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 BRIEF REGARDING DAMAGES FOR BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING

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., hereby responds to the Court's directive to specify the kinds of damages he intends to seek to recover for Defendant's breach of the covenant of good faith and fair dealing, and explaining the legal basis supporting the entitlement to recover such damages here. Plaintiff's Brief also references some of Plaintiff's Exhibits which were filed in Support of Plaintiff's Opposition to Defendant's Motion to Dismiss, and hereby incorporates the same by reference.

MEMORANDUM

I. INTRODUCTION

While, as the Court noted, Governor Mead has been deceased for just over a century and obviously cannot be emotionally harmed by Middlebury's decision to remove the Mead name from the chapel, that does not foreclose the existence of compensatory and punitive damages resulting from Defendant's breach of the covenant of good faith and fair dealing implied in the Mead Memorial Chapel contract between John Abner Mead and Middlebury College.

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II. THE FACTS & CIRCUMSTANCES

The ultimate issue regarding the breach of the covenant of good faith and fair dealing is whether, in light of all of the facts and circumstances, Middlebury College acted in bad faith when it erroneously proclaimed that the Mead Memorial Chapel was named in honor of John Abner Mead and then engaged in its hypocritical public relations smear campaign to scapegoat Governor Mead and use him as a subterfuge to conceal the fact that Middlebury College was literally, a Eugenicist factory, for over 50 years, "espous[ing] inhumane policies that are uniformly condemned today," and teaching Eugenics principles until years after the atrocities of the Holocaust were fully known.

Middlebury College's vast involvement in the Eugenics movement was exponentially more significant than Mead's single public statement on the topic, and, the circumstances surrounding who the parties were and what their inter-relationships were, as well as their actual roles in the Eugenics Movement, are indeed before this Court because that evidence is essential to the Court's determination of the intent of the parties to the contract, the purpose of that contract, as well as to the Defendant's bad motive in the removal of the Mead family name from its Memorial Chapel.

Regardless of whether there was a breach of the express terms of the contract, Defendant breached the Covenant of Good Faith and Fair Dealing implicit in that contract, because Middlebury College's smear campaign against Governor Mead interfered with, completely frustrated, and caused the cancelation of Mead's essential purpose in erecting the Chapel: to memorialize his ancestors and honor them for their devotion to their Christian faith and as a symbol of the simplicity and strength of character of Vermonters. And furthermore, Defendant's breach was effectuated for a bad motive: to serve the selfish ends of the College's marketing team who used Governor Mead as a scapegoat, overemphasizing his role, and using him to create a smokescreen to obscure the vile history of Middlebury College as a racist and antisemitic institution.

Contrary to the Court's imposition of a 100 year time limit on the Mead name, Middlebury

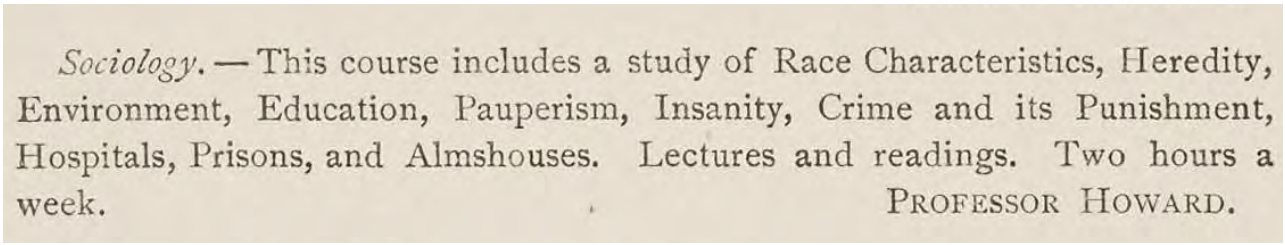
College did not remove the Mead name from the chapel when or because 100 years had elapsed or because the name had been there "long enough" and it was now time to take the Mead name off the building. Instead, Middlebury College removed the Mead name, with no public process or even advance notice to the family, claiming that the Mead Memorial Chapel had been named FOR John Abner Mead and his wife, and then offering up Governor Mead as a symbol of its contempt and condemnation of Eugenics, while failing to even acknowledge in any way whatsoever, no less apologize for Middlebury College's vast and significant role in the Eugenics Movement.

To this day, Middlebury College has made no public apology for its monumental role in the Eugenics Movement in Vermont and beyond, despite training generations of Eugenicists and promoting Eugenics policies for more than a half century. In short, Governor Mead, has been sacrificed on the altar of public relations and used as a pawn to divert attention away from Middlebury College's abhorrent history and to absolve it of 50 years of Eugenic Sin by claiming to severe its only apparent "connection" to Eugenics by throwing its "fall guy," Governor John Abner Mead "under the bus."

This was a breach of the covenant of good faith and fair dealing because it interfered with the purpose of the contract: to honor and symbolize the Mead ancestors who settled and brought Christianity to the valley. Instead, Middlebury College ignored the truth because they were either inexplicably utterly ignorant of their own vial Eugenics history, which is frankly inconceivable given Middlebury College's world-renowned reputation, or they knew full well that they were misrepresenting the truth and falsely casting Mead into the role of an evil mastermind who orchestrated the entire Eugenics movement in Vermont as a subterfuge to hide the real mastermind, Middlebury College.

A. Middlebury College's Eugenics Curriculum 1895-1946

Middlebury College's vast Eugenics curriculum began even before the turn of the 19th century. For example, the 1895 Middlebury College Course Catalogue described the "Sociology" course of study, referencing Race Characteristics, Heredity, Pauperism, Insanity, Crime and Punishment:

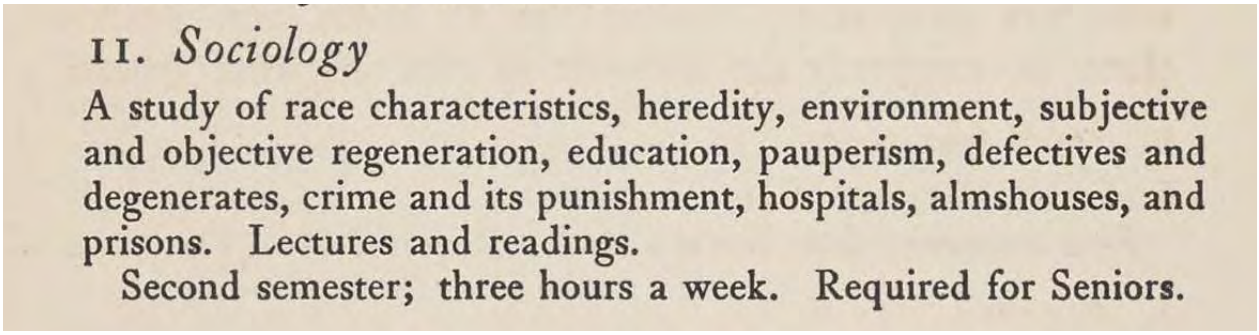


Sociology. — This course includes a study of Race Characteristics, Heredity, Environment, Education, Pauperism, Insanity, Crime and its Punishment, Hospitals, Prisons, and Almshouses. Lectures and readings. Two hours a week. PROFESSOR HOWARD.

Ex. 9, 1895 Middlebury Course Catalogue, p. 30.

The 1895 Catalogue also offered "Zoology," explaining the purpose of the course was to prepare the student to read "current literature relating to variation, heredity and other biological problems." Ex. 9, p.43-44.

