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No. 36834-0-II

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

ASSOCIATED PETROLEUM PRODUCTS, INC.,

Respondent,

v.

NORTHWEST CASCADE, INC.,

Appellant

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DIVISION II
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STATE OF WASHINGTON
BY DEPUTY

RESPONDENT'S BRIEF

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I. INTRODUCTION

The trial court properly concluded that there was no issue of material fact regarding the application of the doctrine of “account stated.” Between December 16, 2005, and April 18, 2006, Northwest Cascade ordered nightly fuel deliveries to its job sites. APP sent NWC detailed invoices on the 15th and last day of each month. NWC admits that these invoices were perfectly adequate to inform NWC that APP had imposed “time on site” charges for 266 instances, where NWC had requested fewer than 200 gallons to a site. NWC *paid, without protest*, all 7 separate invoices from Associated Petroleum for the period covering December 16, 2006 through March 31, 2007.

In mid April, 2007, APP informed NWC that APP would no longer do business with NWC. Subsequently, NWC asserted for the first time that it had paid “time on site” charges by “mistake.” NWC unilaterally offset the earlier payments against APP’s two outstanding invoices, issued after the relationship was terminated (for deliveries from April 1-15, and April 16-20).

NWC did not demonstrate any issue of material fact either in the trial court, or in its brief on appeal. As a matter of law, NWC’s payment without protest of the first 7 detailed invoices, which fully disclosed the

belatedly contested charges, precludes any claim for offset of alleged overpayments. The trial court properly granted summary judgment on APP's claim for its unpaid invoices, based on "account stated." The award of attorney's fees was required by the contract, was supported by an adequate record, and was not an abuse of discretion.

II. STATEMENT OF THE CASE

Because this court reviews the grant of a summary judgment *de novo*, the following factual discussion is detailed. Associated Petroleum Products (APP) is a wholesaler of petroleum products. CP 32, 196. Northwest Cascade (NWC) is a large company primarily engaged in the construction industry and related services. NWC has diesel powered equipment at job sites in and around Pierce County which require fuel. CP 209-210. Beginning in August, 2005, Northwest Cascade asked Associated Petroleum to supply fuel to NWC's equipment at NWC's job sites. The initial agreed price was 20 cents per gallon over APP's cost, as defined by a published market price. CP 32-33, 45-48. There was no stated duration for this arrangement, and it was terminable at will by either party. CP 214, CP 204-205, CP 33, and CP 44-48.

These contractual arrangements included an express, written requirement, imposed by NWC, that

timely payment [by Northwest Cascade] depends upon your [APP's] invoice being complete, correct and in our possession long enough to permit approval by appropriate individuals. Invoices without the required information will not be processed for payment until that information is supplied.

CP48; CP 212-213. Required information included a reference to the NWC equipment number or job site for each fuel order. APP would not be paid if invoices did not contain this information. CP48. NWC insists on this "standard" contract provision "to make sure that we're paying in accordance with the deals and/or quotes." CP 212-213. It has been part of all of NWC agreements with its vendors. CP 212 (dep. Perry p. 17).

Throughout the relationship between APP and NWC, the NWC Fleet Manager, Jeff Warren, was the only person at NWC with whom APP was to discuss any business matter. CP 210-211. NWC clothed him with full authority. "It was his responsibility to completely negotiate" the terms for purchasing from APP, provided he stayed within the parameters secretly set by Mr. Perry. CP 211. It was also Mr. Warren's responsibility to receive, review and approve invoices, as contemplated by NWC's contract provision, quoted above. CP 199-200; 203, 204; CP 213. Mr. Warren's responsibility included the authority to review and approve invoices containing "time on site" charges. CP 215-216 .

APP soon found that this business relationship was not economical. CP 34-35. Unlike other customers of APP's, NWC repeatedly asked APP to deliver fuel to job sites that were inaccessible. *Id.* See also, CP 196-197. On many occasions, NWC asked APP to fuel equipment which took only a few gallons, and sometimes as little as a few tenths of a gallon. *Id.* At a gross profit margin of 20 cents per gallon, APP found it uneconomical to send a tanker truck and driver to deliver fuel to a piece of equipment for a gross profit of a nickel or less, when one-tenth of a gallon might be all that a piece of equipment might take. CP 34-35, 196. See also, e.g., CP 51, 52, 53, 54.

On December 2, 2005, APP sales manager Chris Bertram and APP transportation/operations manager Dennis Gregory had a pre-arranged meeting with NWC's fleet manager, Jeff Warren. CP 35, 286. Mr. Gregory and Mr. Bertram explained an additional "demurrage" charge, or "time on site" charge, that APP would impose beginning with deliveries on December 16, 2005. This charge would be imposed only when NWC requested deliveries to a location which required fewer than 200 gallons.¹

¹ NWC disingenuously argues that APP doubled the price of fuel. NWC brief, pp. 3, 8. The price for fuel was not changed. It remained cost plus \$.20 per gallon. Under the "demurrage" policy, NWC would be charged \$40.00 (plus tax) per half hour of "time on site" for any deliveries to sites where fewer than 200 gallons of fuel were delivered. The extra charge was incurred only when NWC through poor management requested inefficient deliveries of fuel. (CP 35, 197).

CP 35, 197. Warren admits that Bertram and Gregory came to Warren's office and told him that APP "wanted to charge ... demurrage or time-on-site charges." He acknowledges receiving an oral explanation of the details of the charge, which were consistent with CP 206. CP 201-202, CP 206.²

Mr. Warren expressed initial objection to the imposition of the time on site charge during the December 2 meeting. It is also undisputed, and Mr. Warren does not deny, that at the conclusion of the meeting Warren stated, "I don't have a problem with that, as long as I get my fuel." See CP 35, 197; CP287.

Nevertheless, for purposes of the summary judgment, and for purposes of this appeal, it must be assumed that there was no express assent by NWC, at the December 2 meeting, to APP's stated intention to impose the "time on site" charge. It is further assumed that Mr. Warren subjectively intended his statement ("I don't have a problem with that...") to apply only to APP's additional request, also made in the December 2

² Although Warren has denied receiving the written document, CP 206, he admits he received an explanation of the same information. CP 201 (dep. p. 59). He also acknowledges that he does "not remember all of the details of what [Bertram] proposed. CP 259. His memory of the meeting is admittedly poor, and Warren admits that he had even completely forgotten the meeting. CP 287 (Warren dec., par. 12). Warren told Mr. Perry that he "couldn't remember, one way or the other, in terms of what was discussed or not discussed." CP 216. Thus, while it is presumed for the summary judgment and appeal that Mr. Warren did not "agree" to the time on site charge, it is undisputed that APP told Warren that APP planned to impose the charge, and explained exactly what it was. CP 35; 201-202.

meeting, that NWC park its equipment in accessible locations, and not request minimal fuel deliveries. CP 196-197; CP 34-35; CP 287.

The next billing cycle after the December 2 meeting was the December 16-31 invoice (CP 65-75). That invoice, and every subsequent semi-monthly invoice, included "time on site" charges whenever NWC requested fuel deliveries to sites which required fewer than 200 gallons. CP 39; CP 35; CP 73, 74, 82, 83, 94, 97, 110, 113, 124, 127, 142, 145, 158, 161, 172, 175, 178. In addition, APP's Eatonville office began including similar "demurrage"³ charges on its separate billings to NWC from APP's Eatonville office. CP 37; CP 40; CP 42-43; CP 181-195. Between January 1, 2007 and April 18, 2006, Jeff Warren received and approved, *and NWC paid without any protest*, every one of the first 7 semi-monthly invoices, and every one of the 14 demurrage charges in the Eatonville invoices. *This included almost 300 separately itemized time on site and demurrage charges.* CP 65-162; 181-195.

Because it is the fact of these payments, without protest, upon which APP relies for summary judgment, rather than upon an express agreement by Mr. Warren at the December 2 meeting, the next portion of

³ Mr. Warren has used the terms "demurrage" and "time on site" interchangeably. See, e.g., CP 210 (Warrant dep. p. 40). The terms are synonymous. "Demurrage" is defined as compensation for delay or detention in loading or unloading. *Webster's New Twentieth Century of the English Language*, 2d Ed. (1964).

this brief will discuss in detail the undisputed actions of the parties, after December 2, which entitle APP to recover as a matter of law.

