

**IN THE SUPREME COURT OF MISSISSIPPI
NO. 2010-CA-02077**

DAVID L. MARTINDALE

APPELLANT

VS.

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

APPELLEE

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

BRIEF OF THE APPELLANT

ORAL ARGUMENT REQUESTED

**CLYDE H. GUNN, III, MSB # [REDACTED]
CHRISTOPHER C. VAN CLEAVE, MSB # [REDACTED]
W. CORBAN GUNN, MSB # [REDACTED]
DAVID N. HARRIS, JR. [REDACTED]
CORBAN, GUNN & VAN CLEAVE, PLLC
Post Office Drawer 1916
Biloxi, Mississippi 39533-1916
Phone: (228) 432-7826
Fax: (228) 456-0998**

**ATTORNEYS OF RECORD FOR APPELLANT
DAVID L. MARINTDALE**

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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 and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

Chancery Court Judge

by Special Appointment (Jones County):

The Honorable Sanford Steckler

Appellant:

David L. Martindale

Appellee:

Hortman Harlow Bassi
Robison and McDaniel, PLLC

Attorneys for Appellant:

John G. Corlew, Esquire
Virginia T. Munford, Esquire
Corlew, Munford & Smith
Jackson, Mississippi 39211

Attorneys for Appellee:

Clyde H. Gunn, III, Esquire
David N. Harris, Jr., Esquire
Corban, Gunn & Van Cleave, PLLC
Biloxi, Mississippi 39533

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ORAL ARGUMENT REQUESTED

Appellant requests Oral Argument in this matter because it presents, among other issues material to this Appeal, an issue of considerable importance to Mississippi law which arguably has not been expressly addressed by this Court. One of several reasons justifying reversal of the Chancery Court's Order is that Appellant, Defendant below, presented the Chancery Court erred in its interpretation of the Operating Agreement and failed to apply equitable principals as required by the Mississippi Code. Given the importance of this question to Mississippi law in the area of operating agreements of limited liability companies, Appellant respectfully submits Oral Argument would be beneficial to fully address and flesh out this, and the other important issues raised by this Appeal.

STATEMENT OF THE ISSUES

1. Whether The Chancery Court's *Order Granting Partial Summary Judgment*, and *Amendment to Partial Judgment*, Constitute Reversible Error; Where The Chancery Court Erred in its Interpretation of the Amended Operating Agreement by Excluding from its Interpretation Rights and Remedies available to the Defendant as Expressly Set Forth in the Amended Operating Agreement?
2. Whether The Chancery Court's *Order Granting Partial Summary Judgment*, and *Amendment to Partial Judgment*, Constitute Reversible Error; Where The Chancery Court Failed to Apply the Principals of Equity by Applying an Erroneous Legal Standard?
3. Whether The Chancery Court's *Order Granting Partial Summary Judgment*, and *Amendment to Partial Judgment*, Constitute Reversible Error; Where The Chancery Court Failed to Make Any Factual Findings or Conclusions of Law Regarding Defendant's Counter-Claims for Declaratory Judgment, Judicial Dissolution or Breach of Good Faith and Fair Dealings?

IN THE SUPREME COURT OF MISSISSIPPI

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APPELLANT

VS.

CASE NO. 2010-CA-02077

HORTMAN HARLOW BASSI
ROBINSON AND MCDANIEL, PLLC

APPELLEE

BRIEF OF THE APPELLANT

STATEMENT OF THE CASE

A. Procedural History and Facts in Chancery Court

On May 6, 2009, the law firm of Hortman Harlow Bassi Robinson and McDaniel, PLLC (f/k/a Hortman Harlow **Martindale** Bassi Robinson and McDaniel) (hereinafter "Plaintiff") filed a *Complaint for Declaratory Judgment* against David L. Martindale, Esquire (hereinafter "Defendant"). Plaintiff alleged it had fulfilled its obligations to the Defendant under the Firm's *Amended Operating Agreement* when it voted to terminate the Defendant from membership in the professional limited liability company by tendering to Defendant the sum of \$19,800; and that Defendant was not entitled to any further payments or distributions. RE 3-6; R 8-11

On May 28, 2009, Defendant filed his *Answer to Complaint for Declaratory Judgment and Counterclaims*. RE 7-39; R 17-49 In his Sixth Defense, Defendant alleged Plaintiff's claim for declaratory judgment is barred by Plaintiff's unclean hands. RE 7, R 19 In his Seventh Defense, Defendant alleged Plaintiff breached its fiduciary duty to the Defendant. RE 7, R 19 In his Tenth Defense, Defendant alleged Plaintiff failed to deal fairly and in good faith with the Defendant. RE 8, R 20

