IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2010-CA-02077-COA

DAVID L. MARTINDALE **APPELLANT**

v.

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

DATE OF JUDGMENT:	11/30/2010
TRIAL JUDGE:	HON. SANFORD R. STECKLER
COURT FROM WHICH APPEALED:	JONES COUNTY CHANCERY COURT
ATTORNEYS FOR APPELLANT:	CLYDE H. GUNN III CHRISTOPHER C. VAN CLEAVE DAVID NEIL HARRIS JR. WILLIAM CORBAN GUNN
ATTORNEYS FOR APPELLEE:	JOHN G. CORLEW VIRGINIA T. MUNFORD
NATURE OF THE CASE:	CIVIL - CONTRACT
TRIAL COURT DISPOSITION:	PARTIAL SUMMARY JUDGMENT GRANTED IN FAVOR OF APPELLEE
DISPOSITION:	AFFIRMED - 10/02/2012
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

MAXWELL, J., FOR THE COURT:

¶1. The members of a Mississippi law firm, operating as a professional limited liability company, voted unanimously to expel one of their fellow members, David L. Martindale. Under the terms of the firm's operating agreement, upon expulsion of a member, the remaining members were required to either (1) dissolve the company or (2) pay the terminated member $1,100 for each percentage point of membership interest owned. The remaining members voted to pay Martindale $19,800 for his eighteen-percent interest rather

than dissolve the firm. The firm then filed for declaratory relief, alleging it had satisfied its contractual obligations to Martindale. The chancellor agreed and granted summary judgment in the firm's favor. While Martindale argues the result is unjust and that the chancellor had equitable powers to provide him a more favorable figure, we find the firm followed the unambiguous terms of its operating agreement when paying Martin his membership interest upon expulsion. We find no error in the chancellor's grant of summary judgment in the law firm's favor and affirm.

Facts and Procedural History

¶2. David L. Martindale practiced law in Laurel, Mississippi, with Hortman Harlow Bassi Robinson & McDaniel PLLC for approximately fourteen years. Martindale was a member of the firm in 2006 when it undertook the representation of Billy Jack McDaniel, a plaintiff injured in an oil-field accident in Texas.[1] The law firm anticipated a substantial recovery and devoted nearly all of its resources to litigating McDaniel's personal-injury case. Martindale—who was not directly involved in McDaniel's representation—openly questioned and criticized the extent of these expenditures. He believed the attention placed on the McDaniel case negatively impacted the firm's other fee-generating business. Martindale's criticisms persisted, allegedly creating tension between himself and the other members.

¶3. Hortman Harlow's operating agreement provided for the expulsion of any member by

[1] Billy Jack McDaniel chose Hortman Harlow to handle his personal-injury case because his first cousin, Chris McDaniel, was a member of the law firm. Chris and another member of Hortman Harlow, Gene Harlow, were the lead attorneys in the McDaniel case.

a unanimous vote of the other members. Upon expulsion of a member, the operating agreement instructed the remaining members to either (1) dissolve the company or (2) pay the terminated member $1,100 for each percentage point of membership interest he or she owned. On February 24, 2009, the law firm notified Martindale of his expulsion by a unanimous vote of the other members. The firm elected not to dissolve the company, but rather, as permitted by the operating agreement, tendered Martindale a check for $19,800, representing his eighteen-percent membership interest. Martindale refused to accept the check, claiming $19,800 did not reflect his fair share of the law firm.

¶4. On May 6, 2009, Hortman Harlow filed for declaratory relief in the Jones County Chancery Court, alleging it had fulfilled its contractual obligations to Martindale under the operating agreement. Martindale counterclaimed, seeking the fair value of his membership interest as well as actual and punitive damages for assault, battery, and intentional infliction of emotional distress. In September 2009, the McDaniel case settled, and Hortman Harlow received approximately $7,655,000 in attorneys' fees. Martindale sought a preliminary injunction prohibiting the law firm from disbursing his alleged share of the fee. The chancery court granted the injunction and ordered Hortman Harlow to set aside eighteen percent of the fee pending resolution of the dispute.

