IN THE SUPREME COURT OF MISSISSIPPI
NO. 2011-CA-00304

GULFPORT SHOPPING CENTER, INC., ET AL **APPELLANTS**

V.

WILLIAM H. DURHAM **APPELLEE**

ON APPEAL FROM THE CHANCERY COURT OF HARRISON COUNTY, MISSISSIPPI

BRIEF OF APPELLANTS

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CERTIFICATED 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. Gulfport Shopping Center, Inc., appellant.

2. H. Dwayne Williams, appellant.

3. John M. Hill, appellant.

4. Michael V. Shannon, appellant.

5. David L. Strobel, appellant.

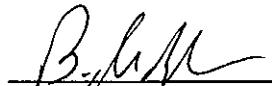
6. C. Hadley Weaver, Jr., appellant

7. William H. Durham, M.D., appellee.

8. Luther T. Munford, B. Lyle Robinson, Phelps Dunbar LLP, attorneys for appellants.

10. Mark A. Nelson, Bryan Nelson PA, attorney for appellee. This lawsuit was brought in 2001 and the former firm of Bryan, Nelson, Randolph and Weathers may also have an interest in the case.

So certified, this the 8th day of November, 2011.



B. LYLE ROBINSON

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INTRODUCTION

The corporate board used corporate rent income for corporate purposes. Among other things, it paid third-party corporate debts which the plaintiff, a fellow shareholder and prospective purchaser, had stopped paying.

The chancellor erred in holding that the corporate board should not have used the rent income to pay creditors but instead should have paid it to the plaintiff even though it had no contractual obligation to do so. The trial court compounded its error by holding the defendant board members personally liable for the money even though the corporate debts they paid were genuine and none of the board members received any of the money.

The plaintiff had no right to the rent income. He had no right to the rent income the board spent and he had no right to other rent income which he personally pocketed but the chancellor did not require him to repay. *Durham v. University of Mississippi*, 966 So.2d 832 (Miss. Ct. App. 2007), held that the right to lease this corporation's shopping center belonged to the corporation, not to the plaintiff, even though he paid certain corporate debts pursuant to an option he ultimately did not exercise. That should also be the result here.

This court should reverse the judgment below and enter judgment here for the corporation against the plaintiff for the amount of rent income he wrongfully withheld from the corporation.

STATEMENT OF THE ISSUES

1. Whether lease rentals belonged to the corporation and not to the plaintiff option holder, just as the right to enforce leases was held to belong to the corporation, and not to this plaintiff in *Durham v. University of Mississippi*, 966 So.2d 832 (Miss. Ct. App. 2007).

If so, the court need go no further.

2. In the alternative, if the party responsible to third party creditors was entitled to the Bruno's rental income, whether the corporation was the party entitled to the income because undisputed evidence shows that when the income was received in June 2000 the corporation was paying the creditors to cure corporate defaults which had arisen because Durham, among other things, had quit paying corporate obligations after April 19, 2000?

If so, the third question need not be decided.

3. If reached, whether the corporate directors are liable to Durham when the rent payments were spent on debts owed to the corporation's third-party creditors and none of the money went to the directors individually?

STATEMENT OF THE CASE

1. Course of proceedings in the chancery court

In 2001, a year after the events that are the subject of this appeal, plaintiff William H. "Rusty" Durham, M.D., sued Gulfport Shopping Center Inc. and its other board members, including John M. Hill, Dewayne Williams, Michael V.

Shannon, David L. Strobel and C. Hadley Weaver ("individual shareholder defendants").

Durham is himself both a 24.5% shareholder and board member of Gulfport Shopping Center, Inc. He also once held an option to purchase the corporation and made an offer to purchase but he never met the required terms.

Defendant Williams originally owned the land on U.S. 49 near the Gulfport airport where the 6.2 acre shopping center is located. Defendants Shannon, Strobel and Weaver own an Alabama construction firm which built the center's only building and arranged to lease it to Bruno's Inc. as a Food World store.

After Forrest County Chancery Judge Sebe Dale transferred the case to Harrison County, the judges there recused themselves and this court appointed Judge James H.C. Thomas Jr. of Forrest County to preside over the case.

Judge Thomas dismissed most of claims on summary judgment. The dismissed claims included wrongful assertions that the sale of the corporation's sole asset, the shopping center, should be set aside. CP 4:508, RE 2.

