THE STATE OF NEW HAMPSHIRE

GRAFTON, SS SUPERIOR COURT

Docket No. 08-E-0294

B.V. Brooks, Kenneth F. Clark, Jr. Marisa Deangelis Kane,
John H. Plunkett, Douglas R. Raichle Robert G. Reed III, and John Steel III

v.

Trustees of Dartmouth College

PLAINTIFFS' MOTION FOR RECONSIDERATION OF "ORDER ON MOTION FOR SUMMARY JUDGMENT"

Now come the Plaintiffs, through counsel, pursuant to Superior Court Rules 59-A and 73, and respectfully move that this Court reconsider and set aside its "Order on Motion for Summary Judgment", dated January 8, 2010 (and served on counsel by the Clerk's Notice of Decision dated January 14, 2010), [hereinafter the "Order"] for the following reasons:

The Plaintiffs believe that the Court, on the one hand, misapprehended their positions on several critical issues and, on the other hand, misapplied the law to the undisputed facts of record. Accordingly, the Plaintiffs file this Motion for Reconsideration in the hopes of avoiding an unnecessary appeal.

As the Court noted in its Order, the Plaintiffs' standing to bring this action [hereinafter the "Current Suit"] is based, alternatively, upon their claims to have rights to enforce the 1891 Agreement as third-party beneficiaries thereof, to have rights to enforce the Agreement as members of a direct party to the contract, the Association of Alumni [hereinafter the "Association"], and to have rights as parties to whom the College has made enforceable promises.

Turning first to the Plaintiffs' claims as third-party beneficiaries, the Court held that their entitlement to such status is "negated" by the Plaintiffs' "admission that the members of the Association could vote to empower the executive committee to end the alleged parity agreement". [Order p. 9 & 11.] In other words, the Court ruled that (a) if the members of the Association still

had the power to terminate the 1891 Agreement, the Plaintiffs could not be third-party beneficiaries thereof, and (b) the Plaintiffs supposedly "admitted" that the members of the Association did indeed have this power.

To begin with, as detailed in RESTATEMENT (SECOND) OF CONTRACTS § 302(1)(b), a party is a third-party beneficiary of a contract "if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and … the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance." See also, Grossman v. Murray, 144 N.H. 345, 347-8 (1999). [See Objection and Response, p. 22.[1]] However, whether someone is a third-party beneficiary of a contract is not determined by the presence or absence of a continuing power in the contract's direct promisee to change the terms of the contract and to affect the third-party's rights thereunder. Consequently, whether or not the Plaintiffs "admitted" that the members of the Association had the power to vote to authorize their Executive Committee to abrogate the 1891 Agreement by signing the stipulation for a dismissal of the Prior Lawsuit with prejudice (or otherwise), the Court was in error to rule that such an admission "negated" the Plaintiffs' standing as third-party beneficiaries.

Moreover, the Plaintiffs respectfully *deny* that they made such an admission. The Plaintiffs acknowledge that they did discuss this issue – but it was in a different context from that suggested by the Court. The Plaintiffs do "admit" that the existence or non-existence of a continuing power in the alumni to alter or even cancel the 1891 Agreement is relevant to whether they are entitled to assert their third-party beneficiary rights by bringing the Current Lawsuit. However, this goes to the application of the doctrine of *res judicata*, not to the Plaintiffs' standing. Here is what the Plaintiffs said in their Objection and Response (p. 29-30):

[1] References herein to "Objection and Response" are to the PLAINTIFFS' OBJECTION AND RESPONSE TO THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND THEIR STATEMENT OF FACTS AND MEMORANDUM OF LAW IN SUPPORT THEREOF, dated September 2, 2009.

The other possible application of the concept of formal privity to this case is with respect to the Plaintiffs' claims as third-party beneficiaries of the 1891 Agreement. In this regard, the RESTATEMENT (SECOND) OF JUDGMENTS, § 56(1) provides as follows:

> When a contract between two persons creates an obligation in favor of another person as an intended beneficiary … a judgment for or against the promisee in an action between him and the promisor does not preclude an action by the beneficiary on the obligation to him unless at the time of the judgment was rendered the promisee had the power to discharge the obligation.

