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

BRIEF OF APPELLANTS

ORAL ARGUMENT REQUESTED

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STATEMENT REGARDING ORAL ARGUMENT

Dr. Claudia A. Limbert, Mississippi University for Women and the Mississippi Board of Trustees of State Institutions of Higher Learning respectfully request that this Court grant oral argument for this appeal. This matter raises unique and critical questions of constitutional law regarding separation of government powers and management and control of Mississippi's public universities by the IHL Board of Trustees. In particular, this action concerns the ability of the IHL Board of Trustees and the institutional executive officers to control and monitor the relationships between Mississippi's public universities and their affiliated entities. Oral argument would assist the Court in addressing these issues presented for the first time to this Court.

STATEMENT OF ISSUES

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.

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.

3. A Mississippi court cannot mandate that a public university president exercise her judgment in a particular manner concerning the goals and nature of the university's relationship with affiliated entities.

4. A public university president cannot have acted in "bad faith" if she exercised a clear contractual right.

5. 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.

6. Specific performance of a contract is not appropriate if the contract requires an ongoing affiliated relationship between the parties as opposed to the occurrence of a particular act or transaction.

7. A public university has a protectable property interest in its names, marks, symbols and logos and may prohibit their use by other persons or entities.

STATEMENT OF CASE[1]

A. Nature of Case

This case concerns the authority of the Mississippi Board of Trustees of State Institutions of Higher Learning to govern Mississippi University for Women and the ability of the University to manage its contractual relationship with the Mississippi University for Women Alumnae Association and other affiliated entities and to control the Alumnae Association's use of the University's names, marks, symbols and logos.

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[1]The following abbreviations are used in this Brief: R___ - Record; RE___ - Record Excerpts; T___ - Trial Transcript; PX___ - Plaintiff's Trial Exhibit; and DX___ - Defendants' Trial Exhibit.

B. Course of Proceedings

On February 1, 2007, Mississippi University for Women sent the Mississippi University for Women Alumnae Association a 60-day written notice of termination of their Affiliation Agreement, as permitted by that contract.[2] On March 29, 2007, four days before the end of the notice period, this litigation originated with the filing of a Complaint by the "Mississippi University for Women Alumnae Association National Executive Board" against Dr. Claudia Limbert, President of the University.[3] The "National Executive Board" sought a temporary, preliminary and permanent injunction and declaratory relief against Dr. Limbert to prevent termination of the Alumnae Association's affiliation with the University.

On April 1, Dr. Limbert moved to dismiss for, among other reasons, lack of subject matter jurisdiction, lack of standing, lack of capacity to sue and mootness.[4] Following a brief hearing in chambers on April 2, the Chancery Court required that the Alumnae Association name and notice all necessary and appropriate parties.[5] The Chancery Court did not grant any of the National Executive Board's requested relief.

The Alumnae Association served its First Amended Complaint on April 5, three days after the end of the termination notice period, identifying itself as the plaintiff and naming as defendants, in addition to Dr. Limbert, Mississippi University for Women and the IHL Board.[6] As in the original Complaint, the First Amended Complaint sought relief solely against Dr. Limbert, including a

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[2]Letter from Mayo to Compretta (February 1, 2007) (PX 5; RE 5 at 34-35).

[3]Complaint (R 3-44).

[4]Defendants' Motion to Dismiss (R 47-92).

[5]Order (R 102).

[6]First Amended Complaint (R 115-65).

permanent prohibition against disaffiliation from the Alumnae Association and miscellaneous declaratory relief. The First Amended Complaint sought no other affirmative relief against Dr. Limbert and no relief of any type against the University or the IHL Board of Trustees.

On April 10, Defendants moved to dismiss the amended claims based on lack of jurisdiction and mootness.[7] That same day, Defendants answered the First Amended Complaint and stated their affirmative defenses to the claims.[8] In addition, the University stated its counterclaim for injunctive and declaratory relief to prohibit the Alumnae Association from using the University's names, marks, symbols and logos to suggest any continued connection to the University.

On May 8, the Chancery Court conducted a hearing on Plaintiff's Motion for Preliminary Injunction, Defendants' Motion to Dismiss and Defendants' Motion for Preliminary Injunction.[9] At the conclusion of the Alumnae Association's proof, the Court denied Defendants' Motion to Dismiss "at this point". By agreement, the parties consolidated the remainder of the proof into a final hearing on the merits, which the Chancery Court conducted on June 5.[10] The parties submitted post-hearing briefs in late July.[11]

In its Opinion and Judgment (October 1, 2007),[12] the Chancery Court determined that Alumnae Association leaders were trying to control the management and leadership of the University and to remove Dr. Limbert as President. The Chancery Court further found that these leaders'

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[7]Defendants' Second Motion to Dismiss (R 202-361).

[8]Defendants' Answer, Affirmative Defenses and Counterclaim (R 166-201).

[9]T 1-216.

[10]T 216-381.

[11]Plaintiff's Post-Trial Brief (R 454-494), and Defendants' Post-Hearing Brief (R 495-543).

[12]Opinion and Judgment (R 544-56; RE 2 at 5-17).

criticisms of Dr. Limbert and her administration were "unmerited" and that Dr. Limbert had "well-grounded" fears that these Alumnae Association leaders were "interfering with the administration of university business". Finally, the Chancery Court determined that Dr. Limbert had the right to exercise her judgment in terminating the written affiliation agreement between the Alumnae Association and the University.

Despite these findings, the Chancery Court concluded that Dr. Limbert acted in "bad faith" when she exercised the 60-day termination provision in the affiliation agreement with the Alumnae Association because (i) her refusal to approve by-laws submitted by the Alumnae Association conflicted with IHL Board policy that affiliated entities be "independent" and (ii) her termination of the affiliation agreement in the face of criticism from Alumnae Association leaders violated First Amendment "Free Speech" rights. Based on these conclusions, the Chancery Court mandated that the University re-affiliate with the Alumnae Association. The Chancery Court also mandated that the University and the IHL Board disaffiliate with the new Mississippi University for Women Alumni Association (and any other alumni group), as the Chancery Court concluded that the formation of the new Alumni Association and entry into an affiliation agreement with that entity were also done in "bad faith". Finally, the Chancery Court refused to prohibit the Alumnae Association from using the University's name, marks, symbols and logos.

Defendants filed their Notice of Appeal on October 26, 2007.[13]

C. Statement of Facts

Mississippi's public universities, like other colleges and universities, have close relationships with certain types of private entities that supplement and complement the universities' operations.

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[13]Notice of Appeal (R 557-59).

These affiliated entities include general foundations, athletic foundations, and alumni associations. These entities vary depending on the size of the institution.[14] Affiliated entities exist "to be supportive of the institution, to enhance its mission, [and] to enhance its success." The role of an alumni association, in particular, is "to help recruit students, faculty, [and] individuals to be supportive of the institution, [as well as] volunteer ways to publicize the institution . . . ."[15]

In 2005, the IHL Board adopted a policy requiring all public universities to enter written operating agreements with their respective foundations. Effective August 2006, the IHL Board expanded that policy to include relationships between Mississippi's public universities and all affiliated entities, including alumni associations.[16] The IHL Board recognized that it should not have direct control over affiliated entities and that these entities must be governed separately to protect their "private, independent" status. "[T]o ensure the independence of the affiliated entities", the IHL Board specifically prohibited its employees (including employees of the various universities) from holding a voting position on the board of directors of any institutionally affiliated entity.[17]

In addition, to protect the integrity of the university system, to instill public confidence in the affiliated entities, and to ensure that the universities' transactions with their affiliates were consistent with the affiliates' mission "to assist and benefit" the respective universities, the IHL Board imposed

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[14]Meredith Testimony, T 223-24.

[15]*Id.*, T 260-61.

[16]*Id.*, T 224-25; IHL Policy § 301.0806 (PX 1; RE 3).

[17]*Id.* (PX 1; RE 3 at 22). Mississippi law requires a nonprofit corporation to have directors that exercise all corporate powers and manage corporate affairs. *See* Miss. Code Ann. § 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.").

certain legal and financial compliance and reporting requirements on the affiliated entities.[18] "To ensure that the relationship is clearly defined", the IHL Board required the universities enter written affiliation agreements with the affiliated entities and required that the agreements include certain specific provisions.[19]

Consistent with its decentralized management system, the IHL Board left implementation of the affiliated entity policy to the various institutional executive officers.[20] The university presidents could determine if affiliated entities were needed at all and, if so, under what terms.[21] Provided that the operating agreements satisfied the mandates of the IHL Policy, the university presidents could determine other provisions necessary to ensure that any affiliated entity operated in a manner that supported and enhanced the university's mission and purpose.[22]

Mississippi University for Women has historically affiliated with two outside entities, the Mississippi University for Women Foundation and the Mississippi University for Women Alumnae Association, Inc. The University had already entered an affiliation agreement with the University Foundation in 2005, but, under the new IHL requirement, the University would need to do the same with the Alumnae Association. Completing this task would prove to be difficult.

Dr. Claudia Limbert, President of the University, discovered before she ever arrived on campus in the summer of 2002 that some leaders of the University's Alumnae Association had inaccurate yet strong views about their roles in the operation of the University. On her flight to

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[18]IHL Policy § 301.0806 (PX 1; RE 3 at 21-22).

[19]*Id.* (PX 1; RE 3 at 22-23).

[20]Meredith Testimony, T 222-23 and 226.

[21]*Id.*, T 226 and 260.

[22]*Id.*, T 226.

Mississippi following her selection as President, some of these Association leaders began aggressively lobbying her about personnel decisions that should be made on campus.[23] Later, one of the leaders sought to have Dr. Limbert create a new position on campus and to appoint that alumna to the job.[24] Dr. Limbert eventually became aware that several University departments did not like dealing with these Alumnae Association leaders.[25]

As part of her new administration, Dr. Limbert re-structured certain areas of the University to more closely resemble the models with which she was familiar. In particular, Dr. Limbert filled the long-vacant position of Vice President for University Advancement with an experienced person, Scott Rawles. Under this organization, the University focused fund raising responsibility with the University Foundation and limited the responsibility of the Alumnae Association to "friend raising". With the limited amount of public funds, Dr. Limbert knew that a well-organized plan for soliciting and obtaining private financial support was critical to the long-term viability of the University.

Some of the Alumnae Association leaders intensely disliked Rawles, who was certainly a change agent. This contingent of Alumnae Association leaders began to interfere and undermine University and Foundation operations.[26] The University first became aware of the scheme in the spring of 2006, when it retrieved emails from the computers of two employees in the Alumni Affairs

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[23]Limbert Testimony, T 49-50.

[24]*Id.*, T 50.

[25]*Id.*, T 50-51.

[26]*Id.*, T 51-55; Flynt Testimony, T 271-73. In addition, the Alumnae Association did not exhibit the signs of health that Dr. Limbert expected and needed from the organization - - - 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 came dormant, and male and minority alumni felt omitted from involvement. *Id.*, T 44 and 54-55.

Office.[27] As detailed in the "Report on Decision Concerning Mississippi University for Women Alumnae Association", dated February 14, 2007, and prepared by University Counsel Perry Sansing,[28] this small cadre of Alumnae Association leaders, operating with the knowledge and assistance of two former University employees in the Alumni Relations Office, had begun a campaign (i) to undermine the Foundation operations by suggesting financial improprieties that did not exist (public and private audits have confirmed that these charges lacked credibility), (ii) to get rid of Rawles by making a false accusation of sexual harassment (an internal University investigation found no evidence to support this allegation), and (iii) to have Dr. Limbert fired and replaced with one of the members of this small group.

As part of their effort, these Alumnae Association leaders had assisted the two former University employees in acting in a manner insubordinate to the University administration, ultimately resulting in the termination of one of the employees and the re-assignment of the other. Time and again, the same names surfaced as the ones involved in this conduct - - - whether at a meeting with Dr. Tom Meredith, the IHL Commissioner, when they sought to have Dr. Limbert fired and replaced with one of their own, the decision to file suit against the University and Dr. Limbert, contributions to the fund for purchasing a full-page advertisement attacking Dr. Limbert and the University or paying for legal expenses - - - and many of these persons served as officers and directors of the Alumnae Association.[29]

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[27] *Id.*, T 46.

[28] DX 12.

[29] 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).

Undeterred by the disclosure of these emails and their destructive activities, the Alumnae Association leaders continued to wage their campaign of interference. Two facilitated meetings in the summer of 2006 did little to placate the Alumnae Association leaders.[30] By this time, Dr. Limbert was developing reservations about the University maintaining a relationship with the Alumnae Association absent a significant change in the Association's leadership and its corresponding appreciation of the Association's role within the broad University framework.

Needless to say, the affiliation agreement negotiations with the Alumnae Association proved difficult, further adding to Dr. Limbert's concern about the University's ongoing relationship. Finally, after a deadline extension and last minute efforts, the University and the Alumnae Association signed their Affiliation Agreement in late October.[31] However, the process was not complete, as the Affiliation Agreement required the Alumnae Association to revise its Constitution and Bylaws within 60 days, change its name to the "Alumni Association" and take certain other actions to ensure that participation in and leadership of the organization would not rest in the hands of the same insular group but would afford opportunities for participation by all members of the University's diverse alumni.[32]

Rather than undertaking a serious revamping of its operative documents to achieve the goals outlined by the University, the Alumnae Association made a few irrelevant changes and submitted its Constitution and Bylaws for President Limbert's consideration. Discussions about the Constitution and Bylaws followed a path similar to those concerning the Affiliation Agreement, with the primary disagreement concerning officer succession, floor nominations and criteria for awards

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[30]Meredith Testimony, T 235-37.

[31]Affiliation Agreement (PX 4; RE 4).

[32]*Id.*, §§ 2.17 and 2.24 (PX 4; RE 4 at 27-28).

given by the Alumnae Association. The University extended the 60-day deadline to allow the Alumnae Association leaders further time to satisfy the provisions of the Affiliation Agreement. Ultimately, as the negotiations were approaching the new deadline, the Alumnae Association accused the University of acting in "bad faith".

The University concluded that the relationship between the Alumnae Association and the University had reached a point beyond repair. The University had worked tirelessly to heal the wounds caused by these Alumnae Association leaders since uncovering their scheme. By this point, however, enough was enough. On February 1, 2007, the University notified the Alumnae Association that the University was terminating the Affiliation Agreement.[33]

Dr. Limbert immediately began the process of redefining the University's relationship with its alumni, a decision that the IHL Board supported.[34] She appointed Andrea Overby, a former President of the Alumnae Association, to chair the University's Alumni Association Advisory Committee.[35] Ms. Overby in turn selected the remaining members of the Advisory Committee. At Dr. Limbert's suggestion, Ms. Overby did invite Betty Lou Jones (Alumnae Association President) to serve, and Ms. Jones accepted. The University's Alumni Affairs Office also created a new alumni entity, Mississippi University for Women Alumni Association.

As a result of their work and deliberations, the Advisory Committee selected a set of interim officers and directors to lead the new Alumni Association. Though Dr. Limbert played no role in the selection of this leadership team, Betty Lou Jones (President of the Alumnae Association) did

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[33]*See* Letter from Mayo to Compretta (February 1, 2007) (PX 5; RE 5).

[34]IHL Board Press Release (February 15, 2007) (DX 8).

[35]Limbert Testimony, T 36-37 and 41-42.

participate. On March 27, 2007, the University and the new Alumni Association announced the signing of an affiliation agreement, which the IHL Board later approved.[36]

April 2, 2007, marked the end of the 60-day termination period under the Affiliation Agreement between the Alumnae Association and the University. As of that point, the relationship ceased between the University and the Alumnae Association until the Chancery Court's Order and Judgment mandated that the University affiliate with the Alumnae Association and terminate its relationship with the new Alumni Association.

SUMMARY OF ARGUMENT

The Chancery Court's Opinion and Judgment (i) violates constitutional limitations on the ability of the judicial branch to interfere with the IHL Board's policy decisions on higher education, (ii) disregards constitutional limitations on the ability of the judicial branch to second-guess an executive branch agency's interpretation of its own rules and regulations, (iii) improperly mandates that Dr. Limbert exercise her discretion in a particular manner concerning the University's association with certain outside entities, (iv) negates the University's clear contractual right to terminate its affiliation with the Alumnae Association, (v) fails to recognize that Dr. Limbert acted in the best interests of the University and consistent with IHL Board policy and directions when making decisions concerning the University's relationships with affiliated entities, (vi) improperly grants a specific performance remedy that is untenable for an affiliation contract, and (vii) fails to protect the University's property interest in its names, marks and symbols.

The University's decision to terminate the affiliation with the Alumnae Association and to form an alliance with the new Alumni Association falls within the constitutional power exclusively

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[36]*See* Affiliation Agreement with Alumni Association (DX 9); Meredith Testimony, T 243-44.

granted to the IHL Board of Trustees and delegated by the IHL Board to Dr. Limbert as President of the University. The separation of powers doctrine prohibits a court from looking behind the decision made by the University once the court recognizes that Dr. Limbert had the authority to exercise her judgment when making her decisions. The Chancery Court has committed reversible error in second-guessing Dr. Limbert's decisions.

The IHL Board has adopted a policy concerning affiliation with outside entities and has set broad parameters for the university presidents to implement this regulation in the best interests of their respective institutions. The separation of powers principle prohibits a court from ignoring the IHL Board's interpretation of the term "independent" and substituting an interpretation unrelated to higher education administration and inconsistent with the IHL Board's policy goals. The Chancery Court has committed reversible error with its unilateral interpretation.

Mississippi law allows a court to mandate that Dr. Limbert perform an official ministerial duty but does not permit that court to mandate the particular result of Dr. Limbert's performance. In fact, Dr. Limbert's discretionary decisions concerning termination of the affiliation with the Alumnae Association and affiliation with the new Alumni Association are protected by the doctrine of "non-judicial interference". The Chancery Court has erred by mandating a particular result concerning the relationship between the University and these outside entities.

The Alumnae Association Affiliation Agreement provides that either party can terminate the relationship on 60-days written notice. The Chancery Court has ignored the University's clear contractual right to terminate its affiliation with the Alumnae Association at the University's will. By failing to acknowledge the University's discretion right, the Chancery Court has committed reversible error.

Moreover, apart from the University's right to terminate the Affiliation Agreement "at will", Dr. Limbert has the ability to terminate the relationship in the proper exercise of her judgment. Similarly, she has the right to enter an affiliation with other outside entities if she determines that these relationships serve the best interests of the University. The Chancery Court has erred by failing to recognize that Dr. Limbert acted in the best interests of the University and consistent with IHL Board policy and directions when she made her decisions concerning the University's relationships with the two alumni associations.

The remedy of specific performance is not appropriate under the circumstances of this case. The Affiliation Agreement necessarily requires the University and the Alumnae Association to have a close continual relationship. The Agreement obligates the parties and their representatives to interact on a regular basis and to achieve common goals. The Chancery Court has erred as a matter of law in forcing this continued relationship by specific performance.

The University has the power to protect its property rights in its names, marks, symbols and logos. The Alumnae Association's continued use of the University's property without the University's permission will cause continued confusion and infringe on the University's property rights. The Chancery Court has erred in failing to grant injunctive relief to prohibit the Alumnae Association's continued use of the University's property.

For these reasons, this Court should reverse the Opinion and Judgment of the Chancery Court, render judgment in favor of Defendants on the Alumnae Association's claims and render judgment in favor of the University on its counterclaim for infringement.

ARGUMENT

A. Standard of Review

While established law recognizes the weight of a chancery court's factual findings, this Court is bound to intercede and reject those findings which are manifestly wrong or clearly erroneous. However, this Court reviews *de novo* all questions of law.[37]

B. IHL Board of Trustees Has Broad Constitutional Powers Concerning Higher Education.

The Mississippi Constitution vests the IHL Board with exclusive power and sole authority to manage and control Mississippi's universities.[38] The Mississippi Legislature has supplemented this constitutional grant with its own delegation of power and responsibility.[39] While the IHL Board is, strictly speaking, a part of the executive branch of government, its status as a "constitutionally-created state agency" entitles it to "operate with a considerable amount of independence and security of position."[40] Thus, the IHL Board's constitutional charter ensures that, while it is "not an island, . . . it is a pretty good sized peninsula."[41]

Pursuant to its constitutional and statutory authority, the IHL Board has delegated to the institutional executive officers the primary responsibility for ongoing management of their respective

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[37] *Bailey v. Estate of Kemp*, 955 So. 2d 777, 781 (Miss. 2007).

