IN THE SUPREME COURT OF MISSISSIPPI

CASE NO. 2007-CA-1926

DR. CLAUDIA A. LIMBERT, individually and as President of Mississippi University for Women; MISSISSIPPI UNIVERSITY FOR WOMEN; and MISSISSIPPI BOARD OF TRUSTEES OF STATE INSTITUTIONS OF HIGHER LEARNING

APPELLANTS

v.

MISSISSIPPI UNIVERSITY FOR WOMEN ALUMNAE ASSOCIATION, INC.

APPELLEE

ON APPEAL FROM LOWNDES COUNTY CHANCERY COURT

BRIEF OF APPELLEE

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MISCELLANEOUS

STATEMENT OF THE CASE

I. Nature of the Case

Contrary to the Appellants' view, this case does not implicate the authority of the Board of Trustees of Mississippi Institutions of Higher Learning (hereinafter "the IHL Board") or the separation of powers doctrine. This case is nothing more than a bad faith breach of contract case. Because the contract at issue is governed by both Mississippi law and the policies of a state agency, administrative law principles also played a role in the chancellor's analysis of the case.

II. Course of Proceedings

On March 29, 2007, Mississippi University for Women Alumnae Association (hereinafter "the Association") filed a petition with the Lowndes County Chancery Court seeking a temporary and permanent injunction and other necessary relief to prevent Claudia A. Limbert (hereinafter "Limbert") from terminating the affiliation agreement between Mississippi University for Women (hereinafter "the University") and the Association.[1] The petition was captioned "Mississippi University for Women National Executive Board v. Claudia Limbert." R. at 3.[2] Limbert moved to dismiss the petition. R. at 47. Following a hearing on April 2, 2007, the chancellor ordered the Association to amend the petition to name all necessary parties. The Association filed its amended petition on April 5, 2007, with the caption "Mississippi University for Women Alumnae Association v. Claudia A. Limbert, individually and in her official

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[1] On February 1, 2007, Limbert announced her intention to terminate the affiliation agreement. The affiliation agreement contained a 60-day termination clause. The Association filed suit as a last resort, when all attempts to persuade Limbert to continue the contract failed.

[2] Citations to the court pleadings and papers are designated as "R at (page)." Citations to the transcript of the court hearings are designated as "T. at (page)." Trial exhibits will be referred to by party designation and exhibit number (ex. Pl. Exh. 1).

capacity; Mississippi University for Women; and Board of Trustees of Mississippi Institutions of Higher Learning."[3] R. at 115.

On April 10, 2007, the Appellants filed their answer to the amended petition and a counterclaim by the University for declaratory and injunctive relief to prevent the Association's use of the University's name and trademarks. The Appellants also filed a second motion to dismiss. R. at 202.

On May 8, 2007, the chancellor conducted a hearing on the Association's amended petition for a temporary injunction. At the end of the day, the Association concluded its evidence, and the chancellor heard argument on the Appellants' motion to dismiss. The chancellor denied the motion. T. at 215. At this time, the parties also agreed to consolidate the proceedings into a final hearing on the request for a permanent injunction so that the chancellor could make a final determination on the merits following the presentation of the Appellants' evidence.[4] The chancellor continued the hearing until June 5, 2007. Following the presentation of the Appellants' evidence on June 5, 2007, the chancellor ordered post-trial briefing to be

[3] Appellants imply that the amended petition was untimely, as it was filed outside the 60-day termination period. The original petition, however, was filed on March 29, 2007, four days before the end of the 60-day termination period. Accordingly, under Mississippi Rule of Civil Procedure 15, the amended petition relates back to the original filing date.

[4] The parties also signed an agreement in chambers regarding the appointed alumni group that Limbert started with her appointment of a single alumna on February 2, 2007, the day after she announced her intention to disaffiliate the Association. Limbert's newly appointed alumni association signed an affiliation agreement with the University on March 27, 2007, before the 60-day termination period on the affiliation agreement between the University and the Association expired. In the agreement signed on May 8, 2007, Limbert and the IHL Board agreed that Limbert would not present the affiliation agreement to the IHL Board for approval and that the IHL Board would not consider approval of that agreement before the conclusion of the hearing before Judge Colom. Contrary to that agreement, on May 17, 2007, the IHL Board approved the affiliation agreement, making Limbert's appointed alumni group an affiliated entity.

submitted simultaneously in lieu of closing arguments. The parties submitted those briefs in late July 2007. R. at 454, 495.

The chancellor entered the Opinion and Judgment of the Court on October 1, 2007. R. at 544. The chancellor held that Limbert's refusal to approve the Association's proposed bylaws and Limbert's decision to terminate the agreement because the Association would not submit bylaws that allowed Limbert to control the nomination and election of officers and the internal governance of the Association constituted bad faith. R. at 554. To remedy Limbert's bad faith breach of the affiliation agreement, the chancellor entered a permanent injunction ordering Limbert to "uphold the existing and valid affiliation agreement between the Association and the University, dated October 25, 2006, and that Dr. Limbert operate under the affiliation agreement in good faith for the duration of the Agreement." R. at 556. The chancellor further ordered Limbert to disaffiliate with her appointed alumni group, holding that "[s]ince the action of Dr. Limbert in terminating the agreement were in bad faith, actions taken by her to form a new alumnae association and enter into a new affiliation agreement were also in bad faith." R. at 556. The chancellor denied the Appellants' requests for relief. R. at 556.

III. Statement of Facts

A. The Affiliation Agreement

In August 2006, the IHL Board instituted a new policy that required each of the eight Mississippi universities to formalize its relationships with organizations termed "affiliated entities."[5] T. at 224-225; Pl. Exh. 1. The IHL Board instituted this policy as a way to encourage public confidence in affiliated entities. Pl. Exh. 1. Under the new policy, codified at

[5] This policy previously was enacted to formalize relationships between Mississippi's universities and their respective foundations, groups organized to accept, manage, and disperse donations to universities. T. at 224; Pl. Exh. 1. The IHL determined, however, that it was necessary to extend the policy to all groups affiliated with the universities, including alumni associations. Pl. Exh. 1.

Section 01.0806 of the IHL's Policies and Bylaws, the University was required to formalize its affiliation with the Association by entering into an "operating agreement." The policy required the contract between a university and an affiliated entity to contain provisions related to certain reporting requirements, such as audits and annual reports, in order to fulfill the purpose of the policy – public confidence in affiliated entities. Above all else, however, the IHL policy required that "*[t]he relationship* between the institutions of The Mississippi State Institutions of Higher Learning and the foundations/entities supporting those institutions *must be based on a recognition of and respect for* ***the private and independent nature of the foundations/entities***." Pl. Exh. 1 (emphasis added).

As with most of the other universities' alumni associations, at the time the policy was enacted, the Association was informally affiliated with the University. The Association has existed continuously since 1889, when the University's first graduates formed an organization to benefit the University. Although the name of the Association has changed to coordinate with the University's various name changes, the Association has always retained its status as a viable and beneficial organization. In 1994, the Association registered with the Mississippi Secretary of State as a not-for-profit corporation. Betty Lou Jones ("Jones") began serving as President of the Association in April 2006 and was President when the IHL announced this new policy.

Jones testified that she became aware of the IHL policy and the required operating agreement between the Association and the University in the late spring or summer of 2006. Jones was not worried about the specific requirements of the agreement, due to the Association's long-standing, mutually beneficial relationship with the University. T. at 87-88. Despite the difficulties Jones had faced as Association president, she remained optimistic that Limbert wanted what was best for the University – a strong relationship with its alumni. Jones's confidence disappeared, however, when she received a copy of the proposed operating

agreement drafted by the University. T. at 88-89. As the testimony from the alumni themselves demonstrated, the Association's support of the University has always been staunch and unwavering and marked by good relationships with faculty, students, staff, and many administrators. Over the course of Limbert's tenure, however, the alumni/president relationship had eroded. Limbert had become increasingly hostile toward and uncooperative with alumni, both individually and as a group, due in part to some alumni criticism of Limbert's leadership style and managerial and institutional decisions.[6]

The proposed operating agreement, which the parties have referred to as the "affiliation agreement," arrived at Jones's home on October 1, 2006, with Limbert's demand that the affiliation agreement be signed and returned by October 27, 2006. T. at 88. When Jones reviewed the agreement, she discovered that "it was very punitive and it included a lot of language that was very restrictive and we just felt like this was not the spirit of cooperation that you have in an affiliation agreement between two entities that are trying to accomplish the same things." T. at 88. After reviewing the proposed affiliation agreements between other alumni groups and their universities, Jones also discovered that Limbert's proposed agreement differed drastically from the other universities' proposed agreements with their alumni associations. Jones, on behalf of the Association, presented a counterproposal – an affiliation agreement

[6] During the course of Limbert's tenure, several major decisions raised the concern of individual alumni. For example, these alumni became concerned about the effect that Limbert's first Vice-President for Institutional Advancement, Scott Rawles, had on the University. Allegations arose that Rawles was behaving rudely toward alumni, was mismanaging Foundation funds, was sexually harassing employees, and was guilty of using racial slurs on a regular basis. T. at 51-52; Def. Exh. 12. Following a brief internal investigation of Rawles, in which the Assistant to the President found no misconduct, Rawles left campus suddenly with a lucrative "consulting contract." The straw that broke the camel's back, however, was Limbert's decision to raid the alumni office the weekend after Homecoming, seize computers and alumni files, and remove both the Director and the Assistant Director. This action was particularly egregious, given the Director's more than forty year employment history with the University.

patterned after both Mississippi State University and the University of Southern Mississippi's recently drafted affiliation agreements. T. at 88. Limbert rejected the proposal outright.