In his *Answer*, Defendant also asserted counter-claims against Plaintiff. RE 15-20, R 25-30 Defendant alleged, among other claims, that Plaintiff used his personal credit and the sweat of his

brow to help finance a case being handled by the Firm under a contingency fee agreement (hereinafter the “*McDaniel* case”), and then terminated his Membership in the Firm just before resolving that case for a sum that resulted in a substantial fee. *Id.* Defendant’s Second Counter-Claim alleged declaratory judgment against the Plaintiff was appropriate because Section 13.10 of the *Amended Operating Agreement* entitles the Defendant to the fair market value of his interest in the professional limited liability company – a sum much greater than the \$19,800 tendered by the Plaintiff. RE 15-17, R 25-27 Defendant’s Third Counter-Claim alleged that judicial dissolution pursuant to Miss. Code Ann. § 79-29-802 was appropriate because the “mangers or the members in control of the limited liability company have been guilty of or have knowingly countenanced persistent and pervasive fraud or abuse of authority or persistent unfairness toward” the Defendant. RE 15, R 27 Defendant’s Fourth Counter-Claim alleged Plaintiff breached its duties of good faith and fair dealings, and that Plaintiff failed to make a just distribution to the Defendant. RE 17-19, R 27-29 Plaintiff filed its *Defenses and Answer of Plaintiff/Counter-Defendant to Counterclaims* on June 26, 2009. R 50-76

Defendant served his First Set of Request for Production, Interrogatories and Requests for Admissions to Plaintiff on July 13, 2009. R 77-78 Plaintiff served Responses to First Set of Requests for Admissions, Interrogatories and Request for Production on July 29, 2009. R 79-80

On September 1, 2009, Defendant filed a *Motion for Preliminary Injunction and Deposit of Funds with the Court* (R 84-166). Therein, Defendant sought an injunction to prevent the Plaintiff from disbursing the substantial fee received upon resolution of the *McDaniel* case, among other relief. *Id.* On the same date, Defendant filed a *Motion for Hearing on Defendant’s Preliminary Injunction and Deposit of Funds with the Court*. R 81-83 Plaintiff thereafter filed the *Response of Hortman Harlow Bassi Robinson and McDaniel PLLC to Motion for Preliminary Injunction and Deposit of Funds with the Court* (R 167-178); and its *Memorandum of Authorities in Opposition to*

The Chancery Court conducted a Hearing on the Preliminary Injunction matter; and on September 29, 2009 entered its *Order Granting Preliminary Injunction*. The Chancery Court Ordered the Plaintiff to deposit 18% of the fees from the *McDaniel* case into an interest bearing account pending the outcome of this litigation, and further required additional security in the amount of \$25,000.00. RE 40-46, R 178-184, T 1-22. The Chancery Court specifically held:

6.1 Substantial likelihood of success on the merits

The Court has examined the Amended Agreement under which the law firm of Hortman Harlow [Plaintiff] operates. The law firm maintains that they have met their one and only obligation to Martindale [Defendant] by tendering to him the sum of the \$19,800.00. The Court notes that the Amended Agreement provides for each member to have a separate retirement account and also a separate capital account. **The Amended Agreement also enumerates what is contained in the capital accounts, one of which is "all work in progress."** As of February 25, 2009, the *McDaniel* case was a work in progress of the firm. At first blush, and without having heard the merits of the matter, the Amended Agreement appears to indicate that in addition to the \$19,800.00 tendered, Martindale would also be entitled to his retirement account as well as his capital account. The Court finds at this juncture that Martindale may, indeed, have a substantial likelihood of success in his claim against Hortman Howe [sic].

Order Granting Preliminary Injunction (emphasis added). RE 42, R 180

Plaintiff filed its *Motion of Plaintiff for Partial Summary Judgment* on May 18, 2010, seeking Summary Judgment in favor of the Plaintiff on Plaintiff's claim for declaratory judgment. RE 47-49, R 189-230 Plaintiff also requested Summary Judgment in favor of the Plaintiff on four of the five Counter-Claims made by the Defendant; specifically Defendant's Counter-claims for declaratory judgment that the Agreement was invalid; alternative declaratory judgment that the Agreement provided Defendant with the right to fair market value of his interest; judicial dissolution; and breach of duties of good faith and fair dealings. Defendant filed his *Response in Opposition to Motion of Plaintiff for Partial Summary Judgment* on June 17, 2010. RE 50-64, R 231-323 Plaintiff filed *Plaintiff's Reply Memorandum in Support of Motion for Partial Summary Judgment* on June 29, 2010. R 323-327

The Chancery Court conducted a Hearing on Plaintiff's *Motion for Partial Summary Judgment* on June 30, 2010. T 22-54 During the Hearing, the Chancery Court requested that supplemental information be submitted evidencing whether Defendant had accepted the offered \$19,800 payment after Plaintiff expelled him from the Firm. T 47-48 The Chancery Court took the matter under advisement at the conclusion of the Hearing. T 53-54

After the Hearing, Defendant filed his *Notice of Filing of Supplemental Evidence in Support of Defendant's Response in Opposition to Motion of Plaintiff for Partial Summary Judgment* on July 2, 2010. R 327-331 The supplemental evidence submitted by the Defendant included the *Affidavit of David L. Martindale*; and a copy of the \$19,800 check given to Defendant upon his expulsion. R 329-331 This supplemental evidence demonstrated that the tendered payment for the Defendant's membership interest was not accepted by the Defendant. *Id.*

The Chancery Court entered its *Order Granting Partial Summary Judgment* in favor of the Plaintiff on September 3, 2010. RE 65-73, R 332-340 The Chancellor's Order included *Findings of Fact and Conclusions of Law*. RE 66-73, R 333-340

