STATE OF MICHIGAN

COURT OF APPEALS

YOUNG & ASSOCIATES, P.C.,	UNPUBLISHED May 25, 2001
Plaintiff-Appellee,	
v	No. 218417 Oakland Circuit Court
ROCAR PRECISION, INC.,	LC No. 98-010304-CK
Defendant-Appellant.	

Before: Neff, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

This action involves a dispute over fees for attorney services. The trial court granted plaintiff's motion for summary disposition under MCR 2.116(C)(10) and entered a judgment in favor of plaintiff in the amount of $72,772.54, plus interest and costs. Defendant appeals as of right. We reverse and remand for further proceedings.

This case arises from defendant, Rocar Precision, Inc.'s, failure to pay plaintiff, a law firm, for services provided to defendant in connection with defendant's 1996 lawsuit against M. C. Aerospace Corporation (Aerospace). The 1996 lawsuit arose out of a subcontracting agreement with defendant, as a subcontractor, to fabricate hydraulic valves used in military aircraft for Aerospace. After the complaint was filed, Aerospace filed a counter-complaint against defendant for breach of contract.

In 1997, defendant hired plaintiff to represent it in the Aerospace lawsuit. Defendant and plaintiff did not execute a written contract for legal services. However, evidence was presented that attorney Rodger Young wrote a letter on behalf of plaintiff to defendant's president, Roger Kunko, to confirm the fee arrangement. The letter stated, in part:

> Please consider this letter to be a confirmation of our fee arrangement. It is my understanding that you retained this Law Firm for the purpose of representing you. We accept the retention on the basis of our standard billing rates (Rodger D. Young/$260 per hour; Associates/$170 per hour; Paralegals/$75 per hour). Additionally, we enclose a retainer billing in the amount of $5,000.00.
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> It is our custom to keep track of our time expended which includes any time devoted to the file such as correspondence, telephone calls, legal research or

> conferences. Further, it is our policy to bill out-of-pocket expenses such as postage, telephone, Xerox, Lexis/Westlaw (legal data bases occasionally accessed for complex legal issues) and the like. Naturally, it is difficult to make any estimate relative to total legal fees that will be expended on this matter inasmuch as they depend on the ultimate complexity.

The confirmation letter contained a place for defendant to accept it as to "form and substance," but there was no evidence that defendant completed the acceptance part of the letter.

Plaintiff thereafter prepared statements of account for its services. Two payments dated February 25, 1998, were recorded on a statement for December 1997 services. Plaintiff thereafter prepared statements of account for its services.[1] Two payments dated February 25, 1998, were recorded on a statement for December 1997 services. The payments correspond to the balance due shown on a May 31, 1997, statement ($2,982.50) and the current work detailed on a June 30, 1997, statement ($2,356.55).

On May 4, 1998, Aerospace was granted summary disposition in the Aerospace lawsuit on defendant's claim for money damages for idle machine time and equipment costs. Aerospace was denied summary disposition on a claim for lost profit damages on a canceled purchase order.

On June 30, 1998, plaintiff received four more payments. The payments were recorded on the monthly statement detailing May 1998 services.[2] The payments corresponded to the current work detailed on monthly statements for July 31, 1997 ($3,726.16),[3] August 31, 1997 ($7,753.49), and September 30, 1997 ($4,871.95). Another payment of $1,648.40 was also paid to bring the total payments received on June 30, 1998, to $18,000. However, the latter payment did not correspond to any monthly totals. The current work amounts for the months after September 1997 were $10,012.23 (October 31, 1997), $3,645.05 (November 30, 1997), $1,315.56 (December 31,1997), $1,067.55 (January 31, 1998), $4,608.67 (February 28, 1998), $3,098.78 (March 31, 1998), $1,258.20 (April 30, 1998), and $3,948.65 (May 31, 1998).

A settlement agreement in the Aerospace lawsuit was signed by defendant's president, Roger Kunko, on August 3, 1998. The agreement required Aerospace to pay $125,000. The payment was made on or about August 11, 1998, and the check was made payable jointly to plaintiff and defendant.

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[1] The earliest statement is dated May 31, 1997. It contains details on professional services and expenses totaling $7,982.50, less a retainer payment of $5,000, for a balance due of $2,982.50. The next statement is dated June 30, 1997. It shows current work of 2,356.55. However, these statements are not part of the lower court record.

[2] According to a cover letter for the May 31, 1998, statement that is in the lower court record, defendant probably would not have received the statement until after July 20, 1998. The cover letter, dated July 20, 1998, is addressed to defendant's president, Roger Kunko. It states, "Enclosed please find our invoice covering the period from May 1, 1998 through May 31, 1998."

