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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 32010 3

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

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.

APPELLANT'S BRIEF

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TABLE OF CONTENTS

I.	ASSIGNMENT OF ERROR	1
	A. The Trial Court Erred In Granting Defendants' Motion For Summary Judgment And Dismissing All Plaintiff's Claims.....	1
II.	STATEMENT OF THE CASE	1
	A. Factual Background	1
	B. Procedural History.....	5
III.	ARGUMENT	6
	A. Standard of Review	6
	B. The Trial Court Erred In Granting Defendants' Motion for Summary Judgment And Dismissing All Plaintiff's Claims.....	7
	C. Defendants' Rebuttal Arguments Do Not Support A Motion for Summary Judgment.....	18
IV.	CONCLUSION.....	32

TABLE OF AUTHORITIES

Cases

<i>Callahan v. Walla Walla Housing Auth.</i> , 126 Wn. App. 812, 818, 110 P.3d 782 (2005)	6
<i>Hill v. Sacred Heart Med. Ctr.</i> , 143 Wn. App. 438, 445, 177 P.3d 1152 (2008).....	6
<i>Seybold v. Neu</i> , 105 Wn. App. 666, 676, 19 P.3d 1068 (2001).....	6
<i>Woodall v. Freeman Sch. Dist.</i> , 136 Wn. App. 622, 628, 146 P.3d 1242 (2006).....	6,7
<i>Mountain Park Homeowners Ass'n v. Tydings</i> , 125 Wn.2d 337, 341, 883 P.2d 1383 (1994)	7
<i>Thoma v. C.J. Montag & Sons, Inc.</i> , 54 Wn.2d 20, 26, 337 P.2d 1052 (1959)	7
<i>Morris v. McNicol</i> , 83 Wn.2d 491, 494, 519 P.2d 7 (1974)	7
<i>Blue Mt. Construction Co. v. Grant Co. School Dist.</i> , 49 Wn.2d 685, 306 P.2d 209 (1957)	8,9
<i>Sea-Van Investments v. Hamilton</i> , 125 Wn.2d 120, 881 P.2d 1035 (1994)	8,9,10,11
<i>Continental Can v. Commercial Etc.</i> , 56 Wn.2d 456, 357 P.2d 887 (1959)	13,14
<i>Gibson v. Calif. Spray-Chemical Corp.</i> , 29 Wn.2d 611, 188 P.2d 316 (1948)	15,16,20
<i>Pimpinello v. Swift & Co.</i> , 253 N.Y. 159, 170 N.E. 530	16
<i>In re Stone's Estate</i> , 272 N.Y. 121, 5 N.E. (2 nd) 61	16
<i>Kennedy v. Cornhusker Hybrid Co.</i> , [146 Neb. 230, 19 N.W. (2d) 51, 160 A.L.R. 351].....	16
<i>Rohlfing v. Tomorrow Realty & Auction Co., Inc.</i> , 528 So.2d 463 (1988)	23

<i>Schweiter v. Halsey</i> , 57 Wn.2d 707, 359 P.2d 821 (1961)	24,27,28
<i>Bigelow v. Mood</i> , 56 Wn.2d 340, 341, 353 P.2d 429 (1960)	26
<i>Dubke v. Kassa</i> , 29 Wn.2d 486, 186 P.2d 611 (1947)	28,29
<i>Johnson v. Puget Mill Co.</i> , 28 Wash. 515, 68 Pac. 867 (dicta)	29
<i>Warner v. Design & Build Homes, Inc.</i> , 128 Wn. App. 34, 114 P.3d 664 (2005)	29,31
<i>Olmsted v. Mulder</i> , 72 Wn. App. 169, 176, 863 P.2d 1355 (1993)	31

STATUTES

RCW 19.36.010.....	20,21
RCW 64.04.010.....	24
RCW 64.040.030.....	30,31

OTHER AUTHORITIES

Corbin on Contracts, Vol. 1, §108, 1963, pg. 485	11,21
Restatement (Second) of Contracts, §28 (1981).....	13,19
5 Am. Jur. 454, Auctions	14,15
Nine Wigmore on Evidence (3d Ed.), 43 §2415	16
49 Am. Jur. 870.....	29
37 C.J.S. 779, § 256	29
Restatement (Second) of Contracts, 614, § 355	29

I.

ASSIGNMENT OF ERROR

A. The Trial Court Erred In Granting Defendants' Motion For Summary Judgment And Dismissing All Plaintiff's Claims.

1. There are genuine issues of material fact regarding the subject auction, what defendants knew about the land sold and why they did not buy it.

2. The land was sold "as is-where is" with no express or implied warranties.

3. The statute of frauds does not apply.

II.

