

VIRGINIA:

IN THE SUPREME COURT OF VIRGINIA

JENNA DODGE, *et al*,

Appellants,

v.

**THE TRUSTEES OF RANDOLPH-MACON
WOMAN’S COLLEGE,
D/B/A RANDOLPH-MACON WOMAN’S COLLEGE,**

Appellee.

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) **Record No. 070843**
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PETITION FOR REHEARING

I. PRELIMINARY STATEMENT

COME NOW Appellants, Jenna Dodge, *et al* (the “Students”), by counsel, pursuant to Rules 5:20 and 5:20A, and seek to have all the Justices consider the Petition for Appeal. The Students’ request follows their receipt of this Court’s notice dated July 30, 2007, refusing their Petition.

This Court should consent to hearing this appeal from the final order dated February 6, 2007 of the Circuit Court of the City of Lynchburg, and reverse the lower court’s erroneous decision to sustaining the demurrer. With all due respect to the Panel and the trial court, it is a serious injustice to these Students to have their case dismissed in abrogation of Virginia’s well-established standards governing demurrers.

The Students are pursuing injunctive relief in order to enforce their contractual rights and to enjoy the benefits of their bargain with Appellee, the Trustees of Randolph-Macon Woman’s College (the “College”), a non-stock, non-member corporation. The

focus of this appeal is on the applicable pleading standards on demurrer, as well as basic principles of Virginia contract law. The Students assign error to, *inter alia*, the trial court's ruling that their claim for breach of contract failed to state a legally cognizable claim.

II. SUMMARY OF ARGUMENT

This case poses the challenge to follow the rule of law in the midst of temptations to do otherwise. While surrounded by forays into tangential, albeit important concerns, the straightforward issues presented to this Court involve basic contract law and established principles of Virginia pleading practice. Nothing else should influence the judgment of this Court regarding whether to review the trial court's decision.

The College chose to demurrer rather than defend against the contract claim by asserting impossibility of performance, changed circumstances or any other defensive basis of avoiding performance under a contract. Instead, the College disputes the very existence of a contract and maintains it has no obligation whatsoever to the Students - - thus seeking to avoid not only specific performance but all other forms of relief as well.¹

In their Complaint, however, the Students contend that the College offered them admission to an institution devoted for 115 years to educating primarily women, without interruption and with only an occasional male admitted for special reasons with no degree prospects. The Students allege they were promised that this environment would continue

¹ Despite its reliance on a demurrer, the College tried to have it both ways by smuggling into the case its un-sworn and untested claim that it "had to go coed." *Transcript*, at 20-22 ("those people who were on the board of the college had to make the decision that was best for the very survival and future of the college"). Such an allegation of fact by counsel at oral argument on a demurrer is, of course, improper and must be disregarded. For purposes of the demurrer and this petition, it cannot be assumed that the facts will support such a defense.

for the anticipated four years they would attend. This is why they chose Randolph-Macon Woman's College ("R-MWC").

At the demurrer stage, a court considers as true all facts plead, all facts fairly and reasonably implied, and all reasonable inferences from those facts², unless documents considered as part of the pleadings clearly contradict that plaintiff's assertions. Here, the Students alleged an express contract³ with either an explicit or implied provision promising that they would receive their undergraduate education at R-MWC for four years in the same environment that lured them there and attended their arrival—an education primarily for women and most assuredly not coeducational. The relevant terms of the contract are found in the acceptance letter.

The analysis begins with these questions:

- (1) Have the Students alleged an express contract promising four years of essentially single sex education in clear and unambiguous terms? or
- (2) Have the Students alleged an express contract potentially promising four years of single sex education, although in ambiguous terms requiring a fact-finder to determine the intent of the parties?

If the answer to either of these questions is yes, the demurrer must be overruled. If, however, the court concluded that **both** questions should be answered no, it still could not properly sustain the demurrer unless the court further concluded from the facts pled and implied and the documents before it, one of three things:

² The facts are set forth in the Complaint and the Bill of Particulars.