The Association, now faced with an October 21, 2006, deadline arbitrarily imposed by Limbert, drafted and submitted a second proposed affiliation agreement on October 19, 2006. T. at 89. That same day, while Jones was attending a University function, Limbert's office delivered an email from Cal Mayo, the University's counsel in this litigation, advising Jones that Mayo's law firm was representing the University in negotiating the terms of the affiliation agreement and advising Jones to seek legal representation. T. at 89. This news shocked Jones, who testified that she "cried because I just didn't feel like that it was necessary to have attorneys . . . when we were all trying to work for the same thing." T. at 89. Feeling as though it had no other choice, the Association sought its own legal representation, although it lacked any independent resources or funding to do so.

Limbert continued to push the Association to sign her proposed affiliation agreement. On October 25, 2006, less than a week after the University retained Mayo, the Association signed an affiliation agreement with the University under Limbert's threat of disaffiliation *and despite concerns that the affiliation agreement did not comply with IHL policy.* Pl. Exh. 4. T. at 90-91. The IHL approved that agreement on November 15, 2006.

B. The Bylaws

Having made the decision to sign the agreement, the Association immediately began plans to comply with its terms. One of the provisions of the affiliation agreement provided that "[w]ithin 60 days of the date of this Agreement, the Association's governing board will provide to the University President, for the President's review and approval, a new Constitution, By-Laws and a Mission Statement for the Association, ***all of which will be consistent with the mission and priorities of the University, this Agreement, and IHL policy.***" Pl. Exh. 4

(emphasis added). Jones immediately contacted the University to confirm the sixty-day deadline and to set up a meeting with the University's administration. T. at 91. Jones and other Association members prepared a set of new bylaws for review at that meeting.

On December 6, 2006, Jones and two other alumni met with Dr. Gary Bouse, Vice-President for Institutional Advancement, and Jan Miller, Director of Alumni Relations. T. at 91. The group "spent three hours going over those bylaws and changing words and agreeing that this could be different and, you know, coming up with, you know, lots and lots of changes, and *specifically to be in compliance with IHL policies. That was our main goal, was to meet that.*" T. at 91 (emphasis added). Jones arranged for a second meeting to be held on January 5, 2007.

On January 4, 2007, the University submitted a revised copy of the bylaws that the Association had submitted for review at the December meeting. T. at 91. Jones testified that "there were several things that we really couldn't agree on and there were several things that we changed." T. at 91. That meeting revealed three main areas of disagreement:

(1) *Succession.* Limbert demanded that the Association eliminate its long-standing policy of officer succession, which provided for officer training and consistency. Limbert claimed, however, that eliminating both the office of president-elect and the succession of officers was necessary to make the Association "more inclusive." T. at 57.

(2) *Officer nominations and election process.* Limbert insisted that the Association abandon its nomination process and appoint the Director of Alumni Relations, a University/IHL employee, as the chair of the nominating committee. The Director would then nominate four members of the Association's nominating committee, and the current Association President would nominate three members. The Association objected to this undemocratic process, which placed control of the nomination process in the hands of the University's administration.

The Association's concern was exacerbated by Limbert's demand that any nominations from the floor must be approved by 75% of the voting membership before even being placed on the ballot. Limbert clearly intended to control the election of the Association's officers, as she believed it would result in "yes-man" leadership within the Association. T. at 58, 94, 333.

(3) *Association awards.* Limbert initially insisted that she be required to approve any awards to be given by the Association. She later amended that demand to require the Vice-President for Institutional Advancement, a University and IHL employee, to approve them. T. at 94. Limbert also insisted on subjective criteria, which would eliminate the Association's current objective criteria of service to the University. T. at 94.

Following the receipt of the University's revisions on January 4, 2007, Jones continued to negotiate with Bouse and Limbert until the next meeting, scheduled for January 12, 2007. During that meeting, Limbert abruptly announced that "this isn't working. We're going to have to start all over again." T. at 94-95. Limbert refused to continue working with the draft that the parties had spent nearly two months revising. According to Jones, Limbert said, "Dr. Meredith said this is a new day. And this is a new day, and we need a whole new set of bylaws." T. at 95.

The next few weeks of negotiations produced very little results, even after Mayo and the Association's attorney stepped in to handle the negotiations. Finally, on January 29, 2007, having received no further guidance from Limbert regarding the provisions with which she disagreed, the Association's attorney sent a letter to Limbert, through Mayo. Pl. Exh. 7. In that letter, the Association attached the most recent version of the bylaws for Limbert's signature. In the event Limbert refused to approve the bylaws, the letter requested that Limbert "explain in writing what provisions are not consistent with the mission and priorities of the University, the Affiliation Agreement, and IHL policy" so that the parties could identify the issues and work toward a resolution. Pl. Exh. 7. Limbert failed to respond. Limbert's next communication was a

letter dated February 1, 2007, stating that she was disaffiliating the Association. Pl. Exh. 5. Limbert also disseminated an email to the entire University community and the alumni list serve announcing that she was disaffiliating the Association *for failure to reach agreement on the bylaws*. Pl. Exh. 6 (emphasis added). Although the Association had provided *117 years* of service to the University, Limbert sought to terminate the relationship only *78 days* after entering into the affiliation agreement.

The very next day, Limbert issued a press release announcing the creation of a committee to create a new alumni association. Limbert appointed a single alumna, who in turn appointed a small group to serve as the committee charged with beginning a new alumni association. The committee eventually created a twelve-member board from its ranks and took the name "Mississippi University for Women Alumni Association." That appointed group then signed an affiliation agreement with the University on March 27, 2007, even though the sixty-day termination period on the affiliation agreement between the Association and the University had not yet expired. The IHL Board approved the appointed association's affiliation agreement on May 17, 2007, in violation of the written agreement between the parties to this litigation. See fn. 4, *supra.*

SUMMARY OF THE ARGUMENT

Appellants have alleged seven points of error in their brief, many of which relate to the Appellants' contention that this case involves issues affecting the IHL Board's constitutional authority. The Association does not share the Appellants' view regarding the nature of this case; accordingly, the Association will address each of the Appellants' arguments within the framework of the case as the Association sees it. For the Court's convenience and ease of reading, however, the Association will identify its responses to the Appellants' alleged points of error through the use of footnotes.

The chancellor found that Limbert's decision to terminate the affiliation agreement with the association constituted a bad faith breach of policy for two reasons: First, the chancellor held that Limbert sought control of the Association's internal governance in a manner that violated the IHL policy's requirement that all affiliated entities remain "independent" from their respective universities. Limbert's decision to terminate the affiliation agreement for a legally impermissible reason – a desire for control that was expressly prohibited by the governing IHL policy – constituted a bad faith breach of the affiliation agreement. Second, the chancellor found that Limbert, acting as an agent of the IHL, and therefore, the State of Mississippi, sought to silence the criticism of some individual alumni by punishing the Association. Limbert's motive in terminating the affiliation agreement, however ineffectual in achieving her goal of silencing alumni criticism, was constitutionally impermissible, and constituted bad faith *per se*. To remedy this bad faith breach of contract, the chancellor exercised her jurisdiction to fashion an equitable remedy: a permanent injunction ordering Limbert to act in good faith in upholding the affiliation agreement and to terminate the relationship with Limbert's appointed group.

The chancellor's holding that Limbert operated in bad faith in terminating the agreement is supported by substantial evidence. The IHL policy governing the parameters of all affiliation agreements requires that affiliated entities remain "independent" from the respective universities they serve. The chancellor correctly found that Limbert was seeking to control the Association's internal governance and that Limbert's actions violated the IHL Board's requirement that the Association maintain its independence while working cooperatively with the University. In making this determination, the chancellor was required to review the affiliation agreement and Limbert's actions in light of the IHL policy.

The IHL policy itself contains no definition of the term "independent." During the course of the hearings, the IHL Board Commissioner testified that the term "independent" had no objective definition. Instead of adhering to the ordinary meaning of the word "independent," the members of the IHL Board had opted to allow each university president to decide what the term meant. T. at 245. The chancellor correctly determined that the IHL Board's interpretation of the term "independent" was arbitrary, capricious, and contrary to law. Having made that determination properly, the chancellor was obligated to intervene.