Defendant filed his *Notice of Appeal of Trial Court's Order Granting Partial Summary Judgment* on September 30, 2010. R 341-343 Pursuant to an agreement with Counsel for the Plaintiff, the September 30, 2010 Notice of Appeal was dismissed so that a Rule 54(b) Certification could be obtained with regard to the Chancery Court's *Order Granting Partial Summary Judgment*. R 351 Contemporaneously with that agreement, Plaintiff filed its *Motion to Enforce Judgment and Dissolve Preliminary Injunction* on October 1, 2010. R 344-345 Defendant filed his *Motion for Rule 54(b) Certification of Judgment* on November 24, 2010. R 354-366 The Chancery Court conducted a Hearing on Defendant's *Motion for Rule 54(b) Certification* and Plaintiff's *Motion to Enforce Judgment* on November 29, 2010. T 54-57 The Chancery Court entered its *Amendment to Partial Summary Judgment Dissolving Preliminary Injunction and Granting Rule 54(b)*

Certification on December 1, 2010. R 367-368 Defendant filed his Notice of Appeal on December 21, 2010, perfecting appeal of all of the Chancery Court's findings, rulings and judgments. R 372-374 Defendant fully complied with the other requirements for perfecting this appeal.

B. Statement of Facts

1. Amended Operating Agreement in Force

On February 25, 2009, the date the Defendant was expelled from his law firm, the Hortman Harlow Martindale Bassi Robinson and McDaniel law firm was operating under the January 1, 2001 *Amended Operating Agreement of Gibbes Graves Mullins Hortman Harlow Martindale & Jones, PLLC* (RE 74-89, R 246-261); and the January 1, 2007 *Amendment to Amended Operating Agreement of Hortman Harlow Martindale Bassi Robinson & McDaniel, PLLC*. RE 90-92, R 262-264 As per the January 1, 2007 *Amendment*, Defendant's membership interest in the firm was eighteen percent (18%), equal to that of members Norman Hortman and Eugene Harlow. RE 92, R 264

2. Defendant's Service to the Law Firm – April 1995 through February 29, 2009

During the time Defendant was a member of the Firm, Defendant made substantial financial and work contributions for the benefit of the law firm; and represented both defendants and plaintiffs pursuant to hourly and contingency fee contracts. RE 93-94 at ¶2, R 265-266 at ¶2 From March 2006 to February 2009, Defendant earned fees for the benefit of the Firm; provided personal guarantees to financial institutions for the financing of Firm business; served as President of the PLLC; and made other substantial contributions of his time, talents and advice in an effort to promote the success of the Firm and the attorneys in it. RE 93 at ¶3, R 265 at ¶ 3

Sometime in the Spring of 2006, while Defendant was a Member, the Firm undertook representation of Mr. Billy Jack McDaniel, who was horribly injured in an oil field accident in Texas. RE 93 at ¶4, R 265 at ¶4 Although Defendant was not directly involved in representation

of Mr. McDaniel, he provided counsel and advice regarding the handling of this case to the other attorneys, specifically associate attorney April Crane Ladner. RE 93 at ¶4, R 265 at ¶4 On December 11, 2007, the *McDaniel* case was filed in the 61st Judicial District in Harris County, Texas. R 267-274

In early 2008, during litigation of the *McDaniel* case, the Firm opened a line of credit at AmSouth/Regions Bank for approximately \$500,000.00, to which Defendant signed a personal guarantee. RE 93-94 at ¶6; R 265-266 at ¶6. Contemporaneously with opening this line of credit, the members of the Firm, including Defendant, substantially decreased the amount of monthly draws paid to the member in order for the Firm to devote its resources to the prosecution of the *McDaniel* case. RE 93-94 at ¶6, R 265-266 at ¶6 The Firm addressed its resources almost entirely to prosecution of the *McDaniel* case; paying minimum Firm overhead only. RE 93-94 at ¶6, R 265-266 at ¶6 Comparison of Schedule K-1 tax return filings for 2007 and 2008 demonstrates that the Defendant's share of liabilities for the Firm increased 455%, from \$20,767 in 2007 (RE 95, R 226) to \$94,595 in 2008 (RE 96, R 227), solely due to the expenditures being made to prosecute the *McDaniel* case. Due to the almost complete dedication of the Firm's resources to all things related to the *McDaniel* case, Defendant was forced to borrow money on the equity of his home to sustain his family. RE 93-94 at ¶6, R 265-266 at ¶6

On or about February 25, 2009, Defendant was allegedly expelled as a member of the Firm by unanimous vote of the Firm's other members pursuant to Art. IX, § 9.1(b) of the *Amended Agreement*. RE 80, R 9, R 21, R 233, R 252 However, the Record does not reflect that any written resolution or other document evidencing the requisite affirmative vote was presented to the Defendant in support of the purported expulsion. Plaintiff locked the Defendant out of his office; and Defendant's personal property, personal files, papers and computer data were packed

by an employee of the Plaintiff (who was fired immediately after packing the property of the Defendant) and sent to Defendant's residence. R 277-278

