IN THE SUPREME COURT
OF THE STATE OF VERMONT

APPELLANT'S BRIEF IN CHIEF

DANNY L. DEGRAFF, NANCY R. DEGRAFF and MBS HARDWARE & LUMBER, INC., d/b/a MILTON BUILDING SUPPLY Plaintiffs/Appellants v. NORMAN BURNETT, Defendant/Appellee v. DANNY L. DEGRAFF, NANCY R. DEGRAFF and MBS HARDWARE & LUMBER, INC., d/b/a MILTON BUILDING SUPPLY, Counterclaim Defendants/Appellants	Appealed From: Chittenden Superior Court Docket No. 778-02 CnC Supreme Court Docket No. 2006-266

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III. STATEMENT OF THE CASE.

From approximately the 1970s to 1990, William and Lois Warren (now Lois Strong) operated a hardware and lumber business on property they owned in Milton. Printed Case (hereafter "PC") 153-154, 168-169. At the time, the Warrens owned several adjoining lots, of which Lots 3, 5 and 7 are relevant to the building supply operation. PC 156. The store itself and most of the materials used in the operation were located on Lot 5. PC 5. Building materials and other items were stored in the back of the property, including on a small portion of Lot 3. PC 6. In the 1980s, the Warrens erected a fence around the supply storage area to deter pilferage and theft. PC 169. Most of the fence was erected around the boundary perimeter of Lot 5 and it continued around the back portion of the property onto Lot 3. PC 169-170.

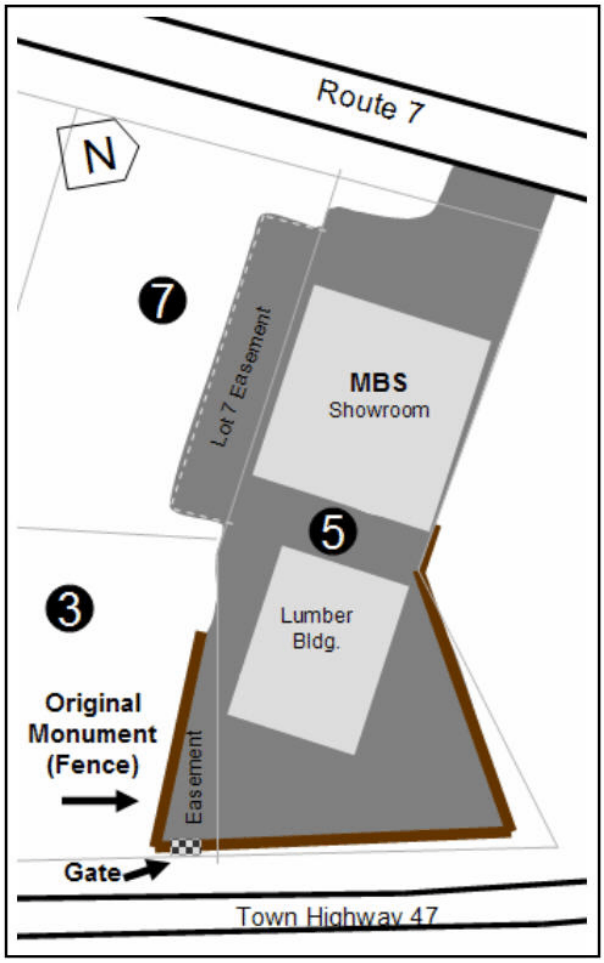

Illustration for demonstration purposes only

In 1990, Danny and Nancy DeGraff purchased the hardware and lumber business and with it Lot 5 from William and Lois Warren. PC 5. As it was the intent of the grantors to sell a "turnkey" operation, the use of the area of Lot 3 on

which the building materials were stored was also sold to the DeGraffs as part of this transaction. PC 173, 249. The fence itself was conveyed in the sale, and served as a monument designating the area wherein the right to store building materials was conveyed via an easement. PC 157, 158. It was the testimony of the grantee and the surviving grantor that the intent of the parties was to convey to the DeGraffs the right to store and use portions of Lot 3, within the limits of the fence, just as the Warrens had for approximately fifteen years prior to the sale of the hardware and lumber business. PC 157-159, 173. Previously, an easement had been unnecessary as the Warrens had owned both lots. PC 5, 182.

The Warranty Deed conveying the property to DeGraffs provides for an easement benefitting Lot 5 and burdening Lot 3. PC 249. The deed stated, "[t]he easement area follows an existing fence line." *Id.* The deed also states "this easement is 27 feet in width at its widest point" and that it is "for the purpose of storing lumber and garage space for the lumber business located on Lot 5." *Id.*

The DeGraffs have operated Milton Building Supply (hereafter the plaintiffs/appellants will be referred to as "MBS") at this location continuously since 1990 using the easement area inside the fence. PC 160. In 1998, at the request of Grantor William Warren, Harold Marsh conducted a land survey involving the easement area benefitting MBS finding the easement area measured 65.32 feet at its widest point. PC 181, 252. No action was taken by Grantor William Warren in response to the apparent discrepancy in the metes and bounds description in the deed to DeGraffs relating to this easement. PC

184.

In 2002, some twelve (12) years after MBS purchased the real property with the easement, appellee Burnett purchased the adjacent burdened property from (common Grantor) William Warren. PC 6. Both the Purchase and Sales Agreement and the deed by which Burnett acquired Lot 3 contain a "reverse warranty" stating respectively that the parties were aware that the size and location of the easement may or may not have been as shown on survey plans and that no warranty was made that the size and location of the easement were as shown on any survey plans. PC 257-266. Shortly after taking title, Burnett, unannounced and in the dead of night, demolished the fence used to describe the easement area, as set out more fully in the deed to MBS. PC 6. In addition, Burnett destroyed a 6' x 24' swing gate belonging to MBS and took other destructive measures. PC 6. The fence was the property of MBS, as it was conveyed by the Purchase and Sales Agreement between MBS and William and Lois Warren. PC 172, 255. Burnett asserts that the easement is limited to a width of 27' feet at its widest point *parallel* to the fence rather than flush up to it. Burnett claims the fence conveyed by the common Grantor to MBS was encroaching (as allegedly the swing gate and other improvements) onto his newly purchased property. PC 185-186, 195-198.

