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.***

## REPLY BRIEF OF APPELLANTS

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## INTRODUCTORY STATEMENT

In this Reply Brief, 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 (herein the "Executors"), by counsel, will address the argument of Appellee Terry Woods ("Woods") that the Executors waived their argument that Virginia does not recognize a claim based on promissory estoppel. Woods raised this argument for the first time in his most recently filed brief. With regard to the remainder of Woods' Brief, including his assignment of cross-error, the Executors will rely on argument in their initial brief.

### I. WOODS' CLAIMS BASED ON PROMISSORY ESTOPPEL FAIL TO STATE A CLAIM FOR WHICH RELIEF CAN BE GRANTED, AND THE EXECUTORS DID NOT WAIVE THIS ARGUMENT BY CHOOSING NOT TO FILE A DEMURRER.

In his brief in response to the Executors' opening brief, Woods argues that even if, as the Executors maintain, his recovery is impermissibly based on promissory estoppel, he is still entitled to keep his judgment. In his view, the

Executors waived their right to complain that his cause of action is not recognized by failing to file a demurrer. Accordingly, Woods maintains, even if the evidence at trial made it abundantly clear that his facts did not constitute an injury compensable under established Virginia law, the Circuit Court was bound nevertheless to award him a judgment based on the non-actionable counts of his Complaint, all because the Executors determined not to engage in a round of demurrers and briefs at the beginning of the litigation process.

This is not the law in Virginia, and never has been.

First, Woods' position is inconsistent with long recognized common law authority regarding the purpose of demurrers and the obligation of courts to enter judgments. A demurrer gives a party the ability to challenge a non-actionable claim at the beginning, thereby avoiding the expense of discovery and trial preparation. But it has never been the <u>only</u> way to assert that a party was not entitled to recovery. As Judge Burks put it,

> [T]he effect of a demurrer is to admit the truth of all statements of facts well pleaded, but the converse is not true that a failure to demur admits the sufficiency in law of the facts adversely alleged, and there are many cases where a party has pleaded over without demurring and yet is allowed to avail himself of the insufficiency in the pleading of his adversary…"

Martin B. Burks, Common Law and Statutory Pleading and Practice, § 214, at 356 (T. Munford Boyd, ed., 4th ed. Michie 1952) (emphasis supplied). As Professor Lile noted, this is especially so in equitable actions such as this one:

> In equity, the failure to demur is nothing like so serious, as at law, since, even though the defendant fails to demur, the court will not grant relief upon the hearing unless there be a proper case made by the bill and the proofs. In short, where it appears that the case is without equity on its merits, the defendant may generally take advantage of the situation at the hearing, orally, or the court will ex mero motu raise the objection.

Edwin B. Meade, Lile's Equity Pleading and Practice, § 186, at 106 (3rd ed. Michie 1952). This has been the law in Virginia since at least the time of the Revolution. See 3

Blackstone, Commentaries *387 (court should not enter judgment for plaintiff, even after trial, if it appears that complaint was "not actionable in itself").

Second, Woods' position is inconsistent with present Virginia statutes and court rules. In support of his argument, Woods writes that "[A] contention that a litigant has made an insufficient claim, or has not raised a proper cause of action, on the other hand, must be raised by demurrer," brief of Appellee at 10 (emphasis supplied), and cites Virginia Code § 8.01-273. The statute does not support his position. The actual language of Va. Code § 8.01-273(A) is:

> In any suit in equity or action at law, the contention that a pleading does not state a cause of action or that such pleading fails to state facts upon which the relief demanded can be granted may be made by demurrer. All demurrers shall be in writing and shall state specifically the grounds on which the demurrant concludes that the pleading is insufficient at law. No grounds other than those stated specifically in the demurrer shall be considered by the court. A demurrer may be amended as other pleadings are amended.

(emphasis supplied). Woods' brief states that a party must file a demurrer, but the statute says that a party may do so. If he determines not to do so, he has recourse to other procedures under the Virginia rules, such as a motion for summary judgment under Virginia Supreme Court Rule 3:20 or a motion to strike the evidence, which would be redundant procedural devices if the law were as Woods states. The decision by a defendant to file a demurrer is permissive, and failure to do so does not prevent the defendant from later challenging the validity of a legal theory in a motion to strike or motion for summary judgment.

Finally, Woods' reliance on Jenkins v. Bay House Associates, L.P., 266 Va. 39, 581 S.E.2d 510 (2003) is misplaced. The plaintiff there had sued the defendants for an injunction restraining them from trespassing on the land under a pond, which plaintiffs claimed they owned. The trial court granted the injunction, and in addition, enjoined the defendants from using the waters of the pond—relief the

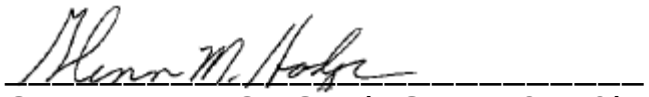
plaintiff had not sought in its complaint. This Court held that the injunction was improper because the plaintiff's complaint had not informed the defendants it sought an adjudication of defendants' riparian rights.

Based on that case, Woods contends that he had to be advised in the Executors' responsive pleadings of every legal theory under which he could be denied the relief he sought. This is not the law. Consistently with Jenkins, the Executors' answer informed Woods of the relief that the Executors sought – dismissal of the Complaint, and costs. The pleading plainly advised Woods of the Executors' position that he was not entitled to any of the relief he requested. Furthermore, the Executors repeatedly argued to the trial court at the ore tenus hearing, and afterwards, that there is no cause of action based on promissory estoppel. The trial court evaluated the argument (and rejected it) at that point. Procedurally, it was proper for the trial court to adjudicate the argument at that time, even though the trial court reached the incorrect conclusion. "If a bill does not state a

case proper for relief in equity, the court will dismiss it at the hearing, though no objection has been taken to the jurisdiction [i.e., the ability of an equity court to recognize the cause of action] by the defendant in his pleadings." Green v. Massie, 62 Va. (21 Gratt.) 356, 362 (1871). Woods had ample opportunity to address the argument. Woods even managed to persuade the trial court that his position was correct. This Court is now reviewing that determination. To hold that Virginia law requires a defendant to demur in order to state every possible legal defect in a plaintiff's theory of a case is, in essence, to require a demurrer in every case that turns, or might turn, on any legal issue at all.

For the reasons herein, and the reasons stated in the Executors' Brief, the decree of the trial court should be reversed, and final judgment rendered for the Executors.

Respectfully Submitted,
VIRGIL MONGOLD
DONALD E. SHOWALTER
By Counsel



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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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b. Counsel for Appellants desires to present oral argument, in person, in support of this Reply Brief of Appellants.

c. Fifteen paper copies and one electronic copy of the foregoing Reply Brief of Appellants were hand-filed with the Clerk of the Supreme Court of Virginia this 31st day of March, 2009.

d. Three true and correct paper copies of the foregoing Reply Brief of Appellants were sent by first-class mail, postage pre-paid this 31st day of March, 2009 to:

M. Bruce Wallinger
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Given under my hand this 31st day of March, 2009.

_____
GLENN M. HODGE