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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

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**COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON**

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**CUSTOM AG SERVICE, INC.,**

**Appellant,**

**vs.**

**LOREN AND JANE DOE WATTS, husband and wife,  
and their marital community, and DOUG AND JANE  
DOE WATTS, husband and wife, and their marital  
community,**

**Respondents.**

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**APPELLANT'S REPLY BRIEF**

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I.

**FACTS**

In their *Brief*, Defendants Watts did not take issue with the Factual Background in Appellant's *Brief* at pages 1-5. They agree that an "auction brochure" (CP 72-77) "was prepared, circulated and placed on the tables at the auction." Respondents' *Brief*, page 1; CP 33, 68. The "auction brochure" was not correct with regard to the number of acres that could be irrigated. *Appellant's Brief*, page 3. That error was corrected before the auction. The corrected information was available online before and in a spiral book at the auction. *Appellant's Brief*, page 4; CP 59. The defendants do not disagree that the spiral book was available at the auction or that the spiral book contained information about the land to be sold at auction, including a section titled "Water Right Information and Report," which section corrected the error about the number of acres that could be irrigated. *Appellant's Brief*, page 4; CP 59, 79-80.

The sole basis of the defendants' argument that the Custom Ag complaint should be dismissed is that Custom Ag "failed to present any sworn evidence that Loren Watts or Doug Watts . . . knew or should have known of a change in the water right being

auctioned with farm ground in Benton County.” *Respondents’ Brief*, page 1. According to the defendants, they “refused to sign a Real Estate Purchase Agreement . . . because it did not include a description of a water right as described in the auction brochure.” *Id.* According to the defendants, this is the reason, and the only reason, why they refused to purchase the property at auction. *Id.*

With regard to what the defendants knew about the subject property and the water right, it is important to remember that Doug Watts, one of the defendants, leased and farmed the subject property prior to the auction. Water for the property was provided as part of the lease. CP 35. Loren Watts knew that his brother “was familiar with the property being sold” because his brother, Doug Watts, “had leased and farmed the property.” CP 33.

## II.

### ISSUE

This is an appeal from an *Order on Defendants’ Motion for Summary Judgment*. CP 90-92. A question before this court is: are there genuine issues of material fact why the defendants refused to sign the Real Estate Purchase Agreement (CP 48-56)? There is no dispute that the spiral notebook, with corrected information regarding water rights for the subject property, was

available online before and at the auction. CP 59. A second question before this court is: should the defendants be held to the information in the spiral notebook whether or not they knew about it?

### III.

#### **ARGUMENT**

What we are dealing with, factually and legally, is this: The defendants had leased and farmed the subject property prior to the auction. The defendants were familiar with the property. There was an error in the "auction brochure" regarding the number of acres that could be irrigated. There was a correction available at the auction, and online prior to the auction, regarding the number of acres that could be irrigated. CP 59, 79-80. The defendants claim that they were not made aware of that correction. Their argument is that: unless there is "sworn evidence" establishing that they were specifically made aware of the spiral book and the correction regarding the water rights they have no liability. Defendants have cited no Washington law supporting their position. Custom Ag, on the contrary, has cited case law, both from Washington and other states, stating that "bids at an auction embody terms made known by

advertisement, posting or other publication of which bidders are or should be aware.” Restatement (Second) of Contracts § 28 (1981).

The defendants acknowledge that the “auction brochure” that they received stated, in relevant part: “arrive prior to the scheduled auction time to review any changes, corrections or additions to the property information.” *Respondents’ Brief*, page 1; CP 75. That the defendants did not, as they claim, see the corrected information that was available at the auction in the spiral book does not support summary dismissal of plaintiff’s complaint. If anything, it serves as a genuine issue of material fact regarding what the defendants really knew or had access to.

Short of a signed statement or testimony from the defendants that they read the Reiersen memo online before the auction or reviewed it in the spiral book at the auction (which will never be forthcoming from the defendants), it will be difficult if not impossible for Custom Ag to present evidence that the defendants knew of the “change in the water right being auctioned.” *Respondents’ Brief*, page 1. However, on the undisputed facts before this court, it has been shown that the defendants should have known or had an opportunity to know of the “change in the water right being auctioned.” *Id.*

**A. There was a meeting of the minds.**

An argument made by the defendants to the trial court and in its *Brief* before this court is that there was no meeting of the minds between Custom Ag and the defendants. Custom Ag addressed this issue in its brief at pages 8-16. In their *Brief*, the defendants state that:

Loren Watts' high bids were for Parcels 1 and 3 with a prorated water right of 1,100 acres. CA's auctioneers' acceptance of the bids was for Parcels 1 and 3 with a prorated water right of 825 acres.