He then held a trial on Durham's claim for an accounting and his claim that the board had no authority to spend $263,988.99 rent income it received in June 2000 from Bruno's bankruptcy estate "for any purpose other than" paying off a corporate debt to a third party. CP 1:9 (Count 3).

At trial, the defendants proved that the money was used to pay off that debt and to pay taxes and other legitimate corporate expenses. The chancellor

nevertheless held that "good faith and fair dealing" required that the money be paid not to the creditors but to the plaintiff, and that the corporation and board members were individually liable for not having done so. He also allowed Durham to keep $110,000 in other rental income. CP 5:615, RE 3.

After rendering judgment, Judge Thomas died. This court appointed Judge William J. Lutz to take his place. He denied rehearing, CP 5:686, RE 4, entered an order granting interest, CP 5:717, RE 5, and this timely appeal followed.

2. Statement of facts

Plaintiff Durham valued the shopping center at $5.2 million. But the corporation owed approximately $2.2 million to the Guardian Life Insurance Company of America and $1 million to the City of Gulfport for loans used in its construction. T 1:124. That left roughly $2 million in equity.

In 1998, however, the center's bankrupt tenant, Bruno's, Inc., stopped paying on its Food World lease which was servicing the debt. Plaintiff asked the company for an option to purchase all of its shares. The board granted the option.

The 1998 option. The term of the May 5, 1998 option was 60 days. D-57 Ex. 1, RE 6. It required that Durham bring the Guardian Life payments current and keep them current during the option period. He then had to, among other things, either get Guardian Life's permission to take over the corporation or pay off the Guardian Life loan. *Id.* The other shareholders were to be released from

their obligations to Guardian. Nothing in the option gave Durham any right to receive any rents from the property.

Durham worked on fulfilling the option but he never succeeded. The 60 days passed but the parties ignored that deadline. Durham kept the Guardian Life payments current through March of 2000. He worked on finding a tenant for the property. Over that period he paid $648,251 for Guardian Life debt service and also paid certain taxes and insurance.[1] But he never found a tenant, never obtained Guardian Life's permission to take over the corporation, and never paid off the Guardian Life loan, for which Guardian Life demanded a hefty prepayment penalty. So the stock powers were never turned over to him. T 1:137, 152, D-57 pp. 17-20.

Durham's sole objective was to lease the shopping center to the Mississippi Space Commerce Initiative ("MSCI"), a public body. He signed a lease which he hoped would rent the center and enable him to make an additional $9 million on 31 adjacent acres he owned individually. T 1:219, 228. But MSCI never obtained the necessary approval from the Attorney General and MSCI's constituent members. On March 10, 2000, MSCI gave final notice that it would not honor the lease. T 2:225. *See Durham v. University of Mississippi*, 966 So.2d 832 (Miss. Ct. App. 2007).

[1] P-31. Durham's accountant totaled $912,239.96, which the chancellor credited, CP 5:612, RE 3, but P-31 shows that total includes the $263,988.89 Bruno's payment Durham never got and so could not possibly have spent. T 1:96.

Durham quit making the Guardian Life payments. He did not make the payments for April or May 2000 or any subsequent month. T 1:167, 186-187, D-24. Even before that in January he did not pay the ad valorem taxes when they came due, and he got into a fight with the city about who was responsible for paying its debt and threatened to put the corporation in bankruptcy. He also allowed letters of credit that were part of the option to lapse. P-13. D-4, D-16, D-19. The building needed repairs. T 1:294.

Accordingly, Len Blackwell, the corporation's attorney, wrote the escrow agent on April 19, 2000 and formally terminated the option.[2] The board confirmed that action in a meeting on May 22, 2000. D-4, RE 8. Durham did not attend that meeting, but his proxy subsequently ratified the May 22 action in a board meeting on June 13, 2001. D-8, RE 11.

The June 2000 offer. Durham then came to the board with an additional proposal involving another potential lessee, IMIX, Inc. At a meeting on June 8, he was given 15 days to buy the stock if he would take the other shareholders out of all liability. The offer describes conditions related to Guardian Life and then sets out two alternatives that depended on whether rent money from the Bruno's bankruptcy was received within the 15-day offer period:

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[2] The chancellor erroneously gave the date of the letter as "May 19" not "April 19". CP 5:612, 615, RE 3.

