SUPREME COURT OF MISSISSIPPI
NO. 2010-CA-02077

DAVID L. MARTINDALE **APPELLANT**

V.

HORTMAN HARLOW BASSI
ROBINSON AND MCDANIEL, PLLC **APPELLEE**

ON APPEAL FROM THE CHANCERY COURT
OF JONES COUNTY, MISSISSIPPI
SECOND JUDICIAL DISTRICT

BRIEF OF APPELLEE

Oral Argument Not Requested

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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 may evaluate possible disqualification or recusal.

Chancery Court Judge (by special appointment to Chancery Court of Jones County, Mississippi):	Hon. Sanford Steckler
Appellant:	David L. Martindale
Appellee:	Hortman Harlow Bassi Robinson and McDaniel PLLC (Members: Norman Gene Hortman, Jr. Eugene M. Harlow Deidra Jones Bassi Brett W. Robinson Christopher B. McDaniel)
Attorneys for Appellant:	Clyde H. Gunn III David N. Harris, Jr.
Attorneys for Appellee:	Corlew Munford & Smith PLLC (Members: John G. Corlew Virginia T. Munford Kathy K. Smith)

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STATEMENT OF THE CASE

I. Statement of Facts

Martindale practiced law with the Plaintiff Hortman Harlow law firm ("the law firm") for approximately fourteen (14) years. The law firm was a professional limited liability company governed by an Operating Agreement. Martindale signed the Operating Agreement year after year during his membership with the law firm. (R. 107-149.)[1] The Operating Agreement provided for expulsion of a member by unanimous vote of the other members. Section 9.1.b. (R. 40, R.E. 80.) The Operating Agreement provided for compensation of an expelled member. Section 9.5. (R. 42, R.E. 82.)

On February 25, 2009, by hand delivered letter, the law firm formally advised Mr. Martindale of his expulsion by unanimous vote of the firm's other members, and their election to pay him "an amount equal to your points less any outstanding personal debt owed to the PLLC." (R.192, R.E. 103.)[2] The payment formula was dictated by the

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1 The terms of the law firm's Operating Agreement remained substantially the same over the years through various amendments, except for changes in members' interests. The terms "Operating Agreement" and "Amended Operating Agreement" are used interchangeably in this brief. The last adjustment to the membership percentages before Martindale's ouster on February 25, 2009, was made on January 2, 2007. The amendment to the Operating Agreement memorializing the action taken at the firm's meeting of January 2, 2007, was signed by the other 5 members of the firm but Martindale refused to sign because he claimed one of the members, Mr. McDaniel, owed him $220. The fact that Martindale did not sign the 2007 amended agreement is of no legal effect, since he signed the Minutes of that meeting, at which he presided as firm President at the time, and he accepted his assigned 18% share of firm distributions for the next 25 months. (Affidavit of Deidre J. Bassi, Exhs. 3 and 5 to Motion of Plaintiff for Summary Judgment, R. 209-211, R.E. 120-122.)

2 Martindale's brief suggests that there was no writing reflecting the law firm's unanimous vote to expel Martindale. The Operating Agreement contains no such requirement, but the record

Operating Agreement, Sections 9.2(a), as incorporated in Section 9.5. The law firm tendered Martindale this amount without deducting any indebtedness amount for his indebtedness to the law firm. The law firm secured release of Martindale from any obligation for law firm indebtedness. (R. 211, Exhibit 4, R.E. 122.)

The Operating Agreement.

The agreement contains the following language:

Article IX. TERMINATION OF A MEMBER'S INTEREST

Section 9.1. Termination of a Member's Interest. A Member's Membership Interest in the Company shall terminate upon any of the following occurrences:

. . . .

(b) Expulsion of a Member by a unanimous vote of the other Members; . . . .

. . . .

Section 9.5. Option to Dissolve. Upon the termination of a Member's Membership Interest under Section 9.1(b) [expulsion], . . . of this Agreement, the other Members may elect either (1) to pay an amount equal to the terminated Member's points as calculated pursuant to Section 9.2(a) less any debt to Company; or (2) to dissolve the Company, in which case all Members (including the terminated Member) shall share in the liquidation proceeds, if any, according to Article IX of this Agreement. (Emphasis added.)

