In The

Supreme Court of Virginia

RECORD NO. 081827

VIRGIL MONGOLD, Co-Executor and Beneficiary of the Estate of Nina M. Dove, Deceased, and DONALD E. SHOWALTER, Co-Executor and Beneficiary of the Estate of Nina M. Dove, Deceased,

Appellants,

v.

TERRY V. WOODS,

Appellee.

BRIEF OF APPELLANTS

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COME NOW Virgil Mongold, Co-Executor and Beneficiary of the Estate of Nina M. Dove, Deceased, and Donald E. Showalter, Co-Executor of the Estate of Nina M. Dove, Deceased (herein "Appellants"), by counsel, and pursuant to Rule 5:23 *et seq*. of the Rules of the Virginia Supreme Court, and show to the Court the following case:

PRELIMINARY STATEMENT

In this suit, the Circuit Court of Rockingham County entered judgment for Plaintiff Terry Woods (hereinafter "Woods") on a theory of *quantum meruit*, despite the fact that there existed an express contract with the Doves for the farm work that he performed. His contract provided for a reasonable salary—one that included regular raises and bonuses. However, the court awarded Woods $106,444.00 in additional salary for the years 1996 through 2004 and $8,728.57 for electric and propane bills that Woods paid during the time that he ran the farming operation himself after Paul Dove's death.

Though styled as *quantum meruit*, Woods' claims are based on a theory of promissory estoppel—despite the fact that the

Virginia Supreme Court has held that there is no cause of action based on promissory estoppel in Virginia. W.J. Schafer Associates, Inc. v. Cordant, Inc., 254 Va. 514, 493 S.E.2d 512 (1997).

Furthermore, the decision below is in clear contravention of established Virginia law on *quantum meruit*, which does not allow for recovery when there is an express contract. Ellis & Myers Lumber Co. v. Hubbard, 123 Va. 481, 96 S.E. 754 (1918).

Finally, the trial court entered judgment for Woods despite the fact that there was no evidence introduced as to the reasonable value of the services provided. The standard of recovery under *quantum meruit* is reasonable compensation minus the amount already paid. Campbell County v. Howard, 133 Va. 19, 112 S.E. 876 (1922). Without evidence of the reasonable value of the services, the record cannot support the judgment below.

Because the trial court's actions were erroneous and ignored plain, well-established Virginia Supreme Court precedent

regarding promissory estoppel and *quantum meruit*, this Court should reverse the trial court's June 10, 2008, Order.

ASSIGNMENTS OF ERROR

1. The Circuit Court erred when it entered judgment for Woods on claims that are based on promissory estoppel, because the Virginia Supreme Court has held that there is no cause of action based on promissory estoppel in Virginia.

2. The Circuit Court erred when it entered judgment for Woods on a theory of *quantum meruit*, because Woods had an express employment contract for which he received a salary plus performance bonuses.

3. The Circuit Court erred when it entered judgment for Woods in the amount of $115,172.57 on a theory of *quantum meruit*, because there is no evidence in the record as to the reasonable value of the services Woods rendered, and no evidence in the record to support any reimbursement of farming costs to Woods.

STATEMENT OF THE NATURE OF THE CASE AND MATERIAL PROCEEDINGS

On July 31, 2007, Woods filed a complaint (the "Complaint") in the Circuit Court of Rockingham County, Virginia, against Virgil Mongold as Co-Executor and Beneficiary of the Estate of Nina Dove, deceased (the "Estate"); Donald E. Showalter as Co-Executor of the Estate; Londia Deavers, Mattie Miller, Arlene Sanger, Walter Eugene Mongold and Damascus Church of the Brethren as beneficiaries of the Estate (collectively the "Defendants"). In the Complaint, Woods sought a preliminary injunction to prevent the sale of certain tracts of land and equipment, the imposition of a constructive trust on those tracts and equipment or in the alternative, a judgment in the amount of $250,000 against the Defendants under a theory of *quantum meruit* relief.

On August 8, 2007, the Rockingham County Circuit Court held a hearing on the preliminary injunction and the Court entered the preliminary injunction on August 15, 2007. On the same day, the presiding judges of the Twenty-Sixth Judicial Circuit recused themselves from presiding at the trial because

one of the Co-Executor Defendants, Donald E. Showalter, is an attorney who regularly practices before the judges of the Circuit.