*Respondents' Brief*, page 3.

There was absolutely no evidence presented by the defendants, either to the trial court or in its *Brief* to this court, that the bid submitted by them was in any way qualified, limited to, or included a prorated water right of 1,100 acres. As clearly stated in the Bidder Registration Terms & Conditions, signed by the defendants before the auction:

All property is sold AS-IS WHERE-IS with no warranty expressed or implied except as to the merchantability of the title.

CP 10.

Were that not sufficient on this point, the "auction brochure," which the defendants acknowledge receiving and having reviewed, said, in relevant part:

All parcels shall be sold "AS-IS WHERE-IS."

...

The property is sold "AS IS-WHERE-IS." No warranty or representation, either expressed or implied, or arising by operation of law, concerning the property is made by Seller or the Auctioneers and are hereby expressly disclaimed. In no event shall Seller or the Auctioneers be liable for any consequential damages. The information is provided and believed to be accurate but subject to verification by all parties relying on it. Seller and the Auctioneers assume no liability for its accuracy, errors or omissions.

CP 75.

In support of their argument, defendants cite *Sea-Van Investments v. Hamilton*, 125 Wn.2d 120, 881 P.2d 1035 (1994): "Generally, a purported acceptance which changes the terms of the offer in any material respect operates only as a counteroffer, and does not consummate the contract." 125 Wn.2d at 126. Custom Ag does not disagree with this general statement of the law. We are not dealing, however with a counteroffer. The auctioneer solicited bids for parcels 1 and 3, sold "as-is where-is." The defendants bid \$3.5 million, with absolutely no expressed limitation or qualification or understanding regarding prorated water rights.

The defendants' argument is that their unexpressed subjective intent when they bid should allow them to refuse to buy the property if their subjective intent was not the same as the objective reality of the property they bid for. If this argument carries the day, every successful bidder at auction could refuse to buy the item in question by claiming that the item was materially different than what he/she/they, the bidder, understood or thought the item to be. Particularly when, as in this case, the item in question is sold "as is-where is," this approach would make all auctions tenuous and outcome dependent on the subjective intent of the bidder.

If the subjective intent of the defendants when they bid is material to the resolution of this matter, we are dealing with a genuine issue of fact that should be decided at trial not on motion for summary judgment. This point was clearly stated in *Sea-Van Investments v. Hamilton*:

Generally, a purported acceptance which changes the terms of the offer in any material respect operates only as a counteroffer, and does not consummate the contract. . . . However, an acceptance can also request a modification of terms, so long as the additional terms are not conditions of acceptance and the acceptance is unequivocal. . . . If any additional conditions contained in the purported acceptance can be implied in the original offer, then they also do not constitute material variances as to make the acceptance ineffective. . . . What constitutes a

material variation is dependent upon the particular facts of each case. . . . Normally, the existence of mutual dissent or meeting of the minds is a question of fact.

*Sea-Van Investments v. Hamilton*, 125 Wn.2d at 126 (internal citations omitted) (emphasis added).

On the authority of *Sea-Van Investments v. Hamilton*, cited as controlling authority by the defendants, the issue of whether there was a meeting of the minds is a “question of fact,” not to be determined on a motion for summary judgment.

**B. The error regarding the water was corrected and the defendants knew about it or should/could have known about it.**

In their *Brief*, the defendants state, with regard to the error concerning the water rights for the subject property:

Regardless of whether the change was the result of a mistake or a change of plans, CA had multiple opportunities to avoid the situation giving rise to this lawsuit. The brochure was mailed. A correction of the water right information could have been mailed to the same mailing list. There was no evidence that that was done.

*Respondent's Brief*, page 3.

Although the spiral book was not mailed to the people who had earlier received the “auction brochure,” the spiral book was available online before, as well as at, the auction. CP 59.<sup>1</sup>

The defendants further argue, with respect to the incorrect information in the initial “auction brochure”:

When the information in the brochure was known to be erroneous, the brochure could have been corrected. Brochures placed on the tables at the auction could have been corrected related to the water right being transferred. There was no evidence that that was done.

*Respondents' Brief*, page 3-4.

There is evidence “that that was done.” The error in the brochure was corrected. The Reiersen memo was in the spiral book. The spiral book was available online before the auction and at the auction. CP 59.<sup>2</sup>

**C. Restatement (Second) of Contracts does not support summary judgment.**

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<sup>1</sup> As explained in footnotes in the Custom Ag *Response to Defendants' Motion for Summary Judgment*, CP 59, the auctioneer, Scott Musser, had been deposed and explained all this. Unfortunately, his deposition transcript was delayed and not available at the time of the hearing on *Defendants' Motion for Summary Judgment*.

