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 APPELLEE

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BRIEF OF APPELLEE

The appellee, Terry V. Woods (herein "Woods"), by counsel, submits this brief in response to the Brief of Appellants filed by 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 Estate"). In support thereof Woods states the following:

PRELIMINARY STATEMENT

Woods submits that: (a) the Trial Court correctly awarded him relief under the theory of quantum meruit, despite the Estate's belated attempts to define his claim as one for promissory estoppel; (b) the Trial Court made a fact-based determination that Woods had no express, enforceable contract with Paul and Nina Dove (herein "the Doves"), and therefore correctly determined that quantum meruit relief was appropriate; and (c) Woods presented adequate evidence to support the Trial Court's award of damages under the law of quantum meruit.

Woods assigns cross-error on the basis that the Trial Court incorrectly limited Woods' quantum meruit damages to a period beginning in 1996, because the uncontroverted testimony proved that Woods began working extended hours without reasonable pay in 1985.

STATEMENT OF FACTS

In December of 1984, when Woods was twenty-one years old, he went to work for Paul and Nina Dove on their farm in Rockingham County. (JA 35-37, 83, 106, Woods Testimony). Woods' job duties were to tend to chickens and mow around the chicken houses. (JA 36, 44, Woods Testimony). Woods was told that he might need to make some hay as well. (JA 36, 44 Woods Testimony). The entire job was to require about thirty-five to forty hours per week. (JA 36, 75, Woods Testimony). The Doves paid Woods a salary, which was for his work tending the chickens. (JA 75, Woods Testimony).

Approximately six months after Woods began working for the Doves they asked him to expand his duties beyond tending chickens. (JA 44-45, Woods Testimony). The Doves wanted Woods to perform numerous additional tasks around their farm and residence, such as tending sheep, building and remodeling various structures, landscaping, doing various odd jobs, and making more hay than was originally intended. (JA 45-46, 56-57, 61-62 Woods Testimony). The Doves could not afford to pay Woods more money for his additional work. (JA 154, 157, R. Dove Testimony). They told Woods they had no children to leave anything to and that if Woods "stuck with" them they would "take care" of him. (JA 36-37, 44-45, Woods

Testimony). Woods expected this meant the Doves would leave him property if he continued to do the additional work, but at that time the Doves did not specifically say what they meant by "take care of you." (JA 61, Woods Testimony).

Pursuant to this arrangement, Woods began to work eleven to thirteen hour days, six to seven days per week. (JA 53-54 Woods Testimony). In this regard, Woods disputes the Estate's Statement of Facts which asserts that Woods' hours did not increase throughout his tenure with the Doves. (Brief of Appellants 9). To the contrary, Woods' hours nearly doubled half-way through 1985 based on the Doves' promise that they would "take care" of him in return for his additional work on their farm. (JA 44-45, 52-54, 75-76, Woods Testimony; JA 261, Plaintiff's Exhibit 5).

Over the years, Woods and the Doves became very close and the Doves told Woods that he was like a son to them. (JA 37-44, Woods Testimony). For example, Woods spent Christmas mornings with the Doves and gave them mother's and father's day cards. (JA 39-41, Woods Testimony). Woods was treated as a family member and "the son the Doves never had." (JA 42-44 Woods Testimony; JA 108, B. Keplinger

Testimony; JA 152, R. Dove Testimony). Nina Dove kept a picture of Woods on her bedroom dresser. (JA 129, Woods Testimony).

In the mid-nineties the Doves became more specific with Woods about their earlier assurance that they would "take care" of him. (JA 47-48, Woods Testimony). They made it clear that Woods would be able to operate the chicken farm after Paul Dove retired, and that he would receive their entire farm after they passed away. (JA 47-48, 57-58, 93, 101-104, Woods Testimony). The Doves paid Woods just enough to get by, and Woods continued to work long hours for less than minimum wage, pursuant to his oral agreement with them that they would leave him the farm in exchange for his additional work. (JA 52-55, 57-58, 75-76, 103-04 Woods Testimony; JA 261, Plaintiff's Exhibit 5). Woods rarely took vacations, and when he did he took only three or four days. (JA 54, Woods Testimony). He would hunt about one week per year, which often meant that he had to wake up at 3:00 a.m. so that he could still get his regular work done. (JA 54, Woods Testimony). He tended to his own farm work in the late evenings after completing his work for the Doves. (JA 56, Woods Testimony).

