

NO. 42448-7-II  
DIVISION II  
COURT OF APPEALS  
OF THE STATE OF WASHINGTON

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DIVISION II  
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STATE OF WASHINGTON  
BY                       
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DIANA PERSON and ROBERT PERSON,  
husband and wife

Appellants

v.

GREGORY L. BOWMAN and STACY BOWMAN,  
husband and wife

Respondents

and

ALEX HERRING,  
a minor

Additional Respondent

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**BRIEF OF APPELLANTS**

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I.

INTRODUCTION

This case involves a request by the Plaintiffs/Appellants Diana Person and her husband Robert Person that this Court reverse the decision of Honorable Elizabeth Martin of the Pierce County Superior Court, rendered on July 22, 2011 which granted summary judgment in favor of Defendants/Respondents Gregory Bowman and Stacy Bowman, leaving only the claims of Plaintiffs/Appellants against Defendant/Respondent Alex Herring.

The Persons believe that the Court erred in ruling that there was no genuine issue of material fact in dispute and that Bowmans were entitled to a dismissal of all claims against them. The Persons seek reversal of that ruling and reinstatement of all claims between all parties.

II.

ASSIGNMENTS OF ERROR

A. The Trial Court erred in granting Bowman's motion for summary judgment, by ruling that there was no genuine issue of material fact with respect to whether Bowmans owned the horse "Toby" or whether Herrings owned the horse "Toby," and by

concluding that "Toby" was owned by the Herrings, thereby protecting Bowmans from liability by reason of the Equine Activity Statute.

B. Issues Pertaining to Assignments of Error.

1. DID THE COURT ERR WHEN IT DID NOT CONSIDER PAROLE EVIDENCE.
2. DID THE COURT ERR BY CONCLUDING THAT THERE WAS DISPUTE WITH RESPECT TO A GENUINE ISSUE OF MATERIAL FACT REGARDING THE OWNERSHIP OF THE HORSE?

III.

STATEMENT OF THE CASE

On December 1, 2010, Person filed an amended complaint in which they alleged that Person was injured as a result of an accident in which Person was a passenger in a horse-drawn buggy which was operated by Alex Herring, a minor. (CP 11-16) The complaint went on to allege that the buggy itself in which Person was a passenger was owned by Herring, but that the horse which was pulling the buggy was provided by the Bowmans. (CP 13, L 18-20) Persons further allege that Bowmans had directed Herring to take Person for a ride in the horse and buggy (CP 13, L 21-23) and that Bowmans were negligent for not insuring that the horse was safe, not insuring that the

operator was qualified, and not insuring that horse was trained correctly for its intended use. (CP 14, L 8-17)

The accident occurred when the horse "Toby" spooked and started running. As he made a sharp left turn, both Herring and Person were thrown from the buggy and Person received injuries. (CP 136, L 21-26)

Prior to the accident, on October 4, 2006, Mrs. Bowman and Herring's mother Tammy Herring signed a bill of sale-purchase agreement. (CP 87) Person in her declaration in opposition to the motion for summary judgment stated that it was her understanding that the horse pulling the buggy was still owned by the Bowmans, that he was leased to the Herrings and that Mrs. Bowman still referred to the horse as theirs. (CP 116, L 22-26) In her deposition testimony, Mrs. Bowman acknowledged that she had on more than one occasion referred to the payments which were made by the Herrings as "lease" payments. (Deposition of Stacy Bowman, P 15, L 3) (CP 94 and 95) Mrs. Bowman went on to acknowledge that she did not know much about the ownership of the horse. (Deposition of Stacy Bowman, P 15, L 25 - P 16, L 2) (CP 94) Mrs. Bowman also acknowledged that while people made payments according to contracts similar to the

one signed by Herrings, that they would not be allowed to remove the horse from the Bowman's property. ((Deposition of Stacy Bowman, P 34, L 18- P35, L 6) (CP 99)

