

Case Summary and Issues

Following Edwin Blinn's guilty plea and sentencing in federal court to money laundering charges, Blinn sued his criminal defense attorney, Robert Hammerle, for malpractice and unjust enrichment. The trial court granted Hammerle's motion for summary judgment on all claims. Blinn now appeals, raising four issues for our review, which we consolidate and restate as three: 1) whether Blinn filed his complaint within the statute of limitations, 2) whether Hammerle committed malpractice, and 3) whether Hammerle was unjustly enriched. We conclude that Blinn did not file his complaint within the applicable statute of limitations, and even if he did, we also conclude that Hammerle did not commit malpractice and Hammerle was not unjustly enriched. Therefore, the trial court's judgment is affirmed.

Facts and Procedural History

Blinn retained Hammerle to defend him in federal court against money laundering charges. Hammerle wrote Blinn a letter, dated May 26, 2005, memorializing their original fee contract:

[T]he flat fee/retainer of \$35,000.00 that is due and owing will be my entire fee barring out of pocket expenses should this trial last no more than five (5) calendar days. However, I will bill hourly for every day that said trial lasts beyond the five (5) [sic] calendar days.

Appellant's Appendix at 125.

After continuing to represent Blinn for nearly eight months, Hammerle sent Blinn another letter, dated January 20, 2006, proposing modification of the fee agreement because Blinn's case was more demanding than anticipated. Apparently Blinn rejected Hammerle's

January 20 proposal, but eventually agreed to a modified agreement.¹ Blinn states the oral agreement was that he would “pay a flat fee for trial work done after the first five (5) days of trial in lieu of the hourly rate for such work contemplated by the original agreement,” and he and Hammerle “agreed upon the additional sum of \$20,000,” which Blinn paid. Id. at 9.

Hammerle ultimately negotiated and Blinn entered a plea agreement, so there was no trial. Blinn pleaded guilty to one count, which carried a maximum sentence of twenty years in prison and a fine of up to \$500,000. Under the agreement, Blinn would be sentenced to between twelve and twenty months in prison and the district court would “consult and take into account” the federal sentencing guidelines. Id. at 66. The agreement did not explicitly address the length or conditions of any supervised release Blinn might be required to serve, but the sentencing judge asked him, “Do you understand also that you’d be subject to up to, I believe it’s three years of supervised release after any prison sentence?” Id. at 92. Blinn replied, “Yes, sir.” Id. The federal district court sentenced Blinn to sixteen months in prison followed by twelve months of home detention.

The plea agreement provided “Blinn also expressly waives his right to contest or seek review of the sentence on appeal on any ground” Id. at 67. Blinn appealed his sentence, specifically challenging the twelve months of home detention. The Seventh Circuit Court of Appeals dismissed his appeal following a partial discussion of the merits. Blinn v. United States, 490 F.3d 586, 588 (7th Cir. 2007), reh’g denied, reh’g en banc denied. Shortly after the Seventh Circuit issued this opinion, Blinn wrote a letter dated June 28, 2007 to the

¹ Blinn now asserts he “did not consider the advance to be a modification of the original fee agreement, although Blinn’s Complaint mistakenly says otherwise.” Appellant’s Brief at 4.

Indiana Attorney General, alleging Hammerle violated ethical rules for not returning Blinn's payment in 2006, and for not objecting to Blinn's home detention. Hammerle testified in a deposition that he considered August 27, 2007, when the Seventh Circuit denied rehearing, to be the last day of his representing Blinn.

On August 26, 2009, Blinn filed his complaint against Hammerle in state court for malpractice and unjust enrichment, arguing Hammerle: 1) provided ineffective assistance in Blinn's sentencing, and 2) was not entitled to keep the \$20,000 Blinn paid him in 2006. The trial court granted Hammerle's motion for summary judgment on all claims. Blinn now appeals. Additional facts will be supplied as appropriate.

Discussion and Decision

I. Standard of Review

On appeal of a summary judgment order we are bound by the same standard as the trial court, and we consider only those materials which the parties designated at the summary judgment stage. Estate of Pflanz v. Davis, 678 N.E.2d 1148, 1151 (Ind. Ct. App. 1997). Summary judgment is appropriate if the "designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Ind. Trial Rule 56(C). The moving party bears the burden of showing no genuine issue of material fact in reliance upon specifically designated evidence. Pflanz, 678 N.E.2d at 1150. If the moving party satisfies its burden, the burden shifts to the non-movant to set forth specifically designated evidence showing there is a genuine issue for trial. Id. A genuine issue of material fact exists where facts concerning an issue which would dispose of

the litigation are in dispute, or where undisputed facts are capable of supporting conflicting inferences on such an issue. Briggs v. Finley, 631 N.E.2d 959, 963 (Ind. Ct. App. 1994), trans. denied. Even if the facts are undisputed, summary judgment is inappropriate where the record reveals an incorrect application of the law to the facts. Gen. Accident Ins. Co. of Am. v. Hughes, 706 N.E.2d 208, 210 (Ind. Ct. App. 1999), trans. denied.

