

STATE OF MICHIGAN
IN THE SUPREME COURT

On appeal from the Court of Appeals, Owens, P.J., Meter and O'Connell, JJ.

FISHER SAND AND GRAVEL COMPANY,

Plaintiff-Appellant,

vs.

NEAL A. SWEEBE, INC.,

Defendant-Appellee.

Supreme Court No. 143374

Court of Appeals No. 297156

Midland County Circuit Court
No. 09-005960-CK-B

**BRIEF *AMICUS CURIAE* OF
MICHIGAN CREDITORS BAR ASSOCIATION**

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STATEMENT OF QUESTIONS PRESENTED

- I. IS AN ACCOUNT STATED AN INDEPENDENT CAUSE OF ACTION GOVERNED BY THE GENERAL SIX-YEAR STATUTE OF LIMITATIONS FOR BREACH OF CONTRACT IN MCL 600.5807(8) EVEN IF THE ORIGINAL CHARGES UNDERLYING THE ACCOUNT STATED INVOLVED THE SALE OF GOODS?

Plaintiff-Appellant answers "Yes."

Defendant-Appellee answers "No."

The Court of Appeals answered "No."

Amicus Curiae Michigan Creditors Bar Association ("MCBA") answers "Yes."

- II. IS PLAINTIFF'S CLAIM ON A MUTUAL AND OPEN ACCOUNT AN INDEPENDENT CAUSE OF ACTION GOVERNED BY THE GENERAL SIX-YEAR STATUTE OF LIMITATIONS UNDER MCL 600.5807(8)?

Plaintiff-Appellant answers "Yes."

Defendant-Appellee answers "No."

The Court of Appeals answered "No."

Amicus Curiae MCBA answers "Yes."

- III. DID PLAINTIFF HAVE A VIABLE AND TIMELY ACTION ON THE ACCOUNT INDEBTEDNESS OWING BY DEFENDANT BASED ON THE CONTENTION THAT DEFENDANT MADE A PAYMENT OF MAY 13, 2005 ON THE ACCOUNT?

Plaintiff-Appellant answers "Yes."

Defendant-Appellee answers "No."

The Court of Appeals answered "No."

Amicus Curiae MCBA answers "Yes."

AUTHORITY FOR FILING BRIEF *AMICUS CURIAE*

This Court granted leave for the Michigan Creditors Bar Association to file a brief *amicus curiae* in this appeal in its Order of May 4, 2012 granting Plaintiff-Appellant's application for leave to appeal.

STATEMENT OF *AMICUS CURIAE* INTEREST

The Michigan Creditors Bar Association ("MCBA") is a special purpose bar association recognized by the State Bar of Michigan. It is a non-profit Michigan corporation founded in 1994. It is an organization of 50 Michigan-based law firms that represent hundreds of creditors, including Target Corporation, Discover Bank, Capital One, Citigroup, and Ford Financial. The member firms file thousands of lawsuits annually to collect millions of dollars of debt owed to their clients.

In the collection cases filed by them, the member firms of MCBA frequently sue on the theories of open account and account stated under Michigan law and have generally regarded the statute of limitations as allowing the creditor six years from the date of the last activity on the account or of the stating of the account in which to file suit, regardless of whether the underlying transactions involve the sale of goods or other contract claim. In the view of MCBA, the decision of the Court of Appeals inappropriately upsets long-standing Michigan law by holding that a four-year statute of limitations under Article 2 of the Uniform Commercial Code applies to suits on an open account or an account stated if the underlying charges involve the sale of goods.

MCBA and its members believe that the correct and most workable rule to follow for claims on an open account and account stated is uniformly to apply the six-year statute of limitations to all such claims. Adhering to the six-year limitations period will avoid difficulties for MCBA's creditor clients in determining which accounts are governed by the six-year

limitations period and which by the four-year limitations period. Applying the six-year limitations period will also avoid disappointing the expectations of creditors who have relied upon the widely-held belief that a creditor has six years in which to sue on an open account or account stated.

For these reasons, MCBA and its members have a strong interest in the issues presented here.

STATEMENT OF THE STANDARDS OF REVIEW

Appellate review of a summary disposition ruling involving limitations issues is de novo. *Grimes v Dep't of Transportation*, 475 Mich 72, 76; 715 NW2d 275 (2006). In the absence of disputed facts, this Court also reviews de novo whether a cause of action is barred by the applicable statute of limitations. *Joliet v Pitoniak*, 475 Mich 30, 35; 715 NW2d 60 (2006).

Any well-pleaded fact in the plaintiff's complaint is assumed to be true unless specifically challenged by movant's presentation of admissible evidence, backed by an affidavit or other documentation, challenging plaintiff's ability to adduce supporting evidence for some indispensable element of its claim. MCR 2.116(G)(5); *Patterson v Kleiman*, 447 Mich 429, 434 n 6; 526 NW2d 879 (1994); *Smith v Kowalski*, 223 Mich App 610, 616; 567 NW2d 463 (1997); *Gortney v Norfolk & W R Co*, 216 Mich App 535, 538-539; 549 NW2d 612 (1996).

The construction and application of statutes of limitations constitute matters of law to be resolved by this Court de novo. *Grimes, supra*, 475 Mich at 76; *Collins v Comerica Bank*, 468 Mich 628, 631; 664 NW2d 713 (2003); *Bambino v Dunn*, 166 Mich App 723, 731-732; 420 NW2d 866 (1988). The primary goal of statutory interpretation is to give effect to the Legislature's intent, focusing first on the statute's plain language. *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). "The words of a statute provide 'the most reliable

evidence of its intent....’ ” *Id.*, quoting *United States v Turkette*, 452 US 576, 593; 101 S Ct 2524; 69 L Ed 2d 246 (1981). When construing a statute, a court must read it as a whole. *People v Jackson*, 487 Mich 783, 791; 790 NW2d 340 (2010).

JUDGMENT OR ORDER APPEALED FROM AND RELIEF SOUGHT

In this matter, Plaintiff-Appellant Fisher Gravel and Sand Company is appealing the opinion of the Michigan Court of Appeals dated June 7, 2011, which affirmed the decision of the Midland County Circuit Court dismissing Plaintiff-Appellant’s claims on account stated and open account against Defendant-Appellee Neal A. Sweebe, Inc. on statute of limitations grounds pursuant to Defendant’s motion for summary disposition.

Amicus Curiae, MCBA, requests that this Court reverse the decision of the Court of Appeals and hold that Plaintiff-Appellant’s causes of action for account stated and open account were timely filed under the six-year general statute of limitations applicable to claims for breach of contract.

STATEMENT OF FACTS

Amicus Curiae, the Michigan Creditors Bar Association, for its Statement of Facts adopts the statement of facts set forth in the Appellant's Brief of Plaintiff-Appellant, Fisher Sand & Gravel Company Company ("Fisher").

Amicus Curiae MCBA briefly summarizes here the most salient facts from Fisher's brief. Fisher supplied goods and materials to Defendant-Appellee Neal Sweebe, Inc. ("Sweebe") starting around October 30, 1991. Sweebe never paid in full for any of the materials it received, but Fisher kept an open account and sent regular statements of account, none of which were ever objected to by Sweebe or claimed to be inaccurate. The final balance due was \$93,182.55 (Exhibit 3 to Fisher's brief in opposition to motion for summary disposition in the trial court, p. 5; Appellant's Appendix p. 60a).

After December 31, 2002, Sweebe acquired less new product than previously, making four purchases in 2003 and ten in 2004. On May 9, 2005, Sweebe acquired a small amount of sand and gravel, for which the charge was \$152.98. On May 13, 2005, Sweebe made a payment of \$152.98 by its check no. 1228, without specifying that the payment was to be applied only to the new charge incurred on May 9 or that the payment could not be applied on Sweebe's open account with Fisher. Fisher credited the undesignated payment against the open account that it maintained with respect to Sweebe.

At some time subsequent to May 13, 2005, Sweebe broke off dealings with Fisher with a substantial balance of \$93,182.55 remaining due from Sweebe according to the account records of Fisher. The present lawsuit was commenced by Fisher against Sweebe in the Midland County Circuit Court on August 13, 2009 and seeks payment on an open account and account stated for deliveries of sand, gravel, and cement (Register of Actions, Item #1; Appellant's Appendix,

p. 1a). The complaint was amended on October 29, 2009 (Register of Actions, Item #27). Sweebe filed its motion for summary disposition, based on the statute of limitations, on November 12, 2009 (Register of Actions, Items #35-37); Fisher answered the motion on December 3, 2009 (Register of Actions, Item #38).

Oral argument on the motion for summary disposition was heard on December 11, 2009 (Register of Actions, Item #41). On February 18, 2010, Midland Circuit Judge Michael J. Beale issued an opinion (Register of Actions, Item #42), ruling that the four-year limitations period of MCL 440.2725(1) applied to all claims, whether for breach of contract, account stated, or open account, and thus that the action was barred. In the opinion, the trial judge rejected Fisher's argument that open account and account stated claims were not governed by statute of limitations for breaches of contracts for sale of goods in Article 2 of the Michigan Uniform Commercial Code, but instead by the six-year statute of limitations for breaches of contract generally. The trial judge also ruled that the May 13, 2005 payment "was a disconnected event" and that the "mutual and open account relationship had essentially ended on that date" (trial court opinion, p. 7; Appellant's Appendix p. 18a). A judgment of no cause for action, taxing costs of \$60 in favor of Sweebe was entered on March 3, 2010 (Register of Actions, Item #45).

Fisher then filed a timely appeal of right with the Court of Appeals on March 23, 2010. On June 7, 2011, the Court of Appeals issued a split decision affirming the trial court's dismissal of Fisher's claims on the basis of the statute of limitations in MCL 440.2725(1). The majority held that the UCC Article 2 statute of limitations relating to contracts for the sale of goods applied regardless of the fact that Fisher had brought its action on the theories of account stated and open account. The majority opinion relied heavily upon a decision of an Oregon intermediate appellate court in *Moorman Mfg Co of California, Inc v Hall*, 113 Ore App 30; 830

P2d 606 (1992), holding that the Article 2 statute of limitations applied regardless of the plaintiff's contention that an account stated creates a new contract that is not governed by the UCC. Judge O'Connell of the Michigan Court of Appeals dissented in a separate opinion in which he stated the view that a payment on an open account triggers a new obligation, separate and distinct from an underlying agreement, and that the new obligation was governed by the six-year limitations period. By endorsing the view of the dissent in Oregon's *Moorman* case, the dissenting opinion also indicated agreement with Fisher's argument that an account stated constitutes a new obligation governed by the six-year limitations period.

On July 12, 2011, Fisher filed a timely application for leave to appeal to this Court from the opinion of the Court of Appeals. On May 4, 2012, this Court granted Fisher's application for leave to appeal stating that the parties should include among the issues briefed whether an action on an open account relating to the sale of goods is subject to the four-year limitations period in § 2-725 of the Uniform Commercial Code (MCL 440.2725), or the general six-year statute of limitations period applicable to contract actions, MCL 600.5807(8).

ARGUMENT

I. AN ACCOUNT STATED IS AN INDEPENDENT CAUSE OF ACTION BASED ON THE DEBTOR'S ACTUAL OR IMPLIED PROMISE TO PAY THE ACCEPTED BALANCE OF THE ACCOUNT AND IS GOVERNED BY THE GENERAL SIX-YEAR STATUTE OF LIMITATIONS FOR BREACH OF CONTRACT IN MCL 600.5807(8).

In this case, Fisher pled a claim for account stated against Sweebe. Legally, an account stated is regarded as a new contract obligating the debtor to pay the accepted balance and is treated as an independent cause of action, separate from the individual transactions leading to the accumulation of the balance due. When a party sues on an account stated, he is suing to enforce the new contract of the debtor to pay the account balance and not the original sale transactions

that led to the accumulation of the account balance. Since an account stated claim is not a suit on the original sales transactions, the applicable statute of limitations is the six-year period for an action for breach of contract under MCL 600.5807(8), not the four-year period for an action for breach of a contract for sale of goods under MCL 440.2725(1) of the Michigan Uniform Commercial Code, UCC § 2-725(1). Because the lower courts in this matter have incorrectly applied the shorter statute of limitations relating to sale of goods, it is appropriate that this Court review the matter and rule that six-year statute of limitations for breach of contract applies to Fisher's claim on an account stated.

Fisher has stated a viable cause of action for account stated in this case and has argued below that the six-year statute of limitations of MCL 600.5807(8) applies to that cause of action. In conjunction with Sweebe's purchases of materials, Fisher asserts that it regularly rendered statements of account to Sweebe and that no objection was ever made by Sweebe to the statements or to the account balances claimed on the statements. In particular, statements showing the account balances due were rendered to Sweebe with respect to the ten purchases made by Sweebe from Fisher in 2004 and the single purchase made by Sweebe from Fisher in May of 2005. The lack of objection by Sweebe to the statements of account rendered by Fisher in 2004 and 2005 gave rise to accounts stated under the law of Michigan.

Plaintiff Fisher's theory of account stated is supported by Michigan law. "An account stated is an agreement between parties who have had previous transactions of a monetary character that all the items of the account representing such transactions, and the balance struck, are correct, together with a promise, express or implied, for the payment of such balance." *Pelavin v Fenton, Davis & Boyle*, 255 Mich 680, 682-683; 239 NW 268 (1931). It is well established under Michigan law that an account stated arises where a statement of account is

rendered and the party receiving the statement fails to object to the correctness of the account within a reasonable time. The lack of objection implies an acceptance of the account and a promise to pay by the debtor party.

The principle that a lack of objection gives rise to an account stated was applied in *Keywell & Rosenfeld v Bithell*, 254 Mich App 300, 330-331, fn 6; 657 NW2d 759 (2002), which quoted an oft-cited passage from *Corey v Jaroch*, 229 Mich 313, 315; 200 NW 957 (1924):

When an account is stated in writing by the creditor and accepted as correct by the debtor, either by payments thereon without demur or by **failure within a reasonable time to question the state of the account** as presented, it **becomes an account stated**

[Emphasis added. Quotations marks omitted.]

Since Fisher alleges that Sweebe made no objection to statements of account rendered in 2004 and 2005, Fisher has a viable cause of action on the accounts stated that arose in 2004 and 2005. If the six-year statute of limitations for breaches of contract generally is applied, Fisher's claim on the accounts stated was timely filed when Plaintiff commenced suit on August 13, 2009.

In the proceedings below, the trial court and the Court of Appeals applied the four-year limitations period for breach of a contract for sale of goods under MCL 440.2725(1), relying on the fact that the original transactions giving rise to the account balance involved the sale of goods, i.e., sales of stones, sand and gravel. The rulings below were erroneous because they ignored the established rule that an account stated is regarded as a new cause of action, independent of the original transactions that gave rise to the account balance.

In Michigan law, when a creditor sues on an account stated it is not necessary for him to prove his right to collect on each underlying transaction comprising a part of the account balance. The nature of the original transactions is immaterial to the plaintiff's right to recover on

an account stated. *Pelavin v Fenton, Davis & Boyle, supra*, states the following regarding a claim on an account stated, quoting from *Stevens v Tuller*, 4 Mich 387, 388-389 (1857):

Neither does the nature of the original transaction, out of which the acknowledgment of indebtedness grew, **appear to be material**. It may have been for the sale of lands, as in this case, as well as for the sale of other property, or for personal services.

[Emphasis added. Quotation marks omitted.]

Stevens v Tuller, supra, explained the nature of an account stated claim as follows:

It is **not necessary**, in support of an account stated, to show the nature of the original transaction, or indebtedness, or **to give the items constituting the account**. It is sufficient to prove some existing antecedent debt, or demand between the parties, respecting which a balance was struck. **Any admission of a balance or acknowledgment** made by one party to another, that a sum of money is due to the latter, is **sufficient prima facie evidence** to entitle the plaintiff to recover under this count.

[Emphasis added.]

An account stated establishes a new cause of action against the defendant in the same manner that the giving of a promissory note for an antecedent debt creates a new cause of action against the debtor independent of the original indebtedness. In regard to the theory of account stated, *Hawley v Professional Credit Bureau*, 345 Mich 500, 506-507; 76 NW2d 835 (1956), explained that “the agreed statement [of the account debt] serves in the place of the original account, as the foundation of an action.”

That the account stated represents a new cause of action was explained in *White v Campbell*, 25 Mich 463, 468 (1872). *White* pointed that an account stated has the same legal effect as if the debtor had given a promissory note for the account balance, stating as follows:

[An account stated] becomes an original demand, and **amounts to an express promise to pay** the actual sum stated. The creditor becomes entitled to recover the agreed balance, in an action based on the fact of its acknowledgment by the debtor, upon an adjustment of their respective claims: The effect of the

operation is said to be much the same **as though the debtor had given his note for the balance.** [Emphasis added.]

J. Calamari & J. Perillo, *The Law of Contracts* § 21.9, p. 808 (4th ed. 1998), also indicates that an account stated is a new and independent cause of action, stating as follows:

[S]ince an account stated is a new contract, the statute of limitations commences upon assent to the account.

The South Dakota case of *O'Neill v Steppat*, 270 NW2d 375, 376-377 (SD 1978), is analogous to the present case and holds that a separate promise to pay an amount owing for purchase of goods is governed by the general statute of limitations for breach of contract—not the UCC statute of limitations for breach of a contract for the sale of goods. In *O'Neill*, the parties entered into a contract for sale of goods and the defendants, after making certain cash payments for the goods, executed a promissory note calling for payment of the balance due by a stated due date. The note was not paid and, four years and three months after the due date, the plaintiffs filed suit on the note to recover the balance due. The defendants argued that the action was one for breach of a contract for sale of goods and that the claim was barred by the four-year limitations period of UCC § 2-725(1). The South Dakota Supreme Court held that four-year limitations period under UCC § 2-725(1) did not apply because the plaintiffs were suing for enforcement of the separate promise contained in the promissory note, not for breach of the original sales contract. The separate promise in the note gave rise to a separate cause of action on the note. The court held the separate cause of action was governed by the six-year general statute of limitations applicable to suits on a contract or obligation.

The *O'Neill* court rejected the argument that the suit on the note would be governed by UCC § 2-725(1) because the original transaction between the parties involved the sale of goods. The opinion pointed to the state's enactment of UCC § 2-701, which provides as follows:

Remedies for breach of any obligation or promise collateral or ancillary to a contract for sale are not impaired by the provisions of [UCC Article 2].

Since the promissory note was an “obligation or promise” ancillary to a contract for sale, the remedy on the note was not impaired by the Article 2 statute of limitations.

Michigan has also enacted UCC § 2-701 as MCL 440.2701. Accordingly, the reasoning of *O'Neill* leads to the conclusion that Fisher’s cause of action for account stated should be governed by Michigan’s general six-year statute of limitations for breach of contract. Fisher is suing on the separate promise of Sweebe to pay the amount owing under the account stated, a recognized cause of action under Michigan law. Under MCL 440.2701, the remedy for breach of that promise in favor of Fisher, which is ancillary to a contract of sale, must not be impaired by Article 2 statute of limitations in MCL 440.2725(1). Plaintiff Fisher had a period of six years to sue on the accounts stated in its favor, pursuant to Michigan’s general statute of limitations for breach of contract.

Defendant Sweebe relies upon *Moorman Mfg Co of California, Inc v Hall*, 113 Ore App 30; 830 P2d 606 (1992), for the proposition that an account stated arising out of the sale of goods is governed by the four-year limitations period of UCC 2-725(1). The reasoning of the *Moorman* majority decision should not be adopted by this Court for several reasons. First, the opinion did not deal with UCC § 2-701 and its directive that remedies for breach of a promise collateral to a contract for sale are not impaired by Article 2 and the Article 2 statute of limitations. In addition, the adoption of the ruling of the *Moorman* majority would run counter to Michigan’s policy against repeals by implication.

Michigan has a well-developed jurisprudence relating to actions on accounts stated and open accounts, which gives a creditor six years to sue after (1) the creation of an account stated or (2) the last item posted to an open account. As indicated in the dissenting opinion of Judge

O'Connell in the Court of Appeals opinion below, there is no affirmative provision of the UCC or Michigan legislation which shows a legislative intent to repeal Michigan's jurisprudence concerning accounts stated and open accounts. Furthermore, under *Valentine v Redford Twp Supervisor*, 371 Mich 138, 144; 123 NW2d 227 (1963), repeal by implication is to be avoided if there is a reasonable construction available which reconciles two statutes. In this matter, there is no basis for regarding the rule of allowing six years for suing on an account stated or open account as abhorrent to the UCC provision for applying a four-year statute of limitations to actions for breach of a contract for sale of goods.

The reasoning of the dissent in the *Moorman* case is more logical and compelling than that of the majority. The dissent correctly pointed out that an account stated is an independent cause of action not governed by Article 2 of the UCC, stating as follows:

When the parties themselves agree upon a sum that the debtor owes and promises to pay to the creditor, that promise creates an *independent* contract between the parties; the new contract is enforceable in its own right, "even though the antecedent debt has been barred by [the] statute of limitations or has been discharged in bankruptcy." *Corbin on Contracts* § 1304, 237 (1962 & 1991 Supp); see also *Meridinal Co. v. Moeck*, 121 Or 133, 253 P 525 (1927)..

.... The four-year Statute of Limitations that applies to contracts for the sale of goods, ORS 72.7250, is inapplicable to plaintiff's account stated claim, because the claim is based on a new and separate contract that was created when defendants acknowledged their indebtedness to plaintiff.

113 Ore App 30, at 34.

In the present case, the Court of Appeals and the trial court erred in treating Fisher's account stated cause of action as governed by the four-year statute of limitations of Article 2, rather than the six-year statute of limitations under MCL 600.5807(8). Accordingly, it would be appropriate for this Court to hold that Fisher's claim for account stated was timely filed under the applicable six-year statute of limitations.

II. PLAINTIFF'S CLAIM ON A MUTUAL AND OPEN ACCOUNT IS GOVERNED BY THE GENERAL SIX-YEAR STATUTE OF LIMITATIONS UNDER MCL 600.5807(8).

In the trial court, Plaintiff Fisher also pled a cause of action against Defendant Sweebe to recover on a mutual and open account. There was activity on the open account of the parties during 2004 and 2005. According to the allegations below, Sweebe made ten purchases of goods in 2004 and one purchase in 2005 and made a payment on the account during May of 2005. In Fisher's view, the open account claim was timely because it was filed within six years of the last activity on the account in May of 2005. However, the trial court and Court of Appeals held that the open account claim was barred by the four-year statute of limitations on actions for breach of a contract for sale of goods in MCL 440.2725(1). *Amicus curiae* MCBA submits that the general six-year statute of limitations applies to the claim on the mutual and open account and that Fisher's cause of action upon the open account was erroneously dismissed below.

Michigan law recognizes a cause of action on a mutual and open account. See *Seyburn, Kahn, Ginn, Bess, Deitch & Serlin, PC v Bakshi*, 483 Mich 345, 355-356; 771 NW2d 411 (2009); *Fuerbringer v Herman*, 225 Mich 76, 78-79; 195 NW 693 (1923); and *Curry v Raich*, 245 Mich 146, 150; 222 NW 160 (1928). That cause of action is regarded as separate and distinct from a claim on the underlying transactions giving rise to the balance due to the creditor. In *Seyburn, supra*, (involving a claim for unpaid attorney fees) this Court explained that the date of accrual is calculated differently for a mutual and open account claim than for a contract claim. The mutual and open account claim is governed by the accrual provision of MCL 600.5831, which provides as follows:

In actions brought to recover the balance due upon a mutual and open account current, the claim accrues at the time of the **last item proved in the account**.

[Emphasis added.]

Seyburn indicated that both a contract action and a claim upon a mutual and open account current are governed by the six-year statute of limitations of MCL 600.5807(8). The important difference between the two types of actions is that the accrual provision of MCL 600.5831 only applies to the mutual and open account claim. The plaintiff in *Seyburn* was not entitled to use that accrual rule because the account had ceased to be a mutual and open account more than six years before the suit was filed. As of the relevant date, the account had ceased to be mutual because the defendant had indicated that he would pay no more moneys to the plaintiff and had ceased to be open (i.e., continuing) because the attorney-client relationship between the parties had ended and no new charges to the account were contemplated.

In the current case, there is no reason why the account maintained between Plaintiff Fisher and Defendant Sweebe would not be considered a mutual and open account within the six-year period preceding the filing of the case on August 13, 2009. The account was a mutual and open account (1) as of 2004 when Sweebe took ten deliveries of product from Fisher and allowed the charges to be added to its account with Fisher and (2) as of May of 2005 when Sweebe obtained one delivery of product from Fisher, allowed the charge to be added to the account, and made a payment to Fisher on the account.

All previous reported Michigan cases have treated the cause of action on an open and mutual account as distinct from a claim on the underlying transactions and have applied the general six-year statute of limitations. See *Seyburn*, *Fuerbringer*, and *Curry*, *supra*. Even if the underlying charges arise from the sale of goods, a mutual and open account current would not be analyzed as claim for breach of a sales contract governed by the statute of limitations for sale of goods. The open account claim is a separate cause of action and should accordingly continue to

be governed by the general six-year statute of limitations, regardless of whether the underlying transactions involve the sale of goods or the provision of services.

Continuing to treat all claims on a mutual and open account as governed by the general six-year statute of limitations will avoid the confusion of having two different limitations periods for claims on a mutual and open account, depending upon whether the charges contained in the account involve the sale of goods or the provision of services. *Amicus curiae* MCBA believes that most Michigan attorneys queried about the limitations period applicable to an open account would answer that the creditor could sue within six years after the last entry to the account. A widely-used Michigan legal reference work indicates that the applicable limitations period for actions on an account is six years, stating as follows:

Actions on accounts are probably subject to the six-year statute of limitations on contract actions, because older cases gave them the same limitation period as contract actions generally under a prior statute of limitation.

29 Michigan Law and Practice (2d ed), Statute of Limitations, § 14. [Footnote omitted.]

Changing to a rule that applies a four-year limitation period to an open account arising from the sale of goods would catch a great many creditors and their attorneys by surprise.

MCLA 440.2701, UCC § 2-701, also militates against applying the UCC Article 2 statute of limitations to a claim on a mutual and open account. That provision states: “Remedies for breach of any obligation or promise collateral or ancillary to a contract for sale are not impaired by the provisions of this article [UCC Article 2.]” *O’Neill v Steppat*, 270 NW2d 375, 376-377 (SD 1978), applied UCC § 2-701 in holding that a promissory note arising from a debt for sale of goods was not governed by the Article 2 statute of limitations. Likewise, a mutual and open account claim arising from charges for sales of goods should not be governed by the Article 2

statute of limitations since it involves an obligation or promise ancillary to a contract for sale, which is not to be impaired by the provisions of Article 2.

Applying the general six-year statute of limitations and the accrual rule of MCL 600.5831 (as all previous Michigan cases on mutual and open accounts have done) leads to the conclusion that Fisher's claim on the mutual and open account was timely in this action. The new entries made to the account in 2004 and 2005 mean that Fisher had six years from the dates of the new entries in which to file a suit on the mutual and open account. In this matter, Fisher brought a timely cause of action on the mutual and open account when it filed suit in August of 2009. Even if this Court accepts Sweebe's contention that the payment and purchase of May 2005 were not related to the open account, the ten purchases on account in account in 2004 gave Fisher until a date in 2010 in which to file suit on the account. Thus, the filing of suit on August 13, 2009 was timely regardless of what view is adopted of the 2005 purchase and payment.

For the foregoing reasons, it is appropriate that this Court reverse the decision made below by the Court of Appeals and reinstate Fisher's cause of action on the mutual and open account.

III. PLAINTIFF HAS A VIABLE AND TIMELY ACTION ON THE ACCOUNT OWING BY DEFENDANT BASED ON THE CONTENTION THAT DEFENDANT MADE A PAYMENT OF MAY 13, 2005 ON THE ACCOUNT.

In this case, Plaintiff Fisher contends that Defendant Sweebe's payment of May 13, 2005 on the account gave rise a new cause of action against Defendant for the account balance, which cause of action was governed by the general six-year statute of limitations under MCL 600.5807(8). The trial court and the Court of Appeals ruled against Fisher, holding that the four-year statute of limitations under MCL 440.2725(1) applied and barred the claim, regardless of the alleged partial payment on the account balance. *Amicus curiae* MCBA submits

that the lower courts erred in rejecting Fisher's theory that the partial payment on the account gave rise to a new and independent cause of action for the account balance which is governed by the general six-year statute of limitations for breach of contract.

First of all, it is clear that the trial court erred when treated as an established fact that Sweebe's payment of May 13, 2005 did not constitute payment on the open account debt with Fisher. Plaintiff Fisher had pled that a new cause of action arose on the account indebtedness by reason of the payment of 2005 and Defendant Sweebe could not point to any written communication or notation on the check designating the payment of May of 2005 as something other than a payment on the open account maintained with Fisher. Accordingly, it was improper for the trial court to resolve the factual issue of whether the payment was or was not a payment on the open account in deciding Sweebe's motion for summary disposition. A trial court may not make findings of fact or weigh evidence in deciding a summary disposition motion, *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).

The majority opinion of the Court of Appeals did not rely on the trial court's ruling crediting Sweebe's contention that the May 2005 payment did not apply to the account. However, the majority ruled that the alleged account payment of May of 2005 was irrelevant because the suit would still have been barred even if the payment applied on the account. *Amicus curiae* MCBA submits that such ruling of the Court of Appeals was erroneous.

Under existing Michigan law, a debtor's partial payment on an antecedent debt is regarded as an acknowledgement of the debt and gives rise to a new cause of action in favor of the creditor based on the implied promise to pay the balance owing. A new limitations period begins running on that new cause of action. That principle was affirmed in *Yeiter v Knights of St Casimir Aid Soc'y*, 461 Mich 493, 497; 607 NW2d 68 (2000), which stated as follows:

A partial payment made on a debt after the debt matures serves to revive the statute of limitations. **A new cause of action accrues on the date of payment.**

[Emphasis added.]

Cases in accord with that holding include *Bonga v Bloomer*, 14 Mich App 315, 319; 165 NW2d 487 (1968), and *Collateral Liquidation, Inc v Palm*, 296 Mich 702, 704; 296 NW 846 (1941).

Based on the concept that the partial payment creates a new cause of action in favor of the creditor, Plaintiff Fisher correctly argues that the new cause of action is based on the debtor's implied promise to pay the balance owing and is not a claim for breach of a contract for sale of goods governed by the four-year statute of limitations of Article 2 of the UCC. The new cause of action arising on the date of payment is properly analyzed as an independent claim for breach of the implied promise of payment and is governed by the general six-year statute of limitations for breach of contract. For that reason, Plaintiff's complaint filed in August of 2009 was timely because it was filed within six years from the date of the partial payment.

In rejecting Plaintiff's theory that the six-year statute of limitations applied to the new cause of action arising from the partial payment, the Court of Appeals indicated that Plaintiff's theory ran counter to the goal of uniformity of interpretation of the Uniform Commercial Code among the states. In the view of MCBA, that reasoning of the Court of Appeals is flawed because a state's jurisprudence regarding open accounts and the limitations period for filing an action upon an account is not a subject matter covered by the Uniform Commercial Code. The goal of uniformity of interpretation is not a basis for arguing that Michigan should strive to make its jurisprudence regarding open accounts and accounts stated consistent with the rules in other states adopting the UCC, such as Oregon. The Court of Appeals should have been more concerned with deciding this case in conformity with the existing Michigan cases recognizing a

new cause of action based on the debtor's implied promise of payment than with following an Oregon decision.

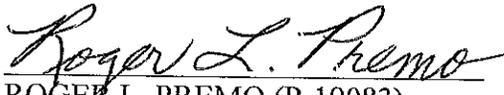
There is no legitimate basis for holding that Article 2 of the UCC has the effect of changing Michigan's existing rule of applying the general six-year statute of limitations to claims upon an account or upon the implied promise arising from a partial payment. As pointed out in the dissent of Judge O'Connell in the Court of Appeals, there is no language in UCC Article 2 which can be interpreted to abrogate Michigan's common law jurisprudence concerning the existence of a separate cause of action arising from a partial payment on an account. Section 1103 of the Michigan UCC, MCL 440.1103, expressly provides that, "unless displaced by the particular provisions of this act, the principles of law and equity . . . shall supplement its provisions." Michigan's existing common-law jurisprudence relating to implying a new cause of action upon the making of a partial payment on account or debt involves principles of law which have continued to apply following adoption of the UCC. Furthermore, as previously mentioned, MCLA 440.2701, UCC § 2-701, also militates against applying the UCC Article 2 statute of limitations to the new cause of action arising from the making of a partial payment.

In this matter, Fisher brought a timely claim on the implied cause of action arising from the partial payment on account made by Sweebe on May 13, 2005. Fisher has alleged a viable cause of action which upon which it was entitled to go to trial in this matter and which should have not have been dismissed upon Sweebe's motion for summary disposition. It is appropriate that this Court reverse the decision made below by the Court of Appeals so as to reinstate Plaintiff's claim on the implied cause of action arising from the alleged partial payment on account of May 13, 2005.

RELIEF REQUESTED

Amicus Curiae, the Michigan Creditors Bar Association, requests that this Court reverse the decision of the Court of Appeals holding Plaintiff-Appellant's claims barred by the statute of limitations.

Respectfully submitted,


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