Herring's mother, Tammy Herring, stated in her declaration that she understood that the horse "Toby" would belong to the Herrings when payment was completed. (CP 134, L 4-6) She further indicated that she had received a telephone call from Mrs. Bowman indicating that as Herrings became more delinquent on their payments that the Bowmans would keep "the down payment money we had paid to be used as lease payments." (CP 134, L 8-10) In Mrs. Herring's mind, the horse was a rented horse until payment was complete. (CP 134, L 4-5) Mrs. Herring recited other conversations with Mrs. Bowman in which it was made very clear that the horse was a leased horse until such time as payment was complete. (CP 134, L15-23) For example, Mrs. Herring recites one conversation after the accident in which she received a telephone call from Mrs. Bowman wherein Mrs. Bowman had apparently changed her position after the accident and insisted that the horse now belonged to the Herrings. (CP 134, L 24, CP 135, L 2)

Bowmans countered the assertions that Bowmans owned the

horse at the time of the accident and filed summary judgment on May 3, 2011. (CP 19-40) After argument, the Court granted the Bowman's motion for summary judgment and dismissed Person's complaint against the Bowmans with prejudice leaving only the claim of the Persons against the Herring. (CP 138-139).

In her ruling Honorable Elizabeth Martin stated the following:

The issue of whether the Bowmans owned the horse, I've struggled with this a fair amount because I understand the factual issues, but I believe the bill of sale operates to basically make the Herrings the owners of the horse. And therefore the Bowmans are not the owners of the horse although they have a security interest in it and clearly the Herrings do not own it free and clear until they have paid in full. They are the owners of the horse for these purposes.

(RP P3, L 17-25)

It is inherent in the Court's decision that neither Mrs. Herring's assertions that she did not believe that she owned the horse at the time of the accident (CP 133-135), nor Person's belief that the horse was owned by the stables (CP 116, L 22-26) nor Mrs. Bowman's acknowledgment that she was unsure about ownership and had referred repeatedly to payments made as lease payments (CP 94)

were taken into account.

The issue of the ownership of the horse is of paramount importance in this case because it directly bears upon the issue of liability of the parties through what is known as the "Equine Activities Statute." The Equine Activities Statute found at RCW 4.24.530 and 540 apply directly to this case. RCW 4.24.540 provides:

(1) except as provide in Subsection 2 of this section and equine activities sponsor or an equine professional shall not be liable for an injury to or the death of a participant engaged in an equine activity and except as provided in Subsection 2 of this Section no participant nor participant's representative may maintain an action against or recover from an equine activities sponsor or an equine professional for an injury to or the death of a participant engaged in an equine activity . . ."

For purposes of these proceedings, the buggy ride in which Person was injured would be considered an equine activity and the Bowmans would be considered equine professionals.

However, there are exceptions found in RCW 4.24.540(2)(b) which states:

Nothing in Subsection 1 of this section shall prevent or limit the liability of an equine activity sponsor or equine

professional: (i) if the equine activity sponsor or equine professional: (b) provided the equine and failed to make reasonable and prudent efforts to determine the ability of the participant to engage safely in the equine activity, determine the ability of the equine to behave safely with the participant and determine the ability of the participant to safely manage the particular equine.

If the Herrings owned the horse "Toby," the equine activities statute protects the Bowmans. If Bowmans owned "Toby" at the time of the accident, then the statute does not protect them and the inquiry falls to whether or not they made reasonable and prudent efforts to determine the ability of the participant to engage safely in the equine activity, determine the ability of the equine to behave safely with the participant and determine the ability of the participant to safely manage the particular equine. That inquiry has not been undertaken because Judge Martin has ruled that the Bowmans are protected by the statute.

IV.

#### ARGUMENT

The broad issue before the Court was whether or not Judge Martin erred when she granted summary judgment in favor of

Bowmans against Persons. The standard of review in which trial Court's decisions on summary judgment are analyzed is de novo. Troxell v. Rainier Public School District No. 307, 154 Wn.2d 345 (2005). The appellate court performs the same inquiry as the trial court. Smith v. Safeco Insurance Co., 150 Wn.2d 478 (2003).

The standard for summary judgment before the trial court and before this Court is that all reasonable inferences must be considered in the light most favorable to the non-moving parties. (Persons) Owen v. Burlington Northern Santa Fe RR Co., 153 Wn.2d 780 (2005). If reasonable minds can differ, the question of fact is one for the trier of fact and summary judgment is not appropriate. Owen, supra.