We liberally construe all designated evidentiary material in the light most favorable to the non-moving party to determine whether there is a genuine issue of material fact for trial. Dunifon v. Iovino, 665 N.E.2d 51, 55 (Ind. Ct. App. 1996), trans. denied. We may affirm a trial court's grant of summary judgment upon any theory supported by the designated materials. Sims v. Barnes, 689 N.E.2d 734, 735 (Ind. Ct. App. 1997), trans. denied. Additionally, we "may determine in the context of summary judgment a mixed question of law and fact." Ebbinghouse v. Firstfleet, Inc., 693 N.E.2d 644, 647 n.2 (Ind. Ct. App. 1998), trans. denied.

II. Statute of Limitations

Hammerle argues that Blinn did not file his complaint within the applicable statute of limitations, which the parties agree is two years. See Morgan v. Benner, 712 N.E.2d 500, 503 (Ind. Ct. App. 1999), trans. denied. In evaluating this argument, we refer to the following three facts from the designated evidence: 1) Blinn displayed his awareness of Hammerle's possible misconduct in his June 28, 2007 letter to the Indiana Attorney General; 2) Hammerle admitted he ceased to represent Blinn on August 27, 2007; and 3) Blinn filed his complaint on August 26, 2009. Even given these facts, Hammerle and Blinn disagree

over when the two-year statute of limitations began to run, and therefore whether it expired before Blinn filed suit.

In particular, Hammerle argues the “discovery rule” applies, and accordingly that the statute began to run, at the latest, on June 28, 2007, when Blinn wrote a letter to the Indiana Attorney General regarding Hammerle’s alleged misconduct. Blinn argues the “continuous representation doctrine” applies, and accordingly that the statute began to run on August 27, 2007, the date Hammerle ceased to represent Blinn.

Hammerle bases his argument on Morgan, which states:

legal malpractice actions are subject to the “discovery rule,” which provides that the statute of limitations does not begin to run until such time as the plaintiff knows, or in the exercise of ordinary diligence could have discovered, that he had sustained an injury as the result of the tortious act of another. For a cause of action to accrue, it is not necessary that the full extent of damage be known or even ascertainable, but only that some ascertainable damage has occurred.

712 N.E.2d at 503 (citations omitted).

Blinn bases his argument on Biomet, Inc. v. Barnes & Thornburg, 791 N.E.2d 760 (Ind. Ct. App. 2003), trans. denied, which explains that “[u]nder the continuous representation doctrine, the statute of limitations does not commence until the end of an attorney’s representation of a client in the same matter in which the alleged malpractice occurred.” Id. at 765. In Biomet, we adopted the continuous representation doctrine for numerous policy reasons as a narrow exception to the discovery rule traditionally followed in legal malpractice actions. Id. at 765-77. In Biomet, we noted several reasons for applying the narrow exception: avoiding disruption of the attorney-client relationship, allowing attorneys to remedy mistakes before being sued, and not forcing clients to second-guess their

attorney's handling of their case. Id. at 766. This doctrine also allows a client to be confident in their attorney's ability to correct errors, or for the client to terminate the relationship and file suit within two years of termination. Id. Finally, the doctrine prevents an attorney from defeating a malpractice action by continuing representation until the statute of limitations under the discovery rule has expired. Id. at 766-67.

These rationales support application of the continuous representation doctrine in Indiana and other jurisdictions, and application to the accounting profession in Indiana as well. See Bambi's Roofing, Inc. v. Moriarty, 859 N.E.2d 347, 357-58 (Ind. Ct. App. 2006). However, here, we find that the rationales supporting our adoption and application of the continuous representation doctrine are absent.

Our application of the continuous representation doctrine is beneficial to the extent that it does not require clients or encourage attorneys to act in ways that might interfere with their relationship or prejudice clients in their ongoing legal matters or a malpractice action. The very existence of the doctrine minimizes incentives for attorneys to act in ways that might otherwise prejudice these clients. However, the doctrine is of negligible utility where its application would not advance the concerns explained in Biomet, and of no utility where the client has already acted – perhaps unaware of the continuous representation doctrine.

Here, Blinn wrote to the Indiana Attorney General complaining of Hammerle's conduct, explaining the fee dispute for Hammerle not returning money to Blinn and Blinn's suspicion of Hammerle's malpractice by not objecting to Blinn's home detention. This letter was likely to disrupt the attorney-client relationship, and demonstrated Blinn was already

second-guessing Hammerle's handling of his case. All the while, Hammerle was dutifully seeking rehearing of the Seventh Circuit decision. Hammerle ended the representation less than two months later, so he was clearly not attempting to defeat a malpractice action by extending representation to run out the statute of limitations.

Therefore, we decline to apply the continuous representation exception and instead follow the default discovery rule for accrual of the statute of limitations. The facts in this case are particularly appropriate for application of the discovery rule, which is "designed to encourage the prompt presentation of claims and to assure fairness to defendants." Silvers v. Brodeur, 682 N.E.2d 811, 817 (Ind. Ct. App. 1997), trans. denied. The discovery rule is also sympathetic to plaintiffs by "toll[ing] the running of the statute of limitations until a party either knows, or should have known, about his injury." Id. Here, the designated evidence clearly shows that Blinn knew of his "injury" – the purportedly improper sentence – in June 2007 and even lucidly expressed his view that it was malpractice in his letter dated June 28, 2007. Therefore, we consider this to be the date of accrual of Blinn's claim, and his two-year statute of limitations expired before he filed his complaint on August 26, 2009. Further, our decision here is not unprecedented, as we have applied the discovery rule to legal malpractice claims in at least one other post-Biomet decision. See Godby v. Whitehead, 837 N.E.2d 146, 150-51 (Ind. Ct. App. 2005) ("[A] criminal defendant is required to file his malpractice action within two years of discovering the malpractice.") (quoting Silvers, 837 N.E.2d at 818), trans. denied. However, because we decide this issue on a narrow exception, we continue to address the merits as well.

