLC v. Estate of Maryland I. Cappaert*, 991 So. 2d 1209, 1214 (Miss. 2008). A breach of fiduciary duty, among others, is recognized as an extreme or special additional circumstance where attorney's fees may be award. *Fought*, 543 So. 2d at 173.

The *Odom* court found that a corporate freeze out is an intentional tort that is committed

with wilful and wanton disregard for the right of the shareholder who is frozen out. When the majority shareholders breach their fiduciary duty to the minority and prohibit them from participating as a shareholder or otherwise act with gross neglect or intentional wrongdoing, a claim lies for attorney's fees and punitive damages. *Odom*, 861 So. 2d at 296.

When the judge found against the individual members, the same evidence supported an award of reasonable attorney's fees. (Williford also could complain of the failure of the judge to award punitive damages, but as the shareholders have spent all the money, the collectability of this judgment is in serious doubt). See *Sudeen v. Castleberry*, 794 So. 2d 237, 252 (Miss. Ct. App. 2001)(attorneys fees are justified in cases of wilful breach of contract and intentional disregard for one's rights).

The proper procedure is for this court to affirm the decision of the trial court and remand the case to the judge for a hearing and award of Williford's reasonable attorney's fees.

CONCLUSION

The judgment of Chancellor Williams should be affirmed, along with his award of interest, and the case should be remanded to the trial judge for a determination of Williford's reasonable attorney's fees.

Respectfully submitted, this the 16 day of January, A.D., 2009.

JAMES STEWART WILLIFORD, JR.

BY: Clark-Hicks
L. CLARK HICKS, JR., [redacted]

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that I have this date served via U.S. Mail, first class, postage prepaid, the original and four (4) true and correct copies of the above and foregoing Brief of Appellee/Cross-Appellant to the following:

Honorable Johnny L. Williams
Forrest County Chancery Court Judge
P.O. Box 1664
Hattiesburg, MS 39403-1664

Robert R. Marshall, Esq.
Law Offices of Erik M. Lowrey PA
525 Corinne Street
Hattiesburg, MS 39401

Ms. Betty Sephton
Mississippi Supreme Court Clerk
P.O. Box 117
Jackson, MS 39205

THIS the 16 day of January, 2009.

Clark Hicks

L. CLARK HICKS, JR., [redacted]
Gunn, Hicks, & Bennett PLLC
211 South 29th Avenue, Suite 201 (39401)
Post Office Box 18350
Hattiesburg, MS 39404-8350
Telephone: (601) 544-6770
Facsimile: (601) 544-6775
Email: clark@gunnandhicks.com
Attorney for Appellee/Cross-Appellant,
James Stewart Williford, Jr.