NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2009 CA 2236

**ALLEN D. H. BLANCHARD, RRPT,
D/B/A RADIATION CONSULTING SERVICES**

VERSUS

**CORS & BASSETT;
SACKS, WESTON, SMOLINKSY, ALBERT & LUBER;
SACKS & SMITH, L.L.C.; AND
THE LAW OFFICES OF STUART H. SMITH**

**On Appeal from the 19th Judicial District Court
Parish of East Baton Rouge, Louisiana
Docket No. 477,896, Division I, Section 24
Honorable R. Michael Caldwell, Judge Presiding**

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Plaintiff-Appellant
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Cors & Bassett, L.L.C.

BEFORE: PARRO, KUHN, AND McDONALD, JJ.

Judgment rendered SEP - 8 2010

PARRO, J.

After a trial on the merits, the trial court dismissed the plaintiff's petition seeking recovery of amounts allegedly owed by a defendant law firm for professional services rendered as an expert. For the following reasons, the judgment is affirmed in part and vacated in part, and this matter is remanded with instructions.

Facts and Procedural History

On November 3, 2000, Allen D. H. Blanchard, RRPT, d/b/a Radiation Consulting Services (Blanchard) filed a "Petition on Contract" against several law firms, including Cors & Bassett, L.L.C., to recover $43,892 allegedly owed for professional services rendered as a radiation expert in two cases pending before a federal district court in Kentucky.[1] In his petition, Blanchard stated that he was retained on a contract basis in April 1995 to provide forensic services. He alleged that the scope of his work for this engagement was subsequently reduced to writing in a letter dated November 24, 1995. In his petition, Blanchard stated he was to be compensated pursuant to "progress payment requests made in the form of invoices submitted" to Cors & Bassett. Invoiced charges were based on professional services at an agreed hourly rate, together with expenses for travel and other incidental matters. Pursuant to their agreement, 40 percent of the fees for professional services was paid up front and the other 60 percent was to be paid after settlement or rendition of money judgments in the Kentucky cases. Those cases were settled in 1996. Pursuant to LSA-R.S. 9:2781, Blanchard formally demanded payment in a letter dated April 8, 1997, of the balance owed on "several open and unpaid invoices from March 16, 1995 through December 26, 1995, totaling $43,892.00."

Following the trial, the trial court ruled in favor of Cors & Bassett on the principal demand and dismissed all of Blanchard's claims against it.[2] The reasons underlying the dismissal of his claims were set forth in oral reasons as follows:

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[1] Cors & Bassett filed a reconventional demand seeking the return of $56,503.18 that it had previously paid to Blanchard. Its claims were based on allegations of fraud and misrepresentation. Cors & Bassett urged that troubling aspects of Blanchard's qualifications and background had come to light in his December 1995 deposition that destroyed his credibility as an expert and its clients' chances of succeeding in the federal suits.

[2] The trial court also dismissed Cors & Bassett's reconventional demand against Blanchard.

This suit is styled by Mr. Blanchard as a petition on a contract. In paragraph six it is alleged that he was retained on a contract basis. Paragraph seven alleges that the agreement was reduced to writing and is evidenced by a letter to Mr. Blanchard from Mr. Jeffrey Harmon, dated November 24, 1995, and attach[ed] to the petition as exhibit A.

The petition and its exhibits were introduced at trial as plaintiff's exhibit A. And at trial, Mr. Blanchard testified that the scope of the services agreed upon was set forth in plaintiff's exhibits O-1 and M.

O-1 is his resume with a, quote, position description, closed quote, which is also what exhibit M is, attached thereto. And that exhibit, the position description, seems to be a generic description with no specific reference to the underlying cases, or to this engagement by Cors & Bassett. It's more or less a generic description of Mr. Blanchard's available services.

The fax cover sheet to plaintiff's exhibit O-1, which was sent in April 1995, also makes no reference to the underlying cases or any specific engagement. The letter from Jeffrey Harmon, that is attached as exhibit A to the petition and is offered as plaintiff's exhibit A at trial, is dated November 24, 1995, after much of Mr. Blanchard's work had been done.

It refers to future agreements on the scope of work to be done, to areas of work already undertaken, and to a third scope of work, which would involve him being available for a deposition.

No terms of payment or agreed upon price are included in any of these exhibits. Now, the testimony at trial, from Mr. Harmon and Mr. Blanchard was that Mr. Blanchard would invoice Cors & Bassett periodically for an hourly rate, for his services and his expenses. Cors & Bassett would pay the expenses and forty percent of the hourly fees upon receipt of the invoices, and the remaining sixty percent of the fees would be paid at the conclusion of the underlying cases.

Plaintiff asserts that he is owed an additional $43,892. Based upon this evidence, plaintiff asserts that he has—or that he had a contract with the defendants, which the defendants breached by not paying him the full amount called for under the contract.

The defendant denies it owes plaintiff any further money, and by reconventional demand, seeks to recover the [sums] previously paid to the plaintiff, on the grounds that plaintiff committed fraud and/or intentional misrepresentation, thus entitling them to return of the monies they've paid.