With that standard in mind, summary judgment is properly granted only when the pleadings, affidavits, depositions and admissions on file demonstrate that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. (CP 56) Hutchins v. 1001 4th Avenue Associates. 116 Wn.2d 217 (1991).

**DID THE COURT ERR WHEN IT DID NOT CONSIDER PAROLE EVIDENCE?**

When Judge Martin made the statement "I believe the bill of

sale operates to basically make the Herrings the owners of the horse. And therefore the Bowmans are not the owners of the horse . . . “ She effectively ruled that no parole evidence would be considered to interpret the agreement or the intent of the parties.

The bill of sale or contract which is the focus of these proceedings is found at CP 77. The sales contract identifies the parties, identifies the subject of the sale, Toby the horse, identifies the price and leaves the amount of the payment “to be determined.” There is an apparent contradiction in the terms of the contract when in Section 6 it indicates a price for full care board “if kept at Summit Stables” yet at Section 7 the contract states “the horse will be kept at this address listed Summit Stables until and/or the purchase agreement is paid in full.” It further states in Section 8 that if the horse is moved without prior approval “the contract will be considered null and void.” Finally the contract states “By signing below the buyer acknowledges this sale is final and they have purchased the horse ‘as is’. The seller will not refund any money toward this purchase in the future unless otherwise stated above.”

The issue is whether under summary judgment standards, with that language, the trial court was correct in ruling that there was no

question but that the Herrings owned the horse and the Bowmans did not. The Court refused to accept parole evidence in the form of Tammy Herring's Declaration, Diana Person's deposition testimony, and Stacy Bowman's deposition testimony with respect to the intent and interpretation of the contract despite the fact that this evidence all suggests that there was a genuine dispute regarding a fundamental issue; who owned the horse when the accident happened.

**DID THE COURT ERR BY CONCLUDING THAT THERE WAS DISPUTE WITH RESPECT TO A GENUINE ISSUE OF MATERIAL FACT REGARDING THE OWNERSHIP OF THE HORSE?**

Parole evidence is generally admissible to construe a written contract and to determine the intent of the parties. Lopez v. Reynoso, 129 Wn. App. 165 (2005). However, it cannot add to modify to, modify, or contradict the terms of a fully integrated contract. Lopez, supra. In Lopez, supra, the Court was faced with a situation where a written contract was entered into that provided for the sale of a vehicle at the price of \$6,500. The language also had written at the bottom as follows:

This order cancels and supersedes any prior agreement and as of the date herein comprises the complete and exclusive statement of the terms of this agreement.

Lopez, Page 168.

There was apparently a dispute about a \$2,000 payment which was made; whether it changed the purchase price or whether it was a credit against the purchase price. Despite the clear fact that a finding that the \$2,000 payment changed the purchase price would on the surface prevent it from being considered as parole evidence, nevertheless the court allowed the inquiry in. The Court of Appeals stated in its analysis, "In Washington the touch tone of contract interpretation is the party's intent." Tanner Electric Coop v. Puget Sound Power and Light, 128 Wn. 2d 656 (1996).

This intent may be discerned from the language of the agreement as well as from viewing the objective of the contract, the circumstances around its making, the subsequent conduct of the parties, and the reasonableness of the respective interpretations.

Scott Galvanizing Inc. v. Northwest Enviro Services Inc., 120 Wn.2d 653 (1993).

Generally people have the right to make their agreements entirely oral, entirely in writing, or partly oral and partly in writing. Lopez v. Reynoso, 129 Wn. App. 165 (2005). With a written contract,

It is the court's duty to ascertain from all relevant extrinsic evidence either oral or written whether the entire agreement has been incorporated in the writing or not. This is a question of fact."

Lopez, Page 171.

In Lopez, supra., when the seller of the vehicle indicated after the fact that the writing was an incomplete expression of the entire negotiations and agreements of the parties, the trial court was obligated to consider any extrinsic evidence to determine whether the agreement was fully integrated and if not, what the other terms consistent with the written agreement were operative. Lopez, Page 172.

