STATE OF VERMONT

SUPERIOR COURT **CIVIL DIVISION**
Addison Unit **Case No. 23-CV-01214**

Hon. James H. Douglas,	)
Special Administrator of the	)
Estate of John Abner Mead,	)
Plaintiff	)
v.	)
	)
The President and Fellows of	)
Middlebury College	)
Defendant	)

PLAINTIFF'S MOTION FOR INTERLOCUTORY APPEAL

NOW COMES Plaintiff, Honorable James H. Douglas, Special Administrator of the Estate of John Abner Mead, by and through his attorneys of the firm Valsangiacomo, Detora & McQuesten, P.C., and pursuant to Rule 5(b)(1)(a) of the Vermont Rules of Appellate Procedure, hereby respectfully requests that this Honorable Court grant permission for Plaintiff to appeal the Court's decision granting in part, Defendants' Motion for Summary Judgment and submits the following Memorandum of Law in support thereof:

MEMORANDUM OF LAW

I. **Introduction**

Plaintiff requests that the Trial Court grant permission to appeal its decision on Defendant's Motion for Summary Judgment, which removed from the jury's consideration, the terms of the contract and intent of the parties with regard to the naming of the "Mead Memorial Chapel," instead imposing a 100-year time limit as a matter of law based upon one case which factually, is vastly dissimilar to the case at bar. Therefore, Plaintiff respectfully disagrees with the Court's decision and seeks permission for Interlocutory appeal to the Vermont Supreme Court.

II. Legal Standard for Interlocutory Appeal

The Vermont Rules of Appellate Procedure Rule 5(b) allows for appeal of interlocutory orders:

> On any party's motion in a civil action, the superior court must permit an appeal from an interlocutory order or ruling if the court finds that (A) the order or ruling involves a controlling question of law about which there exists substantial ground for difference of opinion; and (B) an immediate appeal may materially advance the termination of the litigation.

V.R.A.P. 5(b)(1). In granting a Motion for Interlocutory Appeal, the Vermont Supreme Court applies the legal standard under V.R.A.P. 5(b) as follows:

> V.R.A.P. 5(b) provides that a court must grant interlocutory review if three requirements are met: (1) the order or ruling must "involve[] a controlling question of law"; (2) there must be "substantial ground for difference of opinion" regarding that question; and (3) "an immediate appeal may materially advance the termination of the litigation." V.R.A.P. 5(b)(1); see also 12 V.S.A. § 2386; *In re Pyramid Co. of Burlington*, 141 Vt. 294, 301 (1982). Interlocutory appeals are considered an "exception to the normal restriction of appellate jurisdiction to the review of final judgment" because "[p]iecemeal appellate review causes unnecessary delay and expense, and wastes scarce judicial resources." *Pyramid*, 141 Vt at 300. However, there is a "narrow class of cases" for which interlocutory review is advisable, as articulated by the requirements outlined in Appellate Rule 5(b). *Id*. at 301. The definitions of the criteria enumerated in Rule 5(b) are "not self-evident"; rather, they are deliberately vague so as to "'inject an element of flexibility .... The three factors should be viewed together as the statutory language equivalent of a direction to consider the probable gains and losses of immediate appeal."' *Id*. at 301-02 (quoting 16 Wright & Miller, Federal Practice and Procedure § 3930, at 156 (1977)).

Hardwick Electric Department v. Nisum et al., Docket No. 38-2-16 Cacv, Entry Regarding Order dated August 14, 2019.

III. Controlling Question of Law

The first criterion in V.R.A.P. 5(b) is that an interlocutory appeal involve a controlling question of law:

> Whether a question of law is "controlling" is not defined by whether the question

> governs the outcome of the litigation. This factor requires a practical application that focuses upon the potential consequences of the order at issue. Since the core purpose of [interlocutory appeal] is to avoid unnecessary proceedings in the [trial] courts, the criterion that an order raise a "controlling question of law" would seem, at a minimum, to require that reversal result in an immediate effect on the course of litigation and in some savings of resources either to the court system or to the litigants. At one extreme, an order that preordains the outcome of litigation is certainly controlling. Further down the continuum, an order may be "controlling" if reversal would have a substantial impact on the litigation, either by saving substantial litigation time, or by significantly narrowing the range of issues, claims, or defenses at trial.

Pyramid, 141 Vt. at 302–03 (internal citations and quotations omitted).