³ There should be no dispute that an express contract exists, even if it is only a promise of admission in exchange for the acceptance fee paid, and for a duration of at least the semester for which the tuition is paid. Therefore, the only inquiry is into the remaining provisions of the contract, including its actual duration.

- (1) There is no express contract of any kind between the Students and the College⁴;
- (2) There is an express contract, but it is clear and unambiguous that the contract does not contain the promise for the four years of essentially single sex education which the Students alleged; or
- (3) The express contract is ambiguous, but no reasonable person could interpret the ambiguity to contain the promise which the Students alleged, even with all the extrinsic evidence and the allegation of oral promises of the essentially all female environment the Students came to Lynchburg to experience.

As the Students will demonstrate *infra*, it is reversible error for the trial court to have reached any of these three conclusions from the pleadings and documents it considered.

But the analysis cannot stop here. Even if the trial court found that the contract did not contain an express promise - ambiguous or unambiguous - in order to sustain the demurrer, it must have also found that no reasonable fact-finder could conclude that there was the *implied promise* which the Students alleged. The trial court must have reached this conclusion, despite the fact that the Students alleged **oral promises**⁵, in addition to the written promises implied in the documents they produced with their Bill of Particulars. Again, it is reversible error for the trial judge to have opined from a review of all that was before him that no reasonable person could conclude that the Students alleged an implied promise for four years of education in an essentially all female college.

⁴ But, see footnote 3. It is unclear from the College's papers and oral argument whether it would at least admit that a contract existed for a semester, though virtually every court that has considered the question has recognized some form of contractual relationship between a student and a university.

⁵ It is particularly troubling that the trial court dismissed the case at the demurrer stage with the allegations in the Complaint and the Bill of Particulars of oral promises of the single sex commitment the Students allege. This allegation, unless clearly contradicted by the documents provided (which it clearly was not), is enough for the Students to survive demurrer.

The trial court abandoned the proper pleading standards and sat as the fact finder in this case. It searched only for a very precise express promise, did not find it, and adjudicated the merits of the case at the demurrer stage. In order to make such determinations on the merits, the court needed a fully developed record, which only a trial, following discovery, can provide. If the trial court considered any possible ambiguity or implied promise as part of its analysis, it did not indicate such.

In short, there must be a contract of some kind between the Students and the College. Nearly every court considering the issue has so held. Hence, the only inquiry is into terms, whether ambiguous or clear. In this case, the search is for an express, even if ambiguous, or implied provision with two components, (1) a four year education, and (2) at a college primarily for women. To benefit from that promise, the Students here must fulfill the obligations the College imposes. They did, but the College failed to honor its part of the bargain.

It is obvious that the trial court was concerned with tangential issues which must be excluded from the legal analysis on which this Court must focus. The underlying issues here are profound, and the College has compounded the problem by pressing ahead with its plans, even while these cases are pending.⁶ Regardless, the College must not be allowed to abrogate its contractual obligations because it anticipatorily breached them and moved with such haste as to make enforcement difficult. Such misconduct must not be rewarded. Remedies can be fashioned if the rule of law is followed and these Students receive the opportunity to proceed with their case.

⁶ In addition to this case, a companion case involving issues of charitable trust law is currently pending before this Court on a Petition for Appeal. *See* Record No. 071248.

Virginia has long recognized the wisdom of allowing access to its courts to proceed without inappropriate dismissal at the pleading stage, unless the mandate to do so is clear. The Students established in their pleadings and supporting documents that they were promised, either explicitly or impliedly, in writing and orally, four years at this “Woman’s College” in an essentially all female environment, with the attendant benefits the College extolled in its campaign to bring them to campus. The Petition for Appeal should be granted, thus giving the Students their much-deserved day in court.