Woods strongly contests the Estate's position that his salary or bonuses were meant to compensate him for his additional work on the

Dove Farm. (See Brief of Appellants 8-9.) The Estate's position is not supported by the facts. While Woods did not dispute that he received a salary, flock bonuses, and regular raises, he testified that his salary, bonuses, and raises were less than they otherwise would have been due to the fact that he was to eventually receive the farm in exchange for his additional work. (JA 94, 103-04, Woods Testimony). Woods testified that he agreed to do the additional work only because it was his understanding that he would receive property in addition to his salary. (JA 36-37, 48, 61, 94, Woods Testimony). Woods testified that his salary was related solely to the chicken operation, which took no more than thirty-five to forty hours per week. (JA 36, 54, 75, Woods Testimony). This testimony was corroborated by the fact that, once one accounts for the additional hours Woods performed, his salary was far below minimum wage. (JA 114, Woods Testimony; JA 261, Plaintiff's Exhibit 5). Moreover, several witnesses testified that Paul Dove was not the type of person who would pay Woods, who was like a son to him, only a minimum wage. (JA 123, D. Keplinger Testimony; JA 194-95, B. Malk Testimony; JA 212, C. Keller Testimony).

There were other corroborating facts presented at trial that proved Woods' small salary was not meant to fully compensate him for his work.

In early 2005 Paul Dove decided to retire and he began taking steps to transfer his poultry operation to Woods. (JA 50-52, Woods Testimony; JA 156-57, R. Dove Testimony). Even after Paul Dove was killed in an electrical accident in March of 2005, Nina Dove told Woods that he should continue to put chickens in the houses, that the operation was to belong to him, and that he was to pay all of the expenses and keep all of the income. (JA 18B Stipulation of Uncontested Facts ¶¶ 6, 7; JA 47, 58, 67, Woods Testimony; JA 156-57 R. Dove Testimony). Woods continued to tend Nina Dove's sheep, do the additional, non-chicken related, farm work without pay, and even paid for Nina Dove's utilities with the expectation that he would eventually receive the farm in return. (JA 68, 77, 80, Woods Testimony).

After Paul Dove's death, Woods, his wife, and one of Nina Dove's sisters helped cared for Nina, who had suffered several strokes and needed home care. (JA 69, Woods Testimony). Paul Dove died intestate, but within months of her husband's death Nina Dove made a draft will devising the entire Dove farm to Woods, as had been previously agreed. (JA 18B, Stipulation of Uncontested Facts ¶ 8, Exhibit A; JA 311 Plaintiff's Exhibit 11; JA 67, Woods Testimony; JA 154 R. Dove Testimony). Several of Nina's siblings obtained a copy of that draft will, learning that the Dove

farm was to belong to Woods. (JA 130-33, L. Biller Testimony). Shortly thereafter Nina's siblings began to tell Nina that Woods was not doing his job as he should. (JA 68 Woods Testimony; JA 181-83 C. Woods Testimony).

Nina Dove had another stroke in the late fall of 2005 and went into a nursing home for rehabilitation. (JA 69-70, Woods Testimony). While there, she told Woods and others that her siblings had threatened to leave her in a nursing home if she did not give the Dove Farm to their side of the family. (JA 69-70, Woods Testimony; JA 161-62, R. Dove Testimony; JA 171-72, D. Dove Testimony) Unbeknownst to Woods, within a month after Nina Dove got out of the nursing home two of her siblings took her to her attorney to make another will. (JA 323-30, Defendants Exhibit 1; JA 71, 98-99, Woods Testimony). This final will directed that the Dove Farm be sold and the proceeds given to her siblings. (JA 323-30, Defendants Exhibit 1).

Meanwhile Woods, who still believed he was to inherit the farm, continued to work for Nina Dove until she died on April 16, 2007. (JA 68, 99, Woods Testimony.) Woods was a pallbearer at her funeral. (JA 43-44, Woods Testimony). The executors of Nina Dove's estate refused to honor the agreement between Woods and the Doves that Woods would receive the farm in exchange for his additional work. (JA 4, Complaint ¶ 14).