¶5. Hortman Harlow then moved for partial summary judgment with respect to its claim for declaratory relief and Martindale's non-tort counterclaims. At issue was whether the operating agreement provided Martindale's exclusive remedy for payment after his expulsion. The chancery court found the language of the agreement clear and unambiguous

and granted partial summary judgment in Hortman Harlow's favor.[2]

Standard of Review

¶6. We conduct a de novo review of a trial court's grant or denial of a motion for summary judgment. *Lewallen v. Slawson*, 822 So. 2d 236, 237 (¶6) (Miss. 2002) (citations omitted). Summary judgment is proper "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." M.R.C.P. 56(c). In determining the propriety of summary judgment, we view the facts in the light most favorable to the nonmovant. *Robinson v. Singing River Hosp. Sys.*, 732 So. 2d 204, 207 (¶12) (Miss. 1999).

Discussion

¶7. Because Martindale did not challenge the firm's contractual authority to terminate his membership, we need not consider whether Martindale's expulsion was proper. Instead, our inquiry is limited to deciding whether Hortman Harlow satisfied its contractual obligations to Martindale after his expulsion. Specifically, we must decide if sections 9.2(a) and 9.5 of the law firm's operating agreement provided Martindale's exclusive right to payment after his expulsion.

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[2] Hortman Harlow did not move for summary judgment with respect to Martindale's counterclaim for assault, battery, and intentional infliction of emotional distress, and it remains before the chancery court. After granting Hortman Harlow's motion for partial summary judgment, the chancery court certified the judgment as final under Mississippi Rule of Civil Procedure 54(b).

I. Whether Hortman Harlow's operating agreement or Mississippi law provides Martindale with any right to additional payment.

¶8. Section 9.5 of Hortman Harlow's operating agreement states: "Upon the termination of a Member's Membership Interest under Section 9.1(b) . . . , the other Members may elect either (1) to pay an amount equal to the terminated Members [sic] points as calculated pursuant to Section 9.2(a) less any debt to the company; or (2) to dissolve the Company . . . ." Section 9.2(a) provides the payment formula for a terminated member's interest in the law firm: "The terminating Member shall receive an amount equal to One Thousand One Hundred and No/100 Dollars ($1,100.00), multiplied by each percentage point of Membership Interest owned by the terminating Member as set forth on Schedule "B" in lieu of his positive capital account balance . . . ."

¶9. In Mississippi, "an LLC operating agreement is a contract" and should be interpreted according to contract law. *Bluewater Logistics, LLC v. Williford*, 55 So. 3d 148, 159 (¶45) (Miss. 2011). We generally apply a three-step analysis when reviewing contract interpretation. *Royer Homes of Miss., Inc. v. Chandeleur Homes, Inc.*, 857 So. 2d 748, 752 (¶10) (Miss. 2003). The first step requires that we determine whether the contract is ambiguous. *Id.* If it is not, we must "accept the plain meaning of a contract as the intent of the parties." *Ferrara v. Walters*, 919 So. 2d 876, 882 (¶13) (Miss. 2005) (citations omitted). If we cannot ascertain the contract's meaning and the parties' intent within the contract's "four corners," we apply the "'canons' of contract construction." *Cherokee Ins. Co. v. Babin*, 37 So. 3d 45, 48 (¶8) (Miss. 2010). If the meaning of the contract is still ambiguous, we turn to extrinsic evidence. *Royer Homes*, 857 So. 2d at 753 (¶11).

¶10. However, in summary-judgment cases, reviewing courts must focus solely on the first step of the analysis and determine whether the contract is ambiguous. If it is not, the "parties are bound by the language of the instrument." *Delta Pride Catfish, Inc. v. Home Ins. Co.*, 697 So. 2d 400, 404 (Miss. 1997) (quoting *Cherry v. Anthony, Gibbs, Sage,* 501 So. 2d 416, 419 (Miss. 1987)). But if the contract's terms are ambiguous or subject to more than one interpretation, summary judgment must be reversed and the case should proceed to trial. *Royer Homes*, 857 So. 2d at 752 (¶8).

A. Review for Ambiguity

¶11. Our review for ambiguity requires that we consider the express wording of the contract as a whole. *Babin*, 37 So. 3d at 48 (¶8). We must "accept the plain meaning of a contract as the intent of the parties where no ambiguity exists." *A & F Props. LLC v. Madison Cnty. Bd. of Supervisors*, 933 So. 2d 296, 301 (¶12) (Miss. 2006) (quoting *Ferrara*, 919 So. 2d at 882 (¶13)). "The mere fact that the parties disagree about the meaning of a provision of a contract does not make the contract ambiguous as a matter of law." *Delta Pride Catfish*, 697 So. 2d at 404.