> If at the end of said 15-day time period, Dr. Durham satisfactorily performs all of said conditions, he will have the right to purchase all the stock of the corporation for:
>
> (1) If no money is recovered from Bruno's bankruptcy, then for all sums paid by the Corporation from now and after June 8, 2000 in order to reinstate mortgage payments, taxes and other corporate expenditures; but
>
> (2) In the event funds are received from said bankruptcy, then notwithstanding (1) above, the purchase price of the stock of all of the shares will be the gross amount of said funds (with 24.5% of said gross amount to remain in the corporation representing the 24.5% of all stock issued and outstanding which Dr. Durham now owns).

D-5, RE 9. The offer did not give Durham the right to any rents and in fact it required Durham to pay the other shareholders for their share of any rent that was received from the Bruno's bankruptcy within the 15-day offer period. Unlike its predecessor, however, it did *not* require that Durham make any payments to Guardian Life.

Receipt of Bruno's rent. The minutes show that on June 8 the board expected to receive from the Bruno's bankruptcy $263,988.89 in rent for occupancy before the 1997 bankruptcy. D-5; T 1:170; P-15. It authorized Blackwell to place the money in escrow and use it to pay back taxes and bring current the Guardian debt. D-5, RE 9. The chancellor's opinion says the money was received on May 25, but the documents show that a May 25 check for that amount had been returned on May 30 because it referenced a shopping center that

was not in Gulfport. D-21. See T 1:193 (Durham admits "there was a small discrepancy in the first [check])." The money was eventually received in a second check which arrived on June 12. D-26.

At trial Durham testified that he did not know that a payment from Bruno's was coming until "late June." T 1:169. But he also admitted he got mad, left the June 8 meeting early, and stopped talking to the other shareholders except through his attorney, Tom Starling. Starling, however, remained at the meeting where the pending payment was discussed. When asked about that, Durham admitted "I think he stayed." T 1:248. And Starling's participation in the meeting was confirmed in a letter a few weeks later. D-63.

In any event, Durham never fulfilled the terms of the June offer and in August he refused a board invitation to make another offer. D-6, RE 10. The chancellor found that his ignorance of the pending payment, if any, was not the cause of his decision not to pursue the project further. CP 5:615, RE 3.

Eventual sale. In August 2000, to stave off foreclosure by the city, the board voted to extend an option and to eventually sell the property to board member Wayne Williams. D-6, RE 10. He got the other shareholders released from their obligations to Guardian. Williams, who is a defendant in this action, ultimately invested $435,823.92 in debt payments and other expenses before he lost the property to foreclosure. P-47; D-30; T 1:213-214.

This suit. Durham filed this suit in 2001 and attempted to get the sale of the shopping center set aside. But after he filed suit, the board met on Aug. 12, 2001 and, with Durham's proxy *concurring*, voted to ratify the board actions of May 22, June 8, and August 17, 2000. T 1:277; D-4, RE 8; D-5, RE 9; D-6, RE 10.

The chancery court eventually granted summary judgment and dismissed all of Durham's claims except his claim for an accounting and his assertion that the board did not have authority to spend the Bruno's money on anything other than Guardian Life debt service. CP 4:510-11, RE 2. In so ruling it said:

> The Court finds that there are no facts creating a genuine issues as to the corporate meetings held during the times in question when actions were taken which were within the discretion of the shareholders. Plaintiff participated by telephonic means, was involved, had his vote counted and waived any objection to the meetings.

CP. 4:510, RE 2.

Blackwell's accounting. At trial, Len Blackwell offered an accounting of all the Bruno's escrow money. D-9. His account lists a first expenditure as a $75,683.74 payment to Guardian Life on June 13, 2000. D-9. Two more payments made the total paid to Guardian Life $125,616.78. The Harrison County tax collector was paid $67,987.40. Further payments were made to a property insurance agent, and the corporation's law firm, Blackwell & White. The last substantial payment was to the tax collector in April 2001. The balance as of the time of trial was $20,679.77. D-9.