III. Legal Malpractice

Blinn's malpractice claim is premised on the allegation that Hammerle should have objected when the federal district court imposed twelve months of home detention in addition to a sixteen-month prison term. Hammerle's failure to object, Blinn asserts, resulted in a "sentence inconsistent with [Blinn's] binding plea agreement," Appellant's Br. at 17 (all capitalization omitted), because it imposed "continued punishment" beyond that specified in the plea agreement. *Id.* at 10. He also argues Hammerle's error prevented the Seventh Circuit from deciding his appeal on the merits. We disagree, and for the following reasons affirm summary judgment on his malpractice claim.

The Seventh Circuit explained the facts underlying Blinn's malpractice claim:

[A] [federal] grand jury returned a superseding indictment charging [Blinn] with conspiring to launder monetary proceeds (Count Four) and laundering the monetary proceeds of the unlawful distribution of marijuana (Count Five). Blinn negotiated a plea agreement with the government . . . and pleaded guilty to Count Four of the indictment; Count Five was dismissed. The agreement called for a sentence of twelve to twenty months' imprisonment, which was well below the statutory maximum of twenty years, but it was silent as to any term of supervised release. The district court accepted the plea and was bound by the sentencing recommendation contained in the plea agreement.

Blinn was ultimately sentenced to sixteen months' imprisonment, ordered to pay a fine of \$40,000, and placed on supervised release for three years. In addition to these terms, the district court ordered, as a condition of the supervised release, that Blinn be confined to his home with electronic monitoring for twelve months, except for purposes of employment and other activities approved by Blinn's probation officer. Blinn did not object to the stated terms of his sentence before it was imposed or move to withdraw his plea agreement.

He now appeals, arguing that his sentence of sixteen months' imprisonment to be followed by twelve months of home confinement violates the terms of his plea agreement by exceeding the high end of the sentencing range set forth in his plea agreement by four months. In making this argument, Blinn directs us to section 5F1.2 of the United States Sentencing Guidelines, which advises

that home detention may be imposed as a condition of probation or supervised release, “but only as a substitute for imprisonment.” This provision, Blinn contends, prevents the district court from ordering him to a period of home detention that, when combined with his actual term of imprisonment, exceeds the maximum sentence of twenty months’ imprisonment provided for in his plea agreement. . . .

Blinn, 490 F.3d at 587 (footnote and citations omitted). Under the sentencing guidelines then in effect, district courts were advised to impose a period of supervised release to follow a defendant’s term of imprisonment greater than one year. Id. at 587 n.1.

The Seventh Circuit explained that the legal authorities Blinn cited in support of his argument were non-binding as from other federal circuits and also significantly distinguishable on the facts. Continuing, the court declined to determine whether his sentence violates the terms of his plea agreement because a provision of his plea agreement included a valid waiver of his right to appeal. However, the court did discuss what has become a central issue in Blinn’s malpractice claim – whether Blinn received the benefit of his bargained-for plea agreement.

[T]he terms of the plea agreement and the transcript of the proceedings show that Blinn received exactly what he bargained for – a term of imprisonment not to exceed twenty months. The agreement plainly states, “should the Court accept this plea agreement, Blinn will be sentenced to a sentence within the range of 12 to 20 months’ imprisonment on Count Four . . .” During the plea colloquy, Blinn also confirmed his understanding that if the district court accepted the plea agreement, it was committed “to giving [Blinn] a sentence that is at least 12 months in prison, but no more than 20 months in prison[.]” At Blinn’s sentencing hearing, this range of imprisonment was repeated multiple times by the judge and the government’s attorney before Blinn’s sentence was finally imposed.

It is apparent from the above discussion that the parties bound by the plea agreement – Blinn, the government, and the district court . . . – were all in agreement that Blinn, in exchange for pleading guilty to Count Four, would serve a sentence between twelve and twenty months in prison. In addition,

there was no question that the sentencing judge would set the terms of Blinn's supervised release. Because the plea agreement made no recommendation as to this aspect of Blinn's sentence, during the plea colloquy, the sentencing judge sought and received Blinn's acknowledgment that it was within the judge's discretion to decide the length and conditions of the supervised release.

In addition, as we noted earlier, though given the opportunity, Blinn made no objections to the district court's conditions of his supervised release before it was imposed. Therefore, Blinn's argument that he was somehow deprived of the benefit of his bargain provides no basis for us to make an exception to his appellate waiver and consider the merits of his case.

Id. at 588-89 (citations omitted).

Although the Seventh Circuit did not explicitly address whether Blinn's sentence violates the terms of his plea agreement, it did state that he received exactly what he bargained for – “a sentence between twelve and twenty months in prison.” Id. at 589.

