

No. 36834-0-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY *[Signature]*
DEPUTY

ASSOCIATED PETROLEUM PRODUCTS, INC.,

Respondent,

v.

NORTHWEST CASCADE, INC.,

Appellant.

APPELLANT'S BRIEF

VANDEBERG JOHNSON & GANDARA, LLP

Lucy R. Clifhorne, WSBA # 27287
Attorneys for Appellant

VANDEBERG JOHNSON & GANDARA, LLP
1201 Pacific Avenue, Suite 1900
P. O. Box 1315
Tacoma, WA 98401-1315
(253) 383-3791

ORIGINAL

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I. INTRODUCTION

Six months after Associated Petroleum Products, Inc. (“Associated Petroleum”) agreed to provide on-site fueling services to Northwest Cascade, Inc. (“Northwest Cascade”), Associated Petroleum decided it needed to make more money from the deal. Rather than renegotiating its contract with Northwest Cascade, it simply imposed additional service charges, which it listed on page nine of an 11-page statement. Northwest Cascade paid the invoices for three months before it discovered the unauthorized charges. Northwest Cascade then withheld an amount equal to the unauthorized charges from its final payment to Associated Petroleum.

The trial court found that Northwest Cascade’s assent to the new charges could be implied from its payments, and granted Associated Petroleum’s motion for summary judgment. Northwest Cascade seeks a reversal of the trial court’s orders granting Associated Petroleum’s motion and entering judgment.

II. ASSIGNMENTS OF ERROR

1. The trial court erred when it entered its Order Granting Plaintiff’s Motion for Summary Judgment and Striking Portions of Declaration of Mark Perry, on September 14, 2007.

2. The trial court erred when it entered judgment on September 28, 2007, against Northwest Cascade and in favor of

Associated Petroleum, in the amount of \$48,233.51, including an award of \$32,585.30 for costs and attorneys' fees.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Should summary judgment be reversed when there are substantial issues of material fact regarding whether Northwest Cascade mistakenly paid invoices from Associated Petroleum that contained unauthorized charges? (Assignments of Error 1, 2)

2. Should summary judgment be reversed when Associated Petroleum imposed unauthorized charges without terminating or modifying its existing contract with Northwest Cascade, and the adequacy of its alleged oral notice of the charges is a material disputed fact? (Assignments of Error 1, 2)

3. Did the trial court err in striking Mark Perry's testimony that he disputed unauthorized charges Associated Petroleum had added to its invoices, and that he offered to "split the difference," when Perry was the sole person authorized to modify the terms of the contract with Associated Petroleum and his own offer of compromise was not offered to prove liability? (Assignment of Error 1)

4. Should the trial court's award of attorneys' fees be reversed when the court declined to make an independent evaluation, relying solely on the declaration of counsel? (Assignment of Error 2)

IV. STATEMENT OF THE CASE

This case involves Northwest Cascade's right to deduct unauthorized charges from its payments to Associated Petroleum, after it discovered that Associated Petroleum's statements were not consistent with the terms of the negotiated agreement between the two companies.

Associated Petroleum agreed to provide fleet fueling and meter reading services to Northwest Cascade at a fixed rate of 20 cents over the daily bulk fuel cost per gallon. After performing under the contract for about six months, Associated Petroleum began adding "time on site" charges to its multi-page invoices, which effectively doubled its rate of return for its services. When Northwest Cascade discovered this fact, it deducted the disputed amount from its final payment.

The trial court granted Associated Petroleum's motion for summary judgment on the grounds that either (1) Northwest Cascade's consent to the charges should be implied from its payment of the invoices, or (2) it could unilaterally change its pricing structure because the contract was terminable at will.

Northwest Cascade contends that consent to the stated account cannot be implied from payment because (1) the parties had been performing under a negotiated pricing agreement for five months; (2) it was not properly notified of new charges; (3) the new charges were buried in lengthy invoices that had previously been consistent with the agreed service charges; and (4) Associated Petroleum knew that Northwest Cascade would not consent to pay any more than the agreed price.

Moreover, the disputed invoices could not be considered “new” contracts because Associated Petroleum failed to terminate the existing, negotiated contract, or give any consideration for a modification of its terms.

Summary judgment should be reversed because Northwest Cascade presented evidence of material disputed issues of fact as to each of these issues, and Associated Petroleum failed to meet its burden that it was entitled to judgment as a matter of law.

A. FACTS UNDERLYING CLAIMS

Northwest Cascade is a Washington company in the construction business, which also provides honey buckets and septic and drain cleaning. CP 273. For several decades, Northwest Cascade fueled the large equipment at its job sites by purchasing fuel at bulk rates, storing it in large tanks at its Tacoma office, and delivering it to the various construction sites each evening.

Associated Petroleum is a full-service provider of fuel that markets a “fleet fueling” service to companies like Northwest Cascade:

APP's Fleet Fueling & Wet-Hose Service eliminates costly labor and liabilities by fueling your vehicles during your downtime. While your vehicles are sitting at your job site and/or your facility, our drivers will fuel your equipment so you are ready to go at the beginning of each workday. We run a 24/7 operation and will fuel according to your schedule.

CP 236. In the summer of 2005, Northwest Cascade accepted a fleet fueling proposal from Associated Petroleum. CP 290.

