

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,

Supreme Court No 143374

Court of Appeals No 297156

Isabella Cir Ct No 09-005960-CK-B

-v-

NEAL A. SWEEBE, INC.,

Defendant-Appellee

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**APPELLANT'S BRIEF**

**\*\*\* ORAL ARGUMENT REQUESTED \*\*\***

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**STATEMENT OF QUESTION PRESENTED IN THIS BRIEF**

**Issue I: Where a series of sales of goods occurs on an open account over many years, the last purchase occurring May 9, 2005, and the purchaser, having made a partial payment on the account on May 13, 2005, ultimately fails to pay the remaining balance due, is a suit on open account/account stated subject to a 6-year period of limitations under MCL 600.5807(8), and not to the 4-year period of limitations under Uniform Commercial Code §2-275, MCL 440.2275?**

Plaintiff-appellant answers "yes".  
Defendant-appellee answer "no".  
The Court of Appeals answered "no".  
The circuit court answered "no".

**Issue II: Where partial payment was made on an open account on May 13, 2005, constituting a novation under settled Michigan law, did the trial court err in making a finding of fact, on motion for summary disposition, that the partial payment was an isolated and specific transaction related to a purchase on May 9, 2005, thus not engendering a novation for purposes of the statute of limitations?**

Plaintiff-appellant answers "yes".  
Defendant-appellee answer "no".  
The Court of Appeals answered "no".  
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## Introduction

Plaintiff appeals by leave granted (order of May 4, 2012) a June 7, 2011 published 2-1 decision of the Court of Appeals (majority Appx 4a-8a; dissent Appx 9a-11a)<sup>1</sup>, affirming summary disposition on limitations grounds, MCR 2.116(C)(7).

The Court of Appeals applied the 4-year statute of limitations of the Uniform Commercial Code Article 2 (sale of goods), MCL 440.2725, although the claim presented was one for an account stated or an open account, which under settled Michigan jurisprudence is an independent cause of action governed by a 6-year contract period of limitations, MCL 600.5807(8), without regard to the underlying nature of the transactions giving rise to the claim. *Curry v Raich*, 245 Mich 146, 150; 222 NW 160 (1928); *Stevens v Tuller*, 4 Mich 387 (1857); *Collateral Liquidation, Inc v Palm* 296 Mich 702, 704; 296 NW 846 (1941); *Miner v Lorman*, 56 Mich 212, 216; 22 NW 265 (1885); *Bonga v Bloomer*, 14 Mich App 315; 165 NW2d 487 (1968). The Court of Appeals' majority decision thus not only conflicts with this Court's prior decisions in *Curry*, *Stevens*, *Collateral Liquidation* and *Miner*, but also reflects the Court of Appeals arrogating to itself the authority to overrule this Court's litany of prior decisions, contrary to *Boyd v W G Wade Shows, Inc*, 443 Mich 515, 523; 505 NW2d 544 (1993), overruled in part on other grounds *Karaczewski v Farbman Stein & Co*, 478 Mich 28; 732 NW2d 56 (2007); accord: *Agostini v Felton*, 528 US 203, 237; 117 S Ct 1997; 138 L Ed 2d 1396 (1997).

The Court of Appeals' majority, however, concluded that the UCC *sub silentio* impliedly abrogates these settled legal principles. In so holding, the Court of Appeals' majority focused a great deal of attention on the "Official Comments" to the UCC, although these were not part of 1962 PA 174, by which the Legislature and then-Governor Swainson adopted the UCC for

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<sup>1</sup> Appearing in the official reporter starting at 293 Mich App 66 (2011).

Michigan. Moreover, the Official Comments say nothing specific to the subject at hand, and of course the Legislature has provided a standing directive that even section headings, which are part and parcel of most public acts, are not to be considered in construing any statute. MCL 8.4b. *A fortiori*, general commentary neither incorporated into a public act nor referenced therein ought not be invoked to deduce legislative intent as to a specific issue from the ether—especially where a provision in the statute itself provides contrary directions (see next paragraph).

The Court of Appeals' majority wholly ignored the mandate of MCL 440.1103, which provides:

Unless displaced by the particular provisions of this act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions.

Despite being unable to identify any "*particular* provisions" in the Michigan version of the UCC that displace settled Michigan common law to the effect that a claim based on an account stated or open account is distinct from any underlying transaction reflected in the account and is subject to the general contract period of limitations, the Court of Appeals circumvented this explicit restriction by simply ignoring it.

Finally, the Court of Appeals' majority relied almost exclusively on an Oregon decision, *Moorman Mfg Co of California, Inc v Hall*, 113 Or App 30, 34; 830 P2d 606 (1992), which it found "persuasive"—notwithstanding that *Moorman* built on prior Oregon jurisprudence holding that a claim on an account stated "relates to and cannot be divorced from the underlying sales transaction, *See Edwards v Hoever*, 185 Or 284; 200 P2d 955 (1949)", which is diametrically opposed to Michigan law on the identical subject, *Curry, supra; Stevens, supra; Collateral Liquidation, supra; Miner, supra; Bonga, supra.* The Court of Appeals' majority simultaneously

refused to even acknowledge contrary authority duly brought to its attention, including at least one other Oregon case. *Central Nat'l Bank & Trust Co v Stettinisch*, 821 P2d 1066, 1067 (1987) (5 year limitations period of 12 OS §95, rather than 4-year period under UCC, 12A OS 1981, §2-725, as recognized by UCC §1-103(b) [MCL 440.1103(b)]; *Greer Limestone Co v Nestor*, 175 W Va 289, 292; 332 SE2d 589, 593 n. 1 (1985)<sup>2</sup> (5 year period of limitations of W Va Code 55-2-6 applies to claims based on mutual running account, open account, or any other “accounts concerning the trade or merchandise between merchant and merchant”, even where underlying transactions are sales of goods otherwise subject to 4-year period of limitations of UCC §2-725, W Va Code 46-2-725; part payment in 1980 revived full debt from 1974); *O'Neill v Steppat*, 270 NW2d 375, 376-377 (SD, 1978) (suit on promissory note relating to sale of goods subject to 6-year period of limitations, not 4-year period of UCC §2-725 per UCC §2-701 [MCL 440.2701], which provides that “Remedies for breach of any obligation or promise collateral or ancillary to a contract for sale are not impaired by the provisions of Article 2”). Thus, while purporting to “make the law uniform among the states adopting” the UCC per MCL 440.1102(2)(c), the Court of Appeals’ majority actually opted to engraft a minority position onto Michigan jurisprudence—which in any event should be independent of the UCC, which says nothing about accounts stated or open accounts (absent credit agreements that would bring the matter under Article 9 of the UCC)—contrary to any Legislatively-specified goal of interstate uniformity.

In dissent, Judge O’Connell, noting the Legislature’s mandate as expressed in MCL 440.1103, and finding no indication in the UCC of an intent to change the existing law as to the independent nature of a claim for account stated or open account, was not persuaded defendant

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<sup>2</sup> Note that in West Virginia, unlike Michigan, partial payment on an open account does not revive the period of limitations. *In re Estate of Kneeream*, 120 W Va 147; 196 SE2d 362 (1938).

had carried its burden of demonstrating that a *particular* provision of the UCC displaces plaintiff's claim for open account, citing *General Motors, LLC v Comerica Bank*, unpublished opinion per curiam (Mich App No 291236, issued December 21, 2010)<sup>3</sup>, Appx 99a, at 102a. That failure of persuasion means the general 6-year contract statute of limitations, MCL 600.5807(8), applies, and all 3 Court of Appeals' judges agreed that, in such case, plaintiff's claim may proceed forward.

Another reason why the lower court decisions warrant reversal on plenary consideration is pragmatic and economic. Settled Michigan jurisprudence regarding the distinct nature of suits based on open account reflects the practical consideration that the system in place since *Stevens v Tuller, supra* (1857) encouraged the growth of the Michigan economy. Until the Court of Appeals' published decision herein threw such principles into a cocked hat, a business like Fisher Sand & Gravel, for example, that sells both goods (crushed stone, sand, gravel, concrete mix) and services (ready-mixed concrete<sup>4</sup>) on an open account basis had no need to be concerned

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<sup>3</sup> This case--which in turn relied on the published decision in *Gen Equip Mfr v Bible Press, Inc*, 10 Mich App 676, 680; 160 NW2d 370 (1968), considering the central proposition so mundane that the *GM v Comerica* panel did not feel constrained to publish its opinion, see MCR 7.215(B)—released after the Court of Appeals briefs for both parties had long been filed, was cited by counsel for plaintiff at oral argument (in conformity with MCR 7.215(C)(1), with copies provided to defendant's counsel and the 3 panelists).

