IN THE SUPREME COURT OF MISSISSIPPI

CASE NO. 2007-CA-01926

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 — DEFENDANTS/APPELLANTS

V.

MISSISSIPPI UNIVERSITY FOR WOMEN ALUMNAE ASSOCIATION, INC. — PLAINTIFF/APPELLEE

ON APPEAL FROM LOWNDES COUNTY CHANCERY COURT

APPELLANTS' REPLY BRIEF

ORAL ARGUMENT REQUESTED

J. CAL MAYO, JR. ([redacted]
PAUL B. WATKINS, JR. [redacted]
MAYO MALLETTE PLLC
5 University Office Park
2094 Old Taylor Road
Post Office Box 1456
Oxford, Mississippi 38655
Telephone: (662) 236-0055
Facsimile: (662) 236-0035
Attorneys for Appellants

DAVID L. SANDERS [redacted]
MITCHELL, MCNUTT & SAMS, P.A.
215 5th Street North
Post Office Box 1366
Columbus, Mississippi 39703
Telephone: (662) 328-2316
Facsimile: (662) 328-8035
Attorney for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: **PAGE**

CONSTITUTION AND STATUTES:

OTHER AUTHORITY:

STATEMENT REGARDING ORAL ARGUMENT

The Alumnae Association has not opposed Appellants' request for oral argument. Therefore, Appellants request to be heard orally at the Court's earliest convenience.

ARGUMENT

In February 2007, Mississippi University for Women terminated its affiliation with the Mississippi University for Women Alumnae Association, Inc. The decision followed a period of discord between the University and various Alumnae Association leaders. After many months of unproductive discussions, Dr. Claudia Limbert, President of the University, determined that the Alumnae Association could no longer serve and support the institution's mission and priorities. The University needed a fresh start with a new affiliated alumni association. At all times, Dr. Limbert acted with the knowledge and consent of the IHL Board of Trustees, the state agency charged by the Mississippi Constitution with responsibility for managing Mississippi's public universities.

The Alumnae Association leaders did not like Dr. Limbert and certainly disagreed with her decision. However, their emotional displeasure created no right to a judicial remedy, as Dr. Limbert was simply doing her job. The Chancery Court erred in determining otherwise and in permitting the Alumnae Association continued use of the University's names, marks and symbols following termination of their relationship. This Court should reverse the Chancery Court and render judgment in favor of the University, the IHL Board and Dr. Limbert.

I. University exercised clear contractual right to terminate Affiliation Agreement.

The Affiliation Agreement memorialized the terms of a unique relationship between the University and the Alumnae Association. In exchange for the right to identify itself as one of the University's officially-sanctioned entities, the Alumnae Association agreed to support the mission and priorities of the University. The consideration primarily involved mutual support and required

constant interaction, and the parties necessarily provided a method for either to terminate their affiliation if the relationship soured.

Specifically, the Alumnae Association entered the Affiliation Agreement aware that either party could terminate the relationship in its discretion: "This Agreement may be terminated by either party upon at least 60 days written notice."[1] Section 7.2 was clear and unambiguous and contained no "for cause" termination language. The Alumnae Association or the University could terminate "for good reason, bad reason or no reason at all".[2]

The Chancery Court had the responsibility to ascertain the intent of the parties from looking within the four corners of the Affiliation Agreement.[3] As the termination provision was clear, definite, explicit, and free from ambiguity, the Chancery Court should have looked solely to the language used in the Agreement and given that language the same effect as written.[4] Instead, the Chancery Court implied a "good cause" termination restriction, allegedly derived from the implied covenant of good faith and fair dealing, even though the parties did not bargain for such a provision.[5]

---

[1]Affiliation Agreement, § 7.2 (PX 4; RE 4 at 30).

[2]*See, e.g., Harris v. Miss. Valley State Univ.*, 873 So. 2d 970, 986 (Miss. 2004) (holding that, absent contract expressly providing to contrary, employee may be discharged "at employer's will for good reason, bad reason, or no reason at all, excepting only reasons independently declared legally impermissible."); *Coburn Supply Co. v. Kohler Co.*, 342 F.3d 372, 374-75 (5th Cir. 2003) (holding, under Texas law, party not required to demonstrate cause before terminating "at-will, non-exclusive relationship" and may do so "for a good reason, a bad reason, or no reason at all"); *Hubbard Chevrolet Co. v. Gen. Motors Corp.*, 873 F.2d 873, 876-78 (5th Cir. 1989) (refusing to apply "good faith and fair dealing" to at-will termination provision under Michigan law).

[3]*Dixie South Industrial Coating, Inc. v. Mississippi Power Co.*, 872 So. 2d 769, 772 (Miss. Ct. App. 2004).

[4]*Hamilton v. Hopkins*, 834 So. 2d 695, 700 (Miss. 2003); *Pfisterer v. Noble*, 320 So. 2d 383, 384 (Miss. 1975).

[5]The Chancery Court made the same error when it implied a provision in the IHL Policy requiring the IHL Board to approve any decision to terminate the Affiliation Agreement. *See* Opinion and Judgment, (continued...)