¶12. Here, the plain language of section 9.5 enumerates that when Hortman Harlow expels a member, the remaining members may either (1) pay the terminated member an amount calculated under the formula in section 9.2(a) or (2) dissolve the law firm and share the liquidation proceeds with all members, including the terminated member. Section 9.2(a) then provides that a terminated member shall receive $1,100 for each "percentage point of membership interest owned by the terminated member." This payment is tendered "in lieu of [a terminated member's] positive capital account balance." We find the only reasonable

interpretation of sections 9.2(a) and 9.5 is that the parties intended for these sections to provide a member's exclusive right to compensation upon his or her expulsion.[3]

B. Section 13.10 and Additional Remedies

¶13. While these provisions are clear and unambiguous, Martindale insists sections 9.2(a) and 9.5 were not the only sections of the operating agreement concerning payment to an expelled member. He argues section 13.10 incorporates additional "rights and remedies," which the chancery court erroneously failed to consider. Section 13.10 states, in pertinent part: "[R]ights and remedies [under this agreement] are given in addition to any other rights the parties may have by law, statute, ordinance or otherwise." Martindale suggests the chancellor "failed to give life and meaning to [his] express rights and remedies by 'Law' or 'Otherwise.'" He argues Mississippi Code Annotated section 79-29-306(3)(a) (repealed 2010);[4] two supreme court decisions, *Williford*, 55 So. 3d 148, and *Fought v. Morris*, 543 So.

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[3] We disagree with the dissent's proposed alternate interpretation of the operating agreement's exclusive remedies for expelled members. The dissent argues section 9.5 of the operating agreement could possibly be interpreted to provide compensation for "relinquishment of the right to seek dissolution." This interpretation is unreasonable because it directly conflicts with the plain language of section 9.5, which upon expulsion of a member under section 9.1(b), unambiguously grants the "other Members" the option to dissolve the company—which they chose not to do here. Furthermore, section 9.5 specifically incorporates section 9.2(a)'s method for calculating an expelled member's payment. And section 9.2(a) expressly, and very clearly, provides that such payment is made "*in lieu of* [*a terminated member's*] *positive capital account balance*." (Emphasis added). There is no ambiguity or inherent conflict merely because the LLC operating agreement expressly provides more favorable terms when a member becomes permanently disabled and unable to perform his duties, as contemplated by section 9.4, than it does in a circumstance such as this one, where he is expelled by the other members.

[4] In 2010, the Mississippi Legislature revised the Mississippi Limited Liability Company Act. As part of the revisions, the Legislature repealed section 79-29-306, a statute Martindale cites frequently in his brief. However, the language of section 79-29-306(3)(a)

2d 167 (Miss. 1989); and the implied covenant of good faith and fair dealing provide him some sort of additional "right to fairness and equitable relief." We agree that discretionary equitable relief is available under some circumstances, but not when the underlying contract is clear and unambiguous, and there is no breach or other similar issue with enforcement.

1. Section 79-29-306(3)(a)

¶14. Under section 79-29-306(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." (Emphasis added). Martindale argues this statute granted the chancellor authority to look past the unambiguous LLC agreement to somehow craft him an additional and more favorable equitable remedy. But such an assertion ignores one of the basic principals of contract law—that when a "contract is unambiguous, the 'parties are bound by the language of the instrument.'" *Delta Pride Catfish*, 697 So. 2d at 404 (quoting *Cherry,* 501 So. 2d at 419).

¶15. While section 79-29-306(3)(a) grants chancellors the discretion to fashion appropriate equitable relief, such as enforcement of an LLC agreement or money damages, we find there must be some sort of *breach* or other hindrance with the enforceability of an LLC agreement to trigger this equitable power. Otherwise, chancellors are not authorized to disregard the unambiguous terms of an LLC operating agreement that have been enforced to the letter by the remaining members.

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is now located under Mississippi Code Annotated section 79-29-123(8)(a) (Supp. 2011). Because we ultimately find Martindale's reliance on section 79-29-306(3)(a) is misplaced, we need not address Hortman Harlow's argument that repealed statutes are of no effect in pending cases.