STATEMENT OF THE CASE

A. Factual Background.

Plaintiff owned farm land in Benton County consisting of seven different parcels totaling approximately 1,700 acres of owned land and 174 acres of leased DNR land. CP 2. Parcel 1 consisted of 1,132 (more or less) deeded acres plus 40 (more or less) DNR acres; parcel 2 consisted of 610 (more or less) deeded acres and 8.3 (more or less) DNR acres; and parcel 3 consisted of 125.5 (more or less) DNR acres. CP 2.

The auctioneer was Musser Brothers. CP 2. Before the auction, Musser Brothers sent brochures to potential buyers and posted auction information online. CP 59. Before the auction, defendant Doug Watts and his son leased some of the land sold at auction. CP 35, 60. They knew what water was available for the land. CP 60.

The defendants signed a Bidder Registration Terms & Conditions before the auction began. CP 4, 10. That document said, in its entirety:

I have read the terms and conditions of the auction and agree to be legally bound by them. These properties will be offered to the highest bidder(s) with the final price subject to Seller Approval. Lots will be offered separate, in any combination or as the entirety with bidding conducted in "rounds" until the highest price is achieved and the Auctioneer has exhausted all acceptable bids. Once a bid is made it may not be withdrawn until such time as you are outbid or the winner(s) declared.

I understand a 4% (four percent) Buyers Premium will be added to the bid price.

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

Title will be transferred with Deed, subject to restrictions of record, free and clear of any liens, back taxes mortgages or encumbrances or as otherwise disclosed.

CP 10.

Before the auction, the defendants received the brochure that was sent by Musser Brothers. CP 59. The brochure 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 express 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 43, 75.

The brochure said that "The irrigation for the property is through Water Permits from Washington State Department of Ecology and is identified as permit G4-24758P. The permit allows for usage from March 1 through November 1 annually for 1,100+/- acres." CP 27, 41, 74. This was not correct. The permit number was not as listed. The number of acres for which the water was available and on which the water could be used was not as listed. CP 59, 79-80.

Before the auction, the plaintiff retained Tim Reiersen, a water law expert/consultant, to review the water certificates for the property. CP 59. He issued a memo that clarified the water right issue. CP 79-80.

Before the auction, Musser Brothers put together a spiral book with information about the land to be sold. CP 59. Included in this book, under tab #11, was a section titled "Water Right Information and Report." CP 59. In that section was the memo written by Mr. Reiersen. CP 59, 79-80. That memo explained the error in the brochure and provided correct information about the water rights, including the number of acres that could be irrigated. CP 79-80. The spiral book was available at the auction and was available online before the auction. CP 59. The defendants claim they never saw, read or were told about the book or the Reiersen memo. CP 33, 36.

The defendants at auction bid on various parcels. They were the successful bidders for parcels 1 and 3. Their bid for both parcels was \$3.5 million. CP 33.

Upon completion of the auction, the defendants refused to sign a Real Estate Purchase Agreement. CP 33. Sometime after the auction, the defendants offered to buy parcels 1, 2 and 3 for

\$5.5 million. CP 63. As stated by Custom Ag in its *Response to Defendants' Motion for Summary Judgment*, testimony at trial would show that after the defendants offered to buy parcels 1, 2, and 3, Custom Ag tried to void the sale of parcel 2 to the high bidder for that parcel. Being unable to void that sale, Custom Ag was unable to sell parcels 1, 2, and 3 to the defendants. The plaintiff eventually sold parcels 1 and 3 to a third party. CP 63.

B. Procedural History.

On January 17, 2012, plaintiff offered for sale at auction seven parcels of farm land in Benton County. CP 2.

On January 17, 2012, defendants were the successful bidders at the auction for two parcels of land, #1 and #3. They bid \$3.5 million for both parcels. CP 4, 33.

On January 17, 2012, defendants refused to sign a Real Estate Purchase Agreement. CP 4, 33.

On June 24, 2012, plaintiff filed its Complaint. CP 1-19.

On December 18, 2012, defendants filed their Answer to Complaint. CP 20-23.

On August 22, 2013, defendants filed their Motion for Summary Judgment seeking dismissal of all of plaintiff's claims. CP 26.

On September 27, 2013, the court heard argument on defendants' Motion for Summary Judgment and entered an Order on defendants' Motion for Summary Judgment granting the Motion. CP 85-87.

III.

ARGUMENT

A. Standard of Review.

This is an appeal from an Order Granting Summary Judgment. In reviewing an Order of Summary Judgment a Court of Appeals engages in the same inquiry as a trial court. *Callahan v. Walla Walla Housing Auth.*, 126 Wn. App. 812, 818, 110 P.3d 782 (2005). A Court of Appeals reviews an Order Granting Summary Judgment de novo. *Hill v. Sacred Heart Med. Ctr.*, 143 Wn. App. 438, 445, 177 P.3d 1152 (2008). Summary judgment is appropriate only if the nonmoving party fails to produce sufficient evidence which, if believed, would support the essential elements of his/her/their claim. *Id. Seybold v. Neu*, 105 Wn. App. 666, 676, 19 P.3d 1068 (2001).

