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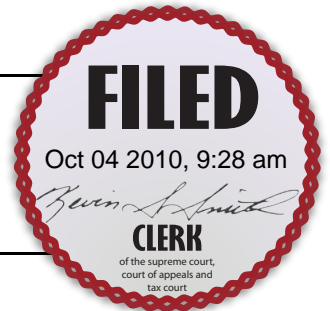
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**IN THE
COURT OF APPEALS OF INDIANA**



ANDY ALAFOGIANIS D/B/A
STACKS RESTAURANT, MEMORIAL
DRIVE, NEW CASTLE, STACKS II
RESTAURANT, BROAD STREET, NEW
CASTLE, AND STACKS RESTAURANT
CONNEERSVILLE, INDIANA

Appellant-Defendant,

VS.

No. 33A01-1003-PL-98

JOSEPH GUFFEY D/B/A
GUFFEY'S ECONOMY REFRIGERATION,
LLC, AND GUFFEY'S HEATING AND
COOLING.

Appellee-Plaintiff.

APPEAL FROM THE HENRY SUPERIOR COURT
The Honorable Bob A. Witham, Judge
Cause No. 33D02-0807-PL-12

October 4, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Andy Alafogianis, who operates two Stacks Restaurants in New Castle and a third Stacks Restaurant in Connersville, appeals the trial court's judgment in favor of Joseph Guffey of Guffey's Economy Refrigeration, LLC, and Guffey's Heating and Cooling. Specifically, Alafogianis contends that \$3,144.04 of the trial court's \$20,652.67 judgment against him is unsupported by the evidence. Concluding that an account stated supports the trial court's judgment, we affirm.

Facts and Procedural History

Guffey provided services on heating, air conditioning, and refrigeration units at Alafogianis's three Stacks Restaurants from 2006 to 2008. Alafogianis called Guffey when he needed service. Guffey or one of his employees performed the work requested by Alafogianis. Before leaving, Guffey or one of his employees provided an invoice that included a description of the work performed and the amount owed for the work. Guffey maintained an open account for each restaurant to keep track of sums owed and payments made. Guffey periodically provided Alafogianis with the open account statements. When Guffey went down to one of the restaurants in June 2008 to request payment, Alafogianis informed Guffey that he would not make any more payments.

Guffey filed a complaint seeking, among other things, the balances owed on each account. Alafogianis's answer claimed, among other things, that Guffey's work was "defective and of poor workmanship." Appellant's App. p. 21. A bench trial was held in January 2010. Guffey and two of his employees testified for Guffey. Guffey testified

that Alafogianis never complained about the work performed or the amounts owed and gave no reason for stopping payments. The trial court admitted the open account statements and various invoices into evidence. Alafogianis, a former employee, and a current employee testified for Alafogianis. Alafogianis testified that he complained about the work performed during the business relationship and that he told Guffey he was stopping payments because of Guffey's poor work and because Guffey overcharged him.

The trial court entered judgment against Alafogianis in the amount of \$20,652.67. Alafogianis now appeals.

Discussion and Decision

Alafogianis presents one issue for review, which we restate as whether \$3,144.04 of the trial court's \$20,652.67 judgment against him is unsupported by the evidence. When reviewing a damage award in a breach of contract case, we do not reweigh evidence or judge witness credibility, and we consider only the evidence favorable to the award. *Whitaker v. Brunner*, 814 N.E.2d 288, 296 (Ind. Ct. App. 2004), *trans. denied*. The damage award must be supported by probative evidence and cannot be based on speculation, conjecture, or surmise. *Id.* We will reverse a trial court's award only when it is not within the scope of the evidence. *Id.*

In his appellate brief, Alafogianis identifies ten invoices and argues that Guffey failed to prove the sums owed. Appellant's Br. p. 5. Specifically, for eight of the invoices, Guffey testified that he did not know if he was present when the work on those invoices was performed or if the work had been performed. *Id.* For one invoice, Guffey testified that he did not know who performed the work or what work had been performed.

Id. And for another invoice, Guffey only presented the open account statement listing the invoice number and the amount owed but failed to produce the actual invoice. *Id.* The amounts on these ten invoices total \$3,144.04.

Alafogianis's arguments fail because the evidence presented establishes an account stated. An account stated is an agreement between the parties that all items of an account and balance are correct, together with a promise, express or implied, to pay the balance. *B.E.I., Inc. v. Newcomer Lumber & Supply Co.*, 745 N.E.2d 233, 236 (Ind. Ct. App. 2001). It operates as a new contract without the need for renewed consideration, and the plaintiff does not need to plead and prove the creation and performance of each contract underlying the account. *Id.* An agreement that the balance is correct may be inferred from delivery of the statement and the account debtor's failure to object to the amount of the statement within a reasonable amount of time. *Id.* at 237. The amount indicated on a statement is prima facie evidence of the amount owed on the account. *Id.* Once a prima facie case is made on an account stated, the burden of proof shifts to the account debtor to prove that the amount claimed is incorrect. *Id.*

Here, Guffey or one of his employees provided an invoice following each service call that included a description of the work performed and the amount owed for the work. Additionally, Guffey periodically provided Alafogianis with statements of his open accounts. Alafogianis never complained about the work performed or the amounts owed and gave no reason for stopping payments. This is sufficient evidence of probative value for the trial court to conclude that an account stated exists. Thus, the amounts indicated on the invoices and the open account statements are prima facie evidence of the amounts

owed. The evidence most favorable to the award shows that Alafogianis failed to prove that those amounts were incorrect. We conclude that an account stated exists and that the trial court's award was within the scope of the evidence. There is no error.

Nonetheless, Alafogianis cites *Smith v. Bruning Enterprises, Inc.*, 424 N.E.2d 1035 (Ind. Ct. App. 1981), in support of his argument that Guffey failed to present sufficient evidence. In that case, Smith and Bruning Enterprises entered into a contract in which Bruning Enterprises was to construct a grain handling, drying, and storage system. *Id.* at 1036. The system malfunctioned, and Smith refused to pay the remaining portion of the contract. *Id.* Bruning Enterprises filed a mechanic's lien, and Smith countersued for damages due to the malfunctioning of the system. *Id.* On the counterclaim, the trial court found for Smith in the nominal sum of \$1.00. *Id.* On appeal, Smith argued, among other things, that the damage award was inadequate. *Id.* at 1037. This Court found that although Smith may have been harmed by the malfunctioning of the system, the evidence failed to establish the extent of his losses. *Id.* The trial court thus properly awarded nominal damages. *Id.*

Smith is distinguishable from this case. The evidence in *Smith* failed to establish the extent of Smith's losses. Here, however, the amounts indicated on the invoices and the open account statements are prima facie evidence of the amounts owed, and Alafogianis failed to prove that those amounts were incorrect.

Affirmed.

MAY, J., and ROBB, J., concur.