The other Members of the Firm allegedly elected not to exercise the option to dissolve pursuant to Section 9.5 of the *Amended Operating Agreement* (which would have resulted in Defendant sharing in the Firm's liquidation proceeds). RE 5 at ¶11, R 10 at ¶ 11; RE 52, R 233; RE 82, R 254 Rather, citing Sections 9.1(b), 9.2(a) and 9.5 of the *Amended Operating Agreement*, Plaintiff tendered Defendant the sum of \$19,800; and asserted this is the maximum sum to which the Defendant is entitled upon his alleged (and physically enforced) expulsion. RE 5, R 10; RE 80-83; R 252-255 Defendant immediately informed the other Members that he disagreed with the assertion that \$19,800 was all the money to which he was entitled. RE 977-99, R 329-331 Defendant did not cash, deposit or negotiate the tendered check for \$19,800. *Id.*

At the time of Defendant's expulsion (February 25, 2009), the Firm had spent approximately \$432,855.00 prosecuting the *McDaniel* case. Substantial portions, if not all, of these expenses were drawn from the AmSouth/Regions Bank line of credit. RE 93-94 at ¶6; R 265-266 at ¶6; R 280 at Nos. 22, 24 and 25. Defendant was not released as personal guarantor on this line of credit, however, until March 24, 2009 – almost one month after Defendant was allegedly expelled from the Firm. RE 100 at "Exhibit 4", R 211 at "Exhibit 4"

3. Assets of the Law Firm Where Withheld from Distribution to Defendant

Plaintiff's \$19,800 "member's interest" tender was made without consideration of the "capital accounts" belonging to Defendant, which are defined by the January 1, 2007 *Amendment* as consisting of "interests in all assets and liabilities of the Company as represented by the net capital accounts (including the Firm's Trust Account)...all accounts receivable, all work in progress (time and expenses) recorded in the accounting system, all furniture, equipment and other personal property . . . , all files (open and closed) wherever located, [and] all accounts and

notes payable, etc.” R 264 (emphasis added). The Chancery Court found that the *Amended Operating Agreement* and *Amendment* defined “all work in progress” as part of the capital account, and that the contingent fee *McDaniel* case was “work in progress” at the time of Defendant’s (alleged but not reflected in any corporate minutes found in the Record) expulsion from the law firm on February 29, 2009. RE 42 at ¶ 6.1, R 180 at ¶6.1 The *Amended Operating Agreement* and *Amendment* are silent regarding valuation of contingent fee assets on “work in progress” and/or “open files”; and the distribution of same.

Further, the *Amended Operating Agreement* does not provide that payment of \$1,100 per membership “point” (18 points X \$1,100 = \$19,800) is the exclusive remedy available to an expelled member. RE 81 at ¶9.2(a); R 253 at ¶9.2(a). To the contrary, the *Amended Agreement* expressly provides:

Section 13.10 Rights and Remedies Cumulative. The rights and remedies provided by this Agreement are cumulative and the use of any one right or remedy by any party **shall not preclude or waive the right to use any or all other remedies**. Said **rights and remedies are given in addition to any other rights the parties may have by law, statute, ordinance or otherwise**.

RE 87, R 259 (emphasis added).

The *McDaniel* case settled on or about September 24, 2009. R 286-296 The resulting attorney fees paid to the Plaintiff from that case were approximately \$7,655,000. T 51 Defendant received no distribution of the proceeds of this “work in progress” in return for his service to the Plaintiff; which services included personal sacrifices, the sweat of his brow and his personal credit, all of which were utilized to secure and provide the capital used to prosecute the *McDaniel* case and/or other, similar cases.

At Hearings regarding the subject *Motion for Partial Summary Judgment* and *Amendment to Order Granting Partial Summary Judgment*, the Chancellor, who overlooked the effect and application of Section 13.10, expressed that the terms of the *Amended Operating Agreement* (as

he perceived them) did not seem to be equitable, reasonable and/or fair when viewed in light of the circumstances. T 48-49, T-55

SUMMARY OF ARGUMENT

The Trial Court abused its discretion, and was manifestly wrong, interpreting the *Amended Operation Agreement* by failing to acknowledge and enforce Defendant's express rights to "any or all other remedies" as expressly provided by the Agreement. In so doing, the Trial Court failed to give life and meaning to Defendant's express rights and remedies by "Law" or "Otherwise" as guaranteed by the Agreement. The Trial Court also committed reversible error by applying an erroneous legal standard when enforcing the Amended Operation Agreement by failing to apply the principals of equity and the "intrinsically fair" doctrine for closely held corporations. The Trial Court further abused its discretion by failing to make finding regarding the counter claims of the Defendant, and summarily granting summary judgment in favor of the Plaintiff regarding those counter claims.