We adopt the reasoning of the Seventh Circuit and find Blinn's sentence did not violate the terms of the plea agreement or the terms of the controlling sentencing statute. Thus, we do not find Hammerle committed malpractice by failing to object because such an objection would not have been successful. See Sanchez v. State, 675 N.E.2d 306, 310 (Ind. 1996) (“To succeed on a claim that counsel was ineffective for failure to make an objection, the [client] must demonstrate that if such objection had been made, the court would have had no choice but to sustain it.”). Blinn has not demonstrated Hammerle's failure to object to the period of home detention was malpractice,² and therefore, summary judgment for Hammerle

² Even if Hammerle's failure to object at sentencing resulted in improper time on home detention, Hammerle cannot be liable for malpractice unless Blinn can demonstrate he would have obtained a more favorable result absent the malpractice. See Clary v. Lite Mach. Corp., 850 N.E.2d 423, 430 (Ind. Ct. App. 2006) (“In the malpractice action, then, it was [the client]'s burden to prove, among other things, that but for [the attorney]'s failure to research and argue the issue of mitigation of damages before and/or during the . . . trial, [the client] would have received a greater damages award.”). Blinn has not asserted that an objection would have worked to his advantage.

Blinn assumes, without reference to authority, that an objection by Hammerle would have resulted in the sentence Blinn now asserts would have been proper. But it seems just as likely that, had Hammerle objected at

was proper.

IV. Unjust Enrichment

A. Analytical Framework

A claim for unjust enrichment is a legal fiction courts conceived to permit recovery where the circumstances are such that “under the law of natural and immutable justice there should be a recovery” Zoeller v. E. Chicago Second Century, Inc., 904 N.E.2d 213, 220 (Ind. 2009) (citation omitted). Courts thereby impose obligations “without regard to the assent of the parties bound, to permit a contractual remedy where no contract exists in fact but where justice nevertheless warrants a recovery under the circumstances as though there had been a promise.” City of Indianapolis v. Twin Lakes Enters., Inc., 568 N.E.2d 1073, 1078 (Ind. Ct. App. 1991), trans. denied. “To prevail on a claim of unjust enrichment, a claimant must establish that a measurable benefit has been conferred on the defendant under such circumstances that the defendant’s retention of the benefit without payment would be unjust.” Second Century, 904 N.E.2d at 220. Essentially, unjust enrichment is the remedy for breach of a constructive contract, implied in law. See id.; Twin Lakes Enters., 568 N.E.2d at 1078.

However, “[w]hen the rights of parties are controlled by an express contract, recovery

sentencing, the district court would have thrown out the plea agreement because the parties did not have a meeting of the minds regarding the sentence. Blinn would then be facing a potential twenty-year sentence.

Further, Blinn cannot demonstrate he was harmed by Hammerle’s failure to object unless Blinn effectively asserts he would have been willing to withdraw his plea and proceed to trial. See United States v. Elkins, 176 F.3d 1016, 1022 (7th Cir. 1999) (where maximum possible sentence was thirty years and defendant received twenty-four months of imprisonment followed by five years of supervised release, defendant could not demonstrate he was harmed by court’s failure to mention supervised release prior to accepting defendant’s plea, “particularly since Elkins nowhere claims that he would have pled differently had the court discussed supervised release”). However, Blinn has neither asserted nor demonstrated he was willing to withdraw his plea.

cannot be based on a theory implied in law.” Keystone Carbon Co. v. Black, 599 N.E.2d 213, 216 (Ind. Ct. App. 1992), trans. denied. Indeed, “[a]s a general rule, there can be no constructive contract where there is an express contract between the parties in reference to the same subject matter.” Twin Lakes Enters., 568 N.E.2d at 1079; accord Keystone Carbon, 599 N.E.2d at 216.

B. Modified Agreement

Blinn’s unjust enrichment claim is based upon Hammerle’s retention of \$20,000 that Blinn paid pursuant to the parties’ modified agreement. The original contract between Blinn and Hammerle states in relevant part, “the flat fee/retainer of \$35,000.00 . . . will be [Hammerle’s] entire fee . . . should this trial last no more than five (5) calendar days. However, [Hammerle] will bill hourly for every day that said trial lasts beyond the five (5) [sic] calendar days.” Appellant’s App. at 125. It is undisputed that under the terms of the original fee contract, Hammerle would retain Blinn’s payment of \$35,000 in the event of no trial. See Appellant’s Br. at 4-5 (noting Blinn and Hammerle’s agreement with this interpretation).

Hammerle argues that in late January or early February of 2006 Blinn agreed to modify the original contract such that he would pay Hammerle an additional \$20,000 (for a total of \$55,000) for representation through the entire trial regardless of length, or to completion of the matter in the event of no trial.

Blinn first responds that he did not agree to modify the original contract at all. In particular, Blinn asserts on appeal he “did not consider the advance to be a modification of

the original fee agreement, although Blinn’s Complaint mistakenly says otherwise.” Appellant’s Br. at 4. On review of summary judgment, we consider the designated evidence to determine if there is a genuine issue of material fact and the movant is entitled to judgment as a matter of law. T.R. 56(C). Here, Hammerle properly designated Blinn’s complaint as evidence for summary judgment at the trial court. Accordingly, although generally parties may liberally amend pleadings in compliance with Indiana Trial Rule 15, a party cannot amend the complaint as part of an appeal. In any event, Blinn’s assertion that his \$20,000 payment was not made pursuant to modification of the original contract is contrary to his strenuous contention that the parties modified the original contract but now disagree over the terms of the modified agreement.

