

No. 36340-2-II

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COURT OF APPEALS,  
DIVISION TWO  
OF THE STATE OF WASHINGTON

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N. JACK ALHADEFF, *Plaintiff/Appellant*,

v.

KITSAP COMMUNITY FEDERAL CREDIT UNION dba KITSAP CREDIT UNION,  
*Defendant/Respondent*.

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APPELLANT'S REPLY BRIEF

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ROSS LAW ADVISORS PLLC  
2010 156<sup>th</sup> Ave. NE, Suite 100  
Bellevue, WA 98007  
(425) 460-3124

Michael D. Ross  
WSBA No. 13891

LAW OFFICE OF JOHN J. MITCHELL  
811 First Ave., Suite 620  
Seattle, WA 98104  
(206) 903-8555

John J. Mitchell  
WSBA No. 12757

Attorneys for Appellant

ORIGINAL

*pm*  
*ALHADEFF 12-3-07*

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I.

**RESPONDENT'S INTERPRETATION OF RCW 62A.5-110(1)(b)  
VIOLATES THE PLAIN MEANING RULE**

Plaintiff/Appellant N. Jack Alhadeff argues that under RCW 62A.5-110(1)(b), the beneficiary warrants to the applicant that the beneficiary has performed all the acts the beneficiary is obligated to perform **under some agreement**, which the statute states may be either an agreement “between the applicant and beneficiary or any other agreement intended by them to be augmented by the letter of credit.” RCW 62A.5-110(1)(b). Defendant/Respondent Kitsap Credit Union (“KCU”), on the other hand, cannot point to any “agreement” to which its alleged warranty under RCW 62A.5-110(1)(b) might relate--neither an agreement between plaintiff and KCU, nor some other agreement plaintiff and KCU “intended to be augmented by the letter of credit.” As a result, there **is** no statutory warranty under RCW 62A.5-110(1)(b). Instead, KCU argues that the letter of credit “arrangement,” whatever that might mean, may be the “agreement” to which its statutory warranty relates under RCW 62A.5-110(1)(b):

It reads too much into the plain text of RCW 62A.5-110 to claim that the “underlying agreement” must absolutely mean a contract separate from the letter of credit **arrangement . . . .**

Respondent's Brief at p. 12-13 (emphasis added). KCU's position that the letter of credit involved in this dispute ("the LOC"), CP 41-42, itself may constitute the "agreement" under RCW 62A.5-110(1)(b) makes no sense and should be rejected by the Court because, under the "plain meaning rule," the statute means exactly what it says. Thus, using KCU's phraseology, the agreement under RCW 62A.5-110(1)(b) does, indeed, "absolutely mean a contract separate from the letter of credit."

The plain meaning rule requires courts to derive the meaning of the statute from the "wording of the statute itself." *Rozner v. City of Bellevue*, 116 Wn.2d 342, 347, 804 P.2d 24 (1991). Only if the statute is determined to be ambiguous, will a court look to the legislative intent in enacting it. *State v. Thorne*, 129 Wn.2d 736, 763, 921 P.2d 514 (1996).

*State v. Lorenz*, 152 Wn.2d 22, 34, 93 P.3d 133 (2004). Under the "plain meaning" of RCW 62A.5-110(1)(b), which is not in any way ambiguous, the beneficiary warrants to the applicant that its drawing on the letter of credit "does not violate any agreement between the applicant and the beneficiary or any other agreement intended by them to be augmented by the letter of credit." KCU is adamant that there is no agreement between it and plaintiff. Thus, to come within the plain meaning of RCW 62A.5-110(1)(b), KCU must identify some **other** agreement plaintiff and KCU intended to augment the LOC. KCU has not done so; instead, it suggests that this Court should

ignore the plain meaning of the statute and conclude that the LOC itself may constitute the “agreement” under RCW 62A.5-110(1)(b).

The LOC itself cannot be the “agreement” referred to in the statute. First, the LOC is not an “agreement between the applicant and the beneficiary”; instead, a letter of credit is an agreement between the issuing bank and the applicant, under which the issuer agrees to pay a third party for the account of the applicant. Second, as pointed out in plaintiff’s opening brief, Professors White and Summers observe that the letter of credit itself is not the “agreement” with respect to which the beneficiary gives its warranty under UCC § 5-110:

We believe that it is an express or an implied condition of the typical underlying commercial contract--***but not the letter of credit itself, of course***--that the beneficiary have properly performed in order for it to have a right *vis a vis* the applicant to draw under a letter of credit.

