

CASE NO. 44773-8-II

**COURT OF APPEALS, SECOND DIVISION
OF THE STATE OF WASHINGTON**

FORD MOTOR CREDIT d/b/a
PRIMUS FINANCIAL SERVICES
Respondent,

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COURT OF APPEALS
SECOND DIVISION
SEATTLE, WA

v.

RAYMOND BRENNEMAN and
VALERIE BRENNEMAN,
Appellants.

**Reply Brief of Respondent
Ford Motor Credit d/b/a
Primus Financial Services**

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I. ASSIGNMENT OF ERROR

Respondent Ford assigns no error to the decision of the court below.

II. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether the Brennemens' claim that their loan obligations were rescinded is unsupported by the record.
2. Whether the vehicle was disposed of in a commercially reasonable manner.
3. Whether Ford satisfied all applicable notice requirements.
4. Alternatively, if Ford's notification regarding disposition of the collateral is deemed deficient, whether the Brennemens have failed to demonstrate any resulting harm.

III. COUNTER-STATEMENT OF THE CASE

Appellants Raymond and Valerie Brenneman ("the Brennemens") purchased a 2004 Volvo automobile from Barrier Volvo on December 6, 2007. In connection with their purchase the Brennemens executed a Retail Installment Agreement, CP 40, which sets forth the terms of the purchase and the installment payments they agreed to make. Respondent Ford Motor Credit ("Ford") is the creditor with respect to the Brennemens' loan.

According to the Brennemans, they took the vehicle to a Volvo dealership for warranty repair of the vehicle's transmission, which they allege was the subject of a manufacturer's recall. CP 43. Mr. Brenneman states in his declaration in opposition to Ford's summary judgment motion, which is *not* made under the penalty of perjury, CP 49, that after the dealership experienced a delay in obtaining a replacement transmission, "arrangements" were made by which the Brennemans surrendered possession of the vehicle to the dealership and agreed to forego a potential "Lemon Law" claim. Mr. Brenneman states in this unsworn declaration that his understanding was that in exchange for surrendering possession, his obligations under the retail installment agreement were satisfied.

However, although the installment sale contract states that it may only be modified by a signed writing, CR 40, the Brennemans did not produce any signed writing purporting to rescind or modify the installment sale contract, nor do they contend that such a signed writing exists. Indeed, the Brennemans produced only their own unsworn declaration, but no admissible documents or other evidence suggesting that their obligation to repay the money they borrowed was satisfied, rescinded or otherwise modified.

To the contrary, the Brennemans sought to walk away from their purchase and their loan. They simply left the car at the dealership and stopped making payments on their loan.

The vehicle was ultimately sold to the highest bidder at a public auction. CP 28. Prior to the auction, notification of the intended disposition of the vehicle was mailed to the Brennemans at the address that appears on their vehicle registration maintained as a public record by the State of Washington for the vehicle that is the subject of this action. CP 58.

Ford initiated this action and filed a motion for summary judgment seeking a deficiency judgment for the balance of the loan less the proceeds of the sale and associated charges. The court below entered summary judgment in favor of Ford, finding that there were no material facts in dispute regarding the Brennemans' liability to Ford for the balance due under the installment contract less the sale proceeds. However, the court also granted the parties the opportunity to submit any supplemental briefing or other materials regarding the value of the vehicle or the correct amount of the judgment to be entered. CP 60.

The only supplemental materials produced by the Brennemans were a brief and some unauthenticated hearsay documents regarding

valuation apparently obtained from the internet. CP 79 - 85. They produced no supporting declaration, and therefore failed to establish the requisite authentication and foundation for admission of these documents into evidence.

Accordingly, the lower court properly entered judgment in favor of Ford. As demonstrated below, that judgment should be affirmed.

IV. ARGUMENT

1. STANDARD OF REVIEW FOR GRANT OF SUMMARY JUDGMENT.

“The standard of review of an order of summary judgment is *de novo*, and the appellate court performs the same inquiry as the trial court.” Jones v. Allstate Ins. Co., 146 Wash.2d 291, 300, 45 P.3d 1068 (2002). Pursuant to CR 56 (c), the moving party is entitled to entry of summary judgment in its favor where the record shows “. . . that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” The facts of record and inferences reasonably drawn from the facts are viewed in the light most favorable to the non-moving party. White v. Kent Medical Center, Inc., P.S., 61 Wn. App. 163, 810 P.2d 4 (1991).