[3] The payment apparently did not consider an August 7, 1997, refund of $75.00 on the statement for a mediation fee. However, this is not material to the issues on appeal.

On November 4, 1998, plaintiff filed the present action. Plaintiff alleged that it possessed the $125,000 settlement check and that defendant refused to endorse it in an attempt to deny it compensation for fees and services. Plaintiff sought $72,772.54, plus interests, costs, and attorney fees, based on breach of contract and account stated claims. According to plaintiff, the balance due was as follows:

Balance due on August 17, 1998 statement[4]	$61,746.51
"Credit per agreement"	(5,000.00)
Copy Corps invoices (June 3 to July 24, 1998)	948.70
Doeren Mayhew invoices	8,895.00
Hamilton-Legato Deposition Center invoices	1,747.73
D. E. Geister & Associates invoices	4,434.60
TOTAL	**$72,772.54**

On November 18, 1998, plaintiff filed a motion for summary disposition under MCR 2.116(C)(10), based on the lack of a genuine issue of material fact. The supporting proofs filed with the brief included the confirmation letter, order of summary disposition in Aerospace lawsuit**,** the settlement agreement**,** the settlement check, and the breakdown of amounts owed. Plaintiff also filed the affidavit of its office manager, who averred that defendant had not suggested any dissatisfaction with or questioned plaintiff's bills. A prior affidavit of an attorney for plaintiff, Steven Susser, which plaintiff had filed with the complaint, averred that defendant was indebted to plaintiff for at least $72,772.54.

On December 9, 1998, defendant filed its answer to the complaint. As amended on December 28, 1998, defendant claimed affirmative defenses based on (1) plaintiff's "prior, material breach of contract," (2) plaintiff's claim being barred, at least in part, because of a lack

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[4] Apparently the August 17, 1998, statement contained details of work between June 1 and August 17, 1998, that totaled $34,520.21. When added to the balance of $27,226,30, from the May 31, 1998, statement, the total due from defendant would be $61,746.51. Plaintiff has included a copy of the August 17, 1998, statement with its appeal brief. Defendant includes this statement, along with other documents dated August 17, 1998. We have not found record evidence that either party filed the August 17, 1998, documents in the lower court or submitted them to the trial court. The Aerospace letter, the April 7, 1997, court order from the Aerospace lawsuit for a substitution of attorneys, and the invoice documents are also not part of the lower court record. The notice of trial date for the Aerospace lawsuit was also not filed, but it appears that plaintiff's attorney showed the trial court some document about a scheduled July 27, 1988, trial date in the Aerospace lawsuit at the motion hearing. Enlargement of the record on appeal is generally not permitted. *Amorello v Monsanto Corp,* 186 Mich App 324, 330; 463 NW2d 487 (1990).

of standing to assert third party claims, and (3) plaintiff's claim being barred, at least in part, by a failure to join all necessary and/or indispensable parties.

On December 21, 1998, a default judgment was entered by the court clerk against defendant.

On December 30, 1998, and again on January 6, 1998, defendant filed a response to the motion for summary disposition, claiming that genuine issues of material fact existed. Defendant asserted that, "[p]ut simply, a review of Plaintiff's Complaint and invoices reveal gross over billing of services, services beyond the scope of the parties' agreement and claims of third parties which Defendant disputes and for which Plaintiff has not standing to assert herein." The factual support for the response included the unnotorized affidavit of defendant's president, a copy of an unsigned letter from defendant's president to Rodger Young dated August 28, 1998, whereby certain charges were questioned, a copy of a September 24, 1998, letter of defendant's president suggesting that the matter should be arbitrated before the Attorney Grievance Commission, a copy of Rodger Young's September 28, 1998, letter denying a fee dispute, and copies of the statements/invoices in for July 1997 through May 1998.

On December 30, 1998, defendant also filed a motion to have the settlement funds placed in an escrow account and to set aside the default judgment. The trial court granted the motion in an order dated January 14, 1999.

On January 12, 1999, plaintiff filed a reply to defendant's response to the motion for summary disposition, arguing that a court need not evaluate the reasonableness of the fees and costs under the terms of the confirmation letter or, alternatively, in light of the parties' performance under the oral contract. Plaintiff also argued that the fees were reasonable, and offered the affidavit of a proposed expert, Thomas Kienbaum, to show that the amount sought was reasonable.