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clearly reflects a hand-delivered letter to that effect on the date of Martindale's ouster, and no contrary evidence. (R. 192, R.E. 103)

Upon expulsion of Martindale, the law firm elected not to dissolve[3] under Section 9.5, but rather to pay Martindale under the death/retirement formula of Section 9.2(a), *i.e.*, $1100 multiplied by his percentage membership interest.

Martindale cites his service to the law firm for 14 years. The law firm operated on a cash basis (Affidavit of Doug Seidenburg, Exh. 8 to Motion of Plaintiff for Partial Summary Judgment, R. 223-228, R.E. 134-139), and for each of those 14 years Martindale received his full percentage value of the firm's profits. The other members of the law firm received their respective percentages of profits. No member of the law firm accumulated any right to compensation beyond that, or accrued any "equitable" right to additional compensation; indeed, there was no accumulation of profits, or reservoir of money, to fund such a hypothetical expectation.

Most professional organizations which provide services derive value only from the ability of its members to generate income from those services. The Hortman Harlow law firm was no different. Its assets–furniture, books, supplies, etc.–did not translate into significant capital account value to its members. In fact, Martindale's capital account[4] had a negative value. (R. 223-228, R.E. 134-139.) After expulsion, Martindale

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[3] Martindale's percentage interest at the time of expulsion was 18%, hence the law firm delivered a $19,800 check to Martindale. (R. 209, R.E. 120.) The law firm elected to forgive Martindale's indebtedness to the firm, which it had the right to deduct in accordance with the Operating Agreement. The law firm released Martindale from any liability on the firm indebtedness. (R. 211, Exhibit 4.) *If the firm had elected to dissolve, Martindale would have received nothing.* His capital account was negative.

[4] Effectively, his share of the law firm's "equity" value.

did receive full benefit of his retirement account. (Martindale deposition, R. 216-17, R.E. 127-128.)

Martindale's argument that he has rights beyond the Operating Agreement pursuant to the equitable principles of "intrinsic fairness" is a mockery of the entire body of contract law and directly contrary to the provisions of the (Revised) Mississippi Limited Liability Company Act, Miss. Code §§ 79-29-101, *et seq.* (2011).

SUMMARY OF ARGUMENT

The Chancellor correctly applied Mississippi contract law to hold that the Operating Agreement should be enforced as written. The Operating Agreement clearly provides a formula for payment to an ousted member upon expulsion from the professional limited liability corporation, and the law firm complied with the Operating Agreement's provisions in calculating its payment to Martindale. Neither Mississippi statutes nor Mississippi case law provides any right to additional payment to Martindale. The Chancellor adequately considered all evidence, including Martindale's arguments that he was unfairly treated by the law firm, and correctly concluded that this case presents no dispute of material facts, and the law supports enforcement of the Operating Agreement as written.

The Chancellor did not abuse his discretion by failing to make fact findings on Martindale's counterclaims. In fact, despite having no duty to do so, the Chancellor made findings and legal conclusions which dispose of the counterclaims and support the award of summary judgment in favor of the law firm on the four counterclaims of Martindale which are the subject of this appeal.

ARGUMENT

Introduction.

This is a classic case for summary judgment. On this appeal, there is no dispute of material facts surrounding the expulsion of Mr. Martindale by Hortman Harlow Bassi Robinson and McDaniel PLLC ("the law firm").[5] The questions on appeal are whether the Chancellor properly applied the law in determining the rights of the parties under the Operating Agreement which governed their professional relationship as a law firm, and in particular, whether Martindale received the amount due to him upon his ouster from the law firm. The Operating Agreement governing the law firm clearly establishes a price the law firm must pay an ousted member, and the firm tendered Mr. Martindale that amount. Martindale has no statutory or other right to additional payments.