The appellate court should consider all facts and reasonable inferences in a light most favorable to the nonmoving party. *Woodall v. Freeman Sch. Dist.*, 136 Wn. App. 622, 628, 146 P.3d

1242 (2006); *Mountain Park Homeowners Ass'n v. Tydings*, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994). The court must determine whether a genuine issue of material fact exists and must not resolve an existing factual issue. *Woodall v. Freeman Sch. Dist.*, 136 Wn. App. at 628; *Thoma v. C.J. Montag & Sons, Inc.*, 54 Wn.2d 20, 26, 337 P.2d 1052 (1959). A material fact is a fact upon which the outcome of the litigation depends, in whole or in part. *Morris v. McNicol*, 83 Wn.2d 491, 494, 519 P.2d 7 (1974).

B. The Trial Court Erred In Granting Defendants' Motion For Summary Judgment And Dismissing All Plaintiff's Claims.

1. There are genuine issues of material fact regarding the subject auction, what defendants knew about the land sold and why they did not buy it.

In their *Memorandum in Support of Summary Judgment*, the defendants made three arguments:

1. "Plaintiff's Claim Should be Dismissed because There was No Meeting of the Minds."
2. "Here, The Plaintiff Created the Confusion and Should Not Profit From It."
3. "The Seller Mislead [sic] the Bidders."

CP 29-31.

Defendants cited two cases in support of argument one; they cited no authority in support of arguments two and three. The three arguments all turn on underlying facts, which facts are in dispute. The two cases cited by the defendants are general statements of contract law and are not on-point with or factually specific to this case. All three arguments are factually specific to this case and should not have been decided on a motion for summary judgment.

a. **Meeting of the minds:** This case involved an auction. The two cases cited by the defendants, *Blue Mt. Construction Co. v. Grant Co. School Dist.*, 49 Wn.2d 685, 306 P.2d 209 (1957) and *Sea-Van Investments v. Hamilton*, 125 Wn.2d 120, 881 P.2d 1035 (1994), do not deal with an auction. They deal with contracts. As general statements of the law with respect to contracts, Custom Ag does not disagree with the language quoted from the two cases. Moreover, the language cited from both cases supports Custom Ag, not the defendants.

In *Blue Mountain Construction Co.*, the defendant advertised for bids for the construction of a new high school. 49 Wn.2d at 686. The plaintiff was the lowest bidder. *Id.* A proposed contract was submitted to the plaintiff but never signed. The defendant therefore notified the plaintiff that acceptance of its bid would be withdrawn

and an action taken to collect the bid bond. 49 Wn.2d at 687. The plaintiff moved to cancel the bid bond. The question before the court was whether the defendant's letter of "acceptance" was, in fact, an acceptance of the bid. The trial court said it was not. 49 Wn.2d at 688. The Supreme Court affirmed. As stated by the court:

The acceptance of an offer is always required to be identical with the offer, or there is no meeting of the minds and no contract. . . . An expression of dissent that changes the terms of the offer in any material respect may be operative as a counteroffer; but it is not an acceptance and consummates no contract. . .

49 Wn.2d at 688-89 (internal citations omitted).

In this case, the bid was made by Watts, not Custom Ag. They offered \$3.5 million for parcels 1 and 3. They did not qualify or limit or condition their offer in any fashion. They offered to pay \$3.5 million for the parcels "as is-where is." Their bid was accepted. The auctioneer did not, in any way, manner or fashion, change the terms of the offer.

The court in *Sea-Van Investments v. Hamilton*, citing with approval *Blue Mountain Construction Co. v. Grant Co. School District*, reached the same conclusion. In that case, Sea-Van Investments Associates brought a suit for specific performance

and/or damages to enforce an alleged contract for the sale of land. 125 Wn.2d at 122. The trial court granted a motion to dismiss at the close of the plaintiff's case, ruling that no contract had been formed. The Court of Appeals reversed the trial court, finding that a contract was formed. The Supreme Court agreed with the trial court and reversed the Court of Appeals. *Id.*

In *Sea-Van Investments v. Hamilton*, the court found that there had been no "meeting of the minds" between the parties as to the essential elements for a sale of land. Consequently, the court found that no contract was formed. 125 Wn.2d at 125. As stated by the court in *Sea-Van Investments*:

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).