A hearing on the motion for summary disposition was held on January 13, 1999. In a January 19, 1999, written opinion, the trial court found that defendant did not meet its burden of showing a genuine issue of material fact. The court concluded that the letter of confirmation specifically enumerated the amount of fees to be charged and that defendant acquiesced in the fee agreement. Thus, the court concluded that the "account stated" was binding and defendant failed to meet its burden to show the existence of a genuine issue for trial.

On January 27, 1999, plaintiff filed an amended complaint, seeking to add a claim for expenses for the period between October 14, 1998, and January 25, 1999, of $8,371.14.

On February 2, 1999, defendant filed a motion for reconsideration of the January 19, 1999, opinion. On February 3, 1999, the trial court entered an order denying the motion, without oral arguments, on the ground that palpable error was not shown.

On or about February 3, 1999, plaintiff filed a motion for disbursement of the settlement funds in escrow and for an award of attorney fees and costs under MCR 2.114. On February 19, 1999, the trial court entered an order to deny the motion.

The judgment in the case at bar awarding plaintiff $72,772.54, plus costs and interest of $1,547.84, is dated February 24, 1999, but was not filed until March 10, 1999. At a hearing on March 10, 1999, plaintiff's attorney asserted that entry of the final judgment rendered the first amended complaint moot, and the trial court agreed. A request for costs and sanctions was also denied. The trial court also entered an order on March 10, 1999, for a partial disbursement of escrow funds to defendant in the amount of $43,856.32.

On April 1, 1999, the trial court entered an order denying a stay of execution of the judgment utilizing escrow funds. That same day, this Court entered an order granting a stay

Defendant first argues that summary disposition was improperly granted because defendant met its burden of showing genuine issues of material fact with regard to both the terms of the parties' contract and any "account stated" claim. We review the trial court's grant of summary disposition de novo, giving due consideration to the fact that plaintiff, as the moving party, has the burden of proof with respect to establishing its alleged contract and related account stated theories with regard to defendant's alleged liability for the $72,772.54 amount sought in the complaint. *Graham v Ford*, 237 Mich App 670, 672-673; 604 NW2d 713 (1999). A motion under MCR 2.116(C)(10) tests the factual support for a claim. *Id.* at 672. Our review is limited to the record developed in the trial court. *Amorello v Monsanto Corp*, 186 Mich App 324, 330; 463 NW2d 487 (1990). Disputed factual issues, or the lack thereof, must be established by admissible evidence. *SSC Associates Ltd Partnership v General Retirement System of Detroit*, 192 Mich App 360, 364; 480 NW2d 275 (1991). All evidence is viewed in a light most favorable to the nonmoving party. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

Upon de novo review of the record, we conclude that the trial court applied the "account stated" principles in *Rippey v Wilson*, 280 Mich 233; 273 NW 552 (1937), too broadly in determining that defendant failed to establish a genuine issue of material fact. In *Rippey*, the Supreme Court did not find all charges in question beyond scrutiny, only those for which assent could be inferred (e.g., charges that were converted into a promissory note).

An account stated means a "balance struck between the parties on a settlement; and where a plaintiff is able to show that the mutual dealings which have occurred between the parties have been adjusted, settled, and a balance struck, the law implies a promise to pay that balance." *Thomasma v Carpenter*, 175 Mich 428, 436; 141 NW 559 (1913). To give an account the force of an "account stated" because of the silence of the party receiving it, the circumstances must justify an inference of assent as to its correctness. *Id.* at 436. As was explained by our Supreme Court in *Kaunitz v Wheeler*, 344 Mich 181, 185; 73 NW2d 263 (1955), quoting from *White v Campbell*, 25 Mich 463, 468 (1872):

> The conversion of an open account into an account stated, is an operation by which the parties *assent* to the sum as the correct balance due from one to the other; and whether this operation has been performed or not, in any instance, must depend upon the facts. That it had taken place, may appear by evidence of an express understanding, or of words and acts, and the necessary and proper inferences from that. When accomplished, it does not necessarily exclude all inquiry into the rectitude of the account. [Emphasis in original.]