Neither the Chancery Court nor the Alumnae Association has ever identified any legal authority that suggests the implied covenant of good faith modifies clear and unambiguous contract terms.

Nothing prevented the University from protecting its interests under the Affiliation Agreement, even if (and especially if) that meant terminating the relationship with the Alumnae Association. The University did not breach the contract with the Alumnae Association, much less the implied covenant of good faith, when it took "only those actions which were duly authorized by the contract."[6] Instead, the University exercised a "no cause" termination provision, a choice available to either party to the Agreement, to protect its interests and to pursue another affiliated relationship. The Chancery Court erred in looking behind this decision to examine the University's rationale when the University acted in a manner consistent with its express rights.

In addition, the concept of good faith had limits, extending to "justified expectations" of the parties but not their irrational expectations.[7] The relationship between the Alumnae Association leaders and the University administration had been, for some time, tenuous at best. The Alumnae Association has even claimed that it signed the Affiliation Agreement in October 2006 under "threat of disaffiliation".[8] Accepting without conceding the Association's statement, the leaders of the

---

[5](...continued)
p. 9, n. 7 (R 552; RE 2 at 13). The Policy required IHL Board approval *to enter into* an affiliation agreement but *not to terminate* that agreement. IHL Policy § 301.0806 (PX 1; RE 3 at 22-23). The Affiliation Agreement gave the parties (*i.e.*, the Alumnae Association and the University) the right to terminate their relationship. The Chancery Court erred when it created a provision requiring IHL approval of terminations, a provision which contradicted the IHL Board's position on its policy. *See* Defendants' Answer, Defenses and Counterclaim, p. 4, ¶ 21, and p. 5, ¶ 44 (April 10, 2007) (R 169-70); Meredith Testimony, T 261.

[6]*GMAC v. Baymon*, 732 So. 2d 262, 269 (Miss. 1999).

[7]*Cenac v. Murry*, 609 So. 2d 1257, 1272 (Miss. 1992) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 205, 100 (1979)).

[8]Appellee's Brief, p. 6.

Association certainly had no "justified expectation" that the Affiliation Agreement was perpetual and that the University would never consider exercising its right to terminate, particularly since the parties included a termination provision in their contract that did not require a showing of "good cause". Instead, the Alumnae Association knew that either party to the Agreement could end the relationship upon 60 days' notice.

II. University had power to make decisions without judicial second-guessing.

Appellants are two governmental entities and a public official. Any judicial review of their actions necessarily implicates separation of powers principles. The fundamental governmental precept of separation of powers prevents one branch of government from exercising the power delegated to another branch.[9] While the doctrine does not prohibit all judicial review of executive branch actions, the Alumnae Association identified no authority for the proposition that Dr. Limbert had a "mandatory, non-discretionary duty"[10] to approve the Association's proposed bylaws or that termination of the Affiliation Agreement was an "attempt to exercise an authority not legally vested in" the University.[11] Therefore, the separation of powers doctrine required the Chancery Court to reject the Alumnae Association's request to second-guess the discretionary policy decisions made by these executive branch members.

The Chancery Court specifically acknowledged that Dr. Limbert had the power to exercise her discretion to terminate the affiliation with the Alumnae Association.[12] Similarly, Dr. Limbert reviewed the bylaws to determine their compatibility "with the mission and priorities of the

---

[9]MISS. CONST., Art. I, § 2.

[10]*Fordice v. Thomas*, 649 So. 2d 835, 840 (Miss. 1995).

[11]*State v. McPhail*, 180 So. 387, 391 (Miss. 1938).

[12]*See* Opinion and Judgment, p. 9 (R 552; RE 2 at 13).

University, this [Affiliation] Agreement, and IHL Policy", an exercise that also obviously involved the exercise of her discretion.[13] Having recognized this discretionary *power to act*, the separation of powers doctrine prohibited the Chancery Court from telling Dr. Limbert *how to act*.

The Alumnae Association has cited *McPhail* for the undisputed proposition that courts may review executive action to assure officers acted within the scope of their legal powers.[14] Yet, the Association has ignored the portion of the decision that expressly prohibits courts from reviewing nonjusticiable matters, *i.e.*, when officers' actions are within "the field of their appointed duties".[15] There can be no serious debate as to whether Dr. Limbert's actions were within her field of duties.

The Alumnae Association has conceded that it "does not claim that Limbert has no discretion with regard to the affiliation of entities or the decision to terminate those agreements".[16] However, the Association has asked this Court to place a constitutionally impermissible limit on the IHL Board's authority to govern Mississippi's universities through their executive officers by permitting a private litigant to challenge those officers' exercise of that discretion. Dr. Limbert's decision to terminate the Affiliation Agreement was a nonjusticiable policy decision that the Chancery Court erred in second-guessing.

The Alumnae Association has also questioned Dr. Limbert's motives in terminating the Agreement and has alleged that Dr. Limbert "cannot argue that her decision to terminate the

---

[13]First Am. Compl., ¶ 30 (April 5, 2007) (quoting Affiliation Agreement, § 2.17) (R 122).