[38] *See* MISS. CONST. Art. VIII, § 213-A. Before adoption of this constitutional amendment, Mississippi's universities had been "political footballs" of the prevailing powers, resulting in loss of accreditation for many of the universities. *State ex rel. Allain v. Bd. of Trustees of Institutions of Higher Learning*, 387 So. 2d 89, 91 (Miss. 1980).

[39] Miss. Code Ann. § 37-101-15 (Supp. 2007).

[40] *Van Slyke v. Bd. of Trustees of Institutions of Higher Learning*, 613 So. 2d 872, 877 (Miss. 1993).

[41] *Id.*

universities.[42] The IHL Board has also specifically delegated to the institutional executive officers the responsibility to consider affiliation with private support groups and the obligation to formalize any such relationship in written agreements with those groups.[43]

C. Separation of Powers Principle Prohibits Court from Reviewing Policy Decisions Concerning Higher Education.

Mississippi government is divided into three distinct branches with different responsibilities: legislative, judicial and executive.[44] One of the most fundamental principles of government in this State is that no branch of government "shall exercise any power properly belonging to either of the others."[45] As relates to this case, the judicial branch should not engage in policy decisions, particularly in those areas delegated by constitution and by statute to a specific executive body. The basis for this principle is clear. Judges, unlike executive branch agencies, "are not experts in the field, and are not part of either political branch of the Government."[46] Judges do not answer to constituents but "have a duty to respect legitimate policy choices made by those who do."[47] The responsibility for making policy choices and resolving competing views of the public interest is not an appropriate task for a court to undertake.[48]

To be clear, the separation of powers doctrine does not prohibit judicial review of a public official's "attempt to exercise an authority not legally vested in him" or an attempt "to do so upon

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[42] *See* IHL Policy § 301.0801 (R 59-61).

[43] *See* IHL Policy § 301.0806 (PX 1; RE 3 at 18-23); Meredith Testimony, T 263.

[44] MISS. CONST., Art. I, § 1.

[45] *Id.*, § 2; *see Barbour v. State of Mississippi*, 2008-EC-00115-SCT (¶14) (Miss. 2008).

[46] *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865 (1984).

[47] *Id.* at 866.

[48] *Id.*

a state of facts which does not bring the asserted authority into existence . . .".[49] When, however, a public official exercises authority vested in that official, this Court has recognized that a court must not interfere:

> [T]here are certain features of official action which are of purely political concern, or which deal with what are merely the managerial problems of the government or of its subdivisions, or which involve divers other matters that are nonjusticiable in their nature, . . . and wherein so long as the officers or agents of the government act within the boundaries of the field of their appointed duties, their actions and decisions are not reviewable by the courts . . . .[50]

This case falls squarely into this latter category of "nonjusticiable" matters. The Alumnae Association has never contended, and the Chancery Court did not conclude, that Dr. Limbert on behalf of the University or the IHL Board lacked the authority to enter the Affiliation Agreement with the Alumnae Association, to review the bylaws submitted by the Alumnae Association, to terminate the Affiliation Agreement or to enter a separate Affiliation Agreement with the new Alumni Association. Instead, the Alumnae Association complained that Dr. Limbert should not have made the decisions that she made.

In other words, this dispute has *never* been about whether Dr. Limbert *had the power to act* but rather about *how Dr. Limbert acted.* The separation of powers doctrine precluded the Chancery Court from stepping into the shoes of the executive branch and second-guessing Dr. Limbert's policy decisions concerning affiliation.

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[49] *State v. McPhail*, 180 So. 387, 375 (Miss. 1938).

[50] *Id.*

1. Alumnae Association Affiliation

The Alumnae Association and the University had the mutual right to unilaterally terminate their affiliation upon 60-days written notice.[51] The Chancery Court even specifically concluded that Dr. Limbert had "the right to exercise her judgment in terminating" the Affiliation Agreement.[52] Separation of powers principles prohibited the Chancery Court from second-guessing the policy decision made by Dr. Limbert to end the University's relationship with the Alumnae Association. In other words, Dr. Limbert, as a representative of an executive branch agency with constitutional authority to manage Mississippi University for Women, had the power to exercise her discretion without fear of judicial intervention. The Chancery Court's second-guessing of her decision and the exercise of her discretion was error.

The error is particularly apparent in this situation. The Chancery Court observed the history of disruption experienced by Dr. Limbert at the hands of the Alumnae Association leaders. Far from being involved in University matters, these Alumnae Association leaders interfered with University operations. The IHL Board empowered Dr. Limbert to make decisions in the best interest of the University. She, and not the Chancery Court, was the expert with the ability to make these policy decisions about affiliation with outside entities.

2. Alumni Association Affiliation

The Chancery Court mandated that Dr. Limbert and the IHL Board rescind any affiliation with any alumni group other than the Alumnae Association. The Chancery Court did not cite, and the Alumnae Association did not identify, any reason why the University cannot affiliate with more

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[51]See Affiliation Agreement, p. 7 §7.2 (PX 4; RE 4 at 13).

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

than one alumni group. To the contrary, IHL Board policy does not limit the universities to a single affiliated relationship, and the undisputed testimony of Dr. Thomas C. Meredith, IHL Commissioner, showed that Mississippi universities regularly conduct business with multiple affiliated entities.[53] Similarly, the IHL Board had the responsibility to accept or reject the agreement between the University and the new Alumni Association, using the judgment derived from its constitutional and statutory authority to manage and control Mississippi's public universities. The Chancery Court improperly trespassed into an area specifically reserved for the IHL Board and forced a policy outcome of the Chancery Court's choosing, namely termination of the relationship with the new Alumni Association. In unilaterally determining that the University should only affiliate with one alumni group, the Chancery Court replaced Defendants' discretion with its own preference for the University's affiliated relationships, a violation of the separation of powers doctrine.

D. Separation of Powers Doctrine Requires Court to Defer to Executive Agency's Interpretation and Implementation of Agency's Rules and Regulations.

In furtherance of the separation of powers principle, Mississippi courts are required to "afford ***great deference to an administrative agency's construction of its own rules and regulations*** and the statutes under which it operates."[54] An administrative decision "***must be upheld*** unless it is so plainly erroneous or so inconsistent with either the underlying regulation or statute as to be arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law."[55]

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[53]Meredith Testimony, T 223.

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

[55]*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)).

Commissioner Meredith explained the IHL Board's general standard of independence (*i.e.*, prohibition against IHL employees serving as voting members of an affiliated entity's board of directors).[56] Beyond this basic criteria, as testified by Dr. Meredith, the IHL Board delegated implementation of the policy to the institutional executive officers. In other words, provided the voting directors were not IHL employees and the affiliation agreements contained the basic provisions required by the Policy, the IHL Board deferred to the various institutional executive officers to decide the degree of independence necessary for entering relationships with the different affiliated entities (foundations, alumni associations, etc.).

The Chancery Court *expressly* rejected the IHL Board's construction of its own policy. The Chancery Court, citing language in IHL Board Policy § 301.0806 for the proposition that affiliated entities must be "independent", rejected the IHL Board's interpretation of that term and adopted a definition giving the Alumnae Association "free will" even while existing as an affiliated entity of the University pursuant to written agreement.

In its Opinion, the Chancery Court relied upon *City of Picayune v. Southern Reg'l Corp.*[57] to impose a definition of the phrase "independent" that gives an affiliated entity unfettered "free will" so long as the entity complies with its articles of incorporation, bylaws and state statutes.[58] The *City of Picayune* decision has nothing to do with affiliated entities, IHL policies, or higher education. That case merely contrasts the relative independence of charitable trusts and charitable corporations: a charitable trust is governed in all aspects by the intentions of its settlor, and a charitable corporation carries out its charitable purpose with relative autonomy (derived from the corporation's charter, by-

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[56]IHL Policy §301.0806 (PX 1; RE 3 at 22); Meredith Testimony, T 225-29.

[57]916 So. 2d 510 (Miss. 2005).

[58]Opinion and Judgment, pp. 10-11 (R 553-54; RE 2 at 14-15).

law and state statutes).[59] Nothing in the *City of Picayune* decision suggests that the IHL Board lacks the authority, as part of managing Mississippi's public universities, to require a private entity to include in its by-laws certain limitations on its "free will" as a condition of obtaining the privilege of affiliation.

To reach its conclusion, the Chancery Court ignored the IHL policy governing universities' relationships with affiliated entities and the Affiliation Agreement that the Alumnae Association signed and accepted, both of which contain many limitations on the "free will" of the Association. The IHL Policy requires an affiliated entity to maintain its books and records in accordance with generally accepted accounting principles and to submit those records to an annual audit to be provided to the IHL Board, prohibits an affiliated entity from compensating an institutional executive officer without IHL Board approval, and requires an affiliated entity to adopt a conflict of interest policy.[60] In addition, the Alumnae Association voluntarily surrendered other aspects of its "free will" when it formalized its relationship with the University, as 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.[61]

In the face of undisputed evidence of the IHL Board's intended construction and application of "independent" as applied to the relationship between universities and their affiliated entities, the

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[59]916 So. 2d at 523.

[60]IHL Policy §301.0806 (PX 1; RE 3 at 21-23).

[61]Affiliation Agreement, §§ 2.2, 2.7, 2.8 and 2.24 (PX 4; RE 4 at 25-28). Of course, there was an ultimate freedom available at all times to the Alumnae Association - - - the choice to reject affiliation with the University if the Alumnae Association did not like the limitations placed on its freedom as a condition of affiliation with the University.

Chancery Court improperly substituted its own interpretation of that term. By doing so, the Chancery Court has granted "free will" to the Alumnae Association while simultaneously requiring the University to maintain an "official" relationship with an organization whose leaders have actively undermined University operations and attempted to control the University. Under the Chancery Court's interpretation of "independence", the University would be forced to affiliate with the Alumnae Association regardless of its conduct, as any effort of the University to require specific conduct would violate the "free will" of the Association.

In essence, the Chancery Court's Opinion assumed that an affiliation with Mississippi's public universities is a "right". Instead, it is a privilege that can be withdrawn at the discretion of the IHL Board and its designees, such as Dr. Limbert. The Chancery Court's unilateral alteration of the undisputed meaning of IHL Board Policy violates the separation of powers doctrine and is an error of law.

E. Court Cannot Mandate that Public University President Exercise Discretion to Achieve Particular Result Concerning University's Relationship with Affiliated Entities.

The Chancery Court "mandat[ed] that Dr. Limbert uphold" the Affiliation Agreement with the Alumnae Association and "operate under" the Affiliation Agreement "in good faith for the duration of the Agreement . . .". The Court also "mandated [Dr. Limbert and the IHL Board] to rescind any affiliation agreement made by Dr. Limbert with any other alumni group." Both actions constitute reversible error.

Mississippi has long recognized the availability of the mandamus remedy, particularly as against public officials or bodies. Authority for mandamus derives from statute and common law.[62]

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[62]Miss. Code. Ann. § 11-41-1 (1972); *see Anderson v. Robins*, 161 Miss. 604, 612, 137 So. 476,478 (1931) (citing *State Board of Education v. City of West Point*, 50 Miss. 638, 642-43 (1874)).

This Court has articulated a four-part test to determine whether a court should issue a writ of mandamus to require a public official to carry out a ministerial duty:

> (1) the petition must be brought by the officers or persons authorized to bring the suit; (2) there must appear a ***clear right*** in petitioner to the relief sought; (3) there must exist a ***legal duty*** on the part of the defendant to do the thing which the petitioner seeks to compel; and (4) there must be an absence of another remedy at law.[63]

As this Court has explained, Mississippi courts "have the power to hear claims that public officials have violated their mandatory, non-discretionary duties of office".[64] However, they may not force executive branch officials to exercise their discretion to bring about a particular result.[65] The most important factor with respect to whether a particular duty is discretionary or ministerial is whether the duty is "one which has been positively imposed by law and its performance required at a time and in a manner or upon conditions which are specifically designated, the duty to perform under the conditions specified not being dependent upon the officer's judgment or discretion."[66]

In considering the request for a mandate against Defendants, the Chancery Court was obligated to follow a doctrine of "non-judicial interference":

> [The court] "can direct an official or commission to perform its official duty or to perform a ministerial act, but it ***cannot project itself into the discretionary function of the official or the commission***. Stated differently, it can direct action to be taken, but it cannot direct the outcome of the mandated function." Thus, a court could, if necessary, compel by mandamus an [official] to perform its

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[63] *Aldridge v. West*, 929 So. 2d 298, 302 (Miss. 2006) (citing *Bd. of Educ. of Forrest County v. Sigler*, 208 So.2d 890, 892 (Miss. 1968)) (emphasis added).

[64] *Fordice v. Thomas*, 649 So.2d 835, 840 (Miss. 1995) (citing *Poyner v. Gilmore*, 158 So. 922, 923 (Miss. 1935)).

[65] *USPCI of Miss., Inc. v. State of Miss. ex rel McGowan*, 688 So.2d 783, 789 (Miss. 1997) (holding that no action would lie against the Governor for his exercise of "mere discretionary functions").

[66] *Fordice*, 649 So.2d at 840 (Miss. 1995) (citing *Poyner*, 158 So. at 923).

> statutory duty upon its failure to do so, or prohibit it by way of injunction from exceeding its statutory authority in some respect; use of an extraordinary writ, however, ***cannot be extended to actually telling the [official] what action to take.***[67]

Nothing supports the conclusion that the Alumnae Association had a clear right to have Dr. Limbert approve its bylaws or to retain its status as an affiliated entity.

In its First Amended Complaint, the Alumnae Association properly recognized the standard by which Dr. Limbert was to exercise her judgment in reviewing the proposed bylaws. The bylaws were to be "consistent with the mission and priorities of the University, this [Affiliation] Agreement, and IHL Policy."[68] It is beyond any serious dispute that the responsibility of setting the mission and priorities of the University and the IHL Board falls squarely within the "discretionary function of the official or the commission" that is protected by the doctrine of non-judicial interference.[69] In holding that Dr. Limbert acted in bad faith when she refused to approve the proposed bylaws, the Chancery Court improperly stepped into the shoes of the IHL Board and Dr. Limbert - - - usurping responsibility for setting the priorities of the University and determining that the Alumnae Association's bylaws were consistent with those priorities.

Furthermore, the University had no legal duty to maintain an affiliation with the Alumnae Association, particularly in the light of the disruptive activity in which its leaders had engaged. IHL Board policy makes clear that the Board and its designees (including Dr. Limbert) are not powerless to exercise their discretion to monitor the extent to which the priorities of the State's universities are followed by officially sanctioned support groups:

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[67] *In re Wilbourn*, 590 So. 2d 1381, 1385 (Miss. 1991) (quoting *Hinds County Democratic Committee v. Muirhead*, 259 So. 2d 692, 695 (Miss. 1972)) (emphasis added).

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

[69] *In re Wilbourn*, 590 So. 2d at 1385.

> While the Board of Trustees cannot control or direct individuals or private organizations, it has the full authority to control the activities of its agents and agencies in their relationships with such individuals or organizations.[70]

In fact, the Chancery Court specifically found that "***Dr. Limbert has the right to exercise her judgment in terminating the affiliation agreement*** . . . ."[71]

The Chancery Court's Opinion will have potentially far-reaching adverse effects on the administration of Mississippi's public universities by improperly empowering an affiliated entity to operate in a manner that undermines the missions and goals of its affiliated university while carrying the banner of an "official" association. This intrusion upon the discretion of Dr. Limbert (the University's chief administrator) and the authority of the IHL Board (the constitutionally-created state agency responsible for higher education) constitutes clear legal error.

F. President Limbert Could Not Have Acted in "Bad Faith" if Clear Contractual Right Existed.

The Chancery Court concluded that Dr. Limbert acted in bad faith when she terminated the Affiliation Agreement between the University and the Alumnae Association because she "showed an intent to control the Association and deprive it of its free will, thereby taking away its independence."[72] This finding is insufficient, as a matter of law, to support the Chancery Court's decision to mandate affiliation between the University and the Alumnae Association. The University had a clear contractual right to terminate the Affiliation Agreement regardless of the reason.

The Chancery Court determined that Dr. Limbert violated the duty of fair dealing which "emanates from the law on contracts" and provides that all contracts contain an "implied covenant

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[70]IHL Policy § 301.0806 (PX 1; RE 3 at 23).

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

[72]*Id.*, p.11 (R 554; RE 15).

of good faith and fair dealing". The Chancery Court also found support for its conclusion in the uniform commercial code. The Court then determined that Dr. Limbert's decision to terminate the Affiliation Agreement over the bylaw dispute "was inconsistent with and in violation of IHL policy" concerning the "independence" of the Alumnae Association. Relying on its own interpretation of the IHL Policy (and rejecting the IHL Board's interpretation), the Chancery Court evaluated the termination and determined it occurred in "bad faith", *i.e.*, for a bad reason.

This Court has defined "good faith" 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."[73] Furthermore, "[b]ad faith . . . requires a showing of more than bad judgment or negligence; rather, 'bad faith' implies some conscious wrongdoing 'because of dishonest purpose or moral obliquity.'"[74] Most importantly, a party has not breached the implied covenant of good faith and fair dealing when it "***took only those actions which were duly authorized by the contract.***"[75]

The Alumnae Association's justified expectations with respect to the continuation of its affiliation with the University included Paragraph 7.2 of the Affiliation Agreement. Under this provision, either party could terminate upon 60-days written notice, without any requirement of "just cause" or "fair basis" for the decision - - - *i.e.*, either party could terminate the Affiliation Agreement "at will".[76] Far from the "conscious wrongdoing" that characterizes a bad faith claim, Dr. Limbert

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

[74] *Univ. of S. Miss. v. Williams*, 891 So. 2d 160, 170-71 (Miss. 2004).

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

[76] *See, e.g., Harris v. Miss. Valley State Univ.*, 873 So. 2d 970, 986 (Miss. 2004) (holding that, absent (continued...)

merely used her judgment to exercise the University's ***express contractual right*** to terminate the agreement. Because her actions were "duly authorized by the contract", she could not have acted in bad faith as a matter of law. The Chancery Court's conclusion to the contrary was erroneous.

The Chancery Court also said that IHL policy required the IHL Board to approve termination of the Affiliation Agreement.[77] To the contrary, the Affiliation Agreement (Section 7.2) clearly provided as follows: "This Agreement may be terminated by either party upon at least 60 days written notice." The Agreement only had two parties: the Alumnae Association and the University. The IHL Board approved the Affiliation Agreement giving the University the ability to terminate the affiliation with the Alumnae Association.[78] The IHL Board later endorsed the University's action in pursuing a relationship with a new alumni association.[79] Finally, the IHL Board has affirmatively stated that its Policies and Bylaws (including specifically Section 301.0806) do not require IHL Board approval for termination of the Affiliation Agreement.[80] To the extent the Chancery Court concluded differently, it erred.

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[76](...continued)
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).

[77]Opinion and Judgment, n. 7 at p. 9 (R 552; RE 2 at 13).

[78]*See* Minutes of Meeting (November 15, 2006) (R 69).

[79]*See* IHL Press Release (February 15, 2007) (DX 8).

[80]*See* Defendants' Answer, Defenses and Counterclaim, p. 4, ¶ 21, and p. 5 at ¶ 44 (April 10, 2007) (R 169-70); Meredith Testimony, T 261.

G. *President Limbert Cannot Have Acted in "Bad Faith" if Actions Served Best Interests of University and were Consistent with IHL Board Directions.*

The Chancery Court concluded that Dr. Limbert acted in "bad faith" because (i) she refused to approve the Alumnae Association's proposed bylaws, (ii) she violated the Association's "free speech" rights, and (iii) she affiliated with the new Alumni Association. Each conclusion lacks factual and legal support.