The defendants have never argued, alleged or asserted that the auctioneer, when he accepted their bid, changed the terms in any material respect. If that in fact is their argument, and as stated by the Supreme Court in *Sea-Van Investments*: "The existence of mutual dissent or meeting of the minds is a question of fact." *Id.*

The parcels of land were offered at auction. The defendants bid (i.e., made an offer) on two of the parcels, one and three. The auctioneer accepted their bid. At that point, there was a meeting of the minds. The defendants' bid was not a counteroffer. The auctioneer, when he accepted the bid, did not change the terms or conditions of the bid; he accepted it as offered.

The acceptance of the bid at auction is commonly signified by the fall of the hammer or by the auctioneer's announcement "Sold." All that is necessary is that the auctioneer shall express his intention to accept the bid, in any mode that is clear to the bidder or that he has reason to know or understand. After such an acceptance, the sale is consummated. Neither party can withdraw and the auctioneer has no power to accept a higher or different bid.

Corbin on Contracts, Vol. I, §108, 1963, pg. 485.

The issue at the heart of defendants' argument re: no meeting-of-the-minds is that the water permit number in the brochure and the number of acres that could be irrigated were incorrect. These errors were corrected before the auction. See

Factual Background subsection above. CP 59 and CP 79-80. Tim Reiersen, a water law expert/consultant retained by Custom Ag to review the water certificates for the parcels sold at auction, wrote a memo that clarified the water right issue. CP 79-80. That memo was in the spiral book that Musser Brothers, the auctioneer, put together and that was available at the auction. CP 59.

The defendants claim they were never told about, saw or read the Reiersen memo. There are two problems with this argument in the context of a motion for summary judgment. First, it creates genuine issues of material fact. That is: what did the defendants really know and why did they really refuse to buy the two parcels? (Custom Ag does not believe the issue of water had anything to do with the refusal.) Second, even if the defendants did not read, look at or know about the Reiersen memo, it was available at the auction. CP 59. The defendants' bid, accepted by the auctioneer, embodied the terms of the auction, even if the defendants did not read all of the terms.

- (1) At an auction, unless a contrary intention is manifested,
 - (a) the auctioneer invites offers from successive bidders which he may accept or reject;
 - (b) when goods are put up without reserve, the auctioneer makes an offer to sell at any price bid by

the highest bidder, and after the auctioneer calls for bids the goods cannot be withdrawn unless no bid is made within a reasonable time;

(c) whether or not the auction is without reserve, a bidder may withdraw his bid until the auctioneer's announcement of completion of the sale, but a bidder's retraction does not revive any previous bid.

(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.

Restatement (Second) of Contracts, §28 (1981) (emphasis added).

The defendants should be held to the terms of the auction, including the corrected information about the water available for irrigation, whether they were aware of such or not. That is, as stated in the Restatement, the defendants are held to the terms "of which [they] are or should be aware." *Id.*

A case involving the sale of land at auction and whether a buyer should be held to the terms and conditions of the auction even if he/she/they did not hear or understand them is *Continental Can v. Commercial Etc.*, 56 Wn.2d 456, 357 P.2d 887 (1959). In that case, Commercial Waterway District No. 1 offered land for sale at auction. It reserved the right to reject any and all bids. 56 Wn.2d at 457. Continental Can was the sole bidder. The auctioneer

accepted its bid. 56 Wn.2d at 458. After the auction, the District decided not to sell the land. Continental Can sued to compel the sale. The trial court held for Continental Can. *Id.* On appeal, the Supreme Court reversed. 56 Wn.2d at 460.

In its opinion, the court, on the issue of reserving a right to reject any and all bids after the auction, cited with approval 5 Am. Jur. 454, Auctions.

The law, however, seems to be well settled, as related to the particulars of this case, that the reservation may be exercised *after sale*, both in the texts and decisions of other states. 5 Am. Jur. 454, Auctions, § 15, reads in part as follows:

“It is the right of the owner of property sold at auction to prescribe, within reasonable limits, the manner, conditions, and terms of sale. Usually the auctioneer, at the time and place appointed for the auction, announces these terms and conditions. . . . 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; 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. . . .*” (Italics ours.)

Continental Can v. Commercial Etc., 56 Wn.2d at 459.

In the case before this court, information regarding water for the parcels was in the spiral notebook available at the auction and

online before the auction. 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.

A case not involving an auction but on point with regard to the issue of whether a buyer who claims not to have read exclusion of warranty language should be held to the exclusionary language is *Gibson v. Calif. Spray-Chemical Corp.*, 29 Wn.2d 611, 188 P.2d 316 (1948). In that case, Gibson, an apple farmer with an orchard near Selah, purchased Elgetol (a chemical spray product) from the defendant for application on an apple orchard to control mildew. 29 Wn.2d at 612. The product allegedly damaged his trees, causing him to lose his crop of Jonathan apples. *Id.* Gibson claimed that the defendant breached an express warranty, breached an implied warranty, and was negligent in recommending the chemical product as a mildew control. *Id.* The jury returned a verdict in favor of the defendant. The trial court set the verdict aside and entered an order granting plaintiff a new trial. The Supreme Court reversed the trial court.