The chancellor applied the same definition of "independent" to the IHL policy that this Court has applied to charitable foundations. See City of Picayune v. Southern Reg'l Corp., 916 So. 2d 510, 523 (¶33) (Miss. 2005). While the Association agrees that the chancellor was correct in her determination that the IHL Board's subjective, amorphous definition of "independent" was arbitrary and capricious, the chancellor erred in finding that the policy itself was ambiguous and, therefore subject to statutory interpretation, rather than finding that it was the IHL Board's *application* of its own policy that was arbitrary, capricious, and contrary to law. The policy itself was clear and unambiguous on its face. Because the policy itself is not ambiguous, the chancellor should have simply adopted the plain meaning of the word "independent." See, e.g., Tower Loan of Mississippi, Inc. v. Mississippi State Tax Comm'n, 662 So.2d 1077, 1083 (Miss. 1995) (citing the proposition that where there is no statutory definition of a word or phrase, "it must be given its common and ordinary meaning."); Richardson v. Canton Farm Equip., 608 So. 2d 1240, 1250-51 (Miss. 1992) (holding that when a statute does not specifically define a term, the term should be given its ordinary meaning); Wilson v. Wilson, 547 So.2d 803, 805 (Miss.1989) (holding that courts "read the words of a statute (or any other legal text) by their common and ordinary meaning."). Had the *chancellor* adopted the ordinary meaning of the word and then applied the policy accordingly, the chancellor would have reached the same

conclusion – that Limbert acted in bad faith in terminating the affiliation agreement and in creating a new, appointed alumni association and that the Association was entitled to a permanent injunction. In other words, the chancellor reached the correct conclusion but for the wrong reason. Therefore, this Court should affirm the chancellor's decision and correct the chancellor's analysis of the IHL policy. See Falco Lime v. Mayor & Aldermen of Vicksburg, 836 So.2d 711, 725 (¶62) (Miss. 2002) (citation omitted) (holding that an appellate court may "affirm where an agency or lower court reaches the right result for the wrong reason.")

Having properly rejected the IHL Board's interpretation of "independent," the chancellor correctly determined that Limbert's attempts to control the Association's internal governance violated the IHL policy and that Limbert's decision to terminate the agreement as a means to punish the Association for refusing to cede control of its internal governance to Limbert constituted bad faith. The record contains substantial evidence to show that Limbert intended to control every aspect of the Association's internal governance, including the content of its bylaws, its methods for nominating and electing officers, and its day-to-day operations. The record also contains substantial evidence to show that Limbert terminated the agreement in order to create a group of her own choosing that would permit her to have control to which she was not entitled. The record also demonstrates that the IHL Board was an active participant in Limbert's plan to illegally terminate the Association's affiliation agreement and to create another alumni organization that would be subject to her control.

Given the nature of the contract and the unique relationship between the parties, the only remedy available to the chancellor was a permanent injunction, and the permanent injunction entered was both valid and appropriate to the situation. Contrary to Appellants' assertions, the chancellor did not enter a writ of mandamus, nor did the chancellor's injunction violate the doctrine of "non-judicial interference." Instead, the chancellor properly exercised her

jurisdiction to remedy Limbert's bad faith breach of the affiliation agreement. The chancellor's decision to order specific performance and to limit Limbert's ability to create a new alumni group was a proper exercise of her equitable jurisdictional power and not, as Appellants contend, an attempt to interfere with the IHL Board's authority.

Finally, even if this Court were to reverse the chancellor's decision, the Association should be permitted to keep its name. The university has registered a single word mark that does not create trademark protection for the name "Mississippi University for Women." Additionally, the University's name is not protected because it is a descriptive term not entitled to trademark protection.

ARGUMENT

I. Standard of review.

The Mississippi Supreme Court "will not disturb the findings of a chancellor when supported by substantial evidence unless the chancellor abused his or her discretion, was manifestly wrong, clearly erroneous, or an erroneous legal standard was applied." Sanderson v. Sanderson, 824 So.2d 623, 625-26 (¶8) (Miss. 2002). Substantial evidence means something more than a "mere scintilla" of evidence, Johnson v. Ferguson, 435 So.2d 1191 (Miss. 1983), but it does not rise to the level of "a preponderance of the evidence." Babcock & Wilcox Co. v. McClain, 149 So.2d 523 (Miss. 1963). In other words, substantial evidence "means such relevant evidence as reasonable minds might accept as adequate to support a conclusion. Substantial evidence means evidence which is substantial, that is, affording a substantial basis of fact from which the fact in issue can be reasonably inferred." Delta CMI v. Speck, 586 So.2d 768, 773 (Miss. 1991). All issues of law are reviewed de novo. Maldonado v. Kelly, 768 So.2d 906, 908 (¶4) (Miss. 2000).

II. The chancellor's holding that Limbert breached the affiliation agreement in bad faith is legally correct and is supported by substantial evidence.

The chancellor held that Limbert breached the affiliation agreement in bad faith through her attempts to control the Association's internal governance and through her attempts to silence individual members of the Association by disaffiliating the entire organization. The chancellor correctly held that Limbert was attempting to assert control over the Association to which she was not entitled and that her decision to disaffiliate the Association for refusing to cede control of its internal operations constituted a bad faith breach of the affiliation agreement. The chancellor further found that Limbert's animosity toward certain individual alumni led her to act, with the apparent authority of the IHL Board, in a manner that was unconstitutional. The chancellor's reasoning was proper and is supported by substantial evidence.

A. The chancellor applied the correct legal standard in reaching the conclusion that Limbert's actions constituted a bad faith breach of the agreement.

In Mississippi, "[a]ll contracts contain an implied covenant of good faith and fair dealing in performance and enforcement." Cenac v. Murry, 609 So. 2d 1257, 1272 (Miss. 1992) (citations omitted). All parties to a contract are required to comport themselves in a manner that constitutes good faith, a duty "based on fundamental notions of fairness." Id. (citation omitted). Good faith is defined as "the faithfulness of an agreed purpose between two parties, a purpose which is consistent with *justified expectations* of the other party. The breach of good faith is bad faith characterized by some conduct which violates standards of decency, fairness or reasonableness." Id. (emphasis added). Bad faith is a "*refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive.*" Bailey v. Bailey, 724 So. 2d 335, 338 (¶9) (Miss. 1998) (emphasis in original). The phrase "bad faith" "implies the conscious doing of a wrong because

of dishonest purpose or moral obliquity; . . . it contemplates a state of mind affirmatively operating with furtive design or ill will." Id.

The chancellor applied the correct legal standard and concluded that Limbert's actions constituted a bad faith breach of the affiliation agreement. The chancellor specifically found that Limbert acted intentionally. The chancellor also found that Limbert acted for the specific purpose of terminating the relationship between the then-117-year old Association and the University so that she could establish an alumni association that would be "Limbert-friendly" and silence the individual alumni who criticized her leadership of the University. The chancellor held that Limbert's purposes were violative of the covenant of good faith inherent in all Mississippi contracts. Substantial evidence supports the chancellor's findings.

B. Limbert's decision to disaffiliate the Association due to her arbitrary refusal to approve the Association's bylaws constitutes bad faith.

The Association submitted bylaws for Limbert's approval, as required by the affiliation agreement. The affiliation agreement contained the same language set forth in the IHL policy regarding the Association's obligation to be "independent" and "governed separately" from the University. The affiliation agreement also provided that the bylaws must be "consistent with the mission and priorities of the University, this Agreement, and IHL policy." Pl. Exh. 4. The affiliation agreement required nothing further with respect to the content of the bylaws, but Limbert insisted on insinuating herself into the Association's work on its own bylaws and demanded provisions that greatly exceeded the scope of the affiliation agreement.

Limbert acted aggressively to prohibit the Association from fulfilling its obligations by sabotaging the meetings between the Association and the University representatives regarding the bylaws. Limbert's failure to cooperate during the bylaws meetings and her insistence on bylaws provisions outside the terms of the affiliation agreement constituted bad faith. Bad faith

is not determined by a pre-set pattern of behavior but "varies according to the nature of the agreement." Cenac, 902 So. 2d at 1272. The agreement required the Association to submit bylaws that were consistent with the missions and priorities of the University, the affiliation agreement, and the IHL policy. The Association fulfilled its obligation, and Limbert arbitrarily refused to approve those bylaws simply because they did not give her control of the Association.

The Appellants presented no testimony and no exhibits to establish how the proposed bylaws failed to meet the requirements of the affiliation agreement. Accordingly, there is no evidence that Limbert's refusal to approve the bylaws was made in good faith and within her rights under the contract. To the contrary, the evidence conclusively proves that Limbert disaffiliated the Association because she could not exert the control she wanted. T. at 58, 333. Pl. Exh. 6. Under the terms of the affiliation agreement and in the context of the long-term relationship between the parties, Limbert had "a duty not only to refrain from hindering or preventing the occurrence of conditions of [her] own duty or the performance of the [Association's] duty, but also to take some affirmative steps to cooperate in achieving these goals." Cenac, 902 So. 2d at 1272. Her decisions to impede the negotiations and to arbitrarily refuse to approve the Association's proposed bylaws constituted a bad faith breach of the affiliation agreement, and substantial evidence supports the chancellor's finding of bad faith.

C. Substantial evidence supports the chancellor's finding that Limbert acted in bad faith when she attempted to disaffiliate the Association because the Association refused to violate the IHL policy's requirement that the Association remain independent.

Limbert's arbitrary refusal to approve the Association's bylaws stemmed from her desire to impose her own set of bylaws on the Association, bylaws that would give her control of the Association. The chancellor reviewed the IHL policy and the affiliation agreement and correctly determined that Limbert sought control of the Association to which she was not entitled.