1. Dr. Limbert properly exercised her judgment concerning the bylaws.

Even if the University could not terminate the contract "at will" (which it could), Dr. Limbert was entitled (if not obligated) to exercise her judgment in reviewing the Alumnae Association's proposed bylaws to ensure they were consistent with the mission and priorities of the University and the IHL Board. In addition, despite a contractual obligation to "use its resources for the sole and express purpose of advancing the University's mission" and "to support the University",[81] Alumnae Association leaders made false allegations against University administrators, interfered with University business and undermined its administration, and attempted to control management and leadership of the University and to remove Dr. Limbert. For any and all of these reasons, Dr. Limbert's refusal to approve the bylaws in the light of her responsibilities and the history of misconduct by Alumnae Association leaders was not, as a matter of law, an act of "dishonest purpose or moral obliquity."

Mississippi law requires that the Alumnae Association, as a nonprofit corporation, have a board of directors to exercise all corporate powers and manage corporate affairs.[82] Understanding

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[81] *See* Affiliation Agreement, pp. 1-2 (PX 4; RE 4 at 24-25).

[82] Miss. Code Ann. § 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 it affairs . . . ."). There is no corresponding requirement for a nonprofit

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the role of corporate directors, the IHL Board adopted a policy recognizing and preserving the "independence" of affiliated entities. Specifically, the IHL Board prohibited IHL or university employees from serving as voting members of an affiliated entity's board of directors.[83] By insuring that no IHL or university employees are voting members of the Association's Board of Directors, Defendants satisfied the broad meaning of "independent" under the IHL Policy.

Finally, Dr. Limbert, as the President of the University, reports to and takes direction from the IHL Board. In this case, Commissioner Meredith explained the IHL Board's policy concerning affiliated entities and the manner in which the IHL Board expected the institutional executive officers to implement that policy. There is no dispute that Dr. Limbert complied with the directions of her superiors (the IHL Board) when reviewing the proposed bylaws and using her discretion to terminate the Affiliation Agreement. The support from the IHL Board (as expressed in its Press Release[84] and its later approval of the affiliation with the new Alumni Association[85]) demonstrates that Dr. Limbert acted in a manner consistent with IHL policy. The Chancery Court's disagreement with the IHL Board's policy and implementation of that policy does not support a finding of bad faith by Dr. Limbert when her conduct complied with the IHL Board's directions.

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[82](...continued)
corporation to have any specific officers. *See* Miss. Code Ann. § 79-11-271.

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

[84]*See* IHL Press Release (Feb. 15, 2007) (DX 8).

[85]DX 9; Meredith Testimony, T 243-44.

2. *Dr. Limbert did not violate "free speech" rights.*

The Chancery Court further concluded that Dr. Limbert's actions in terminating the Affiliation Agreement were based on "constitutionally impermissible grounds."[86] Specifically, the Chancery Court concluded that Dr. Limbert violated the Alumnae Association's right to free speech, holding that "in a democracy, one must allow the most vicarious and unrestrained speech."[87] This conclusion was procedurally and substantively improper.

The Alumnae Association did not allege a free speech violation in either of its complaints, and never sought leave of the Chancery Court to amend its pleadings to reflect such a claim. Defendants never had an opportunity to answer any claim based on an alleged constitutional violation, and neither party offered legal argument or factual support regarding such a claim in the post-trial briefs. The Chancery Court's digression into a discussion of free speech, which the Court claims was "raised by [Plaintiff] in trial", is apparently based on an offhand remark by one of the Alumnae Association's attorneys, without the benefit of a claim to support the comment.

A trial court may only grant such relief "which the original bill justifies and which is established by the main facts of the case, so long as the relief granted 'will not cause surprise or prejudice to the defendant.'"[88] In this case, the original bill does not justify relief granted for any alleged constitutional "free speech" violation,[89] and such relief has undoubtedly caused surprise and unfair prejudice to Defendants, who had no opportunity to respond to any such claim before the issuance of the Chancery Court's Opinion.

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[86]Opinion and Judgment, p.13 (R 556; RE 2 at 17).

[87]*Id.* at 12 (R 555; RE 2 at 16).

[88]*Crowe v. Crowe*, 641 So. 2d 1100, 1004 (Miss. 1994).

[89]First Amended Complaint (R 115-133).

MISS. R. CIV. P. 15(b) provides that issues not raised in the pleadings "shall be treated in all respects as if they had been raised in the pleadings" *if* they "are tried by expressed or implied consent of the parties . . . ." The Alumnae Association did not seek to amend its pleadings to include constitutional claims. The Chancery Court did not suggest, and the record does not reflect, that Defendants expressly consented to a trial of any constitutional claims. Furthermore,

> a finding of implied consent 'depends on whether the parties recognized that an issue not presented by the pleadings entered the case at trial.' If a party fails to object because he does not recognize the significance of the evidence introduced, however, he cannot be said to have consented impliedly to the trial of the unpleaded issues suggested by it. Of course, his inability to comprehend the significance of the evidence must be reasonable in the circumstances presented. For example, implied consent is not found where evidence introduced is relevant to a pleaded issue and the nonobjecting party has no notice that the evidence is intended to raise a new unpleaded issue into the case.[90]

Defendants did not (and could not have) recognized that a constitutional claim was raised by the Alumnae Association, when the only discussion concerning "free speech" rights was an off-hand comment by legal counsel. Even the Alumnae Association did not consider the "free speech" theory as legitimate, as it failed to brief the issue after trial. The Chancery Court erred when it *sua sponte* rendered its decision based on an unlitigated constitutional theory.

Moreover, the Chancery Court's legal conclusion that Dr. Limbert violated the Alumnae Association's First Amendment rights is erroneous as a matter of law. The "speech" the Chancery Court found constitutionally protected was inconsistent with the legitimate pedagogical and administrative messages the University sought to convey. The Chancery Court found, as a matter of fact, that "Dr. Limbert was motivated by a well-grounded fear . . . that an independent group of

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[90]*Shipley v. Ferguson*, 638 So. 2d 1295, 1300 (Miss. 1994).

alumnae were trying to undermine her administration."[91] Because it is clear that the Alumnae Association's leaders were undermining the mission and priorities of the University on behalf of an officially-sanctioned affiliated entity, Dr. Limbert's actions to terminate the Affiliation Agreement with the Alumnae Association was not constitutionally suspect.

Governmental entities, although they do not possess constitutional rights, have the inherent power to control the content of their expression, as well as the message that is conveyed by those persons or entities speaking for them. The United States Supreme Court has held that, "when the State is the speaker, it may make content-based choices" about the messages disseminated by its associates.[92] Furthermore, when an arm of the State designates "private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee."[93] As one court has put it, "[s]imply because the government opens its mouth to speak does not give every outside individual or group a First Amendment right to play ventriloquist."[94] The individual members of the Alumnae Association

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[91]Opinion and Judgment, p.12 (R 555; RE 2 at 16).

[92]*Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 834 (U.S. 1995) ("When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message.").

[93]*Id.*; *see also Columbia Broadcasting System, Inc. v. Democratic Nat'l Committee*, 412 U.S. 94, 140 n.7 (U.S. 1973) (Stewart, J., concurring) ("The purpose of the First Amendment is to protect private expression and nothing in the guarantee precludes the government from controlling its own expression or that of its agents.") (quoting THOMAS EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 700 (1970)); *Muir v. Ala. Educ. Television Comm'n*, 688 F.2d 1033, 1038 (5th Cir. 1982) ("To find that the government is without First Amendment protection is not to find that the government is prohibited from speaking or that private individuals have the right to limit or control the expression of government.") (internal citations omitted).

[94]*Downs v. Los Angeles Unified Sch. Dist.*, 228 F.3d 1003, 1013 (9th Cir. 2000) ("We conclude that when a public high school is the speaker, its control of its own speech is not subject to the constraints of constitutional safeguards and forum analysis, but instead is measured by practical

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certainly have a constitutionally-protected right to voice their opinions about perceived shortcomings on the part of the University's administration. However, the University has the corresponding right to withdraw its *seal of approval* from such statements when the University concludes that it is the Alumnae Association doing the talking.

Attaching "free speech" rights to an alumni association affiliation creates a myriad of problems. For example, the Affiliation Agreement permits the Alumnae Association to use the University's names, symbols, trademarks, logos, and service marks.[95] The Chancery Court's ruling would literally permit the "MUW" Alumnae Association to engage in "free speech" on a variety of matters of public interest (*e.g.*, elections, abortion, school prayer) which are either at odds with the University's position or a matter on which the University chooses to remain silent. However, as an officially-sanctioned affiliated entity bearing the University's name, the Alumnae Association would obviously lead many people to perceive its voice as the University's voice.

The Chancery Court confused the First Amendment right to freedom of speech with the privilege of being an officially-sanctioned affiliated entity. The Chancery Court cited no authority for the proposition that the Alumnae Association has a constitutional right to remain affiliated with the University. One federal court considering similar issues has held that "the First Amendment does not require colleges to fund or recognize alumni groups. Moreover, a college does not unlawfully impede the associational rights of its alumni when it declines to recognize an alumni group."[96]

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[94](...continued)
considerations applicable to any individual's choice of how to convey oneself: among other things, content, timing, and purpose.").

[95]Affiliation Agreement, p.3 at §2.6 (PX 4; RE 4 at 26).

[96]*Ad Hoc Comm. of Baruch Black & Hispanic Alumni Ass'n v. Bernard M. Baruch College*, 726 F. Supp. 522, 523 (S.D.N.Y. 1989).

Defendants have not prevented Alumnae Association members from freely voicing their opinions about the University's administration. Rather, the termination of the Affiliation Agreement simply reflected the University's unwillingness to place its imprimatur on statements inconsistent with its own message or with its desire to remain silent. The First Amendment may prohibit governmental bodies from prohibiting dissenting views, but it does not require the government to join them. The Chancery Court erred substantively in finding that Defendants deprived the Alumnae Association of constitutional rights.

3. Affiliation with new Alumni Association was not "bad" faith.

The Alumnae Association never alleged that actions surrounding the formation of the new Alumni Association or Dr. Limbert's execution of an Affiliation Agreement with the Alumni Association were in bad faith.[97] Nonetheless, the Chancery Court ordered Defendants to rescind the Affiliation Agreement with the new Alumni Association, executed by Dr. Limbert for the University on March 27, 2007, because "actions taken by [Dr. Limbert] to form a new alumnae association and enter into a new affiliation agreement were also in bad faith."[98] No evidence supports the conclusion that Dr. Limbert's creation of the Alumni Advisory Committee and discussions with representatives of the new Alumni Association were carried out in bad faith, and the Chancery Court clearly erred in making this finding.

H. Specific Performance is Not Appropriate if Contract Requires Ongoing Relationship.

The Chancery Court mandated that the University re-affiliate with the Alumnae Association and operate under the Affiliation Agreement in "good faith" for the duration of the Agreement. The

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[97]First Amended Complaint (R 115-133).

[98]Opinion and Order, p.13 (R 556; RE 2 at 17).

Chancery Court erred in mandating this continued relationship because specific performance is not an appropriate remedy under these circumstances. This Court should reverse the Chancery Court and render a decision against the Alumnae Association.

This Court has refused to permit the granting of specific performance in contracts "which require the performance of varied and continuous joint acts, or the exercise of special skill, taste, and judgment . . . because the execution of the decree would require such constant superintendence as to make judicial control a matter of extreme difficulty."[99] Such is plainly the case here, as the Affiliation Agreement will continue in force until 2011 and require various and continuous acts by the parties, many requiring the exercise of special skill, taste and judgment. Specific performance of the Affiliation Agreement will also undoubtedly require constant involvement from the Chancery Court, *as reflected* by the post-Opinion litigation before that Court.[100]

Similarly, this Court requires that a decree of specific performance must in fact require "specific performance":

> In decreeing specific performance, a court of equity must require the performance of some certain and specific act which ought to be performed by the delinquent party, and it cannot enter a general

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[99]*Security Builders, Inc. v. Southwest Drug Company, Inc.*, 147 So.2d 635, 637-638 (Miss. 1962); *see also, Bomer Brothers v. Canaday,* 30 So. 638, 639-640 (Miss. 1901) ("While equity aims to supply a remedy whenever there is a right that cannot be adequately enforced at law, it refuses to be drawn into the absurdity of substituting for an imperfect legal remedy an equitable one less perfect, and more cumbersome and inexpedient.").

[100]Since October 1, Defendants have filed a Motion for Stay of Judgment Pending Appeal and Plaintiff has filed a Motion to Enforce Judgment, both of which are set for hearing before the Chancery Court on Tuesday, February 19. Defendants' Brief in Support of Motion for Stay of Judgment Pending Appeal (December 14, 2007) (Appendix "A" to this Brief), and Defendants' Brief in Support of Response to Plaintiff's Motion to Enforce Judgment (January 28, 2008) (Appendix "B" to this Brief) address the ongoing problems encountered as a result of Chancery Court's forced affiliation.

> decree that in the future the delinquent party shall perform the acts required of him by his contract.[101]

In this case, the Chancery Court simply ordered Defendants to uphold the Affiliation Agreement, *i.e.*, to "perform the acts required of [them] by [their] contract." Such a broad grant of relief in the guise of specific performance is improper as a matter of law.

I. University has Property Interest in Names and Marks and May Prohibit Use by Others.

In its Counterclaim, the University sought to protect its property interests in its names, marks, symbols and logos by prohibiting the Alumnae Association from using them. The Affiliation Agreement specifically prohibited further use of these identifiers by the Alumnae Association following termination of the relationship between the University and the Association. As discussed below, there is no serious dispute that the University has a protectable property interest and the contractual, statutory and common law right to prohibit the Alumnae Association from infringing on this interest with its unauthorized use of the University's property.

1. University owns and has protectable interest in various names, marks and symbols.

Trade names and trademarks symbolize the reputation of a business as a whole.[102] Such names and marks are protected under federal law and Mississippi law. Federal protection applies to both registered and unregistered names and marks under the Lanham Act.[103] Mississippi provides

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[101] *Stinson v. Barksdale*, 245 So.2d 595, 596-97 (Miss. 1971) (reversing injunction granted by chancery court).

[102] 87 C.J.S. *Trademarks* § 25.

[103] 15 U.S.C. §§ 1501 *et seq.*

for protection of registered names and marks by statute[104] and non-registered names and marks by common law.[105]

In this case, the University sought to protect its rights in its 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.[106] The University has used these names, marks and symbols for many years.[107]

Though portions of the names for which the University sought protection contain geographic or generic terms (*e.g.*, Mississippi, university, women, blue, line), these terms have acquired a secondary meaning[108] that indicates the educational services offered by the University. "Mississippi University for Women", "MUW", "The W", "The Long Blue Line", as well as the other names and marks used by the University, suggest the University and its educational offerings, not generally any Mississippi university. When the general public hears these words or phrases in the context of a discussion about higher education, the general public thinks of the University. Clearly, the

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[104]Miss. Code Ann. §§ 75-51-1 *et seq.*

[105]Miss Code Ann. § 75-25-31; *see also Staple Cotton Cooperative Assoc. v. Federal Staple Cotton Co-Op Assoc.*, 162 So.2d 867 (Miss. 1964); *Dollar Department Stores of Mississippi, Inc. v. Laub*, 120 So.2d 139 (Miss. 1960); *Meridian Yellow Cab Co. v. City Yellow Cabs*, 41 So.2d 14 (Miss. 1949); and *Cockrell v. Davis*, 23 So.2d 256 (Miss. 1945). The Lafayette County Chancery Court has rendered two opinions analyzing Mississippi common law on trade names and marks in contexts similar to this case. *See* Appendices to Defendants' Post-Hearing Brief (R 518-543).

[106]Collection of University Marketing Materials (DX 10), and Registered Mark (DX 11).

[107]Flynt Testimony, T 267-70; Limbert Testimony, T 309-13. The Mississippi Legislature gave the University its current name in 1974. Miss. Code Ann. § 37-117-1.

[108]Secondary meaning may be established in a geographically descriptive name or mark where the name or mark no longer causes the public to associate a service with a particular place but rather with a particular source or quality. 87 C.J.S. *Trademarks* § 116; *see also Dixie Oil Co. of Ala. v. Picayune '66' Oil Co., Inc.*, 245 So.2d 839, 841 (Miss. 1971) (geographic or generic trade name may achieve legal status by acquiring secondary meaning).

University's names and marks have achieved a secondary meaning, as it is those very names and marks that the Alumnae Association seeks to continue using for the sole purpose of showing a connection to the University and its mission.

When executing the Affiliation Agreement, the Alumnae Association acknowledged that the University owned certain names, marks and symbols and that the University was permitting the Alumnae Association to use them pursuant to the terms of the Affiliation Agreement:

> The Association acknowledges and agrees that the University owns all copyright, interest in, and right to all trademarks, trade names, logos, and service marks developed by the University, including any trademarks, trade names, logos, and service marks historically associated with or used by the Association. The Association may only use the University's name, symbols, trademarks, trade names, logos, and service marks consistent with the University policy, including but not limited to any symbols, trademarks, trade names, logos, and service marks developed by the University for use by the Association. Upon termination of this Agreement the Association shall be prohibited from using the name, symbols, trademarks, trade names, logos, and service marks of the University.[109]

This provision resulted from the policy adopted by the IHL Board that specifically addresses ownership and control of universities' names and logos:

> While the Board of Trustees cannot control or direct individuals or private organizations, it has the full authority to control the activities of its agents and agencies in their relationships with such individuals or organizations. Such control extends to the regulation or participation in those organizations and the use of a name, logo, or other insignia identified with the institutions of The Mississippi State Institutions of Higher Learning.[110]

The University has a protectable interest in its names, marks and symbols.

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[109]Affiliation Agreement, § 2.6 (PX 4; RE 4 at 26). As Dr. Thomas Meredith testified, the names, marks and symbols used by public universities belong to those institutions even without this type provision in an affiliation agreement. Meredith Testimony, T 227.

[110]IHL Policy § 301.0806, p.24 (PX 1; RE 3 at 23).

2. *Alumnae Association can no longer suggest University connection.*

The Alumnae Association adopted the name "Mississippi University for Women Alumnae Association" when it was incorporated in 1994.[111] As acknowledged by its immediate past president, the Alumnae Association uses this name to identify itself with the University:

> Q. The purpose of using the name Mississippi University for Women before the words Alumnae Association is to identify the alumnae association with Mississippi University for Women, correct?
>
> A. Correct.[112]

The Alumnae Association has also used other names, marks and symbols that belong to the University.[113] It is this use which the University seeks to enjoin.

Both federal law and state law are designed to protect the University from precisely this type of unauthorized association. The Lanham Act[114] provides as follows:

> Any person who, on or in connection with any goods or services . . . uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which . . . is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, . . . shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

This Court has outlined similar common law protections:

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[111]Jones Testimony, T 119.

[112]*Id.*, T 120.

[113]*E.g.*, DX 5, DX 6 and DX 7.

[114]15 U.S.C. § 1125(a)(1)(A). For an analysis of an unfair competition claim under the Lanham Act in a context virtually identical to the current situation, *see Villanova University v. Villanova Alumni Educational Foundation, Inc.*, 123 F. Supp. 2d 293 (E.D. Pa. 2000).

> [W]here a defendant's conduct is likely to cause the public to believe that the goods of the defendant are the goods of the plaintiff or that the plaintiff is in some way connected with or is a sponsor of the defendant, injunctive relief will be granted although there is no competition between the parties.[115]

As a result of the termination of the affiliation with the University, the Alumnae Association should no longer hold itself out to the general public as the "Mississippi University for Women Alumnae Association" and otherwise use the University's names, marks, symbols and logos. The connection suggested by this use no longer exists.