2. *Bluewater Logistics, LLC v. Williford*

¶16. We disagree with Martindale's assessment that the supreme court's recent decision in *Williford* authorized the chancellor here to equitably determine the fair market value of his membership interest—rather than limit his review to the express provisions of the operating agreement's percentage-based arrangement. In *Williford*, the supreme court upheld a chancellor's judgment awarding a wronged minority member of two LLCs the fair market value of his membership interests. *Id.* at 162-63 (¶¶63-68). The chancellor found the two LLCs committed a willful, grossly negligent breach of their LLC agreements by ousting Williford then attempting to rescind their initial offer to buy out his twenty-five percent interest in each LLC. *Id.* at 161 (¶55). The supreme court recognized the chancellor's statutory authority under section 79-29-306(3)(a) to enforce LLC agreements by injunction or grant other discretionary relief the chancellor deems fair under the circumstances. *Williford*, 55 So. 3d at 159-60 (¶45). But the court did not rewrite basic contract law in doing so. *Id.* at 162 (¶63). Rather, it enforced the terms of the LLCs' operating agreements against the breaching members, and recognized the chancellor's statutory authority to fashion appropriate relief. While the LLCs had a right to exclude Williford from the businesses, if they exercised this right, "they had a companion duty to tender payment to him." *Id.* at 163 (¶67).

¶17. Unlike the minority member in *Williford*, Martindale has not shown the other members of Hortman Harlow breached the law firm's operating agreement or failed to enforce it. The law firm enforced the contract as written, tendering Martindale payment as contemplated by the operating agreement he freely entered. And there is no suggestion that

the firm members exceeded the bounds of the LLC agreement when voting unanimously to terminate him. Absent any breach, we find neither section 79-29-306(3)(a) nor *Williford* affords Martindale any additional relief.

3. *Fought v. Morris*

¶18. Martindale next suggests the chancellor "abused [his] discretion and applied an erroneous legal standard by failing to require [Hortman Harlow] to treat [Martindale] in an 'intrinsically fair' manner." The doctrine of "intrinsic fairness," was first recognized by the Mississippi Supreme Court in *Fought*, 543 So. 2d at 171. In *Fought*, the court held that actions of a majority stockholder toward a minority shareholder in a closely held corporation must be "intrinsically fair" when that majority stockholder stands to benefit as controlling stockholder. *Id.* Although *Fought* dealt only with closely held corporations, "the rationale of *Fought* applies with equal force" to limited liability companies. *Williford*, 55 So. 3d at 161 (¶51).

¶19. We agree the majority members owed Martindale a duty to act in an "intrinsically fair" manner, but find no indication they breached this duty in administering his proper payout under the contract. Martindale does not claim his termination was in bad faith, only that the remaining members violated their duty of intrinsic fairness to him in enforcing the operating agreement's payout provision without considering the market value of his membership interest. The law firm expelled and paid Martindale in line with the clear terms of its operating agreement. "With limited exceptions, persons enjoy the freedom to contract. When they do, they are bound by the terms of their contracts." *Titan Indem. Co. v. Hood*, 895 So. 2d 138, 147 (¶41) (Miss. 2004). While Martindale's payout is meager in light of the

large settlement after his expulsion, we find Martindale received what he initially bargained for under the firm's operating agreement.

4. Implied Covenant of Good Faith and Fair Dealing

¶20. Martindale also argues Hortman Harlow's failure to pay him the fair value of his interest breached the firm's implied duty of good faith and fair dealing under the operating agreement. "All contracts contain an implied covenant of good faith and fair dealing in performance and enforcement." *Limbert v. Miss. Univ. for Women Alumnae Ass'n*, 998 So. 2d 993, 998 (¶11) (Miss. 2008) (citing *Morris v. Macione*, 546 So. 2d 969, 971 (Miss. 1989)). Good faith means "the faithfulness of an agreed purpose between two parties, a purpose which is consistent with justified expectations of the other party." *Cenac v. Murry*, 609 So. 2d 1257, 1272 (Miss. 1992). In contrast, bad faith requires "a showing of more than bad judgment or negligence; rather, 'bad faith' implies some conscious wrongdoing 'because of dishonest purpose or moral obliquity.'" *Univ. of S. Miss. v. Williams*, 891 So. 2d 160, 170-71 (¶24) (Miss. 2004) (quoting *Bailey v. Bailey*, 724 So. 2d 335, 338 (¶9) (Miss. 1998)). However, a party does not breach the "implied covenant of good faith and fair dealing when the party 'took only those actions which were duly authorized by the contract.'" *Limbert*, 998 So. 2d at 999 (¶14) (quoting *Gen. Motors Acceptance Corp. v. Baymon*, 732 So. 2d 262, 269 (¶29) (Miss. 1999)).