Applying this rule to the case at bar, unless at the time that the Prior Lawsuit was dismissed, the Association had the right to cut off the third-party beneficiary rights of the alumni under the 1891 Agreement, the dismissal of the Prior Lawsuit has no *res judicata* effect upon the Current Lawsuit. As stated in *comment a* to § 56, whether the Association had such a power is determined by the rules stated in RESTATEMENT (SECOND) OF CONTRACTS § 311. RESTATEMENT (SECOND) OF CONTRACTS § 311(3), in turn, provides that the power of the promisee to cut off the rights of a third-party beneficiary terminate "when the beneficiary … materially changes his position in justifiable reliance on the promise or brings suit on it or manifests assent to it at the request of the promisor or promisee." In the case at bar, all of the Plaintiffs claim that they have taken actions in reliance upon the 1891 Agreement. Petition, ¶30. [Footnote omitted] Accordingly, under the rules of the RESTATEMENT, since their third-party beneficiary rights were, in essence, "vested" at the time that the Association dismissed the Prior Lawsuit, the Plaintiffs were not in formal privity with the Association and the doctrine of *res judicata* does not operate to bar their claims.

As noted above, the Plaintiffs took (and still take) the position that their rights had vested before the Executive Committee filed the stipulation for dismissal with prejudice in the Prior Lawsuit and, thus, that the Current Lawsuit was not subject to the bar of *res judicata*. In other words, the Plaintiffs did not "admit" that the members of the Association could vote the Plaintiffs' third-party beneficiary rights away; on the contrary, the Plaintiffs denied that they could.

Ironically, in its reply memorandum, the College actually seized upon the Plaintiffs' contention that their third-party beneficiary rights had vested and could not be cut off by a vote of the alumni. In this regard, the College argued that, "[I]f plaintiffs were correct on the law, the Executive Committee of the Association would be powerless to amend, modify or terminate the 1891 agreement in perpetuity without the consent of all of its members." REPLY MEMORANDUM OF RESPONDENT TRUSTEES OF DARTMOUTH COLLEGE IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT, p. 15. The College's point, of course, was that this was a supposedly unreasonable position for the Plaintiffs to take and, thus, it could not be a correct statement of the law. [2] However, as is clear from the RESTATEMENT, not only is it a correct statement of the law, but it is also something which has no bearing upon the Plaintiffs' standing as third-party beneficiaries.

The only other instance where the Plaintiffs addressed the issue of the alumni's failure to have voted to cancel the 1891 Agreement was in the context of their argument that the stipulation of dismissal should not be given any *res judicata* effect because it did not deserve judicial recognition. [Objection and Response, p. 34-38.] This argument applied to all of the Plaintiffs' claims and was in the form of an "even if" proposition. In other words, the Plaintiffs were arguing that even if this Court were to reject their contentions that *res judicata* should not bar their claims because they were neither in formal nor in functional privity with the plaintiff in the Prior Lawsuit (i.e., the Association), the doctrine should not apply to bar the Current Lawsuit because the circumstances surrounding the dismissal of the Prior Lawsuit deprived it of any entitlement to judicial respect.

[2] In oral argument, counsel for the College pursued this theme and argued that accepting the Plaintiffs' position on this issue would mean that if there was one alumnus in Juneau, Alaska, who wished to maintain parity despite a vote by all the other alumni to eliminate it, the lone dissenter's rights could not be overridden. Counsel for the Plaintiffs noted that Dartmouth's argument was not something which was particularly germane to the matters currently at issue because the alumni had in fact never even purported to vote to cancel the 1891 Agreement or to otherwise abrogate parity and, thus, that the College's hypothetical was "not this case". At no time did counsel for the Plaintiffs "admit" that the Plaintiffs' third-party beneficiary rights could be taken from them by a vote of the Association.

