STATE OF IDAHO)
County of KOOTENAI)ss

FILED______________________

AT___________ O'Clock _____M
CLERK OF DISTRICT COURT

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Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

PALMER GEORGE, PLLC, *Plaintiff*, vs. **RICHARD R. REESE, ET UX,** *Defendant*.	Case No. **CV 2011 5481** **MEMORANDUM DECISION AND ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on Plaintiff Palmer George, PLLC's (Palmer George) Motion for Summary Judgment, filed September 21, 2011, seeking judgment in the amount of $11,197.91 under the agreement by which defendants Richard and Reva Reese (Reeses) retained Palmer George, plus interest and attorney's fees and costs incurred in the instant action to recover on the underlying agreement. Brief in Support of Plaintiff's Motion for Summary Judgment, p. 8. In its July 7, 2011, Complaint, Palmer George alleges Reeses severally owe $11,197.91 and agreed to pay interest of 18%, accruing from the date of the agreement, on any outstanding balance which remains unpaid for more than thirty (30) days. Complaint, p. 3, ¶¶ VI-VII. Richard Reese entered into the Attorney/Client Contract with Palmer George on April 10, 2008; Reva Reese entered into a similar agreement on May 21, 2008. Exhibits to the Complaint.

Reeses answered the Complaint on August 22, 2011. Reeses submit they retained Palmer George "to settle [a] misdemeanor criminal complaint and restitution complaint." Answer p. 1, ¶ 1(a). Reeses contend that following resolution of the underlying misdemeanor, Palmer George erroneously insisted Reeses were owed compensation on the issue of restitution and improperly left the matter of restitution open for two years during which Palmer George continued to charge fees. *Id.,* ¶¶ 1(b)-1(d). Ultimately, Reeses state the restitution amount entered by the Court was the amount owed by them at the inception of the case, before they retained Palmer George. *Id.,* ¶ 1(f). In response, Michael Palmer testifies in his affidavit:

> 16. Contrary to the assertions made in the Defendants' Answer, and as is indisputably set forth in the record, the criminal cases were not resolved at the May 8, 2009 hearing. Defendants specifically agreed to leave the matter of restitution open, which sum was at the time indeterminate, and to have further hearings on the issue of restitution as a condition of the plea agreement.
>
> 17. Litigation continued on the restitution issue for approximately the following twenty-two (22) months before finally being decided. At no point during this time period did Defendants ever ask that I withdraw as their counsel or communicate that I should discontinue my efforts on their behalf. Which had I done so would have resulted in an order tens of thousands of dollars beyond the restitution amount that was ultimately determined applicable to them.

Affidavit of Michael G. Palmer in Support of Plaintiff's Motion for Summary Judgment, pp. 4-5, ¶¶ 16-17.

Reeses have not responded to Palmer George's motion for summary judgment. This matter is scheduled for a one-day Court trial commencing on November 5, 2012.

Reeses did not appear at the May 8, 2012, hearing on plaintiff's motion for summary judgment.

II. STANDARD OF REVIEW.

In considering a motion for summary judgment, the Court is mindful that summary judgment may properly be granted only where there are no genuine issues of

material fact and the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c). In determining whether any issue of material fact exists, this court must construe all facts and inferences contained in the pleadings, depositions, and admissions, together with the affidavits, if any, in the light most favorable to the non-moving party. I.R.C.P. 56(c); *Sewell v. Neilson, Monroe Inc.,* 109 Idaho 192, 194, 706 P.2d 81, 83 (Ct. App. 1985). A mere scintilla of evidence or only slight doubt as to the facts is not sufficient to create a genuine issue for purposes of summary judgment. *Samuel v. Hepworth, Nungester & Lezamiz, Inc.,* 134, Idaho 84, 87, 996 P.2d 303, 306 (2002). Summary judgment must be denied if reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence. *Smith v. Meridian Joint School District No. 2,* 128 Idaho 714, 718, 918 P.2d 583, 587 (1996); *Riverside Dev. Co. v. Ritchie,* 103 Idaho 515, 519, 650 P.2d 657, 662 (1982). Neither party to this matter has requested a jury trial. In cases set for a court trial, the Court is entitled to arrive at the most probable inference to be drawn from the undisputed evidence presented to it. *J.R. Simplot v. Bosen,* 144 Idaho 611, 618, 167 P.3d 748, 755 (2006). "The test for reviewing the inferences drawn by the trial court is whether the record reasonably supports the inferences." *Id.,* citing *Shawver v. Huckleberry Estates, LLC,* 140 Idaho 354, 360-61, 93 P.3d 685, 691-92 (2004).