Associated Petroleum initially proposed to charge 18 cents per gallon of fuel for its service. CP 273. The pricing structure was expressed in terms of the cents per gallon over the daily cost of fuel from a specified bulk fuel provider (referred to by the parties as the “rack rate”). In response to Northwest Cascade’s request for an additional service (biweekly meter readings), the parties negotiated a total service charge of 20 cents per gallon over the rack rate. Thus, the charges varied daily, as they rose and fell with the cost of the fuel. CP 285-86.

Associated Petroleum began servicing Northwest Cascade’s equipment in August 2005. Its biweekly invoices consisted of several pages with eleven columns of numbers each, detailing the particular pieces of equipment fueled, the number of gallons of fuel delivered to each piece of equipment, at each site, the daily fuel rate, and the tax charged. *See, e.g.*, first invoice, CP 50-63. The statements were complicated because the charge for the service portion of the contract was tied to the cost of the bulk fuel, which varied daily.

After Associated Petroleum began fueling Northwest Cascade’s fleet, its sales manager frequently dropped in on Northwest Cascade, bearing doughnuts, in an effort to garner more business. CP 242-43. By December 2005, Associated Petroleum had not yet acquired additional business from Northwest Cascade, and had decided that its existing contract was not sufficiently lucrative. CP 253. Rather than terminate the contract and hurt its chance to solicit more business, Associated Petroleum devised a plan to impose an additional fee when equipment did not need a

minimum amount to refuel.¹ CP 254 (Gregory Deposition, p. 17, lines 19-21). Associated Petroleum also decided to present the fee to Northwest Cascade as an “operational” issue, by having its operations manager accompany its sales manager in a visit to Northwest Cascade’s fleet manager. CP 255 (Gregory Deposition, p. 19, l. 5-18).

Associated Petroleum’s sales manager, Chris Bertram, arranged a lunch meeting with Northwest Cascade’s fleet manager. In scheduling the meeting, Bertram did not say Associated Petroleum wanted to propose a new pricing structure for services it was already providing. Instead, Bertram said he wanted to discuss “housekeeping issues.” CP 244.

On December 2, 2005, Bertram and the Associated Petroleum operations manager visited the Northwest Cascade fleet manager, bringing Chinese food. Their professed agenda was “helping Northwest Cascade to be more efficient” by such means as a better equipment list, and lining up machines alongside the road. CP 244, 255. Although the fleet manager did not recall seeing it, Associated Petroleum says it gave him a one-page list of “housekeeping” issues on a document captioned “APP Fleet Fueling–Wet-Hosing–Small Tank Delivery Policies & Procedures.” CP 281. Under the caption “Gallonage Requirements,” the document referred to an “hourly demurrage rate” and “Small Tank Delivery” charges.

¹ There is some confusion as to whether Associated Petroleum had such a policy prior to December 2005; its sales representative testified that it did not, CP 243; its operations manager claimed that it did, CP 254.

Northwest Cascade's busy fleet manager was frequently interrupted during the December lunch meeting. CP 256 (Gregory Deposition). There was no discussion of terminating the contract or renegotiating its terms; the fleet manager also expressly refused to pay more for Associated Petroleum's services. CP 286. He believed the meeting concerned the housekeeping issues raised by Associated Petroleum, and he was willing to do what he could to make it easier for Associated Petroleum to perform under its agreement "as long as I get my equipment fueled." CP 35. Associated Petroleum claims that it construed the fleet manager's agreement with its housekeeping requests as agreement to minimum gallonage requirements. CP 299. Unbeknownst to Northwest Cascade, the actual intent of the Associated Petroleum's "housekeeping issues" was to significantly increase its charges. CP 291.

After the lunch, Associated Petroleum did nothing to confirm a modification of its contract with Northwest Cascade: there was no follow-up letter, no phone call or email to confirm the new service charges. CP 286-87. Instead, Associated Petroleum simply inserted the new fees on the ninth page of its next invoice, dated December 31, 2005. CP 73.

Associated Petroleum continued to solicit additional business from Northwest Cascade. CP 245-46. In March 2006, Bertram told Northwest Cascade that Associated Petroleum no longer wanted to provide fleet fueling unless it also got Northwest Cascade's other fuel business. CP 246. Although Northwest Cascade had no problem with its existing suppliers, it agreed to allow Associated Petroleum and its other suppliers to bid for a

complete fuel service package. CP 274, 287. Associated Petroleum, however, was angered by being asked to compete with other suppliers. CP 246 (“Well, I don’t think I want to bid if you’re gonna open it up. ... I’m sorry, but we’re done.”) As a result, Associated Petroleum terminated its contract with Northwest Cascade.

In the process of arranging to obtain fuel from another supplier, Northwest Cascade discovered that Associated Petroleum had been charging considerably more than the agreed 20 cents per gallon over daily rack rate. CP 287. When asked about the unexplained charges, Bertran responded that he would “look into it,” although he later admitted he had no intention of doing so. CP 246.

When the charges were finally explained, Northwest Cascade objected on the grounds that it had not agreed to an increase in service charges. CP 282. At that point, Northwest Cascade determined that it had actually been charged 42.8 cents per gallon over rack rate for Associated Petroleum’s services, rather than the 20 cents to which it had agreed. CP 279-83. Associated Petroleum accomplished this by adding a few thousand dollars in “time on site” fees to each fleet fueling invoice, which typically amounted to \$15,000 to \$25,000. CP 292.