3. Federal violation has occurred.

Under federal law, the analysis of a claim for trademark infringement and unfair competition are basically the same:

> As a general rule, the same facts which would support an action for trademark infringement would also support an action for unfair competition. The gravamen for any action of trademark infringement or common law unfair competition is whether the challenged mark is likely to cause confusion. Therefore, each of these causes of action hinges on whether the similarity between the [parties'] marks creates a likelihood of confusion.[116]

In determining whether a likelihood of confusion exists, courts consider the following nonexhaustive list of factors: (i) the type of mark allegedly infringed, (ii) the similarity between the two marks, (iii) the similarity of the products or services, (iv) the identity of the retail outlets and

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[115] *Cockrell*, 23 So.2d at 262 (citing *Lady Ester, Ltd. v. Lady Esther Corset Shoppe, Inc.*, 46 N.E.2d 165 (Ill. App. Ct. 1943)).

[116] *Marathon Mfg. Co. v. Enerlite Products Corp.*, 767 F.2d 214, 217 (5th Cir. 1985) (citations omitted); *see also Westchester Media v. PRL USA Holdings, Inc.*, 214 F.3d 658, 663-64 (5th Cir. 2000).

purchasers, (v) the identity of the advertising media used, (vi) the defendant's intent, and (vii) any evidence of actual confusion.[117]

The Alumnae Association is using the University's names, marks and symbols. To the extent these names, marks and symbols are not distinctive, they have obtained secondary meaning in the minds of the general public through long use. The Alumnae Association is using the names, marks and symbols in the same education market place as the University and to the same public that the University serves. The Alumnae Association uses newspapers, letters, emails and other media services similar to the University. As already discussed, the Alumnae Association is purposefully using the University's names, marks, symbols and logos to show a connection to the University.

Finally, the Alumnae Association and the University agree that the current situation is confusing and will continue to be so. Betty Lou Jones, immediate past president of the Alumnae Association, stated the problem quite clearly:

> [I]n my opinion, [this] is a tremendous statement in that here you have this tremendous group of alumni winners from two different groups which shows so much confusion. Here you're asking me all these questions about who gave what award, which is the problem, from having two organizations.[118]

The Alumnae Association's use of the University's registered mark or its unregistered names, marks and symbols violates the Lanham Act.

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[117] *Id.*

[118] Jones Testimony, T 147; Limbert Testimony, T 313-14.

4. Common law infringement factors all exist.

Mississippi courts use five factors to determine infringement: (i) identity or similarity of names, (ii) identity of business of respective parties, (iii) extent to which name is a true description of kind and quality of business carried on, (iv) the extent of confusion which may be created or apprehended, and (v) other circumstances which might justly influence the judgment of the judge in granting or withholding the remedy.[119] All factors weigh in favor of granting the injunction.

a. Names are the same.

The University seeks to prevent the Alumnae Association from using its names, marks and symbols. It is those same names, marks and symbols which the Alumnae Association has used in the past with the University's permission and continues to use now without permission.

b. Businesses are the same.

The "business" at issue is the University and its alumni association. There is no distinction, as it is the University itself with which the Alumnae Association seeks to maintain an affiliation.

c. Names and marks are true descriptions of kind and quality of business.

The names, marks and symbols at issue are associated with the educational services provided by the University. The public, particularly persons in Mississippi and persons familiar with the University, are reminded of the University when they see these names, marks and symbols.

The Alumnae Association has attacked the University's request for relief by arguing that other businesses also use "MUW" or "The W" to identify their goods or services. While this is true, the Alumnae Association misses the point. The University has not sought to obtain a monopoly on the letters "MUW" or the phrase "The W". Instead, the University sought to enjoin the Alumnae

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[119] *Meridian Yellow Cab*, 41 So. 2d at 17.

Association from using these names, marks and symbols to communicate to the public some continued association or connection between the University and the Alumnae Association. The Alumnae Association is not operating a hotel or publishing a magazine on women's issues. To the contrary, the Alumnae Association is using the University's names, marks and symbols to suggest a continued affiliation that no longer exists.

d. Existence of confusion is not disputed.

The ultimate issue in most trade name and trademark cases is the "likelihood of confusion". Proof of actual confusion is not necessary, if confusion or deception are liable to result.[120] As already discussed, not only is there a likelihood of confusion, but the parties agree that actual confusion has resulted from the Alumnae Association's continued use of the University's name and marks.

e. Other circumstances weigh in favor of prohibiting further infringement.

The Alumnae Association suggests that its incorporation in 1994 provides it with a claim to continued use of the phrase "Mississippi University for Women". The law is to the contrary:

> Parties organizing a corporation must choose a name at its peril; and the use of a name similar to one adopted by another corporation, . . . if misleading and calculated to injure it in the exercise of its corporate function, regardless of intent, may be prevented by the corporation having the prior right, by a suit of injunction against the new corporation to prevent use of the name.[121]

The Alumnae Association has a simple solution - - - it may amend its articles of incorporation and change its name.[122]

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[120] *Id.*

[121] *Id.*, at 18-19.

[122] Miss. Code Ann. § 79-11-109(1)(j); *see also Meridian Yellow Cab*, 41 So. 2d at 18-19.

5. *Permanent injunctive relief is appropriate.*

Trade name infringement is a matter of equity in Mississippi courts.[123] Following a determination that infringement exists, Mississippi courts have consistently granted permanent injunctive relief to the plaintiff.[124] The Lanham Act also specifically provides for an award of injunctive relief to prevent further infringement.[125]

In this case, the University, as the counter-claimant, was entitled to an injunction prohibiting the Alumnae Association from using "Mississippi University for Women", "MUW", "The W", "Long Blue Line", the University's registered mark and any other names, marks or symbols which might lead the public to conclude that the Alumnae Association is in any way connected to or associated with the University. In failing to grant this relief, the Chancery Court erred. This Court should reverse and render on this issue, granting injunctive relief in favor of the University.

CONCLUSION

This Court should reverse the Opinion and Judgment of the Chancery Court. This Court should render a decision in favor of Defendants on all of the Alumnae Association's claims, including the request for a permanent injunction forcing its continued affiliated relationship with the University. This Court should also reverse the Chancery Court's mandate that the University terminate its affiliated relationship with the new Alumni Association and any other entity. Finally, this Court should render a decision in favor of the University on its counterclaim seeking injunctive

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[123] *Id.* at 16-17.

[124] *Id.* at 19; *Dollar Dept.*, 120 So.2d at 142.

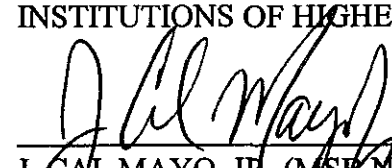
[125] 15 U.S.C. § 1116(a); *see also Haas Outdoors, Inc. v. Oak Country Camo.*, Inc., 957 F. Supp. 835, 838 (N.D. Miss. 1997).

relief prohibiting the Alumnae Association from infringing on the University's property rights in its names, marks, symbols and logos.

THIS, the 15th day of February, 2008.

Respectfully submitted,

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



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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 Brief of Appellants to:

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

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THIS, the 15th day of February, 2008.

J. CAL MAYO, JR.

FILE COPY

IN THE CHANCERY COURT OF LOWNDES COUNTY, MISSISSIPPI

MISSISSIPPI UNIVERSITY FOR WOMEN ALUMNAE ASSOCIATION — PLAINTIFF

V.

FILED
DEC 14 2007
Chancery Clerk

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

Stricken 5/15/08

DEFENDANTS/APPELLANTS' BRIEF IN SUPPORT OF THEIR MOTION FOR STAY OF JUDGMENT PENDING APPEAL

The Alumnae Association asked this Court mandate that Defendants abide by the Affiliation Agreement and never sought modification of any provision in that Agreement. This Court granted the relief requested by the Alumnae Association, requiring that Defendants uphold the "existing and valid" Affiliation Agreement with the Alumnae Association. Despite getting what it wanted, the Alumnae Association now says that this Court's Opinion and Judgment implicitly - yet drastically - modified the Affiliation Agreement and demands that the University accept its revised version.[1]

The Alumnae Association argues this Court made the following changes, among others:

i) deleted a provision requiring an annual audit of the Association's books and records, as specifically required by IHL Policy;[2]

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[1] *See* Email from Gore to Mayo (November 30, 2007), including Redlined Affiliation Agreement (Ex. "A" to Motion for Stay of Judgment Pending Appeal). For the Court's convenience, a copy of the original Affiliation Agreement is attached as Ex. "B" to the Motion.

[2] *See* IHL Policy § 301.0806 (Ex. "C" to Motion for Stay of Judgment).

ii) deleted provisions permitting the University to audit the Association's expenditure of any University funds provided to the Association and requiring an annual report specifying how University resources were used and the benefits to the University from this use;

iii) deleted a provision prohibiting the use of the University's names, symbols and logos after termination, as provided by IHL Policy;

iv) deleted provisions prohibiting the Alumnae Association from applying for 501(c)(3) status and engaging in fund raising activities in competition with the University's Foundation and from entering transactions that create liability for the University;

v) added a provision making the Alumnae Association the University's exclusive affiliated alumni group;

vi) deleted a provision clarifying that the Alumnae Association has no legal entitlement to University funding, personnel or resources;

vii) added a provision requiring the University to grant "in good faith" any reasonable request made by the Alumnae Association for an IHL employee to hold a voting position on the Association's Board, in direct violation of IHL Policy;

viii) deleted a provision requiring the Alumnae Association to have a conflict-of-interest policy, as specifically required by IHL Policy;

ix) deleted a provision requiring that the officer nomination process "be an inclusive process designed to achieve representation that reflects the membership of the alumni"; and

x) added a provision altering the agreement from one terminable "at will" to one terminable only on a "good faith basis".

As it has been for several years, the goal of the Alumnae Association's leaders is clear. They want all the benefits of affiliation with the University (use of the University's facilities, employees, money, names, symbols, marks and other public resources) without any accountability and without any fear that the University may terminate the relationship with the Alumnae Association, even if the Alumnae Association leaders interfere with and undermine University operations and try to

control the management and leadership of the University. Such goals and desires turn on its head the concept of serving as the University's "affiliated entity" - - - the tail cannot wag the dog.

The relationship between the Alumnae Association leadership and the University is broken and unhealthy. Until the appeal is finally resolved, this relationship will not improve. Instead, the Alumnae Association leaders will continue to interfere with University operations and undermine the University's administration. In the meantime, a group of alumni dedicated to supporting the University's mission and priorities (and not their personal priorities) will not have the ability to formally associate with the University, resulting in a chilling effect on these alumni and continued harm to the University. This Court should stay the relief granted in the Opinion and Judgment pending completion of the appellate process.

BACKGROUND

On February 1, 2007, the University gave the Alumnae Association its notice of termination of the Affiliation Agreement pursuant to Section 7.2: "This Agreement may be terminated by either party upon at least 60 days written notice." The Alumnae Association instituted this action against Dr. Limbert in her individual capacity on March 29, 2007, to prevent the University from terminating its affiliation. Dr. Limbert moved this Court to dismiss the Complaint for lack of jurisdiction, failure to join necessary parties, and mootness. The Alumnae Association failed to obtain any relief, and the affiliation ended on April 2, 2007, after expiration of the contractually-required sixty-day termination period.

The Alumnae Association amended its complaint on April 4, 2007, to name as defendants Dr. Limbert (in her official capacity), the University, and the IHL Board of Trustees. Defendants filed a Second Motion to Dismiss, asserting lack of jurisdiction and mootness.

This Court tried this matter on May 8, 2007 and June 5, 2007. The parties submitted trial briefs on July 29, 2007. Among other things, the Alumnae Association requested that this Court mandate Dr. Limbert, the University and the IHL Board "uphold the existing and valid affiliation agreement between the Association and the University, dated October 25, 2006", and "operate under the affiliation agreement in good faith for the duration of the agreement . . .".[3]

In its Opinion and Judgment, this Court determined that Dr. Limbert "showed an intent to control the [Alumnae] Association and deprive it of its free will" with her "refusal to approve the By-Laws" as presented by the Alumnae Association in January 2007.[4] Thus, this Court concluded, Dr. Limbert acted in bad faith when she terminated the Affiliation Agreement between the University and the Alumnae Association "over the By-Laws". Further, this Court held that "the primary motivating factor behind Dr. Limbert's disaffiliation with the Association were the actions . . . of the various members and/or officers of the Association that pertained to the so-called 'criticism' of Dr. Limbert and her administration." This Court ruled that Dr. Limbert terminated the Affiliation Agreement "for constitutionally impermissible reasons" that were *per se* bad faith.

This Court then granted the following ultimate relief:

> An injunction mandating that Dr. 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 is hereby ordered and entered. 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

[3] *See* Alumnae Association's Post-Trial Brief, p. 25 (July 23, 2007) (Ex. "D" to Motion for Stay of Judgment).

[4] *See* Opinion and Judgment, p.11 (October 1, 2007) (Ex. "E" to Motion for Stay of Judgment).

> 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. . . .

After release of this Court's Opinion and Judgment, the Alumnae Association did not ask this Court to alter or amend its ruling (mandating that Defendants "uphold the valid and existing affiliation agreement") to modify the terms of the Agreement. Now, however, apparently no longer satisfied, the Alumnae Association contends that this Court magically amended the Agreement in numerous ways.[5] The Alumnae Association seeks to dramatically redefine its relationship with the University, using terms that conflict with the IHL Policy which establishes the conditions under which the University may affiliate with an outside entity, such as the Alumnae Association. If the Alumnae Association had initially insisted upon such terms, the University would never have signed the Agreement, and the IHL Board would never have approved it.

To be clear, the University cannot have a constructive relationship with the Alumnae Association under its current leadership. This group has demonstrated its true colors on countless occasions, most recently with its efforts to unilaterally re-write the affiliation agreement and force it on the University. Defendants are committed to resolving the appeal expeditiously. Until that process ends, this Court should stay its Judgment.

Stay Judgment Pending Appellate Resolution

Under MISS. R. CIV. P. 62(c), a court granting an injunction may "suspend, modify, restore, or grant an injunction during the pendency of an appeal from such judgment." An application for

[5] *See* Email from Gore to Mayo (November 30, 2007), including Redlined Affiliation Agreement (Ex. "A" to Motion for Stay of Judgment).

a stay "must ordinarily be made in the first instance to the trial court."[6] The court should grant a stay if the applicant shows: (i) a likelihood of success on the merits of the appeal, (ii) irreparable injury absent a stay, (iii) no substantial harm to other interested persons, and (iv) no harm to the public interest.[7] As detailed below, Defendants meet and exceed each of the requirements for a stay. This Court should suspend the effect of the Opinion and Judgment pending appeal.

1. Defendants will succeed on merits of appeal.

As discussed below in detail, Defendants have a strong likelihood of succeeding on the merits of their appeal. However, an applicant for post-trial stay "need not always show a 'probability' of success on the merits; instead, the movant need only present a substantial case on the merits when a serious legal question is involved and show that the balance of the equities weighs heavily in favor of granting the stay."[8] Defendants have certainly presented a "substantial case on the merits". Moreover, this appeal involves a "serious legal question", as this Court has granted extraordinary mandatory relief against two State entities and a public official in a matter that involves issues of academic integrity, separation of powers, and the outer limits of jurisdiction of this State's courts. Weighing all the equities, Defendants satisfy the requirements for a stay of judgment.

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[6] MISS. R. APP. P. 8(b)(1).

[7] MISS. R. CIV. P. 62 cmt. This Court may also weigh "other relevant considerations" when making its decision concerning Defendants' request to stay judgment. *Id.*

[8] *Arnold v. Garlock, Inc.*, 278 F.3d 426, 439 (5th Cir. 2001) (citing *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. Unit A 1981)). In *Ruiz*, the court held that, "[i]f a movant were required in every case to show that the appeal would probably be successful, the Rule would not require as it does a prior presentation to the district judge whose order is being appealed." 650 F.2d at 565.

a. "Separation of Powers" doctrine violated

One of the most fundamental principles of government in this State is that no branch of government "shall exercise any power properly belonging to either of the others."[9] In furtherance of this principle, Mississippi courts are required to "afford ***great deference to an administrative agency's construction of its own rules and regulations*** and the statutes under which it operates."[10] An administrative decision "***must be upheld*** unless it is so plainly erroneous or so inconsistent with either the underlying regulation or statute as to be arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law."[11]

The Mississippi Constitution vests the IHL Board with sole authority for administration of Mississippi's public institutions of higher learning.[12] While the IHL Board is, strictly speaking, a part of the executive branch of government, the Mississippi Supreme Court has held that its status as a "constitutionally-created state agency" entitles it to "operate with a considerable amount of independence and security of position" and that, while it is "not an island, . . . it is a pretty good sized peninsula."[13]

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[9] MISS. CONST., Art. 1, § 2.

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

[11] *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)).

[12] MISS. CONST., Art. VIII, § 213-A.

[13] *Van Slyke v. Bd. of Trustees of Institutions of Higher Learning*, 613 So. 2d 872, 877 (Miss. 1993).

Pursuant to this constitutional authority, the IHL Board has delegated to the institutional executive officers the primary responsibility for ongoing management of their respective institutions.[14] The IHL Board has also specifically delegated to the institutional executive officers the responsibility to consider affiliation with private support groups and the obligation to formalize that relationship in a written agreement with those groups.[15]

In its Opinion and in violation of the separation of powers doctrine, this Court *expressly* rejected the IHL Board's construction of its own rules and regulations in favor of its own. The Court, citing IHL Board Policy § 301.0806 for the proposition that affiliated entities must be "independent", rejected the IHL Board's interpretation of that term and adopted a definition giving the Alumnae Association unfettered "free will" even while existing as an affiliated entity of the University pursuant to written agreement. Then, despite the IHL Board's approval of Dr. Limbert's decision to explore a relationship with a different alumni association and ultimately to affiliate with the new Alumni Association, this Court substituted its interpretation of IHL Policy to require that the IHL Board must disaffiliate the University from the new Alumni Association. This Court erred in its analysis on both counts and improperly substituted its judgment for that of the IHL Board in violation of the "separation of powers" doctrine.

Mississippi law requires that the Alumnae Association, as a nonprofit corporation, have a board of directors to exercise all corporate powers and manage corporate affairs.[16] Understanding

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[14] *See* IHL Policy § 301.0801 (Ex. "F" to Motion for Stay of Judgment).

[15] *See* IHL Policy § 301.0806 (Ex. "C" to Motion for Stay of Judgment).

[16] Miss. Code Ann. § 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 it affairs . . . ."). There is no corresponding requirement for a

the role of corporate directors, the IHL Board adopted a policy recognizing and preserving the "independence" of affiliated entities. Specifically, the IHL Board prohibited IHL employees from serving as voting members of an affiliated entity's board of directors.[17]

On the other hand, to ensure that these entities supported the missions of the respective universities, the IHL Policy made clear that these groups (such as the Alumnae Association) would give up some elements of total autonomy - - - after all, the IHL Board was establishing the parameters for "affiliation" agreements which, by definition, suggest some relinquishment of independence for those entities choosing to affiliate with a university. For example, the IHL Board instructed institutional executive officers (such as Dr. Limbert) (i) to require affiliated entities to maintain financial records according to recognized principles and to subject these records to an annual audit to be provided to the institution, (ii) to prohibit those entities from paying any compensation to institutional executive officers without IHL Board approval, (iii) to require the affiliated entities to submit an annual report of compensation otherwise paid to institutional employees, (iv) to adopt a process for accepting and accounting for gifts and grants through the affiliated entities, and (v) to require the affiliated entities adopt a conflict of interest policy.

At trial, Dr. Thomas C. Meredith, IHL Commissioner, confirmed the IHL Board's general standard of independence (as related to the composition of affiliated entities' boards of directors). Beyond this basic criteria, as testified by Dr. Meredith, the IHL Board delegated implementation of

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nonprofit corporation to have any specific officers. *See* Miss. Code Ann. § 79-11-271.

[17] *See* IHL Policy § 301.0806 (Ex. "C" to Motion for Stay of Judgment). Ironically, this provision (adopted by the IHL Board to insure "independence") is one of the terms of the Affiliation Agreement that the Alumnae Association seeks to modify so that IHL employees may serve as voting members of its Board of Directors. *See* Redlined Affiliation Agreement (Ex. "A" to Motion for Stay of Judgment).

the policy to the institutional executive officers. In other words, provided the voting directors were not IHL employees and the affiliation agreements contained the basic requirements stated in the Policy, the IHL Board deferred to the various institutional executive officers to decide the degree of independence necessary for entering relationships with the different affiliated entities (foundations, alumni associations, etc.).