The Chancellor's order granting partial summary judgment was based upon a valid enforcement of the plain language of the Operating Agreement. The Chancellor's conclusion as to the contractual rights of the parties is bolstered by Mississippi statutory and case law governing professional corporations. There is no basis for Martindale's contentions that the Chancellor erred by failing to consider other "rights and remedies" in the Operating Agreement, because he has failed to show any other rights which Martindale can claim under the Agreement or applicable statutes. Martindale has failed

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5 Disputed factual issues remain only as to the Fifth Counter-Claim of Martindale against the law firm, alleging Assault, Battery, and Intentional Infliction of Emotional Distress. (R. 29-30, R.E. 19-20.) Hortman Harlow did not move for summary judgment on those claims and they are not certified for appeal here. (R. 367-68, 372-73, R.E. 101-102, 140-142.)

to establish that the Chancellor applied an erroneous legal standard by not applying "equity" or "intrinsic fairness" to change the terms of the contract. Martindale has no such right to additional relief, and even if he did, the Chancellor's Order granting partial summary judgment evidences adequate consideration of fairness and equity factors in granting summary judgment on the law firm's claims and four of Martindale's counterclaims.

Martindale contends that he should receive a share of the contingent fee from the *Billy Jack McDaniel* case, which was settled by the law firm following a multi-day trial in Texas in August 2009, six months after Martindale's departure from the firm. That case originated in the law firm through the *McDaniel* plaintiff's relationship with his first cousin, Chris McDaniel, an attorney in the law firm. Mr. McDaniel and another firm member, Gene Harlow, handled the case for the firm, including trial. Mr. Martindale had no role in securing or prosecuting the case. After Mr. Martindale's termination, as is customary, the law firm continued its representation of certain cases, including the *McDaniel* case, and Mr. Martindale continued his separate representation of some other cases, including another contingent fee case in which the law firm claimed no part after Martindale's departure. (Affidavit of Deidre J. Bassi, Exhibit 3 to Motion of Plaintiff for Summary Judgment, R. 209-210.)

Martindale's argument for additional payment from the law firm fails for a number of reasons:

(1)-(2) The Chancellor's opinion granting partial summary judgment did explicitly consider Martindale's argument that equitable considerations entitled him to additional payments beyond those provided by Sections 9.5 and 9.1(b) of the Agreement, and he correctly applied Mississippi law of contracts to conclude that the law firm's payment was sufficient as a matter of law. Neither the Agreement nor statutory law provides Martindale with any right to additional payment.

(3) Contrary to Martindale's suggestion, this Court's reversal of the *Bluewater Logistics LLC v. Williford*, 55 So.3d 148 (Miss. 2011) case, relied upon by the Chancellor, does not change basic contract law which would enforce the Agreement by its terms; and *Fought v. Morris,* 543 So.2d 167 (Miss. 1989), provides Martindale with no "right" to additional payments.

(4) Mississippi law does not require the Chancellor to find facts on a summary judgment motion. Nevertheless, the Chancellor's Order Granting Partial Summary Judgment clearly shows that he did make findings of fact, based on the evidence regarding Martindale's contributions to the firm in light of the terms of the Agreement as well as fairness and equitable considerations. The Chancellor correctly concluded that additional payments beyond those provided in Section 9.1(b) and 9.5

of the Agreement would have been contrary to law. These conclusions were legally correct and should be affirmed by this Court.

1. Neither the Operating Agreement nor the Mississippi LLC statutes provide Martindale a "right" to any additional payment.

Martindale's argument that the Operating Agreement incorporates additional rights provided by the LLC statutes, including a provision which allows a court to award discretionary relief determined to be "fair and appropriate in the circumstances," fails. Both statutes cited by Martindale as providing this "right," Miss. Code § 79-29-306(3)(a) and § 79-29-602, are no longer in effect. Additionally, even if those statutes were deemed to be in effect for purposes of the present case, they would not provide Martindale with any right to additional payments under the Agreement. Contrary to Martindale's assertion, Miss. Code § 79-29-306(3)(a) did not provide him with any rights, but only *allowed* a court to use appropriate remedies, "in its discretion," *to enforce an LLC agreement.* Allowing a discretionary remedy (a tool such as injunction or damages for enforcing a right) is not the same as creating a statutory right. The statute read in pertinent part as follows:

> (3)(a) 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 § 79-29-306, *Repealed* by Laws 2010, Ch. 532, § 3, eff. January 1, 2011.