J. White & R. Summers, *Uniform Commercial Code*, vol. 3, 164 (1995) (emphasis added). Finally, the second agreement mentioned in RCW 62A.5-110(1)(b) that might be the subject of the beneficiary’s warranty is “any other agreement intended by them [the applicant and the beneficiary] to be augmented by the letter of credit.” *Quaere*: If KCU is correct, *i.e.*, that the LOC itself may be the “agreement” to which the RCW 62A.5-110(1)(b)

warranty relates, how can the LOC be the agreement that the parties intend “to be augmented by the letter of credit?” Or, put another way: How can the “letter of credit” be augmented by the same “letter of credit?”

## II.

### **KCU’S WRONGFUL CERTIFICATIONS UPON TAKING DRAWS ON THE LOC DID NOT VIOLATE ANY “EXPRESS OBLIGATIONS” OF THE LOC**

The gist of KCU’s argument was summarized as follows:

Appellant’s breach of warranty cause of action arose when respondent credit union drew on the letter of credit allegedly in violation of that document’s express obligations.

Brief of Respondent, p. 13. Plaintiff has not and does not assert a breach of warranty cause of action. Although it may be easy for KCU to state that its wrongful certifications upon taking draws on the letter of credit violated “express obligations” of the letter of credit, it is harder to identify what those “express obligations” might be. Indeed, KCU, as beneficiary under the LOC, had **no** “express obligations” under the LOC that it could violate. The only party under the LOC with an “express obligation” thereunder was Wells Fargo Bank, which undertook to pay KCU upon receipt of a sight draft and certification statement. KCU had no “express obligation” under the LOC; KCU could have ignored the LOC and never made any draws and still not

have an “express obligations.” KCU did, however, have obligations to plaintiff that arose under the common law of the State of Washington.

### III.

#### KCU’S INTERPRETATION OF RCW 62A.5-115 VIOLATES THE PLAIN MEANING RULE

The statute of limitations under Article 5, RCW 62A.5-115, provides as follows:

**An action to enforce a right or obligation arising under this Article** must be commenced within one year after the expiration date of the relevant letter of credit or one year after the cause of action accrues, whichever occurs later. A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach.

(Emphasis added). In its opening brief, plaintiff argued that, by its own terms, the statute of limitations under RCW 62A.5-115 does not apply in this case because none of his causes of action was brought to “enforce a right or obligation arising under” Article 5. Instead, each cause of action is based on general principles of common law or equity that are **not** displaced by Article 5 of the UCC.

KCU’s counter to this argument is that “Appellant’s position is a futile exercise in semantics.” Brief of Respondent, p. 14. To the contrary, plaintiff’s position involves an appropriate application of the “plain meaning”

rule of statutory interpretation, while KCU’s interpretation of the scope of RCW 62A.5-115 violates the plain meaning rule.

RCW 62A.5-115 is not ambiguous and plainly says that it is applicable only to “An action to enforce a right or obligation **arising under** this Article [5].” (Emphasis added). This point is clarified in the Official Comments as follows:

2. This section applies to all claims for which there are remedies **under** Section 5-111 and to other claims made under this article, such as claims for breach of warranty **under** Section 5-110. . . .

UCC §5-115, Official Comment 2 (emphasis added). Nowhere does RCW 62A.5-115 say that it applies to actions “that **arose out of an Article 5 transaction,**” as KCU argued below, or to claims that **arose under a “relationship,**” as the trial court concluded. RP 32. The statute is quite clear: It applies only to “An action to enforce a right or obligation **arising under** this Article [5].” RCW 62A.5-115 (emphasis added). KCU does not suggest the statute is ambiguous; KCU does, however, mischaracterize Official Comment 3 in an effort to add additional terms to RCW 62A.5-115.

Respondent states as follows:

Official Comment 3 clarifies that “the statute of limitations, like the rest of the statute, applies . . . only to transactions, events, obligations, or duties *arising out of or associated with*

such a letter.”

Brief of Respondent, p. 14 (emphasis is KCU’s). KCU uses its partial quotation from Official Comment 3 to RCW 62A.5-115 to support the following argument:

It is apparent from the plain text of RCW 62A.5-115 and its Official Comment 3 that a cause of action brought more than one year after it accrues is time barred [*sic*], regardless of whether the claim “arises under,” “arose out of” or “is associated with” Article 5.