By 1908, Middlebury College's Sociology course of study was described using the terms "regeneration" and "defectives and degenerates" in addition to referencing hospitals, almshouses (poor farms) and prisons:



II. *Sociology*

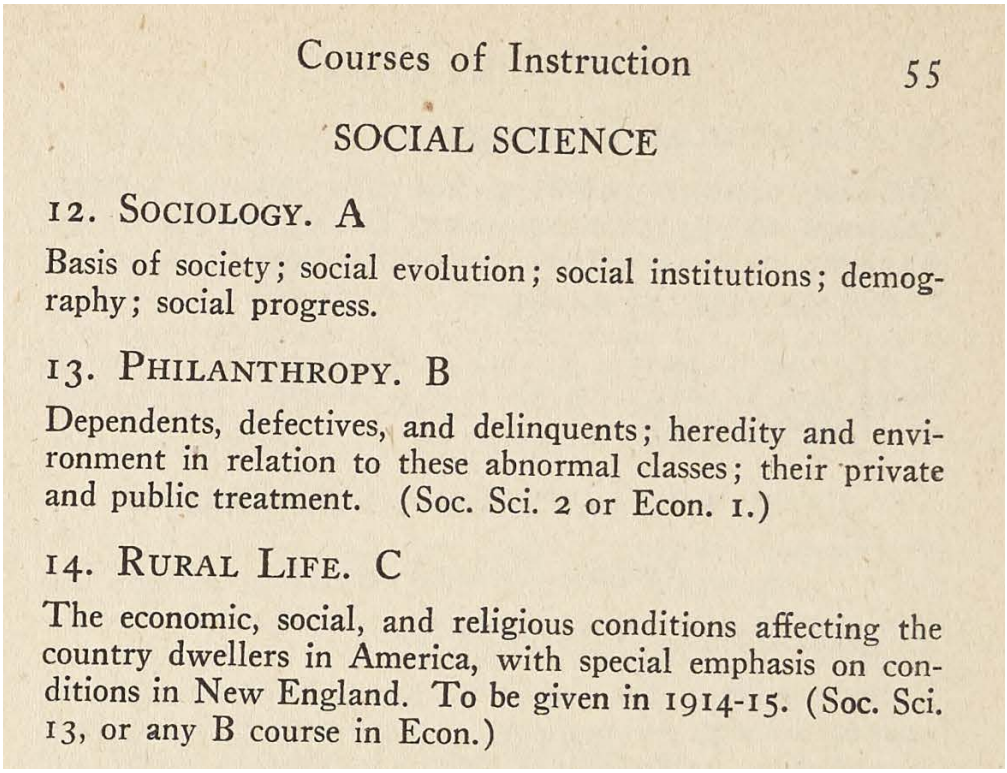
A study of race characteristics, heredity, environment, subjective and objective regeneration, education, pauperism, defectives and degenerates, crime and its punishment, hospitals, almshouses, and prisons. Lectures and readings.

Second semester; three hours a week. Required for Seniors.

Ex. 10, 1908 Middlebury Course Catalogue.

It is interesting to note that Sociology was a required course for Seniors at Middlebury College in 1908, so all Middlebury College students would learn about "defectives and degenerates," the identical labels that Defendant condemns Governor Mead for using four years later in his 1912 Farewell Address.

The Social Science Department continued to expand its Eugenics offerings and by 1913, "Philanthropy" was added to the curriculum and described as: "Dependents, defectives, and delinquents; heredity and environment in relation to these abnormal classes; their private and public treatment" as was "Rural Life" a study of the economic, social, religious conditions affecting country dwellers:



Courses of Instruction 55

SOCIAL SCIENCE

12. SOCIOLOGY. A

Basis of society; social evolution; social institutions; demography; social progress.

13. PHILANTHROPY. B

Dependents, defectives, and delinquents; heredity and environment in relation to these abnormal classes; their private and public treatment. (Soc. Sci. 2 or Econ. 1.)

14. RURAL LIFE. C

The economic, social, and religious conditions affecting the country dwellers in America, with special emphasis on conditions in New England. To be given in 1914-15. (Soc. Sci. 13, or any B course in Econ.)

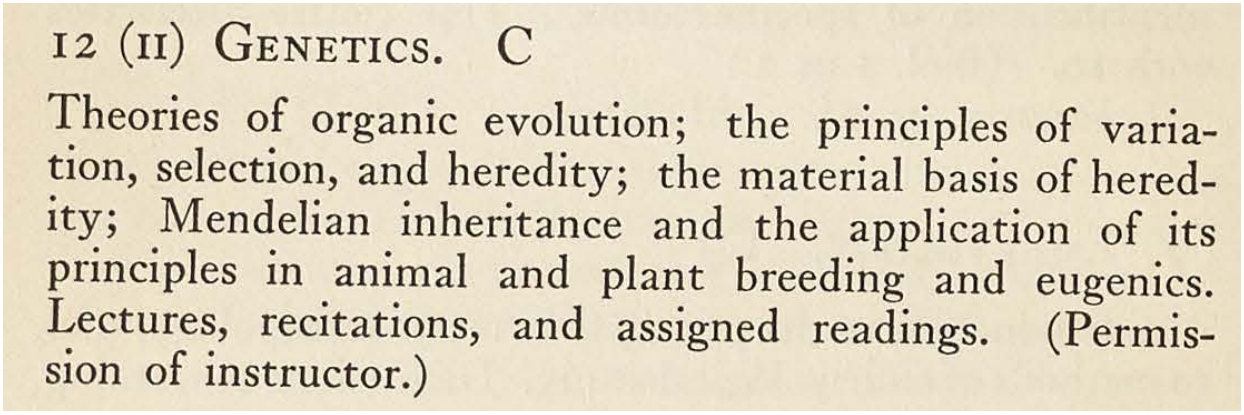
Ex. 11, 1913 Middlebury Court Catalogue, p. 55.

In July 1913, Middlebury College President Thomas hosted the "Rural Life Conference," a week-long Eugenics conference held in connection with the regular summer session of Middlebury College. The object of the conference was to promote the "increasingly important county life movement" and included a week-long course of lectures in Rural Sociology. Ex. 1, Addresses given at the Rural Life Conference Middlebury College Middlebury, Vermont July 7 to 13, 1913.[1]

The 1914 Journal *Heredity* listed Middlebury College as one of 44 colleges and universities

[1] https://www.uvm.edu/~Eugenics/primarydocs/orrlcmc070713.xml

who taught Eugenics in its curriculum.[2] Ex. 13. By 1918, the term "Eugenics" had been introduced into the Middlebury College Course Catalogue describing the Genetics course of study:



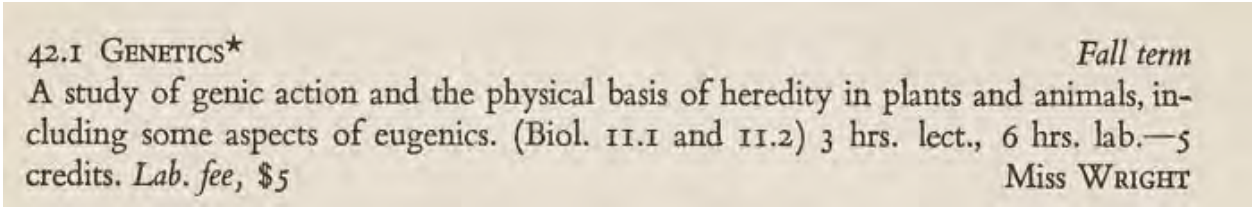
12 (II) GENETICS. C

Theories of organic evolution; the principles of variation, selection, and heredity; the material basis of heredity; Mendelian inheritance and the application of its principles in animal and plant breeding and eugenics. Lectures, recitations, and assigned readings. (Permission of instructor.)