III. ANALYSIS OF SUMMARY JUDGMENT MOTION.

Palmer George argues Reeses have set forth the first two elements of a legal malpractice claim, but have not demonstrated that Palmer George breached its duty to them or that Palmer George's purported negligence was a proximate cause of any damage to Reeses. Brief in Support of Plaintiff's Motion for Summary Judgment, p. 5, citing *Johnson v. Jones,* 103 Idaho 702, 706, 652 P.2d 650, 654 (1982); *Soignier v.*

Fletcher, 151 Idaho 322,___, 256 P.3d 730, 732 (2011). Palmer George states the only breach the Court could possibly read into Reeses' Answer would be with regard to "denied hearings on restitution" or "the bifurcation of misdemeanor and restitution portions of the underlying case", but that Reeses identify no damages resulting from either. Brief in Support of Plaintiff's Motion for Summary Judgment, p. 5. Palmer George goes on to request attorney fees in the instant action for collection upon the Attorney/Client Contract pursuant to I.C. § 12-120(3). *Id.,* pp. 6-8. Reeses have not responded to the motion for summary judgment. Reeses did not appear at the hearing on the motion for summary judgment.

Palmer George does not explicitly set forth its theory of recovery, which this Court presumes to be an action either on an account stated or on an open account. A treatise on the subject of account stated reads:

> An account stated between an attorney and client during the existence of their relationship is analogous to an ordinary fee contract and governed by the same rules. Where a statement of account is balanced and rendered to the client by an attorney and is assented to either expressly or impliedly, and account stated is established.
> **Practice Tip:**
> A law firm seeking recovery of unpaid legal fees from a client must, in order to be entitled to summary judgment on the theory of account stated, provide the client with billing statements that show not only the balance due but also the nature of the services rendered or the hours expended.

7 AM.JUR.2D *Attorneys* § 256 (2012). An account stated is a "document, a writing, which exhibits the state of account between [the] parties and the balance owed one to another, and when assented to, either expressly or impliedly, it becomes a new contract." *Needs v. Hebner,* 118 Idaho 438, 442, 797 P.2d 146, 150 (Ct.App. 1990). "[B]oth parties must have a known bona fide dispute as to the amount owed for the theory of account stated to apply." *Grover v. Wadsworth,* 147 Idaho 60, 64, 205 P.3d 1196, 1200 (2009). In *M.T.*

Deaton & Co. v. Leibrock, 114 Idaho 614, 759 P.2d 905 (Ct.App. 1988), the Idaho Court of Appeals differentiated between actions on accounts stated and actions on open accounts:

> Because the parties are not in agreement, an open account requires proof of services rendered, and a showing that the amounts charged are reasonable. An account stated action requires a showing of mutual assent that an amount is a final balance of account agreed to by the parties and a writing evidencing the final balance. Assent may be implied from failure to object to a billing within a reasonable time. Thus, any written account may become an account stated through acquiescence in its correctness. (citations omitted)