In its Opinion, this Court imposed a definition of the phrase "independent" that has nothing to do with affiliated entities, IHL policies, or higher education as a whole. The decision upon which the Court relies contrasts the relative independence of charitable trusts and charitable corporations: a charitable trust is governed in all aspects by the intentions of its settlor, and a charitable corporation carries out its charitable purpose with relative autonomy (derived from the corporation's charter, by-law and state statutes).[18] Nothing in the decision suggests that the IHL Board lacks the authority, as part of managing Mississippi's public universities, to require a private entity to include in its by-laws certain limitations on its "free will" as a condition of obtaining the privilege of affiliation. To reach its conclusion, this Court must ignore the ultimate freedom available to an entity such as the Alumnae Association - - - the choice to reject affiliation with the University.

The provisions at issue in the bylaws - - - requested by the University and rejected by the Alumnae Association - - - did not violate IHL Policy. None of the questioned provisions made an IHL employee a voting member of the Alumnae Association's Board. Nothing in the provisions detracted from the authority of the Association's Board to ultimately control and manage the Alumnae Association. For example, the Court identified the dispute over the provision concerning floor nominations during the election of officers. However, the language requested by the University

[18] *City of Picayune*, 916 So. 2d at 523.

did not violate IHL Policy as nothing about the Alumnae Association members' election of officers detracted from the Board of Directors' ability to remove any officer with or without cause, as provided by law.[19] Thus, the Board of Directors maintained the ultimate power to change officers if it did not approve of the officers elected by the members.

In the face of undisputed evidence of the IHL Board's intended construction and application of "independent" as applied to the relationship between universities and their affiliated entities, this Court improperly substituted its own interpretation of the term. In the process, this Court has granted "free will" to the Alumnae Association while simultaneously requiring the University to maintain an "official" relationship with an organization whose leaders have actively undermined University operations and attempted to control the University. In essence, this Court's Opinion assumed that an affiliation with Mississippi's public universities is a "right". Instead, it is a privilege that can be withdrawn at the discretion of the IHL Board and its designees, such as Dr. Limbert. The Court's unilateral alteration of the undisputed meaning of IHL Board Policy violates the separation of powers doctrine and is an error of law.

Dr. Meredith also testified that the IHL Board has given the universities' institutional executive officers, including Dr. Limbert, the authority to terminate affiliation agreements. Despite this clearly established and undisputed policy, this Court determined that "it is logical that IHL should have to approve any decision to disaffiliate."[20] This Court's disagreement with the logic or wisdom of the policy at issue is not an adequate basis for disregarding it. Again, the Court has substituted its judgment for that of the IHL Board on a matter of higher education policy.

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[19] Miss. Code Ann. § 79-11-277 (2).

[20] Opinion and Judgment, p.9 n.7 (Ex. "E" to Motion for Stay of Judgment).

In any event, the Affiliation Agreement provided that "either party" had the ability to terminate upon sixty days written notice. The IHL Board approved the Agreement, along with the termination provision, and delegated its administration to Dr. Limbert, on behalf of the University. To conclude that IHL Board approval was required for the University to terminate would necessarily impose the same requirement upon the Alumnae Association if it had chosen to end the relationship. This conclusion flies in the face of the plain language of the contract and of the IHL Board's policy regarding affiliation agreements. This Court's refusal to defer to the IHL Board with respect to the construction and administration of its own policies violates the separation of powers doctrine and constitutes reversible error.

b. Defendants' discretion improperly compelled

According to this Court's Opinion, Dr. Limbert owed a mandatory, non-discretionary legal duty to approve the bylaws submitted by the Alumnae Association, and Defendants are compelled to associate themselves with the Alumnae Association. The Court found that this duty springs from Defendants' purported "refusal to approve the By-Laws," which "showed an intent to control the Association and deprive it of its free will, thereby taking away its independence."[21] Yet, there is no legal basis for the ministerial duty the Court has imposed upon Dr. Limbert.

The Mississippi Supreme Court has articulated a four-part test to determine whether a court should issue a writ of mandamus to require a public official to carry out a ministerial duty:

> (1) the petition must be brought by the officers or persons authorized to bring the suit; (2) there must appear a ***clear right*** in petitioner to the relief sought; (3) there must exist a ***legal duty*** on the part of the

[21] *Id.*, p.11.

> defendant to do the thing which the petitioner seeks to compel; and (4) there must be an absence of another remedy at law.[22]

While Mississippi courts "have the power to hear claims that public officials have violated their mandatory, non-discretionary duties of office",[23] they may not force executive branch officials to exercise their discretion to bring about a particular result.[24] The most important factor with respect to whether a particular duty is discretionary or ministerial is whether the duty is "one which has been positively imposed by law and its performance required at a time and in a manner or upon conditions which are specifically designated, the duty to perform under the conditions specified not being dependent upon the officer's judgment or discretion."[25] Under this standard, this Court erred in ruling that Dr. Limbert had a ministerial duty to approve the by-laws.

With mandamus petitions, this Court must follow a doctrine of "non-judicial interference":

> [The court] "can direct an official or commission to perform its official duty or to perform a ministerial act, but it ***cannot project itself into the discretionary function of the official or the commission***. Stated differently, it can direct action to be taken, but it cannot direct the outcome of the mandated function." Thus, a court could, if necessary, compel by mandamus an [official] to perform its statutory duty upon its failure to do so, or prohibit it by way of injunction from exceeding its statutory authority in some respect; use

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[22] *Aldridge v. West*, 929 So. 2d 298, 302 (Miss. 2006) (citing *Bd. of Educ. of Forrest County v. Sigler*, 208 So.2d 890, 892 (Miss. 1968)) (emphasis added).

[23] *Fordice v. Thomas*, 649 So.2d 835, 840 (Miss. 1995) (citing *Poyner v. Gilmore*, 158 So. 922, 923 (Miss. 1935)).

[24] *USPCI of Miss., Inc. v. State of Miss. ex rel McGowan*, 688 So.2d 783, 789 (Miss. 1997) (holding that no action would lie against the Governor for his exercise of "mere discretionary functions").

[25] *Fordice* 649 So.2d at 840 (Miss. 1995) (citing *Poyner*, 158 So. at 923).

> of an extraordinary writ, however, ***cannot be extended to actually telling the [official] what action to take.***[26]

Nothing supports the conclusion that the Alumnae Association had a clear right to have its bylaws approved by Dr. Limbert or to retain its status as an affiliated entity. In its First Amended Complaint, the Alumnae Association properly recognized the standard by which Dr. Limbert was to exercise her judgment in reviewing the proposed bylaws. The bylaws were to be "consistent with the mission and priorities of the University, this [Affiliation] Agreement, and IHL Policy."[27] The Alumnae Association alleged that the bylaws were consistent and that, therefore, Dr. Limbert's rejection was improper.[28]

It is beyond any serious dispute that the responsibility of setting the mission and priorities of the University and the IHL Board falls squarely within the "discretionary function of the official or the commission" that is protected by the doctrine of non-judicial interference.[29] In holding that Dr. Limbert acted in bad faith when she refused to approve the proposed bylaws, this Court improperly stepped into the shoes of the IHL Board and Dr. Limbert - - - usurping responsibility for setting the priorities of the University and determining that the Alumnae Association's bylaws were consistent with those priorities.

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[26] *In re Wilbourn*, 590 So. 2d 1381, 1385 (Miss. 1991) (quoting *Hinds County Democratic Committee v. Muirhead*, 259 So. 2d 692, 695 (Miss. 1972)) (emphasis added).

[27] First Am. Compl., ¶ 30 (April 5, 2007) (quoting Affiliation Agreement, ¶ 2.17) (Ex. "G" to Motion for Stay of Judgment).

[28] *Id.*, ¶ 31.

[29] *In re Wilbourn*, 590 So. 2d at 1385.

Furthermore, the University had no legal duty to maintain an affiliation with the Alumnae Association, particularly in the light of the disruptive activity in which its leaders had continuously engaged. IHL Board policy makes clear that the Board and its designees (including Dr. Limbert) are not powerless to exercise their discretion to monitor the extent which the priorities of the State's universities are followed by officially sanctioned support groups:

> While the Board of Trustees cannot control or direct individuals or private organizations, it has the full authority to control the activities of its agents and agencies in their relationships with such individuals or organizations.[30]

In fact, this Court specifically found that "***Dr. Limbert has the right to exercise her judgment in terminating the affiliation agreement.*** . . ."[31] Preventing the University from exercising that discretion again violated the "judicial non-intervention" principle.

This Court's Opinion will have potentially far-reaching adverse effects on the administration of Mississippi's public universities by improperly empowering an affiliated entity to operate in a manner that undermines the missions and goals of its affiliated university while carrying the banner of an "official" association. This intrusion upon the discretion of Dr. Limbert (the University's chief administrator) and the authority of the IHL Board (the constitutionally-created state agency responsible for higher education) constitutes clear legal error.

c. No record support for bad faith finding

This Court concluded that Dr. Limbert acted in bad faith when she terminated the Affiliation Agreement between the University and the Alumnae Association because she "showed an intent to

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[30] IHL Policy § 301.0806, *Board of Trustees Authority* (Ex. "C" to Motion for Stay of Judgment).

[31] Opinion and Judgment, at 9 (Ex. "E" to Motion for Stay of Judgment).

control the Association and deprive it if its free will, thereby taking away its independence."[32] This finding is in error, as the Alumnae Association maintained its independence through its Board of Directors, as previously discussed. In addition, the finding is insufficient, as a matter of law, to support the conclusion that Dr. Limbert's actions constituted bad faith.

The Mississippi Supreme Court has defined "good faith" 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."[33] Furthermore, "[b]ad faith . . . requires a showing of more than bad judgment or negligence; rather, 'bad faith' implies some conscious wrongdoing 'because of dishonest purpose or moral obliquity.'"[34] Most importantly, the Supreme Court has held that a defendant did not breach the implied covenant of good faith and fair dealing when it "***took only those actions which were duly authorized by the contract.***"[35]

The Alumnae Association's justified expectations with respect to the continuation of its affiliation with the University included Paragraph 2.17 of the Affiliation Agreement. Under this provision, either party could terminate upon sixty days written notice, without any requirement of "just cause" or "fair basis" for the decision - - - *i.e.*, either party could terminate the Affiliation

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[32] Opinion and Judgment, p.11 (Ex. "E" to Motion for Stay of Judgment.

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

[34] *Univ. of S. Miss. v. Williams*, 891 So. 2d 160, 170-71 (Miss. 2004).

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

Agreement "at will".[36] Far from the "conscious wrongdoing" that characterizes a bad faith claim, Dr. Limbert merely used her judgment to exercise the University's ***express contractual right*** to terminate the agreement. Because her actions were "duly authorized by the contract", she could not have acted in bad faith as a matter of law.

Even if the University could not terminate the contract "at will" (which it could), Dr. Limbert was entitled (if not obligated) to exercise her judgment in reviewing the Alumnae Association's proposed bylaws to ensure they were consistent with the mission and priorities of the University and the IHL Board. In addition, despite a contractual obligation to "use its resources for the sole and express purpose of advancing the University's mission" and "to support the University",[37] the Alumnae Association leaders made false allegations against University administrators, interfered with University business and undermined its administration, and attempted to control management and leadership of the University and to remove Dr. Limbert. For any and all of these reasons, Dr. Limbert's refusal to approve the bylaws in the light of her responsibilities and the history of misconduct by the Alumnae Association leaders was not, as a matter of law, an act of "dishonest purpose or moral obliquity."

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[36] *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).

[37] *See* Affiliation Agreement, pp. 1-2 (Ex. "B" to Motion for Stay of Judgment).

Finally, Dr. Limbert, as the President of the University, reports to and takes direction from the IHL Board. In this case, Dr. Meredith has explained the IHL Board's policy concerning affiliated entities and the manner in which the IHL Board expected the institutional executive officers to implement that policy. There is no dispute that Dr. Limbert complied with the directions of her superiors (the IHL Board) when reviewing the proposed bylaws and using her discretion to terminate the Affiliation Agreement. The support from the IHL Board (as expressed in its Press Release[38] and its subsequent approval of the affiliation with the new Alumni Association) clearly demonstrates that Dr. Limbert acted in a manner consistent with IHL policy. The Court's disagreement with the IHL Board's policy and implementation of that policy does not support a finding of bad faith by Dr. Limbert when her conduct complied with the IHL Board's directions.

d. Improper application of constitutional principles to Alumnae Association

The Court further concludes that Dr. Limbert's actions in terminating the Affiliation Agreement were based on "constitutionally impermissible grounds."[39] Specifically, the Court concluded that Dr. Limbert violated the Alumnae Association's right to free speech, holding that "in a democracy, one must allow the most vicarious and unrestrained speech."[40] This conclusion was procedurally and substantively improper.

The Alumnae Association did not allege a free speech violation in either of its complaints, and never sought leave of the Court to amend its pleadings to reflect such an allegation. Defendants never had an opportunity to answer any claim based on such an alleged constitutional violation, and

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[38] *See* IHL Press Release (Feb. 15, 2007) (Ex. "H" to Motion for Stay of Judgment).

[39] Opinion and Judgment, p.13 (Ex. "E" to Motion for Stay of Judgment).

[40] *Id.* at 12.

neither party offered legal support or factual argument regarding such a claim in the post-trial briefs. The Court's digression into a discussion of free speech, which the Court claims was "raised by [Plaintiff] in trial", is apparently based on an offhand remark by one of the Alumnae Association's attorneys, without the benefit of a cause of action to support the comment.

According to the Mississippi Supreme Court, trial courts may only grant such relief "which the original bill justifies and which is established by the main facts of the case, so long as the relief granted 'will not cause surprise or prejudice to the defendant.'"[41] In this case, the original bill does not justify relief granted for any alleged constitutional "free speech" violation,[42] and such relief has undoubtedly caused surprise and unfair prejudice to Defendants, who had no opportunity to respond to any such claim prior to the issuance of this Court's Opinion.

MISS. R. CIV. P. 15(b) provides that issues not raised in the pleadings "shall be treated in all respects as if they had been raised in the pleadings" *if* they "are tried by expressed or implied consent of the parties . . . ." The Alumnae Association did not seek to amend its pleadings to include constitutional claims. The Court did not suggest, and the record does not reflect, that Defendants expressly consented to a trial of any constitutional claims. Furthermore,

> a finding of implied consent 'depends on whether the parties recognized that an issue not presented by the pleadings entered the case at trial.' If a party fails to object because he does not recognize the significance of the evidence introduced, however, he cannot be said to have consented impliedly to the trial of the unpleaded issues suggested by it. Of course, his inability to comprehend the significance of the evidence must be reasonable in the circumstances presented. For example, implied consent is not found where evidence introduced is relevant to a pleaded issue and the nonobjecting party

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[41] *Crowe v. Crowe*, 641 So. 2d 1100, 1004 (Miss. 1994).

[42] First Amended Complaint (Ex. "G" to Motion for Stay of Judgment).

> has no notice that the evidence is intended to raise a new unpleaded issue into the case.[43]

Defendants did not (and could not have) recognized that a constitutional claim was raised by the Alumnae Association, when the only discussion concerning "free speech" rights was an off-handed comment by legal counsel. Even the Alumnae Association did not consider the "free speech" theory as legitimate, as it failed to brief the issue after trial. Thus, this Court committed procedural error when it *sua sponte* rendered its decision based on an unlitigated constitutional theory.

Moreover, the Court's legal conclusion that Dr. Limbert violated the Alumnae Association's First Amendment rights is erroneous as a matter of law. The "speech" this Court finds constitutionally protected was inconsistent with the legitimate pedagogical and administrative messages the University sought to convey. The Court found, as a matter of fact, that "Dr. Limbert was motivated by a well-grounded fear . . . that an independent group of alumnae were trying to undermine her administration."[44] Because it is clear that the Alumnae Association's leaders were undermining the mission and priorities of the University on behalf of an officially-sanctioned affiliated entity, Dr. Limbert's actions in terminating the Affiliation Agreement with the Alumnae Association were not constitutionally suspect.

Governmental entities, while they do not possess constitutional rights, have the inherent power to control the content of their expression, as well as the message that is conveyed by those persons or entities speaking for them. The United States Supreme Court has held that, "when the State is the speaker, it may make content-based choices" about the messages disseminated by its

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[43] *Shipley v. Ferguson*, 638 So. 2d 1295, 1300 (Miss. 1994).

[44] Opinion and Judgment, p.12 (Ex. "E" to Motion for Stay of Judgment).

associates.[45] Furthermore, when an arm of the State designates "private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee."[46] As one court has put it, "[s]imply because the government opens its mouth to speak does not give every outside individual or group a First Amendment right to play ventriloquist."[47] The individual members of the Alumnae Association certainly have a constitutionally-protected right to voice their opinions about perceived shortcomings on the part of the University's administration. However, the University has the corresponding right to withdraw its *seal of approval* from such statements when the University concludes that it is the Alumnae Association doing the talking.

Attaching "free speech" rights to an alumni association affiliation creates a myriad of problems. For example, the Affiliation Agreement permits the Alumnae Association to use the

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[45] *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 834 (U.S. 1995) ("When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message.").

[46] *Id.; see also Columbia Broadcasting System, Inc. v. Democratic Nat'l Committee*, 412 U.S. 94, 140 n.7 (U.S. 1973) (Stewart, J., concurring) ("The purpose of the First Amendment is to protect private expression and nothing in the guarantee precludes the government from controlling its own expression or that of its agents.") (quoting THOMAS EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 709 (1970)); *Muir v. Ala. Educ. Television Comm'n*, 688 F.2d 1033, 1038 (5th Cir. 1982) ("To find that the government is without First Amendment protection is not to find that the government is prohibited from speaking or that private individuals have the right to limit or control the expression of government.") (internal citations omitted).

[47] *Downs v. Los Angeles Unified Sch. Dist.*, 228 F.3d 1003, 1013 (9th Cir. 2000) ("We conclude that when a public high school is the speaker, its control of its own speech is not subject to the constraints of constitutional safeguards and forum analysis, but instead is measured by practical considerations applicable to any individual's choice of how to convey oneself: among other things, content, timing, and purpose.").

University's names, symbols, trademarks, logos, and service marks.[48] This Court's ruling would literally permit the "MUW" Alumnae Association to engage in "free speech" on a variety of matters of public interest (*e.g.*, elections, abortion, school prayer) which are either at odds with the University's position or a matter on which the University chooses to remain silent. However, as an officially-sanctioned affiliated entity bearing the University's name, the Alumnae Association would obviously lead many to perceive its voice as the University's voice.

The Court has confused the First Amendment right to freedom of speech with the privilege of being an officially-sanctioned affiliated entity. The Court has cited no authority for the proposition that the Alumnae Association has a constitutional right to remain affiliated with the University. One federal court considering similar issues has held that "the First Amendment does not require colleges to fund or recognize alumni groups. Moreover, a college does not unlawfully impede the associational rights of its alumni when it declines to recognize an alumni group."[49]

Defendants have done nothing to prevent Alumnae Association members from freely voicing their opinions about the University's administration. Rather, the termination of the Affiliation Agreement simply reflected the University's unwillingness to place its imprimatur on statements inconsistent with its own message or its desire to remain silent. The First Amendment may prohibit governmental bodies from prohibiting dissenting views, but it does not require the government to join them. This Court erred substantively in finding that Defendants deprived the Alumnae Association of constitutional rights.

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[48] Affiliation Agreement, ¶2.6 (Ex. "B" to Motion for Stay of Judgment).