The plaintiff bought the Elgetol in one-gallon cans. On each can was nonwarranty language. Gibson testified "that he did not read the disclaimer on the cans at the time of the sale." 29 Wn.2d at 614. There was other testimony and evidence that the defendant published a paper called "Ortho News," in an issue of which was exculpatory language regarding the Elgetol. At trial, Gibson testified "at first that he did not read this issue of the Ortho News prior to his first purchase of Elgetol, but later, when the date of the issue was called to his attention, he changed his testimony and testified that he did read it." 29 Wn.2d at 615.

With regard to the issue of whether Gibson read the disclaimer language, the court said:

The fact that he did not read the statement of disclaimer, if such is the fact, would not increase the liability of the company beyond what it would be had he read it. *Pimpinello v. Swift & Co.*, 253 N.Y. 159, 170 N.E. 530; *In re Stone's Estate*, 272 N.Y. 121, 5 N.E. (2nd) 61; *Kennedy v. Cornhusker Hybrid Co.* [146 Neb. 230, 19 N.W. (2nd) 51, 160 A.L.R. 351]; *Nine Wigmore on Evidence (3d Ed.)*, 43 §2415.

Gibson v. Calif. Spray-Chemical Corp., 29 Wn.2d at 621.

That is, if limiting or exculpatory language is published and available to be read, it is not a defense to application of such that the buyer or bidder did not read or know about it.

b. **Plaintiff did not create confusion re: water rights:**

In their *Memorandum in Support of Motion for Summary Judgment*, the defendants argue that “When the water consultant’s letter and attachments were distributed to some, assuming that is the case, but not all, Plaintiff had created two understandings of what water right would be part of the property sale.” CP 30. The defendants claim that these “two understandings” created confusion and that the plaintiff “should not be allowed to profit from doing so.” CP 30.

There was no confusion with respect to the water right issue in the Reiersen memorandum. CP 79-80. That document very clearly identified the correct water permit number and the number of acres that could be irrigated. The defendants, by their argument, are trying to turn the Reiersen clarifying memorandum, CP 79-80, into a source of confusion rather than the correction and clarification that it was. “The current water right that applies is an 825 acre (irrigation purpose) portion of G4-25953(A)P issued January 25, 2008 (**Attachment D**) in quantities 4583gpm flow rate and 2965 acre feet annual volume, for use from March 1-October 31 each year.” CP 79. Custom Ag adamantly disputes this characterization. However, if this argument is to be given any consideration, it underscores the fact that there are/were genuine

issues of material fact which the court should not have resolved on a motion for summary judgment. That is, did the Reierson memorandum create confusion re: the water rights or clarify such? This question should not be answered on motion for summary judgment.

c. **Custom Ag did not mislead the buyers:** Although the defendants cite no authority in support of this argument, they claim that Custom Ag misled the bidders by virtue of not clarifying the water right issue in the brochure. This argument is factually incorrect. There was available at the auction a spiral book, CP 59, that contained the Reierson memorandum, which memorandum explained, corrected and clarified the water right issue. CP 59, 79-80.

If buyers, including the defendants, were misled, this is a genuine issue of material fact that should be developed and decided at trial, not on a motion for summary judgment.

C. Defendants' Rebuttal Arguments Do Not Support A Motion For Summary Judgment.

After Custom Ag filed its *Response to Defendants' Motion for Summary Judgment*, CP 57-66, the defendants filed a *Rebuttal Memorandum*, CP 81-84. In that *Rebuttal*, the defendants made

five arguments, three of which were new arguments, not addressed by the defendants in their *Memorandum in Support of Motion for Summary Judgment*. They are:

1. "Plaintiff's [sic] Have Presented No Evidence to Refute the Watts's Claims that the Parties Never Had a Meeting of the Minds";
2. "Plaintiff's Failure to Establish a Meeting of the Minds Requires Summary Judgment of Dismissal";
3. "Plaintiff Has Not Presented an Enforceable Contract";
4. "Even if the Wattses Had Signed the Tendered Agreement, it Would Not Support Plaintiff's Claims"; and
5. "As Is-Where Is' Had No Application."

CP 81-84.

1 & 2: There was a meeting of the minds:

Arguments 1 and 2 have been addressed above. The defendants made an offer, the auctioneer accepted their offer. The parcels were sold "as is-where is." The defendants are presumed to have been aware of the auction terms. Restatement (Second) of Contracts, § 28 (1981).