At the end of the trial the chancery court held that Durham had no right to repayment of the money he had spent to maintain the option while it was in force. It said he "cannot now complain that his bargain to pay corporate expenses was not what he intended to do in the process." CP 5:614, RE 3. It also affirmed the board's action that acknowledged termination of the option. CP 5:612, 614, RE 3.

Rent money ruling. But the court incorrectly held that Durham was entitled to the Bruno's rent income because it was "realized . . . during the period of time when Plaintiff, under the option and its acquiescence period, was responsible for corporate expenses." 5:615, RE 3. The chancellor based liability on a duty of "good faith and fair dealing." *Id.* He also held the individual shareholder defendants jointly and severally liable with the corporation for the rent money.

Having reached that erroneous conclusion, the court then held that Durham was entitled to keep the $110,000 earned from a temporary rental of center property to State Farm during the option period, and dismissed the corporation's claim to recover that rent. CP 5:615, RE 3.

After Judge Thomas' untimely death, this court appointed former chancellor William J. Lutz to hear the motion for rehearing. He rejected the motion saying that reconsideration "would do nothing more than prolong an inevitable appeal." T 2:373.

SUMMARY OF THE ARGUMENT

1. This court reviews de novo the interpretation of a contract because that presents a question of law. The obligation of good faith cannot change the requirements of the May 1998 option or the June 2000 offer. Neither one gave Durham any right to rent money. He could have bargained for that, but he did not. In *Durham v. University of Mississippi*, 966 So.2d 832 (Miss. Ct. App. 2007), the Court of Appeals held that Durham did not have the right to enforce a lease of the shopping center to MSCI he claimed was breached, even though he held the May 1998 option. Just as he had no right to enforce a lease to MSCI, he had no right to collect payments on other leases of the same property. This is true with respect to the $110,000 State Farm paid as well as the $263,988.89 received from Bruno's for a lease that was terminated before Durham's option went into effect. Durham did not testify that the option or the offer entitled him to receive rent money. His pleadings did not even contest that the rent money belonged to the corporation. They admitted the corporation was entitled to the money if it was spent on a proper corporate purpose.

2. In the alternative only, if the chancellor's principle, that the party paying the liabilities should get the benefit of the rents, were accepted, that would give Durham the State Farm money but not the Bruno's money. The chancellor's factual findings as to timing are manifestly erroneous. Durham admitted he

stopped paying the liabilities when he got an April 19 letter. And the undisputed documentary evidence shows the Bruno's payment was not received by the corporation until June 12 because an earlier check contained an error and had to be returned. At the time the money was received, the corporation was paying the liabilities. Paying the liabilities is what it did with the money.

3. In the final alternative, there is nothing to justify the chancellor's decision to hold the other shareholders personally liable for the Bruno's rent money. Even if Durham has a claim against the corporation for that amount, he does not have a claim against the individuals. The corporation spent the money to pay third party creditors who have to be paid first. All of the money was spent for proper corporate purposes. The expenditures were not ultra vires. And the proof shows that none of the money went to the other shareholders individually. There was no diversion of corporate assets.

ARGUMENT

I. Durham's contracts with the corporation did not entitle him to receive corporate rents even though he was bearing certain corporate expenses.

The interpretation of a contract is a matter of law, which is a matter this court reviews de novo. *Limbert v. Mississippi University for Women Alumnae Ass'n, Inc.*, 998 So.2d 993 (Miss. 2009). Here the chancellor erred as a matter of law in overruling the defense motions, T 2:262, CP 5:686, RE 4, and giving Durham a contractual right to rent for which he did not bargain and to which he did not even plead.

Precedent, the plain language of the options, and the surrounding circumstances all support the conclusion that Durham's options did not give him a right to receive rents the corporation earned. He did not have any right to the Bruno's rent income, and when he did not exercise the option he had no right to withhold the State Farm rent from the corporation.

Where the language is plain, the implied covenant of good faith and fair dealing does not authorize a chancellor to rewrite the parties' agreement. *Limbert, supra*, 998 So.2d at 999. The exercise of a right to terminate a contract is not bad faith. *Lambert v. Baptist Memorial Hospital-North Miss., Inc.*, 67 So.3d 799, 804 (Miss. Ct. App. 2011). Nor is it bad faith for the parties to structure a deal so as to deny a commission to a party who would otherwise have been entitled to one. *Johnston v. Palmer*, 963 So.2d 586, 594-595 (Miss. Ct. App. 2007). Likewise, a

party which acts in accordance with the terms of the contract generally cannot be found to have violated the duty of good faith and fair dealing. *Baldwin v. Laurel Ford Lincoln-Mercury, Inc.*, 32 F.Supp.2d 894, 898 (S.D. Miss. 1998).