Danny L. DeGraff, Nancy R. DeGraff and MBS Hardware & Lumber, Inc., d/b/a Milton Building Supply brought an action against Defendant Norman Burnett seeking declaration of location and scope of MBS' deeded easement, declaration of location and scope of prescriptive easement, claims relating to

interference with easement, interference with private way, trespass and actual damages, removal of surveying monument, damage to personal property, conversion, seeking to quiet title and punitive damages. PC 31-39.

On October 1, 2002, Burnett filed a Motion for Partial Summary Judgment and a Motion *in Limine* barring extrinsic evidence or parol evidence at trial concerning the aforementioned deed provision. PC 51-62. On November 15, 2002, MBS filed a Cross-Motion for Summary Judgment on all counts claiming that as a matter of law, it is entitled to relief because when there is a discrepancy or inconsistency between metes and bounds and that of a referenced monument in a deed, the monument prevails. PC 63-99. As a consequence, the fence line defines the boundary of the easement area despite the actual width of 65.32 feet versus 27 feet, as referenced in the deed. PC 69. In the alternative, MBS asserted the language in the deed to MBS from Grantor William and Lois Warren is ambiguous, thus permitting extrinsic evidence to ascertain the intention of the parties relating to the scope and use of the easement. PC 76.

On April 25, 2003 in a Memorandum Decision and Order, Hon. Judge Dennis Pearson denied the parties Cross-Motions for Summary Judgment and denied Burnett's Motion *In Limine.* PC 112-117. Of particular significance, Judge Pearson found the MBS deed to be "horribly inaccurate, and ambiguous" and decided the term – "follows an existing fence line" – to be "imprecise." PC 115-116. As a consequence, the Court determined that extrinsic evidence was necessary to both "explain the intent of the deed language as to the authorized usage" and to establish the location of the easement. PC 116.

Therefore, this matter came before the Trial Court for merits hearings on June 21, July 13 and August 10, 2005. PC 24-25. Despite finding ambiguity in the deed, Judge Norton denied MBS's request to present full evidence of the intent of the grantors and grantees. Honorable Judge Norton issued findings on September 8, 2005, finding in part that (a) the fence line is a monument, but that it marks the heading or *direction* of the easement rather than its boundary (and that the easement border was a line some thirty eight (38) feet away from the fence but running parallel to the fence); (b) the use of the easement is limited to the right to store lumber and for garage services but no ingress/egress was permitted asserting that no extrinsic evidence as to the intent of the parties relating to the use of the area had been submitted; and (c) denying the claim for damages. PC 11-12.

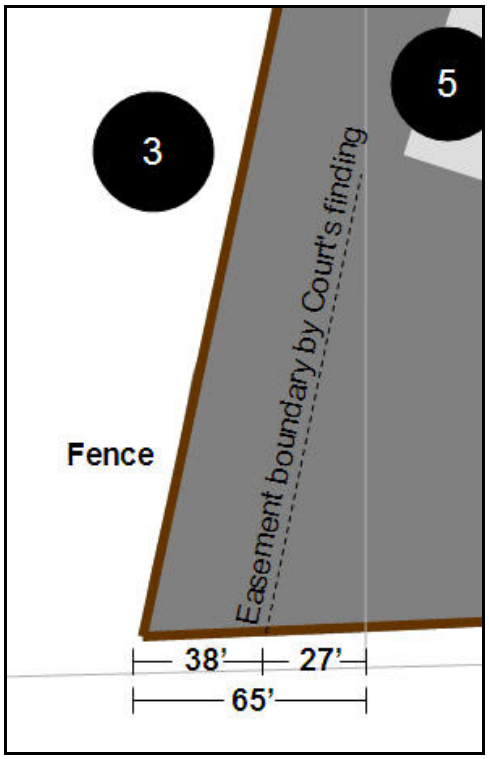

Illustration for demonstration purposes only

Judgment on May 18, 2006 was entered by the Trial Court to which MBS filed a Motion to Stay Pending Appeal and Notice of Appeal on June 15, 2006. PC 1-3, 137-142. The motion to stay was denied on August 28, 2006. PC 149-151.

IV. ARGUMENT.

A. STANDARD OF REVIEW.

Construction of a contract is a matter of law, not a factual determination. *Gannon v. Quechee Lakes Corporation,* 162 Vt. 465, 469, 648 A.2d 1378, 1380 (1994). The Supreme Court on appeal must make its own inquiry into the proper legal effect of the terms of the agreement. *Id.* The question of whether ambiguity exists is a question of law, which the Supreme Court reviews *de novo*. *Mann v Levin*, 2004 VT 100 ¶ 14, 177 Vt. 261, 266-267, 861 A.2d 1138, 1144. If a factual determination is necessary to determine the proper legal effect, the Supreme Court may employ the trial court's valid findings of fact. *Gannon* at 469, 1380.

B. THE RULE OF CONSTRUCTION IS THAT A DISCREPANCY BETWEEN THE REFERENCE TO A MONUMENT AND THE METES AND BOUNDS IS CONTROLLED IN FAVOR OF THE MONUMENT. THE TRIAL COURT ERRED WHEN IT FAILED TO FIND THAT THE MONUMENT CONTROLLED THE BOUNDARY OF THE EASEMENT.

The deed contains a discrepancy between the monument and metes and bounds description. The rule of construction requires that the monument control over the inconsistent metes and bounds. It was error for the trial court to determine otherwise.

The deed uses an undisputed monument – the fence – and states "[t]he easement area follows the existing fence line." The deed also makes a metes

and bounds description – “this easement is 27 feet in width at its widest point.” The fence line is, in fact, some sixty five feet at its farthest (widest point) from the property boundary. This disparity between the actual and deeded measurement created a discrepancy between the monument and the metes and bounds description.

On April 25, 2003, Judge Pearson found this discrepancy to be “ambiguous” and determined that extrinsic evidence was necessary to explain the location of the easement. PC 115. As a matter of law, such discrepancies between a monument and a metes and bounds description *do not constitute a latent ambiguity*. *Vermont Marble Company v. Eastman*, 91 Vt. 425, 448, 101 A. 151 (1917). Such a discrepancy is to be resolved as a matter of law in favor of the monument.

In *Vermont Marble Company v. Eastman*, the Vermont Supreme Court affirmed the long-standing common law rule of construction when metes and bounds are inconsistent with a referenced monument, the monument controls. The Court held that:

> As between courses and distances in a deed on the one hand, and abuttals and monuments on the other, the latter, when identified, must control because mistakes in courses and distances are more probable and frequent than in abuttals and monuments, capable of being clearly designated and accurately described. *Ibid.* at 448.

In *Vermont Marble Company*, the Vermont Supreme Court considered a very similar discrepancy between a monument (a maple tree) and the distance stated in the deed:

> It appears that the length of the course required by the second call in the

> deed, the southerly terminus of which is given as the maple tree, is about 1 8/10 rods shorter than the distance stated in the deed. *Yet this discrepancy, appearing in the application of the description of the land, does not constitute a latent ambiguity*. The maple tree is a natural object then and now on the ground, directly in the course and made to mark the southeasterly corner of the land conveyed; and there is nothing by reason of which the description in this respect is taken out of the general rule, that...monuments...when identified, must control. *Id.* at 448, emphasis added, parenthetical omitted.

A discrepancy that places a monument in conflict with a metes and bounds *does not create ambiguity* that should be resolved by the Court by application of extrinsic evidence. *Id.* Instead, such a discrepancy invokes the rule of construction that a monument prevails over a conflicting metes and bounds description. When examining such a discrepancy, the remedy at law is to have the monument control – and it was error for the trial court to engage in any foray into the subjective intent of the parties or (as apparently happened) attempt to fashion its own replacement map in lieu of the deed language.

A review of the cases reveal that the proper remedy was for the Court to construe the deed with the monument controlling any discrepancy. For example, in 1989 this Court considered *Phillips v. Savage*, 151 Vt. 118, 557 A.2d 500 (1989), which is highly instructive for this appeal. In *Phillips*, the conveyance granted a property that ran "SEVEN HUNDRED FEET (700'), more or less, to the westerly line of Robert Brown and wife." *Phillips v. Savage*, 151 Vt. 118, 118, 557 A.2d 500, 501 (1989). As this Court noted, "[t]he dispute arises because the call of 700 feet, more or less, for the southerly boundary falls approximately 350 feet short." *Id.* at 119, 501.

The metes and bounds description in *Phillips* was off by a similar factor as

in the instant case (actual 350' instead of deed description of 700' and actual 27' instead of deed description of 65'). Such error in the metes and bounds description does not create ambiguity. In *Phillips*, the Supreme Court wrote "the distance call conflicts with a monument....In a conflict between the calls of distance and known monuments, the distances must yield." *Id.* at 199, 501.

Judge Pearson's April 25, 2003 ruling in this matter is erroneous as a matter of law as it is clear that the ruling hinged on Judge Pearson's determination that conflict between the actual measurement and the metes and bounds was "clearly contrary to and inconsistent with the express deed language." PC 116. Faced with this disparity, Judge Pearson declined to follow the controlling rule that the monument prevailed, and instead decided to try to "harmonize" the mis-measurement and the monument. PC 116.

The trial court accepted that the fence was a monument. PC 11. This finding should have been dispositive. Vermont law is that the monument controls and no "harmonization" is necessary. The trial court "may not insert terms into an agreement by implication unless the implication arises from the language employed or is indispensable to effectuate the intention of the parties." *Downtown Barre Development v. C & S Wholesale Grocers, Inc.*, 177 Vt. 70, 75, 857 A.2d 263, 267, 2004 VT 47 ¶ 9.

A survey of the controlling cases establish that the trial court should have simply deferred to the monument. In *Marshal v. Bruce*, 149 Vt. 351, 543 A.2d 263 (1988), a dispute arose because the deeds in both parties' chains of title referred to four metal stakes. Both deeds referred to the distance as 175 feet.

The court found the actual distance to be 210 feet. There was no need to "harmonize" the two, the correct decision was the steel posts were monuments that "control over a call for distance." *Id.* at 352, 264.

In *Monet v. Merritt*, 136 Vt. 261, 388 A.2d 366 (1978), the courses and distances conflicted with the monuments described in the deed such that if the courses and distances were to be followed, it would be impossible to reach a described corner of the property and the survey would not close. There was no need to "harmonize" the inconsistent metes and bounds. Noting "the controlling rule of construction here requires than an inconsistent metes and bounds description yield to a description by monument. Accordingly, distances must be lengthened or shorted and courses varied so as to conform to the monument description." *Id.* at 265, 368, citations omitted.

Rambeau v. Barrows, 127 Vt. 550, 255 A.2d 175 (1969) is similar to the instant case: there, the Plaintiff owned a parcel of property which had a three strand barbed wire fence that was referred to in the Plaintiffs deed and surveys. Conflict developed with a deed that only referred to "courses and distance." The court, in holding that the monument (the fence) defined the boundary, rather than the metes and bounds, stated "the accepted boundary, when marked by identifiable monuments, will prevail over the description in the original grant where the two are at variance." *Id.* at 554, 178.

Here, the metes and bounds description of "27 feet at its widest point" is inaccurate, as the then existing fence width from property line to fence was approximately 65 feet. Therefore, the monument (the fence) that is referenced in

the DeGraffs' Warranty Deed and defined the easement area must prevail over the inconsistent metes and bounds measurement of 27 feet.