The Reiersen memorandum, which corrected the misinformation in the brochure regarding the water rights, was available online before the auction and in the spiral book at the

auction. As stated in *Gibson v. Calif. Spray Chemical Corp.*, “the fact that [the buyer] did not read the statement of disclaimer, if such is the fact, would not increase the liability of the company beyond what it would be had he read it.” 29 Wn. App. at 621.

3. There was an enforceable contract:

In their Rebuttal Memorandum, the defendants argue that the plaintiff did not present an enforceable contract.

Plaintiff claims for breach of an agreement to purchase real property require an enforceable contract. An enforceable contract requires compliance with the Statute of Frauds. RCW 19.36.010. Because plaintiff agreed to convey by warranty deed, an enforceable contract requires a written agreement signed by the Watts. *Id.* Because the Agreement tendered was never signed, it is unenforceable.

CP 83.

The language quoted above is the entire argument made by the defendants on this issue. Other than the citation to RCW 19.36.010, the defendants have no authority to support this argument. This argument should fail for two reasons.

First, the agreement/contract that the defendants breached is their bid to buy the two parcels for which they bid \$3.5 million. Which bid the auctioneer accepted. As stated in Corbin: “The acceptance of the bid at auction is commonly signified by the fall of

the hammer or by the auctioneer's announcement 'Sold'. . . . After such an acceptance, the sale is consummated." Corbin on Contracts, Vol. I, § 108, 1963, pg. 485.

Had the plaintiff not sold parcels 1 and 3 to a third-party, it could have sued the defendants for specific performance. That is, plaintiff could have sought to enforce the sale/agreement.

Second, RCW 19.36.010 does not apply to this auction sale. RCW 19.36.010 requires a contract to be in writing in five specific situations:

1. every agreement that by its terms is not to be performed in one year from the making thereof;
2. every special promise to answer for the debt, default, or misdoings of another person;
3. every agreement, promise or undertaking made upon consideration of marriage, except mutual promises to marry;
4. every special promise made by executor or administrator to answer damages out of his or her own estate; and
5. an agreement authorizing or employing an agent or broker to sell or purchase real estate for compensation or a commission.

The sale of real property at auction does not fall within any of these five categories.

Moreover, there was, at the auction, a Real Estate Purchase Agreement, CP 11-19, 48-56, which the plaintiff signed and which the defendants refused to sign. CP 33. Had the plaintiff not sold parcels 1 and 3 to a third party, an action could have been filed to compel the defendants to purchase the property per the terms of the Real Estate Purchase Agreement. The Complaint filed by the plaintiff is not for specific performance, it is for damages arising from and because of the defendants' refusal to buy the parcels. So, on one hand, the plaintiff has presented an enforceable contract. On the other, plaintiff is not seeking to compel the defendants to execute that contract. Rather, plaintiff is seeking damages as a result of the defendants' refusal to purchase parcels 1 and 3.¹

Although Custom Ag has found very few cases dealing with auction sales of land in Washington, cases from other states may offer some guidance.

¹ Since this argument was raised for the first time by the defendants in their Rebuttal Memorandum, the plaintiff did not respond in writing to this argument. At the hearing on the motion, plaintiff orally made this response.

In *Rohlfing v. Tomorrow Realty & Auction Co., Inc.*, 528 So.2d 463 (1988), a Florida case, an owner of land sold the land at auction. The buyer signed a pre-auction document known as "Real Estate Terms of Sale" and received a written "Buyer's Guide." 528 So.2d at 464. After the auction, the buyer signed a Contract for Sale and Purchase which was subsequently misplaced and not offered into evidence at trial. 528 So.2d at 465. The buyer issued a check for a deposit but later stopped payment on the check. The seller and auctioneer sued for money damages for the deposit, alleging that the buyer breached his agreement to purchase the land. *Id.*

The trial court found that the auction sale and documents did not satisfy the statute of frauds. The District Court of Appeals reversed. 528 So.2d at 468. As stated by the court:

We find and hold that the written "Real Estate Terms of Sale," together with the written "Buyer's Guide" to which the Real Estate Terms of Sale refers, the written "Memorandum of Sale By Public Auction," and the buyer's deposit check with the notations thereon, are sufficiently definite and certain to establish a contract to buy land that complies with the statute of frauds and is enforceable against the buyer. These documents together also constitute a sufficient "note of memorandum" "in writing and signed by the party to be charged therewith" of a "contract for the sale of lands" as to satisfy the requirements of the statute of frauds, section 725.01, Florida Statutes.