Precedent. The Court of Appeals has already held that Durham's partial performance under the option did not give Durham the right to ignore the corporate entity. In *Durham v. University of Mississippi*, 966 So.2d 832 (Miss. Ct. App. 2007), it held that Durham could not personally assert a claim against MSCI for breach of a 1999 lease agreement, because the lessor was the corporation, not Durham. *Id.* 966 So.2d at 835-836. In other words, the lease rights belonged to the corporation and not to Durham.

The Chancellor mistakenly rejected *Durham* as a guide on the ground that Durham was suing the corporation and its shareholders, not a third party. CP 4:510, RE 2. But in both cases the issue was whether the option gave Durham the right to exercise corporate power over corporate leases, and the result should be the same on both. He did not have that power.

The same principle applies here. Because any lease rights belonged to the corporation, not Durham, the corporation had the right to any rent received and Durham did not. Nothing in evidence in this case calls for a different result.

Plain language. Durham had two different opportunities to buy the stock. The 1998 option was designed to last 60 days. It required Durham to keep the Guardian Life loan current. It did not, however, give him any personal right to

receive rents from the interim lease of corporate property if he did not exercise the option. When he failed to exercise the option, he lost any right he might otherwise have had to interim rent he had collected.

Similarly, the June 2000 offer was designed to last 15 days. It not only did not give him any right to receive corporate rents, but it also specifically contemplated that the Bruno's rent income would not benefit Durham in any capacity except as a shareholder. The terms required that, if the Bruno's rent income were received by the corporation within the 15-day option period, Durham would have to pay the defendant shareholders their proportional share of that payment in exchange for their stock.

The chancellor's ruling thus did exactly the opposite of what this bargain contemplated. Instead of requiring compensation to the defendant shareholders for their share of the Bruno's rent income, it required them to pay the whole amount to Durham.

Surrounding circumstances. A number of surrounding circumstances support adherence to the plain language of the option and offer and not giving Durham any right to corporate rents:

* The June 8 option treated the Bruno's rent income as a corporate asset and the board on that date set up an escrow account to receive it and permit its use for corporate purposes. On August 21, 2001, Durham's proxy voted with the board to ratify what was done at the June 8 meeting. *See Keene v. Brookhaven*

Academy, Inc., 28 So. 3d 1285 (Miss. 2010) (shareholders can ratify past corporate action).

* Durham's complaint admits that the Bruno's rent income could be spent to service the Guardian Life loan, which was an unmet corporate obligation after Durham quit paying. CP. 1:9 (Count 3).

* Durham did not answer the corporation's counterclaim for the State Farm rent money and did not deny liability for it until his counsel responded to the corporation's motion for judgment at the end of trial. T 1:336.

* In his testimony Durham made no claim that the terms of the option or offer required that he receive rent money. See e.g., T 1:130. He also did not say that he had been promised rent money, or that anyone ever approved him having rent money.

Each of these points is consistent with the corporation's right to receive rents and are inconsistent with Durham's claim to them.

For these reasons, Durham is no more entitled to rents in this case than he was entitled to lease rights in the 2007 *Durham* case decided by the Court of Appeals. The board had every right to spend the Bruno's rent income for corporate purposes. Durham had no right to it and so what he did or did not know about it is, in the end, irrelevant. And once he failed to exercise any option, he had no right to withhold the $110,000 State Farm had paid for a partial lease of the shopping center while he was negotiating with MSCI.

This Court should reverse the $263,988.89 judgment in Durham's favor, dismiss all of Durham's claims with prejudice, and enter judgment for Gulfport Shopping Center, Inc. on its claim against him for the $110,000, and remand to the trial court for the calculation of prejudgment interest on this liquidated sum.

II. In the alternative only, when the Bruno's rent income was received, Durham was no longer bearing any corporate expenses and so was not entitled to the rent.