Defendant Damascus Church of the Brethren timely filed an answer to the Complaint on August 27, 2007. On September 6, 2007, the Defendant Co-Executors timely filed an answer to the Complaint.

In light of the recusal of the presiding judges of the Twenty-Sixth Circuit, on October 24, 2007 the Supreme Court of Virginia designated the Honorable George F. Tidey to preside over the case.

This case came on for trial on April 21, 2008. Woods presented his evidence and then rested. The defendants then moved to strike the evidence of Woods on grounds that Woods' claims sounded in promissory estoppel, which is not cognizable in Virginia. The defendants also moved to strike the evidence of Woods on the grounds that Woods' *quantum meruit* claim was barred due to the existence of an express contract. Upon consideration of the argument of the Defendants' counsel, the Court overruled the motion to strike. The Defendants then

presented their evidence and rested. There was no rebuttal evidence.

On June 10, 2008, the Circuit Court entered an Order finding that Woods did not present evidence sufficient to establish a constructive trust. (JA 514, Final Order). However, the Court also found that there was a preponderance of the evidence supporting the *quantum meruit* claim. (JA 514, Final Order). As a result, the Circuit Court awarded Woods $115,172.57: $106,444.00 for employment from 1996 to 2004 and $8,728.57 for electric and propane bills that Woods paid during the time that he ran the farming operation himself after Paul Dove's death, despite the fact that he also kept all of the profits from the business during that period. Defendants and Woods noted their objections to the Order. (JA 517-8, Objections to Final Order).

Defendants timely filed their Notice of Appeal and their Petition for Appeal. The appeal was granted on January 14, 2009.

QUESTIONS PRESENTED

1. Can a party evade the Virginia Supreme Court's prohibition of promissory estoppel claims by describing a promissory estoppel theory as *quantum meruit*? (Assignment of Error #1)

2. Can a Plaintiff recover under a theory of *quantum meruit* where there is an express contract between the parties covering the same subject matter? (Assignment of Error #2)

3. In order to recover on a theory of *quantum meruit*, must a Plaintiff present evidence of the reasonable value of the services he provided? (Assignment of Error #3)

STATEMENT OF FACTS

Based on the pleadings, responses to discovery requests and depositions and trial testimony, the following facts are undisputed:

In 1985, Paul and Nina Dove purchased a farm approximately two miles southwest of the village of Bergton, which is located in the northwest section of Rockingham County, Virginia. (JA 18A, Stipulation of Uncontested Facts, ¶ 1). On this

farm, Paul Dove raised chickens, cattle and sheep and grew hay. (JA 18A, Stipulation of Uncontested Facts, ¶ 3).

Woods began working for Paul Dove in 1985 at the age of 21. (JA 18A, Stipulation of Uncontested Facts, ¶ 4). Prior to working for Paul Dove, Woods' only work experience was as a chicken catcher for Rockingham Poultry Cooperative in Virginia and West Virginia. (JA 18A, Stipulation of Uncontested Facts, ¶ 4). Woods does not have a high school diploma or any additional technical or agricultural education. (JA 18A, Stipulation of Uncontested Facts, ¶ 4; JA 83-4, Woods Testimony).

Woods was responsible for working the poultry houses, mowing and weed eating around the poultry houses, making hay, caring for the sheep and other tasks as required on the farm. (JA 2, Complaint, ¶1; JA 36,45, Woods Testimony). Paul Dove paid Woods a salary every two weeks. (JA 18A, Stipulation of Uncontested Facts, ¶ 5). Woods also received a bonus of varying amounts, based on the flocks' performance, when a flock of chickens went to market. (JA 18A, 18C, Stipulation of

Uncontested Facts, ¶ 5, Exhibit A; JA 57, 86, Woods Testimony). Woods also received raises. (JA 58, 94).