Among the circumstances to which the Plaintiffs pointed was the fact that the alumni had not authorized the Association's Executive Committee to dismiss the Prior Lawsuit "with prejudice". The Plaintiffs noted that "*any* attempted relinquishment by the Association of the alumni's right to parity would have required a vote to that effect by the alumni." [Objection and Response, p. 36 (emphasis supplied).] That was a true statement. To the extent that the Plaintiffs were suing as members of the Association to enforce the 1891 Agreement, "even if" their rights could be extinguished without their consent, they could only be extinguished by a vote of the Association's members – and no such vote had ever occurred. Likewise, to the extent that the Plaintiffs were suing as third-party beneficiaries of the 1891 Agreement, "even if" their rights had not vested and thus could be extinguished without their consent, these rights too could only be extinguished by a vote of the alumni - and no such vote had ever occurred [See also, Objection and Response, p. 30, n. 37.] In making this in-the-alternative type of argument, the Plaintiffs nowhere "admitted" that their vested rights as third-party beneficiaries were subject to divestiture by a vote of the body of alumni.

In summary, in granting the College's Motion for Summary Judgment with respect to the Plaintiffs' claims as third-party beneficiaries, this Court's reliance upon the supposed "admission" by the Plaintiffs that their third-party beneficiary rights could be cut off without their consent was misplaced, both because a) there was no such admission and b) even if there had been, it would not as a matter of law "negate" their third-party beneficiary status.

The Court's alternative ground for granting the College's Motion for Summary Judgment with respect to the Plaintiffs' third-party beneficiary claims was based upon the Court's assumption that the Plaintiffs were each claiming to have a personal, individual right to select Alumni Trustees. Again, the Court's ruling arises out of a misunderstanding of the Plaintiffs' claims.

As noted by the Plaintiffs in their Objection and Response, the two documents which together form the 1891 Agreement, the June 23, 1891 Resolution of the College's Board of

Trustees and the June 25, 1891 report of the Association to the alumni, both make specific references to the benefits which the Agreement was expected to confer upon the alumni and, in turn, the obligations which it imposed upon them. [Objection and Response, p. 20-21, n. 28.] In a nutshell, the benefit which the 1891 Agreement conferred upon the alumni was the opportunity to participate in a process to choose half the members of the Board of Trustees and, as the Court correctly stated, to thus enjoy "a greater role in management of Dartmouth College". [Order, p. 10]

Nevertheless, the Court declined to recognize the Plaintiffs' third-party beneficiary status because it concluded that "the undisputed facts do not show that the parties to the 1891 Agreement intended each member of the Association and all future members of the Association to have the benefit, in their individual capacities, of being able to nominate half the members of the Board." [Order, p. 9-10.] The Plaintiffs respectfully suggest that the Court is attacking a straw man. The Plaintiffs do not claim that the parties to the 1891 Agreement intended to confer on them the ability to individually nominate half the members of the Board. What they claim is that the parties to the 1891 Agreement intended to confer upon them - and all other alumni – exactly what we describe above: the ability to individually participate in a collective process to choose one half the members of the Board of Trustees.

Noting that the test for recognition of third-party beneficiary status is whether it is "necessary or appropriate to recognize a right of performance in each individual alumnus", the Court concludes that "the 1891 Agreement would be entirely unworkable if … a right of performance [in each individual alumnus] were recognized". [Order, p. 10] The problem is that the Court's conclusion proceeds from a false premise. The right of performance at issue in this case is not the right of the Plaintiffs to individually choose Board members; it is the right of the Plaintiffs to insist that the College perform the 1891 Agreement - which, in turn, means the right to insist that the College afford them and other alumni an opportunity to participate in a process by which they may all choose half of the Board.