This statute is no longer of any effect. This Court has stated the following concerning the effect of a repealed statute:

> . . . [T]he effect of the repealing statute is to obliterate the repealed statute as completely from the records . . . as if it never had been passed. . . . It must be considered as a law that never existed, except for the purpose, actions or suits which were commenced, prosecuted and concluded while it was an existing law. [Citations omitted.] *Musgrove v. Vicksburg and N.R. Co.*, 50 Miss. 677 (Miss. 1874).

This Court must apply the law as it exists presently, *i.e.*, at the time this Court acts. Even if this statute were considered to grant an additional right to Martindale in addition to the Operating Agreement – which is denied – the statute is of no effect on this appeal. In *Hudson v. Moon*, 732 So.2d 927 (Miss. 1999), this Court reaffirmed the principle that repealed statutes are of no effect in a pending case (unless there has been a final judgment on a vested contract right), stating the following:

> . . . Many decisions in this state have affirmed the rule that the effect of a repealing statute is to abrogate the repealed statute as completely as if it had never been passed . . . . The result of this rule is that every right or remedy created solely by the repealed . . . statute disappears or falls with the repealed statute, unless carried to final judgment before the repeal . . . , save that no such repeal . . . shall be permitted to impair the obligation of a contract or abrogate a vested right. (Emphasis added.) 732 So.2d at 931.

Furthermore, Martindale's plea for this Court to apply equity and fairness principles to award him additional payment from the law firm flies in the face of the clear principles of Mississippi law governing limited liability companies (LLCs) and professional LLCs. The state statutes repeatedly defer to the terms of LLC agreements as the operative instruments for defining rights of the parties, and provide rules for

valuing a departing member's interest only if the Agreement does not provide a rule. *See, e.g.,* Miss. Code § 79-29-601, 79-29-603, 79-29-911 (2011).

Mississippi statutes explicitly recognize the primacy of the terms of the Operating Agreement as to valuation of a member's interest, as follows:

> If a price for the membership interest [in a professional limited liability company] is established in accordance with the . . . written operating agreement or by private agreement, that price controls . . . . Miss. Code § 79-29-911(2).

Likewise, Miss. Code § 79-29-602 (cited by Martindale in opposition to summary judgment, R. 235) provided recovery of "the fair value" of a member's interest in the LLC only "if not otherwise provided [under the . . . limited liability company agreement.] *Repealed* by Laws 2010, Ch. 532, § 3, eff. January 1, 2011. This statute, even if it were still in effect, would afford no additional right to Martindale in the present case, since the LLC agreement provided its own formula for payment.

Finally, Miss. Code § 79-29-603 (2011), also cited by Martindale, provides a manner of valuing a member's interest "upon withdrawal," which is applicable only "if not otherwise provided in an operating agreement . . . ." This statute does not apply here, since Martindale's departure was not a withdrawal but an expulsion, and since the Operating Agreement clearly does have a provision valuing an expelled member's interest.

In the present case, the Operating Agreement specifically provides a price for an expelled member's interest, and clearly, that price controls. An LLC's Operating Agreement is interpreted pursuant to contract law. *Kinkle v. R.D.C., LLC,* 889 So.2d 405

(La. App. 3Cir. 2004), cited with approval by this Court in *Bluewater Logistics, LLC v. Williford*, 55 So.3d 148 (Miss. 2011). The Chancellor's Order enforced the contract as written, and this Court should affirm that decision.

2. The Chancellor considered and rejected Martindale's argument that the law firm acted unfairly in failing to award him a portion of a large contingent fee received by the law firm six months after Martindale's expulsion.