Ex. 15, 1918 Middlebury Course Catalogue.

In 1925, freshmen were required to take a mandatory course which included a lecture on "What Has Civilization to Expect From Eugenics." Among the topics students were expected to study were "Eugenics" and "Galton's Experiments and Observations." (Francis Galton, who coined the term "Eugenics," was an early proponent of the notion that "undesirable" people should be discouraged or prevented from having children.)[3]

During the 1945-1946 academic year, with full knowledge of the atrocities of the Nazi's systematic genocide of 6 million Jews in Europe, Middlebury College continued teaching Eugenics to its students, as it had for the past 50 years. The 1945-46 Middlebury College Course Catalogue continued to offer Eugenics in its Sociology course "Population" and in its Biology course "Genetics":



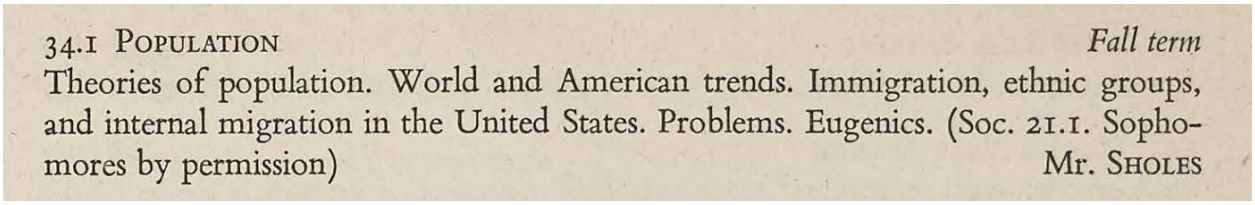
42.1 GENETICS* *Fall term*

A study of genic action and the physical basis of heredity in plants and animals, including some aspects of eugenics. (Biol. 11.1 and 11.2) 3 hrs. lect., 6 hrs. lab.—5 credits. *Lab. fee,* $5

Miss WRIGHT

[2] It appeared in a similar list published by *The Eugenics Review* in 1925.

[3] https://www.bostonglobe.com/2023/06/18/opinion/jeff-jacoby-middlebury-hypocrisy-Eugenics/



34.1 POPULATION *Fall term*
Theories of population. World and American trends. Immigration, ethnic groups, and internal migration in the United States. Problems. Eugenics. (Soc. 21.1. Sophomores by permission) Mr. SHOLES

Ex. 21, 1945-46 Middlebury College Course Catalogue (Sociology & Biology).

As Middlebury College Associate Professor Daniel Silva explained in his December 9, 2021 article "Eugenics, Dispossession and Reparations at Middlebury, published in the Middlebury Campus:

> One only needs to browse the college's course catalogs of the first decades of the 20th century to see the emergence of Eugenics in the curriculum and across departments such as Pedagogy (later renamed Education and Psychology), Biology and Sociology. Looking at the 1931 course catalog alone, Eugenics and ideas of social progress and pathology based on heredity and environment can be found in the descriptions of courses such as "Genetics and Embryology," "Social Psychology" and "Educational Psychology," in addition to nearly the entire course offering of the Sociology department. In this regard, Middlebury's curriculum followed national and international trends of Europe and North America. **It is, therefore, not a stretch to consider that Eugenicists and Eugenics sympathizers, were, to some degree, trained at Middlebury.**[4]

In addition, Professor Silva notes the close relationship that Middlebury College had with "Eugenicists and Eugenics supporters, which included trustees, donors, professors and administrators." *Id.*

B. Middlebury College's Eugenicist Professors, Administrators and Trustees

Indeed, Middlebury College employed Eugenicists as Professors and Administrators and appointed Trustees, many of whom were active participants in the Eugenics Movement. For example, Middlebury College Professor A.E. Lambert, a Eugenicist who delivered a Eugenics lecture at the Rutland Woman's Club on January 4, 1916 stating: "We are living in an age of reason . . . when

[4] https://www.middleburycampus.com/article/2021/12/Eugenics-dispossession-and-reparations-at-middlebury (emphasis supplied).

science predominates. We must blot out the unfit in our race and to do this we must prevent marriages which are not eugenic." Ex.14.

Another notable Middlebury College Eugenicist was Owen Wesley Mills, Biology Professor who taught Eugenics in his Genetics course from 1918-1924. During his tenure at Middlebury College, Professor Mills was a Fellow for the American Association for the Advancement of Science and a Member of the Second International Congress of Eugenics.[5] Ex. 16.

Vermont Governor John E. Weeks, Middlebury College Trustee from 1909 to 1949, who hosted a Eugenics Conference at the Vermont Statehouse in 1927 titled the "Vermont Conference of Social Work" which was an open forum on "Social Legislation" with presentations by many notable Eugenicists including UVM Professor Henry F. Perkins, Director of the Eugenics Survey of Vermont. Ex. 19, Burlington Free Press, Jan 19, 1927, page 2.

C. The Eugenics Survey of Vermont and Middlebury College President Paul Moody

Paul Dwight Moody, Middlebury's president from 1921 to 1942, like so many other leading academics of the era, was "all in on Eugenics." In 1931, he was Chairman of the Committee on the Human Factor, part of the Eugenics Survey of Vermont working in concert with UVM's Professor Henry F. Perkins, the most influential eugenicist in Vermont at the time. President Moody's Committee on the Human Factor recommended a major public relations effort to promote Eugenics among the public. That recommendation appeared in the final report: "Rural Vermont: A Program for

[5] The 1921 Second International Congress of Eugenics, was a gathering that promoted humanity's control of its evolutionary future through selective breeding and reducing "unfit" populations. The history of nearly every major museum and scientific society in Western Europe and the United States is intertwined with the scientific, public, and political acceptance of this now-discredited movement. *Science* and the American Association for the Advancement of Science (AAAS, the publisher of *Science*) are no exception.

the Future," a manifesto replete with Eugenics content, including a "Chart of Defects Found Among 55 Degenerate Families Studied."[6]

President Moody was not only an active and influential Eugenicist, but he was a documented racist, infamous for the most abhorrent comments which were famously quoted by UVM Professor Henry F. Perkins in a 1932 interview. When Dr. Perkins asked Paul Moody of Middlebury College if he had had any students of French-Canadian descent who had made a name for themselves in any type of endeavor Mr. Moody immediately said no, and even on consideration said he thought a lot about it and checked up that not one Canadian had risen to a place of responsibility. When asked if they hadn't contributed much to the community of Middlebury itself, Mr. Moody added another vehement no, stating that the whole French Canadian population could be wiped out of Middlebury and no one would miss it. Vermont Eugenics: A Documentary History: *Ethnic Study of Burlington: Interview with Dr. Perkins re French Canadians* , Anderson, Elin L.. 1932 (emphasis supplied).[7]

Indeed, Middlebury College's vast connection to Eugenics spanned over half a century, continuing years after the world's knowledge of Hitler's death camps and the mass murder of 6 million Jews in Europe.[8] Even Defendant's cited article, "US Scientists' Role in the Eugenics Movement (1907-1939)" details that "by 1936 . . . both England and the U.S. genetic scientific communities finally condemned eugenical sterilization."[9] Yet, Middlebury College continued teaching Eugenics

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[6] See Jeff Jacoby, Hypocrisy at Middlebury College, 6/18/2023, https://www.bostonglobe.com/2023/06/18/opinion/jeff-jacoby-middlebury-hypocrisy-Eugenics/

[7] https://www.uvm.edu/~Eugenics/primarydocs/ofesbfc000032.xml.

