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DIVISION II  
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STATE OF WASHINGTON  
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No. 38610-1-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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**LAUREN L. ELLIS and JOHN DOE ELLIS, husband and wife;  
LAUREN L. ELLIS dba ELLIS CONSULTING dba  
AMERICAN HOME APPRAISAL,**  
*Appellants,*

v.

**KITSAP CREDIT UNION, a Washington State  
Nonprofit Credit Union, dba  
KITSAP COMMUNITY FEDERAL CREDIT UNION**

*Respondent.*

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**BRIEF OF RESPONDENT**

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## I. INTRODUCTION

Appellant Ellis ("Ellis") is attempting to enforce indemnification language appearing in an Appraisal Report prepared for respondent Kitsap Credit Union ("KCU"), despite the fact that no evidence whatsoever exists suggesting that this extraneous indemnity language was bargained for or supported by consideration.

## II. RESPONSE TO ASSIGNMENT OF ERROR

A. *Response to Assignment of Error.* The trial court properly granted summary judgment in favor of KCU. Ellis presented no evidence in response to KCU's summary judgment motion that the indemnity language at issue was bargained for or supported by consideration.

B. *Counter-statement of Issues Pertaining to Assignments of Error.*

1. Whether KCU is bound by indemnity language in Ellis' appraisal in that indemnity by KCU was neither bargained for nor supported by consideration?

2. Whether the appraisal's indemnity language is unenforceable under Washington's statute of frauds absent KCU's written agreement to indemnify?

### III. STATEMENT OF THE CASE

A. *Statement of Facts.* KCU asked Ellis to prepare an appraisal of a development project that was being funded by KCU. CP 43. Ellis performed the appraisal and submitted an Appraisal Report to KCU. *Id.*

There is no evidence in KCU's loan files of any engagement letter or other similar correspondence between KCU and Ellis memorializing the terms or scope of the requested appraisal. CP 15. There is no evidence that Ellis advised KCU that Ellis required KCU to indemnify Ellis for any potential losses as a condition of accepting the appraisal. *Id.* KCU never discussed, negotiated or agreed to the indemnification theory advanced by Ellis. *Id.* Prior to this litigation, KCU was unaware of any potential basis for liability to Ellis. *Id.* In fact, KCU did not even learn about Ellis' indemnification theory until counsel for Ellis notified KCU by letter that Ellis would be seeking indemnification from KCU. *Id.*

Had Ellis initially advised KCU that obtaining KCU's unqualified indemnification would be a condition of KCU's acceptance of the appraisal, KCU would not have accepted the appraisal under that condition. CP 16.

The Appraisal Report which Ellis delivered to KCU was approximately 200 pages long. CP 16. Immediately following the Report's title page, Ellis included a letter to Douglas B. Chadwick, who was KCU's Director of Commercial Lending. CP 15, Ellis' Letter to Chadwick is at CP 18.

This letter provided general background information about the appraisal but said nothing about the topic of indemnification. CP 15, 18. Nor does the letter state Ellis' position that KCU's acceptance of the Appraisal Report obligated KCU to indemnify Ellis. CP 18.

The Appraisal Report contains a Table of Contents immediately following the letter to Mr. Chadwick. CP 16, 19, 20, 21. It is not apparent from reviewing this Table of Contents that the Appraisal Report contained any indemnification obligations. *Id.* KCU had no reason to expect such a provision because it was never negotiated or agreed upon. CP 16.

Buried in the Appraisal Report is the indemnification language at issue in this appeal. CP 16. In the Appraisal Report's Table of Contents, there is a subsection covering "Other Limiting Conditions." CP 20. This "Other Limiting Conditions" subsection is a 2-page list of bullet point items applying to the Appraisal Report. CP 22, 23. The second to the last bullet point item appearing in the "Other Limiting Conditions" subsection is the appraisal language at issue in this appeal.