In the present case, contrary to Martindale's suggestion, the Chancellor had **no** statutory duty to consider whether "fairness" demanded that he award additional money to Martindale. But in fact he did so, made findings thereon, and ultimately concluded that the contract damages provided in Sections 9.5 and 9.1(f) of the Operating Agreement control. The Court made the following pertinent findings:

> 1. . . . [T]his operating agreement has been in full force and effect, as written, since September 1, 1995, amended January 1, 2001, and thereafter amended annually only to reflect the changing points of the members of Hortman Harlow.
>
> 2. Martindale was one of the senior partners in this firm and no doubt had a hand in drafting and approving the operating agreement.
>
> 3. All of the parties to the operating agreement are well-educated, sophisticated attorneys who are adept at drafting, reading, interpreting, and entering into contracts.
>
> 4. The language used in the operating agreement is not complex nor outside the education of the members signing the document.
>
> 5. The print on the operating agreement is of sufficient size that no magnifying glass is required, and there is no disparity in sophistication or bargaining power of the parties to this operating agreement, nor a lack of opportunity to study and inquire about any of its terms.

6. . . . [T]he court finds Martindale to be articulate and knowledgeable regarding the law and contracts and would not have entered into this operating agreement if he felt the terms were such that 'no one in their right minds' would enter into. [*sic*] [Citations omitted] Order Granting Partial Summary Judgment. (R. 332-340, R.E. 65-73.)

These findings by the Chancellor are in direct response to Martindale's arguments that the law firm, by expelling him, was attempting to cut him out from distribution of his "fair interest" in a large personal injury contingent fee in the *Billy Jack McDaniel* case, which was received by the firm some six months after Martindale's expulsion. At the time of his expulsion, this fee was a contingency, and nothing more. Martindale, during his tenure as a member of the firm, shared in the customary manner in the multiple possibilities as to this contingent fee, *i.e.*, that the contingent fee would never materialize at all; or that it would amount to a smaller amount than the expenses incurred by the law firm in prosecuting the case; or that it would result in a profit to the firm. The fact that the contingent fee ultimately materialized in a profitable amount, after a multi-day trial, six months after Martindale's departure, does not change the contract under which Martindale operated for 14 years, and under which he was expelled from the firm. In fact, the evidence before the Chancellor as he made his "fairness" analysis included Martindale's disagreement with the firm's substantial investment of effort and money in the *McDaniel* case which produced the fee he now wants to claim. (R. 233.)

Martindale cannot now be allowed to rewrite the Operating Agreement under which he and his law firm operated for 14 years because the outcome of that case, after his ouster, was favorable to the law firm. The Chancellor considered Martindale's

evidence that as a firm member he accepted smaller salaries during the pendency of the personal injury action and that he participated in the firm's indebtedness to finance the firm's work on the personal injury case. (R. 265-66.) The Chancellor also considered evidence that Martindale personally had no role in securing or prosecuting the *McDaniel* case (Affidavit of Deidra J. Bassi, R. 210, R.E. 121) and disagreed with members of the firm as to how the case was prosecuted. (Martindale's Response in Opposition to Motion for partial Summary Judgment, R. 233.) The Chancellor considered the fairness argument in his discretion and concluded that the firm had not violated any duty of fairness which would override the terms of the contract as written. The weight of the evidence clearly favors the law firm in such an analysis, such that, even if this Court were to apply a fairness analysis to the contract, there is nothing in the record to compel a different result from that reached by the Chancellor.

3. Neither the *Bluewater Logistics* nor the *Fought v. Morris* case provides Martindale a right to additional payments in this case.

Martindale makes much of this Court's reversal of the *Bluewater Logistics* case, 55 So.3d 148 (Miss. 2011). But the *Bluewater Logistics* case does not change basic contract law. In fact, this Court in that case enforced the terms of the LLC agreements, just as the law firm urges in the present case. The reversal in *Bluewater Logistics* resulted in an LLC member's right to receive payment for his shares in the LLCs following his ouster by the other members. In its conclusion, this Court enforced the LLC operating agreements, disallowing the majority members' attempt to act outside the agreements by rescinding the company's action to oust the minority member and

attempting to retract their offer to purchase his shares. This Court specifically stated the following:

> An LLC operating agreement is contractual in nature and binding on the members of the company.