STATEMENT OF THE NATURE OF THE CASE

Woods did not challenge Nina Dove's final Will but instead claimed the Estate was obligated to perform on the Doves' agreement with him. (JA 26, 30, Woods Opening Statement). He filed suit based on alternate theories of constructive trust and quantum meruit. (JA 5-6, Complaint ¶¶ 16-24; JA 26, 30, Woods Opening Statement). The Estate did not file a demurrer. The Trial Court heard the evidence *ore tenus* and held that, while there was clear and convincing evidence that Paul Dove had agreed to give Woods the Dove Farm in exchange for his work, the Court did not find that the agreement was clear and legally enforceable as to Nina Dove. (JA 512, Opinion Letter). The trial judge reasoned that the real estate was owned by Paul and Nina Dove as tenants by the entirety, and it was unclear whether Nina Dove intended the agreement as Paul had. (JA 512, Opinion Letter). The Trial Court awarded Woods $115,172.57, for work he performed from 1996 to 2004, based on his alternative claim for quantum meruit relief. (JA 514, Final Order).

STANDARD OF REVIEW

Despite the Estate's assertion in their opening brief that the three questions it presents are questions of law, the questions presented are actually mixed questions of law and fact. This Court should review the

questions of law *de novo*, but should give deference to the Trial Court's findings of fact. Barter Found., Inc. v. Widener, 267 Va. 80, 90, 592 S.E.2d 56, 60-61 (2004). A trial court's determination of fact is entitled to deference unless plainly wrong or unsupported by the evidence. Quantum Dev. Co. v. Luckett, 242 Va. 159, 161, 409 S.E.2d 121, 122 (1991). Moreover, the evidence is to be reviewed in a light most favorable to Woods, who prevailed at trial. Horton v. Horton, 254 Va. 111, 487 S.E.2d 200 (1997).

PRINCIPALS OF LAW

I. THE TRIAL COURT CORRECTLY AWARDED WOODS RELIEF UNDER THE THEORY OF QUANTUM MERUIT, DESPITE THE ESTATE'S BELATED ATTEMPTS TO DEFINE HIS CLAIM AS ONE FOR PROMISSORY ESTOPPEL.

A. The Estate's Argument that Woods' Quantum Meruit Claim is Based in Promissory Estoppel was Improperly Raised by a Motion to Strike.

The Estate first raised its argument that Woods' claims are based in promissory estoppel in its opening statement at trial. (JA 31-32, Opening Statement). At the close of Woods' case, the Estate moved to strike his evidence stating "this is a case of promissory estoppel, and the Virginia Supreme Court has clearly said that there is no cause of action for promissory estoppel, and for those reasons, we would ask that the suit be

dismissed." (JA 213, Motion to Strike). The Estate renewed its motion to strike the evidence in its closing argument. (JA 250, Closing Argument).

A trial court should grant a motion to strike the evidence only when it plainly appears that the plaintiff has *proved* no cause of action against the defendant or when it would be compelled to set aside any verdict as being *without evidence* to support it. Cuna Mut. Ins. Soc. v. Navy Yard Credit Union, Inc., 237 Va. 679, 683-84, 379 S.E.2d 361, 363 (1989). These tests go to the sufficiency of the plaintiff's evidence, not the sufficiency of his claims. In other words, the trial court, in determining whether or not to grant a motion to strike, must determine whether the plaintiff has provided sufficient evidence to support the claims he has made in his pleadings.

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. Va. Code § 8.01-273 (1950 as amended). Demurrers must be pleaded in writing. Id. Raising such issues by pleading prior to trial is crucial because the issues at trial are defined by the pleadings, not the testimony or evidence. Jenkins v. Bay House Assocs., L.P., 266 Va. 39, 43-44, 581 S.E.2d 510, 512 (2003). The plaintiff has a right to be told by the defendant, in plain and explicit language, the grounds of his defense.

Id. at 43-44 (citations omitted). Moreover, a court is not permitted to enter an order based on a right not pleaded. Id. at 43.

The Estate never moved to strike the evidence on the grounds that Woods failed to prove his claims or that there was insufficient evidence to support them. The Estate never filed a written demurrer to any of Woods' claims, nor did it file any other responsive pleading that addressed the issue of whether Woods' claims were legally sufficient. (JA 16-18, Answer of Virgil Mongold). Instead, it attempted to demurrer in oral argument at trial. (JA 31-32, Opening Statement; JA 213, Motion to Strike; JA 250, Closing Argument).

Since the Estate's argument was that Woods failed raise a claim upon which relief could be granted, rather than to challenge whether Woods proved the claims defined in his pleadings, its motion to strike the evidence was improper. Woods was never informed of this defense in any pleading. Both Woods and the Trial Court were first given notice of this issue at the trial itself. The Trial Court properly overruled the Estate's motion to strike the evidence, not only because the Estate failed to properly raise its defense in a written demurrer, but also because Woods submitted sufficient evidence to prove his quantum meruit claim.