¶21. A professional limited liability company must acquire the membership interests of disqualified members. Miss. Code Ann. § 79-29-911(1) (Supp. 2011). "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." Miss. Code Ann. § 79-29-

911(2) (Supp. 2011). In compliance with section 79-29-911, Hortman Harlow's operating agreement specifically provided a formula to determine an expelled member's interest. By opting against dissolution and instead tendering Martindale a check for $19,800, the law firm acted as authorized by its operating agreement. Because Hortman Harlow could not have acted in bad faith by exercising a contractual right, we find the firm did not breach its implied duty of good faith and fair dealing under the operating agreement. *See Limbert*, 998 So. 2d at 999 (¶14). Thus, we find summary judgment was properly granted in Hortman Harlow's favor.

II. Whether the chancery court erred in failing to make sufficient findings of fact.

¶22. Martindale next claims the chancellor abused his discretion by not making findings of fact on his counterclaims for declaratory judgment, judicial dissolution, and breach of good faith and fair dealing. We disagree.

¶23. Mississippi Rule of Civil Procedure 52(a) provides: "In all actions tried upon the facts without a jury the court may, and shall upon the request of any party to the suit or when required by these rules, find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered accordingly." But a trial court need not make findings of fact on a motion for summary judgment, unless requested by a party under Rule 52(a). *Harmon v. Regions Bank*, 961 So. 2d 693, 700 (¶24) (Miss. 2007). "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." *Id.*

¶24. Martindale did not request additional findings of fact under Rule 52(a). And although the chancellor had no requirement to make factual findings, his findings of fact were more than adequate to dispose of Martindale's counterclaims. We find this issue lacks merit.

¶25. **THE JUDGMENT OF THE CHANCERY COURT OF JONES COUNTY IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.**

BARNES, ROBERTS, CARLTON, RUSSELL AND FAIR, JJ., CONCUR. GRIFFIS, P.J., DISSENTS WITH SEPARATE WRITTEN OPINION, JOINED BY LEE, C.J., AND ISHEE, J. IRVING, P.J., NOT PARTICIPATING.

GRIFFIS, P.J., DISSENTING:

¶26. The majority finds that the only reasonable interpretation of section 9.5 is that the parties intended for this section to provide a member's exclusive right to compensation upon expulsion. I disagree and respectfully dissent.

¶27. In *Dalton v. Cellular South, Inc.*, 20 So. 3d 1227, 1232 (¶10) (Miss. 2009), the supreme court held:

> A contract is ambiguous if it contains conflicting clauses when the contract is read as a whole. This contract is capable of more than one reasonable interpretation as to when and how the contract can be terminated. This contract fails to provide clear direction as to which termination clause applies, without consideration of extrinsic evidence.

The court then determined that "[t]he contract at issue contains termination clauses that lack clarity and that are not harmonious." *Id.* at 1233 (¶12). The court found "that the conflicts among the clauses create an ambiguity." *Id.*

¶28. I agree that a reasonable interpretation of section 9.5 is that the payment of $19,800, the amount "calculated pursuant to Section 9.2(a)," may be interpreted to provide the expelled member's exclusive right to compensation upon his expulsion. I dissent, however,

because I find another reasonable interpretation. Therefore, I am of the opinion that this case should be reversed and remanded for the chancellor to consider the rules of contract interpretation.