Throughout his tenure with the Doves, Woods' hours did not increase. (JA 75, 95, Woods Testimony; JA 261, Plaintiff's Exhibit 5). He worked the same number of total hours each year—and each year made more in salary and bonuses. (JA 261, Plaintiff's Exhibit 5; JA 18A, 18C, Stipulation of Uncontested Facts, ¶ 5, Exhibit A). The Doves also paid for Woods' health insurance for several years. (JA 487-94, Insurance Check Stubs). Woods also received regular Christmas bonuses from the Doves. (JA 495-498, Bonus Check Stubs).

Furthermore, as shown by his testimony, Woods worked on his own farming operation, worked for others in the community, went hunting and took vacations. (JA 44, 54-56, 89-90, 94, Woods Testimony).

After Woods had been employed for about ten years, Paul Dove would express occasionally his feeling that Woods was like his son and that he wanted to leave the property to him. (JA 36-7, Woods Testimony). Woods alleges that he relied on this

promise of receiving the farm after the Doves' deaths in making his decision to continue to work for the Doves. (JA 2-4, Complaint, ¶¶ 3, 4, 12; JA 336-7, 47, 50, 58, 61, 82-3, 104-5, Woods Testimony). At no time did Woods indicate to the Doves that their promise was why he was working for them. (JA 103-5).

Woods worked for Paul Dove until Paul Dove's death on March 11, 2005, when Paul was electrocuted while installing a thermostat in one of the poultry houses. (JA 18B, Stipulation of Uncontested Facts, ¶ 6). After Paul Dove's death, Woods continued working the poultry farm and was paid a salary through the early part of 2005, after which he continued to work the poultry farm and keep all the profits from the sale of the chickens without paying rent for the use of the farm to Nina Dove. (JA 18B, Stipulation of Uncontested Facts, ¶ 7; JA 101, Woods Testimony). He paid the utilities on the farm and kept all of the profits. (JA 101-3, Woods Testimony).

Paul Dove died intestate and the entirety of his property passed to his wife, Nina Dove. (JA 18B, Stipulation of

Uncontested Facts, ¶¶ 8, 9). Nina Dove died testate on April 19, 2007. (JA 18B, Stipulation of Uncontested Facts, ¶ 10). Her will named Virgil Mongold and Donald Showalter as Co-Executors. (JA 18B, Stipulation of Uncontested Facts, ¶ 11). The Clerk of the Rockingham County Circuit Court admitted the will to probate on April 27, 2007, and the Executors duly qualified. (JA 18B, Stipulation of Uncontested Fact, ¶ 12). No provision of the will leaves the poultry houses or any tract of land to Woods. (JA 8-15, Last Will of Nina Dove).

STANDARD OF REVIEW

The three questions presented in this case's assignments of error are questions of law that this Court reviews *de novo*. Barter Foundation, Inc. v. Widener, 267 Va. 80, 592 S.E.2d 56 (2004).

ARGUMENT

I. WOODS' ACTION FOR *QUANTUM MERUIT* RELIEF IS A PROMISSORY ESTOPPEL CLAIM, WHICH IS NOT PERMITTED IN VIRGINIA

Although Woods styles his cause of action as *quantum meruit*, the cause of action described in his Complaint and at trial is promissory estoppel. However, promissory estoppel is not a

cognizable cause of action in Virginia, and as a result granting relief thereon is error.

Promissory estoppel arises where there is a promise that the promisor should reasonably expect to cause action by the promisee and which does cause such action to the promisee's detriment. In re Peanut Crop Ins. Litigation, 524 F.3d 458, 475-76 (4th Cir. 2008). When a party proves the elements of promissory estoppel, a court in a state that allows promissory estoppel can imply and enforce a contract between the promisor and promisee even though no formal contract actually exists.

Woods' claim here sounds in promissory estoppel. Consider his Complaint, where Woods alleges that that:

> Over the course of time that plaintiff worked for Paul and Nina Dove, they both on numerous occasions promised to transfer the farm and farm equipment to plaintiff in return for ongoing and devoted service.

and that

> …relying on the Dove's promises that the real estate, farm equipment, and poultry operation would become his some day, [he] dedicated his life to the Dove's farm…

(JA 2, 3, Complaint ¶¶ 3, 4).

Woods alleges the traditional elements of promissory estoppel: a promise, reliance on that promise and a change in Woods' position.