Once the fence had been accepted as a monument, the trial court should have determined this issue as a matter of law. The monument should have controlled this determination and it was reversible error for the Court to further examine the matter.

C. THE WORD "FOLLOWS" IS A COMMONLY UNDERSTOOD WORD AS PROVABLE BY COMMON USAGE OR A DICTIONARY. IT IS NOT AMBIGUOUS AND IT WAS ERROR FOR THE TRIAL COURT TO ENGAGE IN AN UNWARRANTED EXAMINATION OF THIS TERM.

The question of whether ambiguity exists is a question of law, which the Supreme Court reviews *de novo*. *Mann v Levin*, 2004 VT 100 ¶ 14, 177 Vt. at 266-267, 861 A.2d at 1144. The relevant deed language describes the boundary of the easement that "follows an existing fence line." Judge Pearson wrote on April 25, 2003 that "follows an existing fenceline" is "imprecise." PC 116.

As noted *supra*, it appears that the *imprecision* found by the trial court was the disparity between the monument and the metes and bounds. As discussed *supra*, such disparity is not *ambiguity* at law and the trial court was in error to so find. However, assuming *arguendo* that the trial court found *the phrase itself ambiguous*, as discussed *infra*, this is error as no such ambiguity appears in the phrase as a matter of law.

Breaking this phrase apart to decipher where Judge Pearson might have found alleged ambiguity, there seems to be no dispute about the component term

"existing fence line" (the trial court's April 25, 2003 order in footnote 8 opines that the remaining post ends left in the ground would allow the line to be reestablished if necessary). PC 116. The only remaining word subject to ambiguity is "follows" which is apparently the word that may have confused the trial court. As demonstrated *infra*, "follows" is not ambiguous as a matter of law.

"The question of whether a contract term is ambiguous is a matter of law for the court to decide." *Isbrandtsen v. North Branch Corp.*, 150 Vt. 575, 577, 556 A.2d 81, 83 (1988), citing *Trustees of Net Realty Holding Trust v. AVCO Financial Services of Barre, Inc.*, 144 Vt. 243, 248, 476 A.2d 530, 533 (1984). "A provision in a contract is ambiguous only to the extent that reasonable people could differ as to its interpretation." *Id.* "If a contract, through [sic] inartfully worded or clumsily arranged, fairly admits of but one interpretation, it may not be said to be ambiguous or fatally unclear." *Id.,* quoting *Allstate Ins. Co. v. Goldwater*, 163 Mich.App. 646, 648, 415 N.W. 2d 2, 4 (1987).

"When the language of a deed is clear and unambiguous the court is not at liberty to look at extraneous circumstances for reasons to ascertain its intent. And the intent expressed in the description cannot be altered by evidence or findings of extrinsic facts. The understanding of the parties must be deemed to be that which their own instrument declares." *Haklits v. Oldenbur*, 124 Vt. 199, 202, 201 A.2d 690, 693 (1964). It is well known that before extrinsic evidence may be "used in the constructions of a written instrument, ambiguity must first be found." *Isbrandtsen v. North Branch Corporation*, 150 Vt. at 577, 556 A.2d at 83.

If no ambiguity is found, language must be given effect in accordance with

its plain, ordinary and popular sense. *Id.* When considering common words used in deeds, it is the practice of this Court to look to the common dictionary definitions. See *Haklits v. Oldenburg*, 124 Vt. at 203, 201 A.2d 693. The *Merriam-Webster Online Dictionary* (www.m-w.com) defined the verb form of "follow" as:

> *transitive verb*
> **1 :** to go, proceed, or come after <*followed* the guide>
> **2 a :** to engage in as a calling or way of life **:**
> 1. **PURSUE** <wheat-growing is generally *followed* here> **b :** to walk or proceed along <*follow* a path>
> **3 a :** to be or act in accordance with <*follow* directions> **b :** to accept as authority **:** **OBEY** <*followed* his conscience>
> **4 a :** to pursue in an effort to overtake **b :** to seek to attain <*follow* knowledge>
> **5 :** to come into existence or take place as a result or consequence of <disaster *followed* the blunder>
> **6 a :** to come or take place after in time, sequence, or order **b :** to cause to be followed <*followed* dinner with a liqueur>
> **7 :** to copy after **:** **IMITATE**
> **8 a :** to watch steadily <*followed* the flight of the ball> **b :** to keep the mind on <*follow* a speech> **c :** to attend closely to **:** keep abreast of <*followed* his career with interest> **d :** to understand the sense or logic of (as a line of thought)
> *intransitive verb*
> **1 :** to go or come after a person or thing in place, time, or sequence
> **2 :** to result or occur as a consequence, effect, or inference

The dictionary examples used demonstrate that there is no ambiguity in the term "follow." Definition 1.b. uses the example "follow a path" – which clearly means walk *on* a path. The only reasonable interpretation of "follows the existing fence line" is that the easement border is *on* the existing fence line – not some distance away as argued by defendant and found by the trial court.

Other dictionaries have similar definitions. From *Webster's New World*

Dictionary, Third College Edition:

> **fol·low** (fäl′ō) ***vt.*** ⟦ ME *folwen* < OE *folgian*, akin to Ger *folgen* & (?) Welsh *olafiad*, follower ⟧ **1** to come or go after **2** to go after in order to catch; chase; pursue **3** to go along *[follow* the right road*]* **4** to come or occur after in time, in a series, etc. **5** to provide *with* something that comes after *[*to *follow* praise with blame*]* **6** to take the place of in rank, position, etc. *[*Monroe *followed* Madison as president*]* **7** to take up; engage in *[*to *follow* a trade*]* **8** to come or happen as a result of *[*disease often *follows* malnutrition*]* **9** to take as a model; act in accordance with; imitate **10** to accept the authority of; obey *[*to *follow* rules*]* **11** to support or advocate the ideas, opinions, etc. of **12** to watch or listen to closely; observe *[*to *follow* a conversation intently*]* **13** to be interested in or attentive to current developments in *[*to *follow* local politics*]* **14** to understand the continuity or logic of *[*do you *follow* me?*]* —***vi.*** **1** to come, go, or happen after or next after some thing or person in place, sequence, or time **2** to occur as a natural or logical consequence; result —***n.*** **1** the act of following **2** *Billiards* a shot that imparts a forward spin to the cue ball so that it continues rolling in the same direction after striking the object ball: also **follow shot** —**as follows** as will next be told or explained —**follow out** to carry out fully or completely —**follow through** **1** to continue and complete a stroke or swing after hitting or releasing the ball or puck **2** to continue and complete an action —**follow up** **1** to follow closely and persistently **2** to carry out fully **3** to add to the effectiveness of by doing something more
> ***SYN.***—**follow** is the general word meaning to come or occur after, but it does not necessarily imply a causal relationship with what goes before *[*sunshine *followed* by rain*]*; **ensue** implies that what follows comes as a logical consequence of what preceded *[*clouds appeared and rain *ensued]*; **succeed** implies that what follows takes the place of what preceded *[*who *succeeded* Polk to the presidency?*]*; **result** stresses a definite relationship of cause and effect between what follows and what preceded *[*superstition *results* from ignorance*]* —***ANT.*** **precede**

Definition number 3,"to go along *[follow* the right road*]*", is at issue here. The dictionary example -- "Follow the right road" – means to travel *on* the right road. "Follows an existing fence line" means the easement is *on* the existing fence line. "Follow the right road" does not mean "travel alongside the road at some distance parallel to but not approaching the road" – which is the definition of "follow" offered by Judge Norton in this case.

As discussed *infra*, the trial court was determined to "harmonize" the

disparities despite the rule of construction and despite the normal definition of the word “follow.” By failing to use the correct rules of constructions – that the monument prevailed and common terms are defined by their generally accepted meaning – the trial court labored too heavily to “harmonize” the disparity between the metes and bounds and the actual measurement.

The trial court efforts are contrary to Vermont law and produce a result which is illogical on its face. In its key and fallacious holding, the trial court wrote: “the words in the DeGraff deed *‘follows an existing fence line’* must mean *‘to run besides*.’” PC 11.

“To run besides” is simply not an accepted definition for the word “follows.” In this manner the trial court has gone too far and has committed reversible error. A simple review of the common dictionary definitions show that this is not a definition of the word “follows”.

Common sense teaches us that this definition is facially unsound. If you said to some one as you hiked along the Long Trail together, “Please follow the trail,” and that person began running beside you, parallel to your path, some thirty eight feet away, would you not wonder if that person did not understand the word “follow”? Yet this is the definition offered by Judge Norton in this case.

It should not stand.

Finally, such deed language is contrary to common sense. Why would the drafter use the fence to show the bearing of the easement? Would it not be easier to simply use a compass heading? Why would you build a fence simply to show the bearing of an invisible line some thirty eight feet away?

The trial court's interpretation is an especially illogical conclusion to draw given the history of use of this parcel. It is undisputed that this fence was placed around building supplies to prevent pilferage. PC 171-172. What purpose would be served by placing a fence thirty eight feet away from the supplies it was guarding?

In sum, the trial court found ambiguity where there was none. "Follows" means what Webster's says it means, "to proceed along." The easement proceeded along the existing fence line.

There is no ambiguity. The evidentiary hearing was unnecessary. The Supreme Court should declare as a matter of law that the easement follows, *or proceeds*, on the existing fence line.

D. IF, *ARGUENDO*, THE DEED WAS AMBIGUOUS, THE TRIAL COURT ERRED IN ITS EVIDENTIARY FINDINGS IN THAT THE ONLY PERMISSIBLE INQUIRY WAS INTO THE INTENT OF THE PARTIES AT THE TIME OF THE CONVEYANCE TO ADDRESS THE AMBIGUOUS TERM. THE COURT SHOULD NOT HAVE ENGAGED IN A GENERAL SURVEY OF THE SITUATION AND OFFER ITS OWN SUBSTITUTE INTERPRETATION OF THE AMBIGUOUS TERM.

It was the intent of the parties for the easement to be up to and along the fence line. The only permissible focus of the trial court's inquiry should have been the intent of the grantor and grantee at the time of the grant about the location of the boundary of the easement.

The Trial Court erred by failing to construe the deed by:

> Giv[ing] effect to the intention of the parties [that] can be gathered from the language used when interpreted in

> connection with, and in reference to, the subject matter and purpose sought to be accomplished at the time the instrument was executed. *Creed v. Clogston*, 2004 VT 34, ¶17, 176 Vt. 436, 441, 852 A.2d 577, 582 citing *McDonough v. W.W. Snow Const. Co.*, 131 Vt. 436, 441, 306 A.2d 119, 124 (1973).

Whenever an "ambiguity arises from extrinsic matters, or when, from the language used, the object or extent of the deed or contract cannot be determined, parol evidence is admissible to remove such latent ambiguity." *Pingry v. Watkins*, 17 Vt. 379, 387 (1845).

In this case, it was the clear intent of the parties to convey an easement that had a boundary at the fence.

Dan DeGraff, the purchaser, testified as follows:

Q. So when you entered into the purchase and sale agreement with the Warrens, what was your understanding at this time relative to the yard fence?
Mr. DeGraff: My understanding was that, number one, we were purchasing the fence, which was a continuous fence around the bottom part of the property; and number two, that *I would have an easement to use all the land up to that fence line.*
Q. *Did you understand that you would also have an easement of the fence itself that's on lot three?*
Mr. DeGraff: *Yes, I did.* Emphasis added, PC 161 line 9 to 17

Lois Strong, the surviving original grantor, testified about the fence in the following exchange:

Q. The deed also provides in the easement that it's twenty-seven feet at its widest point. Do you know if the easement area at the time in 1990 when you conveyed it to the DeGraffs, was in fact twenty-seven feet at its widest point?
Ms. Strong: I'm not sure. I have no idea. *To me, it was the fence line, the fence was there and that was visual and that is what we sold the DeGraffs.*
Q. Okay.
Ms. Strong: *Right up to the fence line*. Emphasis added, PC 178 line 10-

19.