B. The Estate's Argument that Woods' Claims are Based in Promissory Estoppel is Irrelevant Because Woods Sufficiently Pleaded and Proved his Claim for Quantum Meruit Relief.

Even assuming the Estate's motion to strike was properly raised, the Trial Court correctly overruled the motion because Woods properly pleaded and proved his claim of quantum meruit. Claims for quantum meruit have long been recognized in Virginia. See Va. Fin. Assocs. v. ITT Hartford Group, Inc., 266 Va. 177, 585 S.E.2d 789 (2003); Kern v. Freed Co., 224 Va. 678, 299 S.E.2d 363 (1983); Burke v. Gale, 193 Va. 130, 67 S.E.2d 917 (1951); Adam-Christian Co. v. McGavock, 147 Va. 252, 137 S.E. 374 (1927). Furthermore, quantum meruit has been recognized as a viable alternative relief to a claim for constructive trust against an estate. See Hendrickson v. Meredith, 161 Va. 193, 170 S.E. 602 (1933).

The elements of a claim for quantum meruit are: (1) a benefit conferred on a defendant by the plaintiff; (2) knowledge on the part of the defendant of the conferring of the benefit; and (3) acceptance or retention of the benefit by the defendant in circumstances that render it inequitable for the defendant to retain the benefit without paying for its value. Urban Protective Servs. v. Great Latin Rests., L.L.C., 2007 Va. Cir. LEXIS 33, at 5 (Fairfax County Mar. 5, 2007), citing Nossen v. Hoy, 750 F. Supp. 740, 744 (E.D. Va. 1990).

While Woods made a claim based upon constructive trust, he also made an alternative claim for quantum meruit. (JA 5-6, Complaint ¶¶ 16-24; JA 26, 30, Woods Opening Statement). Woods successfully pleaded and proved that quantum meruit claim. Woods' Complaint alleges that the Doves obtained a benefit, (JA 4-6, Complaint ¶¶ 14, 17, 22), that the Doves had full knowledge of that benefit (JA 5-6, Complaint ¶¶ 18, 22), and that retention of the benefit would be unjust and inequitable (JA 5-6, Complaint ¶¶ 20, 24). Woods testified to each of these allegations at trial, stating that: (1) for more than twenty years he worked a substantial amount of additional hours for the Doves pursuant to an agreement that he would be compensated at a later date; (2) that the Doves were well aware that he was performing this work to their benefit; and (3) that the Doves knew he expected to be compensated for his additional labor, and that it would be unjust for him to remain uncompensated. (JA 36-37, 44-45, 58, 74-76, 83, 94, Woods Testimony). Wood's testimony was corroborated. (JA 109, 111-14, B. Keplinger Testimony; JA 119-121, 123, D. Keplinger; JA 141-42, V. Biller Testimony; JA 152-57, 159, 164, R. Dove Testimony, JA 170-71, 173, D. Dove; JA 179-80, C. Woods Testimony; JA 190-191, B. Malk Testimony; JA 199-200, B. Secrist Testimony). Woods also argued his

case before the Trial Court as one for quantum meruit. (JA 30, Opening Statement; JA 248-49 Closing Argument).

The Estate cites elements of a claim for quantum meruit from a U.S. District Court decision in Datastaff Technology Group, Inc. v. Centex Const. Co., 528 F. Supp. 2d 587, 598 (E.D. Va. 2007), decided after Woods filed his Complaint. Even applying that standard, Woods still proved his case. Woods testified that he rendered valuable services to the Doves above and beyond what he was paid to do. (JA 36, 44-45, 74-76, Woods Testimony) Woods testified that these services were requested and accepted by the Doves. (JA 36-37, Woods Testimony). Woods testified that the Doves knew he was expecting to receive their farm as compensation for his additional work, in fact, it was their suggestion in the first place. (JA 36-37, 47-48, 58, 83, 94, 103-04, Woods Testimony; JA 261, Plaintiff's Exhibit 5). Woods' testimony in this regard was uncontroverted.