<sup>2</sup> As explained in footnotes in the Custom Ag *Response to Defendants' Motion for Summary Judgment*, CP 59, the auctioneer, Scott Musser, had been deposed and explained all this. Unfortunately, his deposition transcript was delayed and not available at the time of the hearing on *Defendants' Motion for Summary Judgment*.

In its *Brief*, Custom Ag cited to the Restatement (Second) of Contracts, § 28 (1981). That section deals with auctions and states that at an auction:

(2) Unless a contrary intention is manifested, bids at an auction embody terms made known by advertisement, posting or other publication of which bidders are or should be aware, as modified by any announcement made by the auctioneer when the goods are put up.

Emphasis added.

Concerning this language, the defendants argue in their *Brief*:

The Watts' bids embodied that water right. There was no evidence presented that a lesser water right of 825 acres was advertised, posted or otherwise published in a way that Watts should have been aware of it.

*Respondents' Brief*, page 5 (emphasis in original).

This statement is, of course, factually incorrect. There has been ample evidence presented, to the trial court and to this court, that corrected information about the water right was available online prior to the auction and at the auction in the spiral book. CP 59.

Scott Musser was the auctioneer. He was deposed. His deposition transcript was ordered but was not available when the defendants filed their *Motion for Summary Judgment* or when the

court heard argument thereon. In the Custom Ag response to defendants' *Motion for Summary Judgment*, CP 57-66, this point was made in footnotes at CP 59. As stated in both footnotes: "Scott Musser has been deposed and so testified in his deposition. The transcript has been ordered but will not be available until sometime in early October." With respect to what Scott Musser said in his deposition, particularly with regard to the spiral notebook being available online and at the auction, the defendants never objected to what Custom Ag said Scott Musser had said at deposition. The defendants never argued with, disagreed with or took issue with the statement at CP 59 regarding the Reierson memo being available in the spiral book and the spiral book having been available online before and at the auction.

Assuming, since it is not disputed, that the spiral book was available online before and at the auction, and that the spiral book contained the Reierson memo which corrected the water right information, the legal question is: are the defendants presumed to have known of that corrected information whether or not they read it? Case law and other authorities cited by Custom Ag in its *Brief* clearly establish that the defendants are presumed to have been aware of that information. "The conditions of sale may be

incorporated in an advertisement of the auction; in such case, a reference thereto at the time and place of sale is a sufficient announcement of the terms and conditions of the sale.” *Continental Can v. Commercial Etc.*, 56 Wn.2d 456, 459, 357 P.2d 887 (1959).

Or, as stated in 5 Am. Jur. 454, Auctions, § 15:

Terms and conditions so announced generally are deemed to supersede all others and to bind the purchaser even though he did not hear or understand the announcement or was not present at the time of the announcement and such terms were not brought to his actual attention. *The conditions of sale may be incorporated in an advertisement of the auction.*

Emphasis Added.

In addition to the above, there is also the case of *Gibson v. Calif. Spray Chemical Corp.*, 29 Wn.2d 611, 188 p.2d 316 (1948) discussed in the Custom Ag *Brief*, page 15-16.

#### IV.

#### CONCLUSION

The subject property was sold “as is-where is.” No warranty or representation was given. Correct information regarding the water rights for the subject property was available online before and in the spiral book at the time of the auction. The defendants claim that they were not aware of the corrected information. Whether or

not the defendants were aware of what was available for their knowledge is not dispositive of the outcome. Their bids at auction embodied terms "made known by advertisement, posting or other publication of which bidders are or should be aware." Restatement (Second) of Contracts, § 28. On the law applicable to this case, the *Motion for Summary Judgment* should be denied.

If there are legitimate questions or disputes regarding when the corrected information was available and what, if anything, was said at the auction regarding the corrected information, this is a genuine issue of material fact. On the authority of CR 56(c) the *Motion for Summary Judgment* should be denied.

DATED this 7<sup>th</sup> day of March 2014.

MINNICK-HAYNER

By:  Tom

Tom Scribner, WSBA #11285  
Of Attorneys for Appellant

**CERTIFICATE OF SERVICE**

I hereby certify that on the 7 day of March, 2014, I caused to be served a true and correct copy of **APPELLANT'S REPLY BRIEF** by the method indicated below, and addressed to the following:

Terry Miller  
7409 W. Grandridge, Suite C  
Kennewick, WA 99336

U.S. Mail, Postage Prepaid



JUDY LIMBURG

Signed this 7 day of March 2014  
at Walla Walla, Walla Walla County, WA