528 So.2d at 465.

In this case, Custom Ag signed a Real Estate Purchase Agreement. CP 33. That Agreement referenced and incorporated by such legal descriptions for parcels 1 and 3. CP 11-19. The defendants signed the Bidder Registration Terms & Conditions. CP 10. They agreed that they had “read the terms and conditions of the auction and agreed to be legally bound by them.” CP 10. The defendants received an auction brochure. CP 59. Available at the auction was a spiral book with information about the land to be sold, including legal descriptions. CP 59. If the statute of frauds does apply in this case, the multiple documents available, read and signed satisfy the requirements thereof.

4. There was an adequate legal description:

In their Rebuttal Memorandum, the defendants made the following argument which, in its entirety, reads:

An agreement to sell real property containing an inadequate description of the property to be conveyed is void as being in violation of the Statute of Frauds. RCW 64.04.010; *Schweiter v. Halsey*, 57 Wn.2d 707, 359 P.2d 821 (1961). The absence of an adequate legal description renders the agreement void even if it had been signed.

CP 83.

The defendants do not identify or explain what they claim to be “an inadequate description of the property.” Plaintiff is not sure exactly what the defendants are referring to or what description is or was inadequate. At the very least, and if the adequacy of the legal description is/was a genuine issue of material fact, there most certainly was a question of fact regarding this issue sufficient to defeat a motion for summary judgment.

Attached as Exhibit 3 to plaintiff's Complaint is a copy of the Real Estate Purchase Agreement that plaintiff signed after the auction and that defendants refused to sign. CP 11-19. With respect to the issue of an adequate legal description, the Real Estate Purchase Agreement states, in relevant part:

1. PROPERTY PURCHASED. Seller agrees to Sell and Buyer agrees to Purchase, on such terms and conditions as set forth hereafter, the following described property:

(a) all real estate legally described on the addendum or addenda attached, including Auction Parcel(s) ___ #1 and #3; the addendum describes the tracts of land to be purchased with each addendum or addenda setting forth specific characteristics particularly to such Tracts of land, such addenda being incorporated herein by reference.

CP 11, 48.

Legal descriptions for parcels 1 and 3 were in the spiral notebook that was available online before and in print at the auction on January 17, 2012. An instrument which contains reference to another instrument, which other instrument has a sufficient legal description to satisfy the requirements of the Statute of Frauds, is enforceable.

We have held consistently that, in order to comply with the Statute of Frauds, a contract or deed for the conveyance of land must contain a description of the land sufficiently definite to locate it without recourse to oral testimony, or else it must contain a reference to another instrument which does contain a sufficient description.

Bigelow v. Mood, 56 Wn.2d 340, 341, 353 P.2d 429 (1960) (internal citations omitted).

Therefore, had the defendants signed the Real Estate Purchase Agreement, as did the plaintiff, it had, by reference and incorporation, legal descriptions sufficient to satisfy the requirements of the Statute of Frauds. Regarding which, the spiral notebook that was available at the auction had, under tab 3, Title Commitments for all of the parcels, which all had complete legal descriptions.²

² Since this argument was raised for the first time by the defendants in their Rebuttal Memorandum, the plaintiff did not respond in writing to this argument. At the hearing on the motion, plaintiff orally made this response.

In support of their argument the defendants cited, without discussion, *Schweiter v. Halsey*, 57 Wn.2d 707, 359 P.2d 821 (1961). In that case, Halsey listed farm land in Asotin County for sale. Schweiter wanted to buy only a portion of the land. Halsey agreed to sell only that portion to Schweiter. 57 Wn.2d at 708. The parties signed an earnest money agreement, which said that a legal description of the land to be sold was attached. However, “there was, in fact, no legal description attached at the time the receipt was executed.” *Id.* Schweiter later refused to sign a deed and gave notice of rescission of the transaction. 75 Wn.2d at 709. In response, Halsey tendered performance. *Id.* Schweiter sued to obtain a declaration of the rights and duties of the parties under the earnest money agreement. *Id.* Halsey answered and counter-claimed to recover damages. “The trial court rendered a memorandum decision holding that the earnest money agreement was void because it contained no legal description of the real estate involved in the transaction.” *Id.*

Although the Supreme Court agreed that the earnest money agreement was unenforceable and could not be made the subject of a reformation, it concluded that:

this does not entitle [Schweiter] to a return of their earnest money. At no time did [Halsey] repudiate the contract. On the contrary, they tendered performance and did not otherwise dispose of the property until after [Schweiter] commenced this action. Under these facts, the case falls directly within the rule of *Dubke v. Kassa*, 29 Wn.2d 486, 186 P.2d 611 (1947).

Sweiter v. Halsey, 57 Wn.2d at 710-711.

In this case, Custom Ag is similarly situated to Halsey. That is, it did not repudiate the sale but tendered performance to Watts.