2. THE BRENNEMANS’ CLAIM THAT THEIR LOAN OBLIGATIONS WERE RESCINDED IS UNSUPPORTED BY THE RECORD.

The Brennemans claim that when they became dissatisfied with a delay in obtaining a replacement transmission, they surrendered possession of the vehicle to the dealership. It was their understanding, according to Mr. Brennaman, that an 'arrangement' was reached by which the Brennemans' loan obligations were satisfied in exchange for surrendering possession of the vehicle and foregoing a Lemon Law claim. CP 50.

However, the written installment sale contract they signed when purchasing the vehicle is an integrated contract, clearly stating that this writing reflects the entire agreement of the parties, and can only be modified by a writing signed by the parties. CP 40. The Brennemans have not produced any such signed writing, nor do they claim that any such writing exists.

Not only are oral modifications of the written agreement prohibited by its terms, such oral modifications are also prohibited by the Parol Evidence Rule, which generally bars the admission of parol evidence for the purpose of adding to, modifying, or contradicting the terms of a written contract. Berg v. Hudesman, 115 Wn. 2d 657, 801 P.2d 222 (1990). As the court explained in United Financial Cas. Co. v. Coleman, 173 Wn App. 463, 471, 295 P.3d 763, 768 (2012):

The parol evidence rule requires that “all conversations and parol agreements between the parties prior to a written agreement are so merged therein that they cannot be given in evidence for the purpose of changing the contract or showing an intention or understanding different from that expressed in the written agreement.

Id. at 471.

The Parol Evidence Rule applies only to written agreements that are integrated, i.e., intended as a final expression of the parties’ agreement. Coleman, *Id.* at 472. However, the parties specifically agreed that the written contract constituted their entire agreement, and so stated on the first page of the agreement. CP 40.

Furthermore, CR 56(e) requires that supporting affidavits in opposition to a summary judgment motion be admissible in evidence. Evidence of an alleged verbal agreement is barred by the Parol Evidence Rule and by the terms of the written agreement. The Brennemans have produced no competent evidence of any agreement other than the written contract, the terms of which they are bound by.

3. THE VEHICLE WAS DISPOSED OF IN A COMMERCIALY REASONABLE MANNER.

The Brennemans next contend that there is a genuine dispute regarding whether the subject vehicle was disposed of in a commercially

reasonable manner as required by RCW 62A.9A-627(b). The basis of this contention is their claim that the vehicle was defective and was sold in that defective condition. However, the record contains no competent evidence to support such an assertion.

The factual record offered by the Brennemens on this point consists solely of the declaration of Mr. Brenneman in opposition to Ford's motion for summary judgment, which is not made under penalty of perjury as required by GR 13 and RCW 9A.72.085. Nor does Mr. Brenneman's declaration purport to be made based on personal knowledge as required by CR 56 (e).

CR 56b (e) states:

Supporting and opposing affidavits shall be made on *personal knowledge*, shall set forth such facts as would be *admissible in evidence*, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in the affidavit shall be attached thereto or served therewith.

(Emphasis added.)

In addition to not being made under penalty of perjury and based on personal knowledge, the substance of this declaration consists of inadmissible hearsay statements of what an unidentified car dealer mechanic allegedly told Mr. Brenneman about the vehicle's condition,

specifically an alleged factory defect that, according to the Brennemans, renders the vehicle subject to a manufacturer's recall. CP 50. The Brennemans produced no documentation or other admissible evidence to support this claim.

Ford properly objected in the court below to the admission of such improper evidence. CP 95.

By contrast, Ford's motion for summary judgment was supported by sworn declarations with properly authenticated supporting documentary evidence. CP 24 – 29, 34 – 41.

Following a hearing on Ford's motion for summary judgment, the court below entered an Order dated January 15, 2010, CP 59, in which it ruled that there were no issues of fact regarding the Brennemans' liability to Ford, but the court also permitted supplemental submissions from the parties addressing the vehicle's value and the proper amount of the judgment overall.

In response to this order, the Brennemans filed a memorandum of law and attached to it several documents that appear to have been obtained from the internet, CP 75 – 85. However, the Brennemans' memorandum of law is not supported by any declaration, so they established no evidentiary basis for the admission into evidence of any of the statements

regarding value made by the Brennemens in their memorandum of law. The Brennemens do not purport to have made such statements of value based on personal knowledge as required by CR 56 (e), and there is likewise no authentication of the internet documents they attached to their memorandum.

Consequently, although the Brennemens were given an extra opportunity to make a proper factual record regarding the value of the vehicle and the proper amount of the judgment, they did not avail themselves of this opportunity, and instead failed to produce any admissible evidence.