NWC placed orders with APP by phone and email, specifying what job sites it wanted APP to deliver fuel to that evening. APP would then send tanker trucks to the job sites, and deliver the fuel by pumping it into NWC's equipment. CP 33. In practice, NWC requested fuel on a daily basis, often including Saturdays and even occasionally on Sunday. CP 213 (dep. Perry p. 23, 25). The arrangement between APP and NWC was terminable at will by either party. CP 45-48; 204-205; CP 213-214.

Between January 3, 2007 and April 18, 2007, NWC paid 7 semi monthly invoices containing 266 separately itemized time on site charges. CP 36-37; 40-41; CP 65-162. A detailed review of the semi monthly invoices (CP 65-179) shows that orders were placed *every day* between January 3, 2007 and April 18, 2007, with the exception of January 7, 8, 14, 21, 22, 29; February 26; March 5, 12, 19, 26; and April 9, 15, 16 and 19. In addition, approximately 21 other orders were placed through APP's Eatonville office, 14 of which also imposed demurrage charges for delivery of less than 200 gallons after December 15, 2005. CP 181-195.⁴

APP billed NWC twice a month, once through the 15th day, and

⁴ The Eatonville invoices were paid, and are not challenged by NWC. See CP 239, 291. The disputed semi-monthly charges are summarized in Appendix 1. This information was presented to the trial court at CP 40.

once through the last day of each month. CP33.⁵ APP's December 31, 2005 invoice, covering 16 calendar days, was for a total of \$7,426.38. Of that amount, \$1,827.84 was for 42 separately itemized "time on site" charges, when less than 200 gallons had been delivered to an individual job site. CP 35-36, 65-75. Those 42 separately itemized charges filled the entire page 9 of APP's December 31, 2005, invoice under the heading "TIME ON SITE." CP73. The 42 "time on site" charges were also restated in the invoice summary. CP 74. Each of the subsequent semi-monthly invoices contained equally clear itemized "time on site" charges. CP 82, 83, 94, 97, 110, 113, 124, 127, 142, 145, 158, 161, 172, 175, 178. The Eatonville office invoices had equally explicit "demurrage" charges. CP 181-195.

It was the responsibility of Jeff Warren, NWC's fleet manager, to review and approve (or reject) APP's invoices for payment pursuant to the contractual language quoted *supra*, on page 3 of this brief. CP 199-201; CP 213. The December 31 invoice, and each of the subsequent 6 semi-monthly invoices, were approved by Mr. Warren and paid, as were all of the Eatonville invoices containing "demurrage" charges. CP 37, 40; CP 202-203 (dep. Warren pp. 86-89). Warren had actual authority to approve

⁵ A detailed explanation of the process by which APP records and bills its fuel deliveries is set forth in the Declaration of Bertram, CP 33-36. His reference there to "Exhibit 2" is now to CP 50. Bertram declaration Exhibit 3 is now at CP 65.

the invoices. CP 213, 215-216. After receiving the December 31 invoice, Mr. Warren continued to place daily orders for fuel from January 3 (January 1 and 2 being holidays) through April 20, 2006. CP 213; CP 36; CP 65-195. See Appendix I.

NWC admits that the invoices were "perfectly adequate" to inform Mr. Warren of the time on site charges. CP 204. If Warren had "looked at the invoices the way [he is] supposed to look at them, [he] would have seen all of [the time on site charges]." CP 200-201. Mr. Perry's declaration states that when he was first told of the charges, his billing office was able to add up the total "time on site" charges. CP 291. Up until APP severed its relationship with NWC, neither Mr. Warren nor anyone else at NWC expressed to APP any question or objection regarding the invoices. CP 203-204, 37, 41, and 197. APP would not have continued to deliver fuel to NWC if NWC had refused to pay the "time on site" charges. CP 37.

NWC has now stated that it was company policy for Mr. Warren to "exercise discretion" to *not* review the details of invoices. NWC only expected Mr. Warren to look at the first and last pages of the invoices, to assure that the amount charged was "within the range of his expectation." CP 216-217. *NWC admits that as a result of NWC's policy of paying invoices in this manner, Associated Petroleum would have "no way of*

knowing that Northwest Cascade had any objection” to any of its charges.

CP 214-215.

On about April 14, Mr. Warren and Mr. Bertram had a meeting regarding the potential for APP to secure additional business from NWC. The meeting did not go well. At the conclusion of that meeting, Mr. Bertram gave NWC 2 weeks notice that APP would no longer sell fuel to NWC. Within a few days, Mr. Warren had secured an alternate supplier, and APP’s last delivery was on April 20, 2006. CP 37; CP 200, 202.

When Mr. Bertram gave notice of termination on April 14, APP’s final two invoices (April 1-15, and April 15-30) had not yet been issued. APP issued those final two invoices in the ordinary course. The April 15 invoice totaled \$11, 541.33, and included 41 separately itemized time on site charges, which totaled \$1,784.32. The final invoice, through the April 20 delivery, totaled \$2,125.06, including 1 time on site charge. (CP 37, 39-40; 42-43; 164-170). NWC refused to pay the last two invoices, claiming offsets for the “time on site” charges previously paid. CP 239, 274, 291.

III. ARGUMENT

A. Standard of Review

An order granting or denying a summary judgment is reviewed *de novo*. The appellate court engages in the same inquiry as the trial court.

This court will affirm summary judgment if no genuine issue of any material fact exists and the moving party is entitled to judgment as a matter of law. *Mountain Park Homeowners Ass'n, Inc. v. Tydings*, 125 Wash.2d 337, 341, 883 P.2d 1383 (1994).

The amount of an award for attorney's fees "is discretionary, and will be overturned only for manifest abuse of discretion." *Boeing Co. v. Sierracin Corp.*, 108 Wash.2d 38, 65, 738 P.2d 665 (1987).

B. Summary Judgment was Properly Granted

1. The Case is Controlled by the Rule of an "Account Stated"

Washington has adopted the doctrine of "account stated," per the Restatement (Second) of Contracts Section 282. See, *Sunnyside Valley Irrigation District v. Roza Irrigation District*, 124 Wn. 2d 312, 877 P.3d 1283 (1994). It is part of the common law of contracts in this state, and therefore applies in the sale of goods. RCW §§ 62A.2-102, 62A.2-103. Under the Restatement, 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." Quoting from prior cases, the *Sunnyside* court stated, at 315-316:

To impart to an account the character of an account stated it must be mutually agreed between the parties that the balance struck thereon is the correct amount due from the one party to the other on the final adjustment of their mutual dealings to which the account relates. The mere rendition of an account by one party to

another does not show an account stated. *There must be some form of assent* to the account, that is, *a definite acknowledgment of an indebtedness in a certain sum. . . . True, assent may be implied from the circumstances and acts of the parties, but it must appear in some form.* (Emphasis by court.)

An “account stated” is

an admission by each party of the facts asserted and a promise by the debtor to pay according to its terms... [T]his court defined an ‘account stated’ as an agreed balance between parties who have had previous dealings involving the payment of, or agreement to pay, money. Additionally, 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 Wash.2d 294, 822 P.2d 280 (1992).

[Emphasis added.]

While the fact of payment “does not, by itself, establish an account stated as a matter of law...*payment together with a failure to objectively manifest either protest or an intent to negotiate the sum at some future time, does establish an account stated*” as a matter of law. *Sunnyside, supra*, at 316, fn.1 [Emphasis added, citation omitted.] Under this rule, NWC’s *payment* of APP’s repeated billings, containing over 266 separately listed time on site charges, *without a hint of protest*, satisfies the requirement of assent as a matter of law.

Sunnyside v. Roza is indistinguishable from our case. Sunnyside sent Roza annual bills for Roza’s 50% share of maintenance costs on a system of drain channels. After paying several invoices, Roza complained

of poor maintenance and excessive fees. Roza refused to pay the next invoice. Just as in our case, Sunnyside sued Roza to recover for the last invoice, and Roza counterclaimed for recovery or offset of alleged overpayments on the prior invoices. The trial court partially granted Sunnyside's motion for summary judgment, holding that the doctrine of account stated barred Roza's counterclaims for alleged previous overpayments.

On appeal, the Court of Appeals reversed and remanded, holding that there was no "account stated," and reinstated Roza's counterclaims for earlier overpayments. Sunnyside appealed, and the Washington Supreme Court reversed again. The Washington Supreme Court reinstated the trial court's order granting summary judgment. The court held that the counterclaims for alleged past overpayments (made by paying invoices) *were barred, as a matter of law, by the doctrine of account stated*. The Court held that Roza's payments of the previous invoices, without any protest, compelled summary judgment in favor of Sunnyside. The Supreme Court stated, at 124 Wn. 2d 317,

Far from demonstrating that Roza persistently objected to the amounts billed, however, the evidence before the trial court was insufficient even to create a material question of fact as to whether payment of the bills was accompanied by objection. ...There was no evidence the payments were made under protest, or that Roza contested the bills even as it paid them.

NWC argues, at p. 10-16 of its brief, that "account stated" requires express "mutual assent," and therefore cannot apply if there is an issue of fact regarding whether NWC expressly agreed to the time on site charges. This argument was explicitly rejected by the court in *Sunnyside*, at p. 317-318:

The notion that an account stated can only be premised on an express mutual agreement to settle the account by payment of a stated sum misapprehends one of the functions of the doctrine, to permit the court to impute agreement to a party in the absence of explicit agreement about that sum.

To establish an account stated it is not essential to show there was an express "settlement" of an account or a "recalculation" of an amount to be paid. An account stated can result from delivery of a bank statement to which a depositor tacitly assents by holding it for a period of time without objection.

If an account stated can be created by the mere retention of a bank statement without protest, it follows with even greater force that an account stated may be created by the retention and payment of a bill without protest. Because Roza did not allege before the trial court that its payment of the bills between 1980 and 1984 was accompanied by protest, the trial court correctly concluded on summary judgment, under the facts before it, that the doctrine of account stated barred Roza's claims for that period. [Italics by the court. Underscoring added.]

"Account stated" determines the legal effect of NWC's repeated payment without protest while continuing to place nightly orders for fuel. There is no "question of fact as to whether [NWC's] payment of the bills was accompanied by objection. ...There was no evidence the payments were made under protest, or that [NWC] contested the bills even as it paid them," while continuing to order fuel on nightly basis *Sunnyside*, at 317.

Warren admits that he “reviewed all of those invoices and ...approved every one of them for payment.” Warren admits that “Northwest Cascade did not raise any objection to the [time on site] charge until after APP had elected to terminate future sales to Northwest Cascade” in mid April, 2006. CP 203-204. Perry admits that Associated Petroleum had “no way of knowing that Northwest Cascade had any objection” to the charges. CP 214-215. NWC paid not merely 5 invoices, as in Roza, but over 20 separate invoices with 280 separately itemized “time on site” and demurrage charges. Under the doctrine of “account stated,” NWC’s payment and lack of protest constitute “manifestation of assent” to the invoiced prices, as a matter of law. That manifestation of assent precludes NWC from now disputing the invoiced charges.⁶

Nor can NWC dispute the time on site charges in the last two, unpaid invoices which were the subject of the suit. There are several reasons why this is so, as a matter of law. “Once an account stated is

⁶ As the previous quote from *Sunnyside* (at 317-318) demonstrates, the doctrine of account stated does not depend on the existence of a dispute or an effort to compromise. In this respect, it is fundamentally different from “accord and satisfaction.” See Comment (a), Section 282 of the Restatement of Contracts (2nd), which states: “a. Computation not compromise or liquidation. If a debtor and a creditor make an agreement in the nature of a compromise or liquidation of a disputed or unliquidated debt, the agreement may be either a substituted contract or an accord resulting in discharge under the rules stated in §§ 279 and 280. If, however, they make an agreement in the nature of a computation rather than of compromise of the debt, the agreement is called an “account stated.” An account stated must be founded on previous transactions that have given rise to the relation of debtor and creditor *and is usually based on a number of items.*” [Emphasis added.]

established, it becomes” the contract. *Parrott Mechanical, Inc. v. Rude*, 118 Wn. App. 859, 865, 78 P.3d 1026 (2004). That is, the invoiced price, paid without objection, establishes the parties’ contract price. *Id.* Account stated “determines the amount of the debt,” or price. *Northwest Motors, supra*. So, the contract price for repeated fuel orders by NWC, invoiced and paid without protest, are governed by the invoices. This is so because payment without protest establishes an account stated, and an account stated defines the contract.

This rule has been applied in sales of goods, where the purchaser retains and orders goods with knowledge of the invoiced price. The invoiced price becomes the contract price. *Kothes v. Shagren*, 38 Wn.2d 52, 227 P.2d 446 (1951). The court stated, at p. 53-54;

When a buyer receives goods with knowledge of the price demanded by the seller, *or when such price is ...stated on a bill or invoice sent to the buyer*, he will ordinarily be bound to pay that price. This is because the price given represents that at which the seller is willing to sell, *and the acceptance of the goods without protest implies willingness to buy at that price.* [Emphasis added.]

This result is consistent with the hornbook law principle that contracts are defined by the objective manifestations of the parties, not their subjective intention. “This theory imputes an intention to a person which corresponds to the reasonable meaning of that person's words and

acts.” *Northwest Motors, Ltd. v. James, supra*, 118 Wash.2d at 302. In this case, the objective manifestations are unequivocal. (1) APP billed for “time on site” and “demurrage” when deliveries were requested to sites requiring less than 200 gallons. CP 65-195. (2) NWC paid the invoiced charges without protest. (3) NWC thereafter repeatedly placed additional fuel orders on a nightly basis, and repeatedly paid additional time on site charges without protest. The “account stated” defines the contract as: APP will bill and NWC will pay time on site charges. Associated Petroleum is entitled to summary judgment based on the doctrine of account stated is proper, as a matter of law. *Sunnyside, supra; Koths v. Shagren, supra*.

NWC asserts that it cannot be expected to review or understand APP’s “complex” invoices, so therefore payment of the invoices without protest cannot support a ruling based on account stated. NWC cites no case, and counsel for APP has found no case, holding that the application of the doctrine has a maximum page limit. An account stated “*is usually based on a number of items.*” See fn. 6, p. 15, *supra*.⁷

⁷ NWC’s brief does not suggest what information APP should have deleted from its invoices to render them less “complex,” yet still comply with NWC’s contract requirement that NWC need not pay until it received an invoice that was “complete and correct” and complied with CP 48. These “complex” invoices are really quite simple. They show the date and time of a transaction where fuel was delivered; the APP barcode number, corresponding to a specific piece of NWC equipment with NWC’s equipment number; that the delivery was on a job-site (“in yard”); the type of fuel (always diesel #2, or “DFH2”); the number of gallons delivered; the price (excluding tax) per gallon; the

2. The outcome is the same, whether viewed as a UCC sale of goods, or a service contract.

If this is not a contract for the sale of goods, as NWC argues (p. 15 of its brief) then one need look no further than *Sunnyside .v Roza, supra*, and the doctrine of account stated, for controlling authority.

Although NWC argues to the contrary, this was a contract for the sale of goods.⁸ There was no “service” involved in the disputed charge, other than the delivery of “goods,” i.e., fuel. It is a transaction in “goods.” This relationship is governed by Article 2. RCW 62A.2-102, RCW 62A.2-105. The imposition of a delivery charge where small quantities were requested does not alter the fundamental character of the contract: NWC ordered and APP delivered fuel. The fact that a charge may be made for delivery does not take a contract out of Article 2. Article 2 contemplates that the seller may render the service of delivering the goods,

total cost, excluding tax (“EXTAX”); the amount of applicable taxes; and the total charge for the transaction, including tax (“extended amount”). For “time on site” charges, the invoice shows the date and time of the site delivery where fewer than 200 gallons were delivered; the amount of time charged in half hour increments; a charge of \$40.00 per half hour; \$3.52 tax per \$40.00 charge; and a total charge of \$43.52 per half hour charge. See Mr. Bertram’s explanation, CP 33-35.

⁸ NWC repeatedly mentions, with no citation to a record, a “service” portion of the contract. NWC brief p. 5, 15, 19. Yet the invoices at issue (CP 65-179) contain *only* the following charges: (1) a price per gallon for diesel fuel; (2) applicable taxes; and (3) after December 15, 2005 and *only* where a delivery was requested to a site which required fewer than 200 gallons, a delivery charge of \$40 per half hour of “time on site.” CP 34-36, 65-179. The last item is disputed now.

and charge for that delivery. *See, e.g.*, RCW 62A.2-319 through RCW 62A.2-323. A purchase of a book is a sale of a book, whether it is purchased at a book store, or ordered from and shipped by Amazon.com. The character of the transaction does not change between a sale of goods and a service contract depending on whether the purchaser's order meets Amazon's threshold for free shipping.

Analyzed as a sale of goods, the common law rule of "account stated," and *Sunnyside v. Roza, supra*, will still control. Under the UCC,

Whether an agreement has legal consequences is determined by the provisions of this Title, if applicable; *otherwise by the law of contracts* (RCW 62A.1-103)." [Emphasis added.]

RCW 62A.1-102. The UCC preserves the common law of contract "unless displaced by the particular provisions of [Title 62A]." RCW 62A.1-103. The Washington Official Comment to § 1-103 states that the UCC "preserves the common law in Washington save where *in conflict* with legislation or contemporary mores." [Emphasis added.] *Nothing* in Article 2 displaces or conflicts with the doctrine of "account stated." It remains part of the contract law of the sale of goods in Washington. *Kohts v. Shagren, supra*.

Under Article 2, conduct by both parties will, *as a matter of law*, imply assent to certain terms. *See*, for example, RCW 62A.2-204(3); RCW 62A.2-207(2); RCW 62A.2-208. Thus, the UCC does not

eliminate, but rather directs particular attention to, the parties' actual conduct in determining the terms of their agreement. As stated in the Official Comment 1 to § 2-202, "the course of actual performance by the parties is considered the best indication of what they intended..." In this case, the undisputed conduct which implies assent to price, *as a matter of law*, is NWC's repeated payment and re-ordering, without protest, of prices invoiced by APP. *Sunnyside, supra; Koths, supra.*

3. Northwest Cascade did not make a "mistake" entitling it to relief.

It is truly a misnomer to call NWC's conscious policy decision to pay invoices without reviewing them a "mistake." CP 216-217; CP 204. The rule of "account stated" would be meaningless if NWC were permitted to rely on its "mistake" to avoid the rule. NWC's conduct is legally regarded as "conscious ignorance" from an "improvident act."

"A party who receives an account is bound to examine it." 1A C.J. S. Account Stated § 18. The Restatement of Contracts (Second), § 151, defines a "mistake" as a belief that is not in accord with the facts. The Comments to that section state,

[T]he word "mistake" is used to refer to an erroneous belief ...The word "mistake" is not used here, as it is sometimes used in common speech, to refer to an improvident act...

NWC's failure to review invoices before approving them for payment was not a "mistake," it was an "improvident act." Counsel for plaintiff has

found no case, and defendant has not cited any case, which would treat such conscious ignorance as a mistake entitling a party to relief. Ample authority, discussed below, rejects that notion.

Additional sections of the Restatement make clear that “conscious ignorance” by failing to review invoices is not a “mistake” entitling a party to relief. NWC’s reliance on Restatement of Contracts, § 157, to support its claim of mistake is without merit. Restatement (Second) § 154 describes when a party must bear the burden of its own “mistake”:

A party bears the risk of a mistake when ...

(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.

The Official Comments to Section 154 are particularly relevant.

The Drafters call NWC’s conduct “conscious ignorance.”

Conscious ignorance. Even though the mistaken party did not agree to bear the risk, he may have been aware when he made the contract that his knowledge with respect to the facts to which the mistake relates was limited. If he was not only so aware that his knowledge was limited but undertook to perform in the face of that awareness, he bears the risk of the mistake. It is sometimes said in such a situation that, in a sense, there was not mistake but “conscious ignorance.”

“Conscious ignorance” is present here. It was NWC’s conscious policy decision not to review invoices before paying them. Warren knew he was not reviewing the invoices. Mark Perry testified that Warren’s decision not to review even the summary of charges (*e.g.*, CP 231/CP74,

which would have disclosed the “time on site charges”) was company policy. CP 216-217. NWC therefore bears the risk of paying them without protest, especially where, as here, APP had “no way of knowing” that NWC was making this “mistake.” CP214-215.⁹

Official Comments to Restatement of Contracts (Second), § 282, specifically discussing “account stated,” dispel any doubt that failure to review an invoice before paying it without protest provides no basis for recovering money paid by “mistake.” Illustrations 2 and 3 state as follows:

2. 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 failure to credit B with a \$1,000 payment that was stolen by one of A's employees. B writes A that the statement is "correct" without verifying it, and the resulting delay in discovering the *mistake* prevents A from obtaining restitution from the employee. *B is precluded from showing the mistake.* B owes A \$5,500.

3. The facts being otherwise as stated in Illustration 2, B does not write A that the statement is "correct." B's retention of the statement for an unreasonable time is a manifestation of assent to it. B owes A \$5,500.” [Emphasis added.]

⁹ NWC's argument that APP should have known that NWC was paying the semi-monthly invoices by mistake is rendered even more curious by the fact that NWC has not disputed the Eatonville office invoices for “demurrage”. Those charges are not part of NWC's reduction of what it thinks it owes. See, CP 239, 279-280. NWC does not explain how APP should have known that 7 invoices (CP 65-162) were paid by “mistake,” while the 14 Eatonville invoices with identical charges (CP 181-195) were paid without mistake.

In the foregoing illustrations, the *seller mistakenly* included charges due to dishonest actions of *the seller's* own employee. Yet the “innocent” buyer is precluded from showing the mistake due to its delay in discovery. This principle, that delay in asserting a “mistake” precludes relief, applies with much greater force in our case. APP did not include any charge by mistake. It meant to charge every penny. NWC’s delay in discovering NWC’s “mistake” prevented APP from protecting itself and avoiding the present dispute. If objection had been made, the parties could have either resolved the disagreement, or terminated their relationship. APP continued to deliver fuel in reliance on NWC’s objective approval of the invoiced charges. Under the doctrine of account stated, NWC may not consume the fuel, pay for it without objection, repeatedly order and pay for more, and then after it has satiated its demand complain about the price. *Kohts v. Shagren, supra*.

Sunnyside v. Roza, supra, inherently rejected the defense of mistake that NWC asserts here. Roza had paid invoices without protest, and later claimed that it was improperly billed. That “defense,” that the charges that it paid were improper under the parties’ underlying agreement, did not preclude summary judgment based on account stated. *Payment without protest gives rise to account stated, as a matter of law. Sunnyside*, at fn. 1, p. 316.

Furthermore, to the extent that “mistake” could be a defense to “account stated,” the party asserting “mistake” may not do so “if with knowledge at hand [it] failed to ascertain the facts.” 1A *C.J.S. Account Stated*, § 47. (Restatement § 154, discussed *supra* at p. 21, is in accord.) Nor may a party assert “mistake” to the detriment of a party who has relied on the account as stated. *Id.* In our case, NWC had “knowledge at hand,” in the invoices, to ascertain APP’s charges. The invoices were “perfectly adequate” to inform NWC of the time on site charges. CP204. APP relied on NWC’s apparent approval and payment in continuing to deliver fuel. CP 37.

Even if one considers NWC’s repeated payment without protest, and its conscious policy to not review invoices, to be a “mistake,” NWC is still not entitled to recover money paid by mistake. “The general rule is that money paid under a mistake of fact may not be recovered where the mistake was not shared or suspected by the other party, and the other party is not charged with knowing of it.” *Loeb Rhoades, Hornblower & Co. v. Keene*, 28 Wn. App. 499, 500 (1981). In our case, *APP had no reason to know* that NWC was not performing its contractual right to review invoices to assure that they were “complete and correct. CP 214-215. APP had *no reason to know* that NWC was repeatedly ordering and paying for fuel by “mistake,” as opposed to being fully aware of the information

contained in the invoices. APP cannot be charged with knowledge of these “mistakes” by NWC, in the face of NWC’s repeated, objective manifestations of acceptance, as a matter of law, of the invoice terms.

NWC’s reliance on *Loeb Rhoades*, supra, is misplaced. In *Loeb*, a broker tried to change the price of stock after the seller had relied upon the stated price, and sold and delivered the stock. NWC’s argument that APP’s invoices “change” the price after the “bargain ...was made” (NWC brief pp.21-22) ignores the fundamental nature of “account stated.” “Account stated” defines the bargain, even in the absence of an agreement. *Sunnyside*. It “determines the amount of the debt,” *Northwest Motors, supra*, and establishes the price for the contract. *Parrot, supra*. It is NWC which now wants to change that price, after it made the bargain and continued to repeatedly order and consume the fuel that APP delivered.

Snap on Tools Corp. v. Roberts, 35 Wn. App. 32, 665 P.2d 417 (1983), discussed in a misleading fashion at p. 22-23 of NWC’s brief, does not support NWC’s position that NWC may assert its “unilateral mistake” as a basis for avoiding account stated. The term “account stated” does not appear in the *Snap-On* opinion, and the facts and issue were significantly different from our case. In *Snap-On*, a franchisor and franchisee agreed to terminate a franchise. The franchisor agreed to re-purchase the franchisee’s inventory at the current dealer (franchisee) cost. The

franchisor sent the franchisee a check based on the *franchisor's* erroneous calculation of the dealer cost. When the franchisor discovered *its own* miscalculation, it sent the franchisee a letter asking for the amount of the erroneous over payment. The franchisee refused to pay, and the franchisor sued *for unjust enrichment*. Both sides moved for summary judgment, and the trial court entered summary judgment *for the franchisee, based on accord and satisfaction*. On appeal, both sides acknowledged that reliance on accord and satisfaction was clearly error, as there had been no “compromise” of a disputed amount in arriving at the miscalculated value of inventory. Both sides had simply relied on the franchisor’s erroneous calculation. *Snap-On*, at p. 33-34.¹⁰ The franchisee asserted a right to keep the overpayment based on the claim that the termination agreement followed by the payment operated as a general release. The Court of Appeals rejected this assertion. The court held that the erroneous calculation was “obvious.” “ The ‘Recap’ of the order shows a unit price of \$13,180.79, a discount of 33 percent, and a dealer cost of \$13,177.79. The error is obvious.”¹¹ *Id.* *Snap-On* is not an “account stated” case. Had the franchisee sent an account purporting to be an accurate accounting to

¹⁰ (See foot note 6, *supra* this brief for the difference between “accord and satisfaction” and “account stated.”)

¹¹ \$13,180.79 less 33% is, by 5th grade arithmetic, is \$8,831.13, after rounding.

the franchisor, which the franchisor then paid without reviewing it, the doctrine might apply. But where the calculation sent to the franchisee with the check contained an obvious error in arithmetic, the court held that the franchisor's "unilateral mistake of fact may be grounds for relief if the other party knows or is charged with knowing of the mistake ... No party may retain money claiming ignorance of facts which are reasonably ascertainable and would alert that party to the mistake." *Id. at p. 35.* [citations omitted.] Since there was an issue of fact over whether the franchisee should have known of this "obvious" mistake by the franchisor in preparing the calculation, summary judgment was reversed.

Snap-On has no application to our case. APP's invoices accurately set forth the account on the basis of APP's intentions. APP's invoices did not contain charges submitted as a result of any mistake by APP. Nor was it "obvious" to APP that NWC was making a "mistake" in paying its invoices. NWC's argument that APP should have known of NWC's "mistake" is unsupported by any facts, and contradicts Mr. Perry's admission to the contrary. CP 214-215. "Arguments" unsupported by specific facts do not defeat summary judgment. CR 56(c).

Any "mistake" was solely NWC's mistake in paying the invoices without bothering to review them. NWC correctly states the law that one party to a contract is not bound by its unilateral mistake if the other party

knows of or is charged with knowledge of the mistake. *Gammel v. Diethelm*, 59 Wn. App. 272 (1992). This law does not help NWC in this case. Assuming NWC's failure to examine the invoices was a "mistake," rather than "conscious ignorance," NWC has candidly admitted that Associated Petroleum had "no way of knowing" that NWC was paying its invoices by mistake. APP did not include Time on Site charges by mistake. APP did not participate in or have any reason to know of NWC's unilateral "mistake" in failing to exercise its contractual right and legal duty to review the invoices. NWC's "conscious ignorance" is not chargeable to APP.¹²

NWC's assertion that its "mistake" was brought about by APP's "deceptive" act of "burying" the charges lacks factual or legal basis. NWC is in a poor position to complain about the length and detail of the invoices. NWC requested APP to make approximately 1,793¹³ deliveries to individual pieces of equipment between Dec. 16, 2005 and April 15, 2006. This number of transactions, combined with NWC's

¹² *Gill v. Waggoner*, 65 Wn. App. 272, 828 P.2d 55 (1992), discussed at p. 23 of NWC's brief, lends no support NWC's position. In *Gill*, an insurance adjuster offered an accident victim \$35,000.00 to settle a claim, and the offer was accepted. The insurer then claimed the offer was made by mistake, and it had only intended to offer \$3,500.00. The court held that the unilateral mistake by the insurer did not relieve it of its bargain. This case does not help NWC. APP had no reason to know that NWC was paying its invoices and continuing to order more fuel due to any "mistake."

¹³ Based on an actual count of the individual deliveries to each piece of equipment listed in CP 65-174.

requirement for "required information" (CP 48), demands many pages. NWC never voiced any objection to APP regarding the format or content of the invoices. CP 37, 41, 297, 204. Its complaints on appeal are baseless.

4. NWC is charged with the knowledge of and actions by its authorized agent, Jeff Warren.

NWC's brief asserts, with no citation to the record, that its CEO "Perry was the sole person authorized to modify the terms of the contract with Associated Petroleum." (NWC brief, p.2, Issue 3). There is no support in the record for this assertion, and the undisputed fact is that Mr. Warren was the only person with whom APP was to communicate and negotiate regarding any matters. CP 210-211. Mr. Warren was the sole person in NWC who had responsibility to review and approve APP's invoices for payment. CP 199-200, 213, 216. Thus, there is no issue of fact regarding Warren's authority to receive the communications which were admittedly given to him, including APP's plan to impose time on site charges and the invoices which contained the charges.

A principal is charged with knowledge of its agent when
the agent has

actual or apparent authority in connection with the subject matter
"either to receive it, to take action upon it, or to inform the
principal or some other agent who has duties in regard to it."

Denaxas v. Sandstone Court of Bellevue, LLC, 148 Wn. 2d 654, 666, 63 P.3d 125 (2003), quoting from *Roderick*, 29 Wash. App. 311, 627 P.2d 1352 (1981)(quoting *Restatement (Second) of Agency* § 268 cmt. c (1958)). In our case, Warren was the *sole contact* within NWC for Associated Petroleum. Any communication regarding their relationship was to go through Mr. Warren. CP 210-212. If communication from APP required Mr. Perry's consideration, it was Warren's responsibility to "bring it to" Perry for a decision. CP 213. Warren was also the sole person within NWC responsible for reviewing APP invoices. CP 213.

Thus, it is not disputed that Warren possessed the "authority in connection with the subject matter" sufficient to charge NWC with knowledge of the time on site charges in APP's invoices. *Denaxas, supra*.

"If a person exercising reasonable care could have known a fact, he or she is deemed to have had knowledge of that fact." *Denaxas*, at p. 677. Mr. Warren has admitted that "the invoices were perfectly adequate to inform [him] that they were imposing a time-on-site chare...if [he] had looked at them." CP 204. Warren and NWC are charged with knowledge of the imposition of those charges, after December 31, 2005, when Warren placed each one of the more than 100 additional nightly orders for fuel,

while continuing to pay repeated invoices containing the charges. NWC is contractually bound by those charges. *Sunnyside, supra*.

Whatever internal limitations NWC may have placed on Warren's authority to contract, they are not relevant on the question of NWC's knowledge of information in the invoices. Given Mr. Warren's position as APP's sole contact for communication with NWC, under *Denaxas* notice to Warren of the "time on site" fee will, as a matter of law, charge NWC with knowledge.

Denaxas, supra, held that a purchaser was charged with actual knowledge of information provided to his architect, without regard to whether the architect would have had authority to make or modify the underlying contract on behalf of the purchaser. Thus, regardless of whether Mr. Warren had actual authority to expressly renegotiate the terms of the contract with APP, the explanation of the charges given to Warren and delivery of the invoices to Warren charges NWC with knowledge of facts which may be ascertained from the invoices.