[14]180 So.2d 387, *cited in* Appellee's Brief, p. 21.

[15]*McPhail*, 180 So. at 391. The citation to *Albritton v. City of Winona*, 178 So. 799, 803 (1938), on page 21 of Appellee's Brief, is also misleading, as that opinion states that the role of the judiciary is to determine when the executive and legislative branches have "exceeded powers granted to them by the constitution", not when they have generally "overstepped their boundaries".

[16]Appellee's Brief, p. 33.

affiliation agreement served the best interests of the University".[17] However, Mississippi law did not require Dr. Limbert to submit her policy decisions regarding "the best interests of the University" to the Alumnae Association. Dr. Limbert possessed the discretionary authority, granted to her by the IHL Board, to enter into (and terminate) relationships with affiliated entities.

The judiciary may not interfere with discretionary decisions made by executive branch members, such as the IHL Board, the University and Dr. Limbert, and for good reason. If Mississippi's universities and their presidents were subject to legal claims from people or organizations who did not think that the presidents' decisions served the "best interests" of the universities, the presidents would spend every day in a courtroom. For this reason, the separation of powers doctrine prevents a judge from substituting its judgment for that of the appropriate executive officer. While the Alumnae Association has conclusively established that it was unhappy with decisions Dr. Limbert made, it has failed to present any justification for judicial intervention. The Chancery Court erred in second-guessing these executive branch decisions.

III. Dr. Limbert acted in manner consistent with her power as President of University.

Dr. Limbert has served as the chief executive of the University since 2002. Throughout her service, she has made many decisions about the fate and future of the University, bearing in mind the various constituencies affected by her actions. She chose the University's paths knowing many would disagree but with knowledge that such tension came with the territory.

Dr. Limbert discovered quickly that some of the leaders of the Alumnae Association wanted to manage and control the University. Dr. Limbert knew that this was not the role of an affiliated entity or its members, regardless of the alumni's good intentions. As the chief executive officer, she

---

[17]Appellee's Brief, p. 26.

was responsible for University operations, and the IHL Board held her accountable for all aspects of the institution. Over time, as Dr. Limbert and her administrators refused to buckle to their demands, these Alumnae Association leaders began to undermine the University's operations and the functions of its affiliated Foundation. As acknowledged by both parties, the tensions continued through negotiation and execution of the Affiliation Agreement. In addition, the Alumnae Association did not exhibit the signs of health that Dr. Limbert expected and needed from the organization.[18] Ultimately, as Dr. Limbert concluded that the Affiliation Agreement had not resolved the problems with the Alumnae Association leadership, she terminated the relationship in the manner specifically provided in the Affiliation Agreement.[19]

The theory underlying the Alumnae Association's request to mandate the University to maintain affiliation and the Chancery Court's own secondary theory for forcing continued affiliation lacked factual, legal and logical support. To get to the Association's desired result (*i.e.*, Dr. Limbert terminated the Affiliation Agreement in bad faith because she refused to approve the bylaws as submitted by the Association in violation of IHL Policy), the Chancery Court (i) ignored the plain language of the Affiliation Agreement's termination provision (as already discussed), (ii) second-guessed the IHL Board's interpretation of its own affiliated entity policy, (iii) applied an analysis

---

[18]For example, only a small portion of potential members belonged to the Alumnae Association and a smaller portion of these persons attended the annual meeting; leadership control remained in the same few hands; chapters closed or became dormant; and male and minority alumni felt omitted from involvement. Limbert Testimony, T 44 and 54-55.

[19]The divisive conduct continued after the termination of the Affiliation Agreement. For example, these Association leaders purchased an advertisement in March 2007 accusing Dr. Limbert of "dissolving" the Alumnae Association, a complete fabrication as no evidence suggests any such efforts. *See* Advertisement (March 14, 2007) (DX 4). Similarly, the Alumnae Association accused Dr. Limbert of stealing its money (*see* Alumnae Association's Opposition to University's Motion for Preliminary Injunction, p. 9 (R 421)), an allegation the Alumnae Association President, Betty Lou Jones, later admitted was false. Jones Testimony, T 122-24.

inconsistent with the IHL Board's interpretation, (iv) concluded that Dr. Limbert wanted to control the Alumnae Association, and (v) assumed that her rejection of the Alumnae Association's draft by-laws was the sole reason that Dr. Limbert terminated the Affiliation Agreement. Similarly, to reach the Chancery Court's secondary conclusion (*i.e.*, Dr. Limbert terminated the Affiliation Agreement in bad faith because she wanted to violate the First Amendment rights of unnamed Alumnae Association members), the Chancery Court (i) created a legal theory never pled or briefed by the Alumnae Association, (ii) assumed that Dr. Limbert wanted to stop unnamed Association members from publicly criticizing her administration (as opposed to wanting to prevent them from controlling the University and undermining the University Foundation's operations), (iii) concluded that Dr. Limbert believed termination of the Affiliation Agreement with the Alumnae Association would quiet these critics, and (v) transferred legal rights and remedies potentially available to individuals to the benefit of the Alumnae Association.

These theories are addressed in turn below.