<sup>4</sup> The sale of ready-mixed concrete represents a transaction primarily in services rather than goods, and thus one not subject to the 4-year UCC limitations period. *Neibarger v Universal Cooperatives, Inc*, 439 Mich 512, 527-528; 486 NW2d 612 (1992). Ready-mixed concrete is not a generic product, but rather a range of products that must be mixed to specifications appropriate for each use. Thus, concrete for a backyard residential patio is mixed differently than concrete for the foundations of a high-rise building, and concrete for a residential driveway is mixed to a far different specification than concrete for a highway. Improper mixing, or an incorrectly selected mix, will cause what is usually a relatively costly construction project to fail completely, certainly resulting in financial loss and property damage, and likely endangering lives.

By its nature, ready mixed concrete begins to harden within a relatively short span of time after the mixing commences; therefore, time is of the essence in every delivery, and delivery is of the essence of every sales transaction.

Delivery of ready mixed concrete does not involve leaving the product at the curb or in a

with filing suit against its customer, destroying both its relationship with that customer as well as that customer's ability to conduct its own business, as the earliest possible limitations period approaches its termination, or even within 6-years of the *earliest* unpaid transaction. When dealing with a customer like Sweebe (with whom Fisher earlier dealt during construction of the Midland nuclear plant by Consumers Power Company, now Consumers Energy, before the

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warehouse, but pouring the concrete into very specific locations—at approximately 4000 pounds per cubic yard (approximately 2.5 times the density of water), ready mixed concrete defies bulk relocation once it is placed in a particular spot. Concrete which is poured in the wrong place is not merely useless to the customer, but worse than no concrete at all, as it is hard to remove and impossible to functionally transfer to a proper location. Concrete delivered to the wrong place—whether by a few millimeters or a few miles—must be removed at great expense, and then replaced with freshly mixed concrete in the correct and specific location.

Mixing and delivery of concrete requires, among other things, an evaluation of meteorological conditions (humidity, temperature, sunlight) likely to be encountered at the point and time of delivery, as well as coordination with the customer, which must have a crew of laborers, generally paid by the hour, immediately available to work the concrete.

Unlike other types of delivery truck drivers who must merely navigate their vehicles to a destination and often leave the loading and unloading to others, a ready mixed concrete truck driver must load and mix the concrete, time the loading and mixing with the distance and time of travel so the concrete is the proper consistency upon delivery, navigate a vehicle weighing upwards of 25 tons over public roads and often, near the end, over dirt roads or rough terrain, watch for construction workers who might be in the intended path, maneuver the concrete to a highly specific location at the destination, account for and take advantage of gravity in positioning the delivery vehicle and pouring the concrete (or use a highly specialized concrete pump), and then promptly wash out the mixing drum and other accessory parts before the concrete begins to cure and renders an expensive piece of equipment inutile until the concrete can be removed with a jackhammer. Drivers of ready mixed concrete trucks are the key employees of plaintiff's business, and need at least a month of on-the-job training and experience to learn the essentials of the job.

Every supplier of ready mixed concrete promotes its business based on quality and service; without the proper mixture (quality) and timely delivery to the exact spot where the concrete is desired (service), what such businesses offer would be worthless, or worse.

Plaintiff's customers are emphatic that they rely on plaintiff's expertise in choosing the most cost-effective concrete mix for their projects, and on the expertise of plaintiff's drivers in making timely deliveries of concrete ready for forming, screeding, floating and smoothing and with proper hydration so that curing commences neither too soon nor too late in the process.

Thus, the sale of ready mixed concrete represents a transaction predominantly of services, governed by the 6-year contract statute of limitations rather than by the UCC's 4-year period. *Frommert v Bobson Constr Co*, 219 Mich App 735, 738-739; 558 NW2d 239 (1996); *Mahnick v Bell Co*, 256 Mich App 154, 163-164; 662 NW2d 830 (2003); *H Hirschfield & Sons, Inc v Colt Industries Operating Corp*, 107 Mich App 720, 725-726; 309 NW2d 714 (1981).

current account was established), Fisher understood that payments would likely be irregular. But under the long-standing case law of Michigan, Fisher was secure in the knowledge it only had to sue within 6-years of the most recent payment or other transaction in order to protect its interests. In addition to the arguments below, the *amicus curiae* brief of the Michigan Creditors Bar Association reflects and supports this important practical concept.

Now the Court of Appeals has pulled the rug out from under those who, like Fisher, relied on existing jurisprudence to guide their customer relations *vis à vis* contract enforcement, and to make matters worse it also added a significant component of anti-business friction to the Michigan economy at a time in history when the state, only recently tenuously on the road to recovery, can least afford to erect unnecessary barriers to business growth. That the Court of Appeals took this plunge into the abyss without a scintilla of legislative direction (and contrary to MCL 440.1103), and without prior warning to the business community, merely illuminates the fatuity of its reasoning and underscores its failure fully to consider the ramifications of its action. This Court must now step into the breach to restore the settled principles that guided the expansion of the Michigan economy since the state was admitted to the Union and to repair the damage wrought by the Court of Appeals.

Only reversal on leave granted can restore the foundation of certainty necessary to an entrepreneurial economy functioning on credit. This Court must now reaffirm the principles on which merchants like plaintiff and commercial interests generally have relied for 150+ years, recognizing the distinct nature of an action on open account or account stated.

**Note:** In accordance with this Court's order granting leave, plaintiff's Issue I addresses in detail the nature of an action on open account/account stated *vis à vis* the applicable period of limitations, in the context of the specific facts of this case and settled Michigan jurisprudence.

## STATEMENT OF FACTS

Plaintiff Fisher Sand & Gravel, Inc. (“Fisher” or “FS&G”) supplied quantities of crushed stone to defendant Neal Sweebe, Inc. (“Sweebe”—pronounced “Swē-bē”) starting October 30, 1991 (Complaint, ¶9, Appx 20a; Affidavit of Kyle White, President of FS&G, ¶4, Appx 30a). Sweebe never paid in full for any of the materials it received, but Fisher kept an open account and sent regular invoices, to none of which did Sweebe ever object or suggest there was any inaccuracy. The final balance due was \$93,182.55 (Complaint, ¶, Appx ; Statement of Account, Exhibit 1 to Complaint, Appx 23a-29a; Affidavit of Kyle Whie, President of FS&G, ¶3, Appx 30a).

After December 31, 2002, Sweebe acquired less new product than in prior years, making 4 purchases in 2003, and 10 in 2004 (FS&G Brief in Opposition to Motion for Summary Disposition, Exhibit 3, Appx 56a-60a). On May 9, 2005, Sweebe acquired a small amount of sand and gravel, for which the charge was \$152.98, including sales tax (*id.*, item #10246, Appx 60a). By its check #1228, Sweebe tendered payment of \$152.98 on May 13, 2005 (*id.*), without in any way specifying that the proffered payment was to be strictly applied only to the new charge incurred on May 9, or that the partial payment could not be applied to the balance due on Sweebe’s open account.

### Summary of Business Relationship

These two commercial entities have enjoyed a long and mutually beneficial relationship dating back to 1991 (Appx 23a-29a, 56a-60a). While defendant made multiple purchases every year from 1994 through 2004, defendant made payments on the account only irregularly and in random amounts, *e.g.*, \$5000 on June 30, 1992, \$105.03 on December 29, 1995, \$229.95 on July 10, 1998, \$327.02 on September 25, 2002 (Appx 23a, 26a, 28a), and \$152.98 on May 13, 2005

(Appx 60a), never once paying the full balance due (the balance owed always increased).