At trial, Woods testified:

> And over the years, he [Paul Dove] had promised me the poultry farm to grow chickens in as they retired from that, and in the later years, then, said that they was going to make it so the farm would be mine when they passed away. And this didn't happen when they passed away, and that's why I'm here today. **That was my livelihood, and it was a promise to me that—I was counting on it**.

(JA 36-7, Woods Testimony).

When asked by his attorney at trial why he worked for the Doves if he could have made more as a chicken catcher, Woods answered:

> Because they promised me that they were going to leave the poultry operation to me when they retired and the rest of the farm when they passed away.

(JA 58, Woods Testimony).

Consider also the following exchange at trial between Woods and his attorney:

> Q: You were—you say you **relied on this promise** to Paul—or that Paul made to you that you would get the farm?

A: Yeah.

(JA 61, Woods Testimony) (emphasis added).

When making his closing argument for Woods' constructive trust and *quantum meruit* claims, Woods' attorney best expressed Woods' claim:

> The evidence today that there was a promise, that the terms of the promise were clear and definite, that Terry Woods relied on the promise and that if the promise is not performed, he will be left without compensation have been uncontroverted.

(JA 248-9, Woods Closing Argument).

Again Woods argues, almost verbatim, the classical elements of promissory estoppel, as articulated by courts in states where (unlike Virginia) the doctrine is available to set up a contract in the absence of an otherwise enforceable agreement. *Quantum meruit* is an analytically distinct doctrine, with different purposes and elements entirely than the ones that Woods has articulated.

Although courts in Virginia recognize properly pled *quantum meruit* claims, they do not recognize promissory estoppel as a cause of action. "Today, however, we hold that promissory

estoppel is not a cognizable cause of action in the Commonwealth, and we decline to create such a cause of action." W.J. Schafer Associates, Inc. v. Cordant, Inc., 254 Va. 514, 516, 493 S.E.2d 512, 521 (1997). See also Virginia School of the Arts v. Eichelbaum, 254 Va. 373, 493 S.E.2d 510 (1997); Ward's Equipment v. New Holland North America, 254 Va. 379, 493 S.E.2d 516 (1997).

Woods has not questioned the continuing vitality of these cases in the trial court. He has not suggested that those cases are wrongly decided, or that Virginia law has somehow changed to allow promissory estoppel as a cause of action. Rather, he has dressed up a claim for promissory estoppel in the clothing of a *quantum meruit* action. Nevertheless, changing the title that you give to an action cannot change what the action really is. The elements of promise, reliance, and change in position constitute promissory estoppel, not *quantum meruit*.

Presumably, this discussion of the promise to Woods and his reliance on the promise is to argue that it would be unjust not to award him recovery under *quantum meruit*. (JA 6, Complaint, ¶

24). However, this does not make his claim any less promissory estoppel.

Because promissory estoppel claims, no matter what they are called, are not recognized in this Commonwealth, the judgment below is in error and this Court should reverse it.

II. WOODS IS NOT ENTITLED TO *QUANTUM MERUIT* RELIEF BECAUSE WOODS HAD AN EXPRESS EMPLOYMENT CONTRACT

Woods' *quantum meruit* claim has problems beyond its basis in promissory estoppel. Woods cannot prevail on this claim because of the existence of an express contract between Paul Dove and Woods. Virginia law absolutely forbids implying the existence of a contract, such as *quantum meruit*, when the parties themselves negotiated and agreed to an actual (and not fictional) contract on the same subject matter.

The reasoning behind *quantum meruit* is that when a party "gains the labor . . . of another [he] must make reasonable compensation for the same. Hence, when one furnishes labor to another under a contract which, for reasons not prejudicial to the former, is void and of no effect, he may recover the value of his

services on a quantum meruit." Hendrickson v. Meredith, 161 Va. 193, 198, 170 S.E. 602, 604 (1933).

To recover under a legal theory of *quantum meruit*, a plaintiff must show that

> (i) he rendered valuable services, (ii) to the defendant, (iii) which were requested and accepted by the defendant, (iv) under such circumstances as reasonably notified the defendant that the claimant, in performing the work, expected to be paid by the defendant.

Datastaff Technology Group, Inc. v. Centex Const. Co., 528 F. Supp. 2d 587, 598 (E.D. Va. 2007).