[49] *Ad Hoc Comm. of Baruch Black & Hispanic Alumni Ass'n v. Bernard M. Baruch College*, 726 F. Supp. 522, 523 (S.D.N.Y. 1989).

e. Improper disaffiliation of new Alumni Association

The Alumnae Association never alleged that actions surrounding the formation of the new Alumni Association or Dr. Limbert's execution of an Affiliation Agreement with the Alumni Association were in bad faith.[50] None the less, this Court ordered Defendants to rescind the Affiliation Agreement with the new Alumni Association, executed by Dr. Limbert for the University on March 27, 2007, because "actions taken by [Dr. Limbert] to form a new alumnae association and enter into a new affiliation agreement were also in bad faith."[51] No evidence supports the conclusion that Dr. Limbert's discussions with representatives of the new Alumni Association were carried out in bad faith, and the Court abused its discretion with this finding.

Furthermore, this Court did not cite, and no party has identified, any reason why the University cannot affiliate with more than one group of alumni. To the contrary, IHL Board policy does not limit the universities to a single affiliated relationship, and the undisputed testimony of Dr. Meredith showed that Mississippi universities regularly conduct business with multiple affiliated entities. Similarly, the IHL Board had the responsibility to accept or reject the agreement between the University and the new Alumni Association, using the judgment derived from its constitutional authority to manage and control Mississippi's public universities. This Court improperly compelled Defendants to exercise their discretion to bring about a particular result, namely termination of the relationship with the Alumni Association. In unilaterally determining that the University should only affiliate with one alumni group, this Court improperly supplanted Defendants' discretion with its

[50] First Amended Complaint (Ex. "G" to Motion for Stay of Judgment).

[51] Opinion and Order, p.13 (Ex. "E" to Motion for Stay of Judgment).

own preference for the University's affiliated relationships - - - a violation of the separation of powers doctrine.

2. Defendants will suffer irreparable injury in absence of a stay.

The Court's own findings establish that the Alumnae Association's leaders sought to "remove [the president] and/or manage the university" and to "undermine [the University's] administration" by disrupting University operations.[52] Since the Court mandated that the University recognize the Alumnae Association as an officially-sanctioned affiliated entity, nothing has occurred to suggest that these leaders' conduct will change. To the contrary, the Alumnae Association leadership has become emboldened to continue its assault on the University by demanding that the University consent to modifications to the Affiliation Agreement in direct violation of IHL Policy. It is difficult to imagine a more clear-cut case of irreparable injury, as the Court has already determined that many of the Alumnae Association's actions as an affiliated entity were injurious to the University.

After uncovering years of misconduct by the Alumnae Association leaders, the University affiliated with a new Alumni Association whose leaders displayed a willingness to respect and support the mission and priorities of the University and the IHL Board. This new Alumni Association has not taken the actions the Court attributes to the Alumnae Association. The IHL Board supported the University's decision to terminate the Affiliation Agreement and approved affiliation with the new Alumni Association. Absent a stay, the University will have no viable

[52] Opinion and Judgment, pp. 8 and 12 (Ex. "E" to Motion for Stay of Judgment).

alumni support group and, if successful on appeal, will have to re-start the process of affiliating with an organization that supports the mission and priorities of the University and the IHL Board.[53]

In addition, the Opinion raises serious questions concerning the accreditation of the public institutions governed by the IHL Board. Each of the public institutions in Mississippi are members of the Southern Association of Colleges and Schools, commonly referred to as SACS. The SACS Commission on Colleges is the recognized regional accreditation body for colleges in the eleven southern states, including Mississippi. As observed by Dr. Meredith, the Opinion puts at risk the accreditation of Mississippi's public institutions of higher learning under the sections that address governance and administration and external influence.[54] In other words, the Opinion decreases the ability of Mississippi's universities to control their mission and priorities and increases the ability of officially-sanctioned affiliated entities to interfere with university operations.

Defendants will suffer irreparable harm in the absence of a stay.

3. No substantial harm will be done to other interested persons.

Other parties with a direct interest in the outcome of this litigation are the Alumnae Association and the new Alumni Association. Since receiving its written notice of termination more than ten months ago, the Alumnae Association has remained an active Mississippi corporation, held regular business meetings, and elected new officers. There is no reason to believe that the Alumnae Association cannot survive pending resolution of Defendants' appeal.

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[53] *See* Affidavit of Dr. Claudia A. Limbert (December 12, 2007) (Ex. "I" to Motion for Stay of Judgment).

[54] *See* Affidavit of Thomas C. Meredith, Ed.D. (December 11, 2007) (Ex. "J" to Motion for Stay of Judgment).

On the other hand, the new Alumni Association has just begun operations after months of hard work by its organizers. The new Association is in the middle of a membership drive and has not yet had time to establish itself as a viable organization. Without a stay, this Court's mandates will seriously disrupt the new Association's fledgling operations and make it very difficult for the new Association to resume operations once Defendants prevail on their appeal.[55] This potential harm to the new Association is aggravated by the fact that it was never a party to the instant action and did not have the opportunity to defend its interests before the Court's Order stripping its affiliation.

4. Stay will not harm public interest.

A stay of this Court's rulings pending appeal will not harm the public interest. The public is best served by private entities which actually support the mission and priorities of their respective affiliated public universities - - - rather than entities which continually seek to undermine and wrest control from the public servants appointed by the IHL board to administer those institutions.

In fact, public interest weighs in favor of a stay, thus allowing the IHL Board to administer the operations of Mississippi's universities as provided in the Mississippi Constitution, applicable statutes, and the policies of the IHL Board. This Court's ruling has, in effect, eliminated the University's authority to ensure that its affiliated entities support the mission and priorities of the University and the IHL, and will require the University to withstand further attacks on its autonomy and administration from an officially-sanctioned group. The ruling could have a far-reaching impact on the day-to-day operations of colleges and universities, including their ability (and desire) to work with affiliated entities and their ability to maintain a sufficient degree of institutional autonomy to

[55] *See* Affidavit of Renee N. Flynt (December 12, 2007) (Ex. "K" to Motion for Stay of Judgment).

meet appropriate accreditation standards. The uncertainty created by this Court's mandates could cause substantial harm to all of the State's universities.

5. Defendants are not required to post bond.

As agencies and/or agents of the State of Mississippi, Defendants are exempt from any requirement of a bond pending appeal under MISS. R. CIV. P. 62(f) and MISS. CODE ANN. § 11-51-101. Therefore, if this Court grants Defendants' Motion, relief should issue immediately.

CONCLUSION

Defendants have presented a substantial case on the merits with respect to their appeal of this Court's Opinion and Judgment. Because this appeal involves serious legal questions and the equities weigh in favor of injunctive relief, this Court should stay the effect of its mandates pending resolution of Defendants' appeal. Maintenance of the status quo will not harm the Alumnae Association, which has continued to function (and engage in protracted litigation) since receiving its notice of termination more than ten months ago. Defendants request this Court immediately stay its judgment pending completion of Defendants' appeal.

THIS, the 13th day of December, 2007.

Respectfully submitted,

DR. CLAUDIA A. LIMBERT, PRESIDENT; MISSISSIPPI UNIVERSITY FOR WOMEN; and MISSISSIPPI BOARD OF TRUSTEES OF STATE INSTITUTIONS OF HIGHER LEARNING

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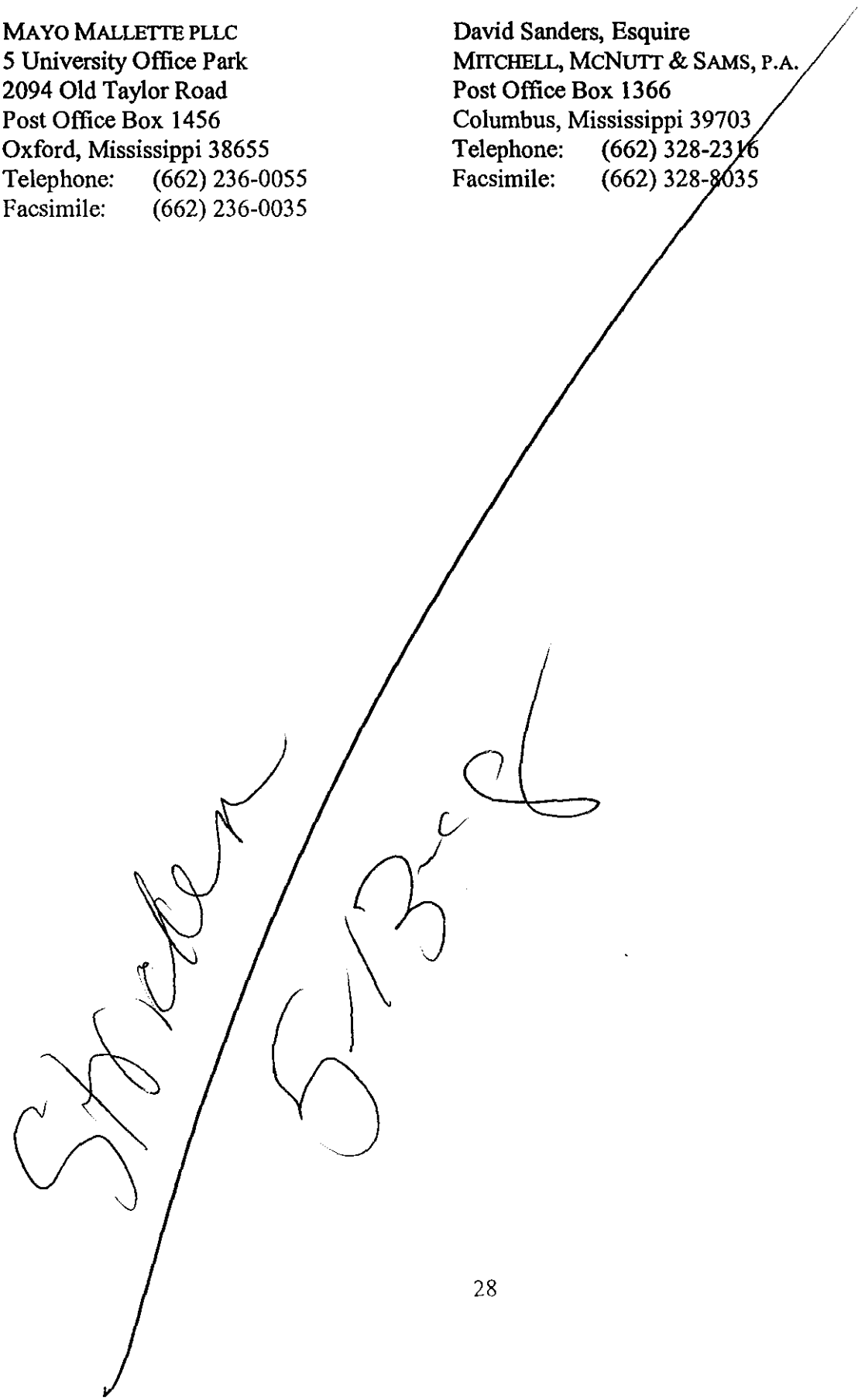

CERTIFICATE OF SERVICE

I, J. Cal Mayo, Jr., attorney for Defendants/Appellants, do certify that I have this date delivered by United States mail, postage fully pre-paid, and by electronic means a true and correct copy of the above and foregoing document to the following:

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THIS, the 13th day of December, 2007.

J. CAL MAYO, JR.

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IN THE CHANCERY COURT OF LOWNDES COUNTY, MISSISSIPPI

MISSISSIPPI UNIVERSITY FOR WOMEN ALUMNAE ASSOCIATION — PLAINTIFF

V.

FILED
JAN 28 2008
Chancery Clerk

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

BRIEF IN SUPPORT OF DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION TO ENFORCE JUDGMENT

The Alumnae Association leaders apparently want MUW's world turned upside down. Rather than have the Alumnae Association serve and support the mission of the University as determined by the University, the Alumnae Association leaders insist that the University serve and support the Alumnae Association. These leaders want the benefits of affiliation with the University (*e.g.*, use of its name, marks, employees and resources) without any of the obligations (*e.g.*, reporting requirements, fund raising limitations and conflict of interest policy). These leaders long ago lost sight of the Association's proper role in the life of the University and have again crossed the line between involvement and interference.

Now, under the guise of a "Motion to Enforce Judgment", the Alumnae Association is, in reality, asking this Court to alter and amend its Opinion and Judgment.[1] Specifically, the Alumnae

[1] *See* MRCP 59.

Association wants this Court to strike numerous provisions in the Affiliation Agreement and in effect to restructure the relationship between the University and the Alumnae Association - - - despite this Court's explicit command that the parties abide by the "existing and valid" Affiliation Agreement and despite express provisions of IHL Board Policy, which the Association ignores. At the least, the conduct of the Alumnae Association leaders makes clear that their goal was and is to exert significant control of the University free from any obligation to otherwise support its administration.

If this Court will not permit the University to sever its relationship with the Alumnae Association despite its leaders' disruptive actions, this Court should, at the least, require the Alumnae Association to fulfill its contractual obligations and reject the Association's request to re-write the terms of its relationship with the University. Alternatively, if this Court accepts the Alumnae Association's contention that the Affiliation Agreement "is not a valid contract" without the drastic revisions it demands,[2] the Court should declare the Affiliation Agreement null and void, ending the relationship between the Alumnae Association and the University.

Alumnae Association's New Affiliation Agreement

In its Opinion and Judgment, this Court determined that the Alumnae Association and its representatives were trying to control the management and leadership of the University and to remove Dr. Claudia Limbert as President.[3] The Court further found that the Association's criticisms of Dr. Limbert and her administration were "unmerited" and that Dr. Limbert had "well-grounded" fears that Association leaders were "interfering with the administration of university business".[4]

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[2]*See* Pl.'s Brief in Support of Motion to Enforce Judgment, p.11 (December 18, 2007).

[3]*See* Opinion and Final Judgment, p. 8 (Ex. "A" to Pl.'s Motion to Enforce Judgment).

[4]*Id.* at pp. 4 n.2, 5, 12 and 13.

Finally, the Court concluded that Dr. Limbert had the right to exercise her judgment in terminating the written Affiliation Agreement between the Association and the University.[5]

After discussing the problems that arose between the University and Alumnae Association leaders concerning the Association's proposed bylaws, the Court determined that Dr. Limbert acted in bad faith by her "refusal to approve the By-Laws" and her "action in terminating the agreement over the By-Laws". Ultimately, this Court granted the following relief:

> An injunction mandating that Dr. 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 is hereby ordered and entered. . . .

Within a few days after this Court issued its Opinion and Judgment, the Alumnae Association indicated that it would soon provide its Bylaws to the University,[6] apparently in a form different than the version represented to this Court at trial by the Association as acceptable.[7] In addition, the Association identified one provision of the Affiliation Agreement that it unilaterally deemed invalid.[8] Later, the Association changed its mind, indicating that numerous provisions of the Affiliation Agreement were no longer acceptable and that resolution of required modifications to the Affiliation

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[5] *Id.* at p. 9.

[6] *See* Email from Hussey to Mayo (October 10, 2007) (Ex. "A" to Defendants' Response to Motion to Enforce Judgment).

[7] *See* Letter from Compretta to Mayo with attached proposed Bylaws (January 29, 2007) (marked as Trial Exhibit "P-7") (Ex. "B" to Defendants' Response to Motion to Enforce Judgment).

[8] *See* Email from Hussey to Mayo (October 10, 2007) (Ex. "A" to Defendants' Response to Motion to Enforce Judgment).

Agreement was a prerequisite to addressing any other issues.[9] For weeks, the University awaited delivery of the Bylaws and the Association's modified affiliation agreement.

Eventually, the Association provided to the University a proposed set of Bylaws and a Constitution totally different from the Bylaws presented to the University in January 2007 and to the Court at trial.[10] In addition, the Association forwarded to the University a new affiliation agreement.[11] According to the Alumnae Association, this Court's Opinion "supports each of the changes in the 'redline' version" of the affiliation agreement.[12]

The Alumnae Association now interprets this Court's Opinion and Judgment as drastically revising the Affiliation Agreement entered with the University on October 26, 2006. Based on a severability provision[13] that provides for survival of the balance of the Agreement if any provisions are declared "invalid or non-enforceable", the Association suggests that this Court in fact silently struck numerous provisions, resulting in a new affiliation agreement. In the process, the Alumnae

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[9]*See* Email from Gore to Mayo (November 15, 2007) (Ex. "C" to Defendants' Response to Motion to Enforce Judgment) ("The affiliation agreement is the contractual cornerstone of the Association's relationship with the University. Until we can reach an agreement on the changes required to the affiliation agreement, it is unwise to attempt to address issues that may or may not be relevant to the affiliation agreement.").

[10]*See* Email from Gore to Mayo with attached proposed bylaws and constitution (November 29, 2007) (Ex. "D" to Defendants' Response to Motion to Enforce Judgment).

[11]*See* Email from Gore to Mayo with attached "redline" affiliation agreement (November 30, 2007) (Ex. "E" to Defendants' Response to Motion to Enforce Judgment).

[12]*Id.*

[13]*See* Affiliation Agreement, § 8.6 (Ex. "K" to Pl.'s Motion to Enforce Judgment).

Association ignores another provision expressly requiring "mutual assent" for any amendment to the Affiliation Agreement.[14]

As an initial matter, the Alumnae Association's position as to the effect of this Court's Opinion and Judgment contradicts the relief requested by the Association and the relief granted by this Court. The Association never asked this Court to amend the Affiliation Agreement or to renegotiate this fundamental document establishing its relationship with the University. To the contrary, the Association specifically asked this Court to mandate its continued enforcement.[15]

The changes now demanded for the first time by the Alumnae Association go to the heart of the relationship between the University and the Association and violate numerous provisions of the IHL Policy that govern Mississippi's public universities' relationships with affiliated entities. For example, the Alumnae Association argues that this Court's Opinion and Judgment resulted in the following changes to the Affiliation Agreement:

i) deleted a provision requiring an annual audit of the Association's books and records, as specifically required by IHL Policy;[16]

ii) deleted provisions permitting the University to audit the Association's expenditure of any University funds provided to the Association and requiring an annual report specifying how University resources were used and the benefits to the University from this use;

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[14]*Id.* at § 7.3.

[15]After trial, the Alumnae Association requested that this Court mandate Dr. Limbert, the University and the IHL Board "uphold the existing and valid affiliation agreement between the Association and the University, dated October 25, 2006", and "operate under the affiliation agreement in good faith for the duration of the agreement . . .". *See* Pl.'s Post-Trial Brief, p. 25 (July 23, 2007).

[16]The Association has apparently conceded that this particular demanded modification violates IHL Policy. *See* Pl.'s Brief in Support of Response to Defendants' Motion for Stay of Judgment Pending Appeal, pp. 19-20 (January 14, 2008).

iii) deleted a provision prohibiting the use of the University's names, symbols and logos after termination, as provided by IHL Policy;

iv) deleted provisions prohibiting the Alumnae Association from applying for 501(c)(3) status and engaging in fund raising activities in competition with the University's Foundation and from entering transactions that create liability for the University;

v) added a provision making the Alumnae Association the University's exclusive affiliated alumni group;

vi) deleted a provision clarifying that the Alumnae Association has no legal entitlement to University funding, personnel or resources;

vii) added a provision requiring the University to grant "in good faith" any reasonable request made by the Alumnae Association for an IHL employee to hold a voting position on the Association's Board, in direct violation of IHL Policy;

viii) deleted a provision requiring the Alumnae Association to have a conflict-of-interest policy, as specifically required by IHL Policy;

ix) deleted a provision requiring that the officer nomination process "be an inclusive process designed to achieve representation that reflects the membership of the alumni"; and

x) added a provision altering the agreement from one terminable "at will" to one terminable only on a "good faith basis".

Simply stated, the University would never have signed and the IHL Board would never have approved an affiliation agreement in the form that the Alumnae Association now wants this Court to force on the University. The Association exercised its "free will" when it negotiated and signed the Affiliation Agreement, while represented by the Mike Moore Law Firm. If the Association no longer wants the benefit of its bargain, this Court should accept the Association's recommendation and declare the Agreement invalid, thus ending its relationship with the University.