Viewed in this light, it is by no means "entirely unworkable" to recognize such individual rights of performance. And the present case is a perfect example. Simply because the Executive Committee of the Association has elected to give up the Association's right to performance of the 1891 Agreement should not preclude these Plaintiffs or any other individual alumnus (or at least any other individual alumnus whose third-party beneficiary rights have vested by having acted in reliance upon the 1891 Agreement) from seeking to enforce the Agreement. If the Plaintiffs are successful in enforcing the Agreement, they will have no greater rights with respect to actually choosing Alumni Trustees than any other alumnus because they will not have – and never claimed to have – the ability to individually choose the alumni representatives on the Board.

More to the point, the undisputed evidence of record establishes that the parties to the 1891 Agreement intended to confer upon the alumni not only benefits, but also rights. In this regard, the June 25, 1891 report to the alumni specifically states that the 1891 Agreement – unlike prior plans which the alumni and the College had considered – was intended to grant the alumni "rights" which would "excite … [their] … clear, constant active interests …, which is needed, and which it was the duty of your Committee to secure, if possible". Exhibit FF, p. 2-3. Accordingly, the Plaintiffs respectfully suggest that, in the words of the RESTATEMENT, recognition of their rights to performance is "appropriate" to effectuate the intention of the parties to the 1891 Agreement, and, therefore, that the Plaintiffs have adequately established their standing as third-party beneficiaries.

Let us now turn to the effect of the alumni's non-vote to end the 1891 Agreement upon the Plaintiffs' claims as members of the Association. Invoking the so-call Bricker doctrine, this Court declined to look behind the stipulation for dismissal of the Prior Lawsuit and accepted it at face value as a *res judicata* bar to the claims of the Plaintiffs as members of the Association in the Current Lawsuit. [Order, p. 7-8.] The Plaintiffs respectfully suggest that the Court has misapplied the Bricker doctrine.

To begin with, the Plaintiffs stand on their arguments as to the non-applicability of the Bricker doctrine to this case as detailed in their Objection and Response [see p. 39, n. 48] and as reiterated at oral argument. Among other things, this includes the College's lack of standing to assert this defense.

In addition, the Plaintiffs respectfully suggest that the Bricker court's reference to a voluntary association's qualified immunity from judicial oversight for its "internal affairs" was never meant to extend to actions taken by an association which materially and adversely affect the legal rights of the association's members vis-à-vis outside parties. This is illustrated by the Bricker case itself. The complaint by the plaintiff in that case concerned the action of the governing body of the New Hampshire Medical Society, of which the plaintiff was a member, in using the services of a particular law firm which sometimes experienced conflicts of interest between its representation of the Society and its representation of other clients. In refusing to get involved in such a dispute, the Supreme Court expressly noted that "the plaintiff does not claim that the society or its attorney has inflicted or threatened to inflict any specific existing or reasonably anticipated damage to himself as a physician or as a member of the New Hampshire Medical Society." Bricker v. New Hampshire Medical Society, 110 N.H. 469, 470 (1970). In other words, the dispute between the parties was more in the nature of a general policy dispute than a dispute over anyone's legal rights. This is quite unlike the case at bar. The fact that the Association's Executive Committee entered into a stipulation with the College which purports to completely and forever bar the Association and its members from enforcing their contract with the College (the implementation of which is the primary business of the Association) is hardly something which pertains only to the "internal affairs" of the Association. Compare, Brzica v. Trustees of Dartmouth College, 147 N.H. 443, 456 (2002) (challenge to a modification to the Association's own process for selecting Alumni Trustees is not judicially cognizable because it is merely a dispute over a voluntary association's "internal governance procedures").