¶29. The relevant sections of the agreement provide:

> Article IX
> TERMINATION OF MEMBER'S INTEREST
>
> *Section 9.1* *Termination of Member's Interest.* A Member's Membership Interest in the Company shall terminate upon any of the following occurrences:
>
> (a) Withdrawal of a Member;
> (b) Expulsion of a Member by a unanimous vote of the other Members;
> (c) Loss of eligibility for membership under Article VIII;
> (d) Transfers by operation of law under Article X;
> (e) Retirement of a Member;
> (f) Death of a Member;
> (g) Permanent Disability as determined by a unanimous vote of the other Members under Section 9.4 of this Agreement.
>
> *Section 9.2* *Payments to Terminated Members.* Upon termination of a Member's interest because of death or retirement, the Member shall be entitled to receive from the Company the amounts set forth below:
>
> (a) The terminating Member shall receive an amount equal to One Thousand One Hundred and No/100 Dollars ($1,100.00) multiplied by each percentage point of Membership Interest owned by the terminating Member as set forth on Schedule "B" in lieu of his positive capital account balance;
>
> (b) The terminating Member shall be paid the total amount of One Hundred Thousand Dollars $100,000, (which will include the amount paid for the points specified in item 9.2(a) above) in full payment of such Member's Membership Interest in the Company. . . .
>
> *Section 9.4* *Permanent Disability.* After a period of six (6) months during which the Member is, because of sickness or injury, unable to perform his main duties for the Company, a Member shall be permanently disabled upon the unanimous vote of the other Members. . . . At the end of the six (6) month period, the disabled Member's Membership Interest shall be terminated and

such Member shall be entitled to receive the payments as provided under Section 9.2 of this Agreement.

Section 9.5 *Option to Dissolve.* Upon the termination of a Member's Membership Interest under Section 9.1(b), (c), or (d) 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 XI of this Agreement.

Section 9.6 *Payments upon Withdrawal.* In the event a Member decides to withdraw (Section 9.1(a)) from the Company, the remaining Members shall acquire the withdrawing Member's Membership Interest in the Company upon the payment of the sum due under Section 9.2(a) only, which payment may be either in cash or partly in cash and partly in assets at their current market value. The assets to be taken must be agreed to by the remaining Members. The payment shall be for the Member's Membership Interest. Any debt of said Member to the Company shall be deducted and withheld from the final amount due.

¶30. We must interpret section 9.5. This section gives the remaining members a choice. They must choose to either pay Martindale $19,800 or dissolve and liquidate the company. If they chose to dissolve, then the company would be liquidated. All assets would be valued, sold and distributed to the members based on their percentage of ownership. Upon liquidation, Martindale, and each of the other members, would thereby receive full payment for their "Membership Interest."

¶31. The members chose not to dissolve the company. Instead, they chose to pay Martindale $19,800. What was this payment for? Was it compensation for Martindale's "Membership Interest?" Or, was it compensation for Martindale's relinquishment of the right to seek dissolution? I do not know. The payment allowed the remaining members to continue practicing law under the Hortman Harlow name without interruption, and without

Martindale.

¶32. The agreement specifically states that the company will pay $19,800 to a member who retires or dies as payment "in lieu of his positive capital account balance." Section 9.2. More emphatically, the agreement states that the company will pay $19,800 to a member who voluntarily withdraws, and "[t]he payment shall be for the Member's Membership Interest." Section 9.6.

¶33. The language is slightly different for a member who becomes permanently disabled. For a disability, the operating agreement provides that "the disabled Member's Membership Interest shall be terminated[,] and such Member shall be entitled to receive the payments as provided under section 9.2 of this Agreement." Section 9.4. The disabled member would receive $100,000, under section 9.2(b) for his membership interest, and this amount would include $19,800, under section 9.2(a) for his positive capital account balance.

¶34. The language use in section 9.5 is different than the language used in sections 9.2, 9.4 or 9.6. The heading of section 9.5 is "Option to Dissolve." The heading of section 9.2 is "Payments to Terminated Members," section 9.4 is "Permanent Disability," and section 9.6 is "Payments Upon Withdrawal." If section 9.5 was intended to be the sole payment to an expelled member, I would expect the section to be titled "Payments upon Expulsion" or something similar.[5] Instead, section 9.5 reads:

Section 9.5 <u>*Option to Dissolve.*</u> Upon the termination of a Member's

[5] I recognize that "*Section 13.8, Headings*" says "[t]he headings in this Agreement are for convenience only and are in no way intended to describe, interpret, define, or limit the scope, extent, or intent of this Agreement or any of its provisions." As such, my opinion is not based on the heading that was used or not used.

> Membership Interest under Section 9.1(b) . . . 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 XI of this Agreement.