Id. at 162.

The point of this Court's opinion in *Bluewater Logistics* is that the terms of the LLC agreements control. The *Bluewater* LLC agreements set the value of the departing member's interest at its "fair market value." *Id.* at 161. Those agreements had no provisions allowing the majority members to rescind their ouster of the minority member or their "offer" to purchase his shares, and this Court enforced the agreement as written. *Id.* at 162-163. By contrast, in the present case the law firm is relying upon specific contract language to determine the amount due to Martindale upon expulsion. This is fundamentally distinguishable from the majority's actions in the *Bluewater Logistics* case, which were conflicting and not based upon any contractual provision.

Additionally, in the *Bluewater Logistics* case, this Court considered application of the Mississippi Limited Liability Act to that LLC agreement. The question was whether the Court could award the money damages as a remedy for the majority's "unfairness" toward the ousted member. The Court, relying on Miss. Code § 79-29-306(3), concluded that the Chancellor did have power to fashion such a remedy (as opposed to an injunction). The measure of the damages, fair market value, actually came from the LLC agreement. In the present case, the LLC agreement provides precisely the measure of payment (under Section 9.2(a)) awarded to Martindale by the law firm. In

any event, the statutory authority of the Court recognized in the *Bluewater Logistics* case no longer exists because the statute is repealed.

Similarly, the *Fought v. Morris* case, 543 So.2d 167 (Miss. 1989) does not create new rights for Martindale beyond those afforded under the Operating Agreement and Mississippi statutes. In *Fought*, this Court reaffirmed the controlling nature of the governing corporate agreement and rejected the parties' attempt to circumvent its provisions. In *Fought*, the Court disallowed a stockholder in a close corporation from circumventing the contract requirements set out in the corporate agreement. That agreement required that a shareholder desiring to sell his stock offer it to the corporation or other stockholders in their proportionate shares. The selling shareholder in *Fought* attempted to sell his shares without adhering to that requirement, changing the balance of control in a close corporation. This Court held that the buyer's action in purchasing that stock violated his duty of good faith not only as an officer and director but as a shareholder, because he acted contrary to the stock redemption agreement. It was the shareholder's breach of the agreement which gave rise to this Court's conclusion that the shareholder violated a duty of good faith to his co-shareholder. The Court explained as follows:

> In the case *sub judice* the stockholders had entered into an agreement which constituted corporate policy. . . . When Peyton decided to sell his stock, Morris saw a way to take control. . . . Morris' intended exclusion of Fought from the purchase of Peyton's shares was a breach of the Stock Redemption Agreement and bylaws, and therefore a breach of his fiduciary duty as an officer, a director and a stockholder under the good faith standard we adopt today. [Citations omitted.] We hold, therefore, that

> Morris breached his fiduciary duty in purchasing all of Peyton's stock, contrary to the Stock Redemption Agreement. *Id.* at 172-73.

That case's recognition that close corporations require "intrinsic fairness" does nothing to change the rights of the present parties. Adhering to the corporate agreement is the best way to recognize intrinsic fairness, because that is what the parties agreed to as fair when they joined together as a law firm. *Fought* has no bearing whatsoever on the present case and creates no right in Martindale to any extra-contractual recovery.

4. The Chancellor did not abuse his discretion in failing to make fact findings on Martindale's counterclaims. In fact, despite no duty to do so, the chancellor made findings and legal conclusions which dispose of the counterclaims.