It is especially inappropriate to decline inquiry into the circumstances surrounding the actions of the Association's Executive Committee in the context of the College's reliance upon those actions to impose the bar of *res judicata*, a doctrine which in New Hampshire specifically implicates equitable considerations. As recently as last summer, in a case in which the interests of the parties to the action at bar were admittedly represented by a party to an earlier action and where all of the formal conditions for the application of *res judicata* were satisfied, the N.H. Supreme Court nevertheless declined to apply *res judicata* "because of the potential adverse impact … on the … interests of persons not themselves parties in the initial action". In re: Zachary, ___ N.H. ___, ___ (July 31, 2009) (also holding that the burden of proof with respect to the application of *res judicata* is upon the party asserting it).[3] Assuming – as this Court has [Order, p. 4] – that the Plaintiffs have standing to sue as individual members of the Association, suffice it to say that invocation of the Bricker doctrine to preclude a judicial investigation of the propriety of the stipulation in question has more than a mere "potential adverse effect" upon the interests of the Plaintiffs and the other alumni; it conclusively extinguishes their interests.

Upon this record, the undisputed facts establish that the Executive Committee (with the connivance of the College) entered into the stipulation which purported to gratuitously give away the legal rights of the Association's members under the 1891 Agreement - and that this was done in secret and with the specific intent of avoiding the possibility that the alumni would not consent. Although this Court does not expressly rule that alumni consent was required, there would be no reason for the Court to rely on the Bricker doctrine to bar the Plaintiffs' claims as members of the Association if such a finding were not implicit in the Court's determination of this issue.

We are left, then, with a situation in which a party to a contract (the College) is being permitted to escape all liability upon its contract where it entered into an agreement with the

[3] In essence, the Supreme Court held that despite the fact that parents and parental surrogates have presumptive authority to act for their children, there are some things which are too important to be determined by a legal fiction. Although the Zachary case was not specifically cast in terms of the limits upon the authority of a voluntary association's governing body vis-à-vis the rights of its members, the analogy is apt.

governing body of the other party to the contract (the Association) to, in effect, cancel the contract despite the fact that the governing body had no authority to take such action and despite the fact that the party being relieved of liability (the College) *knew* that the governing body had no such authority. And, further, this is being permitted to happen despite the fact that the issue involved is not just some "internal" policy dispute among the members of the Association, but instead involves the extinguishment of their contractual legal rights with an outside, third party. It is respectfully suggested that the Bricker doctrine was never meant to authorize the judiciary to sit on the sidelines when confronted with such an unabashed trashing of the rights of the members of a New Hampshire voluntary association.

As pointed out so eloquently in the amicus brief filed in support of the Plaintiffs' petition, the issues in this case have important policy implications for how not-for-profit institutions, especially educational institutions, are to be run, not only in New Hampshire, but throughout the nation. Dartmouth College used to be in the forefront of those institutions which honored principles of governance favoring democratic participation over technocratic efficiency. The source of Dartmouth's version of the principle of democratic participation is the 1891 Agreement. Whether the 1891 Agreement and the principle for which it stands are to continue to be a force in the affairs of Dartmouth College is the issue which this case seeks to resolve. Unfortunately, this Court's don't-ask-don't-tell acceptance of the Association's malodorous stipulation for dismissal "with prejudice" as a bar to the Current Lawsuit resolves nothing; on the contrary, it only consigns the issue to limbo where it will continue to fester like an untreated wound. For the sake of Dartmouth College and all of its alumni, this issue deserves to be determined on its merits.

WHEREFORE, the Plaintiffs respectfully pray that this Court reconsider and set aside its Order granting Dartmouth's Motion for Summary Judgment and, instead, that the Court enter a new order denying said motion.

Respectfully submitted,

B.V. Brooks, et al

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CERTIFICATE OF SERVICE

I hereby certify that on January 25, 2010, copies of the foregoing were served by hand on Attorney Bruce W. Felmly, Esquire, McLane, Graf, Raulerson & Middleton, 900 Elm Street, Manchester, NH 03101, and by first-class mail upon Richard C. Pepperman, II, Esquire, Sullivan & Cromwell, 125 Broad Street, New York, NY 10004.

_____
Eugene M. Van Loan III, Bar #2610

RULE 57-A CERTIFICATION

I hereby certify that no attempt to obtain the concurrence of opposing counsel to the within motion was made because it was not reasonably expectable that counsel would concur.

_____
Eugene M. Van Loan III, Bar #2610