III. ARGUMENT AND AUTHORITIES

a. The Trial Court Applied Improper Demurrer Standards

The trial court evaluated the College’s challenge by applying the incorrect demurrer standards. “The purpose of a demurrer is to test the legal sufficiency of a pleading.” *Fuste v. Riverside Healthcare Ass’n, Inc.*, 265 Va. 127, 131-132, 575 S.E.2d 858, 861 (2003) (citations omitted). A trial court “must consider as true the facts alleged [in the complaint], the facts impliedly alleged, and the reasonable inferences of fact that can be drawn from the facts alleged.” *Almy v. Grisham*, 2007 Va. LEXIS 24, **8-9, 639 S.E.2d 182, 186 (Va. Jan. 12, 2007) (citations omitted). Consequently, “when ruling on a demurrer...**a court is not permitted to decide the merits of a claim but only may decide whether a plaintiff’s factual allegations are sufficient to state a cause of action.**” *Id.* (emphasis added) (citations omitted). The trial court erred by short-circuiting this litigation because it “decided the dispute without permitting the parties to reach a trial on the merits.” *Renner v. Stafford*, 245 Va. 351, 352, 429 S.E.2d 218, 219 (1993).

The trial court was confronted with determining **only** whether the Students had properly alleged a breach of contract cause of action.⁷ The Students made the following allegations of fact, among others, in support of their breach of contract claim:

- (1) When the Students accepted the College's offers of admission, paid tuition and other fees, and registered for classes, a contract was formed between them and the College, which, *inter alia*, included in the written offer letters the express promise that if the Students paid the tuition and fees and enrolled at R-MWC, they would receive a four-year liberal arts education at a woman's college. *Complaint*, ¶ 38; *Bill of Particulars* ("*BOP*"), ¶¶ 2-3.
- (2) The official R-MWC documents sent to each Student contain identical language. Thus, the terms of the contract are not negotiated or individualized for each particular Student, but rather are standardized in nature. In particular, all acceptance letters are identical in all material respects. *BOP*, ¶¶ 6, 11.
- (3) Additional terms of the contract, to the extent relevant, are within the various official R-MWC publications, including promotional materials, the honor code, the student handbook, the academic catalog, correspondence between the College and the Students, and the College's policies and regulations. *Complaint*, ¶ 40; *BOP*, ¶ 5.
- (4) To the extent there is any ambiguity in the offer letters, the official R-MWC materials, provided by the Students in response to the College's Motion Craving Oyer, show that the College at least implicitly promised a four-year single sex education to the Students. *BOP*, ¶ 5; *Memorandum in Opposition to Demurrer*, at 10.

⁷ It was improper for the trial court to consider whether the College had the inherent authority to make the coeducation decision by amending its articles of incorporation. *See Transcript*, at 48-49. That was not at issue at the demurrer stage, and the power to amend articles of incorporation is not a defense to breach of contract allegations regardless. *See, e.g.*, Va. Code §13.1-891 (an amendment to articles of incorporation does not affect the existing [contractual] rights of persons against the corporation). Since it is firmly established that amending articles of incorporation cannot interrupt contractual rights, the mere mention of corporate authority issues raises the concern that they influenced the trial judge's thinking. This line of argument was yet another red herring used successfully by the Defendant to shift the trial court's focus to tangential matters rather than the issues of law before it.

- (5) The College routinely used marketing and other official R-MWC materials, as well as the College's 115-year reputation, to promote the institution and its mission: providing a liberal arts education to women only. *Complaint*, ¶¶ 14-20; *BOP*, ¶¶ 5-6, 11; *Mem. in Opp. to Demurrer*, at 4.
- (6) The College attracted the Students in large part due to the College's representations regarding these unique aspects of R-MWC. The Students relied on such statements in accepting the College's offers of admission. *Complaint*, ¶¶ 14-15, 25, 38-39; *BOP*, ¶¶ 2-4; *Mem. in Opp. to Demurrer*, at 4.
- (7) None of the official R-MWC materials and no oral communication indicated that the College was contemplating the transition to coeducation. *Complaint*, ¶ 22.
- (8) The College's adoption of the Strategic Plan with the dramatic change to coeducation is an anticipatory breach of its contract with the Students, causing them harm for which mere monetary damages will not be adequate. *Complaint*, ¶¶ 29-30, 42-48; *BOP*, ¶¶ 8-10; *Mem. in Opp. to Demurrer*, at 4.

Despite the abundance of allegations regarding the Students' contracts with the College, Judge Mosby stated, "I can't find in any of the pleadings or documents identified in the pleadings by the plaintiff that there's any specific contract that says it's guaranteed that it would be a four-year woman's college."⁸ *Transcript*, at 49. Yet this comment merely means that the court below could not locate a clear and unambiguous *express* promise within the contractual relationship, even though it was alleged in the Complaint and Bill of Particulars. As noted, this only addresses the express contract with an unambiguous express promise.

⁸Yet, as the United States Supreme Court recognized when analyzing Rule 12(b)(6) motions, "what Rule 12(b)(6) does not countenance are dismissals based on a judge's disbelief of a complaint's factual allegations." *Neitzke v. Williams*, 490 U.S. 319, 327 (1989).

The effect of the trial court's ruling translated into the standards applicable at the demurrer stage is that the multitude of documents, including the acceptance letters, and the allegations set forth in the Complaint and the Bill of Particulars could not have been interpreted by a reasonable juror to conclude that the College expressly (even ambiguously), or impliedly promised the Students four years at an all-women's school. Based on far fewer allegations, and similar facts, the United States District Court for the District of Maine concluded that, "by pleading his status as a student of Bowdoin College at the time of the incident, Plaintiff has adequately pleaded the existence of a contractual relationship between Bowdoin and himself." *Goodman v. President & Trs. of Bowdoin College*, 135 F.Supp.2d 40, 55 (D. Me. 2001).

As evidenced by the specific references to the pleadings, *supra*, the Students alleged more than enough facts to support their assertion that such a contract exists and that the College anticipatorily breached it. "When a ...complaint contains sufficient allegations of material facts to inform a defendant of the nature and character of the claim, it is unnecessary for the pleader to descend into statements giving details of proof in order to withstand demurrer." *CaterCorp, Inc. v. Catering Concepts, Inc.*, 246 Va. 22, 22, 431 S.E.2d 277, 279 (1993) (citation omitted). Furthermore, "**when reasonable persons could view alleged [facts] in this manner and the other elements of the [cause of action] are properly pleaded, the controversy must be resolved at a trial on the merits of the claim, rather than by a circuit court on demurrer.**" *Almy*, 2007 Va. LEXIS, at *8, 639 S.E.2d at 187 (emphasis added). The trial court failed to adequately apply Virginia's standards governing demurrers, and for this reason the matter should be reversed and remanded for further consideration.

b. The Acceptance Letters Constitute an Express Contract between the Students and the College

In its search for the “specific contract” promising a four-year education at an all women’s college, the trial court ignored the unambiguous language of the acceptance letters. The College and the Students entered into a contractual relationship when (i) the College sent the letters to the Students offering them admission, and (ii) the Students accepted the offers, ultimately enrolling at R-MWC. *See Goodreau v. The Rector and Visitors of the University of Virginia*, 116 F.Supp.2d 694, 702 (W.D. Va. 2000) (recognizing a cause of action based on contract between university and student); *Krasnow v. Virginia Polytechnic Institute*, 414 F. Supp. 55, 56 (W.D. Va. 1977) (“students enrolled in state supported institutions acquire a contractual right for the period of enrollment to attend, subject to compliance with scholastic and behavioral rules of the institution, and to dismissal for violation thereof, provided the dismissal was not arbitrary and capricious.”).⁹

⁹Other jurisdictions addressing the issue also recognize a cause of action based on contract. *See, e.g., First Circuit: Mangla v. Brown Univ.*, 135 F.3d 80, 83 (1st Cir. 1998) (finding that the student-university relationship is essentially contractual in nature); **Eighth Circuit: Corso v. Creighton University**, 731 F.2d 529, 531 (8th Cir. 1984) (same); **D.C. Circuit: Williams v. Howard University**, 528 F.2d 658, 660-61 (D.C. Cir. 1976) (same); *Goodman, supra*, 135 F.Supp.2d at 55; **District of Massachusetts: Dinu v. President & Fellows of Harvard College**, 56 F.Supp.2d 129, 130 (D.Mass. 1999) (“that the relationship between a university and its students has a strong, albeit flexible, contractual flavor is an idea pretty well accepted in modern case law.”); **District of Vermont: Fellheimer v. Middlebury College**, 869 F.Supp. 238, 242 (D.Vt. 1994); **Northern District of Illinois: Holert v. Univ. of Chicago**, 751 F.Supp. 1294, 1301 (N.D. Ill. 1990); **District of Montana: Peretti v. State of Montana**, 464 F.Supp. 784, 786 (D.Mont. 1979)(*rev’d on other grounds, Montana v. Peretti*, 661 F.2d 756 (9th Cir. 1981)); **Kentucky: Centre College v. Trzop**, 127 S.W.3d 562, 568 (Ky. 2003); **Pennsylvania: Boehm v. University of Pa. School of Veterinary Medicine**, 392 Pa. Super. 592 (1990); **Missouri: Knapp v. Junior College District of St. Louis Cty.**, 879 S.W.2d 588, 592 (Ct. App. Mo. 1994); **New Hampshire: Gamble v. Univ. Sys. of New Hampshire**, 136 N.H. 9, 12-13 (N.H. 1992); **New York: Vought v. Teachers College, Columbia Univ.**, 127 A.D.2d 654, 654-55 (N.Y. App. Div. 1987); **Idaho: Wickstrom v. North Idaho College**, 111 Idaho 450, 452 (1986); **Ohio: Behrend v. State of Ohio**, 55 Ohio App. 2d 135, 139-140 (Ohio Ct. App. 1977); **California: Zumbrun v. Univ. of Southern Calif.**, 25 Cal. App.3d 1 (1972); **Florida: Univ. of Miami v. Militana**, 184 So.2d 701, 704 (Fla. Dist. Ct. App. 1966).

Each letter offering admission became a binding express contract once each Student accepted the offer. This contract was unambiguous in detailing the promise of a four-year, all female educational environment. Yet, based on the sustaining of the demurrer, the trial court must have found either that: (1) the letters made no such promise, or (2) the letters were ambiguous, and no reasonable juror could find that the extrinsic evidence specified in the Complaint, the Bill of Particulars and the accompanying exhibits could be interpreted to create the express or “specific” contract the trial court was unable to find. Neither of those findings makes sense based on the totality of the circumstances in this case. Above all, the interpretation of the contract, if ambiguous, falls within the province of a fact finder. The trial court usurped the role of the fact finder at trial by deciding the case on the merits at the demurrer stage. *See Fun v. VMI*, 245 Va. 249, 253; 427 S.E.2d 181, 183 (1993) (in a breach of contract action, if a document’s interpretation is in doubt, it must be resolved in favor of the plaintiff at the demurrer stage and reserved for determination by a fact finder at a trial on the merits).

By the unambiguous language on the face of the acceptance letters, the College offered each Student a place in her respective class, identified by each Student’s projected graduation date – **four years from the date of matriculation**. *See Petition for Appeal*, at 10-11. Moreover, the acceptance letters explicitly promote the special benefits of The Macon Plan, “which will serve as a guide through your **four years** at Randolph-Macon **Woman’s** College.” Such statements clearly identify the Students’ course of study at R-MWC as a four-year program at a women’s college and establish the College’s contractual undertaking and obligation.

The Students are in compliance with the terms of their contracts with R-MWC. The College, however, is breaching the contract by implementing coeducation at R-MWC prior to the conclusion of each Student's four years of single-sex education at the College.

The College argued that, even if it exists, the alleged contract is only for a semester and fails due to lack of mutuality. *See Mem. in Supp. of Demurrer*, at 15-18; *Transcript*, at 10-12; 18-19. Yet the Students did not assert that they were not bound by their contract with the College. Rather, the parties simply have different obligations.¹⁰ The Students agree with the College that the general rule in Virginia is that each party to a contract must have the right to hold the other to a positive agreement: “**both parties must be bound or neither is bound.**” *Capps v. Capps*, 216 Va. 378, 381, 219 S.E.2d 901, 903 (1975) (citation omitted) (emphasis added). Mutuality of contract involves consideration - - the requirement that there be “promises on each side that something shall be done for the benefit of the other side...although they may relate to different terms of the contract and may be conditioned upon performance by the other party.”¹¹

¹⁰ For example, if a student were to attend R-MWC for three semesters, attain adequate grades, comply with all of the College's rules and regulations, and tender her tuition check for her fourth semester - - the College could not arbitrarily refuse to allow the student to continue her R-MWC education. In cases involving student disciplinary disputes, courts evaluate the college's actions to ensure they did not act arbitrarily. *See, e.g., Ward v. New York University*, 2000 U.S. Dist. LEXIS at *7 (“in reviewing such decisions, the Court is limited to determining whether defendants abided by their own rules, and whether they have acted in good faith or their action was arbitrary or irrational.”)(citations omitted); *Goodman*, 135 F. Supp. 2d at 147 (“...Bowdoin agreed to promote certain principles and abide by certain procedures...Bowdoin, therefore, has not retained the unbridled discretion that would render its promise illusory.”)(citations omitted). The College's assertion that any contract that exists is only for one semester necessarily urges that the College can dismiss students at the end of that semester term for absolutely no reason. No case in the country has so held.

¹¹ Accordingly, the Students seek to hold the College to the binding promises it made to them regarding their four year single-sex education, just as the College would surely hold the Students to its rules, regulations, academic requirements and tuition obligations, which might change during the Students' four years. The trial court should enforce this contract because both parties' obligations are reasonably certain. *Allen v. Aetna Casualty & Surety*, 222 Va. 361, 363, 281 S.E.2d 818, 819 (1981).

C.G. Blake Co. v. W.R. Smith & Son, Ltd, 147 Va. 960, 972, 133 S.E. 685, 688 (1926). Thus, mutuality exists here, yet by failing to hold the College to its obligations under the contract with the Students, the trial court allowed the College to “circumvent the requirement that each party yield consideration for the other’s promise.” *Busman v. Beeren & Barry Investments, LLC*, 69 Va. Cir. 375, 379, n. 2 (Fairfax 2005).

The trial court erred in failing to find that the acceptance letters established an express contractual relationship between the Students and the College with the terms alleged by the Students. Alternatively, it is implied in the letters offering admission that the Students were going to enroll in and graduate four years later from an all-women’s college. “A demurrer, unlike a motion for summary judgment, does not allow the court to evaluate and decide the merits of a claim; it only tests the sufficiency of factual allegations to determine whether the [complaint] states a cause of action.” *Fun v. VMI*, 245 Va. at 252, 427 S.E.2d at 183. At the very least the language could reasonably be interpreted to contain the promises the Students alleged, and thus the matter should have survived demurrer in order for the fact finder to interpret the contract.

c. The Express Contracts between the Students and the College Contain the Promises Alleged by Appellants

All of the College’s promotional statements, both oral and written, with respect to any ambiguous term in the contract, may be used to explain the meaning of those terms. *Jim Carpenter Co. v. Potts*, 255 Va. 147, 155-56, 495 S.E.2d 828, 833 (1998). “It is generally accepted that the terms and conditions for graduation are those offered by the publications of the college at the time of enrollment.” *Goodreau*, 116 F.Supp.2d at 702 (citation omitted). Consequently, representations made by the College to the Students, both orally and in various types of R-MWC literature, must be considered in determining

the terms of the contractual relationship, should the acceptance letter be deemed ambiguous. *Id.*; *See also, Mangla*, 135 F.3d at 83; *Holert*, 751 F.Supp. at 1300. Indeed, they serve as part of the backdrop against which the offers of admission were made.

Even if within the contract between the College and the Students there is no express promise that R-MWC will remain single-sex for the Students' four years, the official R-MWC materials demonstrate there is at least an implied promise to do so. For example, many promotional materials touted: "Why attend a women's college? The advantages...are pretty obvious..." and then listed the higher rates of overall success for women's college **graduates**¹². The Students alleged that they relied on these clear representations regarding the superiority of all-women's schools in deciding to attend R-MWC and contract with the College for their four-year college education. *Complaint*, ¶¶ 14-15, 25, 38-39; *BOP*, ¶¶ 2-4; *Mem. in Opp. to Demurrer*, at 4. This was affirmed by consistent oral promises. *Complaint*, ¶¶ 14-15, 22; *BOP*, ¶ 5.

The Students clearly alleged an express contract, either unambiguous, or informed by the evidence mentioned in the Complaint and produced in response to the Bill of Particulars and Motion Craving Oyer. The terms governing the contractual relationship include the College's promise to provide four years of all-women's education in exchange for the Students' payment of tuition and compliance with R-MWC's academic requirements, rules and regulations. Other issues, such as whether the College had the statutory authority under Virginia law to make the sweeping change to coeducation, were

¹² Once again the implication is compelling. It is not attending the College for a semester or two that provides the advantage the Students sought. It is the opportunity to attend and **graduate** from an all-female institution that, according to R-MWC, would provide these Students with an advantage.

not before the court, nor are they likely to be.¹³ Likewise, the wisdom or basis for the decision was not before the court on this demurrer. The only question presented at the demurrer stage is whether the Students properly pled a cause of action for breach of contract.

The College argued that the Students' pleadings were too generalized to support a breach of contract claim. *See, e.g., Mem. in Supp. of Demurrer*, at 9-10. Yet if the court found that the terms of the parties' contractual relationship were ambiguous, it should have allowed the case to go to trial for the fact finder to determine the parties' intent. "Even if some terms of a contract are uncertain, it may be read in the light of the surrounding circumstances, and, if from such a reading, its meaning may be determined, the contract will be enforced."¹⁴ *R.K. Chevrolet v. Hayden*, 253 Va. 50, 54-55, 480 S.E.2d 477, 480 (1977) (citation omitted); *Fun v. VMI*, 245 Va. at 253, 427 S.E.2d at 183 ("To the extent the exact nature of the letter is in doubt, for purposes of consideration of VMI's demurrer, the doubt must be resolved in favor of the construction given the letter by Fun in her pleadings, that is, that it was a letter of dismissal."). If *Fun* is still the law in Virginia, the trial court's decision in this case cannot be reconciled with it. Based on the facts pled, a reasonable person could interpret the contract in the same manner as the Students. Thus, the Students' pleadings were sufficient to survive demurrer and permit the matter to be considered by the fact finder at trial.

¹³ Regardless, the scope of the College's ability to amend its governing documents does not extend to breaching its contractual obligations in the process.

¹⁴ Furthermore, to the extent that any of the terms in the central written documents were found ambiguous, those terms should have been interpreted against the drafter – in this case, the College. *American Realty Trust v. Chase Manhattan Bank*, 222 Va. 392, 403, 281 S.E.2d 825, 831 (1981).

Similar to the standard for Rule 12(b)(6) motions at the federal level, when a Virginia trial court determines whether to sustain the demurrer and dismiss a case for failure to state a cause of action, it must construe the plaintiff's allegations favorably. *See Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *overruled on other grounds by Davis v. Scherer*, 468 U.S. 183 (1984). At that stage of the proceedings, "the issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test." *Id.* (citation omitted).

The Students have pled numerous facts, which must be accepted as true, in support of their breach of contract claim against the College. It is indefensible that the trial court sustained the demurrer and found that there was absolutely nothing pled which constituted a cause of action potentially entitling the Students to relief. Rather, the trial court jumped ahead and tried the merits of this case at the demurrer stage. This was plain error. The multitude of tangential matters presented by the College in an effort to muddy the waters must be avoided. This Court should grant the Students' Petition for Appeal in order to address the legal issues presented by this case.

IV. CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Appeal to accord the Students the opportunity to convince the Court to reverse the decision of the trial court and remand the case for further proceedings.

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CERTIFICATE OF SERVICE

I hereby certify that on this, the 13th day of August, 2007, a true and accurate copy of the foregoing Petition for Appeal was delivered via email and U.S. Mail, postage prepaid to:

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/s/ Wyatt B. Durette, Jr.

CERTIFICATE OF COMPLIANCE

I hereby certify that this Petition for Rehearing complies with Rule 5:20A of the Rules of the Virginia Supreme Court. The document is in PDF format, in 12 point type, and will print on a page 8 ½ x 11 inches. The word count is 4,282.

/s/ Wyatt B. Durette, Jr.