On the undisputed facts, the principle the chancellor employed just cannot be stretched far enough to give Durham a right to any of the Bruno's rent income. In his summary judgment, the chancellor offered the opinion that Durham:

> should ... have had the benefit ... of any funds which came into the corporate hands during the time he had assumed the liabilities of the corporation under this option.

CP 4:510, RE 2. In his judgment, the chancellor said Durham was entitled to rent because:

> those funds were realized by the corporation during the period of time when [p]laintiff, under the option and its acquiescence period, was responsible for corporate expenses . . .during the time when he had assumed the corporate obligations..."

CP 5:615. But the evidence shows that Durham had repudiated on those obligations well before the time the rent was "realized." For this reason, the chancellor erred in overruling defendants' motions for judgment. T 1:262, CP 5:686, RE 4.

The standard of review of this factual finding is manifest error. *Bowers Window and Door Co., Inc. v. Dearman,* 549 So.2d 1309, 1316 (Miss. 1989) (chancellor's finding of detriment manifestly erroneous). The record, however, more than demonstrates manifest error in the court's finding that he was responsible for and had assumed obligations at the time of the Bruno's rent payment.

Durham did not pay after April 19. With respect to the May 1998 option, Durham's testimony could not have been more clear. He said that, after he received Len Blackwell's April 19, 2000 letter terminating the option, he quit paying any corporate expenses. D-18, RE 7, T 1:167, 186, 187, 231 (paid "through the month of March, 2000"). He did not pay Guardian Life, he did not pay 1999 ad valorem taxes, and the Guardian Life default meant that the City of Gulfport would not get paid on its loan either. T 1:232. *See* p. 6, *supra.*

The chancellor's first error was to attribute to the April 19 letter incorrect date, i.e., May 19. CP 5:612, 615, RE 3. That is not the date on the letter and is not the date Durham gave to the letter. It is a date accidentally used by Durham's counsel which Durham himself corrected. After being asked what his reaction was to the "May 19" letter, Durham said:

> It is April 19th. This one document, April 19, 2000, is when everything changed in this venture, where they cancelled my option, requested their stock back [from the escrow agent], and, *of course I wouldn't pay after April 19th.*

T 1:187 (emphasis added). *See also* T 1:186 (not making payments as of May 31 because of April 19 letter). And the June 2000 offer did not require Durham to pay expenses to keep it open. D-5. *See* p. 7, *supra.*

Durham's accounting expert agreed that he made no payments after April 19. She listed his payments to Guardian Life as well as payments for taxes and insurance and listed no payments after April 2000. P-31. She even admitted the payment she listed as "April" might have been made in March. T. 1:106.

The evidence is therefore undisputed that, as of April 19 Durham no longer regarded himself as "responsible" for corporate expenses and he was not "assuming" corporate obligations.

Bruno's payment "realized" in June. There is also no dispute that the Bruno's rent income was not "realized" by the corporation until long after April 19.

For that reason, the exact date of the receipt of the Bruno's rent income is not material. The chancellor thought the check was received on May 25 but that was the day on which the first check, which was defective, was dated. D-21. Durham admitted that check was defective. *See* p. 8, *supra.* Both exhibits and undisputed testimony shows that the correct check was received on June 12, four days after the June 8 meeting. T 1:325-27; D-26. Len Blackwell opened the escrow account on June 13 with $263,988.89 and on that same day used the money

to cure the Guardian Life default, i.e., paid Guardian Life the amounts that Durham had not paid since March, i.e., $75,683.74. D-9; T1:283-84, 317.

Accordingly, the chancellor manifestly erred in finding that the Bruno's check was "realized" "during the period of time" when Durham was responsible for and assumed corporate obligations. Durham repudiated his obligations almost two months before the corporation "realized" the money, which is one reason why it was imperative for the board to immediately use some of the money to cure the Guardian Life default.

In fact, the chancellor's logic – that the Bruno's rent income should go to the party with obligations at the time the money was "realized" – requires that the money be retained by the corporation, because it was the one paying those obligations in June 2000. And that is only fair because the rent was paid for occupancy well before the date of Durham's May 1998 option.

If it reaches this issue, this court should reverse the judgment in Durham's favor and enter judgment here in favor of the corporation and the shareholder defendants.

III. If reached, the shareholder defendants are not individually liable to Durham for money spent to maintain the corporation and service its debt until the property could be sold.