In its opening brief the Estate selectively pieces together statements made by Woods to argue that his claims are based in promissory estoppel (Brief of Appellants 12-14). This argument fails to address the fundamental issue, which was whether Woods successfully proved his quantum meruit claim. Woods never attempted to plead a case for promissory estoppel. (JA 2-7 Complaint). In fact, he specifically denied making a claim for

promissory estoppel at trial. (JA 248, Closing Argument). The mere casual use of terms such as "promise" or "reliance" do not turn a constructive trust claim, a quantum meruit claim, or any other claim, into a claim of promissory estoppel. Since no demurrer was ever filed by the Estate, the question for the Trial Court was whether Woods proved the claims he pleaded in his Complaint. Whether or not Woods statements can be pieced together to form a different claim that is not recognized in Virginia is irrelevant as long as Woods pleaded and proved a claim that is recognized in Virginia. Importantly, promissory estoppel was not a basis for the Trial Court's decision. (JA 511-12, Opinion Letter; JA 513-17, Final Order). Based upon the facts before it, the Trial Court correctly ruled that Woods was entitled to quantum meruit relief.

II. THE TRIAL COURT MADE A FACT-BASED DETERMINATION THAT WOODS HAD NO EXPRESS, ENFORCEABLE CONTRACT WITH THE DOVES, AND THEREFORE CORRECTLY DETERMINED THAT QUANTUM MERUIT RELIEF WAS APPROPRIATE.

The Estate's argument that the existence of an express contract prevents Woods' quantum meruit relief misconstrues the facts and the meaning of the term "express contract."

In its opening brief the Estate critically misconstrues the facts, stating that the agreement between Woods and the Doves was that "Paul Dove

hired Woods to tend the chickens and chicken houses, to mow, to help make hay, and to help with the farm animals. In Exchange for his work, Woods received a weekly salary with bonuses, had his insurance paid for several years and received regular Christmas bonuses." (Brief of Appellant 19). To the contrary, Woods' agreement with the Doves was two-fold. First, when he was initially hired in December of 1984, Woods' only duties were to tend the chickens, mow around the chicken houses, and maybe make some hay. (JA 35-37, 44-46, 75, Woods Testimony). These duties were to require a maximum of forty hours per week. (JA 75, Woods Testimony). Woods' salary was to compensate him for the portion of his work pertaining to the chickens. (JA 75, Woods Testimony). Woods testified that the second part of the agreement evolved about six months later: the Doves would "take care" of him if he performed *additional* work on their farm. (JA 36-37, 44-45, Woods Testimony). Midway through Woods employment (in approximately 1996) the Doves clarified the agreement, telling Woods would receive their farm (i.e. "the land off the mountain") in exchange for his work. (JA 47-49, 57-58, 93, 101-103, Woods Testimony). This labor-for-property arrangement was due to the fact that the Doves could not afford to pay Woods for his additional work. (JA 156-57, 158-59 R. Dove Testimony). Woods' salary did not increase

mid-way through 1985, even though his hours almost doubled. (JA 44-45, 52-54, 75-76, 94, 104, Woods Testimony; JA 261, Plaintiff's Exhibit 5).

The additional work performed by Woods was substantial. This work included but was not limited to tending sheep, performing construction, remodeling the Dove residence, landscaping, various odd jobs, and making more hay than was originally agreed upon. (JA 45-46, 56-57, 61-62 Woods Testimony). The evidence was that for more than twenty years Woods worked twenty-six to thirty-eight extra hours per week for which he was not compensated. (JA 261, Plaintiff's Exhibit 5). None of the agreements between Woods and the Doves were ever reduced to writing.

The Estate claims that the agreement between Woods and the Doves constitutes an express contract. Under the law of quantum meruit, the law will only imply contract between the parties when there is no express or enforceable contract between them. Hendrickson, 161 Va. at 198-99 (1933). An "express contract" is one where all of the terms and conditions are expressed between the parties. Hendrickson v. Meredith, 161 Va. 193, 200, 170 S.E. 602, 605 (1933). An express contract must also be specific in terms of its subject. Ellis & Myers Lumber Co. v. Hubbard, 123 Va. 481, 493-94, 96 S.E. 754, 757 (1918). An enforceable contract requires mutual assent of the contracting parties to terms reasonably certain under the

circumstances. Allen v. Aetna Casualty & Surety, 222 Va. 361, 364, 281 S.E.2d 818, 820 (1981). Payment of a salary does not necessarily preclude a claim for quantum meruit because such a claim compensates the plaintiff for the reasonable value of his work, less the amount he was compensated. See Id. at 201.