ARGUMENT

A. Standard of Review

This Court reviews the Trial Court's grant of a motion for summary judgment under a *de novo* standard. *Pride Oil Co. v. Tommy Brooks Oil Co.*, 761 So.2d 187, 190 (Miss. 2000) Issues of contract construction are questions of law that are reviewed *de novo*. *Limbert v. Mississippi University for Women Alumnae Ass'n, Inc.* 998 So.2d 993,998 (Miss.,2008) (citing *Dixie South Indus. Coating, Inc. v. Miss. Power Co.*, 872 So.2d 769, 772 (Miss.Ct.App.2004)) The Court reaches its own conclusions as to the applicable law in *de novo* review of the trial court's decision. *Bluewater Logistics, LLC v. Williford*, 55 So.3d 148, 155 (¶24) (Miss. 2011). Upon review, the Court will not disturb the findings of a Chancellor unless "manifestly wrong, clearly erroneous or a clearly erroneous legal standard was applied." *Isom v. Jernigan*, 840 So.2d 104, 106 (Miss.2003) (quoting *Bell v. Parker*, 563 So.2d 594, 596-97 (Miss.1990)). "The moving party has the burden of

demonstrating that no genuine issue of material fact exists, and the non-moving part must be given the benefit of the doubt concerning the existence of a material fact.” *Hosey v. Mediamolle*, 963 So.2d 1267, 1269 (Miss. Ct. App. 2007)

In considering the issues raised by this appeal, this Honorable Court must “examine all the evidentiary matters before [it], including admissions in pleadings, answers to interrogatories, . . . and affidavits.” *Wilner vs. White*, 929 So.2d 315, ¶ 3 (Miss. 2006). “The evidence must be viewed in the light most favorable to the party against whom the motion has been made.” *Id.* “Where there is the slightest doubt over whether a factual issue exists, the court should resolve [the questions] in favor of the non-moving party.” *Rein v. Benchmark Constr. Co.*, 865 So.2d 1134, 1142 (Miss. 2004). “Motions for summary judgment are to be viewed with a skeptical eye. . .” *PDN, Inc. v. Loring*, 843 So.2d 685, 688 (Miss. 2003). “Issues of fact sufficient to require a denial of a motion for summary judgment are obviously present where one party swears to one version of the matter in issue and another party takes the opposite position.” *Wilner*, 929 So.2d 315 at ¶ 3.

B. The Chancery Court Erred in its Interpretation of the Amended Operating Agreement by Excluding Rights and Remedies Expressly Available to the Defendant

The Chancery Court’s *Order Granting Partial Summary Judgment; Findings of Fact and Conclusions of Law*; and *Amendment to Order Granting Partial Summary Judgment* should be reversed and rendered and/or reversed and remanded because the Chancery Court abused its discretion interpreting the *Amended Operation Agreement* by failing to acknowledge and enforce Defendant’s express rights to “any or all other remedies” provided by the Section 13.10 of the *Amended Operating Agreement*. Miss. Code Ann. §79-29-306(3)(a), *Williford*, 55 So.3d at 159 (¶43-45)

The *Amended Operation Agreement* specifically provides that each member is entitled to various rights and remedies with regard to the enforcement of the Agreement. The “savings clause” of the Agreement provides:

Section 13.10 Rights and Remedies Cumulative. The rights and remedies provided by this Agreement are cumulative and the use of any one right or remedy by any party shall not preclude or waive the right to use any or all other remedies. Said rights and remedies are given in addition to any other rights the parties may have by law, statute, ordinance or otherwise.

RE 87, R 259 (emphasis added). By its clear terms, Section 13.10 of the Amended Operating Agreement provides at least five (5) distinctive, cumulative and non-exclusive categories of rights and remedies which are available remedies to a member like the Defendant:

- 1) those provided by the “**Agreement**”;
- 2) those provided by “**Law**”
- 3) those provided by “**Statute**”
- 4) those provided by “**Ordinance**”
- 5) those provided by “**Otherwise**”

The Chancery Court was manifestly wrong, and committed clear error, because it did not acknowledge or enforce these enumerated rights and remedies. The Chancery Court erroneously held that the rights and remedies available to the Defendant were exclusively those provided by the “Agreement” and “Statute”. R 332-340 In so holding, the Chancery Court erroneously failed to give life and meaning to Defendant’s express rights and remedies by “Law” or “Otherwise”, as guaranteed by Section 13.10, *supra*. Without discussion or acknowledgment of Section 13.10, the Chancery Court erroneously ruled that the combination of Sections 9.1(b), 9.2(a), and 9.5 provided the **exclusive** remedy to the Defendant; payment of \$19,800 (\$1,100 per point X 18 membership points) for his 14 years of service and sacrifice for the benefit of the Plaintiff. RE 65-73, R 332-340.

As a matter of law, the Chancery Court had authority to “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. §79-29-304(3)(a), *Williford*, 55 So.3d at 159 (¶43-45). However, the Chancery Court erroneously concluded that Sections 9.1(b), 9.2(a), and 9.5

of the *Agreement* provided the exclusive remedy available to the Defendant; and thereby failed to consider or apply the other remedies available to the Defendant under law and pursuant to statute – and guaranteed to the Defendant by Section 13.10 of the *Agreement*. By excluding the Defendant’s rights and remedies under “Law” and “Otherwise” the Court erroneously eliminated three fifths (3/5) of the rights and remedies guaranteed to the Defendant by the clear and unambiguous terms of the *Agreement*.

The Chancery Court’s mis-interpretation of the Agreement, and failure to acknowledge and apply those rights provided by Section 13.10, demonstrate the Chancery Court abused its discretion, and was manifestly wrong in entering its *Order for Partial Summary Judgment* and *Amendment to Order for Partial Summary Judgment* in favor of the Plaintiff.