Martindale's argument that the Chancellor failed to make fact findings regarding Martindale's counterclaims and thereby abused his discretion, fails for a number of reasons. First, though Martindale cites "facts greatly in dispute," he fails to identify even a single issue of material fact which would render improper the summary judgment on the relevant counterclaims. With no showing of such issue of material fact, *i.e.*, a fact which "matters in an outcome determinative sense," summary judgment should be affirmed. Mississippi Rules of Civil Procedure (M.R.C.P.) 56. This Court stated the rule as follows in *Mercer v. Progressive Gulf Insurance Co.*, 885 So.2d 61, 64 (Miss. 2004):

> The presence of fact issues in the record does not per se entitle a party to avoid summary judgment. The court must be convinced that the factual issue is a material one, one that matters in an outcome determinative sense .... [T]he existence of a hundred contested issues of fact will not thwart summary judgment where there is no genuine dispute regarding the material issues of fact. [Citations omitted.]

Second, this Court has stated that, contrary to Martindale's assertion, it is not necessary for a court to make findings of fact on a motion for summary judgment, as may otherwise be required if a party requests them under M.R.C.P. 52. In *Harmon v. Regions Bank*, 961 So.2d. 693, 700 (Miss. 2007), this Court stated the following:

> . . . . Rule 52 of the Mississippi Rules of Civil Procedure only requires findings of fact in actions tried by the court without a jury and where a party files a motion no later than ten days after entry of judgment. Even though evidence may be received by way of sworn affidavits, deposition testimony and other such evidence, a Rule 56 summary judgment hearing is not an action 'tried upon the facts without a jury' so as to trigger Rule 52 applicability. Neither of those circumstances contemplated by Rule 52 are present here, therefore findings of fact are not necessary. (Emphasis added.)

Martindale asserted five (5) counterclaims in the present case, four of which were determined by the Chancellor to be disposed of by the partial summary judgment granted, *i.e.,* 1) declaratory judgment that the Operating Agreement governing the law firm is invalid and unenforceable; 2) declaratory judgment that the Operating Agreement entitles Martindale to the additional remedy of receipt of the "fair value" of a Member's interest in the firm; 3) judicial dissolution of the PLLC; and 4) damages for alleged breach of duties of good faith and fair dealing. (R. 25-30; R.E. 15-20.) Hortman Harlow did not move for summary judgment on a fifth counterclaim for damages for alleged assault, battery and intentional infliction of emotional distress. That counterclaim was not addressed by the Chancellor's opinion and is not relevant to this appeal.

First Counter-Claim.

Martindale contends in this counterclaim that the Amended Operating Agreement is not a valid agreement, as it was not agreed to by all members of the firm. Martindale has apparently abandoned this claim. The record does not support this argument by Martindale, and his brief cites no such evidence. *See also* n.1, *supra* at p. 1 herein.

By contrast, the Chancellor's opinion includes 21 paragraphs of recitals of facts and law to support his holding that the Amended Operating Agreement is valid and enforceable. Martindale's contention that the Court made no findings as to this counterclaim is completely unfounded and unsupported. (R.332-40, R.E. 65-73.)

Second Counter-Claim.

Martindale's second counterclaim, in the alternative, is that the Amended Operating Agreement entitles him to an additional remedy of receipt of the "fair value" of a Member's interest in the firm under Miss. Code § 79-29-602 (LLC Act). Martindale's argument that the Chancellor failed to find facts is of no avail. First, the Court had no obligation to find facts in a summary judgment proceeding. *Harmon v. Regions Bank*, 961 So.2d 693, 700 (Miss. 2007). Second, it is patently incorrect that the Chancellor failed to make findings of fact. Paragraphs 10-17 of the Chancellor's opinion specifically address the facts and law presented by this counterclaim. The Chancellor even recognized and cited Miss. Code § 79-29-602 (now repealed) which provided for an award of the "fair value" of a member's interest, <u>if not otherwise provided</u> in the limited liability company agreement, and correctly pointed out that the

Amended Operating Agreement in this case does in fact provide for a distribution amount payable to the terminated member, so this statutory section would not apply. Martindale's argument here fails on its face.

Third Counter-Claim.