After hearing the evidence the Trial Court made a factual determination, stating that "[a]ny conversation between Nina [Dove] and Terry [Woods] about the property is not very clear." (JA 512, Opinion Letter.) The Trial Court reasoned that "Paul and Nina owned the property as tenants by the entireties, with right of survivorship. It was not his to convey without Nina's consent." (JA 511-12, Opinion Letter.) This ruling necessarily implies that the contract with Nina was not express because it was not clear enough, and the contract was not enforceable because mutual assent between all of the parties was not adequately proved. The Trial Court's factual findings should not be overturned unless plainly wrong.

The fact that Woods argued that his agreement with Paul and Nina Dove was clear and definite enough to support his claim for constructive trust does not prohibit him from pleading and arguing alternate claims, regardless of inconsistency. See Va. Sup. Ct. Rule 1:4(k). The law of

quantum meruit appropriately provided Woods alternative relief. See Hendrickson v. Meredith, 161 Va. 193, 170 S.E. 602 (1933).

The mere fact that Woods was paid a salary for the portion of his work relating to growing chickens does not make the agreement between Woods and the Doves an "express contract." Such an interpretation fails to account for key terms of the agreement between Woods and the Doves, such as the fact that Woods was to receive property for his additional work. One cannot infer all the terms and conditions of an agreement from a salary alone. The Estate argues that Woods received Christmas bonuses and insurance in addition to his salary, but no witnesses testified concerning Christmas bonuses or insurance, nor was there any evidence implying that these small benefits were meant to compensate Woods for the substantial amount of additional work he performed. (Brief of Appellants 19). Woods testified that his wages would have been much higher if meant to compensate him for his additional work. (JA 94, Woods Testimony.)

The Estate's reliance on Nedrich v. Jones, 245 Va. 465, 477, 429 S.E.2d 201, 207 (1993), Royer v. Board of County Supervisors, 176 Va. 268, 10 S.E.2d 876 (1940), Grice v. Todd, 120 Va. 481, 91 S.E. 609 (1917) and Southern Biscuit Co. v. Lloyd, 174 Va. 299, 6 S.E.2d 601 (1940) is

misplaced. Those cases dealt with written contracts with clear terms. Such contracts allow the trial court much more certainty in determining the subject, terms and conditions of an agreement. The Doves and Woods had no written contract. While Woods was paid a salary and bonuses, there was no evidence that the salary and bonuses were to pay Woods for his additional work or that they precluded him from additional compensation.

III. WOODS PRESENTED ADEQUATE EVIDENCE TO SUPPORT THE TRIAL COURT'S AWARD OF QUANTUM MERUIT DAMAGES.

The measure of damages in a quantum meruit case is the reasonable value of the work performed, less the amount of compensation received. Hendrickson v. Meredith, 161 Va. 193, 201, 170 S.E. 602, 605 (1933).

The Trial Court had ample factual evidence to determine the reasonable value of Woods' additional labor. Woods testified that he worked eleven to thirteen hours per day, six days per week (sixty-six to seventy-eight hours per week), depending on the farming season. (JA 53-54, Woods Testimony). He testified that, while he was being paid a salary, it was only for the portion of his work each week that related to tending chickens, which was a maximum of forty hours per week. (JA 75, Woods Testimony). Woods presented evidence at trial outlining his actual salary,

the amount of his additional unpaid work, and the estimated value of that additional work based on his actual salary. (JA 261, Plaintiff's Exhibit 5).

Woods also presented evidence that, if one considered the total amount of hours worked and the amount he was actually paid, he was paid far less than minimum wage. (JA 261, Plaintiff's Exhibit 5). He and others testified that the Doves were not the type of people to pay Woods, who was like a son to them, less than minimum wage. (JA 94, Woods Testimony; JA 114, B. Keplinger Testimony; JA 123, D. Keplinger Testimony; JA 194-95, B. Malk Testimony; JA 212, C. Keller Testimony).

The Estate argues that, since the Trial Court limited Woods' damages to the years 1996 to 2004, it necessarily follows that the Court found Woods' compensation from 1985 to 1996 to be reasonable. (Brief of Appellant 24-25). The Estate goes on to conclude that since Woods services were not any greater for the period from 1996 to 2004, the Trial Court's decision to pay Woods more during that period is illogical. (Brief of Appellant 24-25). This is a misreading of the Trial Court's ruling. The Trial Court stated that it was awarding damages from 1996 forward because "the evidence from Terry is that the relationship began in the middle of his employment." (JA 512 Opinion Letter). While Woods contends that the Trial Court made an error, there is no evidence which suggests that it

limited damages to the years 1996 to 2004 because Woods was adequately paid from 1985 to 1995. Woods believes that the Trial Court's error in limiting his damages to the years 1996 to 2004 is better explained by his assignment of cross error, which is addressed in more detail later in this brief.