Under the provisions of Limbert's proposed bylaws, Limbert would choose the structure of the Association's governing board and control the nominations and elections processes. Limbert's testimony clearly demonstrated her desire for control of all aspects of the Association's internal governance. Limbert testified that she insisted on control in order to "prevent the same alumnae group that we were having problems with, going out on the floor and then putting up their own slate of officers."[7] T. at 58. Limbert also testified that she did not want to "have gone through all of this just to have it all revert back to the same people running the organization, the same small group replicating themselves once again." T. at 58. Ultimately, Limbert testified that under the provisions she wanted, adding candidates to the slate of officers from the floor would be more difficult, but "it would allow us to have a little control. . . ." T. at 333. In other words, Limbert would only approve the bylaws if those bylaws could ensure that the Association's officers agreed with her philosophy and her administrative decisions

Ultimately, however, nothing could justify Limbert's attempts to control the Association and her decision to disaffiliate the Association for its refusal to cede control to Limbert because, as the chancellor correctly held, the IHL policy governing the affiliation agreement required the Association to be independent and free from the University's – and Limbert's – control.

[7] This statement from Limbert reflected Limbert's demands that the University control the composition of the nominating committee, which would present a slate of officers for election, and that any officer nominations made from the floor require 75% approval from the membership before that nomination could even be placed on the ballot. As Jones testified, such a provision would be undemocratic "because this means that the association is not really in charge of their election of their officers. This is being governed by the nominating committee." T. at 94.

1. The IHL policy clearly required that the Association remain separate and independent from the University, and the chancellor properly rejected the Appellants' position regarding the meaning of the term "independent" within the IHL policy.

The IHL policy requiring all universities to enter into affiliation agreements with their respective affiliated entities states that its purpose is to encourage public confidence in those entities that work alongside the State's universities and help them fulfill their missions. Pl. Exh. 4. To enhance the public's trust in these affiliated entities, the IHL policy requires that these entities submit to certain ethical standards, including a provision for an annual audit. Most importantly, though, the IHL policy acknowledges that affiliated entities "must be governed separately to protect their private, independent status." Pl. Exh. 1. Independence is such an important concept within the policy that the policy emphasizes the necessity that affiliated entities remain "private" and "independent" *on four separate occasions* within the four-page policy.

The Association believed that Limbert's attempts to control the Association's internal governance by dictating the terms of the organization's bylaws violated the IHL policy's requirement of independence, which were also set forth in the affiliation agreement. The Association refused to submit to Limbert's demands because allowing Limbert to control the Association would violate the IHL policy and take away the Association's independence. It was the Association's refusal to relinquish its independence that prompted Limbert to announce her intention to disaffiliate the Association.

With regard to the IHL Board's authority, Mississippi Code Annotated Section 37-101-15(c) (Supp. 2006) provides, as a matter of law, that "[t]he board shall adopt such bylaws and regulations from time to time as it deems expedient for the proper supervision and control of the several institutions of higher learning, insofar as such bylaws and regulations are not repugnant

to the Constitution and laws, and not inconsistent with the object for which these institutions were established." Miss. Code Ann. § 37-101-15(c). The Board of Trustees is solely responsible for implementing policy, and it cannot abdicate its responsibility to the discretion of individual university presidents. Despite this statutory obligation, the IHL Board openly acknowledged that it abdicated the responsibility to define, interpret, and/or apply one of its policies to the individual desires of the university presidents.

During the hearings before the chancellor, the Appellants argued that Limbert's actions did not violate the IHL policy because the term "independent" did not carry its ordinary meaning, but that its definition was left to the individual university presidents to define and apply to the affiliated entities. T. at 245. The IHL Board adopted this position despite the policy's failure to define the word as a special term and despite the clear intention of the policy to keep affiliated entities separate from their respective universities. If, as Meredith testified, the IHL intended for the word "independent" to mean whatever an individual university president wanted it to mean, such an interpretation would be both inconsistent with Mississippi law and clearly erroneous. It would also render the IHL policy meaningless. The policy contains no direction that its interpretation shall be left to the discretion of the university presidents.[8] Pl. Exh. 1.

Moreover, it was clearly erroneous for the IHL Board to apply the word "independent" within this policy to mean that an individual university president could control an affiliated entity. Such an application would be incompatible with the clearly stated purpose of the policy, with the use of the words "separate," "governed separately," and "private" as stated in the policy, and with the plain meaning of the word "independent." Pl. Exh. 1. This interpretation would

[8] The only matters left to the university presidents' discretion are which entities shall be affiliated, and even then, that discretion is subject to IHL approval. Pl. Exh. 1.

also violate the prohibition against allowing IHL employees to serve as voting members of an affiliated entity's board. To interpret the policy to give a university president – an IHL employee – unfettered control over the internal operations of an affiliated entity, to the point that "[t]he university president would have the authority to direct how [an alumni association] would handle it in terms of determining its officers," would give a university president not just one vote, but complete control over that entity. T. at 246. For the IHL Board to give university presidents this sort of control over an affiliated entity contradicts the plain language of the policy, particularly when the policy provides that "[s]enior administrators of the institution should only participate on the affiliated entity's board in an ex-officio capacity." Pl. Exh. 1. The IHL Board's support of Limbert's desire for complete control of the Association's internal governance is not the limited participation required by the plain language of the policy.

The chancellor correctly determined that the IHL Board's interpretation was arbitrary and that the term "independent" should not be given the meaning that the IHL Board, through Meredith's testimony, put forth to support Limbert's bad faith behavior. The Appellants argue that the chancellor's decision to reject the IHL Board's testimony regarding the term "independent" violates the separation of powers doctrine. This argument is without merit.[9]

The separation of powers doctrine is defined as follows: "The powers of the government of the State of Mississippi shall be divided into three distinct departments, and each of them confided to a separate magistracy, to-wit: those which are legislative to one, those which are

[9] The following three paragraphs address issues 1 and 2 in the Appellants' statement of issues, which are as follows: (1) The constitutional principle of separation of powers prohibits a Mississippi court from second-guessing a policy decision concerning higher education administration made by the IHL Board of Trustees and a public university president; and (2) The constitutional principle of separation of powers requires that a Mississippi court defer to an executive branch agency in the interpretation and implementation of that agency's rules and regulations.

judicial to another, and those which are executive to another." MISS. CONST., Art. 1, §1. Article 1, Section 2 provides in pertinent part that "[n]o person or collection of persons, being one or belonging to one of these departments, shall exercise any power properly belonging to either of the others." MISS. CONST., Art. 1, § 2.

The separation of powers doctrine does not, as Appellants imply, preclude judicial review of their activities in this case. Appellants argue that the IHL Board holds an exalted position within the Mississippi government and imply that the IHL Board should be able to act with impunity, no matter how arbitrary or legally erroneous that act may be. The separation of powers doctrine does not prohibit judicial review of the IHL Board's actions in this case. In fact,

> Official action, whether the officer be of the highest or the lowest grade, must be within the Constitution and the laws, and the facts must be such as to uphold or justify the exercise of the official authority which in a given case is exerted. If any officer, be he high or low, attempt to exercise an authority not legally vested in him, or if he attempt to do so upon a state of facts which does not bring the asserted authority into existence, his action thence is as much the subject of judicial review and remedial rectification as is the action of any private person within the jurisdiction of the state.

State v. McPhail, 180 So. 387, 391 (1938). Further, it is the role of the judiciary is to determine when the executive and legislative branches have overstepped their boundaries. Albritton v. City of Winona, 178 So. 799, 803 (1938).

While "[a]n agency's interpretation of a regulation it has been authorized to promulgate is entitled to great deference," it must be overturned if it is "plainly erroneous" or if it is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." Tower Loan of Mississippi, Inc. v. Mississippi State Tax Comm'n, 662 So. 2d 1077, 1081(Miss. 1995) (citing Board of Trustees of State Institutions of Higher Learning v. Sullivan, 763 F.Supp. 178, 184 (S.D.Miss.1991)). It was arbitrary, capricious, and an abuse of discretion for the IHL Board to draft a policy requiring that affiliated entities remain "independent" and then reject the plain

meaning of the policy in favor of an interpretation that completely contradicts the purpose of the policy in order to support the actions of a university president who is clearly acting outside of the scope of her authority and the law. In such cases, the courts have full authority to reject an agency's improper interpretation or application of its own policy and impose a judicial interpretation. In this case, the chancellor was well within her jurisdiction to reject the IHL Board's arbitrary application of its policy and render a judicial determination.[10]

2. While the chancellor properly rejected the IHL Board's arbitrary interpretation of the term "independent" and correctly determined that Limbert acted in bad faith, the chancellor did not apply the correct legal analysis.

The chancellor properly determined that the IHL Board's own interpretation and application of its policy, particularly with regard to the term "independent," was arbitrary and capricious; therefore, the chancellor had the obligation to conduct a judicial review of the policy. The chancellor adopted the definition of "independent" set forth in City of Picayune v. Southern Reg'l Corp., 916 So. 2d 510 (Miss. 2005), which applied to charitable trusts and charitable foundations. In that context, charitable foundations are given "free will" within the confines of the entity's articles of incorporation, bylaws, and the statutes of the State in which they are incorporated. Id. at 523 (¶33).