B. *Statement of Procedure.* KCU concurs with Ellis' statement of the procedural posture.

#### IV. ARGUMENT

A. *Standard of Review.* Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Scott Galvanizing, Inc. v. Northwest EnviroServices, Inc.*, 120 Wn.2d 573, 580, 844 P.2d 428 (1993). The reviewing court engages in the same inquiry as the trial court. *Id.* All facts and all reasonable inferences from the facts are considered in the light most favorable to the non-moving party. *Id.*

B. *The Uniform Commercial Code Does Not Apply to the Parties' Transaction.* Ellis argues that Article 2 of the Uniform Commercial Code (UCC) at RCW Chapter 62A.2-101, *et seq.* applies to the parties' transaction because Article 2 deals with transactions in goods and that the "appraisal KCU purchased from Ellis was moveable and 'specifically manufactured'." (Brief of Appellant, p. 6.) In fact, KCU purchased appraisal services from Ellis, and the Appraisal Report was provided as part of those services.

Washington law recognizes that the majority of jurisdictions analyzing mixed contracts involving the sale of goods and services use a "predominant factor test" to determine whether Article 2 applies. In *Tacoma Athletic Club, Inc. v. Indoor Comfort Systems, Inc.*, 79 Wn.App. 250, 256, 902 P.2d 175 (1995), the court observed "if the sale of goods dominates, Article 2 governs; if the sale of services dominates, Article 2 is inapplicable."

*Tacoma Athletic Club* cites the Eighth Circuit's consideration of a contract for the sale and installation of bowling lanes and equipment.

The test for inclusion or exclusion is not whether they are mixed, but, granting that they are mixed, whether their predominant factor, their thrust, their purpose,

reasonably stated, is the rendition of service, with goods incidentally involved (e.g., contract with artist for painting) or is a transaction of sale, with labor incidentally involved (e.g., installation of a water heater in a bathroom). *Tacoma Athletic Club, supra* at 257, citing *Bonebrake v. Cox*, 499 F.2d 951 (8th Cir. 1974).

Other courts' treatment of mixed contracts are instructive. *Filmservice Laboratories, Inc. v. Harvey Bernhard Enterprises, Inc.*, 208 Cal.App.3d 1297, 256 Cal.Rptr. 735 (1989) dealt with a mixed contract involving the manufacture of motion picture release prints from negatives. In determining the manufacturing was a service, the court noted "[in] determining whether or not a contract is one of sale or to provide services, we must look to the internal 'essence of the agreement.' When service predominates the incidental sale of items of personal property does not alter the basic transaction." *Filmservice*, at 1305, citing *North American Leisure Corp. v. A & B Duplicators, Ltd.*, 468 F.2d 695, 697 (2d Cir. 1972).

The contract construed in *Filmservice* was a services contract because "[t]he 'essence' of the contract was to provide a service which resulted, incidentally, in the transfer of tangible personal property; it was not for the sale of goods." *Filmservice*, at 1306.

*Filmservice* approved *North American Leisure's* analogy to publishing cases:

...where the publisher provides a manuscript to a printer who agrees to manufacture books and who supplies the paper, the printing and binding material, the plates and the engravings. In such cases, courts have invariably found the agreement to constitute one of work, labor and services rather than the sale of books by printer to publisher. *Filmservice, supra* at 1306, citing *North American Leisure, supra* at 697.

The *Filmservice* parties' contract was not for the purchase of the manufactured film prints, but rather was for the manufacturing services by which the prints were produced. *Filmservice* at 1306.

*Incomm, Inc. v. Thermo-Spa, Inc.*, 41 Conn.Supp. 566, 595 A.2d 954 (1991), a case involving a contract to produce a brochure advertisement, is also on point. The *Incomm* court noted that the UCC's definition of "goods" is very broad, but did not apply to the parties' contract. The court acknowledged that the parties contemplated a physical layout of a brochure that could be reproduced for advertising purposes. However, the court found that although both service and materials were purchased, the "essence" of what was being purchased was brochure production services rather than materials. *Incomm* at 569-570.

Applied to the present case, *Tacoma Athletic Club, Filmservice* and *Incomm* indicate that KCU and Ellis' appraisal transaction is predominantly a contract for services to which the Uniform Commercial Code does not apply. When considering the "essence" of the appraisal transaction, it is apparent that KCU was not purchasing the Appraisal Report as a "good" as Ellis argues, but rather requested that Ellis provide appraisal services, which, as an incidental item, included the tangible Appraisal Report. It was the service, knowledge and expertise of a qualified appraiser that KCU was purchasing, which included a report containing the written results of those appraisal services.