* * *

During the trial, I had a difficult time identifying any contract between these parties. I assumed that the voluminous documents . . . introduced at trial . . . [would] show evidence of a contract.

Suffice it to say that based upon my interpretation of the law, they did not. Rather, as asserted by the defendant in his passing reference, the evidence shows only an open account.

* * *

> There was no evidence of an offer and acceptance of a proposal to perform specified work for a specified price. Rather, as evidenced by the correspondence between the parties, it appears in the evidence in this case, there was ongoing modification and/or additions and subtractions to the scope of work to be done, and the agreement was the work to be done would be paid on an hourly basis.

After examining the definition of open account found in LSA-R.S. 9:2781, the trial court concluded that Blanchard's petition did not state a claim on an open account, even though the evidence showed only an open account. However, the court found that the petition did state claims for breach of contract, but because the preponderance of the evidence did not show the existence of a contract, Blanchard's claims were dismissed.

Blanchard appealed, contending that the trial court erred in finding that his services were provided on an open account basis, disregarding the stipulations and admissions of the parties that established the existence of a contract for expert witness services, granting an unpled exception of prescription, and excluding expert testimony on the issue of business ethics.[3]

Analysis

At the time Cors & Bassett engaged the services of Blanchard, LSA-R.S. 9:2781(A) provided that "[w]hen any person fails to pay an open account within fifteen days after receipt of written demand therefor correctly setting forth the amount owed, that person shall be liable to the claimant for reasonable attorney fees for the prosecution and collection of such claim when judgment on the claim is rendered in favor of the claimant."[4] Subsection C of the statute defined "open account" as including "any account for which a part or all of the balance is past due, whether or not the account reflects one or more transactions and whether or not at the time of contracting the parties expected future transactions." Subsection C further provided that an open account also included "debts incurred for professional services, including but not limited to legal and medical services."[5] Any account which fits the definition of an open

[3] The dismissal of Cors & Bassett's reconventional demand has not been appealed.

[4] LSA-R.S. 9:2781 was amended by 2001 La. Acts, No. 1075, § 1 and 2010 La. Acts, No. 695, § 1. Unless otherwise noted, the provisions referenced in this opinion are to those that were in effect prior to the 2001 amendment.

[5] Subsection C was redesignated as subsection D by the 2001 amendment.

account, including but not limited to an account for professional services, falls within the ambit of the statute. See Frey Plumbing Co., Inc. v. Foster, 07-1091 (La. 2/26/08), 996 So.2d 969, 972. Accordingly, charges for professional services are generally characterized as open account claims which necessarily involve some type of contractual relationship between the parties. See Dear v. Mabile, 93-1188 (La. App. 1st Cir. 5/20/94), 637 So.2d 745, 747; see also Heck v. Lafourche Parish Council, 02-2044 (La. App. 1st Cir. 11/14/03), 860 So.2d 595, 607, writ denied, 04-0067 (La. 3/19/04), 869 So.2d 837.

The court in Mid-South Analytical Labs, Inc. v. Jones, Odom, Spruill & Davis, LLP, 40,089 (La. App. 2nd Cir. 9/23/05), 912 So.2d 101, 106-07, writ denied, 05-2487 (La. 4/17/06), 926 So.2d 513, noted that this court in Heck, 860 So.2d at 607, considered such factors as whether (1) the services provided are performed over time involving various projects; (2) the total fee for the services is left open; and (3) billing occurs on a regular basis by the provider of the professional services by sending regular periodic invoices setting forth the amounts for the services performed, e.g., monthly statements.[6] In Frey Plumbing Co., Inc., the supreme court concluded that the statutory provision defining the term open account does not require more than one transaction between the parties or that the parties anticipate future transactions. See Frey Plumbing Co., Inc., 996 So.2d at 972. To the extent Heck and other prior cases held differently, they were overruled by the court in Frey Plumbing Co., Inc.. Id. The extension of a line of credit is another factor that may cause a transaction to be classified as an open account. See Acme Window Cleaners, Inc. v. Natal Construction Co., Inc., 95-0448 (La. App. 4th Cir. 8/23/95), 660 So.2d 926, 928, overruled in part, Frey Plumbing Co., Inc., 996 So.2d at 972.

Although an open account need not involve more than one transaction between the parties nor contemplate future transactions, open accounts ordinarily contemplate a series of transactions between the parties over an indefinite future period. See Frey Plumbing Co., Inc., 996 So.2d at 972; Mid-South Analytical Labs, Inc., 912 So.2d at

[6] These factors are not wholly determinative, nor exclusive. Mid-South Analytical Labs, Inc., 912 So.2d at 106-07.

107. The total cost, unlike a contract, is generally left open or undetermined, although the rate for specific services may be fixed, such as an hourly rate. Finally, the service provider generally requests that the vendee or client keep current on payment of charges through regular billing, and usually sends monthly invoices. Id.

These factors were examined by the trial court in determining if the relationship between Blanchard was one on an open account. The trial court found as follows. Blanchard's services were performed over time and involved various projects. Blanchard billed for the work as it was performed. Future work was contemplated by the parties, and no lump sum price was set for such work. Billing occurred on a regular basis by the provider of the professional services, Blanchard. Blanchard objected to performing further services until payment on invoices was made current. By waiting to collect 60 percent of his hourly fee, Blanchard extended credit to Cors & Bassett. These findings are reasonably supported by the record and are not manifestly erroneous.

Based on our review of the law, the jurisprudence, and the record in this case, we agree with the trial court that Blanchard's claims, although arising from a contractual relationship between Blanchard and Cors & Bassett,[7] can best be characterized as arising out of open account claims for professional services. Accordingly, we find no error in this determination.

In its oral reasons for judgment, the trial court noted that Blanchard's petition did not state a claim on an open account.[8] The failure of the plaintiff to state a cause of action may be noticed by the court on its own motion. LSA-C.C.P. art. 927. However, in his petition, Blanchard prayed for "such other further legal and equitable relief as the Court shall deem necessary and proper." Obviously, Blanchard presented evidence of his open account relationship with Cors & Bassett at the trial of this matter. Thus, the pleadings were "expanded" when evidence on that issue was presented at trial without objection, and that issue "shall be treated in all respects as if [it] had been raised by the pleading." See LSA-C.C.P. art. 1154. Accordingly, the trial court erred in

[7] We acknowledge that Cors & Bassett's answer and reconventional demand admitted that plaintiff was retained by oral agreement to provide expert services.

[8] In so ruling, Blanchard contends that the trial court sua sponte dismissed its claims on the basis of prescription. See LSA-C.C.P. art. 927. We find no merit to Blanchard's assignment of error on this issue.

failing to rule on the merits of Blanchard's claim on an open account.

However, the issue of prescription has been raised relative to Blanchard's claim on an open account. Although Cors & Bassett concedes it did not file an exception raising the objection of prescription in the trial court, it was not precluded from raising the objection of prescription on appeal. See LSA-C.C.P. art. 2163.[9] In its brief to this court, Cors & Bassett stated that "**out of an abundance of caution, [it] hereby pleads an exception of prescription for the first time in the appellate court.**" Uniform Rules of Louisiana Courts of Appeal, Rules 2-7.2 and 2-7.3 require that a formal pleading urging the objection of prescription be filed with this court. Therefore, the assertion in Cors & Bassett's appellate brief, which is not a pleading, was insufficient to bring such an exception before this court. See Williams v. State, Department of Health and Hospitals, 95-0713 (La. 1/26/96), 671 So.2d 899, 902; Echo, Inc. v. Power Equipment Distributors, Inc., 96-1771, 96-1772 (La. App. 1st Cir. 8/7/98), 719 So.2d 79, 86 n.4, writ denied, 98-2392 (La. 11/20/98), 729 So.2d 555. In the absence of a formal pleading, the issue of prescription is not properly before this court. Nonetheless, because counsel for Cors & Bassett at oral argument of this case requested the opportunity to file a formal pleading relative to the issue of prescription, we remand this matter to the trial court to afford Cors & Bassett that opportunity and to allow the trial court to consider the merits of Blanchard's claim on open account, as well as any exception raising the objection of prescription. On remand, Blanchard may amend his pleadings to cause them to conform to the evidence and to raise the issue based on an open account. See LSA-C.C.P. art. 1154.

On appeal, Blanchard urged that the trial court erred in excluding the testimony of his expert on the issue of business ethics. If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact

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[9] Article 2163 provides:

> The appellate court may consider the peremptory exception filed for the first time in that court, if pleaded prior to a submission of the case for a decision, and if proof of the ground of the exception appears of record.
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> If the ground for the peremptory exception pleaded in the appellate court is prescription, the plaintiff may demand that the case be remanded to the trial court for trial of the exception.

in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. LSA-C.E. art. 702. Under Article 702, whether expert testimony is admissible turns upon whether it would assist the trier of fact to understand the evidence or to determine a fact in issue. LSA-C.E. art. 702, Comments—1988, comment (c).

In response to questioning by the court, Blanchard's counsel stated that the expert's testimony would substantiate the position that, as a business person/scientist, Blanchard's conduct did not breach any business ethics standard. After noting that LSA-C.E. art. 702 authorizes expert witness testimony only if it assists the trier of fact in reaching a determination, the trial court found that the testimony of this expert would not help it in determining whether Blanchard was still a viable expert in light of his actions and whether that justified Cors & Bassett's refusal to pay him for his work. In so ruling, the trial court noted that if Blanchard was no longer viable as an expert witness, then it did not matter if Blanchard's actions were ethical or not. Based on the record, we find no abuse of discretion by the trial court.[10]

Decree

For the foregoing reasons, the judgment of the trial court is vacated to the extent that it dismissed Blanchard's claims on an open account. Otherwise, the judgment is affirmed. This matter is remanded to the trial court for further proceedings consistent with this opinion. Each party is to bear their own costs with respect to this appeal.

AFFIRMED IN PART; VACATED IN PART; REMANDED WITH INSTRUCTIONS.

[10] Broad discretion should be accorded the trial judge in his determination as to whether expert testimony should be held admissible and who should or should not be permitted to testify as an expert. LSA-C.E. art. 702, Comments—1988, comment (d).