Despite regarding such conduct as dishonest, Northwest Cascade offered to resolve the dispute by a post-hoc agreement to pay 30 cents over rack rate. CP 282-84. Associated Petroleum did not accept. CP 291. Northwest Cascade therefore deducted the \$13,404.16 in unauthorized charges from its payment of the final two invoices. CP 279, 280.

B. PROCEDURAL HISTORY

Respondent Associated Petroleum initiated this lawsuit on July 11, 2006. Following Northwest Cascade’s answer, Associated Petroleum transferred the matter to mandatory arbitration.

On March 30, 2007, Associated Petroleum timely filed and served a request for trial de novo. It moved for summary judgment on August 15, 2007. Northwest Cascade’s response included a Declaration from Mark Perry, its CEO. Associated Petroleum’s reply included a motion to strike portions of Perry’s testimony.

The Honorable Beverly Grant granted summary judgment, and struck some of Perry’s testimony, and judgment in the amount of \$48,233.51 was entered on September 28, 2007.

The notice of appeal was filed on October 9, 2007. On October 24, 2007, Northwest Cascade paid the disputed judgment in full.

V. ARGUMENT

A. STANDARD OF REVIEW

When reviewing a grant of summary judgment, an appellate court engages in the same inquiry as the trial court. RAP 9.12; *Harris v. Ski Park Farms, Inc.*, 120 Wn.2d 727, 737, 844 P.2d 1006 (1993), *cert. denied*, 510 U.S. 1047 (1994). Summary judgment may be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Weyerhaeuser Co. v. Aetna Cas. & Sur. Co.*, 123 Wn.2d 891, 897, 874 P.2d 142 (1994). The evidence and the inferences reasonably therefrom must be viewed in the light most

favorable to the nonmoving party. *Schaaf v. Highfield*, 127 Wn.2d 17, 21, 896 P.2d 665 (1995). Factual questions may not be resolved by summary judgment unless reasonable minds could reach but one conclusion from the admissible evidence. *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 485, 78 P.3d 1274 (2003).

B. A CONTRACT TO PROVIDE SERVICES AT A FIXED RATE MAY NOT BE MODIFIED WITHOUT MUTUAL ASSENT

A party is not entitled to payment as a matter of law when it agrees to provide services at a fixed rate, issues biweekly statements consistent with the agreement for several months, and then increases its charges without the other party's agreement and without any other change to its invoices or performance. *See, e.g., Tacoma Fixture Co., Inc. v. Rudd Co., Inc.*, ___ Wn. App. ___, 174 P.3d 721 (2008). Nevertheless, Associated Petroleum relied on two theories to claim that it was entitled to judgment as a matter of law: (1) Northwest Cascade's consent to additional charges was implied because it continued to order fuel after paying invoices that included the new charges, and (2) Northwest Cascade cannot claim that it was paying under a mistaken belief that the invoices were consistent with the negotiated agreement, because Associated Petroleum did not cause the mistake and had no reason to be aware of it.

The trial court erred in granting summary judgment because Northwest Cascade presented evidence that it did not agree to a modification, that Associated Petroleum did not terminate its contract or

give adequate notice of a modification, and because mutual assent cannot be implied from the circumstances presented, particularly when viewed in the light most favorable to Northwest Cascade.

1. Associated Petroleum Failed to Terminate its Contract Or Announce That It Would Only Continue to Provide Fleet Fueling Service According to a New Pricing Policy

Associate Petroleum claims it was entitled to adopt a new pricing structure because the contract was terminable at will, and Northwest Cascade implicitly accepted the new charges by continuing to order fuel “on a nightly basis.” *See, e.g.*, CP 8. The trial court agreed. VRP 51. However, this argument is not consistent with fundamental principles of Washington law.

First, a contract cannot exist in the absence of mutual assent to its terms. *Saluteen-Maschersky v. Countrywide Funding Corp.*, 105 Wn. App. 846, 851, 22 P.3d 804 (2001). Second, in the absence of a mutual change of obligations or rights, a subsequent agreement lacks consideration and cannot serve as modification of an existing contract. *Rosellini v. Banchemo*, 83 Wn.2d 268, 517 P.2d 955 (1974). Although either party to a contract that is terminable at will may propose to modify its terms, a party seeking to change the terms of an agreement that calls for continuing performance must terminate the prior agreement with reasonable notice to the other party. *Cascade Auto Glass, Inc. v. Progressive Cas. Ins. Co.*, 135 Wn. App. 760, 145 P.3d 1253 (2006), *review denied*, 161 Wn.2d 1012 (2007); *Mall Tool Co. v. Far West Equipment Co.*, 45 Wn.2d 158, 273 P.2d 652 (1954).

For example, in *Cascade Auto Glass*, the parties signed a contract pursuant to which Cascade would bill an insurer for parts and labor for glass replacement, at fixed prices. 135 Wn. App. at 763. Later, the insurer's agent sent Cascade a series of letters, over the course of several years, with an updated glass repair pricing schedule, each of which superseded the prior schedules. *Id.* at 763-64. The court applied the following principles:

When a contract for a continuing performance fails to specify the intended duration, we construe it to be terminable-at-will by either party after a reasonable time. In addition, the party wishing to terminate the agreement must give reasonable notice to the other party. Whether notice is reasonable depends on the facts and circumstances of each case.

Cascade Auto Glass, 135 Wn. App. at 767 (internal citations omitted).