C. The Chancery Court Applied an Erroneous Legal Standard

Additionally, and in the alternative, the Chancery Court applied an erroneous legal standard to the issues presented by the Plaintiff’s *Motion for Partial Summary Judgment*. Throughout the Chancery Court’s *Order Granting Partial Summary Judgment*, runs the undercurrent that the Chancery Court can only enforce the express terms of the subject *Agreement* (as the Chancellor erroneously interpreted those terms, *supra*). The Defendant posits that this erroneous legal standard was the result of the Chancery Court’s reliance on the now reversed Court of Appeals decision in *Bluewater Logistics v. Williford*, 55 So. 3d 177 (Miss. App. 2009) (Judgment Reversed by *Bluewater Logistics v. Williford*, 55 So.3d 148 (Miss. 2011)). The Chancery Court’s reliance on this erroneous legal standard should require this Honorable Court to reverse and render and/or reverse and remand the decision of the Chancery Court.

Upon review, this Court will not disturb the findings of a chancellor unless “manifestly wrong, clearly erroneous or a clearly erroneous legal standard was applied.” *Isom*, 840 So.2d at 106 “Notwithstanding our respect for and deference to the trial judge, on matters of law it is our job to get

it right. That the trial judge may have come close is not good enough.” *Par Industries, Inc. v. Target Container Co.*, 708 So.2d 44, 47 (Miss. 1998) [citations omitted] “If an erroneous legal standard was applied to the facts, this Court will apply a *de novo* standard of review of the chancellor's findings and will not hesitate to reverse.” *Id.* (citing *Mississippi State Dept. of Human Services v. Barnett*, 633 So.2d 430, 434 (Miss.1993)).

Bluewater Logistics v. Williford was a case of first impression whereby this Court considered the application of the principals of equity to the interpretation of the operating agreement of a limited liability company. *Id.* The facts of *Williford* are analogous to the case at bar. In *Williford*, the limited liability company Bluewater Logisitics, LLC was formed by four members to perform work after Hurricane Katrina. *Williford*, 55 So.3d at 151. After Bluewater Logistics had performed more than \$5 million in contracts for the Government, and had more that \$1 million in payments due, three of its members informed the fourth member (Mr. Wiliford) by telephone (while Mr. Williford was working on company business in Louisiana) that they exercised their rights pursuant to the Operating Agreement to buy him out. *Id.* at 152. Subsequently, Mr. Williford returned to the offices of Bluewater Logistics to find the locks changed, literally locking him out of the business of Bluewater Logistics. *Id.* Litigation was initiated by Mr. Williford to receive the fair market value of his interest in Bluewater Logistics; and the Chancery Court of Forrest County awarded Mr. Williford his fair market interest. *Id.* at 155. After the decision of the Chancery Court was reversed by the Court of Appeals, this Court reversed the Court of Appeals and affirmed the Judgment of the Chancery Court; holding that equitable principals are applied to the enforcement of the operating agreement of a limited liability company. *Id.* at 165.

In the case at bar, the Plaintiff had undertaken the prosecution of the *McDaniel* case, which by all accounts was a substantial case involving severe personal injuries. RE 93, R 265; R 267-274. Days before expelling the Defendant, the Members of the Plaintiff valued the *McDaniel* case at

\$70,000,000. R 282 The Firm dedicated its resources to the prosecution of the *McDaniel* case, to the exclusion of providing its members with disbursements from other work. RE 93-94; R 265-266 Simply stated, the cash capital and line of credit of the Firm was dedicated almost exclusively to the *McDaniel* case. Defendant participated in this financing by personally guaranteeing the line of credit used to finance the *McDaniel* case, and by forgoing his distributions from the other work of the Firm. RE 93-94, R 265-266; R 280 Then on February 29, 2009, after spending over \$430,000 on the *McDaniel* case and on the heels of recent mediation in the *McDaniel* case, the other members of the Firm decided to expel the Defendant and withhold his fair market share of the Firm; disregarding Defendant's 14 years of service to the Firm, the good and valuable credit of his name and the sacrifices he made on behalf of the Firm. The Defendant was "locked out" of his own office and not allowed to retrieve his own property after being informed of his (un-recorded) expulsion (R 277-278); and was denied any share of the multi-million dollar fee paid to the Firm on the *McDaniel* case his sacrifices and credit allowed the Firm to prosecute.

The similarities between the case at bar and *Williford* are striking. In each case, the limited liability company was in the position of receiving substantial amounts of money pursuant to the business affairs of the company. In each case, a majority of the members decided to expel, and deprive the benefit of the anticipated substantial remuneration from, a single member. In each case, the "majority members" "locked out" the expelled member. Finally, litigation ensued whereby the expelled member requested the fair market value of his membership interest in the company. The difference is, Defendant herein was deprived the fair market interest to which this Court ruled a similarly situated LLC member is entitled in *Williford*.

The Plaintiff would have this Court believe that the Chancery Court is not a court of equity and fairness; and/or that a member of a limited liability company is not entitled to relief provided by these principles. To the contrary, the *Mississippi Limited Liability Act* and the subject *Amended*

Operating Agreement embrace equity. The *Mississippi Limited Liability Act*, Miss. Code Ann. §79-29-306(3)(a) states, in pertinent part:

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.