*Id.* The Official Comments to UCC § 5-115 are for the purpose of clarifying or explaining the statute; they are not for the purpose of adding language to the statute. RCW 62A.5-115 is limited to actions to enforce a right or obligation “arising under” Article 5. If the legislature wanted to include within the scope of RCW 62A.5-115 causes of action to enforce a right or obligation “arising out of” or “associated with” Article 5, whatever such right or obligation might be, this Court must conclude that the legislature would have done so.

Moreover, if KCU had quoted **all** of Official Comment 3 to UCC § 5-115, it would be obvious that the Comment only qualifies the letter of credit to which Article 5 applies, *i.e.*, a letter of credit issued on or after the effective date of the statute; it does not add terms to the text of the statute.

In its entirety, Official Comment 3 states as follows:

3. The statute of limitations, like the rest of the statute, applies only to a letter of credit issued on or after the effective date and only to transactions, events, obligations, or duties arising out of or associated with such a letter. If a letter of credit was issued before the effective date and an obligation on that letter of credit was breached after the effective date, the complaining party could bring its suit within the time that would have been permitted prior to the adoption of Section 5-115 and would not be limited by the terms of Section 5-115.

UCC § 5-115, Official Comment 3. Thus, a reading of the comment in its entirety reflects that the terms “arising **out**” of a letter of credit, or “associated **with**” a letter of credit, are **not** intended to add language to the statute itself to expand the scope of the statute to actions that do **not** “arise **under**” Article 5; instead, the comment merely emphasizes that the statute of limitations does not apply to letters of credit issued prior to the effective date of Article 5 itself.

Finally, KCU argues that

it is illogical to assume that Article 5's one-year statute of limitations could be avoided simply by re-labeling the claim to a common law [*sic*] cause of action. Such a maneuver would violate the paramount objective of the UCC: uniformity, and predictability, in commercial transactions such as letter of credit transactions under Article 5.

Brief of Respondent, p. 16. It is unclear what precisely KCU means by the

argument set out above: If plaintiff has common-law claims, those claims may be asserted. *Quaere*: How does one “re-label” a conversion claim—or a promissory estoppel claim—to avoid RCW 62A.5-115? This argument ignores the provisions of Article 5 itself, the Official Comments thereto and the commentary set forth in plaintiff’s opening brief.

The UCC by its own terms does not displace all other law in connection with a dispute that involves a letter of credit. RCW 62A.5-103 defines the scope of Article 5 as follows: “(1) This Article applies to letters of credit and to *certtain* rights and obligations arising out of transactions involving letters of credit.” (Emphasis added). The Official Comments to UCC §5-103 explain the limited scope of Article 5 and the applicability of other rules of law:

2. Like all of the provisions of the Uniform Commercial Code, Article 5 is supplemented by Section 1-103 and, through it, by many rules of statutory and common law. Because this article is quite short and has no rules on many issues that will affect liability with respect to a letter of credit transaction, law beyond Article 5 will often determine rights and liabilities in letter of credit transactions. **Even with letter of credit law, the article is far from comprehensive; it deals only with “certain” rights of the parties.**

UCC §5-103, Official Comment 2 (emphasis added). Washington’s version of Section 1-103, mentioned in the Comment set out above, states as follows:

Unless displaced by the particular provisions of this Title, 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.

RCW 62A.1-103. The Official Washington Comment to this section states in pertinent part as follows:

This section is in accord with several of the earlier uniform laws. . . It is also in accord with RCW 4.01.010, which preserves the common law in Washington save where in conflict with legislation or contemporary mores.

RCW 62A.1-103, Official Comments. The Official Comments to the UCC emphasize that the principles of law and equity, which remain applicable unless specifically displaced by provisions of the UCC, are not limited to those enumerated in Section 1-103: “The listing [of the various principles of law and equity] given in this section is merely illustrative; no listing could be exhaustive.” UCC §1-103; Official Comment 3. Washington courts have acknowledged the mandate of RCW 62A.1-103 and have held that under RCW 62A.1-103, common-law principles regarding commercial transactions, not specifically replaced by the UCC, are adopted. *See e.g., George Lumber Co. v. Brazier Lumber Co.*, 6 Wn.App. 327, 493 P.2d 782 (1972) (common law principles not specifically replaced by the UCC are adopted by it);

*Syrovoy v. Alpine Resources*, 122 Wn.2d 544, 859 P.2d 51 (1993) (common law principles apply to matters that generally are governed by the UCC but are not specifically addressed by the Code). Plaintiff is unaware of any reported decision of any court from any jurisdiction which has held that Article 5 displaces *all* other civil law in connection with *any and all* causes of action involving a letter of credit.