Whether notice is reasonable is, inevitably, a question of fact:

Reasonable notice is notice 'fairly to be expected or required under the particular circumstances. Accordingly, whether Cascade presented sufficient evidence that the letter failed to provide reasonable notice depends on the circumstances surrounding the transaction.

Id. (internal citations omitted). After reviewing the evidence of nationwide pricing practices among insurers and automobile glass repairers, the court held that the insurer had terminated its prior pricing agreements as a matter of law, because its letters "clearly signaled that it was no longer willing to pay according to the pricing agreement." *Id.* at 769.

Cascade Auto Glass stands in stark contrast to the facts presented here. Associated Petroleum wrote no letter, but instead deliberately chose

to introduce its new pricing plan at a lunch meeting ostensibly devoted to helping Northwest Cascade “become more efficient.” CP 255. Associated Petroleum then buried the new charges on the ninth page of a lengthy, complex statement of its fuel deliveries, giving no other indication that it had increased its service charges. CP 65-75.

Associated Petroleum expressly elected not to terminate the contract it had decided was not profitable, treating it as a “loss leader” while it sought additional business. CP 287, 245. Thus, it had no right to unilaterally modify its ongoing contract with Northwest Cascade.

2. Modification of a Contract Requires New Consideration

In 1974, the Washington State Supreme court held that consideration was unequivocally required for the modification of a contract to be effective. *Rosellini, supra* (overruling prior exceptions). Thus, although an owner persuaded his contractor to accept a lower price after construction was 90% complete, the agreement was ineffective because the owner had already agreed to pay a higher price for the same building. *Id.* at 273.

Similarly, Associated Petroleum and Northwest Cascade’s agreement called for continuous performance: the nightly refueling of large equipment at various construction sites. CP 285. However, after Associated Petroleum’s alleged modification, it continued to provide exactly the same fuel and services as it had provided under the contract it negotiated with Northwest Cascade the previous summer. Under the rule expressed in *Rosellini*, Associated Petroleum gave no new consideration to

support the higher price it imposed on Northwest Cascade pursuant to its alleged modification of the contract terms.

3. Associated Petroleum Cannot Rely on Ambiguous Manifestations of Consent

Associated Petroleum argues that it could not only “unilaterally ‘announce’ a price change,” but that Northwest Cascade’s “continued orders” constituted acceptance of the new prices. CP 26 (citing *Mall Tool Co. v. Far West Equipment Co.*, 45 Wn.2d 158, 273 P.2d 652 (1954)). The court in *Mall Tool*, however, confirmed that acquiescence must be clearly manifested; it cannot be based on doubtful or ambiguous factors. *Id.* at 163-64. In the absence of “definite” notice, proposed new terms were ineffective; even if one party was in a position to dictate terms, the other party “had a right to know what they were.” *Id.* at 164.

Associated Petroleum tries to characterize the parties’ performance under their existing contract as a series of “new” contracts, claiming Northwest Cascade “ordered fuel on a nightly basis” (CP 8); placed “daily orders” by telephone and email (CP 11); ordering fuel on “roughly 105 additional occasions” (CP 19) after it imposed new prices. This argument fails for one simple reason: Nightly refueling of its fleet of equipment was the very essence of the service Associated Petroleum agreed to provide in the parties’ negotiated contract. Relaying information as to which job sites were active was simply part of the procedure established by the parties during performance of their contract.

Until one of the parties notified the other that it was terminating the agreement, continued performance cannot and does not imply acceptance of new terms. Where the obligations of the party claiming a modification remain constant, neither acquiescence nor a failure to object can effect a modification of contract. *Ferrer v. Taft Structural, Inc.*, 21 Wn. App. 832, 835-36, 587 P.2d 177 (1978) (citing *Rosellini*); *Westland Constr. Co. v. Chris Berg, Inc.*, 35 Wn.2d 824, 215 P.2d 683 (1950); and *Queen City Constr. Co. v. Seattle*, 3 Wn.2d 6, 17, 99 P.2d 407 (1940)).

4. A ‘Course of Dealing’ Cannot Override the Express Terms of a Contract

The contract at issue involves the sale of both goods and services, although only the service portion of the contract is in dispute. The Uniform Commercial Code (UCC) applies to sales of goods alone, or to sales of goods and services when the sale of goods predominates. *Tacoma Athletic Club, Inc. v. Indoor Comfort Systems, Inc.*, 79 Wn. App. 250, 256 (1995). Here, the cost of the bulk fuel delivered by Associated Petroleum is not at issue, although itemization of the fuel costs and the amounts delivered made up the largest portion of Associated Petroleum’s biweekly statements.

If the UCC does apply, its provisions do not allow Associated Petroleum to add new service charges to a contract without adequate notice. Under the UCC, a court may consider the parties’ conduct when determining whether an invoice term became part of a contract. *Tacoma Fixture Co.*, 174 P.3d at 724. However, their conduct cannot create a new

obligation. *Badgett v. Security State Bank*, 116 Wn.2d 563, 568, 572, 807 P.2d (1991). In addition, when the express terms of the parties' agreement are inconsistent with their conduct, the express terms control. RCW 62A.1-205(4).