C. *Common Law Contract Principles Govern this Transaction.* In attempting to establish that the appraisal transaction is governed by Article 2 of the UCC, Ellis has apparently departed from the position taken before the trial court, that "the appraisal Ellis submitted was, in fact, his counteroffer to KCU: Ellis was offering to form a unilateral contract on the stated terms; this offer could be accepted by KCU's payment." CP 32. Ellis argued below that the Appraisal Report was submitted not as the performance of the parties' unilateral contract, but rather the Appraisal Report was submitted as

a counteroffer "because that submission varied the terms of KCU's offer (the request for an appraisal)." *Id.* Ellis argued below that the submission of the Appraisal Report/ counteroffer was accepted by KCU when it paid for the appraisal services, and became binding on the parties. CP 33.

Ellis is trying multiple legal theories (i.e., arguing the Appraisal Report was a "counteroffer" below and now arguing on appeal that it is a "good" subject to UCC Article 2) in an attempt to justify the indemnification position, Ellis cannot escape the reality that the indemnification language was not bargained for nor supported by consideration.

The basic elements of a contract are offer, acceptance and consideration. This concept is foundational to contract law. Ellis' indemnification theory fails because there is no evidence that the parties bargained for indemnification or that indemnification was supported by consideration. Understanding the fundamental concepts of counteroffers is instructive in this regard.

Below, Ellis cited *Rorvig v. Douglas*, 123 Wn.2d 854, 858, 873 P.2d 492 (1994) that "[i]t is a basic rule of contract formation that 'an expression that changes the terms of the offer in any material respect

may be operative as a counteroffer...!" CP 32. Here, it is undisputed that KCU requested Ellis provide appraisal services. By performing the appraisal Ellis consented to KCU's offer. However, it is also undisputed that KCU did not request the indemnification language that Ellis now attempts to use against KCU. For Ellis to have properly added an indemnification provision to the scope of the parties' agreement, Ellis should have specifically bargained for that with KCU. In other words, Ellis should have counteroffered. A written contract for appraisal services containing this indemnity language and signed by the parties would have reduced this issue.

*Restatement (Second) of Contracts* defines a counteroffer as follows:

A counter-offer is an offer made by an offeree to his offeror relating to the same matter as the original offer and proposing a substituted bargain differing from that proposed by the original offer. *Restatement (Second) of Contracts*, §39(1).

The *Restatement* explains that a counteroffer:

...carries negotiations on rather than breaking them off. The termination of the power of acceptance by a counteroffer merely carries out the usual understanding of bargainers that one proposal is dropped with another is taken under consideration; *if alternative proposals are to be under consideration at the same time, warning is*

*expected. Restatement (Second) of Contracts, §39(Comment a). (Emphasis added.)*

Here, Ellis should have properly bargained for the indemnification by giving KCU specific warning that, as a condition of his appraisal services, Ellis would require KCU's unlimited and unqualified indemnification.

Unlimited and unqualified indemnification, or as the Appraisal Report's language states, indemnification "for any and all claims for loss and liabilities of any nature whatsoever arising out of or related to this contract. . . ." would certainly be a material change from KCU's agreement to pay Ellis for appraisal services. The amount of Ellis' fee for appraisal services is not identified, but it is unreasonable to view the parties' agreement as including KCU's willingness to expose itself to open-ended liability, which could far exceed the fee paid to Ellis for his appraisal services. The record reflects that KCU would not find objectionable a limitation of an appraiser's liability to the fee paid for appraisal services. CP 88. This is entirely different from an open-ended, unlimited and unqualified indemnification of the appraiser, which is what Ellis hopes to receive.

Here, Ellis' performance of appraisal services and submission of the Appraisal Report completed the parties' unilateral contract in which case KCU agreed to pay for, and Ellis agreed to provide, an appraisal. At most, the Appraisal Report can be seen as an acceptance which requests an additional term. *Restatement (Second) of Contracts*, §61 provides:

An acceptance which requests a change or addition to the terms of the offer is not thereby invalidated unless the acceptance is made to depend on an assent to the changed or added terms.

The comment to that section explains:

Acceptance must be unequivocal. But the mere inclusion of words requesting a modification of the proposed terms does not prevent a purported acceptance from closing the contract, unless, if fairly interpreted, the offeree's assent depends on the offeror's further acquiescence in the modification. *Restatement (Second) of Contracts*, §61 (Comment a).

Whether the Appraisal Report's inclusion of indemnification language among its 200 plus pages meets the threshold of "an acceptance which requests a change or addition to the terms of the offer" is debatable. Nevertheless, there is nothing in the record which indicates that Ellis conditioned his acceptance upon the additional indemnification language. His completion of appraisal

services and submission of the Appraisal Report closed the parties' unilateral contract. The completion of that contract is not affected by the inclusion of the indemnification language in the Appraisal Report because Ellis made no effort to condition his acceptance on the additional terms.

Ellis cites *Multicare Medical Center v. Dept. of Social & Health Services*, 114 Wn.2d 572, 790 P.2d 124 (1990) for the position that Washington follows the "objective manifestation theory of contracts" whereby:

The unexpressed subjective intention of the parties is irrelevant; the mutual assent of the parties must be gleaned from their outward manifestations. To determine whether a party has manifested an intent to enter a contract, we impute an intention corresponding to the reasonable meaning of a person's words and acts. *Multicare, supra* at 586-87. (Citations omitted.)

In this case, the parties' "outward manifestations" clearly evidence an intent to contract for appraisal services, but clearly do not evidence mutual assent to the indemnification language. The parties' outward manifestations simply indicate that KCU requested and received appraisal services. It is unreasonable for Ellis to argue that the parties outwardly manifested mutual assent to the indemnification language. The indemnification language is buried in a 200 plus page

Appraisal Report, there is no specific reference to indemnification in the Table of Contents, Ellis' correspondence to KCU submitted with the Appraisal Report did not advise KCU of the indemnification issue, there is no evidence in the record of any attempt by Ellis to make KCU aware of the indemnification issue, and the indemnification language would require open-ended indemnification of Ellis regardless of the fee received.

D. *Ellis' Layered Contract Argument Fails.* Ellis confuses a limitation of liability with an indemnity provision. Ellis' "layered contract" argument is based on *M.A. Mortenson Company, Inc. v. Timberline Software Corporation*, 140 Wn.2d 568, 998 P.2d 305 (2000). That court's layered contract analysis under RCW 62A.2-204 allows a contract for the sale of goods to be made in any manner sufficient to show agreement, including the parties' conduct. *Mortenson, supra* at 582 citing RCW 62A.2-207.

*Mortenson* is distinguishable because UCC Article 2 does not apply to the parties' transaction, which was essentially service-based as discussed above. Nevertheless, the Washington Supreme Court's layered contracts cases support KCU. A limitation of liability (not indemnification) may be unconscionable. *Puget Sound Financial,*

*LLC v. Unisearch, Inc.*, 146 Wn.2d 428, 440, 47 P.3d 940 (2002)

citing RCW 62A.2-719(3), which states:

Limitation of other consequential damages is valid unless it is established that the limitation is unconscionable.

*Mortenson, Puget Sound Financial* and the other cases Ellis relies on deal with limitations of liability clauses in contracts. These cases are distinguishable from the present case, in which KCU disputes the enforceability of indemnification language in the Appraisal Report.

*Puget Sound Financial* dealt with the enforceability of a limitation of liability clause presented in regular invoices for the purchase of commercial services. In that case, Unisearch charged \$25 for performing searches for UCC filings in Washington. All of the search reports sent to the customer included a statement limiting Unisearch's liability to the \$25 fee charged for each search. Unisearch had performed 47 such searches prior to the search leading to the dispute in that case. *Puget Sound Financial, supra* at 431.

The *Puget Sound Financial* court noted that Unisearch's invoices and search reports combined to form a layered contract, as

in *Mortenson*, where the court held that a software purchase order and a separate software licensing agreement sent with the software combined to form the contract. *Puget Sound Financial, supra* at 437.

Ellis argues, based on *Mortenson* and *Puget Sound Financial*, that the parties in this case also had a layered contract. However, Ellis does not explain how the parties' contract in this case is layered or how that is relevant to the indemnification issue on this appeal. *Mortenson* and *Puget Sound Financial* both involved contracts that were held to have consisted of multiple documents. The only document in this case is the Appraisal Report. There is nothing layered about it. Presumably, Ellis cites *Mortenson* because it involved "similar source of limiting terms first delivered to a buyer along with delivery of the product requested" and cited RCW 62A.2-204 for the position that a contract may be formed "in any manner sufficient to show agreement...even though the moment of its making is undetermined." Appellant's Brief at p. 7, citing *Mortenson, supra* at 584.

KCU agrees with Ellis that the limitation and indemnification terms were first delivered to KCU along with delivery of the Appraisal

Report. However, KCU's acceptance and use of the Report does not establish KCU's agreement to the indemnification language.

Examination of *Puget Sound Financial's* unconscionability analysis with respect to the enforceability of the liability limitation in that case, illustrates that Ellis' attempt to insert indemnification language into the parties' agreement is unconscionable.

Whether an exclusionary clause is unconscionable is determined as a matter of law. *Puget Sound Financial, supra* at 438 (citations omitted). Thus, the appellate court can determine unconscionability in this *de novo* summary judgment review.

Liability limitations are evaluated differently in commercial versus non-commercial transactions. *Id.* at 439. In non-commercial transactions involving unfair surprise, liability limitations are unconscionable unless they are (1) explicitly negotiated and (2) set forth with particularity. *Puget Sound Financial, supra* at 439, citing *American Nursery Products v. Indian Wells Orchards*, 115 Wn.2d 217, 797 P.2d 477 (1990) and *Berg v. Stromme*, 79 Wn.2d 184, 484 P.2d 380 (1971). In commercial transactions that do not involve unfair surprise, a totality of the circumstances approach is used to determine unconscionability in limitations clauses. *Id.* The non-exclusive

factors for the totality of the circumstances assessment are (1) the conspicuousness of the clause in the agreement; (2) the presence or absence of negotiation regarding the clause; (3) the custom and usage of the trade, and (4) any policy developed between the parties during the course of dealing. *Id.* citing *Schroeder v. Fageol Motors, Inc.* 86 Wn.2d 256, 544 P.2d 20 (1975).

*Schroeder* and *Berg* are applied in commercial transactions to prevent unfair surprise in business dealings. *Puget Sound Financial, supra* at 439. The *Puget Sound Financial* court did not find unfair surprise in that case, so it did not apply the 2-prong *Berg* analysis. *Puget Sound Financial, supra* at 441. That case noted that unfair surprise is "most commonly associated with a maze of fine print in warranty disclaimers," and noted that the reports and invoices in that case were brief so that unfair surprise was not a concern. *Id.* Unlike the contract in *Puget Sound Financial*, the indemnification language in this case appears as one sentence in a 200-page Appraisal Report, is not specifically referenced in the Appraisal Report's Table of Contents and simply appears as a bullet point on the second page of a 2-page list. For Ellis to pass off this language to KCU is certainly unfair surprise. Since there is no evidence in the record that the

indemnification provision was (1) explicitly negotiated and (2) set forth with particularity, it is *per se* unconscionable. It is especially unconscionable given the indemnification language does not simply limited Ellis' liability to the amount paid for appraisal services. Rather, it attempts to impose an unlimited, unqualified and open-ended indemnification obligation on KCU.

Even absent unfair surprise, the indemnification language is nevertheless unconscionable using the *Schroeder* analysis: (1) the indemnification language is not conspicuous in the 200 page Appraisal Report, (2) there is no evidence in the record that the parties negotiated the indemnification language;<sup>1</sup> (3) there is no evidence of custom or course of dealing between these parties, although Ellis declares, without proof or example, that open-ended indemnification clauses are standard in the appraisal trade;<sup>2</sup> and (4) the parties had no prior course of dealing. The balance of these

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<sup>1</sup> In fact, Ellis appears to concede that it was not negotiated in referring to "similar sorts of limiting terms first delivered to a buyer along with delivery of the product requested." Appellant's Brief, at p. 7.

<sup>2</sup> Ellis claims KCU "never denied that such appraisals usually include indemnification terms" yet disregards KCU's clear statement of its commercial lending policy that "KCU would reject an appraisal report submitted with the requirement that indemnifying the appraiser for any possible litigation arising out of the appraisal report was a condition of KCU's acceptance of that document." Appellant's Brief at p. 10; CP 88.

factors suggest that even if Ellis' actions did not involve unfair surprise, the indemnification language is nevertheless unconscionable under the totality of the circumstances analysis.<sup>3</sup>

E. *The Indemnification Language is Over Broad and Unenforceable.* Under Washington law the duty to indemnify is limited to those situations in which there is some fault on the part of the indemnitor. *Jones v. Strom Construction Co., Inc.*, 84 Wash.2d 518, 521-2.

In this case, Ellis alleges that the Appraisal Report was used by a defendant in the underlying lawsuit, who is not party to this appeal, for improper purposes, and that KCU did not adequately advise its borrower of the Appraisal Report's limiting conditions. Appellant's brief, page 3-4. There is no evidence of any improper conduct on the part of KCU. Ellis highlights language in the Appraisal

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<sup>3</sup> It is relevant that *Puget Sound Financial's* 4-part *Schoeder* analysis found that the limiting clause in that case was not inconspicuous because it appeared on a 1-page invoice with the disclaimer typed on the front of the document. *Puget Sound Financial, supra*, at 442. This is in contrast to Ellis' burial of the indemnification language in the Appraisal Report and failing to advise KCU of that additional term. Ellis will predictably point to his declaration statement that such broad, open-ended indemnification clauses are "standard inclusions in professionally prepared appraisals." CP 43. KCU believes that Ellis' own statements are insufficient to meet *Puget Sound Financial/American Nursery* requirement of establishing "the general commercial setting indicates a prior course of dealing or reasonable usage of trade as to the exclusionary clause." *Puget Sound Financial, supra* at 443.

Report which states that the document is for KCU's "internal decision making" and is prepared for KCU's "sole and exclusive use . . . to assist with the mortgage lending decision." Appellant's Brief, page 2. This language does not prevent KCU from reviewing the Appraisal Report with its borrower in connection with the lending decision. As KCU points out, it is common in commercial lending for a copy of an appraisal to be given to the borrower. CP 88. The record reflects that KCU did not give the Appraisal Report to any other party. Thus, even if the indemnification language were enforceable, KCU would not be required to indemnify Ellis for his litigation expenses below because there is no evidence in the record that KCU had any culpability or control over the circumstances leading to plaintiffs' decision to sue Ellis and the other defendants.

For that matter, there is no evidence in the record that the Appraisal Report contributed to the losses alleged by plaintiffs in the litigation below in which Ellis incurred legal expenses. Ellis seeks indemnification from KCU when there is no evidence whatsoever that KCU had any control over any circumstance that led to Ellis being sued. Moreover, there is no evidence in the record that plaintiffs' decision to name Ellis as a defendant in the litigation below arose out

of the Ellis' appraisal services, rather than some other improper relationship that plaintiffs alleged Ellis had with the other defendants.

F. *Indemnity was Not Bargained for Nor Supported by Separate Consideration.* A defendant who can point out to the trial court that the plaintiff lacks competent evidence to support an essential element of the plaintiff's case is entitled to summary judgment because a complete failure of proof concerning an element necessarily renders all other facts immaterial. *Boyce v. West*, 71 Wn.App. 657, at 665, 862 P.2d 592 (1993).

Here, Ellis' claims against KCU are without foundation because there is no evidence in the record that the indemnification provision was bargained for or supported by consideration. The indemnity of the appraiser was not part of the appraisal requested by KCU. Ellis added this language to the Appraisal Report, but can cite no evidence in the record that the indemnification language was bargained for or supported by any consideration. Because Ellis cannot establish a contractual duty on the part of KCU to indemnify Ellis, summary judgment was properly granted to KCU.

Ellis' contention that whether the parties mutually assented to the indemnification provision is a factual issue which cannot be

decided on summary judgment, is without merit. Mutual assent, or any other factual determination, is not at issue in this appeal. This appeal involves only the enforceability of the Appraisal Report's indemnification language. There are no facts in dispute.

G. *The Statute of Frauds Bars Plaintiff's Claim.* The Appraisal Report's indemnity provision is unenforceable under Washington's Statute of Frauds. Washington's Statute of Frauds provides:

In the following cases, specified in this section, any agreement, contract and promise shall be void, unless such agreement, contract or promise, or some note or memorandum thereof, be in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized, that is to say:...(2) Every special promise to answer for the debt, default or misdoings of another person;...RCW 19.36.010(2).

As applied to this appraisal transaction, there is no evidence that KCU agreed in writing to indemnify Ellis in any aspect of the appraisal transaction. There is no evidence that anyone on behalf of KCU signed any writing or memorandum of any writing agreeing to the indemnification provisions. Washington's statute of frauds will not permit Ellis to slip inconspicuous indemnification language into a document that KCU reasonably understood was simply the requested

appraisal report. Regardless of whether Ellis' attorneys fees have been incurred because of his own misconduct, the misconduct of another party, or, as Ellis alleges, KCU, the statute of frauds will not permit indemnification liability to be passed to another without their express written agreement.

Ellis mischaracterizes his particular statute of frauds problem by arguing that the statute of frauds is not applicable because the parties' agreement has been fully performed.

KCU urges that by performing appraisal services and submitting the Appraisal Report, pursuant to KCU's request, Ellis completed his performance of the parties' contract. The parties had a contract which was completed upon Ellis' performance of KCU's requested services. The scope of this contract was limited to appraisal services and, did not include indemnification.

Ellis inappropriately argues that the UCC allows a contract which does not satisfy the UCC's statute of frauds, but which is valid in other respects, to be enforceable. Brief of Appellant, p. 17. Ellis makes this argument in connection with a contract for the sale of goods. *Id.* As has been established above, the UCC has no

application to the parties' agreement regarding appraisal services and Ellis' UCC-based part performance argument is inapplicable.

Even apart from the inapplicability of UCC Article 2 to this lawsuit, Ellis' part performance argument is insufficient to overcome the statute of frauds problem because Ellis cannot show that a contract *exists* (with respect to the indemnification language) which could be partially performed. In other words, before considering "part performance" as a means of avoiding the application of the Statute of Frauds, there must first exist a contract which can be partly performed.

Washington law will not allow the doctrine of part performance to defeat requirements of the statute of frauds if the existence of the underlying contract is uncertain. Application of the part performance doctrine "requires the contract be established by clear and unequivocal proof, leaving no doubt of the character, terms or existence of the contract." *Pacific Cascade Corp. v. Nimmer*, 25 Wn.App. 552, 559, 608 P.2d 266 (1980).

In this case, Ellis cannot show that a contract exists with respect to the indemnification issue. Ellis' inclusion of the indemnification language in the Appraisal Report does not establish

that KCU agreed to the unlimited, unqualified and open-ended indemnification that Ellis seeks. KCU did not sign a contract, memorandum, engagement letter or any other writing agreeing to indemnify Ellis, which would meet the Statute of Frauds' specific requirement that any promise to answer for the debt of another be in writing signed by the promising party.

For the indemnification language to have been enforceable under the Statute of Frauds, Ellis should have made it expressly clear to KCU that KCU would be required to indemnify third party plaintiffs as a condition of accepting the Appraisal Report. Ellis should have then obtained KCU's written authorization for that indemnify obligation. However, Ellis did not take these measures and although the parties' agreement for the provision of "appraisal services" has been fully performed, Ellis cannot show any evidence of an indemnification agreement that meets the Statute of Frauds' specific requirement that the indemnitor sign a written agreement of that obligation.

## **V. CONCLUSION**

Ellis lacks competent evidence to support his indemnification theory and the trial court appropriately granted summary judgment.

Ellis is unable to show that the indemnification language was bargained for or supported by consideration. The statute of frauds bars Ellis' attempt to impose an indemnification obligation on KCU absent KCU's written agreement to indemnify.

Respectfully submitted this 11 day of May, 2009.

  
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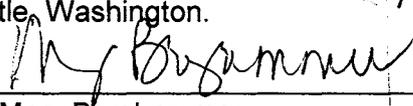
#### DECLARATION OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the date below, I mailed via U.S. Mail, first class, postage prepaid, and electronic mail, a true copy of this document to:

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Dated: May 11, 2009, at Seattle, Washington.

  
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Mary Berghammer

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