Thus, notwithstanding KCU's contention to the contrary, plaintiff was not required to "re-label" its claims to common-law causes of action because the plain language of the UCC does not displace common-law causes of action.

#### IV.

### ***KRAUSE V. STROH BREWING CO. IS NOT CONTROLLING AUTHORITY AND, IN ANY EVENT, IS DISTINGUISHABLE ON ITS FACTS***

KCU makes much of plaintiff's decision not to discuss *Krause v. Stroh Brewing Co.*, 240 F. Supp.2d 632 (E.D. Mich. 2002), which KCU erroneously characterizes as "controlling authority," Brief of Respondent, p. 13, and "identical" to the case at bar. It is neither.<sup>1</sup> *Krause* is a decision of

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<sup>1</sup>KCU's mischaracterization of the precedential value of *Krause* is more than mere hyperbole; it is inappropriate, disingenuous and should not be tolerated by this Court.

a trial court--the U.S. District Court for the Eastern District of Michigan--on a motion to dismiss and applies Michigan state law. *Krause* is no more “controlling authority” or binding on this Court than is a decision of a court from a foreign country! Indeed, as a decision of a trial court, *Krause* is not binding on any court, except perhaps on the trial judge himself! As a decision of a trial court, *Krause* is devoid of meaningful analysis precisely because it has no precedential value. It does not appear to have ever been cited in any reported decision. Judge Zatkoff, the trial judge in *Krause*, erroneously created a new cause of action under Mich. Com. Laws § 440.5110(1)(b), *i.e.*, an “action for wrongful collecting upon letters of credit.” In doing so, Judge Zatkoff, as the trial judge in the court below, ignored the plain meaning of the statute. If there a “plain meaning” rule under Michigan law it was violated by the *Krause* judge.

Underlying the trial court’s erroneous analysis of RCW 62A.5-110(1)(b) is its failure to understand and to recognize that the statute deals primarily with “standby” letters of credit, which the LOC in this case is not, *i.e.*, plaintiff’s LOC was **not** posted as security for the performance of some party under an underlying agreement; instead, the LOC was intended to provide additional funding to Meridian to complete construction of the

Meridian project under the budget approved by KCU in connection with KCU's construction loan to Meridian of \$4.5 million.

Plaintiff noted in its Memorandum in Opposition to the summary judgment motion below, at CP 54, that KCU had failed to cite any reported decision that supports its argument that RCW 62A.5-110(1)(b) displaces all other civil law--including the tort and equitable claims asserted by plaintiff--in connection with any and all causes of action involving a letter of credit. In its Reply to plaintiff's Memorandum in Opposition to the summary judgment motion, KCU cited one case, *Krause*. CP 126. There is apparently no other reported decision from any jurisdiction on this issue, presumably because the plain meaning of the statutes involved--UCC §§ 5-110 and 5-115--suffices to preclude litigation as to its meaning.

In *Krause*, the plaintiffs were the shareholders of Northland Beverage Corp., which had entered into a contract with defendant Stroh Brewery Company, under which Stroh agreed to do "contract brewing" for Northland. Northland gave Stroh a standby letter of credit, issued by First Union National Bank, to secure its payment under the contract. In its contract with Northland, Stroh agreed not to present the letter of credit for payment unless Northland failed to pay as agreed. The plaintiff shareholders pledged their

personal assets to the bank to secure Northland's letter of credit.<sup>2</sup> Stroh drew on the letter of credit. More than one year later, plaintiffs sued Stroh under numerous common-law theories premised on an alleged breach by Stroh of its agreement with Northland not to draw on the letter of credit unless and until a default by Northland, a default which the plaintiffs denied. Stroh moved to dismiss on several grounds, arguing, as KCU does here, that all of plaintiffs' claims arise under the warranty provisions of UCC § 5-110 and were time-barred under UCC § 5-115. Applying Michigan law, and Michigan's version of UCC §§ 5-110 and 5-115, the trial court dismissed the complaint without any analysis of the proper application of UCC § 5-110. Instead, Judge Zatkoff engrafted upon the Michigan version of UCC § 5-110(1)(b) a new cause of action for "wrongfully collecting on a letter of credit:"