[8] By 1942, the American press carried a number of reports about the ongoing mass murder of Jews. The US government confirmed this information in late 1942 . . . In January 1944, President Roosevelt created the War Refugee Board, which took significant measures to aid Jews and other victims. https://encyclopedia.ushmm.org/content/en/article/the-united-states-and-the-holocaust-1942-45.

[9] See Steven A. Farber, U.S. Scientists' Role in the Eugenics Movement (1907–1939): A Contemporary Biologist's Perspective, 5 Zebrafish 243, 244 (2008). https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2757926/

for another decade, until 1946.

Having discovered the evidence of Middlebury's early and prominent involvement in Eugenics, it seems far more likely that Mead was influenced BY the men that he knew at Middlebury College, and it is obvious that Middlebury College itself and its President Moody, were the architects who built the bridge spanning three decades after Mead's 1912 speech, acting as the catalyst of promotion, advocacy, and teaching of Eugenics which did, in fact, lead to the enactment of Eugenics sterilization legislation in Vermont.

D. <u>Scapegoating as Subterfuge</u>

Reviewing the long history of Eugenics at Middlebury College from 1895 to 1946, brings one to the inescapable conclusion that it was Middlebury College itself which contributed to the philosophical and scientific basis for the Nazi program of Eugenics, not one speech in 1912 by Governor Mead.

Remember that John Mead was a beloved family physician, an OB/Gyn and surgeon. His Medical School Dissertation was on the Treatment of Uterine Prolapse, a leading cause of death related to childbirth and the likely cause of his own mother's death at age 23, shortly after his birth. Thus, is was Dr. Mead, the physician who, seeing the tsunami of legislation sweeping the country in 1912, advocated as a physician, not for the sterilization of women, but to investigate instead, a new operation called the Vasectomy, which promised a vastly safer alternative which would have protected the health and lives of women in 1912, 16 years before the discovery of penicillin in 1928.

Furthermore, in point of fact, Mead did not support the legislation that was introduced after he left office in 1912 and vetoed by his successor. Thus, the suggestion that Mead was engaged in a Eugenics "Campaign" is pure speculation unsupported by any documentary evidence or sufficient scholarly research. Mead's only known comments relating to Eugenics are contained solely in his 1912 Farewell Address.

Yet, despite, or maybe because of, the state of all the available evidence, Governor Mead was used as a public relations diversion to cover up Middlebury College's dreadfully shocking history. Defendant embraced a false narrative, declaring the erasure of the Mead name, which they thought would instantly purify their unclean hands and sever Middlebury College's only perceived affiliation with Eugenics. Instead of taking responsibility for its own history and learning from it, and apologizing to the victims who were harmed by Middlebury College, a Eugenics Institution, they doubled-down and arrogantly asserted that the name "Mead Memorial Chapel" was a vague reference, an after-thought which was never agreed to by the College Trustees.[10] Such a callous and demeaning statement denigrates a sacred space dedicated as a holy temple, built to memorialize the deep religious faith of Mead's ancestors, and designed to honor and symbolize the strength of character of Vermonters. Thankfully the Court has recognized Defendant's position as straining credulity.

III. THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

A. Introduction

Parties in a contractual relationship have an obligation to treat each other in good faith and deal with each other fairly. This is known as the covenant of good faith and fair dealing and it is implied in every contract. The definition of the "covenant of good faith and fair dealing" is broad. See *Carmichael v. Adirondack Bottled Gas Corp.*, 161 Vt. 200, 208-09 (1993) (citing Restatement

[10] "In short, Eugenics was for decades entwined in the intellectual culture and public image of Middlebury College. Yet no one would have any inkling of that history from the college's current president and board of trustees. In their long document justifying the removal of Mead's name from the chapel, they made no mention of the school's extensive connection to the Eugenics movement. They condemned Mead for holding views that were considered progressive and scientific at the time without acknowledging that those views for many years were taught, promoted, and applauded by the faculty and administrators of Middlebury itself. It's hardly surprising that as a loyal and active Middlebury alumnus, Mead was influenced by the views of his alma mater and fellow alums." See Jeff Jacoby, Hypocrisy at Middlebury College, 6/18/2023. https://www.bostonglobe.com/2023/06/18/opinion/jeff-jacoby-middlebury-hypocrisy-Eugenics/

(Second) of Contracts § 205). It is an underlying principle implied in every contract that each party promises not to do anything to undermine or destroy the other's rights to receive the benefits of the agreement. *Id.* (citing *Shaw v. E.I. DuPont de Nemours & Co.*, 126 Vt. 206, 209 (1966)). The implied covenant of good faith and fair dealing exists to ensure that parties to a contract act with faithfulness to an agreed common purpose and consistently with the justified expectations of the other party. *Id.* (quoting Restatement (Second) of Contracts § 205 comment a). The covenant of good faith and fair dealing protects against conduct that violates community standards of decency, fairness, or reasonableness. *Id.* (quoting Restatement (Second) of Contracts § 205 comment a).

A party asserting this claim does not need to demonstrate a breach of the underlying contract to succeed on their claim for breach of the implied covenant of good faith and fair dealing. *See Carmichael v. Adirondack Bottled Gas Corp.*, 161 Vt. 200, 208-09 (1993) at 1216 (affirming jury award for breach of the implied contract of good faith and fair dealing even though no breach of express term in the underlying contract was alleged). However, the party must identify conduct separate from that which breached the underlying contract to form the basis for the breach of the implied covenant. See *Langlois v. Town of Proctor*, 2014 VT 130, ¶ 59; see also *Monahan v. GMAC Mortg. Corp.*, 2005 VT 110, ¶ 54 n.5. Stated differently, the party cannot argue that the conduct that breached the underlying contract is the same conduct that breached the implied covenant of good faith and fair dealing. *Langlois*, 2014 VT 130, ¶ 59.

B. <u>The Development of Vermont's Duty of Good Faith and Fair Dealing</u>

The development of Vermont's Duty of Good Faith and Fair Dealing was comprehensively analyzed by Vermont Attorney W. Scott Fewell in his 2010 Vermont Bar Journal article, <u>Vermont's Implied Covenant of Good Faith and Fair Dealing in Commercial Contracts</u>, and provided the following description of Vermont's jurisprudence regarding the Implied Covenant of Good Fath and Fair Dealing:

Vermont law imposes a duty of good faith and fair dealing ("implied covenant" or "good faith") on all contracts. As explained in *Shaw v. DuPont*,[11] the crux of the duty is that neither party to a contract may do anything to interfere with the other party's right to enjoy the benefit of the contract.

While a claim for breach of contract addresses the breaking of express promises and obligations, a claim for breach of the covenant of good faith and fair dealing addresses the breaking of the implicit promises that make the contract possible in the first place.[12] The implied covenant claim, as applied in Vermont, is nothing short of a moral litmus test for what constitutes socially acceptable conduct between contracting parties and is intended to prevent any dichotomy between the spirit and letter of the agreement.