A. IHL Policy

At the heart of the Alumnae Association's theory was its interpretation of the word "independent" as used at various times in the IHL Policy. Under the Association's hypothesis, the IHL Board intended for "independent" to be interpreted in isolation to mean total "free will" and the right for an affiliated entity to act in any manner, even if such conduct is detrimental to the University and its administration, without fear of any reaction by the University. The Alumnae Association theorized that Dr. Limbert was seeking control of the Alumnae Association through its bylaws and that she terminated the Affiliation Agreement in violation of the IHL Policy when the Alumnae Association presented bylaws which did not provide her this absolute control. The Chancery Court erred in adopting this theory.

Like a statute, the IHL Policy must be read and interpreted in context as a whole and not in individual parts.[20] Even if the IHL Board's intentions concerning the word "independent" were somehow ambiguous or unclear (which they were not), the IHL Board was uniquely suited to choose the best interpretation among the alternatives.[21] The IHL Board, and not the Chancery Court, best understood the needs and concerns of higher education administration in Mississippi.

Here, the Alumnae Association isolated a single word and gave it a selected meaning without regard to the context of the use. However, the IHL Board provided express guidance on the meaning of independence under the policy, guidance which the Alumnae Association ignored. Specifically, "to ensure the independence of the affiliated entities", the IHL Board prohibited its employees (including employees of the various universities) from holding a voting position on the board of directors of any institutionally affiliated entity.[22] Within this broad definition of "independence", the IHL Board deferred to the institutional executives to implement the details of the operating agreements for the various affiliated entities, provided that the operating agreements contained the other required provisions.[23] In adopting the definition urged by the Alumnae Association, the Chancery Court substituted its judgment regarding the meaning of "independent" for that of the IHL Board. Ironically, and despite its stated concerns about maintaining its independence, the Alumnae

---

[20]*Dupree v. Carroll*, 967 So.2d 27, 30 (Miss. 2007); *Kerr-McGee Chemical Corp. v. Buelow*, 670 So.2d 12, 17 (Miss. 1995).

[21]*Fed. Express Corp. v. Holowecki*, 128 S. Ct. 1147, 1158 (2008)(Where ambiguities in statutory analysis and application are presented, the agency may choose among reasonable alternatives."). *See also Id.* at 1155 ("Just as we defer to an agency's reasonable interpretations of the statute when it issues regulations in the first instance, . . . the agency is entitled to further deference when it adopts a reasonable interpretation of regulations it has put in force.").

[22]IHL Policy § 301.0806 (PX 1; RE 3 at 22).

[23]Meredith Testimony, T 225-29.

Association asked the University to waive this "independence" provision so that IHL employees could serve on the Association's Board of Directors. The University refused to waive the prohibition, ensuring that the Association would remain "independent".[24]

The Chancery Court's only justification for its refusal to defer to the IHL Board's construction of its policy was its statement that "the Mississippi Supreme Court has defined an 'independent entity.'"[25] However, this Court has never interpreted the IHL Board policy at issue, and the Chancery Court's failure to afford the IHL Board's interpretation of its own policy the "great deference"[26] to which it is entitled was clear legal error. Nothing in the record demonstrates that the IHL Board's interpretation of its policy was "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law."[27]

Reviewing IHL Policy 301.0806,[28] the IHL Board did not intend affiliated entities, such as this Alumnae Association, to be "completely independent" or to have absolute "free will" as argued by the Alumnae Association and as determined by the Court. For example, the Policy required affiliated entities to maintain financial and accounting records in accordance with Generally Accepted Accounting Principles, submit to an annual audit by a CPA firm, provide annual audited financial statements and a list of all officers, directors and trustees, and adopt a conflict of interest

---

[24]Jones Testimony, T 75-76.

[25]Opinion and Judgment, p. 10 (R 553; RE 2 at 14).

[26]*Smith v. Univ. of Miss.*, 797 So. 2d 956, 960 (Miss. 2001).

[27]*Bd. of Trustees of Inst. of Higher Learning v. Sullivan*, 763 F. Supp. 178, 184 (S.D. Miss. 1991) (quoted in *Tower Loan of Miss., Inc. v. Miss. State Tax Comm'n*, 662 So. 2d 1077, 1081 (Miss. 1995)).

[28]IHL Policy § 301.0806 (PX 1; RE 3).

policy. In sum, the Policy made clear that affiliated entities (while private and independently governed) had obligations to their respective institutions and the IHL Board.

Regardless of its exact definition, the word "independent" does *not* mean that the institutional executive officers of Mississippi's universities must approve any set of bylaws proposed by the universities' affiliated entities or remain affiliated with entities that seek to "manage the University" and "undermine [its] administration".[29] The Alumnae Association guided the Court to a definition of "independence" that suited it, but provided absolutely no justification for a departure from the IHL Board's uncontradicted statement of the policy's purpose and meaning. Viewed in the broader context, if nothing else, "independent" must have meant that the Alumnae Association could elect to terminate the affiliation with the Univeristy, and *vice versa*.