Martindale's third counterclaim attempts to assert a claim for judicial dissolution of the professional LLC. Again, this claim is defeated by the terms of the Amended Operating Agreement itself. By signing the Agreement repeatedly, Martindale specifically waived any right he might otherwise have had for judicial dissolution. Section 13.4 of the Agreement provides as follows:

> Section 13.4. Waiver of Action for Partition.
>
> Each Member irrevocably waives during the term of the Company any right that he may have to maintain any action for a decree of dissolution of the Company or for partition with respect to the property of the Company. (Emphasis added.)

It is well-settled law that in the absence of ambiguity or other conditions which would abrogate the contract, the plain meaning of contract language should be enforced as written. Where the contract is clear and unambiguous, its meaning is a matter of law, and this Court therefore should give the words of the contract their commonly accepted meaning. *Fradella v. Seaberry*, 952 So.2d 165 (Miss. 2007). Martindale has presented no proof or legal argument to nullify this provision of the Operating Agreement which he freely agreed to, repeatedly, for a period of 14 years.

Additionally, even if this claim were legally cognizable (which it is not), the record contains no evidence of "persistent and pervasive fraud or abuse of authority or

persistent unfairness toward any member" as alleged. The Chancellor reviewed the evidence as to unfairness of the law firm toward Martindale and correctly concluded, based on ample evidence, that that claim was unfounded. *(See* discussion at pp. 12-14 above.) This counterclaim therefore has no merit.

Fourth Counter-Claim.

In this counterclaim, Martindale contends that the law firm's failure to pay him the "fair value of his interest" in the law firm constitutes a breach of the firm's contractual duty of good faith and fair dealing. But Martindale's argument for a "fair value" recovery, whether based upon the statutes discussed above or on the duty of good faith and fair dealing, cannot supersede the terms of the Operating Agreement itself. The language of the Operating Agreement sets a price for the interest of an expelled member, and that contractual language controls. The parties to a contract, especially professional parties to a professional operating agreement, are bound to read and know the contract provisions. Enforcing the contract as written cannot constitute a breach of implied duty of good faith and fair dealing. *See Mladineo v. Schmidt*, 52 So.3d 1154 (Miss. 2010).

Furthermore, Martindale has submitted no summary judgment evidence that he did not receive the "fair value" of the interest in the firm at the time of expulsion. The only measure of that value is Martindale's capital account, which was negative.

By granting summary judgment in favor of the law firm under the Operating Agreement as to the amount due to Martindale upon expulsion, the Chancellor correctly determined that this counterclaim has no merit.

CONCLUSION

This dispute arises from the unfortunate end of a 14-year professional relationship. The relationship was governed by a valid and enforceable agreement which clearly set terms for payment in the event of expulsion of a member. The law firm followed those provisions to the letter, except to act in Martindale's favor by releasing him entirely from indebtedness (rather than deducting that amount from the payment to him pursuant to the Operating Agreement, Section 9.2(c), R. 41, R.E. 31). The Chancellor considered all of Martindale's evidence that he was treated unfairly by the law firm, and correctly concluded that nothing in the record justifies overriding the clear and unambiguous terms of the professional agreement.

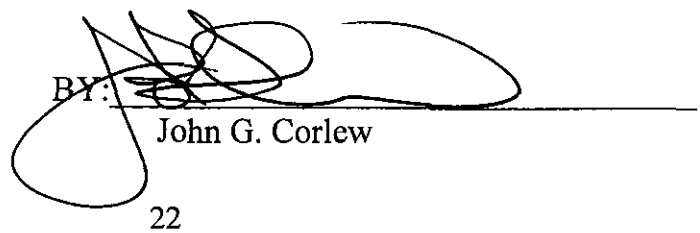
Respectfully, the Chancellor's Order Granting Partial Summary Judgment should be affirmed.

DATED: December 15, 2011

Respectfully submitted,

HORTMAN HARLOW BASSI ROBINSON AND MCDANIEL PLLC

BY: CORLEW MUNFORD & SMITH PLLC



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CERTIFICATE OF SERVICE

I, John G. Corlew, hereby certify that I have caused to be served by United States mail, postage prepaid, a true and correct copy of the above and foregoing on the following:

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SO CERTIFIED this the 15th day of December, 2011.

JOHN G. CORLEW