Article 5 . . . provides a cause of action for wrongfully collecting on a letter of credit. *See Mich. Comp. Laws § 440.5110(a)(b)* ("If presentation is honored, the beneficiary warrants: (b) To the applicant that the drawing does not violate any agreement between the applicant and beneficiary . . ."). Therefore, the one-year statute of limitations applies

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<sup>2</sup>Although Judge Zatkoff did not recite in his opinion all of the facts underlying the plaintiff shareholders' lawsuit, one may assume it was brought because First Union National Bank sought reimbursement from Northland for its payment of the letter of credit proceeds to Stroh. Northland may not have been in a position to reimburse the bank, which may have made demands on the shareholders' personal assets that were pledged as security for the letter of credit.

to actions for wrongfully collecting upon letters of credit.

*Krause*, 240 F. Supp. at 635. Judge Zatkoff then found as follows:

Plaintiffs allege that one condition of Northland's agreement with Defendant was that the latter would not collect upon the letter of credit unless Northland was in default, which Defendant allegedly violated. . . . The Court finds that his action, which arises out of Northland's agreement with Defendant, is governed by Article 5.

*Id.*, 240 F. Supp. at 636. The court then applied the one-year statute of limitations to dismiss the plaintiff shareholders' three causes of action which the court determined arose "pursuant to the agreement" between Northland and Stroh: breach of contract, unjust enrichment and promissory estoppel.

The plaintiff shareholders had also asserted tort claims for negligence and conversion. Judge Zatkoff dismissed the tort claims as well, but the basis for his ruling had nothing to do with Article 5 of the UCC; instead, the dismissal of the tort claims was based on Michigan common law:

Plaintiffs' two tort claims shall also be DISMISSED. "As a general rule, there must be some active negligence or misfeasance to support a tort. There must be some breach of duty distinct from breach of contract." In other words, "the threshold inquiry is whether the plaintiff alleges violation of a legal duty separate and distinct from the contractual obligation." With regard to the tort claims . . . Plaintiffs' [*sic*] that they arise out of the same agreement as do Plaintiffs' Counts II – IV. Therefore, Plaintiffs' tort claims shall be DISMISSED because they do not arise out of a separate and distinct legal duty as does the contractual obligation.

*Id.* (Michigan citations omitted).

In the court below, the trial judge did not specifically address his reasons for dismissing plaintiff's tort claims, other than to say that the court adopted the reasoning of *Krause* and as follows:

I find the sole relationship between your client and this financial institution was set up under the letters [*sic*] of credit that he was the applicant for. There was [*sic*] no other duties, contracts, or other obligations recognized by the common law of this state or equity that is applicable. And, for that reason, I'm granting summary judgment.

RP 32. As stated above, however, the *Krause* court dismissed the tort claims on their merits under Michigan common law, not as time-barred under Article 5 of the UCC. The Court below, however, dismissed all of plaintiff's claims as time-barred under RCW 62A.5-115, without regard to the merits, which, in any event, were not before the Court on KCU's motion! *Krause* cannot constitute a basis for dismissing plaintiff's tort claims. The trial judge clearly erred.

*Krause* is distinguishable from the instant case on several grounds. First, Judge Zatkoff held that the three breach of contract claims were all based on the brewing contract between Northland and Stroh. In the case at bar, the court below found there was **no** agreement between plaintiff and KCU and KCU continues to deny there was any agreement between it and

plaintiff. The *Krause* plaintiffs' derivative claim through Northland arose under Stroh's alleged breach of its warranty to Northland that its drawing on the letter of credit did not violate the Northland/Stroh agreement. Under the *Krause* rationale, the court below should have found there was no agreement to which the RCW 62A.5-110(1)(b) warranty applied. It is incorrect, therefore, to state as KCU does that "*Krause* is identical to the case before this court." Reply of Respondent, p. 17. The facts of *Krause* are superficially similar to the case before this Court, in that they involve a letter of credit and a motion to dismiss under UCC § 5-115, otherwise the facts are materially different and the result of the case supports the construction of RCW 62A.5-110 advocated by plaintiff.