Blinn next argues that the parties’ modified agreement refers only to any work Hammerle would have billed hourly after the first five calendar days of trial, and did not modify an undisputed provision in the original contract that Hammerle would retain \$35,000 in the event of no trial.

However, the context surrounding Blinn’s eventual acquiescence to modify the original contract reveals what was really going on. Looking to the context – evident in the designated record – expands our view of the dispute and allows us to apply the law where the “facts and circumstances have been sufficiently developed.” Waterfield Mortg. Co., Inc. v. O’Connor, 172 Ind. App. 673, 677, 361 N.E.2d 924, 926 (1977).

Nearly eight months after the parties finalized the original contract, Hammerle wrote to Blinn in a letter dated January 20, 2006:

Quite frankly, in thirty years of practice, it has been exceedingly rare for me to revisit the issue of fees once a case has begun. . . .

However, the simple fact is that the demands of your case far, far exceed that anticipated when I agreed to get involved. In any event, if I am going to do this right, which I intend on accomplishing, here is what needs to be done from a financial standpoint[.]

Id. at 127.

Hammerle's letter then proposes expanding to "full-time" the roles and responsibilities of another attorney and a paralegal who had been assisting Hammerle with Blinn's case, and specifies their rates of pay. Id. Hammerle's letter continues:

As to me, I have quite frankly used up the retainer that you have paid me as of today's date. However, I will continue to work on this matter personally through the end of this month without billing further. However, as of February 1, 2006, I propose billing at the rate of \$250.00 an hour for all out-of-Court work and \$300.00 an hour for in-Court trial work.

. . . [T]he fact is that I am going to have to literally put nearly everything else aside in order to properly defend you in trial

Id. (emphasis added).

This letter reveals that the reason for modifying the original contract was that Hammerle had already used up the entire \$35,000 Blinn paid him earlier, and the \$35,000 was not a "flat fee" for work to completion or up to a certain point (i.e., five days of trial), but a "retainer" to be billed against hourly. See id. at 125 (referring to the "flat fee/retainer of \$35,000.00"). This background makes clear that the original contract called for Hammerle to bill hourly up to and including the first five days of trial. In other words, the \$35,000 was merely an estimate that the parties apparently agreed was likely to cover anything before and

including the first five days of trial.³ Hammerle’s January 20, 2006 letter shows this was his understanding of the original contract. Id. Blinn’s eventual acquiescence to modify the original contract makes clear that this was his understanding as well, despite his appellate argument to the contrary and the “entire fee barring out of pocket expenses” language in the original contract. Id. at 125.

Further, if Blinn understood the original contract as stating that \$35,000 was full compensation under all circumstances except for a trial exceeding five days, then he would not have modified the contract pursuant to Hammerle’s letter stating he “used up” the funds and – implicitly but clearly – that he had been billing hourly against Blinn’s account. Id. at 127. If Blinn understood the original contract to mean that Hammerle was not entitled to additional compensation until after five days of trial, then Blinn would not have acquiesced to pay Hammerle more before trial began – “to go to trial.” Addendum to Appellant’s Brief at 5. During a deposition, Blinn stated: “I had an agreement for a flat fee of \$35,000. Mr. Hammerle asked me for an additional sum of money. I gave him [\$]20[,000]. He said he

³ The record also indicates that prior to the May 26, 2005 letter memorializing the original contract, Hammerle proposed the following fee arrangement:

A retainer/flat fee in the amount of \$35,000.00. I will bill against that non-refundable fee my attached hourly rate along with those of any of my Associates and Paralegal who we will need to get the job done properly.

Regardless, the stated retainer/flat fee will be all that will be owed absent total expended hours exceeding that amount. . . .

Appellant’s App. at 123.

Notably, Hammerle’s proposed phrasing regarding billing at his hourly rate was not included in the later-memorialized original contract. While we recognize this distinction, the original contract that followed this early proposal does not clearly express that Hammerle was not to bill hourly. Similarly, the equivalent phraseology – “retainer/flat fee” and “flat fee/retainer” – of Hammerle’s first proposal and the May 26, 2005 original contract does not expressly state that Hammerle was not to bill hourly. Further, this distinction is of little consequence because the communication between Hammerle and Blinn in 2006 makes clear that both understood Hammerle to be billing hourly against Blinn’s account.

needed it to go to trial.” *Id.* (emphasis added).

The designated evidence includes two different calculations by Blinn as reasons for his agreement to modify the original contract. The first is included in a verified complaint for disciplinary action against Hammerle filed by the Acting Executive Secretary of the Disciplinary Commission of the Indiana Supreme Court:

Blinn . . . “did the math” and realized that, if [Hammerle] began billing him as of February 1st and spent every day on his case for the next 6 weeks [before trial was scheduled to begin], Blinn, conceivably, could end up owing [Hammerle] a huge sum (above the \$35,000 already paid) that could be substantially in excess of \$20,000.

Appellant’s App. at 20.

This description of Blinn’s calculation is consistent with the other designated evidence that indicates the parties intended for Hammerle to bill hourly in the original contract even before trial began, that the parties did not intend for \$35,000 to be a flat fee for full payment of all work until the end of five days of trial, and that under the original contract Blinn could end up owing Hammerle more than \$35,000 prior to and even in the event of no trial.