Upon cross-examination, Ms. Strong repeated her understanding as to meaning of the language in the deed.

Mr. Parker: I think your testimony was that you intended or that it was your belief that the deed conveyed this easement to the fence line?
Ms. Strong: Yes.
Q. But that isn't what the document says, is it?
Ms. Strong: In my opinion, it does. PC 179 line 11-17.

The Warrens' attorney, Robert Kohn, also verified that the fence was the intended easement line:

Q. ...was further from the fence than twenty-seven feet.
The Court: Take the answer.
Mr. Kohn: *Mr. Warren represented to me that it was his understanding that the intention of the easement was that it go to the fence line*...Emphasis added, PC 244 line 17 to 24.

When considering the scope of an easement in *Hunsdon v. Farrar*, 128 Vt. 410, 264 A.2d 809 (1970), the Vermont Supreme Court held:

> The intention of the parties, not the language used, is the dominating factor, and the circumstances existing at the time of the execution of the deed, the situation of the parties and the subject matter are to be considered. The object and purpose sought to be accomplished may also be considered. *Id.* at 415, 813, citations omitted.

In the instant case, the trial court wrongly considered evidence of conduct and parties that were neither *at the time of the execution of the deed* nor were related to the object and purpose sought by the Warrens and the DeGraffs. The trial court's findings are contradicted by the testimony of the grantee and grantors. The trial court should have limited its inquiry to this narrow issue of the "purpose sought to be accomplished at the time the instrument was executed."

Creed v. Clogston, 2004 VT 34, ¶17, 176 Vt. at 441, 852 A.2d at 582. As it was established, the intent of the original parties was to convey an easement up to and including the fence, and it was error for the trial court to substitute its own interpretation for the clear intent of the grantors and grantee.

E. THE FAILURE TO ADMIT AND CONSIDER CERTAIN TESTIMONY REGARDING GRANTORS' INTENT WAS REVERSIBLE ERROR AND IT WAS LIKEWISE ERROR FOR THE COURT TO ENGAGE IN ITS OWN INTERPRETATION OF THE DEED LANGUAGE.

By failing to grant the MBS summary judgment and finding ambiguity of a core term, the trial court's only reasonable focus of inquiry would be into the intent of the parties when drafting the original deed. PC 115. Judge Pearson wrote that the deed "is ambiguous as to both location and allowed use." Emphasis in original, PC 115. However, Judge Norton, at trial refused relevant and important evidence on this very matter.

When Lois Strong, one of the original grantors was asked, "What was your intention in conveying this easement area that follows the existing fence?", the Court sustained an objection stating, "you can allow extrinsic evidence if there's an ambiguity. I don't see any ambiguity here." PC 177 line 10-12. This trial ruling is in error and in direct contradiction to the earlier rulings of the trial court which had held "extrinsic evidence as to construction of the deed language will apparently be needed to resolve this dispute." PC 112, emphasis in original. The intent of the original grantors and grantee was the *only* relevant focus of the trial court's inquiry, yet the trial court rejected efforts to introduce this relevant

evidence.

For example, MBS sought to introduce the testimony by Robert Kohn, Esq. Mr. Kohn had prepared the original documents for the Warrens, the grantors. He was well situated to testify about the intent behind the language that was used. The trial testimony illustrates that the trial court precluded this testimony – despite the fact that it went to the only core issue that could permissibly be the focus of the court's inquiry.

Objection was raised by Mr. Parker:

> Mr. Parker: This witness, as I understand it, is going to be offered to testify about Mr. Warren's intentions that...
> The Court: I'm not going to allow intentions.
> Mr. Parker: All right. I heard counsel say that in open court. So to the extent that this witness is going to be asked any questions about what he...
> The Court: No, the doctrine of merger in the deed would bar intentions, but if relates to boundaries, that's the only exception that would apply, I think. PC 243 line 4 to 16.

Subsequently, the Court upheld multiple objections and severely limited such testimony as to intent. PC 162 line 22-24, 163 line 9-13, 176 line 12-17, 178 line 5, 180 line 14-21, 232 line 24 to 234 line 14, 336 line 1-3.

The trial court erroneously believed that the doctrine of merger barred testimony regarding intent. PC 232 line 24 to 233 line 8. This is a misapplication of the parol evidence rule and is contrary to the controlling law which is that "the intention of the parties, not the language used is the dominating factor…" *Creed v. Clogston*, 2004 VT 34, ¶17, 176 Vt. at 441, 852 A.2d at 582. The parol evidence rule does not apply in instances such as this where the focus of the inquiry is to explain the intent of the drafting parties. See *Herbert v. Pico Ski*

Area Management Company, 2006 VT 74.

This issue was addressed in *Breslauer v. Fayston School Dist.*, 163 Vt. 416, 659 A.2d 1129 (1995). Citing the parol evidence rule, the trial court had refused extrinsic evidence on an ambiguous contract term. Relying on *Isbrandtsen*, the Supreme Court wrote: "We conclude that the agreement is ambiguous, and the court erred in not allowing plaintiff to introduce extrinsic evidence to show the agreement of the parties." *Id.* at 426.

In marked contrast to the unwarranted exclusion of relevant testimony regarding the intent of the original parties, the trial court permitted opinion testimony from David Bowers, who was called by Mr. Burnett but was never tendered nor qualified as an expert. Objection was raised that Mr. Bowers had not been identified as an expert. PC 199 line 23 to 200 line 19. Mr. Parker, counsel for Burnett, at trial identified Bowers as a fact witness. PC 200 line 23 to 201 line 4.