When the elements of *quantum meruit* are met, the Court will imply a contract between the parties to pay for the work performed. Ellis & Myers Lumber Co. v. Hubbard, 123 Va. 481, 502, 96 S.E. 754, 760 (1918). This point is critical. For a court to award recovery under a theory of *quantum meruit*, the contract between the parties does not actually exist or is void. The court creates a contract between the parties to prevent inequity. Kern v. Freed Co., 224 Va. 678, 299 S.E.2d 363 (1983).

When an actual, express contract exists, there is no need for *quantum meruit*; the parties have already negotiated an actual agreement, presumably acceptable to both. Nedrich v. Jones, 245 Va. 465, 477, 429 S.E.2d 201, 207 (1993) (citing Royer v. Board of County Supervisors, 176 Va. 268, 280, 10 S.E.2d 876, 881 (1940)). There is no need to imply one. As, this Court has noted, "It is only in the absence of an express or of an enforceable contract between parties that the law (whether at law or in equity) will, from circumstances, imply a contract between them." Ellis 234 Va. at 502; See also Raymond, Colesar, Glaspy & Huss, P.C. v. Allied Capital Corp., 961 F.2d 489 (4th Cir. 1992). See also Southern Biscuit Co. v. Lloyd, 174 Va. 299, 6 S.E.2d 601 (1940); Grice v. Todd, 120 Va. 481, 91 S.E. 609 (1917).

In this case, there is no question that there is an express contract between Woods and the Doves and the law cannot imply an agreement in addition or in contravention thereof.

Woods does not, and cannot, allege that there was no agreement. To the contrary, he has always contended that there was an enforceable, express agreement among the Doves and

himself. The agreement was simple: Paul Dove hired Woods to tend the chickens and chicken houses, to mow, to help make hay and to help with the farm animals. (JA 2, Complaint , ¶ 1; JA 36, 44, Woods Testimony). In exchange for this work, Woods received a weekly salary with bonuses, had his insurance paid for several years and received regular Christmas bonuses. (JA 18A, Stipulation of Uncontested Facts, ¶ 5; JA 487-94, 495-498). As can be seen from Woods' paychecks and stubs, his salary was regular and consistent. (JA 482-6, Woods Salary Check Stubs). This is not a situation where Woods occasionally or seasonally helped the Doves out in some informal manner—like a day laborer or a neighborhood boy who mows yards. Woods worked for them for 23 years and was paid regularly and reasonably every two weeks. He was paid regular amounts based on his salary and bonuses based on the performance of the flocks. (JA 57, Woods Testimony; JA 18A, Stipulation of Uncontested Facts, ¶ 5).

Woods does not argue that there was no contract, that the contract was void or that the contract is unenforceable. He

worked; the Doves paid. Because of this express agreement between the parties there can be no recovery for *quantum meruit*.

Woods argued below that there was unjust enrichment in this case, and that *quantum meruit* recovery was therefore appropriate, despite the existence of an express contract and the case law that seems to foreclose that recovery. This argument is flawed for three reasons.

First, if truly unjust enrichment has taken place in a circumstance that included an express contract, the claim still cannot be one for *quantum meruit*, because the case law is clear that *quantum meruit* and an express contract cannot co-exist. The claim may, perhaps, be one for a constructive trust based on general equitable principles. Woods presented and argued this claim below. However, in situations of potential constructive trusts, in order to prevent fraud and protect bargains, the law wisely requires a heightened evidentiary showing—clear and convincing evidence. Sutton v. Sutton, 194 Va. 179, 72 S.E.2d 275 (1952). The trial court correctly rejected that claim here

because it determined that the evidence did not rise to that heightened standard. That mixed determination of law and fact is entitled to this Court's deference absent clear error. Horton v. Horton, 254 Va. 111, 487 S.E.2d 200 (1997).

Second, Woods' *quantum meruit* claim is really based on the argument that Woods did not receive enough compensation for his work—that the salary and bonuses were nice, but he would like the farm also. These are not the sort of claims that *quantum meruit* is intended to address. There is no allegation that the consideration was nominal, only that it was inadequate. But, as Lord Nottingham famously put it, "The Chancery mends no man's bargain," Maynard v. Moseley, 36 Eng. Rep. 1009, 1011 (H.L. 1676). Having agreed to work as an at-will employee for the salary and bonuses he received, Woods cannot now complain that he wants more.