The Trial Court also awarded Woods $8,728.57 for electric and propane bills he paid to Nina's benefit after Paul Dove passed away. (JA 512, Letter Opinion; JA 514, Final Order). The Estate incorrectly asserts that these bills were related to the poultry business. (Brief of Appellants 26-27.) The evidence was that these bills were for Nina Dove's house, not the poultry business. (JA 78-80, Woods Testimony). The poultry houses and the Dove residence were on the same meter and Woods testified that Nina had agreed to reimburse him for the portion of the bill relating to her house (approximately $150 per month). (JA 67-68, 78-79, Woods Testimony). The propane was also related to the Dove Residence. (JA 67-68, 79 Woods Testimony). Nina Dove had agreed to reimburse Woods for these expenditures but never followed through because her siblings were "grumbling" about her spending money. (JA 78-80, Woods Testimony).

The Estate raises the argument that reimbursement for electric and propane expenses are not properly recoverable under the theory of

quantum meruit. (Brief of Appellants 26-27). This argument was raised for the first time in the Estate's opening brief. This argument was not raised in the Estate's objection to the Trial Court's final order, nor was it raised in its assignment of error. (JA 517, Final Order; JA 518 Assignments of Error). The Estate's assignment of error pertaining to this matter is that:

> 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.

(JA 518, Assignments of Error). Woods' claim for reimbursement of the electric and propane bills was not a claim for the value of services, nor was it a claim for reimbursement of farming costs. Since the Estate's argument is outside of its assignment of error, it is not properly before this Court.

Even if the Estate had properly raised this issue in its assignment of error, Woods is entitled to be compensated for the value of the electricity and propane he provided to Nina Dove under the theory of quantum meruit. Woods conferred the benefit of electricity and propane on Nina Dove, she had knowledge that such a benefit was being conferred on her, and her acceptance of the benefit under the circumstances would have been inequitable. (JA 78-80, Woods Testimony).

ASSIGNMENT OF CROSS ERROR

I. QUESTION PRESENTED.

The sole question presented on Woods' assignment of cross error is whether the Circuit Court erred in finding that Woods' quantum meruit relief began in 1996.

II. STANDARD OF REVIEW.

The question presented on Woods' assignment of cross error is a mixed question of law and fact and the trial court's determination of fact is entitled to deference unless plainly wrong or unsupported by the evidence. Quantum Dev. Co. v. Luckett, 242 Va. 159, 161, 409 S.E.2d 121, 122 (1991).

III. PRINCIPALS OF LAW.

A claim of quantum meruit arises when (1) the plaintiff confers a benefit on the defendant; (2) the defendant has knowledge of the conferring of the benefit; and (3) under the circumstances the defendant's acceptance or retention of the benefit would render it inequitable for the defendant to retain the benefit without paying for its value. Urban Protective Servs. v. Great Latin Rests., L.L.C., 2007 Va. Cir. LEXIS 33, at 5 (Fairfax County Mar. 5, 2007), citing Nossen v. Hoy, 750 F. Supp. 740, 744 (E.D. Va. 1990). The measure of damages in a quantum meruit case is the

reasonable value of the work performed, less the amount of compensation received. Hendrickson v. Meredith, 161 Va. 193, 201, 170 S.E. 602, 605 (1933). Importantly to this case, the damages in a quantum meruit action are based upon the reasonable value of the services performed, regardless of the terms of the agreement or intention. Po River Water & Sewer Co. v. Indian Acres Club, 255 Va. 108, 114-15, 495 S.E.2d 478, 482 (1998).

The Trial Court erred in determining that Woods' quantum meruit damages began in 1996 but this error could have been based in law, fact, or both. In granting Woods' relief the Trial Court stated "[t]he evidence from Terry is that the relationship began in the middle of his employment. I will award Terry a judgment against the estate in the amount of $106,444.00 (1996-2004) plus the electric bills of $4,200 and the propane bills of $4,528.57." (JA 512, Opinion Letter).

Assuming the Trial Court is saying that Woods' quantum meruit claim began at the time his agreement with the Doves began, its ruling is in error because a quantum meruit action is based upon the reasonable value of the services performed, regardless of the terms of the agreement or intention. See Po River Water & Sewer Co., 255 Va. at 114-15.