Blinn argues he made a slightly different strategic calculation: Blinn evaluated the likelihood that he would end up paying an extremely high amount if Hammerle billed at his hourly rate for a trial lasting two or three weeks or longer,⁴ and therefore chose to modify the original contract by paying a limited additional sum of \$20,000 for work after the first five days of trial to limit his additional expenses. This is unlikely because as mentioned above, Hammerle had been billing hourly all along and was already in need of additional payments

⁴ Hammerle and Blinn’s federal prosecutor at some point considered a trial of two to three weeks to be “a certainty.” Appellant’s App. at 27.

by the time Blinn agreed to modification. As a result, Blinn was aware that this additional sum was partially compensation for work from late January and early February, and partially a flat fee to cover all future work on this case.

Blinn also argues the modified agreement was “subject to a condition precedent, namely the occurrence of a trial lasting beyond five calendar days.” Appellant’s Br. at 15. A condition precedent “must be performed before the agreement of the parties shall become a binding contract, or it may be a condition which must be fulfilled before the duty to perform an existing contract arises.” Blakley v. Currence, 172 Ind. App. 668, 670, 361 N.E.2d 921, 922 (1977). Again, the context of the parties’ modified agreement makes clear that the parties did not intend to create a condition precedent. Their original contract provided for Blinn’s payment of \$35,000, to be billed against hourly, although the parties estimated that amount would take them through the first five days of a trial. The parties’ modified agreement provided for Blinn’s payment of an additional \$20,000 –\$55,000 total – for Hammerle’s representation to the completion of a trial regardless of length or in the event of no trial. The modified agreement limited and fixed Blinn’s expenses and Hammerle’s compensation, and was not contingent on satisfaction of a condition precedent.

At bottom, we have examined the designated evidence in the light most favorable to Blinn, the non-moving party, and have concluded there is no genuine issue of material fact precluding judgment as a matter of law in favor of Hammerle. See Dunifon, 665 N.E.2d at 55. We cannot and have not reweighed the evidence. Rather, we have culled through the evidence designated by both parties and now affirm summary judgment on a theory

supported by the designated materials. Sims, 689 N.E.2d at 735. In sum, the context in which the parties modified the original contract spells out precisely what the parties intended in both the original contract and modified agreement. Hammerle had been billing hourly all along, and when he told Blinn the initial \$35,000 was used up and expected trial to last multiple weeks, Blinn agreed to modify the fee agreement to limit and fix his expenses. Hammerle did not breach a constructive contract, implied in law, and thus Blinn is not entitled to a claim for unjust enrichment.

C. Express Contract Referring to the Same Subject Matter

We also find compelling an alternative route to the same conclusion that Hammerle was not unjustly enriched. Again, we begin with an undisputed understanding of part of the original contract: Hammerle would keep Blinn’s payment of \$35,000 even in the event of no trial. Because this understanding is undisputed, it constitutes an “express contract between the parties in reference to the same subject matter,” Twin Lakes Enters., 568 N.E.2d at 1079, as that in dispute – whether Hammerle would keep Blinn’s payment of \$35,000 even in the event of no trial. If, as Blinn argues, the modified agreement did not affect this undisputed portion of the original contract, then this portion of the original contract would remain in effect.

Accordingly, even if we were to accept Blinn’s argument that this portion of the original contract was not modified, there still remains an express contract referring to the same subject matter, thereby precluding his claim for unjust enrichment. See id.; Town of New Ross v. Ferretti, 815 N.E.2d 162, 168 (Ind. Ct. App. 2004). Therefore, under this

theory, it is immaterial whether the modified agreement addressed the subject matter of the unjust enrichment claim, because the original contract indisputably did, thereby precluding Blinn's claim of unjust enrichment.

In sum, even if the original contract dictated what Hammerle was due in the event of no trial and the modified agreement did not affect the original contract in this regard, the original contract's undisputed guidance on this subject matter precludes Blinn's claim for unjust enrichment.

Conclusion

Blinn did not file his complaint within the applicable statute of limitations, and his claims are therefore time-barred. Further, addressing the merits, the trial court did not err in granting summary judgment against Blinn on his malpractice claim because Blinn has not demonstrated Hammerle's failure to object to the period of home detention was malpractice. Neither did the trial court err in granting summary judgment against Blinn on his unjust enrichment claim. For the above reasons, summary judgment in favor of Hammerle is affirmed.

Affirmed.

VAIDIK, J., concurs.

MAY, J., dissents with opinion.

**IN THE
COURT OF APPEALS OF INDIANA**

EDWIN BLINN, JR.,)	
)	
Appellant-,Plaintiff,)	
)	
vs.)	No. 49A02-1006-CT-634
)	
ROBERT HAMMERLE and HAMMERLE &)	
CLEARY, formerly known as HAMMERLE)	
ALLEN & CLEARY, also formerly known as)	
HAMMERLE & ALLEN, Attorneys at Law,)	
)	
Appellees-Defendants.)	
)	

MAY, Judge, dissenting

I agree with the majority’s analyses of the limitations and malpractice issues. However, I believe there is a genuine issue of material fact as to whether Hammerle was, under the terms of the parties’ original and modified fee agreements, unjustly enriched when he retained the additional \$20,000 even though there was no trial. I must therefore respectfully dissent.