Nonetheless, Mr. Bower was immediately asked to give opinion testimony. Objection was raised. PC 202 line 24 to 203 line 6. Mr. Parker explained, "What this witness is doing, Judge, is he's presenting a summary of already entered exhibits under 106 in an effort to consolidate what The Court has already heard is a cohesive way, (inaudible) what we understand the deed to be." Despite the fact that this is almost a text book description of expert testimony, the trial court permitted the unqualified testimony, "Yes, I'll allow the gentleman to testify." PC 203 line 24-25. After some testimony, the trial court, observed that the witness "has testified to [sic] range into expert witness" and continued the hearing to

permit discovery into Mr. Bower's opinions. Upon reconvening the hearing on August 10, 2005, Mr. Bowers was never tendered nor qualified as an expert. Ms. DeGraff-Murphy's previous objection still stood and this testimony should have been stricken.

Mr. Bowers testified to many matters that are incorrect statements of law. For example, when asked:

> Q. Do you know what the law is as it relates to if there's a difference between courses and distances and a reference to monuments?
> Mr. Bowers: You go with metes and bounds first. You look for the monuments that are there. The deed is the operative agreement. PC 206 line 16-21.

This is, as outlined *supra*, an absolute misstatement of the applicable law and completely invalidates Bowers' testimony. Bowers was substantially impeached by his general lack of qualifications, and because he was a tenant of Mr. Burnett. PC 207-242. Nonetheless, the trial court ruled '[t]he court finds that Bowers's testimony is compelling and concludes that his findings are conclusive on the measure and nature of the easement." PC 10. Mr. Bowers methods – as adopted by the Court – involved using a GPS device and the United State Geologic Survey's concrete markers. As discussed *supra*, this method is impermissible as the only reasonably inquiries were into the meaning of "follows" and the description of the monument.

In this matter, the Superior Court substituted its own judgment for the established intent of the parties, wrongfully precluded testimony of the intent of the Warrens and DeGraff when conveying the easement, and relied upon

testimony that should have been inadmissible on the issues to be addressed. Based on the above, the trial court's findings are erroneous and mandate reversal.

F. THE FINDINGS FAILED TO ADDRESS OR AWARD DAMAGES DUE TO MBS FROM THE DESTRUCTION OF THE FENCE.

It was undisputed that Burnett destroyed the fence and other property of MBS "by taking down the gate and plowing up much of the gravel roadbed, and cutting down the fence...specifically referenced in the easement clause in the 10/18/90 deed from Warren to DeGraffs" in what was characterized by the trial court as "a fit of self-help." PC 6, 115.

Dan DeGraff testified on behalf of MBS about the destruction of his recent improvements to the easement, including the "yard fence" that was conveyed to him by the original grantor. PC 165-167, 255. MBS demanded the cost of replacing the fence, the swing gate, gravel and the driveway in its verified complaint. PC 36. MBS produced evidence of the estimate of replacement costs of $3,790 at trial. PC 167 line 2 to 20. MBS also requested findings of fact from the court on this issue. PC 135. Meanwhile, Burnett freely admitted that he removed the fence and cut the fence posts flush to the ground in order to establish what he considered to be the delineation between the Degraffs easement and his own property line. PC 189-190, 195-198.

Despite the undisputed nature of the damages to MBS' property, the trial court's findings summarily rejected damages as follows:

> Plaintiffs DeGraff, the non-prevailing party, are denied any claims for damages arising from the loss of the gate or any structures on the encroached area. In addition, the Degraffs shall remove all materials and structures presently on the encroached area as well as the authorized easement...PC 12.

While it may be proper for the court to deny the non-prevailing party the costs of litigation under V.R.C.P. 54(d)(1), no such similar rule exists for the denial of damages properly due to the non-prevailing party. PC 247.

The court's failure to award damages for property destroyed by Burnett in his "fit of self-help" is reversible error. There is no dispute that the fence running the length of the entire easement was removed and the fence posts were cut flush to the ground. PC 195. The fence was conveyed to the DeGraffs by the original grantors. PC 157, 183. The fence was indisputably destroyed by Burnett. PC 219-222. When testimony is undisputed, critical and relevant, the court is required by law to consider it. *Shortle v. Central Vt. Pub. Serv. Corp.*, 134 Vt. 486, 489, 365 A.2d 256, 258 (1976). This matter had been fairly raised by the *Verified Complaint*, ¶ 19 and 20, and prayer had been made for compensation for replacement costs of the fence, the swing gate, gravel and driveway. PC 29.

"In tort, compensation is provided, as nearly as possible, to restore a person damaged to the position he would have been in had the wrong not been committed." *My Sister's Place v. City of Burlington*, 139 Vt. 602, 612, 433 A.2d 275, 281 (1981). A dispute as to the location of the fence is not a defense at law to MBS's valid claim against Burnett for the intentional destruction of its property.

Judge Norton's failure to properly award damages for the destruction of

the MBS's property based on credible, undisputed testimony constitutes reversible error.

G. THE SCOPE OF THE EASEMENT INCLUDES, AS A MATTER OF LAW, USES CONSISTENT WITH THE PERMITTED USE.

The warranty deed conveyed an easement to MBS "for the purpose of storing lumber and garage space for the lumber business located on Lot 5." PC 249. The trial court's findings prohibited use of the easement area as an ingress/egress point. PC 12. This is inconsistent with the use of the area for "storing lumber and garage space" as the easement area is adjacent and abuts Town Highway 47. Access from Town Highway 47 is implicit and consistent with the intended use of the easement and it was error of the Court to find otherwise.