The *Denaxas* court also had this to say about the Purchaser's claim of ignorance and mistake with respect to details contained in a survey, which had been delivered to Purchaser's architect before closing a transaction: "Allowing Purchaser to avoid its contractual promises here would be rewarding *selective ignorance*. Purchaser had the survey several

months before closing, but Singleton did not review it. Had Singleton reviewed the survey, he would have noted [the information he claimed he lacked].” *Id.*, at 667. [Emphasis added.]

Our Supreme Court’s rejection of “selective ignorance” as a basis for relief parallels the Restatement’s rejection of “conscious ignorance” through “improvident acts,” discussed *ante* at p. 20-21. NWC’s claim that it did not know of the time on site charges, as it paid the invoices, is not a basis for relief, whether analyzed as “account stated,” “mistake,” lack of knowledge or authority by the necessary persons within NWC, or as selective or conscious ignorance.

5. The agreement between the parties was terminable at will. Imposition of “time on site” charges did not require NWC’s consent, or consideration.

NWC repeatedly argues that no modification to impose time on site charges could occur, because the parties had already agreed to a price of 20 cents per gallon above the published “rack” price. NWC characterizes this as a “fixed” price (NWC brief p. 19), although “the cost of each gallon varied daily.” CP 32-33, 286. NWC’s brief fails to cite to any portion of the record for its inherent argument that APP had agreed that it could not change the price. NWC has admitted that this initial agreement was terminable at will. CP 204-205, 214.

Since the agreement was terminable at will, it was modifiable unilaterally by APP. *See, e.g., Cascade Auto Glass, Inc. v. Progressive Casualty Insurance Company*, 135 Wn. App. 760, 768-769, 145 P.3d 1253 (2006):

[A] terminable-at-will contract *may be unilaterally modified*. *See Mayflower Air-Conditioners, Inc.*, 54 Wash.2d at 213, 339 P.2d 89; *see also Swalley v. Addressograph-Multigraph Corp.*, 158 F.2d 51, 54 (7th Cir.1946) (“Furthermore, since the contract was one terminable at the will of either party, it therefore could be modified at any time by either party as a condition of its continuance...” [Emphasis added.]

This law applies in sales of goods. *See, e.g., Mall Tool Co. v. Far West Equipment Co.*, 45 Wn. 2d 158, 273 P.2d 652 (1954). While *Mall Tool* is a pre UCC case, nothing in the UCC modifies the rule in that case. *Mall Tool* holds that when a sales contract is terminable at will, the seller may unilaterally “announce” a price change. The buyer’s continued orders thereafter constitute acceptance of the announced new price.

The agreement is terminable at will, Mall [the seller] could at any time propose a modification thereof as a condition of its continuance. [citations omitted.] When a modification was proposed (to use a more euphemistic expression than the realistic ‘announced’) by Mall, Far West had the choice of accepting the modification or refusing to accept it, knowing that refusal would mean termination. [Citations omitted.]

Id., at 162-163. In our case, NWC’s continued orders, with knowledge of and ongoing payment of 280 invoiced time on site/demurrage charges

between December 16 and April 18, constituted acceptance of the invoiced price. *Mall Tool, supra; Sunnyside, supra; Cascade Auto Glass, supra; Koths, supra*. Under this rule, Mr. Warren's purported "rejection" of APP's announced price change for small orders is of no legal significance. NWC could either accept the change by continuing to do business, or stop placing orders. Warren's "rejection," assuming it was stated, could not trump APP's announced intention to impose the charge, particularly when NWC repeatedly placed orders while it paid invoices without protest.

NWC argues that APP could not modify the original price, unless APP either furnished additional consideration, or first terminated the contract. NWC brief, pp. 11-13. This is an inaccurate statement of the law. If the contract in this case is viewed as a service contract, it was terminable at will and therefore it was therefore modifiable at will, and without consideration other than future performance. *Cascade Auto Glass, supra*. If analyzed as an Article 2 sales contract, no "technicalities" such as NWC argues ("you must terminate before you can modify," NWC brief p. 11; or APP had to provide consideration, NWC brief p. 13) are required. The UCC covers this explicitly: "An agreement modifying a contract within this Article needs no consideration to be binding." RCW 62A.2-209(1). Official Comment 1 to this section states:

This section seeks to protect and make effective all necessary and desirable modifications of sales contracts *without regard to the technicalities* which at present hamper such adjustments. [Emphasis added.]

Viewed as a contract for sale of goods, neither consideration nor technical termination is required for APP to change its prices, or for application of the doctrine of account stated. *See, e.g., Sunnyside, supra. Mall Tool Co. v. Far West Equipment Co, supra.* The UCC has not abrogated the common law rule of unilateral modification of contracts that are terminable at will. That rule is the same, whether the contract is one for goods or services. *Cascade Auto Glass, supra; Mall Tool, supra.* Cases which require consideration to modify executory contracts which are *not* terminable at will, such as *Rosellini v. Banchemo*, 83 Wn. 2d 268, 517 P.2d 955 (1974), cited by NWC at p. 11 of its brief, have no application to a contract terminable at will, nor to *any* contract within Article 2. In the case at bar, APP's continued performance under the modified terms is sufficient consideration. While some cases have applied a different rule in employment contracts, *Cascade Auto Glass* and *Mall Tool* are the controlling law with respect to either the sale, or "service" of delivering, fuel.

NWC's argument (page 13 of its brief) that all that APP did was perform under the original contract, and therefore the original contract

remains in force (i.e., no time on site charges) is unsound and illogical. The original contract was always terminable at will, and APP was under no continuing obligation to sell at the same price for any length of time, or to do business with NWC at all. In addition, *neither party performed per the original agreement. APP billed, and NWC paid without protest or reservation, almost 300 separate charges for "time on site" and demurrage.* When NWC paid the time on site charges, and repeatedly ordered and paid again, NWC was paying and performing *under the new contract.* That is the definition of "account stated": the payment of invoices without protest establishes an account stated as a matter of law, and that account stated is the contract. *Sunnyside, supra;* and *Parrott Mechanical, Inc. v. Rude, supra.*

NWC argues that APP must show express mutual assent to establish a new contract in order for APP to recover. NWC brief, page 10-14. *NWC has it backwards. To escape summary judgment, NWC must show that it objectively manifested a protest at the time it paid APP's invoices! Sunnyside v. Roza, supra.* NWC simply does not understand the doctrine of account stated. *APP is not contending,* for purposes of this motion, that Jeff Warren's statement at the December 2, 2005 meeting that he "didn't have a problem" with APP's stated intention to impose a Time on Site charge was an objective assent. *APP does contend,* as our State

Supreme Court held in *Sunnyside v. Roza*, that *NWC's subsequent payment of the invoices "together with a failure to objectively manifest either protest or intent to negotiate the sum at some time in the future" establishes an account stated as a matter of law and requires summary judgment.*

6. Alternate theory presented to the trial court also supports summary judgment.

A parallel theory presented to the trial court also compels summary judgment, based on the undisputed facts in this case. *Goodliffe & Son v. Odzer*, 423 A. 2d 1032 (Pa. Super. 1980), is a very similar case to ours. *Goodliffe* does not expressly rely upon the doctrine of "account stated, but its holding is completely consistent with the doctrine,

In *Goodliffe*, a paragraph in a gas distributor's proposed written contract contained a demurrage charge. That paragraph was stricken out by the buyer before the parties signed it. *Id.* at 1033. The contract prohibited any modification except by a written instrument signed by the buyer and the seller. Nevertheless, the seller contended that a few months after the contract was signed the parties orally agreed to a demurrage charge, and subsequent invoices contained demurrage charges. The buyer paid the invoices without protest. Just as in our case, eventually the parties parted ways, and the buyer tried to offset the demurrage charges

which he claimed were paid by “mistake” against unpaid charges. The seller sued. The buyer denied that there was any agreement to modify the written contract. The trial court ruled in plaintiff’s favor. On appeal, the court held that the alleged oral agreement to the demurrage charge was *ineffective* to modify the contract, pursuant to UCC § 2-209(2). (“A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded...”) Nevertheless, the court held that the “hundreds of transactions in which appellee charged and appellant paid demurrage” constituted a “waiver” of the non-modification clause under 9-209(4), notwithstanding that *the written contract between the parties had specifically excluded demurrage charges, and specifically excluded any modification except by a written agreement signed by an authorized agent of the buyer and the seller!* *Id.* at 1035. Although the court’s analysis in *Goodliffe* focused on “course of performance” and “waiver” under UCC §§ 2-208 and 2-209, “account stated” provides an equally compelling and controlling route to the same conclusion. Application of “account stated” in our case does not require APP to overcome express written exclusions of either demurrage charges or unsigned modifications.