A circumstance that may preclude a finding of an account stated is where the contract is in dispute. *Kaunitz v Wheeler*, 344 Mich 181, 185; 73 NW2d 263 (1955). An attorney-client relationship must be established by contract before an attorney is entitled to be paid for services. *Plunkett & Cooney, PC v Capitol Bancorp Ltd*, 212 Mich App 325, 329; 536 NW2d 886 (1995). A valid contract requires a meeting of minds on all essential terms, which is judged by an objective standard that looks to the express words of the parties and their visible acts, not the subjective state of mind. *Kamalnath v Mercy Memorial Hosp Corp*, 194 Mich App 543, 548; 487 NW2d 499 (1992). Parties need not limit their relationship to a single contract for an undertaking, but rather, may enter into a series of a increasingly detailed contracts, each legally binding, as an undertaking progresses. *Opdyke Investment Co v Norris Grain Co*, 413 Mich 354, 360; 320 NW2d 836 (1982). Further, parties may enter into an oral contract, the terms of which may be demonstrated by a course of dealing and performance. *H J Tucker & Associates, Inc v Allied Chucker & Engineering Co*, 234 Mich App 550, 567; 595 NW2d 176 (1999).

Here, while a genuine issue of material fact was not shown regarding the fact that the parties entered into an oral contract, we note that neither party offered evidence of express words used to reach their agreement. The documentary evidence filed by plaintiff in the form of the April 1997 confirmation letter concerning a "fee arrangement" for standard billing rates and out-of-pocket expenses, while relevant, does not either detail all aspects of the parties' agreement nor provide controlling evidence regarding the terms of the parties' oral contract. See generally *Brady v Central Excavators, Inc*, 316 Mich 594, 609-610; 25 NW2d 630 (1947) (real contract may be shown by parol evidence when parties exchange letters purporting to be confirmation of prior oral agreement), and *American Parts Co, Inc v American Arbitration Ass'n*, 8 Mich App 156, 174-175; 154 NW2d 5 (1967) (a party that enters into an oral agreement cannot change that agreement simply by sending a written "confirmation" with additional or different terms). Viewed in a light most favorable to defendant, we conclude that the confirmation letter evidences plaintiff's understanding of part of the oral contract (i.e., "standard billing rates" and out-of-pocket expenses) in a manner that differs from the understanding expressed in the affidavit of defendant's president, Roger Kunko, (i.e., a "reasonable attorney fees" arrangement) filed in opposition to the motion.[5]

Considering the lack of factual development regarding the parties' express words used to form the oral contract, we are left with the evidence of the parties' actual course of performance after the confirmation letter was written to determine if a genuine issue of material fact was shown as to either plaintiff's contract or account stated theories of liability. Having considered the evidence of plaintiff's periodic statements for legal services, defendant's irregular payment history reflected in those periodic statements (e.g., payments recorded with "received" dates of

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[5] Although the filed copy of Kunko's affidavit does not show that it was attested to by a person who has authority to administer oaths, we have treated the affidavit as proper evidence for defendant to oppose the motion for summary disposition because this issue was not raised below. Had it been timely raised, defendant could have been afforded an opportunity to remedy the defect. In passing, we note that unsworn affidavits generally to do not satisfy the requirements of MCR 2.116(C)(10). *SSC Associates Ltd Partnership, supra* at 363. See also MCR 2.119(B)(1)(c) and *People v Burns*, 161 Mich 169, 173; 125 NW 763 (1910).

February 25 and June 30, 1998), Kunko's August 28, 1998, letter to plaintiff regarding its objections, and the other proofs submitted, we find it reasonable to infer that defendant acquiesced to certain types of expenses and hourly attorney rates by making payment, without objections, for periodic statement amounts reflecting those expenses and hourly rates.

However, we conclude that a genuine issue of material fact exists as to whether defendant acquiesced to all items underlying the $72,772.54 amount sought by plaintiff under the account stated theory, as well as the terms of the parties' contractual arrangement. In particular, from the evidence that plaintiff billed defendant for work as of August 17, 1998, viewed in conjunction with the evidence that Kunko made timely objections in his August 28, 1998, letter to the number of hours billed by plaintiff for its services, it may be inferred that defendant did not acquiesce to all the hours billed. A lack of acquiescence may also be inferred from Kunko's objections to certain Doeren Mayhew invoices in that letter, at least with respect to the time charged for trial preparation. The objections, coupled with the lack of factual development as to whether the Doeren Mayhew invoices were within the scope of the parties' oral contract, preclude summary disposition as to contract and account stated theories pursued by plaintiff.