The Alumnae Association has argued that Dr. Limbert sought "complete control" of the Association's governance when she insisted on certain bylaw language related to the election of officers.[30] However, the Association ignored the statutes concerning corporate governance that give the exclusive power to control and manage a non-profit corporation to the board of directors.[31] The Alumnae Association had no corresponding obligation even to have officers, and the Association's directors retained the right to remove officers "at any time with or without cause".[32] Thus, fully complying with the IHL policy requiring independence, Dr. Limbert never attempted to have any University employee serve as a voting member on the Alumnae Association Board of Directors. In

---

[29]*See* Opinion and Judgment, pp. 8 and 12 (R 551 and 555; RE 2 at 12 and 16).

[30]*See* Appellee's Brief, p. 20.

[31]*See* Miss. Code § 79-11-231 (1) and (2); *see also City of Picayune v. Southern Reg'l Corp.*, 916 So. 2d 510, 523 (Miss. 2005) ("It is well settled that the directors of a corporation are charged with the duty of managing its affairs.").

[32]*See* Miss. Code § 79-11-277(2).

fact, Dr. Limbert never attempted to direct or control any appointment or election to the Alumnae Association's Board of Directors. Because the Board had ultimate authority to manage and control the Alumnae Association (and not the officers), Dr. Limbert would have little ability to control the Association absent control of the Board.

The Alumnae Association has identified on several occasions the composition of the officer nominating committee as evidence of the improper "control" exercised by Dr. Limbert and the University. However, *the Alumnae Association agreed to this arrangement as part of the Affiliation Agreement.*[33] In other words, the Alumnae Association voluntarily relinquished this aspect of its "independence". As in any contractual relationship, the Alumnae Association gave up numerous aspects of its "independence" as part of the consideration for obtaining the benefit of affiliation.[34] However, such relinquishment of the Association's "free will" did not place the Affiliation Agreement in violation of the IHL Policy requiring "independence" for affiliated entities.

B. First Amendment

The Alumnae Association has pointed to no proof in support of its argument that Appellants consented to trial of any First Amendment issues. None of the pleadings alleged a violation of the First Amendment. Furthermore, the use of the words "free speech" in the Alumnae Association's opening and closing statements on the first day of trial did not constitute notice to Appellants that the Alumnae Association intended to join a constitutional issue. The Chancery Court gave the

---

[33]Affiliation Agreement, § 5.2 (PX 4; RE 4 at 30).

[34]The Affiliation Agreement requires the Alumnae Association, among other things, to submit an annual budget to the University President, to enter an agreement with the MUW Foundation for receipting gifts, to provide notice to University of any Association meetings, and to change its name. Affiliation Agreement, §§ 2.2, 2.7, 2.8 and 2.24 (PX 4; RE 4 at 25-28).

parties an opportunity to address all legal issues in post-trial briefs, and the Alumnae Association made no mention of any right to constitutional relief.[35]

The Alumnae Association has conceded that it had no First Amendment right for Appellants to violate.[36] No individuals were ever joined as plaintiffs in this matter. Nonetheless, the Association has argued that the Chancery Court properly ruled on the free speech rights of certain unnamed individual members. If the Alumnae Association had no constitutional right to be protected, there could be no rational argument that the "rights" of people who are not parties to this action could bring about a mandated affiliation for the Alumnae Association. The Alumnae Association has cited no legal authority to suggest otherwise.

Moreover, there was no evidence that any individual alumna's ability to express herself was restricted in any way. Rather, the University exercised its inherent right to refuse to affiliate with an entity which did not share its mission and priorities and whose leaders demonstrated the desire to manage and control the University and to undermine its administration. The University was well within its rights to regulate the content of messages disseminated by its affiliated entities and to take appropriate action to ensure that its message is "neither garbled nor distorted" by the Alumnae Association.[37] In short, the Alumnae Association's attempts to bootstrap on an individual's First Amendment right must fail because there was no free speech violation under these circumstances.

---

[35]Alumnae Association's Post-Trial Brief (R 454-479).

[36]Appellee's Brief, p. 29.

[37]*Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 834 (U.S. 1995).

The Alumnae Association's argument that it "never took any action in its minutes to warrant" the termination of the Affiliation Agreement[38] ignores the IHL Board's constitutional authority to define the mission and priorities of the State's universities and the University's contractual authority to terminate the Agreement for any reason. There is no legal or factual support for the notion that the University was beholden to the Alumnae Association unless and until the Association memorialized its attempts to subvert the University's administration in its corporate minutes. The University and Dr. Limbert were not concerned about official actions of the Alumnae Association, as it was abundantly clear that the conduct of various officers and directors was not consistent with the best interests of the University.[39]

IV. University had exclusive discretion to associate with other affiliated entities.

In March 2007, the University signed an affiliation agreement with a new alumni association, the Mississippi University for Women Alumni Association. By agreement, the IHL Board consented to delay consideration of the affiliation agreement until the next hearing date (May 8, 2007) as the parties attempted to mediate their dispute.[40] The mediation was unsuccessful, and the IHL Board considered and approved the new affiliation agreement in late May, following the May 8 hearing.