Finally, Woods might have taken the position that the promise of the farm being left to him was part of the express contract. However, in that case, recovery under *quantum meruit* is still inappropriate; the correct action would be one at law for

breach of contact. That is not an action Woods pled, perhaps because he was concerned about the Statute of Frauds, perhaps because he could not prove a meeting of the minds. In any event, whatever claims that Woods might have pled, it is clear that the claim actually before the Court must fail.

The existence of an express contract in this case is uncontroverted and forecloses recovery in *quantum meruit*. Accordingly, the judgment below must be reversed.

III. WOODS FAILED TO PRESENT EVIDENCE TO SUPPORT THE AWARD OF DAMAGES.

The literal Latin meaning of the phrase *quantum meruit* is "whatever it's worth." Even if *quantum meruit* was available to rewrite the terms of an express contract that looked fine when negotiated but seems to one party like a bad deal in retrospect, Woods was simply not shown that he has not been paid what his work is worth.

The measure of damages in a *quantum meruit* case is the reasonable value of the work or labor performed less the actual compensation to the laborer. Campbell County v. Howard, 133 Va. 19, 112 S.E. 876 (1922).

In this case, Woods has already been reasonably compensated for his work and has given no evidence to support the position that he was not. In exchange for his work, Woods received a weekly salary with bonuses. (JA 18A, Stipulation of Uncontested Facts, ¶ 5; JA 261, Plaintiff's Exhibit 5). Over the years, Woods pay increased regularly. (JA 94, Woods Testimony; JA 261, Plaintiff's Exhibit 5). The Doves paid for Woods' insurance for several years and gave him regular Christmas bonuses. (JA 487-98, Christmas Bonus Check Stubs).

Despite the allegations in his Complaint that he worked "increased hours" for "reduced pay," Woods' own evidence shows that in fact he worked the same number of hours for increasing pay every year. (JA 261, Plaintiff's Exhibit 5; JA 95, Woods Testimony).

The Circuit Court awarded no damages for the years 1985-1995, implicitly finding that the compensation Woods performed for those years was reasonable. (JA 512, Opinion Letter; JA 513-5, Final Order). At the same time, the trial Court awarded over $100,000 in damages for the period 1996-2004, even though

Woods worked the same number of annual hours during that period, and in fact made more money than he had previously. (JA 512, Opinion Letter; JA 513-5, Final Order; JA 261, Plaintiff's Exhibit 5). There is no increase in hours worked after 1996, or decrease in pay, that would support any recovery under *quantum meruit*. The only change is that this is the time when Woods claims that Paul Dove expressed his desire that Woods have the farm when Dove passed away. (JA 47, Woods Testimony). The Circuit Court's award clearly is not based on *quantum meruit*—that is, on a finding that Woods was not reasonably paid—but on the promise of the farm and Woods reliance on the promise.

A plaintiff's "case can rise no higher than [his] own uncontradicted testimony." Southside Virginia Training Center/Comm. of Virginia v. Shell, 20 Va. App. 199, 203-04, 455 S.E.2d 761, 763 (1995) (citing Massie v. Firmstone, 134 Va. 450, 462, 114 S.E.2d 652, 655-56 (1922)). Woods' own evidence showed that from 1985 until Paul Dove's death he worked the same hours. (JA 261, Plaintiff's Exhibit 5; JA 76, 95, Woods Testimony). Wood's own evidence also showed that from 1985

until Paul Dove's death, the Doves paid him an increasing amount of money. (JA 261, Plaintiff's Exhibit 5). If recovery under *quantum meruit* is not appropriate for the period from 1985 until 1995 because compensation was adequate, then it is not appropriate from 1996 until 2005 either, when Woods' compensation was more, only because Paul Dove articulated that he would like Woods to have the farm someday.

Woods offered no evidence what the reasonable value of his services would be, but if, as the trial court found, they were worth what he received from 1985-1995, one wonders why they were suddenly worth much, much more in 1996. The record contains no answer. Woods has the burden of showing that he was not reasonably compensated; because he has failed to do so, the judgment below is in error.