In adopting this definition and applying it to the IHL policy, the chancellor essentially conducted a statutory interpretation analysis. The chancellor erred, however, in looking outside the policy for a definition of the term "independent." The first rule of statutory construction is that the policy or statute at issue must be ambiguous before a court undertakes the process of adopting an outside definition. See, e.g., Armstrong v. Estate of Thames, 958 So. 2d 1258, 1259 (¶5) (Miss. 2007); Walker v. Whitfield Nursing Ctr., Inc., 931 So.2d 583, 590(¶ 25) (Miss.2006).

[10] This paragraph concludes the Association's refutation of Appellants' argument on Issues 1 and 2.

In this case, the dispute arose not because the IHL policy was ambiguous, but because the IHL Board and Limbert applied the policy in a way that violated the plain meaning of the policy. The IHL policy was clear and unambiguous; therefore, the chancellor should have simply applied the plain and ordinary meaning of the word "independent" to the IHL policy.

The IHL policy could not be clearer. All affiliated entities are to be independent from both the IHL Board and the university with which they are affiliated. The IHL policy states that "[t]he Board of Trustees recognizes that it cannot and should not have direct control over institutionally affiliated foundations/entities. These foundations/affiliated entities must be governed separately to protect their private, independent status." Pl. Exh. 1. The word "independent" is given no special definition within the affiliation agreement, and the plain meaning of the word is consistent with the other provisions of the IHL policy; therefore, this Court should afford the term its plain meaning. Merriam-Webster defines the word "independent" as "*not subject to control by others*," "*self-governing*," "not affiliated with a larger *controlling* unit," and "not looking to others for one's opinions or for guidance in conduct." See www.m-w.com. (last visited April 1, 2008) (Merriam-Webster website) (emphasis added). Accordingly, the chancellor should have applied the plain meaning of the word "independent" to the IHL policy and concluded that the Association was self-governing and not subject to the control of the University or the IHL Board.

Applying the plain and ordinary meaning of the word "independent" is not only legally correct, it also provides the most logical reading of the IHL policy and will provide for the most consistent and universal application of the policy. By interpreting the term "independent" to mean "self-governing" and "not subject to control by others," the IHL Board will ensure that the public maintains confidence in these entities and that they are not puppets or straw man organizations that would provide a means for public entities – i.e. universities – to operate

behind closed doors. Appellants argue that the reporting and auditing requirements demonstrate that the IHL Board intended for university presidents to control affiliated entities, but such an interpretation is contrary to the overarching purpose of the policy. The more logical reading of the policy is to give the term "independent" its full plain and ordinary meaning. Through this proper reading of the IHL policy, the reporting requirements – whether they are viewed as obligations that the affiliated entity undertakes or as the relinquishment of a right that the affiliated entity would otherwise have – would constitute consideration for entering into a contract with the university, which in turn will provide services and financial support to that affiliated entity, and provide a way for universities to ensure that that affiliated entities are effective in their support of their respective universities. Other than the requirement that affiliated entities "adhere to ethical standards" listed in the policy, the IHL policy imposes no other restrictions except to prohibit IHL employees from serving in anything other than an ex-officio – i.e. non-voting – capacity. Accordingly, the IHL policy should not be interpreted to prevent any further restrictions on an affiliated entity's independence.[11]

[11] Correcting the chancellor's interpretation will have a direct impact on the affiliation agreement, as the affiliation agreement contains a severability clause. As the record clearly demonstrates, Limbert's attempts to control the Association and strip it of its independence began with the negotiation of the affiliation agreement. The affiliation agreement, which the Association signed under threat of disaffiliation, contains provisions which provide Limbert with control that exceeds the scope of the IHL policy. In order to comply with the IHL policy, those terms should be stricken, as provided for in the severability clause. Pl. Exh. 4 (providing that "[t]he provisions of this Agreement are severable, and in the event that any provisions of this Agreement shall be determined to be invalid or non-enforceable under any controlling body of the law, such invalidity or non-enforceability shall not in any way affect the validity or enforceable nature of the remaining provisions hereof."

3. Substantial evidence supports the chancellor's findings that Limbert's attempts to terminate the agreement because the Association would not violate the IHL policy and cede control to Limbert constituted a bad faith breach of the affiliation agreement.

Limbert violated the IHL policy and the affiliation agreement by seeking control to which she was not entitled. Limbert's decision to terminate the affiliation agreement because the Association would not violate the IHL policy and cede control of the entire organization to Limbert constitutes bad faith. Limbert could not require that the Association commit a wrongful or illegal act (i.e., violating IHL policy) as a condition of performance of the affiliation agreement.

Although the chancellor erred in her analysis of the IHL policy that governs affiliation agreements, the result is the same under the proper analysis, and substantial evidence supports the chancellor's findings. Limbert acted in bad faith, and the IHL Board acquiesced in that behavior by applying its policy in a manner that was inconsistent with the plain reading of the policy. This Court may affirm the holding of a lower court when it reaches the right result, even if the reasoning of the lower court was incorrect. Falco Lime, 836 So. 2d at 725 (¶62). Accordingly, this Court should uphold the chancellor's ruling that Limbert acted in bad faith by attempting to take control over the Association's internal governance because the IHL policy clearly indicates that an affiliated entity, such as the Association, is not to be governed by either the University or the IHL Board.

Appellants argue that the chancellor erred in holding that Limbert terminated the affiliation agreement in bad faith.[12] First, Appellants argue that "a public university president cannot have acted in 'bad faith' if she exercised a clear contractual right." While the affiliation agreement does contain a termination provision, that provision may not be exercised in a manner

[12] The following four paragraphs address Issues 4 and 5 of Appellants' brief.

that violates the "inherent covenant of good faith and fair dealing" contained in the contract. As discussed, *supra*, Limbert did act in bad faith when she attempted to disaffiliate the Association.

Appellants also argue that "a public university president cannot have acted in 'bad faith' if her actions were in the best interests of that university and consistent with the IHL Board of Trustees' directions." Limbert cannot argue that her decision to terminate the affiliation agreement served the best interests of the University. As she did before the chancellor, Limbert argues to this Court that her decision was driven by a notion that individual alumni were attempting to "undermine the University" and control her operation of the University. Appellants focus heavily on this testimony and contend that the chancellor wholly adopted Limbert's testimony in her opinion and judgment. Appellants also claim that the actions of individual alumni justified Limbert's actions. While the Association acknowledges that Limbert did not have a good relationship with some alumni, Appellants' reliance on this issue is irrelevant to this case.

First, the Association is a not-for-profit corporation. As such, it can only speak or act through its minutes. American Tel. & Tel. Co. v. Purcell Co., 606 So.2d 93, 97 (Miss. 1990). The Appellants presented no evidence of any actions by the Association to "undermine" or control the University or to have her fired. The Appellants presented no evidence because there was none. At no time did the *Association* take any action that could be construed as negatively impacting the University. Second, *all of the individual actions* that Limbert relies on to bolster her claims occurred *prior to the signing* of the affiliation agreement. The Association's actions following the signing of the affiliation agreement reflect nothing but a sincere desire to serve the best interests of the University. Accordingly, Limbert cannot argue that she was acting in good faith in response to the actions of the alumni acting either independently or as the Association. Limbert's argument is further countered by her own testimony, which reflects her true intention

in disaffiliating the Association – a personal dislike of individual alumni that extended far beyond any natural desire to quash criticism. When asked to describe her personal disapproval of the officers of the Association, Limbert could cite no valid disagreement or conflict with any of the Association's current leadership.

If Limbert truly believed that the Association could not support the University, the time to exercise the "discretion" that the IHL Board claims to have bestowed upon Limbert was prior to the signing of the affiliation agreement. Limbert could have opted not to affiliate with the Association, but once she signed the contract, she had a contractual obligation to act in good faith. Likewise, the IHL Board, having approved that affiliation agreement, also had a duty of good faith. The IHL Board does not have the authority to validate Limbert's illegal behavior by supporting it. Instead, this argument imputes Limbert's bad faith behavior to the IHL Board, making them not just complicit in her behavior by approving her decision to terminate the affiliation agreement, but guilty of bad faith behavior in the first instance, by enforcing their policies in a manner inconsistent with a plain reading of the policy and in a manner that encourages university presidents to violate Mississippi contract law simply because they find themselves subject to criticism regarding their leadership choices.[13]

D. The chancellor's holding that Limbert's decision to disaffiliate was based on an unconstitutional motivation is legally correct and supported by substantial evidence.

Appellants argue that the Court improperly considered the First Amendment issue because the issue was not properly raised in the pleadings or at trial. Appellants also argue that the Court imposed a right of free speech on an organization, when the right of free speech is clearly an individual right. The record clearly demonstrates that Appellants' arguments have no merit.

[13] This paragraph concludes the Association's refutation of Appellants' Issues 4 and 5.