Since *Shaw*, the implied covenant has undergone a rather striking evolution. Initially treated as a mere aid in interpreting existing contract terms, the implied covenant has been transformed by the Vermont Supreme Court into a derivative but distinct tort action requiring an independent factual basis from that supporting a breach of contract action. The protections afforded by the implied covenant have been extended to a variety of contractual relationships, including employment and insurance law. However, the duties imposed in one substantive area of law does not neatly apply to other contractual relationships.

. . .

Contractual Good Faith in Vermont Jurisprudence

The concept of good faith as applied to contracts has existed in American jurisprudence for nearly two centuries and purportedly derives its origins from the Latin legal maxim *pecta sunt servanda*, or the "obligation to keep agreements."[13] Since its early formulation, the concept has been applied to a variety of contractual relationships, including insurance, employment, and arms-length commercial agreements. Both the Uniform Commercial Code and the Restatement (Second) of Contracts contain requirements for good faith performance of contracts, although their respective approaches differ.[14]

In Vermont, the idea of contractual good faith emerged during the early nineteenth century, but did not become well-established until the middle of the twentieth century.[15] The modern formulation of this duty, first articulated in *Shaw*, is that good faith attaches to all contracts as a matter of law and requires that the

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[11] Shaw v. DuPont, 126 Vt. 206, 209, 226 A.2d 903, 906 (1966).

[12] *See* Robert S. Summers, *The General Duty of Good Faith--Its Recognition and Conceptualization*, 67 Cornell L. Rev. 810, 826-27 (1981-82); E. Allan Farnsworth, *Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code*, 30 U. Chi. L. Rev. 666, 667-71 (1962-63).

[13] Id., note 2, at 828.

[14] Farnsworth, *supra* note 2; Robert S. Adler & Richard A. Mann, *Good Faith: A New Look At An Old Doctrine*, 28 Akron. L. Rev. 31, 41-44 (Summer 1994).

[15] *See* Buck v. Kent, 3 Vt. 99, 102 (1830) (holding that it was a violation of good faith and the agreement to retain note and fraudulently convey to a third party).

contracting parties do nothing to destroy the rights of the other party to receive the benefit of the bargain.[16]

In the 1994 decision in *Carmichael v. Adirondack Bottled Gas of America*, the Supreme Court adopted the Second Restatement's formulation of the implied covenant.[17] Section 205 of the Second Restatement imposes a duty of good faith and fair dealing in the performance and enforcement of contracts, but not in contract formation.[18] Under the Second Restatement, "good faith performance or enforcement" requires that the parties adhere to an agreed-upon common purpose consistent with the justified expectations of the parties.[19]

The Second Restatement adopts the so-called "excluder" concept of good faith, advocated by Professor Robert S. Summers, which defines the contours of good faith by its opposite corollary bad faith, and is expressly concerned with the enforcement of fairness, justice, and community standards in the commercial area.[20] The excluder approach permits the courts to develop the outer boundaries of the duty based on the particular contract, transaction, and applicable community standards. However, this "negative" approach, while having the benefit of flexibility, provides little guidance as to what constitutes good faith performance and enforcement and creates unnecessary uncertainty.

In addition to adopting the Second Restatement approach, the Supreme Court has further tailored good faith claims in ways not required under the Second Restatement's approach. First, the Court has construed good faith as a tort under the rationale that the obligation of good faith is imposed on contracting parties as a matter of public policy rather than arising from the agreement of the parties.[21] Second, the Court permits good faith to be pled as a separate and distinct claim from breach of contract provided the claim has a distinct factual predicate.[22] These modifications have created a relatively unique cause of action in Vermont.

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[16] *Shaw*, 126 Vt. at 209.

[17] *Carmichael v. Adirondack Bottled Gas*, 161 Vt. 200, 208, 635 A.2d 1211 (1993).

[18] Restatement (Second) of Contracts § 205 (1981).

[19] *Id*., § 205(a).

[20] *See Summers*, *supra* note 2. In addition to the intruder concept, Professor Karl Llewellyn advocated an honesty in fact (so-called "pure heart, empty head") approach, which has been incorporated into the UCC. *See* E. Allan Farnsworth, *The Concept of Good Faith in American Law*, Saggi, Conferenze E Seminari 10, at p. 12 (April 1993). Professor Steven J. Burton has offered a competing interpretation of the role of good faith in the enforcement of contracts, describing a breach of good faith as an attempt by a contracting party to wrongfully "recapture opportunities forgone in contracting." *See* Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 Harv. L. Rev. 269 (1980).

[21] *Carmichael*, 161 Vt. at 208, 635 A.2d at 1216.

[22] *Monahan*, 2005 VT 110, ¶54 n.5, 893 A.2d 298, 316 n.5.

The Development and Application of the Implied Covenant in Vermont Case Law

The Vermont Supreme Court has used the implied covenant in a number of different commercial contexts. In *Shaw*, the Supreme Court used the implied covenant in a licensing dispute to infer missing terms that were "necessarily implied" from the expressed terms.[23] The Court observed that the "implication that the defendant is not to exceed the limits of his license ... is an inference which follows from the language of the parties and becomes spelled out in explicit terms."[24] As such, the Court appeared to use the implied covenant as an aid in interpreting the terms of the contract, and little more.

However, in *Sullivan v. Lochearn, Inc*., the Court applied the implied covenant to course of dealing conduct. In *Sullivan*, the Court examined the parties' course of dealing and inferred the absence of a contractual right to unilaterally terminate a contract, even though the contract was silent on this issue.[25] In *Carmichael v. Adirondack*, the Supreme Court relied upon the implied covenant to infer obligation arising from the parties' obligations in winding down the contract. The Court observed that the course of dealings between the parties in the winding down of the contract created obligations that, while not expressly stated, were enforceable when breached.[26] Thus, the Court reaffirmed that course of dealing *25 can create expectations that, while not contractual, nonetheless create obligations of good faith based on the expectations of the parties.

The Supreme Court has also applied the implied covenant to situations in which one of the contracting parties has interfered with the ability of a party to perform its part of the contract. In *Carter v. Sherburne Corp*., the Court applied the implied covenant to prevent a contracting party from obstructing contractual performance and then seeking damages for the delay caused by its own obstruction.[27] In *Century Partners, LP v. Lesser Goldsmith Enterprises, Ltd*., the Court found a breach of the implied covenant where the landlord created a continuing permit violation but failed to cooperate with tenant in remedying the situation.[28]

The Supreme Court has refused to find a breach of the implied covenant where a party has merely sought to exercise a contractual right that was merely adverse to the other contracting party. In *Southface Condominium Owners Assoc. v. Babcock*, the Court refused to find a breach of the implied covenant where proceeds from the sale of condominium units were applied to unpaid charges on a promissory note, as required by the note, rather than used to build additional amenities that had been promised to

[23] *Shaw*, 126 Vt. at 209-10, 226 A.2d at 906-07.

[24] *Shaw*, 126 Vt. at 210, 226 A.2d at 906.

[25] *Sullivan v. Lochearn,* 143 Vt. at 153, 464 A.2d at 747.

[26] *Carmichael*, 161 Vt. at 208-09, 635 A.2d at 1216-17.

[27] *Carter v. Sherburne Corp.*, 132 Vt. 88, 93-94, 315 A.2d 870, 874 (1974).