Ford, by contrast, had previously filed with the lower court its Supplemental Certification in support of its motion for summary judgment, which set forth the specifics of the vehicle's sale, 'as is,' by "Manheim Seattle," a locally established vehicle auctioneer. The successful bid was \$13,000. CP 24, 28 – 29.

In response to the lower court's invitation, Ford also supplemented its prior submissions by producing a copy of Manheim's 'Vehicle Condition Report,' CP 91, the admissibility of which the Brennemens did not contest. This report refutes the Brennemens' undocumented claim that the vehicle was defective and therefore had virtually no value. Rather, the

report reflects that the vehicle was drivable and in average condition. Neither this report nor the successful bid of \$13,000 supports the Brennemans' allegation of a factory defect rendering the vehicle nearly worthless.

In summary, Ford established, and the court below ruled in its Order dated March 19/ 2010, that the sale of the vehicle was made in a commercially reasonable manner, and that the resulting sale to the highest bidder of \$13,000 established the reasonable value of the vehicle.

Despite being given an additional opportunity to produce evidence relating to the vehicle's value and the proper amount of the judgment, the Brennemans failed to produce any admissible evidence. The lower court's grant of summary judgment should be affirmed.

4. FORD SATISFIED ALL APPLICABLE NOTICE REQUIREMENTS.

The Brennemans next challenge the sufficiency of Ford's notification of the disposition of the vehicle following its sale at auction pursuant to RCW 62A.9A-611. The only aspect of the notification they challenge is the address to which such notice was sent, specifically the address reflected for the Brennemans on the subject vehicle's registration record maintained by the State of Washington as a public record.

RCW 62A.9A-611 provides that “. . . a secured party that disposes

of collateral under RCW 62A.9A-610 shall send to . . . [the debtor] a reasonable authenticated notification of disposition.

RCW 62A.1-201(26) states:

A person “notifies” or “gives” a notice or notification to another by taking such steps as may be reasonable required to inform the other in ordinary course *whether or not such other actually comes to know of it.*

(Emphasis added.)

Pursuant to RCW 62A.1-201(36), "Send" in connection with a writing, record, or notice means:

To deposit in the mail or deliver for transmission by any other usual means of communication with postage or cost of transmission provided for and properly addressed and, *in the case of an instrument, to an address specified thereon* or otherwise agreed, or if there be none to any address reasonable under the circumstances . . .

(Emphasis added.)

Thus, written notices under the UCC are sufficient when sent in a manner and to an address that are reasonable under the circumstances. Actual receipt is not required. RCW 62A.1-201(26).

In the present case, Ford sent written notification by mail to the address at which the Brennemans are registered with the State of Washington as owners of the vehicle that is the subject of this action. CP

58. The Brennemans admit that they resided at the address reflected on the vehicle registration, although they maintain that they did not live at that address at the relevant time CP 65, 71. However, despite their claim that the vehicle registration record produced by Ford is not genuine, the Brennemans have not produced any document they claim to be the genuine registration record, nor did they otherwise explain how an address that was admittedly theirs at one time came to be on the vehicle registration record if they did not provide it themselves.

In summary, Ford provided reasonable notice under the circumstances, thereby satisfying the statutory notice requirements raised by the Brennemas, even if they did not receive actual notice.

5. EVEN IF FORD'S NOTIFICATION REGARDING DISPOSITION OF THE COLLATERAL IS DEEMED DEFICIENT, THE BRENNEMANS HAVE FAILED TO DEMONSTRATE ANY RESULTING HARM.

Ford demonstrated above that its notification to the Brennemans regarding the disposition of the collateral was reasonable and therefore statutorily sufficient.

However, even assuming (but certainly not conceding) that Ford's notification was deficient in some material respect, the consequence of such deficient notification is not an automatic forfeiture of Ford's right to recover a deficiency judgment. Rather, any loss resulting from the

insufficient notice is set off against the deficiency that Ford may recover. McChord Credit Union v. Parrish, 61 Wn. App. 8,14, 809 P. 2d 759 (1991).

In the present case, the Brennemens have neither claimed nor demonstrated through competent evidence that they suffered any loss *as a result* of inadequate notice of the sale. Indeed, considering Mr. Brenneman's purported understanding that his obligations under the installment contract were satisfied by surrendering possession of the vehicle and foregoing a Lemon Law claim ,CP 49, 50, actual receipt of notice of the proposed sale would likely have been of little significance to the Brennemens.

Consequently, even if Ford's notification of the collateral's disposition is deemed deficient, the Brennemens have failed to establish any compensable harm resulting from it, even after being given an extra opportunity by the court below to supplement the record with any evidence of value or the proper judgment amount.