The majority might well be correct, and a trier of fact might reasonably find, that “the context surrounding Blinn’s eventual acquiescence to modify the original contract reveals what was really going on.” (Slip op. at 14.) It might also be correct in its characterizations of, among other things, what Hammerle’s letter seeking a modification “implicitly but clearly” stated regarding whether Hammerle had been billing hourly all along, (*id.* at 16), the

various ways Blinn might have “understood the original contract,” (*id.*), or how the “context” of the modified agreement “makes clear” the parties did not intend a condition precedent, (*id.* at 18).

But while the majority finds it “apparent” that the parties considered the original \$35,000 “merely an estimate that the parties apparently agreed” was likely to cover Hammerle’s work through the first five days of trial, (*id.* at 15), it is equally apparent to me that no designated evidence compels that characterization such that all genuine issues of material fact about the parties’ intentions in signing the original contract have been resolved.

The majority relies on context, implicit statements, and speculation as to the parties’ “understanding.” I believe we must, in determining whether Blinn was paying a “flat fee” or a “retainer” against which Hammerle would bill, instead rely on the explicit statements in the agreements that were favorable to Blinn as the non-movant. For that reason, summary judgment is inappropriate on the unjust enrichment claim.

Summary judgment is permitted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C). There is such a genuine issue if the trial court is required to resolve disputed facts, but summary judgment is likewise inappropriate if *conflicting inferences* arise from the facts. *Lawson v. Howmet Aluminum Corp.*, 449 N.E.2d 1172, 1175 (Ind. Ct. App. 1983). To preclude summary judgment, the conflicting inferences must be decisive to the action or to a relevant secondary issue. *Id.*

Here, they are. Those conflicting inferences are highlighted by the conclusions the

majority draws from “context,” (slip op. at 14), “background,” (*id.* at 15), a statement made “implicitly” in Hammerle’s letter, and the “understanding” the majority attributes to the parties. (*Id.* at 16.) As disputes about the evidence or inferences to be drawn therefrom are to be resolved in favor of the non-movant, here Blinn, T.R. 56, summary judgment on the unjust enrichment issue was error.

The evidence on which we should rely – the explicit language most favorable to Blinn – requires reversal of summary judgment. The majority finds, from “context – evident in the designated record,” (slip op. at 14), that the initial \$35,000 was “not a ‘flat fee’ for work to completion . . . but a ‘retainer’ to be billed against hourly.” (*Id.* at 15.) It then notes the explicit language in the letter Hammerle wrote Blinn to memorialize the original agreement, where Hammerle referred to “the flat fee/retainer of \$35,000.” (App. at 125.) On review of summary judgment, I do not believe we may, as the majority appears to do, read the phrase “flat fee” out of the designated evidence, especially when our standard of review requires us to view the evidence and inferences therefrom in the light most favorable to Blinn.

Nor is it apparent the parties could have any “understanding” of what a “flat fee/retainer” agreement is, as those terms are incompatible. In *In re Kendall*, 804 N.E.2d 1152, 1154 (Ind. 2004), our Indiana Supreme Court undertook to “distinguish between the advance fees charged by the respondent here (that were to be earned in the future at an agreed rate) and advance fees that are agreed to cover specific legal services regardless of length or complexity (fixed or ‘flat’ fees).” The Court noted one description of the term “flat fee” as embracing “all work to be done, whether it be relatively simple and of short duration, or

complex and protracted.” *Id.* (quoting Alec Rothrock, *The Forgotten Flat Fee: Whose Money Is It And Where Should It Be Deposited?* 1 Fla. Coastal L.J. 293, 299 (1999)). “As distinguished from a partial initial payment to be applied to fees for future legal services[*i.e.*, a “retainer” like that to which the majority finds Hammerle and Blinn agreed], a flat fee is a fixed fee that an attorney charges for all legal services in a particular matter, or for a particular discrete component of legal services.” *Id.* at 1157.

The \$35,000 in the original agreement before us could not have represented *both* a “flat fee” and a “retainer,” and which type of agreement it was should be decided by the trier of fact at a trial, not by this court on review of a summary judgment.

Nor can I agree with the majority that an unjust enrichment claim is unavailable to Blinn because the parties had an express contract. Express terms in a valid contract preclude “the substitution of and the implication by law of terms *regarding the subject matter covered by the express terms of the contract.*” *Zoeller v. East Chicago Second Century, Inc.*, 904 N.E.2d 213, 221 (Ind. 2009) (emphasis added), *cert. denied, reh’g denied*. Therefore, when the rights of parties are controlled by an express contract, recovery cannot be based on a theory implied in law. *Id.*

Assuming *arguendo* that the parties’ agreement regarding the additional \$20,000 amounted to a valid contract in the form of a modified fee agreement,⁵ I believe there is a genuine issue of material fact as to whether any terms of such contract expressly addressed

⁵ This modification appears to have been an oral agreement. Hammerle asserts it did not need to be put in writing because it was “more advantageous to the client.” (Br. of Appellees at 30.) In his complaint, Blinn says he “agreed to a modified fee arrangement,” (App. at 9), that he “did agree to pay a flat fee for trial work done *after* the first five (5) days of trial in lieu of the hourly rate for such work contemplated by the

the subject matter of Blinn's unjust enrichment claim, *i.e.*, whether the parties contemplated Hammerle would retain the additional \$20,000 even if there was no trial.