Section 13.10 of the subject *Amended Operating Agreement* similarly states that any Member is entitled to any and all remedies available pursuant to the “Agreement”, “law”, “statute”, “ordinance” or “otherwise”. RE 87, R 259

When examining the actions of closely held corporation, this Court has adopted the “intrinsically fair” doctrine. In *Fought v. Morris*, 543 So.2d 167 (Miss. 1989), this Court provided a lengthy discussion addressing the duties owed to members of closely held corporations and the duty to treat minority members “intrinsically fair” *Id.* The Court recognized:

...often close corporations consist of friends or family members where the directors, officers and shareholders are synonymous. Each contributes his or her capital, skill, experience, and labor to the company. Management and ownership are substantially identical. Each shareholder has an inside view of the company's operations and maintains an element of trust and confidence in each other which is commonly lacking in a large or publicly-held corporation. Persons involved in a close corporation should act, therefore, at all times in good faith toward each other and to the corporation in order to maintain this confidence.

Fought, 543 So.2d at 170. The Court held,

. . . in a close corporation where a majority stockholder stands to benefit as a controlling stockholder, the majority's action must be ‘intrinsically fair’ to the minority interest. Thus, 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. The Court further explained, “[W]e mean that blind adherence to corporate statutes may not be used to circumvent the corporation's by-laws, charter or various agreements.” *Id.*

In this case, the Plaintiff was a closely held professional limited liability company with six (6) members. RE 92, R 264 The Chancery Court abused its discretion and applied an erroneous legal standard by failing to require the Plaintiff to treat the Defendant in an

“intrinsically fair” manner. Instead, the Chancery Court prescribed to “blind adherence” to statutory law. Specifically, the Chancery Court’s *Order Granting Partial Summary Judgment* finds that the only money owed to the Defendant is \$19,800; pursuant to Chancery Court’s exclusive application of Miss. Code Ann. § 79-29-911(2) to the *Amended Operating Agreement*. RE 79,R 253; R 337-338 Miss. Code Ann. § 79-29-911(2) states in pertinent part:

(2) If a price for the membership interest is established in accordance with the certificate of formation or written operating agreement or by private agreement, that price controls.

As cited herein above, the Chancery Court abused its discretion by failing to acknowledge and/or apply all remedies guaranteed by Section 13.10, and those required by Miss. Code Ann. §79-29-306(3)(a), which include equitable remedies. This “blind adherence” to limited statutory law is “intrinsically unfair” to the Defendant.

The Chancery Court made no finding with regard to the 455% personal debt increase suffered by Defendant solely for the benefit of the Plaintiff, and ultimately for the benefit of the majority members. RE 95-96, R 226-227; RE 65-73, R 332-340 The Chancery Court made no express findings regarding the “intrinsically unfair” manner in which the majority members voted to expel and “lock out” Defendant without consideration for the capital, skill, experience, and labor he provided for 14 years, including the securing of a line of credit and forgoing disbursements from the Firm to allow for the prosecution of the *McDaniel* case. *Id.* The Chancery Court made no express findings regarding the timing and manner by which the majority members expelled the Defendant while the large contingency fee lawsuit was on the eve of resolution. *Id.*

The Chancery Court seemingly felt it hands were tied by the erroneous decision of the Court of Appeals in *Williford*, 55 So.3d 177 (Miss. App. 2009) and Miss. Code Ann. § 79-29-911(2). Although the Chancery Court did not make any express findings regarding the intrinsically unfair treatment of the Defendant; the Chancellor did express reservations regarding its perceived inability

to provide the Defendant with an equitable and intrinsically fair remedy. The Chancellor stated at the Hearing on Plaintiff's *Motion for Partial Summary Judgment*:

I'm going to try to sort it out...**It may be a gross inequity to Mr. Martindale** [Defendant], and it may be the law... If it came down as was laid out ..., that Martindale's amount or percentage was set at 18 percent and then after the fact he doesn't get 18 percent of what would normally be – in other words, **if you were to amortize that final result, that is the fees and the big lawsuit and put it over the entire time that the law firm was having to fund it, if he had put out monies to fund it but didn't share in the result, that certainly seems inequitable and unfair.** It may be that that's what he bargained for, that's what he agreed to, and that's what he can get. **It doesn't sound fair to me.** But it may be that that's a binding contract.

T 48-49 (emphasis added). At the Hearing preceding the *Amendment to the Order Granting Partial Summary Judgment*, the Chancellor again expressed concerns about the inequities of the result he erroneously concluded he was bound to apply as matter of law:

I think [Defendant] made a terrible decision in agreeing to the contract, but after I looked at enough law, I decided that, yeah, it was a bad decision, and **the outcome may be inequitable**, but I think that he – that's a decision he is stuck with. So that's where I left it.

T 55.

Since the time of the Chancery Court's decision, and while this matter was on Appeal, this Court resolved the question of whether the Chancery Court may apply the principals and maxims of equity to a limited liability operating agreement. This Court held that the Chancery Court is specifically empowered to do so. *Bluewater Logistics v. Williford*, 55 So.3d 148, 155 (Miss. 2011). The Chancery Court abused its discretion by not applying the "intrinsically fair" doctrine as set forth *supra*, and by applying an erroneous legal standard to the facts of this case.