---

[38]Appellee's Brief, p. 29. This Court's decision in *AT&T v. Purcell Co.*, 606 So.2d 93 (Miss. 1990), upon which the Alumnae Association relies more than once, does not hold for the proposition for which the Alumnae Association cites it, *i.e.*, that a corporation can only speak or act through its minutes. Instead, the opinion states that, while official minutes are the "best evidence" of official corporate action, they are "not the only evidence of corporate action". *Id.* at 97; *see also Longanecker v. Diamond Head Country Club and Property Owners Assoc. Inc.*, 760 So. 2d 764, 773 (Miss. 2000) (holding that personal knowledge of corporate actions is admissible).

[39]Jones Testimony, T 73-74, 134-35, 139-40 and 150; Meredith Testimony, T 232-34; Limbert Testimony, T 316-17; Report on Decision Concerning Mississippi University for Women Alumnae Association (February 14, 2007) (DX-12).

[40]*See* Agreement (April 12, 2007) (R 369).

Without any factual findings, the Chancery Court concluded that the actions taken by Dr. Limbert (not the IHL Board) "to form a new alumni association and enter into a new affiliation agreement" were in bad faith. Neither the Chancery Court nor the Alumnae Association have cited any authority for the decision to prohibit the University from affiliating with more than one alumni association. Like the other decisions made by the University, this decision fell in the policy-making purview of an executive branch agency. Therefore, the decision was outside the realm of judicial review. This Court should reverse the Chancery Court's mandate for Dr. Limbert to disaffiliate the University from the Alumni Association.[41]

V. Chancery Court improperly mandated particular executive branch decisions.

The Alumnae Association suggests that the absence of the magic word "mandamus" in its papers takes this matter outside the realm of law limiting the power of courts to mandate specific action by government officials. However, the Alumnae Association concedes, as it must, that the Chancery Court has clearly "commanded" a public official and two public bodies to "do an act" which the Alumnae Association argued the President, the University and the IHL Board had a "legal duty" to do.[42] Namely, the Chancery Court has compelled (i) the University to re-affiliate with the Alumnae Association under the terms of the Affiliation Agreement, (ii) Dr. Limbert to operate under the Affiliation Agreement in good faith for the remainder of the life of the Agreement, and (iii) Dr. Limbert, the University and the IHL Board to rescind any other affiliation agreements.

---

[41]The Chancery Court has stayed the effect of its ruling on this issue. *See* Opinion (February 19, 2008), and Order (February 25, 2008) (Appendix A to this Reply Brief). This Court denied the Alumnae Association's Motion to Vacate Stay. *See* Order (April 16, 2008). The Alumnae Association has also appealed the Chancery Court's ruling, which appeal is docketed as 2008-TS-00514.

[42]The Alumnae Association alleged that Dr. Limbert "violated her ministerial duty" when she refused to approve the bylaws in the form presented by the Alumnae Association and violated IHL policy when she demanded bylaws that intruded on the "private and independent nature" of the Alumnae Association. *See* Amended Complaint, ¶¶ 32 and 34-37 (R 123-24).

The Alumnae Association's reference to the statute giving the circuit court jurisdiction over mandamus actions also provides it with no relief.[43] The Association is technically correct that the circuit court should have exercised original jurisdiction over this matter. However, the entry of final judgment by the Chancery Court has mooted the jurisdictional error, unless this Court remands this matter for further consideration based on some other error.[44] In any event, the underlying relief sought by the Alumnae Association qualifies this as a mandamus action.

The suggestion by the Alumnae Association that it sought "injunctive relief, which is considered an equitable remedy"[45] and not a writ of mandamus reflects a misunderstanding of the nature of a writ issued against public officials. Arising through common law, the issuance of a writ of mandamus was "largely controlled by equitable principles."[46] This Court long ago distinguished the availability of injunctive relief (threatened violation) from the relief available by a writ of mandamus (existing violation).[47] In this case, the Alumnae Association did not allege or contend that Appellants were threatening future breach of their duties. Instead, the Alumnae Association alleged that Appellants had defaulted on existing duties, thus warranting the Chancery Court to mandate action.

---

[43]Appellee's Brief, pp. 30-31.

[44]Miss. Const., Art. 6, § 147; *see, e.g., Graves v. Dudley Maples L.P.*, 950 So. 2d 1017, 1022-23 (Miss. 2007) (holding that appellate court may not reverse trial court for lack of subject matter jurisdiction without finding additional errors mandating remand).

[45]*See* Appellee's Brief, p. 31.

[46]*Anderson v. Robins*, 161 Miss. 604, 612, 137 So. 476, 478 (1931).

[47]*Wood v. Gillespie*, 169 Miss. 790, 798, 142 So. 747, 750 (1932).