[28] *Century Partners, LP v. Lesser Goldsmith Enterprises, Ltd*., 2008 Vt. 40, ¶¶16-24; 958 A.2d 627, 632-35 (2008).

the purchasers of the units.[29] In *Downtown Barre Development v. C&S Wholesale Grocers, Inc*., the Court observed that there may be instances in which a contracting party could act in bad faith while exercising a retained contractual right, but refused to find that defendant had acted in bad faith under the unique facts of that case, where defendant was seeking only to exercise a contractual right that was adverse to plaintiff.[30]

Two other anomalous but nonetheless significant cases dealing with the implied covenant are worth mentioning because their dicta has further shaped the current scope of the implied covenant. In *Greene v. Steven's Gas Service,*[31] the Supreme Court permitted the plaintiff to proceed, without explanation, under a contractual implied covenant claim notwithstanding the availability of the more narrowly applicable first-party insurance bad faith claim.[32] At issue in *Greene* was whether a claim for breach of the implied covenant was subject to a contractual limitations clause.[33] Plaintiff argued that since the implied covenant claim was grounded in tort it was not a claim "on the policy" and therefore not subject to the contractual limitations clause.[34] The Supreme Court, relying on an Iowa Supreme Court case,[35] held that since the implied covenant claim was based on the insurer's denial of coverage, such a claim was "a disguised attempt to resolve a dispute as to [defendant's] liability for his loss and is therefore subject to the policy limitations clause."[36] The implicit suggestion in *Greene*

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[29] *Southface Condominium Owners Assoc., Inc. v. Babcock*, 169 Vt. 243, 247, 733 A.2d 55, 58-59 (1999).

[30] *Downtown Barre Development v. C&S Wholesale Grocers, Inc.*, 204 VT 47, ¶18-19, 177 Vt. 70, 80, 857 A.2d 263, 270 (2004).

[31] *Greene v. Stevens Gas Service*, 2004 VT 67, 177 Vt. 90, 858 A.2d 238 (2004).

[32] The Vermont Supreme Court recognized a first-party insurance bad faith claim in *Bushey v. Allstate Ins. Co.*, 164 Vt. 399, 670 A.2d 807 (1995). To state a claim for first-party bad faith, plaintiff must show that the insurance company had no reasonable basis for denying coverage under the policy and the company knew or recklessly disregarded that absence of any reason to denying coverage. The *Bushey*-styled claim seems to be the proper fit in *Greene*, which was clearly a coverage case, but Court allowed plaintiff to bring the generic contractual claim without comment. The first-party bad faith claim was created for reasons peculiar to the insurer-insured relationship, including the superior bargaining position of the insurer and the public interest nature of the insurance industry. *See id*. at 403. In contrast, the contractual implied covenant is premised on the mutual obligation to honor promises set forth in the contract without regard to reasonableness. Unlike the traditional implied covenant claim, whose doctrinal origins are more clearly rooted in contract, the first-party claim has always been rooted in tort. *See Dolan v. Aid Ins. Co.*, 431 N.W.2d 790, 791 n.1 (Iowa 1988). Notwithstanding the doctrinal differences, the outcome in Greene with respect to the contractual limitations clause would have likely been the same under either type of claim. *See CBS Broad. v. Fireman's Fund Ins. Co.*, 70 Cal. App. 4th 1075, 1086 (Cal. App. 2d Dist. 1999) (Where denial of the claim in the first instance is the alleged bad faith and the insured seeks policy benefits, the bad faith action is on the policy and the limitations provision applies.) However, the Court's treatment of the two claims as practically identical raises real concerns about the duties incumbent on contracting parties in arms-length transactions, the measure of damages relative to each type of claim, and has caused confusing in subsequent cases.

[33] 2004 VT 67, ¶18, 177 Vt. at 98, 858 A.2d at 245.

[34] 2004 VT 67, ¶23, 177 Vt. at 100, 858 A.2d at 246.

[35] 2004 VT 67, ¶¶26-29, 177 Vt. at 101-103, 858 A.2d at 247-48.

[36] *Id*.

was that tort claims for breach of implied covenant cannot rest on the same factual premises as breach of contract. In *Monahan v. GMAC*, the Supreme Court expressly affirmed that it would no longer recognize a separate cause of action for breach of the implied covenant when the plaintiff also pleads a breach of contract based on the same conduct.[37]

Recently, in *Harsch Properties, Inc. v. Nicholas*,[38] the Supreme Court once again revisited the implied covenant and sought to clarify some of the broader language in its earlier cases. First, the Court clarified that the implied covenant would constitute a separate cause of action where it was based on different conduct from the breach of contract claim.[39] However, the Court's language left open the possibility of pleading breach of implied covenant as an element of breach of contract.

Second, in *Harsch Properties* the Court seems to move away from characterizing the implied covenant as a tort observing that "[a]lthough claims for breach of the implied covenant take on many qualities of a tort action, these claims are not fully and exclusively torts. The implied covenant arises out of a contractual relationship between the parties, *id*., and creates duties under the contract ... Thus, although breach of the implied covenant may create an action in tort, the covenant arises from the contract and exists because of the contract."[40] There is some suggestion in *Harsch Properties* that the Court was aware of the dangers of an independent, tort-based implied covenant and sought to reconnect the duty of good faith with the performance of express contractual obligations rather than as a generalized duty of good faith in contract.

W. Scott Fewell, Esq., Vermont's Implied Covenant of Good Faith and Fair Dealing in Commercial Contracts, Vt. B.J., Summer 2010, at 24, 24–28.

C. The Vermont Supreme Court's Current Standard

In 2018, the Vermont Supreme Court decided *Tanzer v. MyWebGrocer, Inc.*, 2018 VT 124, 209 Vt. 244, 262–63, 203 A.3d 1186 (2018) which contains a very comprehensive explanation of the covenant as it has further developed in Vermont:

> ¶ 32. The covenant of good faith and fair dealing is implied in every contract. Carmichael v. Adirondack Bottled Gas Corp. of Vt., 161 Vt. 200, 208, 635 A.2d 1211, 1216 (1993). Thus, "[a] cause of action for breach of the covenant of good faith can arise only upon a showing that there is an underlying contractual relationship between the parties, but breach of that underlying contract is not necessary before bringing a tort action under the covenant." Monahan v. GMAC Mortg. Corp., 2005 VT 110, ¶ 54

[37] 2005 VT 110, ¶54 n.5, 179 Vt. at 187 n.5, 893 A.2d at 316 n.5.

[38] *Harsch Properties, Inc. v. Nicholas*, 2007 VT 70, 932 A.2d 1045.

[39] *Id*. at ¶13, 932 A.2d at 1050.

[40] *Id*. at ¶17.

n.5, 179 Vt. 167, 893 A.2d 298 (citation omitted). We have explained that the covenant acts to protect **1199 the parties to a contract, and to ensure that they "act with faithfulness to an agreed common purpose and consistency with the justified expectations of the other party." Carmichael, 161 Vt. at 208, 635 A.2d at 1216 (quotation omitted). The covenant's protection does not extend simply to actions taken in fulfillment of a contract, but also actions taken in terminating a contract and winding up the contractual relationship between the parties. Id. at 210, 635 A.2d at 1217. The covenant likewise "covers not only contract performance, but also contract enforcement," including "settlement and litigation of contract claims and defenses." Langlois v. Town of Proctor, 2014 VT 130, ¶ 61, 198 Vt. 137, 113 A.3d 44 (quotation omitted). The covenant of good faith and fair dealing "is violated by dishonest conduct such as conjuring up a pretended dispute, asserting an interpretation contrary to one's own understanding, or falsification of facts." Id.