When granting an easement, a party is presumed to have contemplated such a scope for the created easement as would reasonably serve the purpose of the grant. *Presault v. United States*, 100 F.3d 1525, 1542 (Fed Cir 1996) quoting Richard R. Powell, 3 Powell on Real Property § 34.12[2] (Patrick J. Rohan ed., 1996). Uses that are inconsistent with the purpose of the grant or not reasonably foreseeable at the time of the establishment of the easement should not be permitted. *Id.*

The easement at issue was granted for the express purpose of storing lumber and other material in relation to a lumber business. PC 249. The history of use, by both the grantor and the grantee, was to use the drive adjacent to Town Highway 47 for access to the rear of the property. PC 163-164, 174-175.

Indeed, the original owners, the Warrens, had received a permit for the access on Town Highway 47.

> Q. From your standpoint, you've mentioned that trucks exit onto Highway 47 or (inaudible) lot five, is that right?
> Mr. DeGraff: Correct.
> Q. And why, why is that?
> Mr. DeGraff: Back prior to purchasing the property, Mr. Warren had received a permit to put an access onto Route 47, with the intention of particularly...
> Mr. Parker: Object to what Mr. Warren's intentions were.
> The Court: He can describe what he did, right, without using the word intention. What happened?
> Mr. DeGraff: By having an access to the back of Route 47 here, this allows tractor trailers, forty-eight foot sized tractor trailers to come in the front, drive all the way into the back and it allows for unloading of building materials in the backyard...
> PC 163 line 1-25.

Lois Strong testified similarly:

> Q. During the time you and Bill Warren owned the store, what did you store on the land that we've been discussing, this easement area?
> A. Building materials.
> Q. Okay, and you heard Mr. DeGraff testify that his building materials come in on trucks and pallets and large pieces of lumber. Is that similar to how Warren's lumber as also delivered?
> A. Yes.
> Q. Okay. And how is inventory taken off of those large trucks?
> A. A fork lift. PC 174 line 6-17.

Where a certain use is not expressly granted, it is within the proper scope of the easement if the court finds it consistent with the grantor's "paramount purpose" in granting the easement. See *Bernards v. Link*, 199 Ore. 579, 603, 248 P.2d 341, 351 (1952). Moving lumber requires access by trucks. Using garage space implicitly means access with motor vehicles. Access to the easement area through the drive onto Highway 47, as previously used by the Warrens and as used by MBS,

is within the proper scope of the easement and it was error for the trial court, which failed to consider uses implicit in the grant, to limit ingress/egress to the easement area.

H. THERE WAS NO WAIVER OF RIGHT TO JURY TRIAL AS REQUIRED BY THE RULES.

MBS demanded a trial by jury in their Amended and Restated Complaint dated July 23, 2002. PC 38. Jury trial is a fundamental right "to be held sacred" by the Vermont Constitution. Vt. Const., Bill of Rights, § 12. This demand was renewed in Plaintiff's motion for *Jury Trial by Right* dated October 1, 2004. PC 118-120.

This motion was denied by Judge Norton stating that the right to jury trial was waived under V.R.C.P. 39(a)(1) at a hearing on January 8, 2004. PC 128, 246. Under V.R.C.P. 39(a)(1), a party is entitled to a jury trial properly demanded under Rule 38 unless the party or its attorney of record, by written stipulation filed with the court or by an oral stipulation *made in open court and entered into the record*, consents to trial by the court sitting without a jury. PC 246.

On January 9, 2004, Judge Matthew Katz held a pre-trial conference "in chambers." PC 22. This conference did not occur in open court, nor was it held on the record. During the conference, Judge Katz suggested a bench trial. MBS understood that this bench trial would occur fairly soon ("by 01/2" as referenced in the docket entry) and that Judge Katz planned to visit the easement site personally. PC 22, 118. Based on these understandings, MBS informally agreed to a bench

trial. Unfortunately, the trial did not commence until many months later and Judge Katz never visited the easement site.

However, Rule 39(a)(1) clearly states that only oral stipulations made in *open court* operate to waive a party's right to jury trial. V.R.C.P. 39(a)(1), PC 246. The high degree of certainty required by the rule derives from the important fundamental Constitutional right at issue. MBS's demand for jury trial was improperly denied by Judge Norton as MBS never waived its right to jury trial through written stipulation or oral stipulation in open court as mandated by the rule.

I. STATEMENT OF HOW THE ISSUES WERE PRESERVED IN THE RECORD.

The preservation of issues relevant to § IV.B., C., D., E. and G. are identified specifically in these respective sections and were also preserved in:

- *Motion for Summary Judgment and Opposition to the Defendant's Motion for Summary Judgment, Memorandum in Support of Plaintiffs' Cross Motion for Summary Judgment and Opposition to the Defendant's Motion for Summary Judgment,* and *Statement of Undisputed Facts for Cross Motion for Summary Judgment* filed on November 19, 2002, PC 63-99.
- *Plaintiff's Supplemental Memorandum in Support of Summary Judgment and in Opposition to Defendant's Motion for Summary Judgment and Motion in Limine* filed on April 7, 2003, PC 100-111.
- *Requests to Find* filed on June 15, 2005, PC 129-136.

The preservation of issues relevant to § IV.F. is identified specifically in that respective section and also preserved in the trial transcript and *Requests to Find* filed on June 15, 2005, PC 129-136.

The preservation of issues relevant to § IV.H. is identified specifically in that respective section and also preserved by *Jury Trial by Right* filed on October 4, 2004.

V. CONCLUSION AND STATEMENT OF PRECISE RELIEF SOUGHT.

Request is made for:

1) Disposition in MBS's favor by a finding, as a matter of law, no ambiguity exists in the deed and the monument prevails.

2) Disposition in MBS's favor by finding, as a matter of law, ambiguity in the word "follows" but that the intent of the original grantors and grantee, as a matter of law, was that the monument control.

3) Remand for further determination of the intent of the grantors and grantee with the directive to permit extrinsic evidence on this topic.

4) Grant of $3,790 compensation for the destruction of the fence and such other damages as appropriate.

5) Remand for jury trial.

6) Such further relief as the Court shall deem appropriate.

Dated: November 20, 2006 in South Burlington, Vermont.

Ward & Babb

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