C. The Chancery Court Failed to Make Findings Regarding Defendant's Counter-Claims

The Chancery Court abused its discretion by not making findings of fact regarding the Defendant's Counter-Claims that were also addressed in the subject *Motion for Partial Summary Judgment*. "[W]here ... a case is hotly contested and the facts greatly in dispute and where there is any complexity involved therein, failure to make findings of ultimate fact and conclusions of law

[under Rule 52(a)] will generally be regarded as an abuse of discretion.” *Carpenter v. Berry*, 58 So.3d 1158, 1161 (Miss. 2011) (quoting *Tricon Metals & Services, Inc. v. Topp*, 516 So.2d 236, 239 (Miss.1987)). “This Court will remand for findings of fact and conclusions of law where it is not ‘obvious from a review of the record such that the absence of written findings may be excused.’” *Id.* (quoting *Precision Interlock Log Homes, Inc. v. O’Neal*, 689 So.2d 778, 780 (Miss.1997)).

The Chancery Court did not make any findings of fact regarding the Defendant’s Counter Claims for Declaratory Judgment; Judicial Dissolution; and/or Breach of Good Faith and Fair Dealings. RE 72-73, R 339-340 The Chancery Court summarily found that “there is no genuine issue of material fact in the declaratory judgment action and, therefore summary judgment is appropriate and should be granted.” RE 72, R 339 Although the Defendant provided the Chancery Court with evidence of admissions in pleadings, answers to request for admission, and affidavits in support of his Counter Claims (which evidence presented numerous, disputed genuine issues of material fact), the Chancery Court abused its discretion and failed to view that evidence in the light most favorable to the Defendant by providing no findings regarding Defendant’s Counter Claims.

CONCLUSION

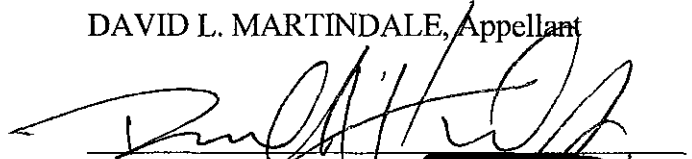
The Record in this case shows that the Trial Court’s *Order Granting Partial Summary Judgment* should be reversed and rendered and/or reversed and rendered. The Trial Court abused its discretion interpreting the *Amended Operating Agreement* by failing to acknowledge and enforce the Defendant’s express rights to “any or all other remedies”, including remedies in equity, as expressly provided by Section 13.10 of the subject Agreement. In so doing, the Trial Court was manifestly wrong in its interpretation and enforcement of the *Amended Operating Agreement*. The Trial Court applied an erroneous legal standard and blindly adhered to statutory provisions, thereby forsaking the application of the “inherently fair” doctrine. While this matter was on Appeal, this Court has held that the correct legal standard is for the Trial Court to apply the principles of equity to

the enforcement of the operating agreement of a limited liability company, and to view the circumstances of the transaction/expulsion in an "intrinsicly fair" manner regarding the rights of the minority member. The Trial Court abused its discretion in granting summary judgment in favor of the Plaintiff because the Trial Court failed to provide any findings regarding the counter-claims of the Defendant when evidence in the Record demonstrated numerous, disputed genuine issues of material facts.

Defendant incurred substantial costs pursuing this appeal. Plaintiff prays that all costs of this appeal be accessed against Plaintiff in accordance with Miss. R. App. P. 36.

Respectfully submitted, this the 12th day of September, 2011.

DAVID L. MARTINDALE, Appellant



Clyde H. Gunn, III, (MSB [REDACTED])

Christopher C. Van Cleave, (MS [REDACTED])

W. Corban Gunn, (MSB [REDACTED])

David N. Harris, Jr. (MSB [REDACTED])

CORBAN, GUNN & VAN CLEAVE, PLLC

P.O. Drawer 1916

Biloxi, Mississippi 39533

Telephone: (228) 432-7826

Facsimile: (228) 456-0998

CERTIFICATE OF SERVICE

I, undersigned counsel, do hereby certify that I have this day served, via U.S. Mail, postage prepaid, a true and correct copy of the above and foregoing Brief of the Appellant to the following:

TRIAL JUDGE:

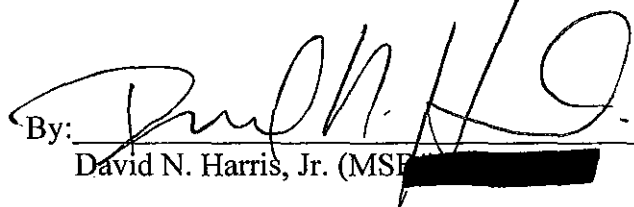

The Honorable Sanford R. Steckler
Chancery Court Judge by Special Appointment
P.O. Box 659
Gulfport, MS 39502-0659
Telephone: (228) 865-4096
Fax: (228) 865-1646

ATTORNEYS FOR APPELLEE:

John G. Corlew, Esquire
Virginia T. Munford, Esquire
Corlew, Munford & Smith
P.O. Box 16807
Jackson, MS 39236
Telephone: (601) 366-1106
Fax: (601) 366-1052

Respectfully submitted, this, the 12th day of September, 2011.

DAVID L. MARTINDALE, Appellant

By: 
David N. Harris, Jr. (MSF )