In *Brown v. Mid-Am. Waste Sys., Inc.*, 924 F. Supp. 92, 94 (S.D. Ind. 1996), Brown, a landfill operator, agreed in 1988 to sell his shares to Mid-American. Mid-American paid Brown about \$750,000, but the purchase agreement provided an additional \$4.5 million would be payable to Brown if a then-pending permit application to expand the waste disposal area at the landfill was approved by the Indiana Department of Environmental Management ("IDEM"). If IDEM did not approve the Expansion Application by October 1, 1991, no additional purchase price was due. IDEM delayed issuance of the permit until 1993.

Brown alleged Mid-American was unjustly enriched by its beneficial use of the newly-permitted expansion area of the landfill, but Mid-American argued the Purchase Agreement precluded the implication of a contract under an unjust enrichment theory: "[B]ecause the rights and obligations of the parties are controlled by the express terms of a valid contract, defendant maintains that plaintiff cannot base his recovery upon a contract implied in law." *Id.* at 94.

The Southern District of Indiana agreed with Mid-American. It summarized Indiana law on that question:

Under Indiana law, the terms quasi-contract, contract implied-in-law, constructive contract and *quantum meruit* are used almost interchangeably as "legal fictions, created by courts of law, to provide a remedy which prevents unjust enrichment and thereby promotes justice and equity." *City of Indianapolis v. Twin Lakes Enterprises, Inc.*, 568 N.E.2d 1073, 1078 (Ind. App. 1991). Each doctrine allows courts to impose obligations "without regard to the assent of the parties bound, to permit a contractual remedy where

original agreement," *id.*, and he and Hammerle "agreed upon the additional sum of \$20,000." (*Id.*)

no contract exists in fact but where justice nevertheless warrants a recovery under the circumstances as though there had been a promise.” *Id.*; see also *Wright v. Pennamped*, 657 N.E.2d 1223, 1229 (Ind. App. 1995).

Courts, however, “do not sit to improve the bargains that parties freely negotiate.” *Wood v. Mid-Valley Inc.*, 942 F.2d 425, 428 (7th Cir. 1991). The existence of express terms in a valid contract thus precludes the substitution of implied terms regarding matters covered by the contract’s express terms. *Keystone Carbon Co. v. Black*, 599 N.E.2d 213, 216 (Ind. App. 1992). In short, “there can be no constructive contract where there is an express contract between the parties in reference to the same subject matter.” *Twin Lakes*, 568 N.E.2d at 1083.

Id. at 94.

In *Brown*, the agreement explicitly

allocate[d] the risks surrounding IDEM’s acceptance of (or delay in accepting) the Expansion Application. Thus, because there is an express and valid contract already covering the subject matter upon which plaintiff bases his unjust enrichment claim, there is no need for the Court to imply a contract or invent contractual terms.

Id. at 94-95.

In the case before us, by contrast, no express term in the amended fee agreement indicates whether the \$20,000 would belong to Hammerle if Blinn’s trial was less than six days. I acknowledge the majority’s characterization of the original \$35,000 as “merely an estimate” the parties expected to cover anything through the first five days of trial. (Slip op. at 15). But I would not at the same time disregard the explicit language of Hammerle’s letter memorializing the parties’ original agreement that the original \$35,000 “*will be my entire fee . . . should this trial last no more than [five days].*” (App. at 125) (emphasis added). The amended agreement provided Hammerle would represent Blinn throughout trial, regardless of its length, for a flat fee of \$20,000. But no trial ever happened.

This ambiguity further demonstrates why there is a genuine issue of fact as to whether Hammerle was unjustly enriched by retaining the money Blinn paid pursuant to the amended agreement. The amended agreement is silent as to when it takes effect. If the facts are viewed in the light most favorable to Hammerle and the original agreement was, as the majority holds, a retainer, then the amended agreement would have taken effect when the parties entered into it. If the facts are viewed in the light most favorable to Blinn, the non-moving party on summary judgment, then the original agreement means what it explicitly says: the \$35,000 was the “entire fee” Blinn owed for representation through the first five days of trial. (App. at 125.) If that is the case, the amended agreement would not take effect until day six of trial. As there never was a day six of trial, Hammerle would be unjustly enriched if he retained the additional \$20,000.

I therefore cannot agree with the majority that “the original contract indisputably” addressed “the subject matter of the unjust enrichment claim,” (slip op. at 20). An agreement that \$35,000 will be the entire fee for representation cannot “indisputably” address an agreement that \$20,000 would be added to the cost of representation contingent on a circumstance that never arose. There is a genuine issue of material fact as to whether the modified agreement to pay Hammerle a flat fee of \$20,000 to “take the matter to the conclusion of trial without further billing,” (App. at 42), could have “controlled” the “rights and obligations of the parties,” *Brown*, 924 F. Supp. at 94, when the original agreement explicitly set forth the “entire fee” for representation and when the trial explicitly contemplated in both agreements never took place.

Thus, based on the designated evidence, when viewed in the light most favorable to Blinn as the non-movant, I believe there is a genuine issue of material fact as to whether Hammerle was unjustly enriched when he retained the \$20,000. Summary judgment on that issue was improper, and I must respectfully dissent.