Notably, a private person has standing to petition for a writ of mandamus only "if he can show an interest separate from or in excess of that of the general public."[48] In its effort to convince the Chancery Court to grant the requested relief, the Alumnae Association included the following sworn averment:

> Plaintiff Alumnae Association is a longstanding and venerable Mississippi entity that is directly impacted by Defendant Limbert's disorderly actions described above. Plaintiff has an interest in the subject matter of this Amended Complaint ***separate and in excess of interest of the general public's significant interest.***[49]

Thus, while the Alumnae Association might have avoided use of the word "mandamus" in its Amended Complaint, it plainly sought to satisfy the standing element essential to maintain a mandamus action by arguing its heightened interest as distinguished from that of the general public.[50]

The Chancery Court has commanded that a public official and two state entities undertake specific acts regarding relationships with certain affiliated entities. By definition, this is an action of mandamus. For the reasons stated in Appellants' Brief,[51] the Chancery Court's mandates improperly required the University and Dr. Limbert to undertake specific actions.

VI. Specific performance was inappropriate remedy for affiliated relationship.

The Chancery Court's judgment ignored a truth recognized by both parties at the time of the execution of the Affiliation Agreement, namely, that circumstances could arise in which a continued

---

[48]*Dupree*, 967 So. 2d at 29.

[49]Amended Complaint, ¶ 55 (R 129).

[50]A search of reported decisions reveals that this standard for determining standing to petition for a writ of mandamus is unique to such remedy. In other words, the only reason that the Alumnae Association would have included in its Amended Complaint the averment concerning its distinct and heightened interest (as compared to that of the general public) was to satisfy the standing requirement for an action of mandamus.

[51]*See* Appellants' Brief, pp. 21-24.

relationship between the Alumnae Association and the University would no longer be practical or desirable. Paragraph 7.2 of the Agreement allowed either party to avoid such a situation by terminating the Affiliation Agreement for any reason. The remedy of specific performance was inappropriate where, as here, the parties to a contract specifically sought to avoid being bound to each other under tenuous circumstances. The net result of the Chancery Court's decision was to force two dissatisfied parties to re-marry when the parties had included a no fault divorce provision in their pre-nuptial contract.

VII. University was entitled to injunctive relief to prevent use of its marks and symbols.

For many years, the University has used various names, marks and symbols to identify the educational services it offers.[52] These names and marks include "Mississippi University for Women", "MUW", "The W", "The Long Blue Line", and certain symbols, as reflected in various University marketing materials and its Registered Mark.[53] The Alumnae Association expressly acknowledged this ownership when it signed the Affiliation Agreement and specifically agreed to cease use of the University's marks and symbols upon termination of the Affiliation Agreement.[54] Despite these contractual promises, the Alumnae Association seeks to continue holding itself out to the public as the "Mississippi University for Women" Alumnae Association through use of the University's name and its various symbols, even after termination of the Affiliation Agreement. This Court should render judgment in favor of the University on its counterclaim for injunctive relief.

In its Brief, the Alumnae Association fails to address the terms of the Affiliation Agreement which speak directly to the current situation - - the University owns the names and marks, the

---

[52]Flynt Testimony, T 267-70; Limbert Testimony, T 309-13.

[53]Collection of University Marketing Materials (DX 10); Registered Mark (DX 11).

[54]Affiliation Agreement, § 2.6 (PX 4; RE 4 at 26).

CERTIFICATE OF SERVICE

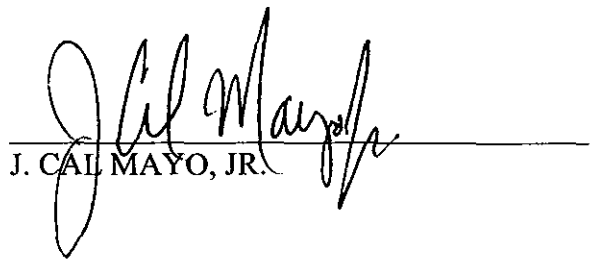
I, J. Cal Mayo, Jr., one of the attorneys for Appellants, do certify that I have this date delivered, by United States mail, postage fully prepaid, and by electronic means, a true and correct copy of the above and foregoing Appellants' Reply Brief to:

Honorable Dorothy W. Colom
Lowndes County Chancery Court
P. O. Box 708
Columbus, MS 39703
CHANCERY COURT JUDGE

Julie L. Hussey, Esquire
DLA Piper US LLP
401 B Street, Suite 1700
San Diego, California 92101

Kimberly Golden Gore, Esquire
3415 W. Carrington Street
Tampa, Florida 33611
ATTORNEYS FOR APPELLEE

THIS, the 23rd day of May, 2008.



J. CAL MAYO, JR.

STATE OF MISSISSIPPI, COUNTY OF LOWNDES

I, Lisa Younger Neese, Clerk of the Chancery Court in and for said County and State hereby certifiy that the foregoing contains a whole, true and correct copy of Division as the same appears on the file in my office, at Columbus, Mississippi.

Witness my hand and official Seal,

this the 20 day of February A.D., 2008

Lisa Younger Neese
Clerk of the Chancery Court of Lowndes County, Mississippi

By Kaitlin H. Burgin D.C.