In the current case, the Bowmans believe the sales agreement is complete and final on its face and in particular the portion which states that the sale is final. However, not only does Mrs. Herring contradict that, but even Mrs. Bowman when she acknowledges that the payments might be called "lease payments." Just as in Lopez, supra., these parties appear to disagree on one of the fundamental aspects of the transaction; whether it is a lease in which the sale only becomes final when the last payment is made or whether it is a purchase that becomes final when the document is executed. That

is precisely the type of inquiry that parole evidence can be admitted to clarify, when the document is unclear.

In The Matter of Prior Brothers Inc., 29 Wn. App. 905 (1981), the Division III of the Court of Appeals dealt with the issue of when a sales contract became effective. Like the case before this Court, Prior, supra., involved a written contract. In allowing parole evidence, the Court stated:

The trial court must hear all extrinsic evidence to determine whether the parties intended the agreement to be a final integration before it can apply the parole evidence rule.”

Prior, Page 909.

In Berg v. Hudesman, 115 Wn.2d 657 (1990), the Court again allowed extrinsic or parole evidence to interpret the rental clause on a commercial lease. While the court stated:

We now hold that extrinsic evidence is admissible as to the entire circumstances under which the contract was made as an aid in ascertaining the party’s intent.”

Berg, at Page 229.

Parole evidence admitted to interpret the meaning of what is actually contained in the contract does not alter the terms contained

in the contract. DePhillips v. Zolt Construction Company Inc., 136 Wn.2d 26 (1998).

Person's position is that parole evidence is necessary to properly determine the intent of the parties. While Bowmans may wish the Court to take the position that the contract is plain on its face and that the sale became final upon execution of the document, the actions of the parties clearly contradict this. Mrs. Bowman in describing payments as "lease payments", Mrs. Herring in stating that she recognized that the agreement was a "lease" until the final payment was made, and Mrs. Person in expressing her belief that the horse belonged to the stables, all contradict Bowman's position.

The belief of Mrs. Herring is bolstered in some sense by portions of the contract. Suggesting that the horse cannot be removed from the stables without permission; suggesting that the contract is null and void if the horse is moved from the stables; stating that the execution of all necessary paperwork regarding the horse will not take place until after the final payment; and inclusion of a provision that any payments made will be forfeited until payment in full has been received, are all clauses common to leases.

Taking the facts in the light most favorable to the Persons, it

would appear quite evident that there was a reasonable question with respect to whether ownership of the horse had transferred at the time of the written contract or whether such transfer was delayed until the completion of the lease payments. Nothing in the contract says specifically that ownership of the horse is transferred upon signing of the document. Nothing in the conduct of the parties suggests that the ownership of the horse transferred upon the signing of the contract. While the contract does say that the sale is final, it does not specify when that sale actually takes place. That is a matter for testimony and decision by the trier of fact.

V.

#### CONCLUSION

The Persons believe that the Superior Court erred when Judge Martin granted summary judgment. In doing so, even though she was aware of factual questions, she ruled that the written document was the final arbiter of what the terms of the agreement between the parties was. The Persons believe Judge Martin mistakenly relied on the Parole Evidence Rule to exclude evidence other than the document itself, to reach her conclusion. It remains Person's position that there is a dispute about a genuine issue of material fact, i.e. who

owned the horse, and that as a result, Judge Martin erred, her decision should be reversed, and the case remanded for trial with all issues and all parties participating.

Respectfully submitted this 6th day of February, 2012.

A handwritten signature in black ink, appearing to read 'A. Froehling', written over a horizontal line.

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ROBERT PERSON, ) NO. 42448-7-II  
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) OF SERVICE  
GREGORY L. BOWMAN and STACY )  
BOWMAN, and ALEX HERRING, )  
)  
Respondents. )  
\_\_\_\_\_ )

The undersigned certifies under penalty of perjury under the laws of the state of Washington that I am now and at all times herein mentioned, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below, I caused the following documents:

**Brief of Appellant and Transcript of Proceeding**

to be served upon designated counsel of record in the manner noted below:

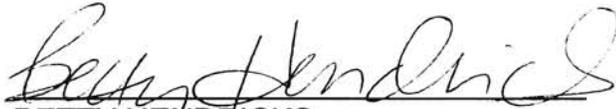
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DATED this 7th day of February, 2012, at Puyallup,  
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A handwritten signature in cursive script, appearing to read "Betty Hendricks", written over a horizontal line.

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