When NWC paid the invoices of Dec. 31, January 15 & 31, February 15 and 28, and March 15 and 31, as well as the Eatonville

invoices, NWC's objective manifestation of assent to the invoiced charges permitted APP to believe that its invoices had been determined to be "complete and correct," and accepted by NWC. NWC's payment without protest deprived APP of any opportunity to protect itself from the consequences of NWC's tardy objection, were that tardy objection allowed. Whether viewed as an "account stated," course of performance, or retention of goods with knowledge of the invoiced price, the result is the same. The doctrine of account stated "imputes agreement to a party" as a matter of law, where there is payment coupled with a failure to object. *Sunnyside, supra*, at p. 317-318. APP's invoiced price "represents that at which the seller is willing to sell, *and the acceptance of the goods without protest implies willingness to buy at that price.*" *Kohts, supra*. The undisputed course of performance, consisting of "hundreds of transactions in which [APP] charged and [NWC] paid demurrage" establishes the contract by course of performance. All three theories lead to the same result, under the undisputed facts.

7. NWC's authorities are not relevant.

NWC relies on *Tacoma Fixture Company, Inc., v. Rudd Company, Inc.*, 142 Wash. App. 547, 174 P.3d 721 (2008), to argue that payment of invoices may not establish the *price* of a contract. The case does not support NWC. *Tacoma Fixture* involved the common occurrence of an

oral order, followed by insertion of additional terms in confirmation documents sent after the contract was formed. The case did not involve a dispute over price. In *Tacoma Fixture*, the purported new term was an attempt to disclaim the otherwise implied warranty of merchantability. This attempt is governed expressly by RCW 62A.2-207(2)(b) and its Official Comment 4: a clause negating an implied warranty of merchantability is a "material alteration," and therefore may not be effectively inserted in a confirmation of acceptance, nor implied by failure to object.

The rule in *Tacoma Fixture* is simple: the UCC requires express assent to a disclaimer of implied warranties. *Tacoma Fixture* does *not* involve the rule of account stated, which fixes the amount due from payment of an invoice without protest.¹⁴ Except in the limited circumstances covered by RCW 62A.2-207(2)(a) and (b), failure to object to confirmatory terms in invoices *has* legal consequences, whether in a sales or service contract. *Hunt-Wesson Foods, Inc. v. Marubeni Alaska Seafoods, Inc.*, 23 Wash. App. 193, 197, 596 P.2d 666 (1979) (failure to object to confirmation of order describing 500 metric tons of cottonseed

¹⁴ Unlike a disclaimer of an implied warranty, which requires mutual assent to be binding under the UCC, a contract may be made between the parties even when there is *no agreement* on price. RCW 62A. 2-204; RCW 62A.2-305. One method of fixing the price, as a matter of law, is payment of an invoice without protest. *Sunnyside, supra*.

oil obligated purchaser to that quantity); *Puget Sound Financial, LLC v. Unisearch, Inc.*, 146 Wn.2d 428, 47 P.3d 840 (2002) (limitation of liability included in invoices for *services* held enforceable as a matter of law in summary judgment); *Kohts v. Shagren, supra* (payment and retention of invoiced without protest establishes invoiced price). It is worth recalling here that the UCC “preserves the common law in Washington save where *in conflict* with legislation or contemporary mores.” See discussion *ante*, pp. 19-20.

Ferrer v. Taft Structural, Inc. 21 Wn.App. 832, 587 P.2d 177(1978), cited at p. 15 of NWC’s brief, held that a subcontractor could not unilaterally change the amount of its bid, after the bid had been relied up on by the general contractor in securing the main contract. The Court of Appeals held that the subcontractor’s bid was enforceable by promissory estoppel, and that the general contractor had not agreed to the sub’s tardy attempt to change the bid price. This case has no relevance to a seller’s right to announce a change in price, and the buyer’s acceptance of that new price as a matter of law when it repeatedly pays the invoiced price without protest and proceeds to order additional goods.

NWC incorrectly asserts that APP is attempting to rely on a “course of dealing” to “override the express terms of a contract.” NWC further argues that the parties’ “conduct cannot create a new obligation,”

citing *Badgett v. Security State Bank*, 116 Wn. 2d 563, 807 P.2d 356 (1991). NWC brief, pp. 15-16. NWC's argument is misguided in several respects. First, there are no "express terms" of this "terminable at will" arrangement which are inconsistent with the imposition of the "time on site" charge. Nor is APP attempting to override any express terms by a "course of dealing." *Cf.*, RWC 62A.2-105(4). Second, NWC's argument is inherently contradictory. NWC asserts that it had a single contract which could not be modified without its assent. "Course of dealing" involves a "sequence of *previous*" conduct, in prior transactions. RCW 62A.1-205(1). A "course of *performance*" arises when "the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance *and opportunity for objection to it* by the other..." RCW 62A.2-208(1). NWC's theory of continuing performance under a single contract, which is also APP's view of their relationship, involves a "course of performance" analysis, not a "course of dealing." "Course of performance" may modify or add to the terms of the prior agreement.¹⁵ *Goodliffe & Sons, supra*. One "course of

¹⁵ 1 White & Summers, *Uniform Commercial Code*, Section 3-3 (4th Ed.) discussed the difference between these two concepts.

Course of performance ...differs from course of dealing. For example, a course of dealing is a sequence of conduct between the parties prior to entering into a particular agreement whereas course of performance arises subsequent to entry into the agreement. While the difference appears clear, both courts and lawyers occasionally err....[A course of performance] *may add to the express terms of the agreement*. This is

performance” which establishes a contract, as a matter of law, is the sale of goods, followed by an invoice setting forth the price, followed by payment without protest. *Sunnyside, supra; Koths v. Shagren, supra.*

Badgett v. Security State Bank, supra, does not support NWC. In that case, a borrower defaulted on a loan. The borrower tried to persuade the bank to modify the loan, but the bank refused. The borrowers contended on appeal that “the Bank was obligated by the duty of good faith . . . to affirmatively cooperate with them in their efforts to . . . restructure their loan.” *Id.*, at 116 Wn. 2d 359-360. The Washington Supreme Court held that the Bank was under no duty to modify the terms of its agreement. The case does not hold, as NWC contends, that a seller may not announce a new price, or that the parties’ conduct may not establish additional terms, or that payment of an invoice without protest will not establish an account stated, or that retention of invoiced goods will not establish the invoice price. *Mall Tool, supra, Cascade Auto*

so even where the contract is unambiguous and complete on its face.”
[Emphasis added.]

See also, Battle Creek State Bank v. Haake, 587 NW 2d 83, 91 (NE, 1998), stating, Section 1-205(4) is properly applied to the *preagreement* course of dealing between the parties, whereas Section 2-208(3) has more relevant application to the parties’ *postagreement* course of performance.” [Emphasis by court.]¹⁵

A course of performance which is acquiesced in may establish or modify the parties’ agreement. RCW 62A.2-208(3); 1-201. The course of performance may add terms, or modify terms. *Id.* The acquiescence need not be deliberate, and the UCC does not make the effect of acquiescence depend on whether or not the acquiescence was by “mistake,” or conscious and deliberate.

Glass, supra, Sunnyside, supra, Koths, supra, and RCW 62A.2-208 compel rejection of NWC's argument.

C. The trial court properly disregarded and ordered stricken portions of Mark Perry's "Declaration."

The trial court ordered stricken (CP 308) very limited portions of Mr. Perry's "declaration." The court struck Mr. Perry's assertion of what Mr. Warren, the sole NWC contact with APP, did or did not agree to. CP 291, lines 15-16. The court also struck Perry's reference to his pre-suit offer to pay half of APP's time on site charges. CP 291, line 23-24. The former statement by Perry is inadmissible hearsay, and lacking in personal knowledge. Since Perry never participated in direct discussions with APP, he has no basis for knowing what Mr. Warren did or did not agree to, or what might have been "clearly explained" to Mr. Warren. CP 291. The latter comment regarding the pre-suit offer to compromise is irrelevant, and does not tend to prove or disprove whether NWC is indebted to APP, or for how much.¹⁶ Both comments were properly stricken. An affidavit submitted on summary judgment must be made on personal knowledge,

¹⁶ The court did not strike, but called "inadmissible legal opinion" Mr. Perry's statement regarding assertion that NWC "should not have had to review" APP's invoices (CP 292, CP308) The legal opinion should have been stricken. *King County Fire Protection Dist's No. 16, No. 36 v. Housing Authority of King County*, 123 Wn. 2d 819, 872 P.2d 516 (1994).

set forth admissible evidentiary facts, and affirmatively show that the affiant is competent to testify to the matters stated therein. *McKee v. Am. Home Prod. Corp.*, 113 Wn.2d 701, 706, 782 P.2d 1045 (1989).

The trial court's order disregarding Mr. Perry's declaration may be affirmed on another basis. The declaration is not signed and dated so as to be admissible. CP 275 (not signed or dated), 292 (not dated). RCW 9A.72.085 requires that a declaration must, among other requirements, state "the *date* and place of its execution." [Emphasis added.] The trial court's order may be affirmed on that basis, too. *Plein v. Lackey*, 149 Wn.2d 214, 222, 67 P.3d 1061 (2003).

D. The trial court properly awarded attorneys' fees.

"The standard of review of a fee award is manifest abuse of discretion. Accordingly, the scope of appellate review is narrow." *Fisher Properties, Inc. v. Arden-Mayfair, Inc.*, 115 Wash.2d 364, 375, 798 P.2d 799 (1990)(citation omitted). An award is properly based on a calculation of the reasonable time spent multiplied by the attorney's reasonable hourly rate. *Id. See also, Mahler v. Szucs*, 135 Wash.2d 398, 434, 957 P.2d 632 (1998).

In the case at bar, the contract provides for recovery of "reasonable attorneys' fees plus all attendant collection costs..." CP 46 (Purchase

Agreement, paragraph 3). APP's counsel submitted detailed records of its time and expenses. CP310-329. This record demonstrates, at CP 311, that (1) APP's counsel billed at an "extremely low" rate for an attorney of similar ability and experience; (2) attorneys in NWC's law firm charge at a rate approximately 50% higher; and (3) APP's counsel did not even charge for numerous entries. That record is not contested. Thus, the requirement that the rate be reasonable and supported by an adequate record is met.

NWC has challenged very few entries regarding the reasonableness of the number of hours. NWC's challenges reflect ignorance of relationship of those charges to the case. NWC challenges as "unrelated fees" the entries on 1/22, 5/29, 6/11 and 6/12, all 2007.¹⁷ In the court below, NWC labeled these entries as "charges related to a separate project (Eatonville) between plaintiff and defendant" CP 335. NWC counsel fails to understand that the Eatonville invoices are part of this case, this motion and this appeal. *See*, CP 181-195, CP 36-37, CP 40, all referencing invoices for "demurrage" charges invoiced by APP's Eatonville office after December 15, 2005 and paid by NWC. *See*, discussion *ante*, this brief, at pp. 6-8, 38-39, and fn 9 at p. 22 *ante*.

¹⁷ The challenged entries are CP 326, "ref # 52"; CP 327 ref. # 104; 328 ref. # 108.

NWC challenged entries for researching a spoliation issue on 1/4, 1/22 and 8/29.¹⁸ CP 335. In its brief (p. 30) NWC says this time is “related to a claim on which plaintiff did not prevail.” That is an astounding assertion, given that the case never was tried. Nevertheless, research on an issue that would arise at trial was reasonable, both at the arbitration level, and at the *de novo* trial should it be held. The fact that APP prevailed on summary judgment does not mean that it was not reasonable for counsel to briefly research issues that would arise at arbitration, or at trial.

NWC challenges fees related to the weather at the December 2 meeting. At the arbitration, and if the case had to be tried, Warren’s credibility and memory of what occurred at the meeting on December 2 was an issue. Mr. Warren testified in his deposition that he could remember nothing remarkable about the weather, and that his co-worker attended the meeting. Bertram and Gregory both testified that it snowed heavily, and that Mr. Warren’s co-worker was not in attendance during

¹⁸ Spoliation entries are at CP 323; 326 ref. # 50; and 328 ref. # 122. The spoliation research concerned NWC’s inability to produce a copy of the first “time on site” invoice which Warren approved (the Dec. 31, 2005 invoice). NWC’s copy of the invoice which Warren physically approved would be interesting, as perhaps it would contain evidence that he observed and noted the long list of time on site charges at CP 73, or at CP 74.

the meeting because she could not make it to work due to the heavy snow. Finding evidence of the weather was an appropriate investigation.¹⁹

The award of fees was based on an adequate record of reasonable time and rates. That award may be disturbed only for a “manifest abuse of discretion”, which is not present. *Fisher Properties, Inc., supra.*

E. Associated Petroleum is entitled to an award for its attorneys fees and expense on appeal.

Pursuant to the contract (paragraph 3, CP 46), APP is entitled to its reasonable fees and expense on appeal. RAP 18.1(a), RAP 14.2.

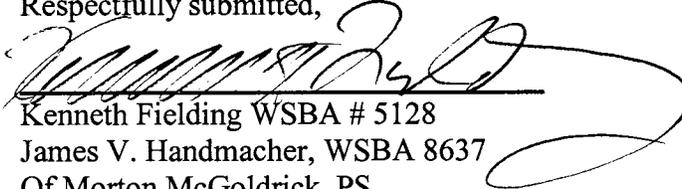
IV. CONCLUSIONS

The trial court properly determined that there was no issue of material fact. NWC repeatedly paid APP’s invoices containing clearly identified “time on site” and “demurrage” charges, without any protest. APP had “no way of knowing” that NWC was paying the invoices by mistake. NWC’s failure to review the invoices without paying them is not a “mistake” entitling NWC to any relief.

¹⁹ Although the discussion of weather is not documented in the record before this court, Warren’s lack of memory is documented. *See, e.g.*, CP 287 (“I could not recall any such meeting...Now...I do recall the meeting”); CP 286 (“This meeting did not stand out in my mind...”); CP 216 (Warren told Perry “he had so many meetings with [APP] that he couldn’t remember ...what was discussed or not...”).CP 216 If credibility were to be an issue at trial, Warren’s ability to remember details of the meeting is appropriate cross-examination.

The trial court properly awarded all of the “extremely low” fees charged by APP’s counsel, APP is entitled to its reasonable fees and expenses on appeal.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "James V. Handmacher", is written over a horizontal line. The signature is stylized and extends to the right of the line.

Kenneth Fielding WSBA # 5128
James V. Handmacher, WSBA 8637
Of Morton McGoldrick, PS
Attorneys for Respondent

APPENDIX

Invoice Date	Number of Separately Listed Time on Site Charges	Total \$ Amount of Time on Site Charges in the Invoice	Total Amount of Invoice	Status of Invoice When Suit was Filed
Dec. 31, 2005	42 (CP 73, 74)	\$ 1,827.84	\$ 7,426.38	Approved Paid in full
January 15, 2006	26 (CP 82, 83)	\$ 1,131.52	\$ 4,444.17	Approved Paid in full
January 31, 2006	43 (CP 94, 97)	\$ 1,871.36	\$16,512.88	Approved Paid in full
Feb. 15, 2006	45 CP 110, 113)	\$ 1,958.40	\$ 16,524.93	Approved Paid in full
Feb. 28, 2006	28 CP 124, 127)	\$ 1,218.56	\$ 17,857.17	Approved Paid in full
March 15, 2006	39 (CP142, 145)	\$ 1,697.28	\$ 25,118.29	Approved Paid in full
March 31, 2006	43 (CP 158, 161)	\$ 1,871.36	\$ 19,707.60	Approved Paid in full
TOTAL PAID through 3/31 invoice	266 (CP 73-162)	\$11,576.32	\$107,591.42	Approved and Paid IN FULL
April 15, 2006	41 (CP 172, 175)	\$ 1,784.32	\$ 11,541.33	UNPAID
April 30, 2006	1 (CP 178)	\$ 43.52	\$ 2,125.04	UNPAID
Amount Owed when suit was filed	CP 164-179	\$ 1,827.84	\$ 13,666.37 (not including interest and attorney's fees)	UNPAID