Counsel for the Association raised the free speech issue in his opening statement, commenting that "as far as the public policy, there's a real free speech issue here. . . ." T. at 14. In closing argument, counsel for the Association again addressed the issue of individual free speech, questioning whether Limbert had the right to control the actions and words of individuals, be they alumni, students, or University employees. T. at 206-07. More importantly, much of the Appellants' own testimony focused on statements made by individuals who also happened to be members of the Association, but not on any official statements or actions from the Association itself. Appellants made much of a series of emails from individual alumni that criticized Limbert's leadership and raised concerns about an administrator suspected of sexual harassment and poor stewardship of the Foundation's funds. In fact, the entire dispute between these few alumni and Limbert, from Limbert's perspective, was based on the individuals' exercise of free speech. Limbert herself testified that she sought to control individuals by imposing restrictions on the Association. T. at 58, 333. With much of Appellants' own evidence consisting of the statements of individual alumni, the Association is puzzled by Appellants' argument that the Appellants did not consent to trial of the constitutional implications of Limbert's behavior. Appellants did try the issue.

Appellants' assertion that this Court bestowed a First Amendment right on the Association, a not-for-profit corporation, is simply incorrect. Throughout this process, Appellants have demonstrated an inability to distinguish between the actions of individuals and the actions of the Association. The Association, as a corporation, speaks only through its minutes. See American Telephone & Telegraph Co. v. Purcell Co, Inc., 606 So. 2d 93, 97 (Miss. 1992). Appellants submitted no evidence that the Association ever took any official action to criticize Limbert or her administrators, much less waged a campaign to have her fired. Instead, the Appellants focused their evidence on the statements of individuals. While some of these

individuals were members of the Association, it is clear that these emails constituted a private exchange between a small group of individuals and were not a part of any official Association activity. In fact, the Association's president during that period, Betty Lou Jones, testified that she was completely unaware of the conflict until Limbert raided the Alumni Office and fired its employees. T. at 80-85. The Association, a not-for-profit corporation, never took any action in its minutes to warrant such punitive behavior from Limbert, and Limbert's complaints related only to the actions of individual alumni.

Even though the Association was not involved in the dispute, Limbert attempted to silence these few individuals by punishing the Association. The Court correctly stated that Limbert, acting with the approval of the IHL Board, "acted with the power of the sovereign, and if she acts with the power of the government, she is restricted by all the requirements of the Fourteenth Amendment to the United States Constitution prohibiting denial of rights under the First and Fifth Amendments, as well as the Mississippi Constitution, providing for free speech. . . ." R. at 554-55. The chancellor supported that statement with evidence of Limbert's complaints about the statements of individuals.

While Limbert could not violate the Association's free speech rights, because it had none, her actions were clearly intended to silence the individuals with whom she disagreed. That attempt to silence those individuals, although ineffective, constituted a violation of their free speech rights; therefore, Limbert terminated the affiliation agreement for a constitutionally impermissible reason. The chancellor held that "[w]hen an official's actions are motivated by constitutionally impermissible grounds, they are *per se* in bad faith. . . ." R. at 556. The chancellor's findings that Limbert attempted to control the Association as a means to silence the voices of individual alumni are supported by substantial evidence.

III. The chancellor's issuance of a permanent injunction was a proper exercise of the chancery court's equitable jurisdiction.

Having found that Limbert violated the affiliation agreement in bad faith, the chancellor fashioned a permanent injunction requiring Limbert to honor the affiliation agreement with the Association and ordering Limbert to disaffiliate with her appointed group. The chancellor's injunction was consistent with the relief requested by the Association and was clearly within the boundaries of the chancellor's equitable jurisdiction. In fact, given the nature of the relationship between the parties and the nature of the affiliation agreement, a permanent injunction requiring specific performance was the only viable option available to the chancellor and was the only vehicle by which the chancellor could grant the relief to which the Association was entitled. Accordingly, the chancellor committed no legal error in issuing the permanent injunction and its terms are legally sound and supported by substantial evidence.

A. The chancellor did not issue a writ of mandamus.[14]

Mississippi's mandamus statute sets forth the types of specific cases in which a writ of mandamus is appropriate and explains how a party may seek this very limited remedy. The mandamus statute provides in pertinent part as follows:

> On the complaint of the state, by its Attorney General or a district attorney, in any matter affecting the public interest, or on the complaint of any private person who is interested, the judgment shall be issued by the circuit court, commanding any inferior tribunal, corporation, board, officer, or person to do or not to do an act the performance or omission of which the law specially enjoins as a duty resulting from an office, trust, or station, where there is not a plain, adequate, and speedy remedy in the ordinary course of law. All procedural aspects of this action shall be governed by the Mississippi Rules of Civil Procedure.

Miss. Code Ann. § 11-41-1. The Appellants make two erroneous contentions in arguing that this appeal is based upon a writ of mandamus issued by the chancellor. First, only a circuit court may issue a writ of mandamus. Second, the permanent injunction is both a proper remedy for a

[14] This subsection addresses Issue 3 of the Appellant's Statement of Issues.

chancellor to employ and constitutes the only adequate remedy available in this case, as it provides the necessary relief to remedy Limbert's bad faith breach of contract.

The Association brought this matter before the chancery court seeking injunctive relief, not a writ of mandamus. The Association maintained this position consistently throughout the course of the hearing. The Amended Complaint requested a permanent injunction, as did the Association's post-trial brief. R. at 115, 454. Nowhere in the Association's pleadings or in its legal arguments at trial is the word mandamus even mentioned.

The Association pursued its case in the chancery court precisely because it was seeking injunctive relief, which is considered an equitable remedy. Had the Association wanted to seek a writ of mandamus, it would have filed its complaint with the circuit court because the statute is clear – only a circuit court may issue a writ of mandamus. See Miss. Code Ann. § 11-41-1. The chancellor would have no jurisdiction to issue a writ of mandamus. During the hearing, the chancellor also denied the Appellants' motion to dismiss the amended complaint after hearing an argument from the Appellants that the Association was actually seeking a writ of mandamus. T. at 194-96; 215.

Appellants seek to pervert the nature of the chancellor's order by their repeated use of the word "mandate." While the chancellor did use the word "mandate" in her order granting the permanent injunction, it is clear from the course of proceedings and the chancellor's opinion that her use of that word is related to the Association's request for a permanent injunction requiring the Appellants to act[15] and not as a means of issuing a writ of mandamus. Only by twisting the

[15] In earlier cases, injunctions that required a party to act affirmatively were known as "mandatory injunctions," while injunctions that required a party to cease and desist from acting were known as "prohibitory injunctions." It is clear from the context of the chancellor's order that the word "mandate" is used in this context and not as an indication that the chancellor is issuing a writ of mandamus. See M.R.C.P. 65, cmt.

meaning of the chancellor's words can the Appellants claim that the chancellor issued a writ of mandamus. Additionally, it is clear from the Association's pleadings that the Association sought the equitable remedy of a permanent injunction in both form and substance.

Likewise, the chancellor's entry of a permanent injunction does not violate the doctrine of "non-judicial interference." Although this doctrine is related to writs of mandamus, which are not at issue in this case, the chancellor's actions do not infringe upon the doctrine. See, e.g., Hinds Cty. Democratic Exec. Comm. v. Muirhead, 259 So.2d 692, 695 (Miss. 1972). Appellants argue that the chancellor could not order Limbert to approve the Association's bylaws because those bylaws were required to be consistent with the mission and priorities of the University and it is within the discretion of the University and the IHL Board to set the mission and priorities of the University. This argument is nonsensical. First, to correct Appellants' erroneous statement, and as a matter of clarity, it is the *legislature*, not the University or the IHL Board, that is responsible for stating the mission of a university in the State of Mississippi. MISS. CONST., Art. 8, Section 213A (establishing the Board of Trustees of Institutions of Higher Learning but holding that "[n]othing herein contained shall in any way limit or take away the power the Legislature had and possessed, if any, at the time of the adoption of this amendment, to consolidate, abolish or change the status of any of the above named institutions."). Second, the chancellor did not order Limbert to approve a specific set of bylaws. The chancellor simply stated, correctly, that as a matter of law, Limbert could not arbitrarily refuse to approve a set of bylaws that met the contractual requirements – in this case, consistency with the mission and priorities of the University – and then claim that she was exercising her good faith discretion to

terminate the contract because the Association was not in compliance with the terms of the affiliation agreement.[16]

Finally, the Appellants argue that Limbert had no legal duty to continue the affiliation agreement, citing the prior disagreements between Limbert and individual alumni as the reason for Limbert's decision to terminate the agreement. The Association does not claim that Limbert has no discretion with regard to the affiliation of entities or the decision to terminate those agreements, but the Association does take the position that Limbert's discretion must be exercised in good faith. As stated *supra*, Limbert had the discretion to choose whether to affiliate with the Association, and she opted to enter into an affiliation agreement with the full knowledge that she did not have a good relationship with some individual alumni. As the record clearly demonstrates, Limbert violated the doctrine of good faith in a number of ways; therefore, her decision to terminate was an abuse of her discretion.