Furthermore, where (but only where) notification is deemed deficient, there is a rebuttable presumption that the value of the vehicle was at least equal to the remaining balance of the debt. McChord, *Id.* In the present case, Ford produced competent evidence that the vehicle was

sold to the highest bidder at a public auction, which yielded \$13,000 for a vehicle the Brennemans claim was defective and may have been essentially worthless.

The parties were invited by the lower court to produce supplemental materials on the issues of value and the proper judgment amount. Ford produced, without objection, additional, specific evidence of the vehicle's condition and value as established by public auction. The Brennemans produced only unauthenticated hearsay documents from the Internet which are inadmissible in evidence.

Thus, even if Ford had given insufficient notice and thereby became subject to the rebuttable presumption that the value of the vehicle is equal to the outstanding loan balance, Ford rebutted that presumption with the introduction of competent evidence of both the vehicle's condition and fair market value established by a sale to the highest bidder at a public auction.

Because the Brennemans produced no evidence that they suffered any loss *as a result* of any inadequate notice of the sale, any loss suffered by the Brennemans based on this record resulted from their own decision to walk away from their contractual obligations.

The Brennemans now argue that Ford's valuation evidence, the

admission of which they did not contest, was insufficient because it did not ‘pinpoint’ the value as of the date of the repossession, citing McChord Credit Union v. Parrish, 61 Wn. App. 8, 14, 809 P. 2d 759 (1991). The Brennenmans did not contest the admission of this evidence in the court below by moving to strike or otherwise challenging it. The general rule, to which none of the recognized exceptions apply, is that matters not raised in the court below may not be raised for the first time on appeal. Eberle v. Sutor, 3 Wn. App. 387, 475 P.2d 564 (1970).

Furthermore, the court in McChord, *Id.*, relied on the holding in Empire South, Inc. v. Repp, 51 Wn. App. 868, 879, 756 P. 2d 745 (1988) for the proposition that the evidence used to rebut the presumption that the car’s value equals the outstanding loan balance must pinpoint the value as of the time of repossession. However, unlike the court below in the present case, the court in Empire made a specific finding that the sale was *untimely*, which necessitated that the value be pinpointed as of the time of repossession rather than as the date of the untimely sale.

Empire is therefore distinguishable from the present case, in which there was neither a finding nor even a contention that the sale was untimely. Ford produced competent evidence that the sale was conducted on the open market through public auction, and that the sale report

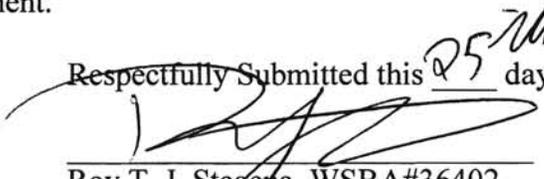
detailed the condition of the vehicle in various respects with corresponding adjustments in value. The Brennemans were given an extra opportunity to supplement the record with evidence bearing on the car's value or the proper amount of the judgment overall, but failed to do so.

In summary, Ford's notification of the sale was reasonable and therefore statutorily sufficient. But even if that notification is deemed insufficient, the deficiency judgment to which Ford is entitled should not be reduced by the amount of any loss resulting from any inadequacy of notice because the Brennemans failed to prove any such loss through competent evidence.

IV. CONCLUSION

The court below properly entered summary judgment in favor of Ford based on the properly admitted facts of record. This Court should affirm that judgment.

Respectfully Submitted this 25th day of July, 2013,



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CERTIFICATE OF SERVICE

I, Sarah O'Sullivan certify that on the 25th day of July, 2013, I caused the foregoing document, Reply Brief of Respondent Ford Motor Credit d/b/a Primus Financial Services, to be delivered to the following parties in the manner indicated below:

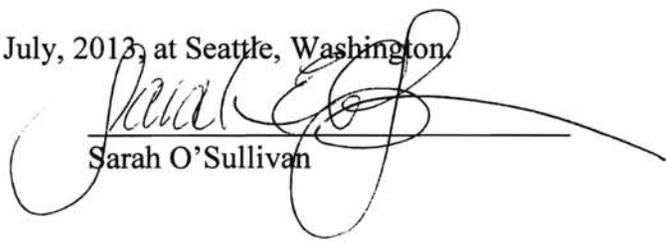
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STATE OF WASHINGTON
BY  DEPUTY

Under penalty of perjury of the laws of the State of Washington, the foregoing is true and correct.

Dated this 25th day of July, 2013, at Seattle, Washington.


Sarah O'Sullivan