In *Tacoma Fixture*, the court explained:

[T]he parties had already formed a contract when each of these invoices was received ... Following UCC § 2-207, the additional terms on the backs of the invoices should therefore be considered proposals for addition to the contract. However, because the terms materially altered the agreement ... they could not automatically become a part of the contract. **Further, because the parties already had a contract, Rudd could not unilaterally modify the contract based upon TFC's silence ...**

Because the parties never agreed to the additional terms but conducted themselves in a manner indicating the existence of a contract, the contract's terms are governed by UCC 2-207(3). Therefore, the contract consisted only of those terms agreed to by the parties and any supplementary terms provided by the UCC.

Tacoma Fixture, 174 P.3d at 724 (emphasis added).

This is consistent with the analysis in *Cascade Auto Glass*, where the court found that “[b]ecause national pricing standards change frequently, both parties expect that their pricing agreements will be modified or revoked in response to market shifts.” 135 Wn. App. at 768. In such circumstances, letters updating the price schedules constituted reasonable notice of a termination of prior pricing agreements.

The facts of this case do not support modification on the basis of the parties' conduct. A “course of dealing” is defined as “a sequence of

previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.” RCW 62A.1-205(1). Here, the parties had agreed that Associated Petroleum would provide regular, ongoing fleet fueling services in return for a 20-cent surcharge on each gallon of fuel purchased by Northwest Cascade. For at least five months, Associated Petroleum provided lengthy statements itemizing the its fuel deliveries, and otherwise performing under the negotiated agreement. A “course of dealing” analysis thus supports a finding that Associated Petroleum agreed to provide nightly fleet fueling services for a 20-cent-per-gallon surcharge, consistent with the negotiated agreement.

Because Associated Petroleum failed to submit evidence that Northwest Cascade agreed to a modification of the terms of the parties’ agreement, its assent cannot be implied as a matter of law.

C. ASSENT IS NOT IMPLIED BY PAYMENT WHEN A CREDITOR HAS ADDED CHARGES TO A COMPLEX INVOICE WITHOUT ADEQUATE NOTICE

Associated Petroleum relies heavily on the “account stated” doctrine to claim its right to the additional charges. Washington has adopted the rule that when a debtor and creditor both manifest assent to a sum as an accurate computation of an amount due, the statement becomes a promise to pay that amount. Washington follows the doctrine as expressed in the Restatement (Second) of Contracts, which provides that in some circumstances, assent to a statement may be implied:

(1) An account stated is a manifestation of assent by debtor and creditor to a stated sum as an accurate computation of an amount due the creditor. A party's retention without objection for an unreasonably long time of a statement of account rendered by the other party is a manifestation of assent.

(2) The account stated does not itself discharge any duty but is an admission by each party of the facts asserted and a promise by the debtor to pay according to its terms.

Restatement (Second) of Contracts ("Rest. Contracts"), § 282 (1981).

Whether a failure to object implies assent depends upon the information available to the parties; "the mere rendition of an account by one party to another does not show an account stated." *Sunnyside Valley Irrigation District v. Roza Irrigation District*, 124 Wn.2d 312, 315-16, 877 P.2d 1283 (1994). Moreover, the effect of a stated account is subject to the rules involving mistaken payment. Rest. Contracts § 282, cmt c. Thus, assent may not be implied in situations involving a claim of fraud, mistake, or accident. *Sunnyside Valley Irrig. Dist.*, 124 Wn.2d at 316.

The Restatement offers the following illustration of the effect of an account stated:

1. A regularly sells goods to B. From time to time B returns some of the goods for credit and makes payments for the rest. At the end of each month, A sends B itemized statements of B's outstanding balance. One of the statements incorrectly gives an outstanding balance of \$5,500 because of A's oversight in failing to debit B with a \$1,000 delivery and to credit B with a \$500 payment both made during the preceding month. Before either mistake is discovered, B writes A that the statement is "correct." There is an account stated, but it does not prevent A from proving the \$1,000 delivery or B from proving the \$500 payment. B owes A \$6,000.

Rest. Contracts § 181, illustrations.

Here, Northwest Cascade negotiated a fixed rate for nightly on-site refueling of construction equipment, and expressly refused to pay more. CP 245, 286. By the time Northwest Cascade received Associated Petroleum's December 31, 2005 invoice containing new charges, it had been receiving biweekly invoices for five months, each of which had been consistent with the parties' contract. In the December 31, 2005 invoice, Associated Petroleum added "time on site" charges to the ninth page of its statement of variable fuel charges. CP 73. Northwest Cascade's fleet manager failure to catch the addition is hardly surprising, when the charges first appear on page nine of an 11-page statement. CP 286, CP 65-75.

Because the cost of fuel made up the largest portion of each invoice, the additional service charges added less than two thousand dollars to each invoice. CP 239. However, the effect of the additional charges was to charge Northwest Cascade more than twice what it had agreed to pay for Associated Petroleum's delivery services. CP 279. At a minimum, there is an issue of fact as to whether Northwest Cascade implicitly consented to the "time on site" charges by payment of the invoices under these circumstances. As the Washington Supreme Court explained,

Generally speaking, an account stated is an agreed balance between parties who have had previous dealings involving the payment of, or agreement to pay, money; the account to become stated including an agreement that the items thereof are correct, and that the balance struck is justly due. From such a state of facts, the law presumes a promise to pay the balance as shown on the account. An account stated

determines the amount of a debt, some previous liability having existed, and does not of itself create a primary obligation.

