

STATE OF MICHIGAN
IN THE SUPREME COURT

DEAN ALTOBELLI,

Supreme Court No. 150656

Plaintiff/Appellee/Cross-Appellant,

Court of Appeals No. 313470
(Judges Borrello, Servitto and Beckering)

v

MICHAEL W. HARTMANN, MICHAEL P.
COAKLEY, ANNA M. MAIURI, JOSEPH M.
FAZIO, DOUGLAS M. KILBOURNE, JOHN D.
LESLIE, AND JEROME R. WATSON,

Lower Court No. 12-635-CZ
Ingham County Circuit Court
Hon. Paula Manderfield

Defendants/Appellants/Cross-Appellees.

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RESPONSE TO CROSS-APPLICATION FOR LEAVE TO APPEAL

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COUNTER-STATEMENT OF ISSUES PRESENTED

- I. MCL 450.4509(1) has provided since 1997 that: “A member may withdraw from a limited liability company only as provided in an operating agreement.” Miller Canfield’s Operating Agreement states that “[a] Principal may voluntarily withdraw from the Firm at any time . . .” Did the Court of Appeals correctly conclude that the statute does not require limited liability companies to prescribe specific methods and conditions under which a member could voluntarily withdraw, and that the general language of Miller Canfield’s Operating Agreement was therefore sufficient to allow for a principal’s voluntary withdrawal?

Defendants/Cross-Appellees say “Yes.”

Plaintiff/Cross-Appellant says “No.”

The Court of Appeals said “Yes.”

The Trial Court said “No.”

I. INTRODUCTION

In the summer of 2010 Plaintiff, a Miller Canfield senior principal, withdrew from the Firm by moving to Alabama to work in the University of Alabama's football program, as he still does today.

MCL 450.4509(1), a part of Michigan's Limited Liability Company Act, states that a member "may withdraw from a limited liability company only as provided in an operating agreement." Miller Canfield is organized as a limited liability company, and its operating agreement provides that a member "may voluntarily withdraw from the Firm at any time." This is consistent with the statute. Effective July 31, 2010, after Plaintiff had left Michigan for Alabama and transitioned his clients to other lawyers, his voluntary withdrawal was accepted.

Plaintiff contends, after having become dissatisfied with his 2010 compensation and seeing his overture to return on an of-counsel basis in 2011 rejected, that in fact he did not withdraw from the Firm. He argues that the statute's reference to withdrawal "only" as provided in an operating agreement required Miller Canfield to detail the circumstances under which a senior principal could withdraw. Because the agreement does not specify – for instance – that leaving the practice of law and working in another profession could be deemed a withdrawal, he says he could not have withdrawn.

Plaintiff's farfetched argument suggests that a Miller Canfield principal could never withdraw from the Firm other than through death, e.g., if he left the practice, went to work for a competing law firm, or lost his license to practice law. Plaintiff's position is inconsistent with common sense, the statute, and Miller Canfield's operating agreement. It certainly does not warrant this Court's attention.

Plaintiff asks this Court to address a narrow issue: Is the operating agreement's (hereafter "OA") provision that a Miller, Canfield, Paddock and Stone, P.L.C. (hereafter "Miller Canfield") senior principal "may voluntarily withdraw from the Firm at any time" enough to satisfy MCL 450.4509(1)? Or does the statute require the OA to detail a specific manner or process of withdrawal – e.g., by written resignation – and/or a list of permissible reasons in order for the withdrawal to be effective? The trial court concluded that Plaintiff could not have resigned; the Court of Appeals reversed that holding after applying familiar principles of statutory interpretation to reach an obvious outcome (and avoid an absurd one). Plaintiff's issues meet none of the criteria for review by this Court that are enumerated in MCR 7.302(B)(2). They do not implicate the state or its subdivisions, they are not of major importance to the jurisprudence, and the result below is not manifestly erroneous or resulting in injustice. See generally, *Gulf Underwriters Ins Co v McClain Indus*, 483 Mich 1010, 1011 (2009) (Young, J., concurring in denial of leave) (narrow disputes applicable only to the parties are not appropriate for Michigan Supreme Court review).

II. COUNTER-STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

Miller Canfield will briefly describe Plaintiff's actions that led the Firm's managers to conclude that he had resigned. That the Firm does not address each of Plaintiff's factual assertions does not mean it agrees with his version of events. What matters at this point is only that there are disputed questions of fact regarding whether he voluntarily withdrew, which Plaintiff attempts to remake into a question of law.

Certain material facts are undisputed. First, Plaintiff wanted to go to work for the University of Alabama as Nick Saban's assistant. Second, he never changed – or offered to change – his decision to leave for Alabama once he knew that Miller Canfield would consider his

employment there a withdrawal from the Firm. In fact, Plaintiff had begun his new employment well before the Firm accepted that withdrawal.

Miller Canfield's OA contains these provisions:

- A principal "may voluntarily withdraw from the Firm at any time and shall withdraw involuntarily in the event two-thirds (2/3) of the persons who are the senior Principals vote in favor of such withdrawal, as provided in section 2.8 hereof." OA § 2.29.
- A Miller Canfield principal must "devote his or her full time" to the Firm, and may not engage in outside employment without the written approval of the CEO and the Managing Directors. OA § 2.17.
- The Managing Directors "have the full and complete right, power, and authority to construe the provisions of this Operating Agreement and any action taken thereon," and their decision shall be binding on all principals. They also have the authority to "supply any omission . . . in the provisions of this Operating Agreement . . ." OA § 3.1.

Miller Canfield filed the Affidavits of Michael Hartmann, then the Firm's CEO and a Managing Director, and Leroy Asher, a member of Plaintiff's practice group in the trial court. Those Affidavits, attached hereto as Exhibits 1 and 2, depict Plaintiff's deliberate and knowing decision to withdraw from the Firm. Before Altobelli made that decision, he discussed his career plans with then CEO Hartmann in early June 2010. Altobelli told Hartmann that (i) he had been offered a position in the University of Alabama football program that he wanted to take, (ii) it was his dream to coach football, and (iii) if things worked out as he hoped, he could make more money coaching football than he could practicing law. (Exhibit 1, Hartmann Aff ¶ 9.) Altobelli had spoken to Hartmann before about his interest in coaching football and his periodic contacts with his onetime coach, Nick Saban. (*Id.*, ¶ 10.) He advised that a factor in his decision "to pursue an opportunity at Alabama" was his dissatisfaction with the way Miller Canfield had compensated him. (*Id.*, ¶ 13.) Shortly thereafter, without receiving any promise or commitment from the Firm about his status, Altobelli accepted Alabama's offer. He transitioned his clients to

others, vacated his office, and moved to Alabama to begin his new job in mid-June, 2010 (*id.*, ¶ 8; Exhibit 2, Asher Aff ¶¶ 2-5), asking Mr. Asher – to whom he had assigned clients – whether he would return them to him “if he returned to the Firm in the future.” (Exhibit 2, ¶¶ 2-4.)

In early July 2010, relying on Section 2.17 of the OA, Altobelli asked Hartmann to discuss his “status with the Firm” with the Managing Directors, and to seek approval of his “outside compensation with the University of Alabama” as well as keeping his status and compensation unchanged for at least six months. (Exhibit 1, ¶ 6 and Ex. A thereto.) Alternatively, Altobelli proposed that if he withdrew from the Firm they should come to an early agreement regarding his 2010 compensation. Following the steps contemplated by the OA, Hartmann discussed Altobelli’s request with the Managing Directors, who denied it. (Exhibit 1, ¶ 7.) Hartmann advised Altobelli that “[t]he Managers discussed [his] status” and concluded that he could “not remain a principal while [he] work[ed] at Alabama” since the Firm’s Agreement “contemplate[d] the full time practice of law.” (*Id.*) Altobelli thus knew that he could not accept the Alabama coaching offer and still remain a senior principal at the Firm, but nevertheless accepted his job at the University of Alabama. (*Id.*, ¶ 11.)¹

III. ARGUMENT

A. Plaintiff’s Cross-Application Presents An Invented Issue.

Plaintiff’s Cross-Application warns that the Court of Appeals has distorted the meaning of MCL 450.4509(1) by engrafting onto it a doctrine of “implied withdrawal.”² But Miller

¹ In December 2010, Plaintiff discussed with several principals his possible return to the Firm, and in January 2011 he proposed an “Of Counsel” arrangement with the Firm while he continued to work for the University of Alabama. (Exhibit 1 ¶¶ 17-19.) No agreement on his proposal was reached. Plaintiff continues to work for the University of Alabama today. (Exhibit 1 ¶¶ 19-20.)

² For instance, Plaintiff writes that “defendants asked the circuit court to recognize a novel principle of Michigan law – implied withdrawal of ownership in a limited liability company.” (Cross-Application, p 7.) Plaintiff also represents that the “Court of Appeals proceeded to . . .

Canfield never argued that Plaintiff implicitly withdrew, and the Court of Appeals did not frame its holding in terms of “implied withdrawal.” Instead, the Court of Appeals agreed with Miller Canfield that MCL 450.4509(1) merely requires an LLC to provide generally in its operating agreement that members have the ability to withdraw voluntarily, without requiring details on when or how this may occur.

Plaintiff mischaracterizes the issue because he is intent on shoehorning his argument into the case law addressed in his Cross-Application. Those cases, discussed *infra* at pages 9-10, dealt with specific statutory or operating agreement requirements concerning voluntary withdrawal. When an LLC’s operating agreement or a statutory default rule demands specific reasons or steps, compliance is of course necessary. But Miller Canfield’s OA permits voluntary withdrawal by a principal in general terms, and the Court of Appeals held that MCL 450.4509(1) required nothing more.

Plaintiff acknowledges that a resignation could be effected by submitting a written notice – thereby contradicting himself. He says that Miller Canfield’s practice at the time he left was “to obtain a written notice of withdrawal from any Principal who was willing to voluntarily withdraw his or her ownership position in the Firm.” (Cross-Application, p 2.) However, the OA does not explicitly authorize, or require, withdrawal by this method any more than by any other method.³ Furthermore, Plaintiff’s argument that an operating agreement must describe specific steps constituting withdrawal would mean that Miller Canfield’s principals are bound to it for their lifetime (unless expelled). That cannot be the case. An operating agreement that

remedy the omission of any alternative method in the Operating Agreement by establishing a principle of ‘implied’ withdrawal.” (*Id.*, p 13.)

³ Plaintiff’s circuit court complaint asserted at ¶ 159 that the right to withdraw was spelled out in section 2.34(c) of the OA. But that section speaks only to the substitution of a “PC” for the individual, and vice versa, in case a Miller Canfield principal chooses PC status for tax purposes.

would bind a lawyer to a firm for life would violate general rules of the profession, including MRPC 5.6, which prohibits restrictions on a lawyer's right to practice wherever he chooses.

B. The General Provision In Miller Canfield's Operating Agreement Allowing A Principal To Withdraw Voluntarily Satisfies The Statute.

Examining the 1997 amendment to MCL 450.4509(1) underscores the point. Before its amendment by 1997 PA 52, the statute indicated that a member “may withdraw from a limited liability company as provided in an operating agreement or by written notice to the company and to the other members at least 90 days in advance of the date of withdrawal.” (Emphasis added.)

After the amendment the statute provided, more generally, that a member “may withdraw from a limited liability company only as provided in an operating agreement.” By deleting the reference to written notice, the Legislature declared that whatever provision was made in an LLC's operating agreement for voluntary withdrawal would govern. It surely did not preclude withdrawal in writing, as Plaintiff's argument necessarily suggests. Of course, if an operating agreement requires specific circumstances or procedures for withdrawal – thus limiting a member's options – it must be followed. But the word “only” cannot be read (as the trial court did) to demand that an operating agreement spell out such limiting detail.

The Court of Appeals did not discuss the legislative history of the 1997 amendment. Contemporaneous bill analyses and articles show that the purpose of the 1997 amendments to Michigan's LLC act was to provide for more – not less – flexibility for withdrawal of membership in limited liability companies, in order to keep Michigan competitive with other states that were quickly embracing a less-is-more approach to such entities.⁴ The Legislature

⁴ While this Court has expressed skepticism about using bill analyses to determine legislative intent, *Frank W Lynch & Co v Flex Technologies*, 463 Mich 578, 587; 624 NW2d 180 (2001), such analyses can have persuasive value in certain circumstances. *Kinder Morgan Mich, LLC v City of Jackson*, 277 Mich App 159, 170; 744 NW2d 184 (2007).

wanted to make Michigan “one of the most flexible among the states.” See Exhibit 3, House Legislative Analysis for House Bill 4606; see also, Mitchell E. Bean & Marjorie Bilyeu, *Recent Legislative Changes to Michigan’s Limited Liability Company Act*, 3 Fiscal Forum October 10, 1997 at 2, 4 (attached as Exhibit 4). In 1997 states were rushing to adapt their LLC statutes to a change in IRC regulations that made it much simpler for an LLC to elect pass-through partnership tax treatment without being concerned that the LLC had too many “corporate characteristics” to qualify for such treatment. *Id.*; see also, Peter A. Mahler, *When Limited Liability Companies Seek Judicial Dissolution, Will the Statute Be Up To The Task?*, 74 NY St Bar Ass’n Journal June 2002, at 1, 3 (attached as Exhibit 5).⁵

The only sensible way to read the 1997 amendment is that the Legislature intended to provide greater flexibility, without requiring that every possible method of resigning be enumerated. Miller Canfield’s OA is an example of such flexibility.

“[Because] the language of the statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written. No further judicial construction is required or permitted.” *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 199 (1999). The language the Legislature used must be given its common and ordinary meaning, which may be supplied by reference to dictionary definitions. *Spectrum Health Hosp v Farm Bureau Mut Ins Co of Michigan*, 492 Mich 503, 515; 821 NW2d 117

⁵ Plaintiff avoids discussing how the 1997 amendment impacts his argument. Although he writes that there is a “significant question as to whether the 1993 or 1997 version of [the statute] governed this case,” he then says that resolution of this question does not matter. (Cross-Application, at 11-12.) Plaintiff does not explain how application of the pre-1997 version of MCL 450.4509 would assist him, and he ignores the fact that several amendments to the OA occurred after 1997. Each of those amendments incorporated and continued the unmodified portions of the prior OA. See, for instance, Plaintiff’s Exhibit 3, the 2001 Second Amendment to the OA, which recites in section 10 that except for the amended portions the OA “shall continue in full force and effect as if restated word for word herein.” The Firm thus had continued the text of § 2.29 as its means of complying with the amendment to MCL 450.4509(1).

(2012). Applying these rules, the enabling statute says that members may voluntarily withdraw only when the operating agreement says withdrawal is permitted. Miller Canfield's OA permits them to do so at any time, as must be the case for lawyers. The Court of Appeals interpreted the statute correctly in light of these basic principles, rejecting the trial court's holding that an operating agreement must describe the means by which a member's voluntary withdrawal could be accomplished.

C. Ordinary Principles Of Contract Interpretation Also Support The Court Of Appeals' Holding.

An operating agreement is a contract subject to ordinary rules of contract interpretation. If the contract fairly admits of but one interpretation, it is not ambiguous. *Farm Bureau Mutual Ins Co v Nikkel*, 460 Mich 558, 566; 596 NW2d 915 (1999). The language of a contract should be given its ordinary and plain meaning. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 47; 664 NW2d 776 (2003). Importantly, a contract is not rendered invalid or unenforceable simply because it does not define each and every one of its terms. See *Pugh v Zefi*, 294 Mich App 393, 396; 812 NW2d 789 (2011) (noting that if a contract fails to define a term, "it is appropriate to consult a dictionary to determine the ordinary or commonly used meaning").

Having decided that Miller Canfield's OA satisfied the statute, the Court of Appeals applied this common sense approach to OA § 2.29. Nothing in the OA said that the few circumstances in which voluntary withdrawal was mentioned (e.g., death and conversion to or from PC status) were the only circumstances under which a member could voluntarily withdraw.

A principal who walks away from the Firm and the practice, as Plaintiff did, does not deserve greater protection than the partner who resigns in writing. Plaintiff knew full well that the Firm would consider his actions a withdrawal, and followed through on his plans to coach football at Alabama regardless. It was not necessary for the Firm's OA to specify that going to

work for another employer outside the field of law would constitute voluntary withdrawal from the Firm.⁶

D. Plaintiff's Authorities Do Not Support His Position.

The few cases Plaintiff cites do not support his argument. As already noted, the Court of Appeals did not install a “concept of implied withdrawal of ownership in a LLC,” as contended in Plaintiff’s brief at pages 20-23. In *Implants Int’l Ltd v Implants Int’l N America, LLC*, 2008 WL 4104477 (ED Mich), the Court merely enforced an operating agreement which specified, and limited, the circumstances under which a member could withdraw, concluding that withdrawal had not occurred. Again, Miller Canfield does not dispute that when the members of an LLC choose to limit the circumstances and manner under which a member may withdraw, those prescriptions have to be followed. But the principals of Miller Canfield did not make that choice.

In *Bell v Walton*, 861 A2d 687; 2004 Me 146 (2004), Maine’s LLC statute specified that a member could voluntarily withdraw “by giving thirty days’ written notice to the other members, unless the operating agreement or articles of organization provided otherwise.” The articles of organization did not address the subject, and no operating agreement was in place, so the statutory default rule had to be followed.

Similarly, in *Sealy v Clifton, LLC*, 34 Misc3d 266; 933 NYS2d 805 (2011), *affirmed* 106 AD3d 981, 966 NYS2d 454 (2013), the statute permitted withdrawal “only upon either an event enumerated in the operating agreement or with the consent of at least two-thirds in interest of the members.” That holding, too, is inapplicable to Michigan’s very different statutory language

⁶ There should be no question that section 3.1 of the OA unambiguously empowered the Firm’s managers to decide that Plaintiff had withdrawn. However, the Court of Appeals opted not to take that analytical step, and Miller Canfield does not dwell on that point here because all such questions must be resolved in arbitration.

which does not require such “enumeration.”⁷ In *Klein v 599 Eleventh Ave Co, LLC*, 14 Misc3d 1211, 836 NYS2d 486 (2006), the operating agreement was silent on the subject of voluntary withdrawal, so no voluntary withdrawal could be deemed to have occurred.

These cases say nothing about the narrow issue Plaintiff asks this Court to consider: Whether the word “only” in MCL 450.4509(1) expresses the Legislature’s intention that LLC operating agreements must include a specific procedure or a detailed list of events that might constitute a member’s withdrawal, and that absent such a provision there can be no voluntary withdrawal. Neither common sense nor ordinary principles of statutory construction supports that contention.

IV. CONCLUSION

The issue raised in Plaintiff’s Cross-Application does not merit this Court’s attention. Plaintiff uses false alarms and inapposite authorities to paint a misleading picture of the Court of Appeals’ holding. As the Court knows, Miller Canfield previously filed an Application for Leave to Appeal contending that this dispute belongs in arbitration. If Miller Canfield’s application is granted and its position sustained, Plaintiff’s assertion that he did not in fact resign through words and actions will be resolved by an arbitrator.

⁷ *Mitchell v Brewer*, 705 SE2d 757 (NC App 2011), is to the same effect as *Sealy* – the statutory language was the same, and no operating agreement was in effect to authorize voluntary withdrawal.

Respectfully submitted,

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Dated: February 3, 2015
216904

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 3, 2015, I electronically filed the foregoing **Response to Cross-Application for Leave to Appeal** and this **Certificate of Service**, using the TruFiling system, which will send notification of such filing to Mark Granzotto, Dean Altobelli, and John Oostema.

/s/ Maribeth Lindquist

Maribeth Lindquist