Second, the letter of credit in *Krause* was a standby letter of credit, with respect to which the warranty in RCW 62A.5-110(1)(b) has "primary application." UCC § 5-110, Official Comment 2. Interestingly, KCU argues that the absence of meaningful analysis in *Krause* actually supports its position:

Whether the letter of credit was a standby or other type of letter of credit was not at all relevant to the outcome of *Krause*. The opinion does not indicate that the type of letter of credit used is relevant at all. Nor was it relevant to *Krause* that the parties had a contractual relationship separate from their letter of credit agreement.

Brief of Respondent, p. 18. Because the letter of credit at issue in *Krause* was a “standby” letter of credit, and clearly within the coverage of the UCC § 5-110 warranty, the absence of analysis is not surprising. KCU cannot, of course, deny the obvious: that, notwithstanding Judge Zatkoff’s failure to analyze the relevant statutes, the *Krause* letter of credit **was** a standby letter of credit and the applicant and beneficiary **did** have a separate contract.

Third, the tort claims in *Krause* were dismissed on their merits under Michigan common law, and not because they were time-barred under the UCC. KCU has failed to articulate how *Krause* supports a dismissal of plaintiff’s tort claims under Washington law.

Fourth, one of plaintiff’s claims dismissed on summary judgment is an equitable claim under the doctrine of money had and received. No ruling in *Krause* supports the dismissal of this claim.

## V.

### **KCU OWED DUTIES TO PLAINTIFF THAT SUPPORT THE TORT CLAIMS**

KCU did not move for summary judgment of dismissal of any of plaintiff’s claims **on their merits**; only to dismiss the claims on the basis that they are time-bared under RCW 62A.5-115. Thus, the elements of the tort claims, and the evidence supporting such claims, were not issues before the

court below and not relevant to the trial court's ruling that all of plaintiff's claims, including his tort claims, are dismissed. Nonetheless, the trial court found "no other duties, contracts, or other obligations recognized by the common law of this state or equity that is [*sic*] applicable." RP 32. This finding was in error. Similarly, KCU is incorrect when it argues that it owed no duties "outside of Article 5" upon which plaintiff could assert tort or equitable claims. Brief of Respondent, p. 10.

When declining plaintiff's request that it specifically agree by means of a letter agreement not to draw upon the LOC in the event KCU's borrower, Meridian, was in default under the Construction Loan, Doug Chadwick, KCU's Director of Commercial Lending, instead, stated as follows:

On each request for draws under the Letter of Credit we are required to affirm that there are no events of default and think this is sufficient protection [for you].

CP 62, § 4. By this statement, upon which plaintiff relied in determining to fund the LOC, KCU undertook a duty to plaintiff to exercise reasonable care in making its certifications of no events of default on making its draw requests. Mr. Chadwick admitted that each of KCU's three certifications to Wells Fargo contained gross misrepresentations of fact. CP 96-98.

A negligent misrepresentation claim may be based upon a promise of

future conduct. *Markov v. ABC Transfer & Storage Co.*, 76 Wn.2d 388, 396, 457 P.2d 535 (1969). Moreover, Washington has adopted the Restatement (Second) of Torts § 552 (1977), which sets forth the elements for claim for negligent misrepresentation:

(1) One who, in the course of his business, profession or employment ... supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

*See, e.g., Haberman v. WPPSS*, 109 Wash.2d 107, 161-62, 744 P.2d 1032, 750 P.2d 254 (1987) (*quoting* Restatement (Second) of Torts § 552(1) (1977)), appeal dismissed, 488 U.S. 805, 109 S.Ct. 35, 102 L.Ed.2d 15 (1988). Section 551 of the Restatement (Second) of Torts (1977) imposes liability for failure to disclose:

(1) One who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the nonexistence of the matter that he has failed to disclose, if, but only if, he is under a duty to the other to exercise reasonable care to disclose the matter in question.

(2) One party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated,

(a) matters known to him that the other is

entitled to know because of a fiduciary or other similar relation of trust and confidence between them; and

(b) matters known to him that he knows to be necessary to prevent his partial or ambiguous statement of the facts from being misleading;....