(Emphasis added).

¶35. Section 9.5 does not state that it is payment "in lieu of his positive capital account balance" or for his "Membership Interest." Sections 9.2 and 9.6. The exclusion of such language indicates that section 9.5 could be reasonably interpreted as payment as consideration for the remaining member's decision to not seek dissolution. The expelled member would retain the right to his capital account.

¶36. In footnote 3, the majority argues that "section 9.5 specifically incorporates section 9.2(a)'s method for calculating an expelled member's payment. And section 9.2(a) expressly, and very clearly, provides that such payment is made 'in lieu of a member's positive capital account.'" This language proves an ambiguity in the agreement.

¶37. Section 9.4 specifically incorporates section 9.2, yet section 9.5 does not. Section 9.4 states that a "disabled Member's Membership Interest shall be terminated and *such Member shall be entitled to receive the payments as provided under Section 9.2 of this Agreement*." (Emphasis added). Thus, a terminated disabled Member is entitled to receive $19,800 (section 9.2(a)), for his positive capital account balance, and an additional amount up to a total payment of $100,000 (section 9.2(b)), for his membership interest. Section 9.4 says that a disabled Member's interest is terminated, and he is to be paid "as provided under section 9.2" for "full payment of such Member's Membership Interest in the Company."

¶38. Section 9.5 uses completely different language. If section 9.5 said the expelled member was to be paid "as provided under section 9.2," I would agree with the majority. It does not. Instead, section 9.5 says, "*Option to Dissolve.* Upon the termination of a Member's Membership Interest under Section 9.1(b) . . . 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 . . . ." Hence, the ambiguity and my dilemma. What is the payment "as calculated pursuant to section 9.2(a)" for? I do not know. It could be interpreted as payment for his membership interest or it could be consideration to allow the remaining members to continue the company and not dissolve it.

¶39. The majority defines our difference of opinion in footnote 3. The majority adds language, not present in the agreement and not based on a reasonable inference, to reach its conclusion. I read only the words and language used by the parties in the agreement. I can only conclude that the agreement used different language for a reason. It is from the use of the language in section 9.4 ("as provided under Section 9.2") as opposed to the language in section 9.5 ("as calculated pursuant to Section 9.2(a)") that I find an ambiguity.

¶40. Under the agreement, each member's ownership interest is only in his or her capital account. The company's "property" is defined in section 1.9 as:

> all those assets and liabilities of the Company as represented by the capital accounts of the partners (Members) as set forth in Schedule "A" attached hereto and made part hereof together with any and all other property, whether real or personal, interests, assets or rights owned or held by or on behalf of the Company at any time hereafter.

Schedule "A" defines "Capital Accounts" as:

> The Capital Accounts of the Members are interests in all assets and liabilities of the Company as represented by the net capital accounts listed [the same to include, but is not limited to, all checking and savings accounts (including the firm's Trust Account) all at AmSouth Bank, all accounts receivable, all work in progress (time and expenses) recorded in the accounting system, all furniture, equipment and other personal property reflected in the depreciation schedule and located in the office building at 414 West Oak Street, Laurel, Mississippi, all files (open and closed) wherever located, all accounts and notes payable, etc.] . . . .[6]

(Brackets in original).

¶41. I recognize that the standard of review is de novo. I have viewed the facts in the light most favorable to Martindale, the nonmovant. Although I agree that the majority's interpretation is reasonable, I am of the opinion that there is more than one reasonable interpretation of section 9.5. I conclude that there is an ambiguity in the agreement. Thus, I am of the opinion that there is a genuine issue of a material fact in dispute, and Hortman Harlow is not entitled to a judgment as a matter of law. I would reverse the summary judgment and remand this case for further proceedings.

LEE, C.J., AND ISHEE, J., JOIN THIS OPINION.

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[6]Although not relevant to the outcome of this appeal, the agreement appears to have a contradiction in section 6.4 which provides that the company will use the cash method of accounting and the definition of "Capital Accounts" which requires the inclusion of amounts based on the accrual method of accounting. Based on capital account definition in Schedule "A," Martindale's capital account would not simply be based on actual profits and loss from prior years, which were based on the cash method of accounting, but would also include all "work in process (time and expenses) recorded in the accounting system," i.e. the McDaniel contingency fee case.