Even if the rent money should have gone to Durham rather than to debt service and other corporate expenses, Durham's only claim would be one against the corporation for the amount it owed him. There was no basis for Judge

Thomas' inexplicable decision to hold the other shareholders personally liable for that amount. His opinion offers no reasons for that decision, and after his death Judge Lutz made no attempt to justify it.

The standard of review for this unexplained piercing of the corporate veil is de novo because it presents a question of law for the court to decide. *Nash Plumbing, Inc. v. Shasco Wholesale Supply, Inc.*, 875 So.2d 1077, 1081-83 (Miss. 2004) (reversing chancellor and holding shareholder not liable for the obligations of the corporation). Absent a showing of fraud or equivalent malfeasance, a shareholder is not liable for the debts of a corporation. *Foamex, L.P. v. Superior Products Sales, Inc.*, 361 F.Supp.2d 576, 578 (N.D. Miss. 2005) (fraud or equivalent malfeasance necessary to render shareholder liable for obligations of the corporation).

First, Durham made no attempt to prove the claim he pled, which was that any expenditure of money for any purpose other than paying Guardian Life was outside of the corporation's powers. CP 1:9, citing Miss. Code Ann. § 79-4-3.04. Durham offered no proof that any of the expenditures from the Blackwell escrow were ultra vires. *Tallahatchie Valley Electric Power Ass'n v. Mississippi Propane Gas Ass'n, Inc.*, 812 So.2d 912, 922 (Miss. 2002). In fact, the directors have a fiduciary duty to third party creditors which requires debts to them be paid without any preference being given to debts owed to another director or shareholder. *Cooper v. Mississippi Land Co.*, 220 So.2d 302, 307 (Miss. 1969). *See also*

Covington v. Covington, 780 So.2d 665, 667-668 (Miss. Ct. App. 2001) (no distribution to shareholders until third party creditors paid).

Second, in his papers, Durham wrongly claimed the individual shareholder defendants should be held liable because they "may not bleed the corporation of its assets." *See* CP 2:298, *citing Morris v. Macione*, 546 So.2d 969, 971 (Miss. 1989). In *Morris*, shareholders created a new corporation and transferred an old corporation's assets to it in an attempt to avoid a debt the old corporation owed.

This Court held that both the new corporation and the shareholders could be held liable to the extent fair value was not paid. The shareholders' personal liability, the Court said, "arises from their diversion of corporate assets, the legal veil ordinarily limiting their liability rent by their conduct." *Id.* at 972.

But here the proof showed nothing of the kind. No assets were "bled." The Bruno's rent income was all used for legitimate corporate purposes, i.e., to pay debts owed to third parties. Each shareholder testified without contradiction that he did not personally receive any of the Bruno's money. T 1:298, 314, 327, 331. There was no "diversion of corporate assets" and so there is no basis for the "legal veil" to be pierced.

For these reasons, if anyone is liable to Durham for the amount of the Bruno's rent income, it is the corporation, not the individual shareholder defendants. This Court should, as a final alternative, reverse the judgment below

insofar as it holds the individual shareholder defendants liable for the amount of the Bruno's rent income.

CONCLUSION

Durham gambled on getting a lease with MSCI and lost, at least insofar as the shopping center was concerned. His adjacent 31 acres were a much different story. In any event, the chancellor sympathized with Durham and tried to find a way to give him some relief. But judgments in a court must be grounded in fact and law, and not just in sympathy.

The May 1998 option and the June 2000 proposal were simple and straightforward. Neither of them entitled Durham to receive rents before he exercised the option or accepted the proposal. He did neither, and that should be the end of the case. There are other possible results, but the best one is to hold Durham to his bargain, absolve the defendants of liability, and require him to pay back to the corporation the $110,000 he personally pocketed. Under no circumstances should the individual shareholder defendants have been held liable to Durham for anything.

For these reasons, this court should reverse the judgment below, dismiss all of Durham's claims with prejudice, enter judgment here in favor of the corporation and against Durham for $110,000, remand for a determination of prejudgment interest, and grant such other relief as the court deems just.

This the 8th day of November, 2011.

Respectfully submitted,

BY: _____

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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the Brief of Appellants has been served via U.S. Mail, postage prepaid, on the following:

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This the 8th day of November, 2011.

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