*Colonial Imports, Inc. v. Carlton Northwest, Inc.*, 121 Wn.2d 726, 732, 853 P.2d 913 ( 1993). In *Colonial Imports*, the court endorsed the notion that the duty to disclose arises when the facts are peculiarly within the knowledge of one person and could not be readily obtained by the other. In the case at bar, plaintiff had no way of knowing that Meridian was in default under its construction loan from KCU prior to KCU's drawing on the LOC. The facts involving the defaults were "peculiarly" with the knowledge of KCU and were revealed to plaintiff only in discovery. If plaintiff had known of Meridian's defaults **prior** to KCU's draws on the LOC, he could have taken action under RCW 62A.5-109 to obtain injunctive relief to prevent Wells Fargo Bank from honoring KCU's draws.

Plaintiff's negligence claims--KCU's failure to exercise reasonable care when making its certifications of fact to Wells Fargo Bank (Fourth Cause of Action); failure to exercise reasonable care when making representations upon which plaintiff relied in agreeing to fund the LOC (Fifth

Cause of Action); and failure to advise plaintiff of the changes in the scope of the Meridian Project, and the effect of such changes on the viability of the Project, prior to taking draws on the LOC (Eight Cause of Action)—are based on the duties set forth above. Plaintiff's conversion claim is, of course, an intentional tort, which is not considered under negligence concepts. *See e.g., Miller v. Kennedy*, 11 Wn. App. 272, 281-82, 522 P. 2d. 585 (1974) (Dealing with assault and battery).

A conversion is the act of willfully interfering with

any chattel, without lawful justification, whereby any person entitled thereto is deprived of the possession of it. Money, under certain circumstances, may become the subject of conversion. However, there can be no conversion of money unless it was wrongfully received by the party charged with conversion, or unless such party was under obligation to return the specific money to the party claiming it.

*Pub. Util. Dist. No. 1 of Lewis County v. Wash. Pub. Power Supply Sys.*, 104 Wn.2d 353, 378, 705 P.2d 1195 (1985) (citations omitted).

## VI.

### **PLAINTIFF'S EQUITABLE CLAIMS DO NOT ARISE UNDER ARTICLE 5**

KCU argues that

any equitable claim that appellant may have is also inextricably tied to the letter of credit transactions and Article 5 for the same reasons. Appellant cites no equitable claim

that is meaningfully different than [*sic*] what appellant could have asserted as a breach of RCW 62A.5-110(1)(b)'s warranty.

Brief of Respondent, p. 10. Plaintiff asserts two equitable claims:

1. Third Cause of Action. A promissory estoppel claim based on KCU's promise that it would not take draws on the LOC if it could not make the certifications with respect to the absence of any Events of Default under the note dated June 27, 2003.

2. Seventh Cause of Action. An equitable claim under the doctrine of money had and received on the grounds that KCU is not entitled in equity to retain the \$1 million represented by the draws it made on the LOC.

These equitable claims, by definition, do not arise under the UCC: They arise under principles of equity.

## VII.

### CONCLUSION

In concluding his ruling in the court below, the trial judge stated as follows:

Consequently, I believe that the Kitsap Credit Union is entitled to summary judgment. Of course, we have Courts of Appeal that are far smarter and wiser than I am on the issue. And maybe the commercial folks of this state might

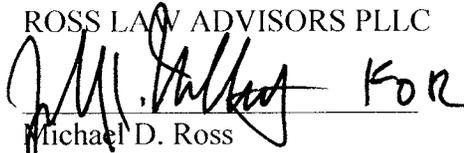
benefit from that issue. But I find that summary judgment, counsel, is appropriate in this case.

RP 31.

Plaintiff respectfully asks this Court to reverse the summary judgment and to remand plaintiff's claims against KCU for trial on their merits.

RESPECTFULLY submitted this 1st day of December, 2007.

ROSS LAW ADVISORS PLLC



Michael D. Ross  
WSBA No. 13891

LAW OFFICE OF JOHN J. MITCHELL



John J. Mitchell  
WSBA No. 12757  
Attorneys for Appellant  
N. Jack Alhadeff

**CERTIFICATE OF SERVICE**

JOHN J. MITCHELL declares as follows:

On December 3, 2007, I deposited into the U.S. Mail, with postage prepaid, a copy of the Appellant's Reply Brief in this matter addressed to the attorney for Respondent as follows:

Frank R. Siderius, Esq.  
Siderius Lonergan & Martin LLP  
500 Union St., Ste. 847  
Seattle, WA 98101

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Seattle, Washington on December 3, 2007.

John J. Mitchell