This lawsuit arises because, after the course of dealing induced plaintiff to extend credit and provide goods to defendant over an extended period of time, defendant, with a large balance due, broke off the relationship and now seeks to avoid the responsibility of paying for what it received. Defendant nowhere claimed in its motion for summary disposition (Appx 37a-38a) that it does not owe money to plaintiff<sup>5</sup>, or that the amount claimed by plaintiff (\$93,182.55, of which \$91,820.35 represents pure charges for materials and \$1,362.40 finance or late payment charges (Appx 60a), is in any way incorrect. Those unchallenged aspects of plaintiff's complaint were therefore mandatorily assumed true for purposes of this motion in the trial court and on appeal. 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).

### **Procedural History**

This lawsuit was initiated on August 13, 2009 (Appx 1a), and seeks payment *inter alia* on an open account or account stated for deliveries of sand, gravel, and cement (Complaint, ¶¶16-21, Appx 21a). Defendant filed its motion for summary disposition, based on the statute of

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<sup>5</sup> In its answer to the Complaint, Sweebe acknowledged owing some amount of money, although contending the amount was less than \$25,000 (Answer, ¶6, Appx 32a). Sweebe also admitted doing business with FS&G on credit (answer, ¶17, Appx 33a). Attached to Sweebe's answer was the "counter affidavit" of Neal Sweebe, President, which did not deny any aspect of the account stated affidavit of Kyle White (see MCL 600.2145) which accompanied the Complaint (Appx 30a) and incorporated the detailed open account statement (Appx 23a-29a), in which Mr. Sweebe merely averred "Defendant is entitled to a set off for damages incurred through the provision of faulty product by plaintiff. The amount of the set off exceeds the amount due on invoices less than 6 years old." (Appx 30a, ¶3). As this in no way negated any part of the claim on open account, and Sweebe did not file any counterclaim, it is clear that Sweebe effectively admitted the account stated claim for purposes of MCL 600.2145. Moreover, by positing "faulty product", Sweebe also put most prior sales in the category of services (mixed concrete), rather than goods (sand, gravel, powdered cement), and thus outside the ambit of Article 2 of the UCC.

limitations, on November 12, 2009 (Appx 1a and 37a-45a); plaintiff answered the motion on December 3, 2009 (*id.* 1a and 46a-63a).

As reflected in the affidavit of Kyle White, President of Fisher Sand and Gravel filed in opposition to the motion for summary disposition (Appx 54a) and accompanying account statements (Exhibits 2 and 3 to FS&G's answer and brief in opposition to summary disposition, Appx 23a-29a and 56a-60a), the last purchase of material by Sweebe occurred on May 9, 2005 (Appx 29a and 60a)<sup>6</sup>.

As for the last transaction between the parties *vis à vis* the concept of limitations, defendant last made a partial payment of \$152.98 on May 13, 2005 (Appx 60a), which Fisher applied to the prior balance due on Sweebe's open account (*id.*), rather than to only the latest purchase. This lawsuit was commenced on August 13, 2009 (Appx 1a), or 4 years and 3 months after the last payment.

Oral argument on the motion for summary disposition was heard on December 11, 2009 (Appx 74a-97a). On February 18, 2010, Midland Circuit Judge Michael J. Beale issued an opinion (Appx 12a-18a), ruling that the 4-year limitations period of MCL 440.2725 applies to all claims, whether for breach of contract, account stated, or open account, and thus that the action is barred. The trial judge further "found" as "fact" that the May 13, 2005 payment "was a disconnected event" and that the "mutual and open account relationship had essentially ended on that date" (opinion, p. 7—Appx 18a). A judgment of no cause for action, taxing costs of \$60 in favor of defendant, was entered on March 3, 2010 (Appx 2a-3a).

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<sup>6</sup> Possibly misreading Exhibits 2 and 3, the trial court opined (February 18, 2010 opinion, p. 6—Appx 17a) that the date of the last sale was October 25, 2004. Whether defendant last purchased materials from plaintiff on October 25, 2004 or May 9, 2005 is not crucial, because, as shown below, the period of limitations runs from the date of the last payment on the account, May 13, 2005, irrespective of the date of the last sale, but in any event suit was filed within 6 years of each possibly relevant date.

Plaintiff then filed a timely appeal of right on March 23, 2010 (Appx 1a). After the Court of Appeals split decision of June 7, 2011 (Appx 4a-11a) affirming the circuit court, plaintiff now appeals by leave granted (order of May 4, 2012—Appx 98a).

## ARGUMENT

**Issue I: Where a series of sales of goods occurs on an open account over many years, the last purchase occurring May 9, 2005, and the purchaser, having made a partial payment on the account on May 13, 2005, ultimately fails to pay the remaining balance due, a suit on open account/account stated is subject to a 6-year period of limitations under MCL 600.5807(8), and not the 4-year period of limitations under Uniform Commercial Code §2-725, MCL 440.2725.**

### Standard of Review

MCR 2.116(C)(7) provides that a party may move for summary disposition on the ground, *inter alia*, that expiration of the statutory period of limitations bars the claim. In considering a (C)(7) motion, the Court must consider all documentary evidence filed or submitted by the parties. *Glancy v City of Roseville*, 457 Mich 580, 583; 577 NW2d 897 (1998). In reviewing the evidence presented, the Court is liberal in finding a genuine issue of material fact. *Lyle v Malady*, 458 Mich 153, 176-177; 579 NW2d 906 (1998); *Marlo Beauty Supply, Inc v Farmers Ins Group*, 227 Mich App 309, 320; 575 NW2d 324 (1998). Any well-pleaded fact in the Complaint is assumed 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)((4)-(6); *Patterson v Kleiman, supra*, 447 Mich at 434 n 6; *Smith v Kowalski, supra*, 223 Mich App at 616; *Gortney v Norfolk & W R Co, supra*, 216 Mich App at 538-539. The affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties must also be viewed in the light most favorable to the party opposing the motion. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

In this regard, note that no affidavit or documentary evidence accompanied Sweebe's motion for summary disposition and supporting brief (Appx 37a-45a). Sweebe's reply brief in support of summary disposition (Appx 64a-66a) did include as Exhibit B an affidavit of Neal A. Sweebe (Appx 72a-73a), in which Mr. Sweebe claimed that "The payment I made [in May, 2005] was only for the specific invoice and not a payment on account", but without indicating that any such limitation was ever communicated to FS&G contemporaneously with the tendering of such payment (the legal significance of this point, fatal to Sweebe's legal position, is developed in detail below, Issue I, Parts A, pp. 13-14 and B, p. 14, and Issue II, pp. 29-31 below), and also stated his "belief" that "my company would have the right to offset the entire amount of the debt if such old events [construction of the Midland nuclear plant] were to be litigated." Mr. Sweebe's statement of belief is not an averment of fact and thus is not cognizable for summary disposition purposes. MCR 2.119(B)(1)(b); MCR 2.116(G)(6); *Tata v Botsford Gen Hosp*, 472 Mich 904; 696 NW2d 684 (2005).

Appellate review of summary disposition 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).

In this instance, defendant submitted no documentary evidence with its (C)(7) summary disposition motion. In contrast, Plaintiff submitted the affidavit of its President with additional exhibits (Exhibits 2 and 3 being "true and correct" statements of the account—Appx 54a-60a). To the extent the trial court, which in the event of a remand will later function as trier of fact, had any doubts as to the veracity of the affiants or the weight to be given their testimony, it might (no jury having been demanded) have scheduled an immediate trial in its discretion, MCR

2.116(I)(3), but the trial court could not disregard the affidavits or other documentary evidence, or anticipate its role as fact finder at trial to resolve the motion. *Durant v Stahlin*, 375 Mich 628, 647-648; 135 NW2d 392 (1965); *Kermizian v Sumcad*, 188 Mich App 690, 692-693; 470 NW2d 500 (1991); *Reed v Kaydon Eng Corp*, 38 Mich App 353, 356-357; 196 NW2d 487 (1972).

This appeal also involves the construction and application of statutes of limitations, which constitute matters of law to be resolved by this Court judicially and de novo. *Grimes, supra*, 475 Mich at 76; *Collins v Comerica Bank*, 468 Mich 628, 631; 664 NW2d 713 (2003). The primary goal of statutory interpretation is to give effect to the Legislature's intent, focusing first on the statute's plain language. *Rowland v Washtenaw Co Rd Comm'n*, 477 Mich 197, 202; 731 NW2d 41 (2007); *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....'" *Sun Valley Foods, id.*, quoting *United States v Turkette*, 452 US 576, 593; 101 S Ct 2524; 69 L Ed 2d 246 (1981); *MDEQ v Worth Twp*, 491 Mich 227; \_\_\_ NW2d \_\_\_ (2012)<sup>7</sup>. When "when interpreting a statute, its words 'should not be construed in the void, but should be read together to harmonize the meaning, giving effect to the Act as a whole.'" *Houston v Governor*, 491 Mich 876, 878; 810 NW2d 255 (2012), quoting *Gen Motors Corp v Erves*, 399 Mich 241, 255; 249 NW2d 41 (1976).

### Legal Analysis

#### **A. Where a Debtor Tenders Partial Payment, the Tender Satisfies Only a Corresponding Portion of the Debt *Pro Tanto***

Michigan jurisprudence adheres to the ancient rule that where a sum of money is owed, and the debtor tenders a portion of the debt, the tender satisfies only an equal portion of the debt

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<sup>7</sup> The relevant portion appears in Part III of the Court's opinion immediately after the text of MCL 324.3109 is quoted in full, and immediately followed by footnote 19, citing as authority for the proposition *People v Morey*, 461 Mich 325, 330; 603 NW2d 250 (1999). The Advance Sheet for 491 Mich Part 2 is not yet available and a jump cite cannot be more accurately provided at this time.

*pro tanto*, even if it is claimed the creditor accepted the partial payment in full satisfaction of the debt. As summarized in *Cunningham v Irwin*, 182 Mich 629, 633; 148 NW 786 (1914):

The rule of law is generally recognized as well settled by the great weight of authority that a payment of less than the full amount of a past-due, liquidated, and undisputed debt, although accepted and receipted for as in full satisfaction, is only to be treated as a payment *pro tanto*, and does not estop the creditor from suing for and recovering the balance. This is ancient bench law, supported by no statutory authority or rule of property, and, though often criticized as unreasonable, unfair, and unjust, it is said its long and general acceptance commends itself to the courts with almost irresistible force.

Accord: *Widner v Western Union Tel Co*, 51 Mich 291, 296-297; 16 NW 653 (1883). Thus, on receiving \$152.98 from defendant on May 13, 2005 with no accompanying stipulation or instructions whatsoever, plaintiff could at its option treat the payment as merely reducing Sweebe's overall obligation by \$152.98

**B. Partial Payment on an Antecedent Debt Revives the Period of Limitations, AND Engenders a New Cause of Action for the Balance Owed**

For more than a century and a quarter in Michigan, the rule has been that partial payment on an antecedent debt not only serves to revive the statute of limitations, but engenders an entirely new cause of action for the debt owed. A new cause of action accrues on the date of payment. *Miner v Lorman, supra*, 56 Mich at 216; *Bonga v Bloomer, supra*, 14 Mich App at 319; *Alpena Friend of the Court ex rel Paul v Durecki*, 195 Mich App 635, 638-639; 491 NW2d 864 (1992).

As recently as *Yeiter v Knights of St Casimir Aid Society*, 461 Mich 493, 497; 607 NW2d 68 (2000), this Court reaffirmed this principle, noting:

[A] partial payment restarts the running of the limitation period unless it is accompanied by a declaration or circumstance that rebuts the implication that the debtor by partial payment admits the full obligation.

As explained in *Collateral Liquidation, Inc v Palm, supra*, 296 Mich at 704, “[t]he effect of the payment under the statute is equivalent to a new promise.” Such new promise is an independent

contract, stands independently of any sale of goods or other transaction that may underlie it, and is subject to the 6-year general contract statute of limitations, MCL 600.5807(8). The present suit is accordingly not barred, even though the underlying transaction was one involving goods rather than services.

**C. Partial Payment on an Open Account or Account Stated Not Only Restarts the Limitations Period and Engenders a New Right of Action for the Balance Owed, But the Nature of the Cause of Action is Independent of Any Underlying Transaction**

Partial payment on an open account or account stated not only restarts the limitations period and engenders a new right of action for the balance owed (Part B above), but the nature of the cause of action is independent of any underlying transaction. Defendant's own principal authority (from defendant's motion for summary disposition brief, Appx 39a-45a, and then its Court of Appeals appellee's brief) makes this very point. In *Moorman Mfg Co of Cal v Hall*, *supra*, , the majority found that the 4-year UCC statute of limitations barred the claim. But Judge Rossman, dissenting (on a point not directly addressed by the majority), opined that because the claim was one based on an account stated, it represented a separate agreement to pay "enforceable in its own right" even if the antecedent debt were barred by the statute of limitations. 113 Or App at 34; 830 P2d at 608.

Here, under well established Michigan jurisprudence applicable to open accounts and accounts stated, defendant's partial payment represents a renewed promise to pay as to which the 6-year contract statute of limitations applies, and the claim is clearly not barred, where suit was filed less than 5 years thereafter. Indeed, defense counsel admitted, in arguing his motion in the trial court, that if the \$152.98 payment made on May 13, 2005 was intended as partial payment on account, then the affirmative defense of limitations would be unavailing (TR 12/11/09, p. 8, lines 2-8—Appx 81a).

**D. Michigan Case Law and Statute Both Recognize Suit on Open Account as a Cause of Action in its Own Right, Distinct from and Independent of any Underlying Transaction(s)**

This Court's decision in *In re Dei's Estate*, 293 Mich 651, 655-658; 292 NW 513 (1940) is directly on point:

2. As to whether the whole or any part of plaintiff's claim is barred by the statute of limitations, we must first determine whether or not the account as presented was a mutual and open account current. If so, the judgment of the trial court must be affirmed. If not, only those items charged against decedent in her lifetime can be allowed that accrued within six years prior to her death.

The statute, 3 Comp Laws 1929, Sec 13977, Stat Ann Sec 27.606, provides:

'In actions brought to recover the balance due upon a mutual and open account current the cause of action shall be deemed to have accrued at the time of the last item proved in such account'.

Plaintiff filed his claim with the commissioners on or about September 30, 1938, and it is contended by appellant that all of the services performed by claimant more than six years prior thereto were barred under the provisions of the statute. We are not in accord with this contention. If the above statutory provision is controlling, claimant's cause of action did not accrue until the date of the last item of services performed by him which was on May 17, 1933, and he would have a period of six years thereafter within which he might present and prosecute his claim against deceased. He presented his claim well within the six year period.

The trial court found that there was a mutual and open account current between claimant and decedent and that claimant's cause of action did not accrue until May 17, 1933, the date of the last item proved in his account and that, therefore, his claim was not barred by the statute of limitations.

Appellant cites *Goodsole v Jeffery*, 202 Mich 201; 168 NW 461, 462, and insists that it is authority for the proposition that the claim involved in this case is barred by the statute. In the *Goodsole Case*, plaintiff and defendant entered into an oral contract that plaintiff should lease to defendant and defendant should rent from plaintiff a piano at a monthly rate of rental, the date of payment of which was not specified. Operation under the contract began August 8, 1906, and the period for which plaintiff sought to recover rent at the rate of \$2.50 per month ended May 8, 1911. The court found that it was to be inferred from the testimony that plaintiff charged defendant on his book monthly with the rent and gave him credit for any sums that were paid. On May 8, 1911, plaintiff charged defendant \$2.50 for rent for one month and on his book the last item of credit was February 2, 1910. The suit was instituted August 30, 1916. Defendant contended that the point in issue was whether the payment made February 2, 1910, rendered the account a mutual open account current. The trial court was of the opinion that the point had been

adjudicated and settled in *Payne v Walker, supra*. On appeal, we said:

‘I know of no decision of this court, and think there is none to be found in any jurisdiction, holding that, where the dealings of the parties relate entirely to and are governed by a special contract for the payment of money, at agreed upon periods, an open mutual account is established by performance of the contract obligation, whether a book account of it is kept or not. The trial court was in error, and, the defendant having pleaded the statute of limitations, judgment should have been directed in his favor for any part of plaintiff's demand which did not accrue six years before the action was begun.’

The distinction that is made in the above quotation between the two cases cited is applicable to all of the other cases that have been cited by appellant in support of his contention that the account was not a mutual and open account current.

The entries from plaintiff's books which were received in evidence established prima facie that he rendered services for decedent for which he had not received payment and that the account was a mutual and open account current. The trial court committed no error in rendering judgment in favor of claimant.

The statute cited, construed and applied in *Dei's Estate*, 3 Comp Laws 1929, §13977, was carried forward into the 1948 compilation, Comp Laws 1948, §609.14, which in turn was supplanted by the Revised Judicature Act, 1961 PA 236, §5831, and is now MCL 600.5831—unchanged from its 1929 counterpart:

Sec. 5831. 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.

Thus, not only does case law, but statutory law as well, continue to recognize suits on open account as something to be treated distinctly and separately from sales of goods and other matters regulated by the Uniform Commercial Code. Especially is this clear because the Michigan version of the UCC was adopted by the same Legislature—that which served from 1961-1962—as that which enacted the RJA, and both were signed into law by the same Governor (former Justice John Swainson). For purposes of MCL 440.1103, the UCC cannot reasonably be understood as superseding a statute expressly applicable to accounts stated and open accounts, where the latter are specifically addressed by another statute enacted at the same

legislative session. *In re Gallagher Ave in City of Hamtramck*, 300 Mich 309, 313; 1 NW2d 553 (1942); see also *In re Macomber*, 436 Mich 386, 395 n. 5; 461 NW2d 671 (1990), citing 2A Sands, Sutherland Statutory Construction (4<sup>th</sup> ed), §51.03, p. 469.

**E. An Action for an Account Stated or Open Account is Separate and Distinct from Any Underlying Transaction, Under Settled Michigan Jurisprudence, and Subject to a 6-Year Limitations Period**

An “account stated” or “open account” is “an agreement, between parties who have had previous transactions of a monetary character, that all the items of the accounts representing such transactions are true and that the balance struck is correct, together with a promise, express or implied, for the payment of such balance.” *Leonard Refineries, Inc v Gregory*, 295 Mich 432, 437; 295 NW 215 (1940). “ [W]here a plaintiff is able to show that the mutual dealings which have occurred between two parties have been adjusted, settled, and a balance struck, the law implies a promise to pay that balance.” *Keywell & Rosenfeld v Bithell*, 254 Mich App 300, 331; 657 NW2d 759 (2002), quoting *Watkins v Ford*, 69 Mich 357, 361; 37 NW 300 (1888).

“The conversion of an open account into an account stated, is an operation by which the parties assent to a sum as the correct balance due from one to the other; \* \* \* The parties may still impeach it for fraud or mistake. But so long as it is not impeached, the agreed statement serves in place of the original account, as the foundation of an action.” *White v Campbell*, 25 Mich 463, 467-468 (1872) (emphasis added). Here, plaintiff’s statement of the account (Complaint, ¶12 and Exhibits 1 and 2, Appx 21a, 23a-29a, 30a, Answer and Brief in Opposition to Motion for Summary Disposition, Exhibits 1, 2 and 3, Appx 54a, 23a-29a, 56a-60a) stands entirely unimpeached (see pp. 11-12 above, discussing the deficiencies in the affidavit of Neal A. Sweebe attached to defendant’s summary disposition reply brief, Appx 72a-73a).

Under settled Michigan jurisprudence, whatever the nature of the underlying transactions,

once thus converted, the claim is for an account stated, which claim “serves in place of the original account, as the foundation of an action”, *Hawley v Professional Credit Bureau*, 345 Mich 500, 506-507; 76 NW2d 835 (1956), and subject to the 6-year statute of limitations applicable to contracts generally. *Curry v Raich, supra*, 245 Mich at 150. As this Court held in *Stevens v Tuller, supra*, 4 Mich at 388 (emphasis added):

**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. As Lord Mansfield says: “It is an agreement by both parties that all the articles are true.” It is not necessary, however, that there should have existed mutual accounts between the parties; it may relate to a single debt or transaction. **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.

Thus, it is irrelevant whether the underlying transactions are sales of goods generally subject to a 4-year limitations period under MCL 440.2725, or anything else. The claim for an account stated stands on its own independently of the underlying transactions, and subject to its own 6-year period of limitations.

In “finding” (Feb. 18, 2010 opinion, p. 7—Appx 18a) that Sweebe’s May 13, 2005 partial payment was not on the open account but a “disconnected event”<sup>8</sup>, Judge Beale cited *Seyburn, Kahn, Ginn, Bess, Deitch & Serlin, PC v Bakshi*, 483 Mich 345; 771 NW2d 411 (2009), without bothering to provide a jump cite (a citation to a specific page of the decision) to some supportive

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<sup>8</sup> It should go without saying that it was wholly improper for Judge Beale to purport to render any findings of fact in the context of a motion for summary disposition, and without an actual trial. MCR 2.116(I)(3); *Durant v Stahlin, supra*; *Kermizian v Sumcad, supra*, 188 Mich App at 692-693. As this Court held in *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994), “The court is not permitted to assess credibility, or to determine facts on a motion for summary judgment. *Zamler v Smith*, 375 Mich 675, 678-679; 135 NW2d 349 (1965).”

passage therein. *Seyburn* turned on the unique difficulties that arise with regard to enforcement of attorney retainer contracts—given that under the Michigan Rules of Professional Conduct (e.g., MRPC 1.16(c)) and Michigan Court Rules of 1985 (i.e., MCR 2.117(C)(2)), lawyers cannot quit serving a client merely because the client has fallen into arrears. Thus, the time for filing suit for fees earned arises only when the attorney stops serving the client by virtue of the representation concluding or a court granting an order for withdrawal. 483 Mich at 359-360. Though cited by defendant, even the Court of Appeals' majority rejected reliance on *Seyburn* as a legitimate basis for resolving the issue presented here. See 293 Mich App at 70-71 (Appx 5a).

This Court in *Seyburn* concluded there was no mutual account because (a) there was an express written contract, (b) there was no mutual relationship, where the client last made a payment in 1992 and announced he would make no further payment, and (c) there was a judicial admission by the plaintiff that there was no claim based on a mutual or open account. 483 Mich at 356-358. None of these factors is extant here—this lawsuit does not derive from an attorney-client relationship, there is no express written contract, there was never an announcement by Sweebe that it would refuse to pay either the balance due or the usual charges for additional materials, and there was no judicial admission by plaintiff Fisher that there was no claim based on a mutual or open account or an account stated—exactly the contrary occurred here (TR 12/11/09, pp. 11-21—Appx 84a-94a; see also Complaint, ¶¶16-21—Appx 21a). Defendant's reliance on *Seyburn* is wholly misplaced and in no way supports the trial court's decision.

Sweebe never objected to any invoice or statement of its account. But even if Sweebe had objected, whether its objection(s) were made within a reasonable time (and were otherwise valid) would be a question for the trier of fact, and it would be error to resolve the issue on motion for summary disposition. *Peter v Thickstun*, 51 Mich 589, 593-594; 17 NW 68 (1883).

Thus, in Michigan, a claim based on an account stated or an open account is also independent of the underlying claim and subject to a 6-year period of limitations, based on the principles underlying Judge Rossman's dissent in *Moorman, supra*. The 6-year period runs from May 13, 2005, the date of the last payment. *Curry v Raich, supra*, 245 Mich at 150. Alternatively, at the earliest, the 6-year period runs from the date of the last transaction, when defendant took a delivery of sand on May 9, 2005 (or October 25, 2004, if one credit's the trial court's misreading of the record). MCL 600.5831. Either way, this action commenced August 13, 2009 (Appx 1a) is well within the 6-year period of limitations.

Defendant, in the trial court, contended that because the underlying transaction is a sale of goods<sup>9</sup>, the 4 year limitations period of Uniform Commercial Code §2-725, MCL 440.2725, applies, and, as this case was commenced more than 4 years after partial payment, suit is still barred even though the partial payment revived the debt. This argument ignores Michigan jurisprudence, exemplified by multiple binding precedents, which establishes that an action on an account stated<sup>10</sup> or an open account constitutes a claim distinct from any underlying transaction

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<sup>9</sup> As noted above, pp. 11-12, in Mr. Sweebe's affidavit attached to defendant's summary disposition reply brief, Appx 72a-73a, the assertion of "faulty product", which could hardly apply to sand or gravel, represents—in the summary disposition context where facts are viewed in a light most favorable to the non-moving party, *Maidern v Rozwood, supra*—a concession that the underlying transactions were sales of services (ready mixed concrete), not goods, (see footnote 4, pp. 4-5 above) and therefore *ab initio* outside the ambit of Article 2 of the UCC and its 4-year limitations period.

<sup>10</sup> The trial court also erred in opining (Feb. 18, 2010 opinion, p. 6—Appx 17a) that a claim for an account stated must be pursued in accordance with MCL 600.2145. The statute supplements the common law as to accounts stated, but does not supplant it. *Gordon et al*, Michigan Causes of Action Formbook §41.1 (Appx 61a-63a). Michigan has long adhered to the rule that statutes are presumed to supplement the common law unless the Legislature clearly specifies otherwise. As held in *Marquis v Hartford Accident & Indemnity*, 444 Mich 638, 652-654; 513 NW2d 799 (1994):

[A]s we emphasized in *Rusinek v Schultz, Snyder & Steele Lumber Co*, 411 Mich 502, 508; 309 NW2d 163 (1981), in the absence of a contrary expression by the Legislature,

reflected in the account, e.g., *Curry v Raich, supra*, citing *Payne v Walker*, 26 Mich 60, 62 (1872) (“The second [objection] raises the question, whether payments on account are sufficient to render it an open and mutual account so as to prevent the remedy thereon being barred by the statute of limitations. We think the circuit judge was correct in holding that they are.”) and *Hollywood v Reed*, 55 Mich 308, 310-311; 21 NW 313 (1884) (same).

Courts in other states and federal courts likewise have held that a period of limitations other than that provided by UCC §2-725, applies when partial payment has revived the underlying debt. *Central Nat’l Bank & Trust Co v Stettinisch, supra*, 821 P2d at 1067 (Okla, 1987) (5 year limitations period of 12 OS §95, rather than 4-year period under UCC, 12A OS 1981, §2-725, as recognized by UCC §1-103(b) [MCL 440.1103] providing that general statutes and case law of the state supplement the Code, and are not supplanted by it unless specifically so indicated); *Greer Limestone Co v Nestor, supra*, 175 W Va at 292; 332 SE2d at 593 n. 1 (5 year

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well-settled common-law principles are not to be abolished by implication in the guise of statutory construction.

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In *Rusinek*, this Court stated:

“Although a statute which expressly extinguishes a common-law right is a proper exercise of legislative authority, *Myers v Genesee Co Auditor*, 375 Mich 1; 133 NW2d 190 (1965), statutes in derogation of the common law must be strictly construed, *Morgan v McDermott*, 382 Mich 333; 169 NW2d 897 (1969), and will not be extended by implication to abrogate established rules of common law, *Bandfield v Bandfield* [117 Mich 80; 75 NW 287 (1898) ]. The statute, however, must be construed sensibly and in harmony with the legislative purpose. *In re Cameron’s Estate*, 170 Mich 578; 136 NW 451 (1912).” *Id.* 411 Mich at 507-508.’

Accordingly, FS&G may properly pursue a claim for account stated based solely on the common law, without availing itself of the alternative methodology provided under MCL 600.2145 (although in fact FS&G did so additionally—Appx 23a-30a, and Sweebe failed to avoid liability by filing a proper counter-affidavit satisfying the requirements of the statute, Appx 35a-36a), and the trial court manifestly erred in ruling to the contrary.

period of limitations of W Va Code 55-2-6 applies to claims based on mutual running account, open account, or any other “accounts concerning the trade or merchandise between merchant and merchant”, even where underlying transactions are sales of goods otherwise subject to 4-year period of limitations of UCC §2-725, W Va Code 46-2-725; part payment in 1980 revived full debt from 1974); *O’Neill v Steppat, supra*, 270 NW2d at 376-377 (SD, 1978) (suit on promissory note relating to sale of goods subject to 6-year period of limitations, not 4-year period of UCC §2-725 per UCC §2-701 [equivalent to MCL 440.2701<sup>11</sup>], which provides that “Remedies for breach of any obligation or promise collateral or ancillary to a contract for sale are not impaired by the provisions of Article 2”).

In *Childs v Taylor Cotton Oil Co* 612 SW2d 245, 31 UCCRS 590 (Tex Civ App, 1981), an action by a cotton oil company against the estate of a cotton-seed seller on sworn account for goods and materials, in which the defendant counterclaimed, *inter alia*, for the balance due on the open account, the court concluded that a four-year statute of limitations concerning mutual and current accounts between merchants (Tex Rev Civ Stat art 5527(3)), which provided that the cause of action accrued upon cessation of dealings, governed the action, rather than the four-year UCC statute of limitations prescribed in Tex Bus & Com Code Ann §2.725, which would have run from the date of the sale of the goods in question, despite the plain language in UCC §10-103<sup>12</sup> to the effect that acts inconsistent with UCC were repealed to the extent of their inconsistency with a Code provision. The court explained that, where the legislature had amended art. 5527 several times after enacting or amending the UCC, the latter amendment

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<sup>11</sup> “Sec. 2701. 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.”

<sup>12</sup> The Michigan Legislature adopted no similar provision, so the present case is *a fortiori* with respect to the distinct nature of a claim based on an open account and the applicability of MCL 600.5807(8) thereto.

operated to retain by re-enactment the applicability of the non-UCC statute of limitations for actions such as the one at bar. Finding that the amended statute was also intended to be supplementary to, rather than inconsistent with, the UCC, the court determined that the trial court properly determined that the plaintiff's action was not time-barred.

See also *Naph-Sol Refining Co v Murphy Oil Corp*, 550 F Supp 297 (WD Mich, 1982), affd in part and revd in part 728 F2d 1477 (Emergency Ct App, 1983) (where, applying Michigan law, plaintiff alleged the defendant engaged in practices which resulted in plaintiff's paying greater price increases for defendant's products than other classes of purchasers in violation of certain federal regulations, and the court rejected defendant's assertion the contract action was barred by MCL 440.2725, instead applying the six-year statute of limitations for residual personal actions, MCL 600.5813, where the action was regarded as one to recover overcharges made in violation of federal statutes, rather than damages for breach of a contract of sale of goods) and *Son v Coal Equity, Inc*, 122 Fed Appx 797; 55 UCC Rep Serv 2d 342; 2004 FED App 0092N (CA 6, 2004) (Five-year statute of limitations for an action upon a merchant's account for goods sold and delivered, rather than UCC's more general four-year statute of limitations for sale of goods claims, applied to breach of contract claim asserted by liquidating agent of coal producer's Chapter 11 estate in adversary proceeding against electric utility under Kentucky law.)

These federal and sister state decisions, being rendered in jurisdictions which treat actions on accounts stated and open accounts as distinct from any underlying transaction for limitations purposes, commend themselves to this Court, which for nearly 150 years has similarly developed the jurisprudence of open and stated accounts, in contrast to rogue decisions from Oregon and elsewhere in which the history of accounts stated is entirely contrary.

**F. Nothing in Michigan's Version of the Uniform Commercial Code Purports to Alter Michigan Common Law to the Effect that a Claim Based on an Open Account is Distinct and Independent of Any Underlying Transaction, and Subject to a 6-Year Period of Limitations**

With regards to open accounts as a cause of action separate and independent from any underlying transaction, and subject to its own period of limitations, one searches Article 2 of Michigan's version of the UCC in vain for any hint of Legislative disapproval or alteration, still less for *particular* language, per MCL 440.1103, abolishing the common law "in no uncertain terms." While Article 2 is certainly comprehensive as to sales of goods (as Article 3 is to negotiable instruments, *Hoerstman Gen Contr, Inc v Hahn*, 474 Mich 66, 75; 711 NW2d 340 (2006)), it says nothing, directly or indirectly, which can be interpreted as abrogating the concept of an open account or an account stated (both of which continue to be separately referenced in other statutes, e.g., MCL 600.2145 and 600.5831), the latter of which was contemporaneously enacted. As earlier noted, the UCC itself provides in MCL 440.1103:

Unless displaced by the particular provisions of this act, the principles of law and equity \* \* \* shall supplement its provisions.