114 Idaho 614, 616, 759 P.2d 905, 907. Here, the parties disagree as to the amount Reeses owe Palmer George. Reeses have asked, in their Answer, that Palmer George only be awarded costs for the settlement of the misdemeanor, implicitly requesting that no fees be awarded for the restitution issue. Answer, p. 1. No question of fact remains as to whether Reeses ever assented, because by virtue of not objecting to any billing within a reasonable time, they are deemed to have implicitly assented. *Id.* In *M.T. Deaton,* the Court of Appeals noted the absence of "any contention that the amount Deaton claimed was incorrect or was not a final balance." 114 Idaho 614, 617, 759 P.2d 905, 908. The Idaho Court of Appeals held that the written statement of account sent out, setting forth the balance due, was sufficient to uphold the trial court's judgment on the account stated theory. *Id.* Similarly, here, the Court has only Reeses' pleading setting forth their dispute about the amount owed. "If a party resists summary judgment, it is his responsibility to place in the record before the trial court the existence of controverted material facts. A party may not rely on his pleadings nor merely assert that there are some facts which might or will support his legal theory, but rather he must establish the existence of those facts by deposition, affidavit, or otherwise." *Berg v.*

Fairman, 107 Idaho 441, 444, 690 P.2d 896, 899 (1984). Having not done so here, Reeses cannot survive summary judgment.

IV. ANALYSIS OF PALMER GEORGE'S REQUEST FOR ATTORNEY FEES.

Palmer George also seeks an award of fees and costs pursuant to I.C. § 12-120(3), despite its representing itself in these proceedings. Certainly, based on the above findings, Palmer George are the prevailing parties in this lawsuit.

The Idaho Court of Appeals considered whether an exception to the general rule that *pro se* litigants are not entitled to awards of fees exists where those *pro* se litigants happen to be lawyers in *Swanson & Setzke, Chtd. V. Henning,* 116 Idaho 199, 774 P.2d 909 (Ct.App. 1989). The *Swanson* Court disagreed with both arguments made by the plaintiff law firm seeking to collect a debt on an open account for legal services: (1) that I.C. § 12-120 mandates an award of fees to the prevailing party regardless of whether the party is *pro se*, or (2) that a prohibition of fees to *pro se* litigants should be subject to an exception for *pro se* lawyers. 116 Idaho 199, 202-03, 774 P.2d 909, 912-13. The Idaho Court of Appeals wrote:

> The system would be one-sided, and would be viewed by the public as unfair, if one party (a lawyer litigant) could qualify for a fee award without incurring the potential out-of-pocket obligation that the opposing party (a nonlawyer) ordinarily must bear in order to qualify for a similar award. Moreover, if both parties opt to litigate pro se, it would be palpably unjust for one of them (the lawyer litigant) to remain eligible for an attorney fee award, while the other becomes ineligible.

116 Idaho 199, 203, 774 P.2d 909, 913. The Idaho Court of Appeals then held, "…because the other rationales for the general rule against fee awards are applicable to lawyer and nonlawyer litigants alike, we decline to carve out a special exception for lawyers *pro se.*" 116 Idaho 199, 203, n. 3, 774 P.2d 909, 913, n. 3.

V. CONCLUSION AND ORDER.

For the reasons stated above, this Court exercises its discretion and grants plaintiffs their summary judgment motion in all respects, save for their request for attorney fees pursuant to Idaho Code § 12-120.

IT IS HEREBY ORDERED plaintiff's Motion for Summary Judgment is GRANTED in all respects, save for their request for attorney fees pursuant to Idaho Code § 12-120. Plaintiffs are entitled to a judgment in the amount of the debt ($11,197.91) from the date the debt was incurred, with interest accruing at the contract rate of 18% due on any balance which remained unpaid for more than thirty (30) days.

IT IS FURTHER ORDERED plaintiff is the prevailing party, but plaintiff's request for attorney fees pursuant to Idaho Code § 12-120 is DENIED.

IT IS FURTHER ORDERED counsel for plaintiff prepare a Judgment consistent with this Memorandum Decision and Order.

Entered this 9th day of May, 2012.

____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _______ day of May, 2012, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer	Fax #	Lawyer	Fax #
Brandie J. Rouse	676-1683	Richard R. Reese, Pro Se	
Reva G. Reese, Pro Se			

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Jeanne Clausen, Deputy Clerk