Not only is the Association wrong substantively, the Alumnae Association's requested post-trial relief is also procedurally barred. MRCP 59(e) allows a party ten days to request that a court alter or amend a judgment. The Association never made any such request, and this Court should not permit the Alumnae Association to do so at this late date, more than 90 days after entry of the Opinion and Judgment while this matter is pending on appeal.

Alumnae Association's Misconduct

Attempting to mask its true goal of re-writing the Affiliation Agreement, the Alumnae Association continues with the same misconduct cited by this Court in its Opinion and Judgment, i.e., "unmerited" *ad hominem* attacks on Dr. Limbert, undermining of University administration and efforts to manage the University. The baseless claims in the Association's Brief in Support of Motion to Enforce Judgment are prime examples of the Association's unchanged *modus operandi*.

1. PIE Council Member

The Alumnae Association asked the University to appoint a member of its Board of Directors to the University's PIE Council. The Association then provided the University with information indicating that Dr. Eddie Betcher, who serves as Chair of the University's Foundation, was a member of the Association's Board. The University appointed Dr. Betcher to the PIE Council.[17]

Later, the Association changed its mind and decided that Dr. Betcher was not a member of its Board. Instead, the Association indicated that Dr. Gary Bouse, who serves as President of the Foundation, was a member of its Board.[18] As Dr. Bouse is a member of the PIE Council, the

[17]*See* collective Emails (Ex. "F" to Defendants' Response to Motion to Enforce Judgment).

[18]*Id.*

Association's Board is represented on the Council.[19] The University does not understand the Association's confusion on this situation. Regardless, this is an example of the Association attempting to micro manage University operations.

2. Association Member/Alumni List

The Association's request for information from the Office of Alumni Relations has changed over time. Initially, the Association wanted a list of its members. As communicated to the Association, the University understands that, at one time, the Association's bylaws required annual contributions to the University's Foundation as a prerequisite for active membership status.[20] In cooperation with the University's Foundation,[21] the Office of Alumni Relations has previously provided such a list of Association members who had made these annual contributions. However, as the University understood that the Association had or was changing its bylaws, the University requested that the Association confirm its new membership classifications and criteria.

The Association has now changed its request, seeking a list of all University alumni. Contrary to the Association's suggestion, all alumni are not members of the Association. Moreover, the University does not own or maintain a current list of alumni. Periodically, the University will request and use information from the Foundation (which does maintain such a database) about the University's alumni.

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[19] *See* Affidavit of Dr. Gary A. Bouse, ¶ 9 (January 18, 2008) (Ex. "G" to Defendants' Response to Motion to Enforce Judgment).

[20] *Id.* at ¶ 7.

[21] The University's Foundation is a separate legal entity with its own independent Board of Directors. *Id.* at ¶ 4.

As the University has indicated to the Alumnae Association, the University has an alumni directory prepared in 2002 that is available for sale. In addition, the University is in the process of creating a new alumni directory, which will be completed and available for purchase shortly.[22]

3. Foundation Accounts

As it did at trial, the Alumnae Association refuses to accept certain uncontroverted truths about the various accounts mentioned by the Association in its Brief.

First, neither the University nor the Association owns the funds held in these various accounts. The accounts are owned and maintained by the University's Foundation. Certain persons serve as account managers for the accounts, but, ultimately, the funds are spent in accordance with Foundation procedure.[23]

Second, Dr. Limbert has no signatory or other authority over the spending of these funds. While she did create one of the funds (Stovall Account) for the benefit of a state-owned building that houses the University's Office of Alumni Relations, she is not the account manager and does not sign the checks to spend the funds from the account. Dr. Limbert has never taken funds from these accounts and does not owe any money to the accounts. Just as the Association's President has previously admitted wrongfully accusing Dr. Limbert of stealing property,[24] the Association's statement that Dr. Limbert has misappropriated funds is another example of its leaders' malicious intent toward Dr. Limbert.

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[22] *Id.* at ¶ 8

[23] *Id.* at ¶ 6

[24] *See* Pl.'s Opposition to Counter-Claimant University's Motion for Preliminary Injunction, p.9 (May 7, 2007) ("Limbert wrongfully seized property and funds belonging to [the Association], and has not returned the stolen property and funds to the Association . . . .").

Third, contrary to the Association's suggestion in its Brief,[25] this Court did not address these accounts at any point in its Opinion and Judgment. Nor could it do so. The Foundation is not and never has been a party to these proceedings. While the Association did subpoena volumes of documents from the Foundation at great expense to the Foundation (for which the Association has failed to reimburse the Foundation), the Association never used any of this information at trial.

In sum, if the Association has any issues concerning any accounts at the Foundation, the Association should take up those issues with the Foundation. The University does not own or control those funds, as made clear at trial.

4. Alumni Association[26]

Since this Court's ruling on October 1, the University has not provided any support to the Alumni Association.[27] The University is not aware of any meetings that the organization has conducted and has not been invited to any such meetings. After October 1, the University has not represented the Alumni Association as its official affiliated alumni association. In early October, the University removed the link on its website to the Alumni Association's website. On the other

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[25] *See* Pl.'s Brief in Support of Motion to Enforce Judgment, p.6.

[26] The Alumnae Association's continued use of the phrase "Dr. Limbert's appointed" to identify the Alumni Association reflects a disregard for the undisputed facts and a disdain for the thousands of MUW alumni who have chosen to avoid participation in the Alumnae Association's organization. Dr. Limbert appointed a single person (Andrea Overby, an alumna of the University) to lead a committee of Ms. Overby's choosing to study and make recommendations to the University concerning development of a positive relationship with its affiliated alumni association. From there, many MUW alumni volunteered their time and energy to address and resolve the problems created by the Alumnae Association leaders.

[27] *See* Bouse Affidavit, ¶ 5 (Ex. "G" to Defendants' Response to Motion to Enforce Judgment).

hand, as reflected by the emails,[28] the University has coordinated several meetings and events for the Alumnae Association, including an on-campus meeting of its Board of Directors in October.

The Association is correct that the IHL Board has not taken formal action to rescind the affiliation agreement. First, there is no need for formal action in the light of the Court's Opinion and Judgment, which the University has fully honored.

Second, as reflected in the emails the Alumnae Association provided to the Court, the University, Dr. Limbert and the IHL Board have attempted in good faith to resolve the issues with the Alumnae Association in a manner which would include a merger or joinder of the Alumnae Association and the Alumni Association. Unexpectedly, the Alumnae Association ceased discussions with the University and the IHL Board on November 12. Then, after weeks of requests from the University, the Alumnae Association finally provided the University with its version of the "existing and valid" affiliation agreement. For reasons already discussed, the University, Dr. Limbert and the IHL Board immediately asked this Court to stay the judgment, which motion is still pending before this Court.

In conclusion, the only affiliated alumni association with which the University has maintained any dealings since October 1, 2007, is the Alumnae Association.

5. Communications Between Litigants

The Alumnae Association leaders have taken a simple litigation-created necessity and conducted a smear campaign against Dr. Limbert and the University. Once again, the misconduct of the Association's leaders reflects the difficulties encountered by the University in attempting to have a meaningful relationship with this organization.

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[28] *See* n.30, *infra*.

Following the Opinion and Judgment as Defendants considered pursuing an appeal, the parties agreed that all communications between the parties should flow through legal counsel to ensure effective communication and to avoid misunderstandings. Ultimately, Defendants did pursue their appeal, so the limitations on direct contacts remained in place and will remain in place during the pendency of the appeal.[29]

Contrary to the Association's suggestion, however, none of this has created any hardship. The Association has made numerous requests for assistance or information from the University. Typically, the University has either approved direct contact with the appropriate person on campus or has provided the requested information. By way of example, the University has quickly responded to numerous requests forwarded by the Alumnae Association, including those requests made a part of the Association's Motion to Enforce.[30]

The only problems have arisen from miscommunications from the Association's legal counsel to the University's alumni. As reflected in their emails, Ms. Hussey and Ms. Gore suggested to the University's alumni that all of them were members of the Association and that all of them (regardless of their need) should direct all communications "no matter how small" through legal counsel and could have no contact of any type directly with the University.[31] The Association's legal

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[29]Notably, the need to limit direct contact is made even more necessary by the fact that Kym Gore serves as President-elect of the Association and as one of its two legal counsel. Ms. Gore tends to routinely and without notice switch hats between lawyer and client. *See* Email from Gore to Mayo with attached letter from Gore to Bouse (November 30, 2007) (Ex. "H" to Defendants' Response to Motion to Enforce Judgment).

[30]*See* collective Emails (Ex. "I" to Defendants' Response to Motion to Enforce Judgment).

[31]*See* collective Emails (Ex. "J" to Defendants' Response to Motion to Enforce Judgment).

counsel knew this was false and knew that such a misrepresentation would simply create more confusion and dissension among the University's alumni.

As mentioned by the Alumnae Association, Defendants did suggest in October that certain non-lawyer representatives meet to discuss settlement. This became necessary as it was quite apparent that the Association's legal counsel had no desire to achieve a resolution. Unfortunately, after a couple of preliminary meetings, the Alumnae Association's leaders ended the process and refused to permit the Association's President, Susan Puckett, to have further discussions with Dr. Limbert.[32] The holding of such settlement discussions is not "highly irregular" but the abrupt and unexplained cessation of such discussions certainly is.

CONCLUSION

The Alumnae Association does not want to support the mission of the University as an "affiliated entity" normally would. Instead, the Alumnae Association wants to get rid of Dr. Limbert and take control of the University to manage for its purposes. This Court does not have to take any action to enforce the judgment, as it - - - for better or worse - - - is in full force and effect now. However, for those reasons already discussed, this Court should stay the judgment pending resolution of the appeal of this matter to the Mississippi Supreme Court. Alternatively, this Court should declare the Affiliation Agreement invalid and void, as suggested by the Alumnae Association.

[32]See collective Emails (Ex. "K" to Defendants' Response to Motion to Enforce Judgment).

THIS, the 21st day of January, 2008.

Respectfully submitted,

DR. CLAUDIA A. LIMBERT, PRESIDENT; MISSISSIPPI UNIVERSITY FOR WOMEN; and MISSISSIPPI BOARD OF TRUSTEES OF STATE INSTITUTIONS OF HIGHER LEARNING

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CERTIFICATE OF SERVICE

I, J. Cal Mayo, Jr., attorney for Defendants/Appellants, do certify that I have this date delivered by United States mail, postage fully pre-paid, and by electronic means a true and correct copy of the above and foregoing document to the following:

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ATTORNEYS FOR PLAINTIFF/APPELLEE

THIS, the 21st day of January, 2008.

J. CAL MAYO, JR.

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ROY WHITE and KEVIN WHITE,
d/b/a R. & K. TIMBER **APPELLANTS**

Versus **NO. 2007-WC-01212-COA**

GEORGE LEE DUKES **APPELLEE**

BRIEF OF APPELLEE

Oral Argument Requested

Appeal From: The Circuit Court of Newton County

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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ROY WHITE and KEVIN WHITE,
d/b/a R. & K. TIMBER **APPELLANTS**

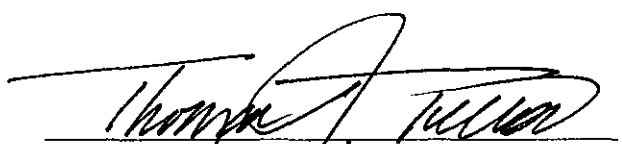
Versus **NO. 2007-WC-01212-COA**

GEORGE LEE DUKES **APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judiciary may evaluate possible disqualification or recusal.

1. George Lee Dukes, Appellee
2. Thomas L. Tullos, Attorney for Appellee
3. Roy White ,Appellant
4. Kevin White, Appellant
5. Steven D. Slade, Esq. Attorney for Appellants
6. Honorable Marcus D. Gordon-Circuit Court Judge, Newton County
7. Mississippi Workers' Compensation Commission, Phyllis Clark, Secretary
8. Joe Jordan, Co-Claimant



THOMAS L. TULLOS

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2. THE RULING OF THE COMMISSION CORRECTLY APPLIED THE LAW IN REGARDS TO REQUIRING THE EMPLOYERS TO OBTAIN WORKERS' COMPENSATION INSURANCE COVERAGE PRIOR TO THE TIME THAT THE CLAIMANT SUFFERED AN ON THE JOB INJURY.

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STATEMENT OF THE CASE

This case deals with whether or not the job related injury suffered by the Claimant, George Lee Dukes, falls within the ambit of the Workers' Compensation Act (hereinafter referred to as the Act). The Claimant asserts that it does, but the appellants, the employers herein, argue that they did not fall within the requirements of the Act at such time as the Claimant was injured.

The Claimant was injured on July 16, 2003. He subsequently filed his motion to controvert, and on May 11, 2006, the ALJ rendered an Order finding that the Claimant's injury did fall within the act and awarded the Claimant benefits. The employers filed an appeal to the full commission. On November 9, 2006, the full commission affirmed the ruling of the ALJ. (R.E. 1,2)

Thereafter, the employers filed an appeal to the Circuit Court of Newton County. On June 29, 2007, the Circuit Court affirmed the full Commission. (R.E. 3)

George Dukes and Joe Jordan were employed by Kevin and Roy White in the latter part of June, 2003, as saw hands in their logging operation. They were paid $90.00 per day. It should be noted that the Claimant had worked for Hickory Timber Company which had gone out of business in December, 2002. Hickory Timber had been owned by Roy White's wife but was managed by Roy White.(Tr. 17, 18, 19, 20, 28, 31, 32, 33).

Thereafter, Roy White decided to go back into the logging business. In late June, 2003, he hired the Claimant and six other men as his work force. The logging operation started in earnest in the last week of June, 2003. The Whites regularly employed two saw hands, a skidder operator, a mechanic, two truck drivers, and a foreman.

(Tr. 22, 23, 25, 26, 28, 29, 32, 35, 36, 51, 52, 53, 54, 116, 117, 118, 119, 128, 129, 130)

For reasons best known unto themselves, the Whites wrote payroll checks on June 27, 2003, but paid their employees in cash for the weeks ending July 4 and July 11,2003 Although the claimants worked three (3) days during the week ending July 18, only one payroll check was written for one (1) member of the whole logging crew and that check was payable to Joe Jordan. George Dukes was not paid for almost a year. (Tr. 62, 96, 97).

On July 16, 2003, the Claimant and Joe Jordan were severely injured while in the process of felling a tree. As the tree fell, another tree behind them fell upon them. No determination was ever made why this tree fell upon them.(Tr. 120)

The Claimant suffered a humeral fracture and an inferior subluxation. Since the accident he has had difficulty with finger grip and numbness over the left small finger. (See Dr. Robert Tiel's letter to Dr. Lon Alexander dated July 18, 2004, R.E. 4)

After his injury, the Claimant discovered that the Whites did not have workers' compensation insurance. However, the Whites had taken out a disability policy for their employees which did pay a few weeks of disability payments to Dukes. On the benefits schedule page, Roy White gave the information that he had seven (7) employees as of June 24, 2003.(Tr. 60, 61) (R.E. 5)

The Whites did eventually obtain workers' compensation insurance on July 28, 2003. However, this coverage did not provide any benefits to Jordan or Dukes. (Tr. 89)

The Whites did file a motion to bifurcate after March 29, 2005. At the hearing on April 4, 2005, their attorney said " It was my, suppose a suggestion - it was in the form of a motion, but it was my suggestion to the Commission to do it that simply to - to clarify the record and separate the record as to what portion of the hearing addressed which

issue." The Administrative Law Judge overruled the motion and proceeded to trial. But no harm accrued to the Whites. (Tr. 12, 13, 14)

At the hearing it became painfully apparent that the Whites kept poor records and paid by cash. During discovery the Appellee requested copies of all documents which would reflect how much had been paid to Jordan and Dukes. Roy White testified that he did have a time book which would reflect days and hours worked by his employees, but he had not looked for it and did not produce it. (Tr. 48, 49)

SUMMARY OF THE ARGUMENT

1.

Pursuant to § 71-3-5, Miss. Code Ann., 1972 as amended, employers fall within the ambit of the Mississippi Workers Compensation Act if the employer:

> ... have in service five (5) or more workmen or operatives regularly in the same business or in or about the same establishment under any contract of hire, express or implied.

The Mississippi Supreme Court in Jackson v. Fly, 65 So.2d 782, 784-785 (Miss. 1952) defined the meaning of "regularly employed" as:

> .... all employment in the usual course of trade, business, profession or occupation of the employers, the question whether the number of men employed is such as to bring the employer within the act is to be determined by the character of the work in which they are employed, however brief or long, and not by the character of the employment, whether regular, casual, occasional, periodical, or otherwise, so long as they are hired to do work in the common or usual business of the employer.

In the case at bar the employers had seven (7) "regularly employed" workmen. Therefore, the employers fell within the Act.

2.

This is a workers' compensation case--not a criminal case nor a divorce action based upon a charge of uncondoned adultery. The appropriate standard of proof is by a preponderance of the evidence--not beyond a reasonable doubt nor by clear and convincing evidence. Further, doubtful claims should be resolved in favor of compensation, so as to fulfill the beneficial purpose of statutory law.

3.

Pursuant to § 71-3-7, Miss. Code Ann. 1972, compensation shall be payable for the disability of an employee from injury arising out of and in the course of his employment, and every employer who falls within the Act is liable for and shall secure the compensation payable to the employee. Further, an employer's liability under the Act is not affected by his failure to obtain insurance.

4.

The Commission was not in error when it ruled that certain occupational accident benefits were not creditable as payments made "in lieu of compensation." Further, the Commission did not err when it ruled that the Claimant did not make an election of his remedy by accepting benefits payable under an accident policy.

ARGUMENT

STANDARD OF REVIEW

An appellate court must defer to an administrative agency's findings of fact if there is even a quantum of creditable evidence which supports the agency's decision. Hale vs. Ruleville Health Care Center, 687 So.2d 1221, 1224 (Miss. 1997). " This highly deferential standard of review essentially means that this Court and the circuit courts will not overturn a Commission decision unless said decision was arbitrary and capricious." *Id.* at 1225; Georgia Pacific Corporation vs. Taplin, 586 So.2d 823 (Miss. 1991).

The Mississippi Supreme Court has held:

> We do not sit as triers of fact; that is done by the Commission. When we review the facts on appeal, it is not with an eye toward determining how we would resolve the factual issues were we the triers of fact; rather, our function is to determine whether there is substantial and creditable evidence to support the factual determination by the commission.

South Central Bell Telephone Co. vs Aden, 474 So.2d 584, 588 (Miss. 1985). Stated differently, this court may reverse the Commission's order only if it finds that order clearly erroneous and contrary to the overwhelming weight of evidence. Myles v. Rockwell Int'l., 445 So. 2d 528, 536 (Miss. 1983) (citing Masonite Corp. v. Fields, 229 Miss. 524, 91 So. 2d 282 (Miss. 1956)); Riverside of Marks v. Russell, 324 So.2d 759, 762 (Miss. 1975). Appellate courts may not simply reweigh the evidence and substitute its decision for that of the Commission. Indeed, this court has a duty to defer to the Commission when its decision can be supported. Fought v. Stewart C. Irby Co., 523 So. 2d 314, 317(Miss. 1988).

ISSUES

ISSUE NO. 1

THE COMMISSION'S RULING WAS APPROPRIATE, DID APPLY THE CORRECT LEGAL STANDARD, AND WAS SUPPORTED BY A PREPONDERANCE OF THE EVIDENCE

A.
PREPONDERANCE OF THE EVIDENCE VERSUS CLEAR AND CONVINCING PROOF

The employers are attempting to require Dukes to prove his case, not by a preponderance of the evidence, but by clear and convincing proof. This is not a quasi- criminal case. § 71-3-83, Miss. Code Ann., 1972, is not the controlling statute in this case. It plays no part in this case. § 71-3-83 is a penal statute that places a monetary fine and up to a year in jail upon an employer for failure to secure the payment of compensation to an injured claimant. The claimant is not attempting to have the employers fined nor incarcerated. Even if the claimant desired to do so, he could not in this case. In order to avail himself of §71-3-83, the claimant would have to employ the services of the criminal courts of Newton County, Mississippi. There, the employers would be entitled to mount a defense and be tried by a jury of their peers.