Because summary disposition was incorrectly granted, we vacate the judgment of $72,772.54, plus interest and costs. We express no opinion on whether plaintiff is entitled to summary disposition for specific items or rates billed, but rather remand for further proceedings consistent with this opinion. To properly determine if a genuine issue of material fact exists as to plaintiff's account stated theory, each periodic statement that defendant failed to pay should be considered individually. Although assent has been found where a debtor does not object within a reasonable time to periodic statements, what constitutes a reasonable time may present a question of fact. *Leonard Refineries, Inc v Gregory*, 295 Mich 432, 437; 295 NW 215 (1940). Because assent is dependent upon the facts, all circumstances surrounding defendant's failure to pay must be considered. *Kaunitz, supra* at 185. Because an account stated, even if established, does not necessarily exclude all inquiry into the account, the terms of the parties' oral contract, as evidenced by their express words and performance, should also be considered. Cf. *Kusterer Brewing Co v Friar*, 99 Mich 190; 58 NW 52 (1894) (mere rendering of bills for barrels of beer at a greater price than the parties' agreement did not fix price, even where bills were not objected to when presented).

Further, because a genuine issue of material fact exists as to the terms of the parties' agreement, we find it unnecessary to consider the parties' arguments on whether a genuine issue of material fact exists with regard to the reasonableness of plaintiff's charges. This issue is relevant only if it is determined, as a matter of fact, that the parties' contract provides for fees to be determined based on reasonableness.

In passing, we note that, while plaintiff submitted the affidavit of a proposed expert to support its position on reasonableness, that affidavit was based in part on the expert's understanding of facts (e.g., that defendant wanted "all appropriate trial preparation") that were disputed by Kunko in his affidavit (i.e., that plaintiff "represented to me that they would periodically consult with me concerning the Action to lower the need for unnecessary legal fees"). Although an expert is not required to base an opinion on evidence admitted at a hearing, MRE 703; *People v Dobben*, 440 Mich 679, 695-696; 488 NW2d 726 (1992), the dispute over

the underlying facts alone precludes summary disposition on the question of reasonableness. In any event, factual development is necessary to determine if the litigation underlying the parties' oral contract was sufficiently complex to require expert testimony. *Zeeland Farm Svcs, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 198; 555 NW2d 733 (1996). Even if expert testimony was necessary, plaintiff would have borne the burden of proof at trial, and the trier of fact would have had the ability to reject even the most positive evidence that plaintiff could introduce. See generally *Baldwin v Nall*, 323 Mich 25, 29; 34 NW2d 539 (1948) (jury may disbelieve most positive evidence, even when it is uncontradicted); cf. *SSC Associates Ltd Partnership, supra* at 365 (trial court should not usurp a jury's right to determine credibility when deciding a motion for summary disposition). Hence, giving due regard to the fact that this is a case where the moving party, plaintiff, would have had the burden of proof at trial, we are not persuaded that the expert's affidavit entitled plaintiff to summary disposition.

We also find it unnecessary to address defendant's claim that an alleged written contract containing fixed rates for attorney fees was modified. This issue is moot because it assumes facts that were not claimed or evidentially supported by either party. As we have previously discussed, plaintiff's confirmation letter, while relevant evidence, does not establish the contract itself. Further, the only rate dispute apparent from the record has to do with whether the parties' oral contract provided for reasonable fees, as claimed by defendant, or standard billing rates, as claimed by plaintiff. Considering the parties' dispute in light of the evidence that defendant actually made payments for periodic statements containing rates different from those stated as "standard billing rates" in the confirmation letter, we are not persuaded that the record establishes any genuine issue of material fact for trial regarding the existence of a fixed rate contract. In any event, before one can decide if a contract was modified, the terms of the initial contract must first be established. If there is an existing contract, the parties are free to modify it in the same way that a meeting of minds created the initial, binding contract. See generally *Port Huron Education Ass'n v Port Huron Area School Dist*, 452 Mich 309, 326-327; 550 NW2d 228 (1996). Because a determination of the terms of the initial contract require further factual development, a determination on whether the contract was modified would be premature.

Finally, defendant's claim challenging plaintiff's standing to assert rights of third parties is not properly before us because it lacks citation to any supporting authority regarding the concept of standing. A party may not simply announce a position or assert an error and leave it to a reviewing court to discover and rationalize the basis of the claim. *Goolsby v Detroit*, 419 Mich 651, 655 n 1; 358 NW2d 856 (1984). We note, however, that the only causes of action pleaded by plaintiff were the breach of contract and related account stated theories. Although genuine issues of fact exist on whether plaintiff can prove a right to recover the requested amount of $72,772.54 under these theories, we are not persuaded that defendant has demonstrated that these causes of action implicate any question involving the concept of standing. See generally *Bowie v Arder*, 441 Mich 23, 42-43; 490 NW2d 568 (1992) (standing requires an interest in the subject matter of the controversy).

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Janet T. Neff
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey