IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ROSEMARY and DAVID SUTTON, husband and wife; BELA SZABO, an individual; JERRY and BECKY DEETER, husband and wife; FOTH FAMILY TRUST, a family trust; JOHN LARSEN, an individual; PAMELA MCPEEK and WILLIAM HALIGAN, husband and wife; START NOW CORPORATION, a nonprofit corporation; SARA BLAKE, an individual; LAVONNE and WILLIAM MUELLER, husband and wife; GENE and JOANNE BREITBACH, husband and wife; THE EDWARD L. SENNER AND EUNICE I. SENNER REVOCABLE LIVING TRUST, a living trust; MARK and KIMBERLEY SENNER, husband and wife, Plaintiffs, v. MALIBU DEVELOPMENT CORPORATION, a Washington corporation; THE MERIDIAN ON BAINBRIDGE ISLAND, LLC, a Washington limited liability company; JOHN ERICKSON and JANE DOE ERICKSON, husband and wife; BRUCE A. MCCURDY and CONNIE M. MCCURDY, husband and wife; CHRISTOPHER M. HEINS and CYNTHIA HEINS, husband and wife; PREFERRED BENEFIT SERVICES, INC., a Washington corporation, Defendants, LAUREN L. ELLIS and JOHN DOE ELLIS, husband and wife; LAUREN L. ELLIS d/b/a ELLIS CONSULTING d/b/a AMERICAN HOME APPRAISAL, Appellants, KITSAP CREDIT UNION, a Washington state nonprofit credit union d/b/a KITSAP COMMUNITY FEDERAL CREDIT UNION, Respondent.	)	No. 63871-8-I DIVISION ONE UNPUBLISHED OPINION FILED: November 23, 2009

Appelwick, J. — Kitsap Credit Union orally requested that Ellis perform a property appraisal. Ellis submitted a written appraisal report that contained an indemnity clause. KCU paid for and used the report. Ellis was sued based on allegations the appraisal provided the basis for an improper investment scheme. Ellis sought indemnification from KCU, but the trial court granted summary judgment to KCU. Enforcement of the contract is not barred by the statute of frauds, and Ellis raised an issue of material fact as to the trade usage of such indemnifications clauses. We reverse and remand for further proceedings.

FACTS

Kitsap Credit Union (KCU) asked Lauren Ellis to prepare an appraisal of a development project in Kitsap County. The record contains no information about the terms, payment, or expectations agreed to by the parties, but the parties do not dispute the existence of this initial contract. Ellis prepared the appraisal and submitted the completed appraisal report to KCU in January 2003. The parties do not dispute that KCU paid for and used the appraisal.

The appraisal summary included language limiting the use of the appraisal to "the sole and exclusive use of [KCU]" for use only in "internal decision making regarding construction financing." The clause further states that the appraisal "is not to be relied upon by any third parties for any purpose whatsoever" and limits Ellis's responsibility to KCU. KCU provided it's borrower with a copy of the appraisal.

In July 2007, several plaintiffs brought a lawsuit alleging a fraudulent investment scheme involving an agent of KCU's borrower. Ellis was named in

the suit as having provided appraisals for use in valuing the project. The disagreement between KCU and Ellis arose when Ellis attempted to invoke the indemnification clause he had included on page twelve of the appraisal summary:

> The client agrees to indemnify and hold harmless Ellis Consulting. [sic], its officers, and employees from any and all claims for loss and liabilities of any nature whatsoever arising out of or related to this contract, the appraisal report, or the inclusion of the appraisal report as an exhibit to a registration statement and prospectus used as part of a real estate securities offering.

Ellis moved to join KCU as a third-party defendant pursuant to the indemnity clause. He also moved for summary judgment against the plaintiffs. Both motions were granted. KCU moved for summary judgment to avoid indemnification. KCU claimed to have had no knowledge of the indemnification clause, and further claimed that KCU would never have agreed to such terms. The trial court granted the motion without explanation.

Upon the trial court's certification of the summary judgment as a final order as required under CR 54(b), Ellis appealed.

DISCUSSION

When reviewing a summary judgment order, the appellate court undertakes the same inquiry as the trial court. Thompson v. Peninsula Sch. Dist. No. 401, 77 Wn. App. 500, 504, 892 P.2d 760 (1995). Summary judgment is proper when there are no genuine issues of material fact and the moving party is entitled to a judgment as a matter of law. CR 56(c). The moving party bears this burden of proof. Young v. Key Pharms., Inc., 112 Wn.2d 216, 225, 770 P.2d

182 (1989). All facts and inferences are considered in the light most favorable to the nonmoving party. Ashcraft v. Wallingford, 17 Wn. App. 853, 854, 565 P.2d 1224 (1977), adhered to on remand, 579 P.2d 384 (1978).

I. Indemnification

The contract question raised here is controlled by either common law or the Uniform Commercial Code article 2 (2003) (UCC) as codified in chapter 62A.2 RCW. Contracts for goods, defined as "all things (including specially manufactured goods) which are moveable at the time of identification to the contract for sale," are governed by chapter 62A.2 RCW. RCW 62A.2-102, -105. Common law controls in service contracts. Here, Ellis argues that the appraisal summary is a "good," because it is moveable and "specially manufactured." But, Ellis ignores that his appraisal formed the basis for the summary, and the performance of an appraisal is a service. Therefore, even if the appraisal summary is a "good" within the meaning of RCW 62A.2-105, the contract has a service component as well.

Washington uses the predominant factor test to determine whether chapter 62A.2 RCW or common law governs a contract for the sale of goods and services. Tacoma Athletic Club, Inc. v. Indoor Comfort Sys., Inc., 79 Wn. App. 250, 256, 902 P.2d 175 (1995). This test examines mixed contracts and "'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).'" Id. at 257 (quoting Bonebrake

v. Cox, 499 F.2d 951, 958–59 (8th Cir. 1974)). In Washington, installation of a dehumidification system was found to be a goods contract, with the installation and labor as incidental. Tacoma Athletic, 79 Wn. App. at 258–59. But, "[a]n agreement by a commission merchant to harvest, clean, pack, and sell on commission the agricultural products of a farmer is not a sales agreement." Smith v. Skone & Connors Produce, Inc., 107 Wn. App. 199, 205, 26 P.3d 981 (2001). Instead, the contract involves the sale of expertise and purchase of a service. Id.

The classification of a contract under the predominant factor test is a question of fact. Tacoma Athletic, 79 Wn. App. at 258. Generally, questions of fact are not amenable to summary judgment. CR 56(c). But, "when reasonable minds could reach but one conclusion, questions of fact may be determined as a matter of law." Hartley v. State, 103 Wn.2d 768, 775, 698 P.2d 77 (1985). Under the predominant factor test, Ellis's expertise and performance of the appraisal service is the heart of the contract. The appraisal summary is merely a tangible articulation of the results of that service, rather than a good for sale. As a result, this is a service contract controlled by common law—chapter 62A.2 RCW does not apply directly.

Even though chapter 62A.2 RCW does not control, the Supreme Court has applied the UCC by analogy to a service contract in a similar scenario. In Puget Sound Financial, LLC v. Unisearch, Inc., Puget Sound Financial entered into an oral contract with Unisearch to perform a UCC filing search. 146 Wn.2d 428, 431, 47 P.3d 540 (2002). Unisearch complied and then sent an invoice for

$25 which also included a liability limitation statement. Id. The Supreme Court held that the liability limitation, presented in a regular invoice for the purchase of commercial services, was enforceable. Id. To reach this conclusion, the court relied upon a case involving a goods contract under the UCC. Id. at 437–38 (citing M.A. Mortenson Co., Inc. v. Timberline Software Corp., 140 Wn.2d 568, 998 P.2d 305 (2000)).

Mortenson, addressed the validity of liability limitations in the increasingly common "shrinkwrap license[s]" that accompany computer software. 140 Wn.2d at 571. Mortenson purchased licensed software from Timberline. Id. The software packaging included a license agreement with a liability limitation clause. Id. at 574–75. When Mortenson encountered a problem with the software, Timberline invoked the limitation clause. Id. at 576–77. Mortenson argued that the contract consisted only of the purchase order and that it never saw or agreed to the provisions in the licensing agreement. Id. at 577. The court disagreed and held the terms of the license to be part of the contract, and use of the product constituted assent to the terms. Id. at 584. "We conclude because RCW 62A.2-204 allows a contract to be formed 'in any manner sufficient to show agreement . . . even though the moment of its making is undetermined,' it allows the formation of 'layered contracts.'" Id. In Mortenson that layered contract consisted of the purchase order and the license agreement that accompanied the software.

Both Puget Sound Financial and Mortenson employed course of dealing and trade usage to support the inclusion of the supplemental terms in a layered

contract. "Trade usage and course of dealing are relevant to interpreting a contract and determining the contract's terms." Puget Sound Fin., 146 Wn.2d at 434. The use of course of performance and trade usage in Mortenson stems from the UCC definition of an "agreement," which would not apply to this predominantly service contract. But, the Restatement (Second) of Contracts § 222 (1981) also includes trade usage as important evidence of contractual terms. "'Unless otherwise agreed, a usage of trade in the vocation or trade in which the parties are engaged or a usage of trade of which they know or have reason to know gives meaning to or supplements or qualifies their agreement.'" Puget Sound Fin., 146 Wn.2d at 434 (quoting Restatement (Second) of Contracts § 222 (1981)). In Puget Sound Financial, Unisearch submitted evidence of other liability exclusions on invoices from other states, and produced an expert who declared that liability limitation included on invoices was standard industry practice. Id. at 435. The court found the "unrebutted evidence persuasive of trade usage, supporting the inclusion of the limiting language in the contract." Id. The court also used the history of 47 prior search transactions between Unisearch and Puget Sound Financial as evidence of a course of dealing. Id. at 436. Based on this course of dealing, trade usage, and layered contract approach, the court determined that the liability limitation provision in the invoice had been incorporated into the contract for services. Id. at 437–38.

Trade usage is generally a question of fact. Mortenson, 140 P.2d at 585. The record in both Puget Sound Financial and Mortenson allowed the court to determine that the additional terms constituted part of the contract as a matter of

law. The record here is more limited. To defend against summary judgment below, Ellis argued that the appraisal constituted a counteroffer. In so doing, he presented evidence that indemnity clauses are commonly used in appraisals. In his declaration Ellis states, "I have reviewed literally hundreds of professionally prepared appraisals over the last twenty (20) years and been [sic] an expert witness in many superior court and bankruptcy cases. The terms and conditions set forth on pages 5 and 12 of this appraisal are standard terms contained in most, if not all, professionally prepared appraisals." He further explains that such indemnity provisions are important, because of potentially unlimited liability as compared to relatively modest appraisal fees. According to Ellis, he would not perform an appraisal without the indemnification clause.

KCU does not rebut this trade usage evidence. Ellis's declaration raises a question of fact about the trade usage of indemnification clauses which is material in ascertaining the existence of a layered contract and the terms of any such contract. This precludes summary judgment.[1]

II. Statute of Frauds

KCU contends that if a contract exists, the contract is unenforceable under the statute of frauds. According to RCW 19.36.010(2), the statute of frauds requires a writing, signed by the party to be charged, for "every special promise to answer for the debt, default, or misdoings of another person." KCU argues that an agreement to indemnify is such a promise and requires a writing.

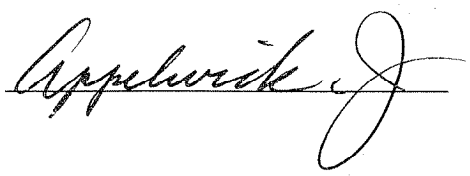
[1] On this record we cannot determine as a matter of law whether trade usage supports the inclusion of the indemnification clause and the other terms contained in the appraisal summary as part of the contract. Though Ellis argues that KCU breached these additional provisions by giving the appraisal to its borrower that issue is not properly before us.

According to KCU, Ellis cannot show the existence of a contract with the indemnification language, and therefore, part performance cannot prevent application of the statute of frauds.

But, as discussed above, whether a contract exists remains an open question. Ellis raised the issue of trade usage which may support the creation of a layered contract. Furthermore, if a layered contract exists, the parties have fully performed that contract—Ellis completed and tendered the appraisal summary and KCU paid for and used the report. "Full performance by one party removes a contract from [the statute of frauds]." Rutcosky v. Tracy, 89 Wn.2d 606, 611, 574 P.2d 382 (1978) (citing Becker v. Lagerquist Bros., Inc., 55 Wn.2d 425, 434, 348 P.2d 423 (1960)). Therefore if a layered contract exists, KCU cannot employ the statute of frauds to void the contract.

Several questions remain in this case—whether the contract includes the additional terms of the appraisal summary and whether KCU has any liability for breach of the contract they formed. Summary judgment was improper.

We reverse and remand.



WE CONCUR:

Leach, J. Grosse, J.