B.
APPROPRIATE STANDARD OF PROOF

The appropriate standard of proof in this case is by a preponderance of the evidence. "To establish entitlement to benefits under workers' compensation, the claimant bears the burden of proving by a preponderance of the evidence each element of the claim of disability." See: Bryan Foods, Inc. v. White, 913 So. 2d 1003, 1008 (Miss. App. 2005); Hedge v. Leggett & Platt, Inc., 641 So. 2d 9, 13 (Miss. 1994).

Further, "[D]oubtful claims should be resolved in favor of compensation, so as to fulfill the beneficial purpose of statutory law". See: Sharpe v. Choctaw Electronics Enterprises, 767 So. 2d 1002, 1006 (Miss.2000); Frito-Lay, Inc. v. Leatherwood, 908 So. 2d 175, 180 (Miss. App. 2005); Miller Transps., Inc. v. Guthrie, 554 So. 2d. 917, 918 (Miss. 1989); Walker v. Delta Steel Bldgs. and Builders, 878 So. 2d. 113, reh. den., cert. den., 878 So. 2d. 66 (Miss. App. 2003); Peco Foods of Mississippi v. Keyes ,820 So. 2d 775(Miss. App. 2002).

C.

CASE LAW DISTINGUISHED

It should be noted in two earlier cases involving employers who fell within the Act but who violated § 71-3-83, the Supreme Court did not state that the claimants had to prove that their claim fell within the Act beyond a reasonable doubt or by clear and convincing proof. In Pascagoula Crab Company v. Holbrooks, 94 So. 2d 233, 234 (Miss. 1957), the Court had the perfect opportunity to state that the claimant was laboring under an heightened standard of proof. But it did not. In Jackson v. Fly, 60 So. 2d 782 (Miss. 1952) the Court looked with disfavor upon the employer and said:

> ... The object of the statute is to shift the burden resulting from the accidents of our intense industrial activities from the employer to the general public. It is humane in its purpose, and its scope should be enlarged rather than restricted. Its provisions should be liberally construed, so as to include all services that can be reasonably said to come within them. pg. 786 .

The cases cited by the employers are not applicable to the case at bar. The employers first cite McFadden v. Miss. State Bd. of Medical Licensure, 735 So. 2d 145 (Miss. 1999). McFadden deals with a quasi-criminal situation whereby a physician is charged with prescribing pain narcotics to drug abusers without appropriate reason or control. The Court held that since

the licensure statutes and regulations at issue were penal in nature, then the Board was required to prove its case by clear and convincing evidence. (pg. 152).

In the case at bar, Dukes is only trying to obtain his rightful benefits. He is not attempting to penalize monetarily the employers nor is he trying to put them in jail. Simply put, this action is a civil action as opposed to a criminal or quasi-criminal action.

The employers reliance upon Miss. Transp. Com'n v. Dewease, 691 So. 2d 1007 (Miss. 1997) is misplaced. Dewease dealt with the narrow issue of whether or not penalties would be imposed for the untimely payment of medical benefits. It did not deal with the issue of whether or not the employer fell within the Act. But the Court did say:

> ...Workers Compensation claims, and the laws that govern them, are to be construed broadly and liberally in favor of the claimant. (at pg. 1016)

Finally, the employers rely upon Delchamps, Inc., v. Baygents, 578 So. 2d 620 (Miss. 1991). But this reliance is misplaced as well. Baygents deals with the imposition of the twenty percent (20%) penalty on unpaid disability installments as allowed pursuant to § 71-3-37 (6). The Court did not say that the issue of whether an employer falls within the Act should be strictly construed nor did it say that the claimant has to prove that the employer falls within the Act by anything more than a preponderance of the evidence. As a matter of fact, Baygents does not address this issue at all.

D.

THE COMMISSION FOLLOWED THE APPLICABLE LEGAL STANDARD IN REGARDS TO DETERMINING THAT THE EMPLOYER HAD FIVE OR MORE EMPLOYEES REGULARLY EMPLOYED AS REQUIRED BY § 71-3-5

§71-3-5, Miss. Code Ann., 1972, holds that the following employers shall fall within the parameters of the Act:

> Every person, firm and private corporation, including any public service corporation but excluding, however, all nonprofit charitable, fraternal, cultural, or religious corporations or associations, that have in service five (5) or more workmen or operatives regularly in the same business or in or about the same establishment under any contract of hire, express or implied.

In order to prove that the employer employed five or more workmen, the Claimant must meet this burden by the preponderance of the evidence. (See Claimant's argument in subpart B).

The employers wrongly assert that the phrase "regularly in the same business" has not been defined by Mississippi case law. To the contrary the phrase was very early on defined by the Supreme Court in Jackson v. Fly, 60 so. 2d 782 (Miss. 1952). (It should be noted that in 1952 an employer was required to employ eight (8) employees before he fell within the Act.) The Court quoted with approval 58 Am. Jur., Workmen's Compensation, §87, pg. 640, as follows:

> ... Under an act applicable to employers having not less than the specified number of workmen or operatives regularly employed, which defines the term 'regularly' as meaning all employments in the usual course of trade, business, profession or occupation of the employers, the question whether the number of men employed is such as to bring the employer within the act is to be determined by the character of the work in which they are employed, however brief or long, and not by the character of the employment, whether regular, casual, occasional, periodical, or otherwise, so long as they were hired to do work in the common or usual business of the employer. pg. 784-785.

In further definition of the word "regularly" the Court quoted Larson's Workmen's Compensation Law, Vol. 1, § 52.20, pg. 769:

> ...Since the practical effect of the numerical boundary is normally to determine whether compensation insurance is compulsory, an employer cannot be allowed to oscillate between coverage and

> exemption as his labor force exceeds or falls below the minimum from day to day. Therefore, if an employer has once regularly employed enough men to come under the act, he remains there even when the number employed temporarily falls below the minimum....
>
> * * * * *
>
> ....The word 'regularly' is not synonymous with constantly or continuously. The work may be intermittent and yet regular. Men may be regularly but not continuously employed... The word "regular" is used in the act as an antonym of the word "casual" and, when an employee is regular, or "regularly employed," he is not casual...pg 785

The Court then ruled that the employer, although he never had more than seven employees working at any time, did fall within the Act because he did "regularly" employ more than eight employees in his work. pg 785.

Fly was explicitly followed in Mosley v. Jones, 80 So. 2d 819, 821 (Miss. 1955), and Falco Lime v. Mayor of Vicksburg, 836 So. 2d 711 (Miss. 2002).

In the case at bar, the employers had employed seven (7) workmen in late June, 2003. These seven (7) men were regularly employed in the logging operation through the date of the accident, and all seven (7) men were actually on the job when this horrific accident occurred. (Tr. 28, 31, 32, 33, 35, 51, 52, 57, 58, 61, 85)

Based upon the testimony of the employers, they fall within the Act.

E.

THE WEIGHT OF EVIDENCE DID VERIFY THAT FIVE OR MORE WORKMEN WERE REGULARLY EMPLOYED BY THE EMPLOYERS

The claimant would incorporate his earlier arguments in regards to the fallacy of the employers' arguments that the claimant must prove by clear and convincing evidence that the

Employers regularly employed five (5) or more employees. The Employers' arguments are not sound in the law nor in the evidence.

From an evidentiary standpoint, the claimants would refer this Commission to Roy White's testimony at page 28 of the transcript:

> Well, I hired Mr. Dukes, and I hired Mr. Jordan; and I hired a couple of truck drivers. I think it was Tony Buckley and Mr. Avis Gibbs, I believe was driving the trucks.
>
> ****
>
> I had Mr. Dawkins out there as a foreman and also Mr. Albert Johnson, and they were kind of working as co-foremen when I first went back in the business...

Kevin White testified as follows on page 85:

> Q. All right. Mr. White, do you have personal knowledge of which employees worked on a day to day basis in that last month (sic) of June?
>
> A. I- of course, I know that Joe and George did, Albert Johnson, Don Dawkins. I don't remember Earlee for sure during that time, but he was out there on in through July, I know, and, of course, Arvis Gibbs and Tony Buckley drove, you know, our trucks.

In regards to payment records, it is clear that the Whites paid their employees with checks in June, 2003. The Claimant testified that he was paid in cash for the work performed for the first two weeks of July, 2004. (Tr. 117, 118, 131). It is interesting that Dukes' testimony was uncontradicted by the Whites. Roy White said that it was possible that he paid his employees in cash. (Tr. 59) Kevin White stated that he knew that his employees worked during the month of July, 2003, admitted that only one (1) paycheck was written in July, but he could not explain

how the other employees were paid during the rest of the month. (Tr. 95, 96). It should be noted that the Whites' bank statements reflected that only one (1) payroll check was written during the entire month of July, 2003, and that check was made payable to Joe Jordan. None of the other employees received a check even though the Whites admitted that the crew was working in July. (Tr.50, 52, 53, 54, 55, 80, 92, 93). It would seem logical that if the Whites did not pay by check then they paid in cash. There was also a good deal of contradictory testimony in regards to how many days were worked during the first two (2) weeks of July by the logging crew. George Dukes testified that the crew worked nine (9) days the first two (2) weeks and the first two and a half (2½) days the week in which he was injured. (Tr. 115, 116, 117, 118).

Interestingly, Roy White testified that he had a time book which would reflect the number of hours and days worked by his employees. However, he not only did not produce the purported time book but stated that he had not even looked for it. It would be logical to assume that the time book was not produced because its contents would have been adverse to the Whites' position (Tr. 48, 49, 50). Furthermore, on December 23, 2003, the Claimant served his First Request for Production of Documents upon the Whites. Request to Produce No. 6 asked them to produce all payroll and attendance records for the Claimant. The employers never produced nor gave any indication that any time book or books existed in regards to the Claimant. It can only be assumed that this information would have been contrary to the Whites' other testimony. (R.E. 6).

For the Whites to now complain that the claimant did not prove his case is contrary to the notion of fair play in light of the Whites' failure to produce relevant and material documents which would have been of aid to the Commission in deciding this case.

ISSUE II

THE RULING OF THE COMMISSON CORRECTLY APPLIED THE LAW IN REGARDS TO REQUIRING THE EMPLOYERS TO OBTAIN WORKERS' COMPENSATION INSURANCE COVERAGE PRIOR TO THE TIME THAT THE CLAIMANT SUFFERED AN ON THE JOB INJURY.

The appellee objects to this issue being raised at this late date. Impossibility to obtain workers' compensation coverage was not raised as an affirmative defense in the answer to the petition to controvert. (R.E.7, 8, 9) Neither Roy White nor Kevin White ever testified that it had been impossible to obtain workers' compensation coverage. The thrust of their testimony was that they were not subject to the Act and, therefore, not required to obtain coverage.

The only testimony about this particular matter is to be found on pages 86 and 87 of the transcript. Kevin White testified that they, the employers, had not even attempted to get worker's compensation before late July, 2003, which was after the Claimant was injured. They had not talked to anyone about procuring coverage. Therefore, it would seem that the employers' argument that they could not obtain coverage is meritless in view of the fact that they did not attempt to get coverage at all until after the Claimant and Joe Jordan were injured. However, they were able to get coverage when they did apply for it. As a matter of fact, the employers obtained coverage on July 28, 2003, twelve days after the accident.(Tr. 88)

From a close reading of Kevin White's testimony, it is clear that the employers did not obtain coverage until twelve days after the accident because of a decision made on their part to limit the expenses of their logging operation--not because of the impossibility of obtaining coverage. (Tr. 89)

The argument of the appellants runs counter to the requirements of the Act. § 71-3-7, Miss. Code Ann., 1972 as amend., states as follows:

> Compensation shall be payable for disability or death of an employee from injury or occupational disease arising out of and in the course of employment, without regards to fault as to the cause of the injury or occupational disease...
>
> * * * * *
>
> Every employer to whom this chapter applies shall be liable for and shall secure the payment to his employees of the compensation payable under its provisions.

Based upon this statute there is no waiting period, no grace period, allowable to the employer. If the employer falls within the Act and an employee is injured in the course of his employment, then the employer shall be liable for the payment of compensation to and for the benefit of the employee. Further, the Mississippi Supreme Court in Dawson's Dependents v. Delta W. Exploration Co., 245 Miss. 335, 147 So. 2d 485 (1962) held that an employer's liability under the Act is not affected by his failure to obtain insurance.

ISSUE III

THE RULING OF THE COMMISSION WAS CORRECT IN RULING THAT THE CLAIMANT DID NOT WAIVE HIS RIGHTS TO WORKERS' COMPENSATION BENEFITS BY ACCEPTANCE OF BENEFITS PAID UNDER AN AIG POLICY AND FURTHER THAT THE EMPLOYERS ARE NOT ENTITLED TO A CREDIT FOR PAYMENTS MADE UNDER THIS POLICY

A.

SHOULD LINDEN LUMBER COMPANY HAVE BEEN DISMISSED FROM THE CASE

The Claimant takes no position in regards to whether or not Linden Lumber should have been dismissed from the case. The Claimant looks to Roy White and Kevin White for satisfaction of his workers' compensation benefits.

B.

DID THE CLAIMANT WAIVE HIS RIGHTS TO WORKERS' COMPENSATION BENEFITS WHEN HE WAS PAID BENEFITS UNDER AN ACCIDENT POLICY

In regards to the issue of whether the claimant waived his rights to workers' compensation benefits, the claimant denies that the payment of certain medical bills and a few disability payments by the AIG policy terminated his rights to benefits pursuant to the Act. The argument of the employers flies in the face of long established precedent in Mississippi. See: Riddell v. Cagle, 227 Miss. 305, 85 So. 2d 926 (1956). In Miss Workers' Compensation, Dunn 3rd Ed., §24, we find the following language.

> Non-waiver by acceptance of either benefits. The exclusiveness of the Act is also applied when the beneficiaries elect to claim compensation, and in such event liability is imposed without reference to other forms of insurance benefits which may have been secured, in lieu of compensation insurance, by the employer for the benefit of the employee or his dependants. Thus, liability under the Act is not discharged, in whole or in part, by the payment and acceptance of the proceeds of a life and accident policy taken out by the employer for the benefit of the employee and his dependents and such payment may not be considered as an advance payment of compensation.

The mere fact that the Claimant received certain benefits does not take this case from within the Act. If it did, then every employer who has procured disability policies and accident policies for their employees would immediately terminate them for fear that payment and acceptance of benefits would destroy the exclusivity of the Act.

C.

ARE THE EMPLOYERS ENTITLED TO A CREDIT FOR BENEFITS PAID UNDER THE AIG POLICY

The employers also argue that they are entitled to credit for any payments made pursuant

to the AIG policy. Although the employers argue that these benefits were paid in lieu of workers' compensation benefits, and should be credited accordingly, the policy in question is not, by its own terms, a workers compensation policy. Instead, this policy specifically provides that the benefits provided thereunder are not in lieu of workers' compensation benefits, but are instead separate benefits payable outside the applicable workers' compensation law. Even the employer admits this was a "non-compensation common law insurance policy."

In Sawyer v. Dependents of Head, 510 So.2d 472 (Miss. 1987), an uninsured employer was sued in tort, and also under the Workers' Compensation Law, by the dependants of a deceased employee, and was allowed to take credit against his workers' compensation liability for certain common law liability payments paid on his behalf. The Court reasoned that, under Miss. Code Ann. §71-3-71, (rev. 2000), any common law recovery obtained by a claimant should be credited against the claimant's workers' compensation recovery, whether the common law recovery arises from a claim made against a third party, or against the employer itself. 510 So. 2d at 476-480. There is no issue here arising under § 71-3-71, and no separate common law liability claim has been filed against the Employers.

In the case at bar, the uninsured employers did not pay benefits to the Claimant as the result of a common law liability claim filed against them. Instead, the claimant received payments under the terms of a non-workers' compensation occupational accident insurance policy. In Riddell v. Cagle's Estate, 85 So.2d. 926 (Miss. 1956), the dependants of a deceased worker filed a claim for workers' compensation benefits against the employer who "neither secured insurance to cover his [workers' compensation] liability nor became a self insurer." 85 So.2d at 926. Instead, the employer secured an accidental death insurance policy, and upon the death of his employee, this policy paid the widow $5,000.00. When the widow and children were

awarded workers' compensation benefits, the employer sought credit for the accidental death benefits paid under the aforementioned policy. 85 So. 2d at 96.

The Court denied the employer credit for these payments, and stated:

> The Commission did not approve Riddell's unorthodox method of protecting himself against liability for workmen's compensation benefits; and obviously would not have done so if it had been called on for that purpose. The policy did not purport to pay workmen's compensation benefits.
>
> * * * * *
>
> The appellant's act in purchasing the $5,000 policy on the life of Cagel did not release him from liability to Cagle's widow and dependents for such benefits as they are entitled to under the Workmen's Compensation Act.

85 So.2d at 927.

This decision was later upheld in Hedgepth v. Fair, 418 So. 2d. 814 (Miss. 1982), a similar case where an uninsured employer sought credit for $5,000.00 in life insurance benefits which had been secured by the employer and which were paid to the dependants of an employee killed on the job. As in the present case, the employer contended that "because he had voluntarily purchased the policy, the payment of [proceeds by the] insurance company constituted an advanced payment of compensation within the purview" of the Workers' Compensation Law, and should be credited against the employer's worker's compensation accordingly. 418 So.2d at 815.

The court rejected this claim because the employer "was neither a self-insurer nor otherwise within the act" which, in turn, belies its claim that benefits paid under a policy of insurance completely separate from and outside of the Workers' Compensation Law should be considered an advance payment of workers' compensation benefits, or a payment in lieu of workers' compensation benefits. 418 So. 2d at 815-816.

The upshot of these cases is that an employer subject to the Workers' Compensation Law may not evade the requirements thereof, and once caught, excuse their or mitigate their actions by offering completely unrelated insurance policies or proceeds as a substitute for proper workers' compensation insurance or approved self insurance. Otherwise, employers would feel perfectly free to evade the Workers' Compensation Law, knowing that if a cheaper insurance alternative could be found, this would be sufficient to discharge their workers' compensation liability.

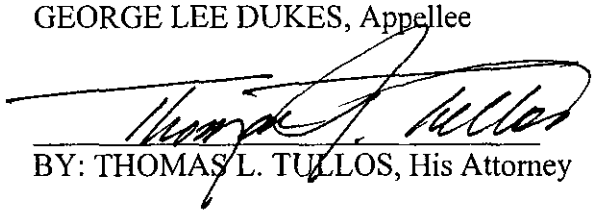
Employers may provide other disability or accident related benefits which are, as in Western Electric, Inc. v. Ferguson, 371 So.2d. 864 (Miss. 1979, "complementary to the compensation act."; but, they cannot evade the requirements of this Act and try to substitute a non-workers' compensation insurance policy in the place of acceptable workers' compensation insurance.

CONCLUSION

The Claimant suffered a severe injury on July 16, 2003, while in the course and scope of his employment. The employers had at least seven workmen regularly employed in their business at the time of the accident. For reasons best known unto themselves, they failed to have workmen's compensation insurance. They were under a clear legal duty to have the claimant covered by workers' compensation insurance. The record is clear that they simply failed to procure the insurance. From a close review of the employer's testimony it is obvious that they failed to procure the coverage because they simply did not want to incur the added expense. If the employers did not want to run the risk of personal liability, then they should not have started their work activities until they had procured the insurance coverage.

The employers have done all within their power to avoid their duties and responsibilities under the law in this matter. More than four years have elapsed since the claimant was injured. It is high time for the employers to step up to the plate and shoulder their moral and legal responsibilities.

Respectfully Submitted,
GEORGE LEE DUKES, Appellee



BY: THOMAS L. TULLOS, His Attorney

CERTIFICATE OF SERVICE

I, Thomas L. Tullos, attorney for George Lee Dukes, Appellee, do hereby certify that I have delivered by U. S. Mail, postage prepaid, the foregoing Brief of Appellee to:

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Mississippi Workers' Compemsation Commission
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This the 14 day of December, 2007.

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