Plaintiff seeks review of the Trial Court's imposition of a controlling question of law, which is the imposition of a 100-year limitation on the duration of the Mead Memorial Chapel name as a matter of law. The ruling has taken the determination of the contracting parties' intent away from the jury and has in effect, dismissed Plaintiff's breach of contract claim. If the existence of a contract is a jury question, then Plaintiff believes that the intent of the parties to that contract should be similarly decided by a jury.

Additionally, the Trial Court must find that reversal would result in an immediate effect on the course of litigation and in some savings of resources either to the court system or to the litigants. See *Pyramid* at 303. Reversal of the Trial Court's decision will result in an immediate effect on the course of the litigation, determining whether Plaintiff will be trying the entire contract claim along with the breach of good faith and fair dealing claim. Conversely, should the Supreme Court uphold the Trial Court's ruling on the duration of the name, then the inapplicability of the contract claim would be decided with finality, thereby resulting in some savings of resources.

IV. Materially advance the litigation

V.R.A.P. 5(b) also requires the potential to materially advance the termination of the litigation:

> The second criterion contained in V.R.A.P. 5(b) is that an interlocutory appeal must have at least the potential to materially advance the termination of the litigation.

> *Pyramid*, 141 Vt. 305. In determining whether this criterion is met, "[t]rial time alone is an incorrect metric. An interlocutory appeal is proper only if it may advance the ultimate termination of a case…A trial court must consider not only the time saved at trial, but also the time expended on appeal." *Id*.

Hardwick Electric Department v. Nisum et al., Docket No. 38-2-16 Cacv, Entry Regarding Order dated August 14, 2019.

Allowing an appeal of the contract claim has the potential to materially advance the termination of litigation. As noted above, should the Court reverse the Trial Court's decision, it would likely result in trial of the contract claim. Should the Court affirm the Trial Court's decision, it would obviate the need for an appeal on this issue after judgment.

V. Substantial ground for a difference of opinion

The final criterion under V.R.A.P. 5(b) is that the appealed order involve a question on which there is "substantial ground for a difference of opinion":

> V.R.A.P. 5(b) does not supersede the trial court's authority and responsibility to decide difficult legal issues. Trial courts should not be bashful about refusing to find substantial reason to question a ruling of law, even in matters of first impression. Thus, in interpreting this criterion, the courts should place little stock in the vehemence of disagreeing counsel.
> …
> A standard consistent with the policy underlying this criterion would require a trial court to believe that a reasonable appellate judge could vote for reversal of the challenged order. Unless an order triggers this degree of doubt in the mind of a trial judge, certification of the order is improper.

Pyramid, 141 Vt. at 306–07 (internal quotations and citations omitted).

The instant request for permission to appeal involves a question on which there is substantial ground for a difference of opinion. The Court has acknowledged that if the jury finds there was a contract, there was an obligation to name the chapel the "Mead Memorial Chapel," but that 100 years was, in essence, long enough. The Court points to the lack of funds supplied by Mead for

maintenance of the building in the future, when the building maintenance obligation was a detriment accepted by Middlebury College and was part of the bargained for consideration that was "paid" by the college.

Furthermore, that this case is a novel issue of first impression in Vermont and there is no Vermont caselaw to support the limitation of the Mead Memorial Chapel name, it is reasonable to conclude that an appellate judge could vote for a reversal of the challenged order and allow the case to proceed as a contract action to be submitted to the jury.

VI. Conclusion

The decision on the contract claim in this case satisfies all the requirements for interlocutory appeal. As demonstrated above, permitting an Interlocutory Appeal of the applicability of the contract claim will save the parties, the Trial Court and the Supreme Court resources by consolidating the contract issues for trial or providing finality to the contract claim. Granting permission to appeal at this juncture will also avoid the possibility of a retrial of the case on the contract claim. Therefore, the Court should grant leave to file an interlocutory appeal because this matter involves a controlling question of law on which there is a substantial ground for a difference of opinion, and granting permission to appeal will materially advance the litigation and save precious judicial resources.

WHEREFORE, Plaintiff respectfully requests that the Court grant Plaintiff permission to take an interlocutory appeal to the Vermont Supreme Court on the Trial Court's decision granting partial summary judgment to Defendant, including the contract issue regarding the duration of the Mead Memorial Chapel name.

DATED at Randolph, County of Orange and State of Vermont, this 17th day of October 2024.

The Honorable James H. Douglas,
Special Administrator of the
Estate of John Abner Mead, *Plaintiff*

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