Assuming the Trial Court awarded quantum meruit relief starting 1996 because it found that 1996 was when the benefit was first conferred, its

ruling is plainly wrong because all of the factors that one would consider in determining the start of Woods' quantum meruit claim originated in 1985, not 1996. The uncontroverted evidence in this case proved that Woods began rendering additional services to the Doves, working increased hours without additional pay, starting halfway through 1985. (JA 44-45, Woods Testimony). It was undisputed that this additional unpaid labor was requested by the Doves in 1985 and that they were aware a benefit was being conferred upon them at that time. (JA 36-37, 44-45, 61, 94, 103-04, Woods Testimony). It was undisputed that Woods performed this additional labor with the expectation that he would inherit the farm. (JA 36-37, 58, 61, 105, Woods Testimony). It was also uncontroverted that, under the circumstances, the Doves knew Woods expected to be paid for his additional work starting midway through 1985 when they requested that he work additional hours without additional pay. (JA 83, 94, 103-04, Woods Testimony).

The only factual significance of 1996 was that this was when Woods argued that the agreement became specific enough to support his claim for *constructive trust*. In that regard Woods testified that when his hours drastically increased half-way through 1985, the details of his agreement with the Doves were imprecise. (JA 36-37, 44-48, 93, Woods Testimony).

At that point he assumed he would get property in exchange for his work because the Doves told him they had no children to leave anything to and they would take care of him in exchange for his additional work. (JA 44-45, 93, Woods Testimony). It was in 1996 (midway through Woods' employment) that Paul Dove specified exactly what Woods was to receive in exchange for his additional labor. (JA 47-48, 93 Woods Testimony).

In outlining Woods' *constructive trust* claim, Woods' attorney pointed out that the terms of the agreement did not need to be clear at its inception, only that they become clear at some point during its performance. (JA 26-27 Opening Statement). The Trial Court agreed with Woods that his agreement was clear enough with respect to Paul Dove, but it also ruled that it was not clear enough with respect to Nina Dove. (JA 511-12 Opinion Letter; JA 513-15 Final Order). While the fact that the agreement became specific in the mid-nineties was crucial to prove the clear and definite terms required for his *constructive trust claim*, it was factually insignificant to Woods' *quantum meruit claim*.

The Trial Court appears to have simply confused the date when the original agreement with Woods was clarified, with the starting date of his quantum meruit claim. Since Woods' first began to perform increased work

without increased pay in reliance on the (imprecise) agreement in 1985, his quantum meruit compensation should begin in 1985.

CONCLUSION AND RELIEF SOUGHT

For the reasons stated in this brief, Woods submits that: (a) the Trial Court correctly awarded Woods relief under the theory of quantum meruit, despite the Estate's belated attempts to define his claim as one for promissory estoppel; (b) the Trial Court made a fact-based determination that Woods had no express, enforceable contract with the Doves, and therefore correctly determined that quantum meruit relief was appropriate and (c) Woods presented adequate evidence to support the Trial Court's award of quantum meruit damages.

Woods further submits that the Trial Court erred in limiting his damages to post-1996, when the uncontroverted testimony was that Woods hours substantially increased midway through 1985.

WHEREFORE, Appellee requests that this Court deny Appellants' Appeal and requests that this Court sustain his Assignment of Cross Error and remand this case to the Trial Court with the instruction to calculate compensation for Woods from the time he began working additional hours without compensation.

Respectfully submitted,

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By Counsel

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CERTIFICATE

Pursuant to Rule 5:26(d) of the Rules of the Supreme Court of Virginia, Counsel for Appellee, Terry V. Woods certifies as follows:

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

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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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Defendant, Damascus Church of the Brethren is represented by:

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

c. Fifteen paper copies and one electronic copy of the foregoing were hand filed with the Clerk of the Supreme Court of Virginia, this 17th day of March, 2009.

d. Three true and correct paper copies of the forgoing Brief of Appellee were sent by first class mail, postage prepaid, this 17th day of March 2009, to:

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Harrisonburg, Virginia 22801

and

Philip C. Stone, Jr.
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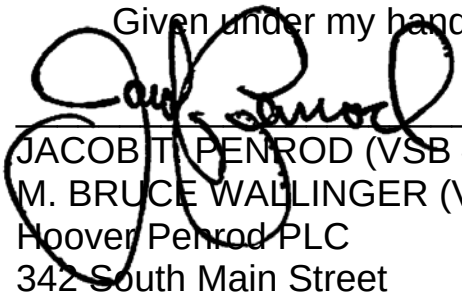
Given under my hand this 17th day of March 2009.



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