Northwest Motors, Ltd. v. James, 118 Wn.2d 294, 304-5, 822 P.2d 280 (1992) (quoting *Goodwin v. Northwestern Mut. Life Ins. Co.* 196 Wash. 391, 410, 83 P.2d 231 (1938)). In other words, an “account stated” depends upon the existence of an open account; here, on the other hand, each of the supplier’s invoices was paid in full until the unauthorized charges were discovered. CP 40.

Although in some circumstances, payment without objection may give rise to a legal implication of agreement to a stated account, it cannot do so here, where Northwest Cascade contends that it paid the disputed statements in the mistaken belief that they were consistent with the parties’ agreement, as the earlier statements had been.

1. Consent to an Invoice Is Not Implied by Payment, When the Invoicing Party Acts Inequitably

The equitable rules regarding mistake allow a contract to be reformed when, for example, “one of the parties mistakenly believes that the writing is a correct integration of that to which he had expressed his assent and the other party knows that it is not.” *Gammel v. Diethelm*, 59 Wn.2d 504, 508, 368 P.2d 718 (1962) (quoting 3 Corbin on Contracts, § 614, p. 730). A mistaken party’s negligence in failing to observe that an invoice is inconsistent with an agreement does not deprive him of the remedy, when the other party acts in an unfair or dishonest manner. *Id.* Thus, a unilateral mistake may relieve the mistaken party from its

obligations, “if the other party knows or is charged with knowing of the mistake.” *Basin Paving, Inc. v. Port of Moses Lake*, 48 Wn. App. 180, 185, 737 P.2d 1312 (1987).

For example, in *Gammel*, a seller inserted a provision into the parties’ written contract that required monthly payments *plus* accrued interest, which differed from the parties’ agreement that monthly payments would *include* interest. 59 Wn.2d at 505. Finding that the seller had acted inequitably by changing this provision, the court granted judgment reforming the parties’ contract.

Associated Petroleum argued that the rules governing mistakes do not apply here, citing *Loeb Rhoades, Hornblower & Co. v. Keene*, 28 Wn. App. 499, 624 P.2d 742 (1981). CP 22. In *Loeb*, a stock broker sought a refund from an investor after it paid the investor a higher than market price for his stock. The court reversed summary judgment granting the refund, because there was no evidence that the investor knew or should have known of the broker’s mistake. 28 Wn. App. at 500. The *Loeb* court noted that:

Cases cited by [the broker] are concerned with contracts entered into without consideration, trees mistakenly cut, or **errors made after the parties had entered into the contract, or a case of mistaken overpayment**. They are thus not applicable here. Here, the [broker] made a bad bargain and has asked the court to make him a better one. The [investor] is not responsible for this error of judgment.

Id. at 500-501 (emphasis added). Here, on the other hand, we do have a case of mistaken overpayment, and one where Associated Petroleum tried

to change the bargain *after* it was made. Associated Petroleum should not be excused from performing merely because it no longer liked its bargain, or allow it to unilaterally improve its position without terminating the bargain or obtaining Northwest Cascade's consent to a new one. Respondent's reliance on *Loeb* was misplaced.

2. Associated Petroleum Caused the Mistaken Overpayment And Had Reason to Be Aware of It

A party may void a contract based on a unilateral, material mistake if it does not bear the risk of that mistake and the other party either had reason to know about it, or caused it. Rest. Contracts § 153. A party may “bear the risk” of a mistake if the risk is allocated by agreement, or the party is held at fault for not discovering the mistake, or when it would be inequitable not to shift the burden. Rest. Contracts § 154.² However, a mistaken party's fault in failing to discover the facts does not bar his remedy “unless his fault amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing.” Rest. Contracts § 157.

For example, in *Snap-On Tools Corp.*, the court reversed a grant of summary judgment because “a unilateral mistake of fact may be grounds for relief if the other party knows or is charged with knowing of the

² Section 154 states in full: “A party bears the risk of a mistake when (a) the risk is allocated to him by agreement of the parties, or (b) he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient, or (c) the risk is allocated to him by the court on the ground that it is reasonable in the circumstances to do so.”

mistake.” *Snap-On Tools Corp. v. Roberts*, 35 Wn. App. 32, 35, 665 P.2d 417 (1983) (citing *Halver v. Welle*, 44 Wn.2d 288, 266 P.2d 1053 (1954); *Loeb Rhoades, Hornblower & Co.*, 28 Wn. App. at 500; *Appleway Leasing, Inc. v. Tomlinson Dairy Farms, Inc.*, 22 Wn.App. 781, 784, 591 P.2d 1220 (1979); and *Puget Sound Nat’l Bank v. Selivanoff*, 9 Wn. App. 676, 681, 514 P.2d 175 (1973)). The court remanded for determination of the factual question as to whether the party receiving the overpayment had access to information that would show he had been paid in mistake. *Id.*

The Washington Supreme Court has consistently followed these rules, holding that where one party mistakenly believes a writing correctly reflects a prior agreement, and the other party has reason to know that in fact it differs from that agreement, then the first party’s negligence in failing to observe the difference does not deprive him of the right to reformation of the error. *Gammel*, 59 Wn.2d at 508 (citing 3 Corbin on Contracts, § 614, p. 730). *See also Gill v. Waggoner*, 65 Wn. App. 272, 276, 828 P.2d 55 (1992) (declining to charge injured party with knowledge of insurer’s mistake in offering \$35,000 rather than \$3,500 to settle claim, when injured party had demanded \$37,156).