B. The chancellor properly ordered specific performance of the affiliation agreement.[17]

Appellants contend that specific performance is not appropriate in this circumstance, citing the principle that courts generally refuse to grant specific performance in cases where "the execution of the decree would require such constant superintendence as to make judicial control a matter of extreme difficulty." Security Builders, Inc. v. Southwest Drug Co., Inc.,147 So. 2d 635, 637-38 (Miss. 1962). The cases which cite this principle, however, have been restricted to

[16] Appellants also contend that the chancellor violated the separation of powers doctrine by ordering Limbert to continue its affiliation with the Association, arguing that Limbert had the discretion to terminate the contract. Appellants cite no authority for the proposition that a bad faith termination of a contract is a discretionary act over which a court has no authority. Appellants cite no authority because there is none. Good faith performance of a contract is the law – it is not a discretionary act to be fulfilled at the whim of a state employee. Accordingly, the chancellor was well within her authority to order specific performance of the contract as part of a permanent injunction.

[17] This subsection addresses Issue 6 in the Appellants' Statement of Issues.

long-term lease situations or construction contracts. Id. In those cases, while monetary damages may not create a completely satisfactory remedy, monetary damages can provide some compensation for the wronged party. This case is not one of those cases.

While this case is simply a bad faith breach of contract case involving a state agency, the facts of this situation and the relationship between the parties do make this case unique, thereby rendering the general principle cited by Appellants inapplicable. In this case, specific performance is the *only* remedy available to the Association. No amount of money, no form of restitution, and no other equitable remedy can compensate the Association for the loss of the benefits of the affiliation agreement. Only specific performance of the contract will provide the Association with some relief. Further, the Association disagrees that the continuation of the affiliation agreement will require continuing judicial supervision. If Limbert and the IHL Board uphold the agreement in good faith, no judicial intervention will be required. The Association certainly has no desire to continuing to litigate these issues or to create obstacles to the performance of the affiliation agreement. The Association simply wants the opportunity to continue its mission of supporting the University and promoting its welfare and its best interests.

The chancellor, sitting in her capacity as a court of equity, properly considered the following maxims of equity: (1) the clean hands doctrine, and (2) equity regards as done that which ought to be done. Limbert came before the chancellor seeking to justify her actions and to cripple the Association by stripping the Association of its name and its assets. The clean hands doctrine "prevents a complaining party from obtaining equitable relief in court when he is guilty of willful misconduct in the transaction at issue." Bailey v. Bailey, 724 So.2d 335, 337 (Miss. 1998) (citing Calcote v. Calcote, 583 So.2d 197, 199-200 (Miss. 1991)). Limbert's clear pattern of bad faith behavior simply could not prevail under the clean hands doctrine. Additionally, equity also "regards as done that which ought to be done." Mississippi Chancery Practice, § 34.

Simply put, this Court is empowered to do that which is right and just, because "[e]quity delights to do complete justice and not by halves." Id. Only the exercise of the chancellor's equitable jurisdiction to enter an injunction requiring specific performance of the affiliation agreement could satisfy the demands of justice in this case; therefore, the chancellor's decision to enter a permanent injunction requiring specific performance is both legally sound and supported by substantial evidence.

C. The chancellor also properly ordered Limbert to disaffiliate with her appointed alumni group as a provision of the permanent injunction.

The chancellor clearly had the right and the authority to declare the contract with Limbert's appointed association void and to order Limbert to discontinue her relationship with that group. The chancellor specifically found that Limbert's decision to create a new, appointed alumni group was a continuation of her bad faith actions in terminating the affiliation agreement between the University and the Association. In other words, had Limbert not terminated the Association's affiliation agreement in bad faith, her appointed alumni group would never have existed. The chancellor's finding of bad faith is not only supported by substantial evidence, it also constitutes a logical and common sense conclusion.

Limbert announced her intention to disaffiliate the Association on February 1, 2007, ending a 117-year informal relationship only 78 days after formalizing that relationship by the signing of the affiliation agreement. On February 2, 2007, Limbert announced that she had appointed a single alumna to create a committee that would create a new alumni association, citing the disaffiliation of the Association as the impetus for the appointment. The appointed committee then created a new alumni association from its own members, adopted the name Mississippi University for Women Alumni Association, which the University had recently registered with the Mississippi Secretary of State, and signed an affiliation agreement with the University on

March 27, 2008. All of these actions were completed prior to the end of the sixty-day termination period of the affiliation agreement between the Association and the University.

Substantial evidence supports the chancellor's finding of bad faith – it is apparent that Limbert had been planning the disaffiliation of the Association and the creation of a group of her choosing to take the place of the Association for some time, despite her contractual obligations to the Association.[18] In fact, Limbert and Meredith had discussed the possibility of eliminating the Association and creating a new alumni group months before the Association even received the affiliation agreement to sign. T. at 258-60. Moreover, while Limbert was creating her new appointed alumni group, she made repeated claims to the public at large that she wanted to work with the Association to resolve the dispute. On these grounds alone, the chancellor's decision to order Limbert to cease contact with her appointed group is legally sound and supported by substantial evidence.

After Limbert signed the affiliation agreement with the appointed alumni group but before it was approved by the IHL Board, the University, the IHL Board, and the Association entered into an agreement that Limbert would not present the affiliation agreement for approval to the IHL Board until after the chancellor concluded the hearings on the Association's petition. That contract was brought to the IHL Board for approval on May 17, 2007, following the May 8, 2007, hearing but prior to the June 5, 2007, hearing. This action violated a binding agreement between the parties that was signed in the presence of the chancellor and filed with the court.

[18] The IHL Policy does not specifically limit the number or types of entities with which a university president may choose to affiliate (with IHL Board approval), and the chancellor's injunction was clearly not intended to interpret the IHL Policy in such a manner. Rather, the provision of the permanent injunction requiring Limbert to disaffiliate from her appointed alumni group serves to insure that Limbert would operate in good faith in upholding the affiliation agreement between the University and the Association and constitutes a proper exercise of the chancellor's equitable jurisdiction.

Pl. Exh. 9. Accordingly, the affiliation agreement between Limbert and her appointed group should never have existed or been officially approved. Declaring the contract void was a proper exercise of the chancellor's equitable jurisdiction. Complete justice could only be done by restoring the Association to its rightful place as the affiliated alumni organization representing the University and by ordering Limbert to undo the contract with her appointed alumni group, which she entered into with the bad faith intention of replacing the Association.

IV. Should this Court reverse the chancellor's decision, the University is not entitled to the trademark protection it claims.[19]

Finally, the Appellants claim that if this Court reverses the chancellor's ruling granting a permanent injunction, the Court should order the Association to cease the use of the University's "names, marks and symbols, including 'Mississippi University for Women,' 'MUW,' 'The W,' 'Long Blue Line,' its registered mark and various symbols associated with the University." Appellants Brief at p. 36. The University is not entitled to trademark protection because it does not own the names and terms that it claims to own, nor is there any likelihood of confusion if the Association continues to use its full name – Mississippi University for Women Alumnae Association.

To successfully state a cause of action under the Lanham Act, 15 U.S.C. § 1125, or common law doctrines of trademark and trade name infringement, the University must demonstrate, as a foundational matter, that its owns each of these marks and that they are valid and legally protectable marks. Ford Motor Co. v. Summit Motor Prods., Inc., 930 F.2d 277, 292 (3d Cir. 1991); see also Union Nat'l Bank v. Union Nat'l Bank, 909 F.2d 839, 844 (5th Cir. 1990). If a mark has not been *federally registered*, then its validity is dependent on proof that the mark has a secondary meaning such that, in the minds of the public, the primary significance of

[19] This section addresses Issue 7 of the Appellants' Statement of Issues.

the term is to identify the source of the product itself. Ford Motor Co., 930 F.2d at 292; see also Pebble Beach Co. v. Tour, 155 F.3d 526, 536 (5th Cir. 1998).[20]

The Association has been in continuous existence since 1889, when the University graduated its first class. In 1994, the Association incorporated as a non-profit corporation under the laws of the State of Mississippi using the name Mississippi University for Women Alumnae Association. R. at 424-28. The Mississippi University for Women Alumnae Association is a private and independent group operating as a separate entity. Until October of 2006, the University has never attempted to control the Association or the Association's use of the term "Mississippi University for Women" in its name. The full name of the Association, therefore, has a separate legal meaning from the name of the University and belongs to the Association pursuant to Mississippi's Nonprofit Corporation Act. See Miss. Code Ann. § 79-11-157, *et seq.*

Further, the terms "MUW" and "the 'W,'" ***which are not registered trademarks of the University,*** are commonly used in reference to businesses or goods other than the Mississippi University for Women. The term "MUW" is a trademark registered to MUW Design, an adult lingerie company, and is also affiliated with Monadnock United Way. R. at 429-30. The term "MUW" is indeed trademarked, but not to the Appellants. "The 'W'" is a term frequently associated with the W hotel brand, the "W" magazine, and the hip-hop group The Wu-Tang Clan, which in 2000 released an album called "the W." More recently, in the 2000 and 2004 presidential election, "W" was the rally cry of supporters of President George W. Bush. The University has no claim to these trade names because they are part of the public domain and are not uniquely associated with the University.

[20] For a comprehensive discussion of trademark law and the circumstances in which a name is entitled to trademark protection, please see the Association's brief in opposition to Appellants' second motion to dismiss. R. at 417-21.

The only registered trademark belonging to the University is a word mark, which is essentially a logo used by the University. Def. Exh. 11. As a registered word mark, the protections afforded to this type of trademark cover the mark as a whole, and not the individual components which combine to create the word mark. See Estate of P.D. Beckwith, Inc. v. Commissioner of Patents, 252 U.S. 538, 545-56 (1920); see also J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 11:27 (4th ed. 1996). "The commercial impression of a trademark is derived from it as a whole, not from its elements separated and considered in detail. For this reason it should be considered in its entirety." Id. Therefore, the University's trademark registration extends protection to the "W symbol" itself, and not to the individual parts included within the symbol. Therefore the phrase "Mississippi University for Women" is not a protected trademark of the University merely because it is included within the seal that is included in the "W symbol" registered with the United States Patent and Trademark Office. Similarly, the use of the "W" as the background for the University's trademark symbol does not protect the phrase "the W" as a trademark simply because it is a portion of the protected design. Separately protecting individual portions of a completed design would lead to absurd results which would essentially allow persons to gain trademark protections of otherwise unprotectable words or symbols simply by including them in larger designs. Therefore, the trademark protections afforded to the "W symbol" are not extended to the components which comprise the symbol – only the entire symbol itself.

Because the name "Mississippi University for Women" is not entitled to trademark protection, the Association could only be prohibited from use of the name in the event that this Court finds that there is a likelihood of confusion. Appellants claim that the Association should be prevented from using its own name, Mississippi University for Women Alumnae Association pursuant to Meridian Yellow Cab Co. v. City Yellow Cabs, 41 So. 2d 14 (Miss. 1949). That

case, however, is distinguishable from the case before the Court. In Meridian Yellow Cab, two companies incorporated a cab service in the town of Meridian, Meridian Yellow Cab Co. ("Meridian Cab") in 1945 and City Yellow Cabs ("City Cab") in 1948. Id. at 823. While Meridian Cab charted their company in 1945, they did not begin supplying taxi services until a few months after City Cab began operations in 1948. Id. Meridian Cab then brought suit under Mississippi law, specifically Section 5322, Code of 1942, which prohibited the creation of a corporation with the same name as another corporation already existing in the state or creation of a corporation with a name so similar as to be misleading. Id. at 822-23.[21] A determination that a name is sufficiently similar as to be misleading is dependent on:

> circumstances; the identity or similarity of the names; the identity of the business of the respective corporation; how far the name is a true description of the kind and quality of the articles manufactured of the business carried on; the extent of the confusion which may be created or apprehended; and other circumstances which might justly influence the judgment of the judge in granting or withholding the remedy.

Id. at 826 (citing 13 Am. Jur., Par. 137, 274). Agreeing with the trial court's finding that the corporation's names were so similar, and emphasizing that the business engaged in the exact same trade in the same city, the Mississippi Supreme Court found that City Cab's name was misleading to the point of confusion. *Id.* at 828-30. Moreover, Meridian Cab had a superior claim because of its earlier incorporation, regardless of the date on which operations began. Id. at 830.

The Meridian Yellow Cab case is therefore distinguishable from the instant case. Primarily, the law underlying the decision in Meridian Yellow Cab is based on the names of corporations registered by the state. The code provides corporations who register with the state

[21] Currently, the law at issue in Meridian Yellow Cab is codified at Miss. Code Ann. § 79-4-4.01 et. seq.

protection from other companies who would mislead the public by adopting confusingly similar names. However, the University is not a registered corporation with the state of Mississippi. The Alumnae Association, however, is registered with the state as is the Mississippi University for Women Foundation. Therefore, the University cannot assert any protections that formed the foundation of the Meridian Yellow Cab decision.

Even if the court applies Meridian Yellow Cab to the instant case, the facts are significantly distinguishable. In Meridian Yellow Cab, both corporations were engaged in the same business in the same area. Id. at 823. The University is in the business of education, which is different then the business of alumni relations. Even Dr. Limbert stated in her testimony that the University and any alumni association serve a different purpose, calling the alumni "friend makers." T. at 35-36. Moreover the Alumnae Association serves persons who have previously attended the University, and the University primarily serves current attendees and seeks the business of non-attendees. Therefore the markets in which the Alumnae Association and the University function are distinguishable, unlike the geographic area which was shared by both cab companies in Meridian Yellow Cab. Id. at 823. Therefore, the factors on which the court based its decision in Meridian Yellow Cab are not present in the instant case.

In examining all the factors established by the Meridian Yellow Cab court, the University's claim is unsupported by Mississippi law. The names of the University and the Alumnae Association are significantly different because of the additional phrase "Alumnae Association" denotes a key difference in the organizations at issue. The name of the Alumnae Association clearly states "a true description of the kind and quality of the articles manufactured or the business carried on" by the corporation. Id. at 826. It is an association of persons who are alumni of the University. Finally, the Meridian Yellow Cab court discussed the extent of confusion which is created in reference to two corporations which shared a similar name. Id. In

the instant case, any confusion which may arise is not between the two organizations themselves but the relationship between the two organizations, which is not the basis for the statutory protection. Therefore, under the Meridian Yellow Cab analysis, the University's claim must fail. Finally, should this Court determine that the Association should no longer be affiliated with the University, to the extent any confusion may exist regarding the Association's status as an unaffiliated entity, the Court may impose the requirement that the Association clearly identify itself as being unaffiliated with the University without prohibiting the use of the Association's name, which is protected by virtue of its registration with the Mississippi Secretary of State.

CONCLUSION

The chancellor's ruling, which granted a permanent injunction to the Association, required that Limbert

> uphold the existing and valid affiliation agreement between the Association and the University, dated October 25, 2006, and that Dr. Limbert operate under the affiliation agreement in good faith for the duration of the Agreement. Since the actions of Dr. Limbert in terminating the agreement were in bad faith, actions taken by her to form a new alumnae association and enter into a new affiliation agreement were also in bad faith. Therefore, Dr. Limbert and IHL are mandated to rescind any affiliation agreements made by Dr. Limbert with any other alumni group.

R. at 556. The chancellor applied the correct legal standard for bad faith breach of contract in Mississippi, and substantial evidence supports her findings that Limbert and the IHL Board acted in bad faith in terminating the affiliation agreement between the Association and the University. The record contains ample evidence that Limbert acted in bad faith by (1) arbitrarily refusing to approve the Association's proposed bylaws, which were sufficient to meet the contractual requirements of consistency with the University's missions and priorities, and then terminating the affiliation agreement under the pretense that the Association failed to submit appropriate bylaws; (2) terminating the

affiliation agreement when the Association refused to cede the independence granted to it under both the IHL policy and the affiliation agreement, thereby giving Limbert control of the Association to which she was not legally entitled; and (3) terminating the affiliation agreement, in her position as an agent of the State, for the express purpose of attempting to silence criticism from individual alumni, in violation of the First Amendment.

Having found that Limbert acted in bad faith, the chancellor acted appropriately in issuing a permanent injunction requiring Limbert to honor the contract and to rescind the illegal contract between Limbert and her appointed alumni group. The chancellor's equitable jurisdiction was broad, and the terms of the permanent injunction fall squarely within those boundaries. The permanent injunction is the only vehicle that can provide the Association the relief to which it was entitled – status as an affiliated entity of the University, and the guarantee of Limbert's good faith going forward to provide the Association with the support that it needs to fulfill its mission, as provided for in the affiliation agreement. By ordering Limbert to rescind the affiliation agreement with her appointed alumni group, the chancellor ensured that the Association would receive the support it contracted for and created equity by preventing Limbert from benefiting from her bad faith conduct.

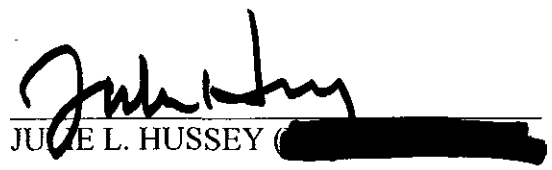
The chancellor's sole error was the decision to categorize the IHL Board's testimony regarding the relevant policy as the IHL Board's actual *definition* of the term "independent" as set forth in the policy rather than categorizing it as the IHL Board's improper *application* of the policy. The chancellor should have concluded that the IHL policy was clear and unambiguous and that the term "independent" should be given its plain and ordinary meaning. The chancellor's error, however, is inconsequential to the

outcome of this case, as the chancellor reached the same decision that she would have reached had she properly applied Mississippi law on statutory interpretation. The outcome is the same, regardless of the analytical path that the chancellor chose in arriving at her decision.

Accordingly, Appellee Mississippi University for Women Alumnae Association respectfully requests that this Court affirm the chancellor's order granting the permanent injunction and that this Court uphold the terms of that injunction. The Appellee also respectfully requests that this Court correct the chancellor's legal analysis regarding the interpretation and application of the relevant IHL policy to reflect that the term "independent" should be given its plain and ordinary meeting.

This, the 16th day of April 2008.

Respectfully submitted,

BY: 
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CERTIFICATE OF SERVICE

I, JULIE L. HUSSEY, one of the attorneys for Appellee, do hereby certify that I have, this day, served via electronic mail and United States mail, a true and correct copy of the above and foregoing to the following:

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