¶ 33. A breach of the covenant may be shown by evidence that a party to a contract acted in such a way as to "violate[ ] community standards of decency, fairness or reasonableness, demonstrate[ ] an undue lack of diligence, or [take] advantage of [other parties'] necessitous circumstances." *263 Monahan, 2005 VT 110, ¶ 3, 179 Vt. 167, 893 A.2d 298. A party may collect punitive damages under the covenant where the party can show that the other party acted with actual malice. Id. ¶ 54 n.5. "Actual malice may be shown by conduct manifesting personal ill will, evidencing insult or oppression, or showing a reckless or wanton disregard of plaintiff's rights." Id. ¶ 4 (quotation omitted). Where a party alleges both breach of contract and breach of the implied covenant of good faith and fair dealing, dual causes of action are permitted only where the different actions are premised on different conduct—"we will not recognize a separate cause of action for breach of the implied covenant of good faith and fair dealing when the plaintiff also pleads a breach of contract based upon the same conduct." Id. ¶ 54 n.5 (emphasis in original); see Ferrisburgh Realty Inv'rs v. Schumacher, 2010 VT 6, ¶ 26, 187 Vt. 309, 992 A.2d 1042.

¶ 34. As we have explained, whether conduct breaches the covenant is a question of fact that depends heavily on the context of the conduct alleged to have breached the covenant. Carmichael, 161 Vt. at 209, 635 A.2d at 1217. So a jury instruction concerning a breach of the covenant will list few "precise analytical elements," but will instead ask the jury to determine whether, given the surrounding context of the alleged conduct, that conduct constitutes a breach. Id.

. . .

¶ 38. . . . The court also correctly instructed the jury regarding the implied covenant of good faith and fair dealing—"that MyWebGrocer made an implied promise not to do anything to destroy or impede Mr. Tanzer's ability to get the benefits of his agreement with MyWebGrocer under the phantom share plan" and that "bad faith implies an intention to mislead or deceive another, or a neglect or refusal to fulfill some duty or other contractual obligation not prompted by an honest mistake or disagreement." . . .

¶ 39. This is not to say that Tanzer may not be able to pursue a claim for breach of the covenant of good faith and fair dealing. Tanzer presented evidence beyond that relating to the breach of the contract between the parties, and the conduct

> alleged to underpin Tanzer's contract and covenant claims does not completely overlap.
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> ¶ 40. As noted above, the covenant covers not just contract fulfillment, but also contract enforcement, including settlement and litigation. Langlois, 2014 VT 130, ¶ 61, 198 Vt. 137, 113 A.3d 44. Even so, there is a distinction between litigation conduct that violates the covenant and litigation conduct that is an aggressive prosecution or defense. Litigation conduct that reflects dishonesty—"such as conjuring up a pretended dispute, asserting an interpretation contrary to one's own understanding, or falsification of facts"—violates the covenant of good faith and fair dealing. Id. Litigation conduct falling below this high bar does not. . . .Nevertheless, we emphasize that any litigation conduct alleged to have breached *267 the covenant must fall within the narrow scope of dishonest conduct.

Tanzer v. MyWebGrocer, Inc., 2018 VT 124, ¶¶ 32-34 and 38-41, 209 Vt. 244, 262-263 and 265-267, 203 A.3d 1186, 1198-1199 and 1201–1202 (2018).

IV. APPLICATION OF THE LAW TO THE FACTS

Turning to the case at bar, the factual question is whether Middlebury College acted in good faith and dealt fairly and consistently with the justified expectations of John Mead in the performance of their agreement. *Langlois*, 2014 VT 130, ¶ 59. Plaintiff asserts that Defendant stripped the Mead family name off of the Memorial Chapel by erroneously recounting the Mead Memorial Chapel's own history, that the chapel was named in honor of Governor Mead and his wife, instead of Mead having built the Chapel as a memorial to honor his ancestors. This false narrative created the supposed rationale for Defendant's removal of the name "Mead" from the Chapel in the manner that it did, which was in direct defiance of its covenant and the expectation that the College will act honestly and reasonably in the faithful pursuit of the agreed common purpose of the contract.

Instead, the College used Mead as a scapegoat, portraying itself as an innocent bystander which naively accepted money from an unknown bad guy who had fallen from grace. Middlebury College created a story to hide its staggering half-century of Eugenics teaching and advocacy, all at the expense of an honorable man who, no matter his limitations and context, spent his life caring for and serving his patients, neighbors, church, city, college, state and nation.

The 1914 Trustees of Middlebury College knew exactly who Governor Mead was, and regrettably, Mead helped to further Middlebury College's institutional Eugenics agenda, at least for a moment in time, in a single speech, in 1912. However, Middlebury College's hypocritical gaslighting and framing of Mead for its crimes, was more than a breach of contract, it was for a bad motive, to lay blame elsewhere. Therefore, Defendant has acted in bad faith with improper motive and with wanton disregard for the rights of the Plaintiff , which constitutes a breach of the covenant of good faith and fair dealing to faithful pursue the agreed common purpose of the contract.

Faithfully pursuing the Mead Memorial Chapel's purpose of honoring and memorializing the Mead ancestors does not include scapegoating a man for the college's public relations purposes while erasing the Mead family name from its Memorial as well as John Mead's lifetime of accomplishments and philanthropy that benefitted the State of Vermont and its people as well as generations of Middlebury College students. Plaintiff submits that as bad faith conduct in light of the monumental contributions to Eugenics made by Middlebury College in educating its students with Eugenics curriculum from 1896 to 1946. For fifty years, Middlebury College was in the business of Eugenics programming of its students, who would become the teachers, doctors, lawyers, judges, legislators, clergy and business leaders of tomorrow. Yet, it was Mead who Middlebury College excised as a cancer on the College.

Consequently, Plaintiff must be allowed to pursue discovery to determine what Middlebury College knew about the true purpose of the naming of the Mead Memorial Chapel, what Middlebury College knew about its own Eugenics history, what information that they considered, what process that they followed. Did the College intentionally use Mead as a subterfuge or did they recklessly disregard Mead's rights to reasonably expect Middlebury College to faithfully pursue the agreed common purpose of the contract.

To prevail on a claim for breach of the implied duty of good faith and fair dealing, the plaintiff must prove the following:

- The defendant acted in bad faith
- The defendant's actions prevented the plaintiff from realizing the benefits of the contract
- The plaintiff suffered injury or loss as a result

The first element will require further discovery so that Plaintiff can determine in more detail, the motives and reasons for the Defendant's apparent intentional or reckless actions that Plaintiff believes is a bad faith breach of the covenant.

The second element, that Middlebury Colllege's actions prevented the plaintiff from realizing the benefits of the contract is satisfied because the College's removal of the Mead name through the creation of a false narrative, has highjacked the purpose of the contract, to honor and memorialize the Mead family ancestors who embodied the simplicity and strength of the Vermont character, thereby destroying the family legacy that Mead intended to preserve.

The third element, that Plaintiff suffered injury or loss as a result is present because the benefit of the bargain has been canceled and destroyed by the Defendant's false narrative to lay blame on Mead, the "fall guy", as a subterfuge to conceal its own sordid history. By eliminating Mead's benefit of the bargain, his estate has been damaged due to the diminution in value of the consideration received under the contract, his lost time and opportunities, fiduciary fees and expenses, litigation costs and expenses of suit, and attorneys fees under the Bad Faith exception to the American Rule.