CHANCERY COURT LOWNDES COUNTY MISSISSIPPI

Appendix "A"

IN THE CHANCERY COURT OF LOWNDES COUNTY, MISSISSIPPI

MISSISSIPPI UNIVERSITY FOR WOMEN ALUMNAE ASSOCIATION — PLAINTIFF

V. — CAUSE NO.: 2007-0220-C

CLAUDIA A. LIMBERT, individually and in her official capacity; MISSISSIPPI UNIVERSITY FOR WOMEN; and BOARD OF TRUSTEES OF MISSISSIPPI STATE INSTITUTIONS OF HIGHER LEARNING — DEFENDANTS

OPINION

Comes now before the Court, Defendant's Motion to Stay Judgment and the Plaintiff's Motion to Enforce Judgment. The Court will address first Defendant's Motion to Stay. Based on the pleadings and argument of counsel, the Court will grant a partial stay of the judgment. Specifically, the Court stays that provision of the judgment whereby the university and Dr. Limbert were mandated to disaffiliate with the new alumni association. There is no IHL policy which prevents a university president from affiliating with any or as many alumni associations that it desires. While it is too late for the Court to amend its judgment, it was clearly the intent of the Court that the President not replace the alumnae association, the plaintiff, with a new association. All other aspects of the final judgment are to remain in effect and the stay is denied.

Turning next to the Plaintiff's motion to enforce judgement, the Court hereby denies the same. The allegations made by the Plaintiff against the Defendant are all without merit. The Plaintiff has misconstrued or misinterpreted this Court's opinion and judgment of October 2007. There was no finding by this Court that the Plaintiff is to be "independent" in its support of the university. This Court's finding was narrow. Dr. Limbert's control under the agreement of how

the plaintiff elects its officers, its nominating process and what awards it gives, deprived the Plaintiff of its independence. The remaining provisions of the contract are enforceable and binding on all parties.

Plaintiff is now asking the Court to rewrite the agreement of the parties. The Court declines to do so. Dr. Limbert, as President of the university, under the authority given to her by IHL, makes the decisions regarding what role she will allow Plaintiff to play at the university. It is not the Court's role to advise the President what she will or will not allow an association to do or not to do. Plaintiff's Motion to Enforce Judgment is denied.

Counsel for Defendants shall prepare an order accordingly and present it to counsel opposite.

THIS the 19th day of February, 2008.

CHANCELLOR

IN THE CHANCERY COURT OF LOWNDES COUNTY, MISSISSIPPI

MISSISSIPPI UNIVERSITY FOR WOMEN ALUMNAE ASSOCIATION — PLAINTIFF

v. — No. 2007-0220-C

CLAUDIA A. LIMBERT, individually and in Her official capacity; MISSISSIPPI UNIVERSITY FOR WOMEN; and BOARD OF TRUSTEES OF MISSISSIPPI STATE INSTITUTIONS OF HIGHER LEARNING — DEFENDANTS

MISSISSIPPI UNIVERSITY FOR WOMEN — COUNTER-CLAIMANT

v.

MISSISSIPPI UNIVERSITY FOR WOMEN ALUMNAE ASSOCIATION — COUNTER-DEFENDANT

ORDER CONCERNING DEFENDANTS' MOTION FOR STAY OF JUDGMENT PENDING APPEAL AND PLAINTIFF'S MOTIONS TO ENFORCE JUDGMENT AND TO STRIKE AFFIDAVITS

This matter came before this Court on Defendants' Motion for Stay of Judgment Pending Appeal and Plaintiff's Motions to Enforce Judgment and to Strike Affidavits. On Tuesday, February 19, 2008, this Court conducted a hearing on these Motions in West Point, Mississippi. Following consideration of the motions, attachments, briefs and oral argument and being otherwise fully advised in the premises, the Court rendered its Opinion on the record, which was filed with the Chancery Clerk in written form on Wednesday, February 20, 2008. For the reasons stated in that Opinion, which is incorporated by reference, the Court determines that Defendants' Motion for Stay of Judgment Pending Appeal should be granted in part and denied in part, and that Plaintiffs' Motions to Enforce Judgment and Motion to Strike Affidavits should be denied *in toto*.

IT IS THEREFORE ORDERED AND ADJUDGED as follows:

1. Defendants' Motion for Stay of Judgment Pending Appeal is granted as relates to that portion of the Opinion and Judgment that ordered rescission of the affiliation with the Mississippi University for Women Alumni Association. Otherwise, Defendants' Motion for Stay of Judgment Pending Appeal is denied.

2. Plaintiff's Motion to Enforce Judgment is denied. Plaintiff's Motion to Strike Affidavits is also denied.

SO ORDERED, this the 25th day of February, 2008.

CHANCELLOR

AGREED & APPROVED AS TO FORM ONLY:

ATTORNEY FOR PLAINTIFF

ATTORNEY FOR DEFENDANTS

STATE OF MISSISSIPPI, COUNTY OF LOWNDES

I, Lisa Younger Neese, Clerk of the Chancery Court in and for said County and State hereby certifiy that the foregoing contains a whole, true and correct copy of Orders as the same appears on the file in my office, at Columbus, Mississippi.

Witness my hand and official Seal,

this the 25 day of February A.D., 2008

Lisa Younger Neese
Clerk of the Chancery Court of Lowndes County, Mississippi

By Lautrell H. Burgin D.C.

CHANCERY COURT LOWNDES COUNTY MISSISSIPPI