Here, all three factors support Northwest Cascade’s position: (1) Associated Petroleum’s failure to provide adequate notice of its intent to increase its service charges resulted in Northwest Cascade’s mistake as to the content of its invoices; (2) Associated Petroleum had reason to know of the mistake because Northwest Cascade had expressly refused to

pay increased service charges; and (3) Northwest Cascade acted in good faith and in accordance with reasonable standards of fair dealing.

Associated Petroleum admittedly knew that Northwest Cascade expressly refused to pay more than 20 cents per gallon for fleet fueling services. CP 245, 286. Northwest Cascade's fleet manager testified that he was certain he never agreed to pay more than the negotiated rate for the fleet fueling service:

A I recall that we had an agreement for 20 cent margin, and that's all I was agreeing to pay.

Q Okay. I'm trying to find out if ... you understood what he proposed but you rejected it.

A I rejected it.

CP 259. In response to this testimony, Bertram testified that he did not dispute the fleet manager's refusal to pay more than a 20 cent margin, but that the new "time on site" charge it had devised did not technically change that margin. CP 245.

In other words, Associated Petroleum sought to increase its fees without renegotiating the bargain it had struck. By introducing new "minimum gallonage requirements" in a "housekeeping" meeting with an operational manager, and failing to alert its customer that it was increasing its fees, Associated Petroleum deliberately facilitated Northwest Cascade's mistake. Under these circumstances, the risk of that mistake does not shift to the mistaken party. Rest. Contracts § 154.

Nevertheless, Associated Petroleum insists that it is entitled to summary judgment because, after it inserted the new charges in its

statements, Northwest Cascade “continued to order fuel on a nightly basis with full knowledge of the price charged.” CP 10. However, the manner in which Associated Petroleum inserted “time on site” charges into its invoices – charges which were not consistent with the parties’ express agreement – did not give rise to a legal implication that Northwest Cascade continued to perform “with full knowledge” of the price it was paying.

3. Northwest Cascade Acted in Good Faith and in Accordance With Reasonable Standards of Fair Dealing

Upon Northwest Cascade’s discovery of the additional charges, it promptly notified Associated Petroleum and requested a credit. When Associated Petroleum refused, Northwest Cascade made a good faith offer to split the difference, which was also rejected. Thus, the evidence showed that Northwest Cascade acted according to reasonable standards of fair dealing, and retained its right to credit for the mistakenly payments.

Associated Petroleum argued that Northwest Cascade’s earlier payment, without objection, constituted a promise to pay the total charged, regardless of whether Northwest Cascade knew that the invoices were not consistent with the parties’ agreement. However, this is not the law.

A mistaken party’s fault in failing to know or discover the facts before making the contract does not bar him from avoidance or reformation under the rules stated in this Chapter, unless his fault amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing.

Rest. Contracts § 157. In other words, even if each invoice constituted a new contract, and even if Northwest Cascade were found to have been careless in reviewing invoices, the “contract” to pay time on site charges may be voided unless the carelessness was in bad faith. The obligation the law imposes on a party that discovers a non-fraudulent mistake is to tell the other party it intends to void the contract within a reasonable time after its discovery, Rest. Contracts § 381, which is exactly what Northwest Cascade did here.

Northwest Cascade paid several invoices containing additional charges, in the mistaken belief that they reflected the same mutually agreed charges that had been invoiced and paid in the nine prior invoices. The first “time on site” charge was buried on page nine of the 12-31-05 invoice. CP 73. The additional charges never appeared before page six, until after the parties’ contract was terminated. CP 77-176. Objective review of these invoices shows that Northwest Cascade cannot be said, as a matter of law, to have acted in bad faith when it failed to discover the additional charges in its invoices. Even Associated Petroleum’s sale manager, when initially asked to identify the “time on site” charges on an invoice, found it so confusing that he was unable to do so until after studying the invoice off the record, with his counsel. CP 247-50.

Nevertheless, the trial court entered summary judgment in favor of Associated Petroleum in the amount of \$13,667.37 principal, \$1,980.84 prejudgment interest, and \$32,585.30 costs and attorneys’ fees. Aside

from the clerical errors,³ summary judgment was not supported by the law and the evidence. Material questions of fact exist as to whether Associated Petroleum gave reasonable notice of the additional charges it intended to impose, and whether Northwest Cascade response was in accordance with principles of good faith and fair dealing.

D. NORTHWEST CASCADE WAS ENTITLED TO RESTITUTION

Northwest Cascade was entitled to restitution in the amount it mistakenly overpaid Associated Petroleum:

A party who has avoided a contract on the ground of lack of capacity, mistake, misrepresentation, duress, undue influence or abuse of a fiduciary relation is entitled to restitution for any benefit that he has conferred on the other party by way of part performance or reliance.

Restatement (Second) Contracts § 376 (1981).

The mere fact that a mistaken party could have avoided the mistake by the exercise of reasonable care does not preclude either avoidance (§§ 152, 153) or reformation (§ 155). Indeed, since a party can often avoid a mistake by the exercise of such care, the availability of relief would be severely circumscribed if he were to be barred by his negligence.