Defendant, the circuit court, and the Court of Appeals are/were all unable to point to any "particular provision of this act" which supplants Michigan common law as to accounts stated and open accounts. Thus, such common law, as augmented by specific statutes such as MCL 600.2145 and 600.6831, remains in full force. As held in *New Properties, Inc v George D. Newpower, Jr., Inc* (Mich App No 259932, released September 14, 2006), Appx 125a:

First, as the trial court found, there is no affirmative provision of the UCC or other legislation that shows a legislative intent to repeal MCL 600.2919a. Second, our Supreme Court has rejected the notion of repeal by implication in *Valentine v McDonald*, 371 Mich 138, 123 NW2d 227 (1963), stating:

Repeal by implication is not permitted if it can be avoided by any reasonable construction of the statutes. If by any reasonable construction two statutes can be reconciled and a purpose found to be served by each, both must stand. The duty of the

courts is to reconcile statutes if possible and to enforce them. The courts will regard all statutes on the same general subject as part of one system and later statutes should be construed as supplementary to those preceding them. (Citations omitted).

Third, § 1103 of Article 4 of the UCC expressly provides that

Unless displaced by the particular provisions of this act, *the principles of law and equity, \* \* \* shall supplement its provisions.* (Emphasis added.) [MCL 440.1103.]

Thus, the Legislature has itself instructed Michigan's "one court of justice", Const 1963, art 6, §1, that prior law, common or statutory, continues in full force unless "displaced by the particular provisions of this act." Nothing in the UCC either specifically abolishes the cause of action on an open account or alters its nature as independent of any underlying transaction. As this Court has often abjured,

We reaffirm that the duty of the courts of this state is to apply the actual terms of an unambiguous statute.

*Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 58; 642 NW2d 663 (2002). Expansive application of MCL 440.2725, where the Legislature has expressly directed a contrary approach when doing so displaces existing common law, statutory application, or equitable principles, is therefore not permissible here. The settled jurisprudence which treats a claim based on open account as independent and distinct from any underlying transaction, and subject to a 6-year period of limitations, thus continues unabated.

As this Court has long recognized, 'An act will not be construed to repeal or modify earlier legislation, if, giving such effect to the act, an apparent purpose would appear to disturb an established system of written law, covering a vital field in our system of government.' R.C.L. vol. 25, p. 919.

*Attorney General ex rel Owen v Joyce*, 233 Mich 619, 623; 207 NW 863, 864 (1926). The principles governing open accounts represent just such an established system of written law, covering a vital field—commercial credit—in our system of government as well as our state and national economy.

The importance of stability in the law governing commercial transactions has long been singled out for special consideration. For example, in *Gilman v City of Philadelphia*, 70 US (3 Wall) 713, 724; 18 L Ed 96 (1865) the US Supreme Court held:

It is almost as important that the law should be settled permanently, as that it should be settled correctly. Its rules should be fixed deliberately and adhered to firmly, unless clearly erroneous. Vacillation is a serious evil. '*Misera est servitus ubi lex est vaga aut incerta.*'<sup>13, 14</sup>

Then, in *National Bank v Whitney*, 103 US (13 Otto) 99, 101-102; 26 L Ed 443 (1880), absent express legislative direction, the US Supreme Court refused to construe a statute as defeating a land transfer effectuated under existing mortgage jurisprudence. *Whitney, supra*, was then cited by Justice Brandeis in discussing *stare decisis* in *Burnet v Coronado Oil & Gas Co*, 285 US 393, 406-408; 52 S Ct 443, 447; 76 L Ed 815 (1932) (dissenting opinion)<sup>15</sup>.

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<sup>13</sup> To like effect is successful use of the same Latin axiom by counsel for the prisoner Erick Bollman in *Ex parte Bollman*, 8 US (4 Cranch) 75, 89; 2 L Ed 554 (1807), a case arising from Burr's Rebellion:

Again let it be asked, is not the law to be considered as settled by these repeated decisions? Are we still, as to this most important point, afloat on the troubled ocean of opinion, of feeling, and of prejudice? If so, deplorable indeed is our condition.

*Misera est servitus, ubi lex est vaga aut incerta.*

This great principle, *stare decisis*, so fundamental in our law, and so congenial to liberty, is peculiarly important in popular governments, where the influence of the passions is strong, the struggles for power are violent, the fluctuations of party are frequent, and the desire of suppressing opposition, or of gratifying revenge under the forms of law, and by the agency of the courts, is constant and active.

<sup>14</sup> Bouvier's Law Dictionary (1856) identifies this expression, with slight variation from plural to singular endings, as *Misera est servitus, ubi jus est vagum aut incertum* and translates it into English as "It is a miserable slavery where the law is vague or uncertain."

<sup>15</sup> Not only has *Burnet's* majority decision been subsequently overruled in part, *Helvering v Bankline Oil Co*, 303 US 362, 369; 58 S Ct 616, 619; 82 L Ed 897; 38-1 USTC P 9154; 20 AFTR 782 (1938), but Justice Brandeis' sentiments have subsequently been approvingly cited and quoted in majority decisions such as *Runyon v McCrary*, 427 US 160, 175 n. 12; 96 S Ct 2586; 49 L Ed 2d 415 (1976) and *Edelman v Jordan*, 415 US 651, 671 n. 14; 94 S Ct 1347; 39 L Ed 2d 662 (1974) as well as in majority decisions of this Honorable Court, e.g., *Li v Feldt (After*

Here, no compelling reason to overrule the long line of authority beginning with *Stevens v Tuller, supra* (1857), continuing with *Payne v Wallace, supra* (1872), *Hollywood v Reed, supra*, (1884), *White v Campbell, supra* (1888), *Curry v Raich* (1928), and—just six years before Michigan adopted the UCC—culminating with *Hawley, supra* (1956), appears. Certainly, there is no language in the UCC itself to suggest any such *legislative* intent, while, as shown above, powerful legislative indications to the contrary abound.

Meanwhile, those who extend credit commercially have legitimately relied on so settled and repeatedly confirmed a legal doctrine. On the other hand, commercial credit *users* like defendant have not shown that the Legislature intended to bestow a windfall on them as a class by adopting the UCC, which was designed to make uniform the laws governing commercial transactions to facilitate commerce, not to choke off commercial credit or pull the rug out from under enterprises like plaintiff Fisher Sand & Gravel which extend credit.

The lower courts in this case have perpetrated serious mischief which will have untold deleterious consequences to the Michigan economy and the Michigan business climate. This is not a mere jeremiad, or a lawyer's hyperbole; *amici* such as the Michigan Creditor's Bar Association have already raised the hue and cry, fearing the worst, and with good reason. Restoration of the established rules governing open accounts and accounts stated as forms of action independent of underlying transactions and governed by a 6-year limitations period now represents an imperative on this Court's agenda.

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*Remand*), 434 Mich 585, 559 n. 7; 456 NW2d 55 (1990), *Brown v Manistee Rd Comm'n*, 452 Mich 354, 365 n. 17; 550 NW2d 215 (1996), and *Boyd v WG Wade Shows, supra*, 443 Mich at 526 n. 16.

**Issue II: Where partial payment was made on an open account on May 13, 2005, constituting a novation under settled Michigan law, the trial court erred in making a finding of fact, on motion for summary disposition, that the partial payment was an isolated and specific transaction related to a purchase on May 9, 2005, thus not engendering a novation for purposes of the statute of limitations.**

### Standard of Review

It is well settled that a trial court may not weigh the evidence or make determinations of credibility when deciding a motion for summary disposition. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994); *White v Taylor Distributing Co, Inc*, 275 Mich App 615, 625; 739 NW2d 132 (2007); *Zurich Ins Co v CCR & Co (On Rehearing)*, 226 Mich App 599, 603; 576 NW2d 392 (1997). As held in *Reed v Kaydon, supra*, 38 Mich App at 356-357:

[O]n a motion for summary judgment, ‘a trial judge may not anticipate his role as trier of the fact.’ See *American Parts Co, Inc v American Arbitration Association*, 8 Mich App 156, 170; 154 NW2d 5 (1967).

Accord: *Durant v Stahlin, supra*. That principle again received this Court’s imprimatur in *Woodward v Cadillac Overall Supply Co*, 396 Mich 379, 384; 240 NW2d 710 (1976), and also in MCR 2.116(I)(3).