Woods counter this argument by claiming that his salary was inequitable because it worked out to less than minimum wage. This is not persuasive, however, because farm laborers are exempted from minimum wage and overtime requirements. See

29 U.S.C. § 213. There is no minimum wage for him to be paid less than.

Woods was paid a reasonable wage for the work that he performed. He presented no evidence that the salary he was paid by the Doves' was less than adequate or that his pay was less than standard for the type work that he performed—other than to claim he was not paid for his "overtime" work, ignoring the nature of a salary, as opposed to hourly wage work.

Finally, there is the matter of the $8,728.57 that the trial court awarded to Woods as reimbursement for electric and propane bills. The uncontroverted evidence is that that Woods incurred these expenses after Paul Dove died, and during a period in which he kept all the profits from the business. This is logically inconsistent; if the business was Nina Dove's during the period in question, she should pay the expenses, but is entitled to the profits. If the business belonged to Woods, he is surely entitled to the profits, but must also bear the expenses.

However, it is well outside the scope of equity jurisprudence and *quantum meruit* relief to force Petitioners to subsidize Woods'

enterprises. The award of the $8,728.57 is unwarranted and should be vacated.

Woods claims that these expenses, or a portion of them were really expenses of Nina Dove. Even if this is the case—and evidence for this does not appear in the record—*quantum meruit* is not the proper means of recovery for any portion of the electric and propane expenses that were attributable to the house in which Nina Dove was living in when she passed away. If Woods believes that the Estate owes him money based on an agreement between Nina Dove and himself relating to the payment of bills, that claim is properly handled during the administration of the Estate as a debt. It is not, however, something recoverable under *quantum meruit*. The expenses of running the poultry operation are not related to the reasonable value of Woods' work.

Woods has failed to show that he was not reasonably compensated for his work; if anything, the award of damages for the period after 1996 only—the supposed promise to leave the farm to Woods—shows that the trial Court was really awarding damages for promissory estoppel, not under the *quantum meruit*

formula. Woods has not met his burden of showing his entitlement to recover, and the judgment below is accordingly in error.

CONCLUSION AND RELIEF SOUGHT

For the reasons herein stated, Petitioners submit that the trial court erred in: (a) awarding relief to Woods when his claim was based on a theory of promissory estoppel; (b) awarding relief to Woods under a theory of *quantum meruit* where there was an express contract covering the same subject matter; and (c) awarding relief to Woods based on insufficient evidence.

WHEREFORE Appellants pray that this Court reverse the judgment of the trial court and enter a final judgment in their favor.

Respectfully Submitted,
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CERTIFICATE

Pursuant to Rule 5:26(d) of the Rules of the Supreme Court of Virginia, counsel for Appellants, Virgil Mongold, Co-Executor and Beneficiary of the Estate of Nina M. Dove, Deceased, and Donald E. Showalter, Co-Executor of the Estate of Nina M. Dove, Deceased certify as follows:

a. The Appellants, Virgil Mongold, Co-Executor and Beneficiary of the Estate of Nina M. Dove, Deceased, and Donald E. Showalter, Co-Executor of the Estate of Nina M. Dove, Deceased, are represented by:

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The Appellee, Terry V. Woods, is represented by:

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Jacob T. Penrod
Hoover Penrod, PLC
342 South Main Street
Harrisonburg, Virginia 22801
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b. Counsel for Appellants desires to present oral argument, in person, in support of this Opening Brief of Appellants.

c. Twelve paper copies and one electronic copy of the foregoing Opening Brief and Joint Appendix were hand-filed with the Clerk of the Supreme Court of Virginia this 20th day of February, 2009.

d. Three true and correct paper copies of the foregoing Opening Brief and Joint Appendix were sent by first-class mail, postage pre-paid this 20th day of February, 2009 to:

M. Bruce Wallinger
Jacob T. Penrod
Hoover Penrod, PLC
342 South Main Street
Harrisonburg, Virginia 22801
(540) 433-2444

Given under my hand this 20th day of February, 2009.

_____
GLENN M. HODGE