Rest. Contracts § 157, cmt a. Northwest Cascade acted in good faith by questioning the charges as soon as it discovered them, giving prompt notice of its dispute when they were finally explained, and then offering to

³ The principal was actually \$13,666.37 and interest \$1,971.90 (3.79 x 501 days + .69 x 486 days - \$262.23 payment applied to interest). The fee award is addressed in part E.

compromise the dispute. CP 290-92. Northwest Cascade was therefore entitled to an offset in the full amount it mistakenly paid to Associated Petroleum. Rest. Contracts § 158 (relief for mistake includes restitution).

E. THE COURT ERRED IN STRIKING MARK PERRY'S TESTIMONY

Prior to considering Associated Petroleum's motion for summary judgment, the trial court first considered its motion to strike portions of the Declaration of Mark Perry. The motion was granted as two portions of Perry's testimony, neither of which is supported by Washington law.

The court first struck the third sentence of paragraph 6 of Perry's declaration, which stated:

6. I was even more surprised when I learned that Associated Petroleum had been billing us more than twice what we agreed to pay. At first, I thought it must be a mistake. Once it was clear that **Associated Petroleum had added charges we had not agreed to**, I told Jeff to ask for a credit. Copies of our email exchanges are attached as Exhibit 1.

CP 274, 291 (emphasis added). Associated Petroleum argued that Perry had no personal knowledge of whether its fleet manager agreed to new charges. CP 296. However, Associated Petroleum was not relying on an assertion that Northwest Cascade consented to the charges. CP 296, 305. Moreover, as CEO, Perry has personal knowledge as to "what his company did or did not agree to." Verbatim Report of Proceedings ("VRP") 9-14-07, p. 4. At summary judgment, Northwest Cascade was entitled to have the evidence, and reasonable inferences therefrom,

construed in its favor – including testimony that it had not agreed to the new “time on site” charges that were added to seven of its 16 invoices.

The trial court also struck Perry’s description of his letter protesting the charges, which included an offer to “split the difference”:

8. In June 2006, I received a letter from the credit manager. A copy is attached as Exhibit 3. I responded the following week, explaining that any changes to the contract they had implemented had not been clearly explained, and offering to resolve the dispute by splitting the difference. A copy is attached as Exhibit 4.

CP 274, 291. The judge held this to be “an irrelevant and inadmissible offer of settlement discussions.” CP 308. However, an offer of compromise that is not offered to prove liability or amount is not inadmissible on that ground. ER 408. Moreover, the letter was relevant evidence of Northwest Cascade’s agreement to the new charges, or lack thereof, and its diligence in discovering them. At summary judgment, the court should have given Northwest Cascade the benefit of any inferences to be drawn from its CEO’s testimony.

The trial court’s error in striking Perry’s testimony that his company had not consented to a change in the terms of an existing contract, and that he disputed the charges when he learned of them, paved the way for the court’s error in granting summary judgment.

F. THE COURT ERRED IN FAILING TO INDEPENDENTLY REVIEW ATTORNEYS’ FEES AND COSTS

In Washington, trial courts are required to make an independent assessment of the reasonableness of attorneys’ fees; “they may not merely

rely on the billing records of the prevailing party's attorney.” *Mayer v. City of Seattle*, 102 Wn. App. 66, 79, 10 P.3d 408 (2000) (quoting *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 744, 733 P.2d 208 (1987)). The court must also create an adequate record for review. *Id.* (quoting *Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 632 (1998)). Neither of these requirements was met here, where the award was based solely on counsel’s declaration. VRP 9-28-07, p. 10-11.

Northwest Cascade questioned whether separate charges were encompassed in the attorneys’ hourly rate; whether any of the fees were for wasteful or unrelated services; and whether all costs were properly awarded. CP 333-37. For example, appellant questioned fees to research whether it snowed on the day of the December meeting (1/10/07, 1/23/07); fees related to a claim on which plaintiff did not prevail (1/4/07, 1/22/07, 8/29/07); and unrelated fees (1/22/07, 5/29/07, 6/11/07, 6/12/07). CP 335.

Rather than address particular concerns, the court stated that the hourly rate was reasonable, and that she believed in attorneys getting paid for what they do. VRP II, p. 11. While an admirable sentiment, it is probably not the active role envisioned by the appellate courts.

VI. CONCLUSION

Summary judgment should be reversed because material issues of fact exist as to whether Associated Petroleum gave adequate notice that it was unilaterally modifying its agreement to provide fleet fueling services at a fixed rate to Northwest Cascade. In addition, material issues of fact exist as to whether Northwest Cascade was entitled to a credit in the

amount of payments in the mistaken belief that the invoices were consistent with its negotiated agreement with Associated Petroleum, because Associated Petroleum both contributed to causing the mistake, and had reason to know about it. For all of the above reasons, the trial court's order granting summary judgment should be reversed.

DATED this 22th of March, 2008.

Respectfully submitted,

VANDEBERG JOHNSON & GANDARA, LLP

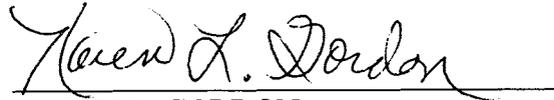
By *Lucy R. Clifftorne*

Lucy R. Clifftorne, WSBA # 27287
Attorneys for Appellant

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date I caused to be delivered via Legal Messenger Service, a true copy of Appellant's Opening Brief, to the attorney of record for Respondent, at his last known business address as follows:

Kenneth Fielding
Morton McGoldrick
820 A Street, Suite 600
Tacoma, WA 98401

Dated this 27th day of March, 2008, at Tacoma, Washington


KAREN L. GORDON

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