### Legal Analysis

After acknowledging the principle of novation (TR 12/11/09, p. 8, lines 2-8—Appx 81a), defense counsel did attempt to assert that no reasonable juror could find that the May 13, 2005 partial payment of \$152.98 was on account (*id.*, lines 23-25). However, it is well settled that summary disposition is “hardly ever appropriate” in cases involving questions of credibility, intent, or state of mind. *Michigan Nat’l Bank-Oakland v Wheeling*, 165 Mich App 738, 744-745; 419 NW2d 746 (1988); *Tumbarella v Kroger Co*, 85 Mich App 482, 492; 271 NW2d 284 (1978). Given defendant’s complete failure to specify, either on its check #1228 or in an accompanying note, that the payment was strictly intended to apply only to the May 9, 2005 purchase, a rational

trier of fact—especially one viewing the evidence in a light most favorable to FS&G, the party opposing summary disposition, *Maiden v Rozwood, supra*—could well conclude that defendant left the issue of application of its payment open to interpretation by the recipient, and that Fisher Sand & Gravel properly elected, as was its right, to apply the payment to the account balance as it stood on the date the partial payment was received. As held in *Leonard Refineries v Gregory, supra*, 295 Mich 438-439:

There is another reason why the defendant should have been allowed to go to the jury on the question of account stated. The last item of plaintiff's account, that of \$194.14 for delivery on 7-14-37, was for a c.o.d. shipment. When this truckload was brought to defendant's filling station, the driver refused to unload it until payment had been made. The defendant thereupon gave the driver a check payable to plaintiff for the claimed value of this load, plus \$25 to be applied on previous account. While the testimony is in dispute, viewed in the light most favorable to defendant, this last item claimed by plaintiff was paid for. However, plaintiff applied this check on earlier items of account, leaving the shipment of 7-14-37 unpaid. The circumstances of this payment negative the right of plaintiff to thus apply this payment. A debtor, upon paying money to his creditor, has a right to say on which one of several demands the payment shall be applied. *Thayer v Denton*, 4 Mich 192. There was a dispute as to whether a certain endorsement was on this check when the plaintiff received it. This question should have gone to the jury. If the endorsement was there when the check was delivered to the driver, it is evidence of payment for the shipment of 7-14-37. The debtor had the right to direct the application of the check to this payment, and the balance on account. *Harper v Concrete Publishing Co*, 166 Mich 429; 131 NW 1112.

Here, in contrast to *Leonard Refineries*, defendant tendered payment in the amount of its most recent purchase 4 days (or, according to the trial Court, 6½ months) later, with no accompanying stipulation, written or oral, to preclude Fisher from applying Sweebe's check #1228 "on earlier items of account", and so constituting a novation. At a minimum, in this regard an issue of material fact is presented, and it was error for the trial court to grant summary disposition and usurp the right of a jury or other trier of fact to weigh the evidence.

Indeed, absent such a direction accompanying partial payment, the creditor has the primary right in the first instance to apply a partial payment to the open account balance, rather

than to any specific item therein. As this Court held in *White Truck Sales of Saginaw, Ltd v Citizens Commercial & Sav Bank*, 348 Mich 110, 116; 82 NW2d 518 (1957):

The burden of proof as to a special deposit was on plaintiff [debtor]. Deposits are regarded as special only when made and intended for a special purpose by both depositor and bank. The trial judge was correct in holding that it had not carried this burden.

This creditor's option is limited only by the requirement that part payment first be applied to interest and then to principal:

The rule as claimed by the complainant, and adopted by the circuit court, was the one which is sometimes called the Massachusetts or the United States rule, and was laid down by Chancellor Kent as follows: "When partial payments have been made, apply the payment, in the first place, to the discharging of the interest then due. If the payment exceeds the interest, the surplus goes towards discharging the principal, and the subsequent interest is to be computed on the balance of the principal remaining due. If the payment be less than the interest, the surplus of interest must not be taken to augment the principal, but the interest continues on the former principal until the period when the payments, taken together, exceed the interest due, and then the surplus is to be applied towards discharging the principal, and interest is to be computed on the balance as aforesaid." This rule was adopted by this court in *Payne v Avery*, 21 Mich 524, and is the rule recognized in most of the United States. We think that the circuit court was right in its manner of computing interest, and that it reached the right conclusion.

*Wallace v Glaser*, 82 Mich 190, 191; 46 NW 227 (1890); accord: *Niggeling v Dep't of Transportation*, 195 Mich App 163, 167; 488 NW2d 791 (1992).

Nonetheless, the trial court, in its opinion (Feb. 18, 2010 opinion, p. 8—Appx 17a), purportedly "found"—in violation of *Durant*, *Woodward*, *Skinner*, and *White v Taylor Distributing, supra*—that the \$152.98 payment was merely a "disconnected event", possibly in payment for the materials acquired 4 days (or 197 days)<sup>16</sup> previously, and not on the account. The trial court grossly erred in making findings of fact or weighing evidence in deciding defendant's summary disposition motion, *Skinner v Square D Co, supra*, 445 Mich at 161.

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<sup>16</sup> Depending whether the last purchase of sand and gravel occurred on May 9, 2005 or October 25, 2004, as the trial court "determined" (Feb. 18, 2010 opinion, p. 6—Appx 15a). See footnote 6 above, p. 9.

## RELIEF REQUESTED

The circuit court's order granting summary disposition must be reversed in all respects; the Court of Appeals decision affirming that result must likewise be reversed.

Furthermore—unless this Court directs the entry of summary disposition in favor of FS&G under MCR 7.316(A)(7) and MCR 2.116(I)(2)—the Court should direct that remand proceedings be conducted before a different trial judge. Irrespective of whether there might be grounds for disqualification-- which as the Court is well aware has very demanding requirements and which is usually not forthcoming based on rulings in the ordinary course of judicial proceedings, however egregious such rulings may be—an entirely separate legal doctrine permits an appellate Court to direct such reassignment without regard to whether grounds for disqualification exist. As held in *People v Evans*, 156 Mich App 68, 72; 401 NW2d 312 (1986), adopting *United States v Sears, Roebuck & Co, Inc*, 785 F2d 777 (CA 9, 1986), the appellate Court may direct reassignment in order to preserve the appearance of justice and fairness. See also *People v Lowenstein*, 118 Mich App 475, 482; 325 NW2d 462 (1982).

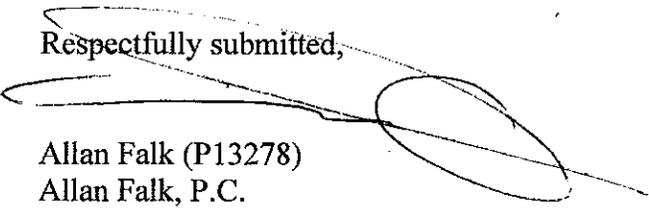
Under the three-part federal standard of *United States v Sears, Roebuck & Co, Inc, supra*, a remand to a different judge, irrespective of issues of actual disqualification, is appropriate when (1) the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his mind previously expressed views or findings determined to be erroneous; (2) reassignment is advisable to preserve the appearance of justice; and (3) reassignment would not entail waste and duplication out of proportion to any gain in preserving the appearance of fairness.

As for the first two factors, here, Judge Beale, who will serve as trier of fact on remand, has expressed a firm conclusion—in a completely inappropriate context, contrary to *Durant*,

*Woodward, Skinner, and White v Taylor Distributing, supra* —that merely because the May 13, 2005 payment of \$152.98 matched the charges incurred on May 9, 2005, the payment was not on account but specific to the May 9 transaction. Judge Beale made this “finding” notwithstanding the complete failure of defendant to specify contemporaneously how its partial payment should be applied, and in the face of defendant’s history of paying mostly small, random amounts<sup>17</sup> on the balance owed. If the case were remanded to Judge Beale, and after a bench trial he adhered to the views already so strongly expressed, the appearance of injustice to the public would be manifest and operate to the grave discredit of Michigan’s “one court of justice”, Const 1963, art 6, §1.

Inasmuch as there were no substantive proceedings before Judge Beale, “reassignment would not entail waste and duplication out of proportion to any gain in preserving the appearance of fairness”.

Respectfully submitted,



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<sup>17</sup> *E.g.*, \$5000 on June 30, 1992, \$105.03 on December 29, 1995, \$229.95 on July 10, 1998, \$327.02 on September 25, 2002 (Appx 23a, 26a, 28a), and \$152.98 on May 13, 2005 (Appx 60a)