V. DAMAGES AVAILABLE FOR BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING

Attorney Fewell, in his Vermont Bar Journal article, also examined the damages that are available for breach of the Covenant of Good Faith and Fair Dealing, providing the following analysis:

> There has been little discussion of available damages for breach of the implied covenant in Vermont law. In light of the tort-like nature of the claim, the question arises whether a party is entitled to tort damages for breach of the implied covenant, and whether, in fact, the calculation of damages based on tort versus contract is materially different. The answer to both is yes.
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> In *Monahan*, the use of the tort standard for punitive damages for breach of implied covenant suggests that the Court will look to tort law for the measure of damages under an implied covenant claim.[41] This observation is bolstered by the Court's implied covenant decisions. For example, in *Carmichael* the jury returned a verdict for $60,000 for compensatory damages and $100,000 in punitive damages related to the breach of implied warranty claim, notwithstanding a directed verdict on the breach of contract claim.[42] There was no discussion of the basis of damages but the existence of non-contractual damages is obvious.
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> In *Harsch Properties*, the trial court distinguished between damages available for breach of contract and breach of good faith and fair dealing.[43] The trial court instructed the jury that breach of contract damages were comprised of the commission the broker would have earned under the broker agreement, and implied covenant damages should be the "value of the lost opportunity to effect a sale and thereby receive compensation under the contract."[44] On appeal the Supreme Court agreed with the trial court's characterization that good faith damages were distinct from contractual damages, and observed that the "lost opportunity" costs were undefined in the contract and supported by little evidence at trial.[45]
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> What little anecdotal evidence is available would suggest that the implied covenant provides for tort-based damages, including physical damages otherwise foreclosed in a contract action by the economic loss doctrine.[46] The substantial benefit *28 of tort damages is the absence of the requirement of contractual foreseeability. While the outer limit of tort damages is determined by proximate cause, there is no requirement that proximate cause be limited to damages reasonably foreseeable to the parties.

W. Scott Fewell, Esq., Vermont's Implied Covenant of Good Faith and Fair Dealing in Commercial Contracts, Vt. B.J., Summer 2010, at 24, 24–28.

In 2017, the Vermont Federal District Court in Kindred Nursing Centers E., LLC v. Estate of Nyce, No. 5:16-CV-73, 2017 WL 2377876 (D. Vt. May 31, 2017) had occasion to consider a claim

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[41] *Monahan*, 2005 Vt. 110, 179 Vt. 167, 893 A.2d 298.

[42] *Carmichael*, 161 Vt. 200, 635 A.2d 1211.

[43] *Harsch Properties*, 2007 VT 70, 932 A.2d 1045 (2007).

[44] 2007 VT 70, ¶13-20, 932 A.2d at 1049-1051.

[45] *Id*.

[46] *See Gus Catering Inc. v. Menusoft Systems*, 171 Vt. 556, 558, 762 A.2d 804, 807 (2000).

for attorneys fees under the "bad faith" exception to the American Rule when the parties were in privity. The Court identified two "variants" of the bad-faith exception:

> But Vermont recognizes at least one other variant of the "bad faith" exception that does not depend on the presence of a third party.[4] In *In re Gadhue*, 149 Vt. 322, 544 A.2d 1151 (1987), the Vermont Supreme Court expanded the exception articulated in *Albright* to include "situations where the bad faith action of one person caused another person to incur litigation expenses in unnecessary judicial proceedings with the wrongful actor." *Brisson*, 2016 VT 56, ¶ 29. The Vermont Supreme Court has recently reaffirmed that it recognizes an exception to the American Rule, without saying that the exception depends on the presence of a third party. *See Depot Square Pizzeria, LLC v. Dep't of Taxes*, 2017 VT 29, ¶ 7 (citing *Gadhue*) ("[A]n exception to the American Rule may occur when one of the litigants has acted in bad faith.").
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> Under both *Albright* and *Gadhue*, "the exception is triggered only by conduct that could be described as in bad faith, vexatious, wanton, oppressive, or unreasonably obstinate." *Id.* ¶ 30. "[T]he equitable power to award attorney's fees as an exception to the American Rule 'must be exercised with cautious restraint ... only in those exceptional cases where justice demands an award of attorney's fees.' " *Id.* ¶ 31 (quoting *Agency of Nat. Res. v. Lyndonville Sav. Bank & Trust Co.*, 174 Vt. 498, 501, 811 A.2d 1232, 1236 (2002) (mem.)). . . . For present purposes, it is sufficient to note that, while the presence of privity between the parties may preclude application of the *Albright* variant of the bad-faith exception, it does not preclude application of the *Gadhue* variant.

Kindred Nursing Centers E., LLC v. Estate of Nyce, No. 5:16-CV-73, 2017 WL 2377876, at *4–5 (D. Vt. May 31, 2017)

Then in 2018, the Vermont Supreme Court in *Tanzer*, further addressed the parties ability to pursue a damages claim for breach of the covenant, stating the following regarding punitive damages and the recovery of litigation expenses, including attorneys fees, which are recoverable upon a showing the wrongful act of one person has involved another in litigation ... or has made it necessary for that other person to incur expenses to protect his interests:

> ¶ 41. . . .It nonetheless bears repeating that a party may only pursue punitive damages on a breach of the covenant claim when the party has presented evidence **1202 that the other party acted with actual malice—as "shown by conduct manifesting personal ill will, evidencing insult or oppression, or showing a reckless or wanton disregard of plaintiff's rights." Monahan, 2005 VT 110, ¶ 4, 179 Vt. 167, 893 A.2d 298 (quotation omitted). Any request for attorney's fees will also need to be considered in light of the evidence presented in a new trial. Though here again, we

> emphasize that attorney's fees are only recoverable upon a showing of bad faith litigation conduct. See id. ¶¶ 76-80. As we explained in In re Gadhue, "where the wrongful act of one person has involved another in litigation ... or has made it necessary for that other person to incur expenses to protect his interests, litigation expenses, including attorney's fees, are recoverable." 149 Vt. 322, 327, 544 A.2d 1151, 1154 (1987) (quotation omitted).[2]

Tanzer v. MyWebGrocer, Inc., 2018 VT 124, ¶¶ 32-34 and 38-41, 209 Vt. 244, 262-263 and 265-267, 203 A.3d 1186, 1198-1199 and 1201–1202 (2018).

VI. DAMAGES SOUGHT

Plaintiff claims Compensatory Damages including, but not limited to, diminution in value of benefit of his bargained-for consideration, lost time and opportunities, litigation costs and expenses, and attorneys' fees under the "bad faith" exception to the American Rule. *See In re Appeal of Gadue*, 149 Vt. 322, 327 (Vt. 1987).

In addition, Plaintiff claims Punitive Damages for Defendant's bad faith conduct in scapegoating Governor Mead for their own ulterior bad motives, obfuscating the College's shameful past, by blaming a "fall guy". Such extraordinary circumstances, warrant an award of attorneys fees as well as punitive damages to punish Defendant's bad faith conduct and deter such actions in the future by Middlebury College or by other bad actors.

Lastly, because compensatory damages are inadequate, Plaintiff prays that the Court invoke its equity jurisdiction and provide injunctive relief ordering the restoration of name Mead Memorial Chapel to the building.

WHEREFORE, Plaintiff respectfully requests that he be permitted to proceed with Discovery with regard to the claim for breach of the covenant of good faith and fair dealing so that he may prepare for trial of the claim.

DATED at Randolph, County of Orange and State of Vermont, this 4th day of November 2024.

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

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