Schweiter v. Halsey, cited with approval by Watts, discussed “the rule of *Dubke v. Kassa*.” In that case, Dubke orally agreed to purchase a house from Kassa. The purchase price was \$4,400.00. Dubke made a payment of \$250.00. As explained by the court in *Dubke v. Kassa*, the transaction was evidenced by “just one piece of writing, a receipt which read as follows: ‘received of A.H. Dubke \$250.00 as deposit on 2418 E. Hartson. Total price to be \$4,400.00.’” 29 Wn.2d at 486-87. Thereafter, Dubke refused to purchase the property. At all times prior to the lawsuit being filed, however, Kassa were “ready, willing and able to complete the sale.” 29 Wn.2d at 487. Dubke filed an action to recover the \$250.00 payment. The trial court held for Dubke. The Supreme Court reversed “with direction to enter a judgment of dismissal.” *Id.*

As explained by the court:

The applicable rule is that a vendee under an agreement for the sale and purpose of property which does not satisfy the statute of frauds, cannot recover payments made upon the purchase price if the vendor has not repudiated the contract but is ready, willing, and able to perform in accordance therewith, even though the contract is not enforceable against the vendee either at law or in equity. 49 Am. Jur. 870, § 564; 37 C.J.S. 779, § 256; 2 Restatement of the Law of Contracts 614, § 355; *Johnson v. Puget Mill Co.*, 28 Wash. 515, 68 Pac. 867 (dicta).

Dubke v. Kassa, 29 Wn.2d at 487.

In the case before this court, Custom Ag, the vendor, did not repudiate the sale of parcels 1 and 3 to Watts. They were ready, willing, and able to conclude the sale. It was not until Watts categorically refused to purchase the property as bid that Custom Ag sold to a third party. As stated in *Dubke v. Kassa*: "It does not seem to be, nor can it be, seriously urged that appellants sacrificed their rights to retain the payment received because they sold the property to a third person after the respondent had commenced this action." 29 Wn.2d at 487.

5. As is-where is language is applicable:

In their Rebuttal Memorandum, the defendants made the following argument, which, in its entirety, states:

The term "as is-where is" as applied in the cases cited to and relied upon by the plaintiff are [sic] related to warranties and the condition of the property. *Warner v.*

Design & Build, 128 Wn. App. 34, ___ P.3d (2005). Here, neither the condition of the property nor warranties is at issue. In both the brochure and the Agreement, plaintiff agreed to convey by warranty deed. Warranty deeds have their own warranties pursuant to RCW 64.040.030. So the "as is-where is" issue is confused at best.

CP 83.

Plaintiff is not sure exactly what argument the defendants are making. Undeniably the property was sold "as is-where is." The brochure, which defendants acknowledge receiving, states: "The property is sold 'AS IS-WHERE IS'. No warranty or representation, either express or implied, or arising by operation of law concerning the property is made by Seller or the Auctioneers and are hereby expressly disclaimed." CP 43, 75. Clearly the condition of the property and any warranties were at issue. For the defendants to say they were not at issue is to ignore the facts.

The defendants further argue that "Plaintiff agreed to convey by warranty deed. Warranty deeds have their own warranties pursuant to RCW 64.040.030. So the 'as is-where is' issue is confused at best." CP 83.

Although the plaintiff signed the Real Estate Purchase Agreement, the defendants refused to sign it. CP 33. Is it the defendants' argument that because they refused to sign the Real

Estate Purchase Agreement there are no warranties, hence the “as is-where is” exclusion is not applicable? That is, the defendants appear to be arguing that since they did not sign the Real Estate Purchase Agreement, which would have its “own warranties pursuant to RCW 64.040.030,” the “as is-where is” exclusion does not apply.

This is not what the Court of Appeals said in *Warner v. Design & Build Homes, Inc.*

An “as is” clause means that the buyer is purchasing property in its present state or condition. *Olmsted v. Mulder*, 72 Wn. App. 169, 176, 863 P.2d 1355 (1993) rev. den. 123 Wn.2d 1025 (1994). “The term [‘as is’] implies that the property is taken with whatever faults it may possess and that the seller or lessor is released of any obligation to reimburse the purchaser for losses or damages that result from the condition of the property.” *Olmsted v. Mulder*, 72 Wn. App. at 176.

Warner v. Design & Build Homes, Inc., 128 Wn. App. at 39.

Remember, before the auction began the defendants signed a Bidder Registration Terms and Conditions form. CP 4, 10. It said, in relevant part: “All property is sold AS IS-WHERE IS with no warranty expressed or implied except as to the merchantability of the title.” CP 10. The defendants knew, before they bid on any parcels, that the property was being sold “as is-where is.” Undeniably, the condition of the property and any warranties were

at issue. For defendants to say, "Here, neither the condition of the property nor warranties is at issue," CP 83, is flat out incorrect.

Moreover, the Real Estate Purchase Agreement, which the plaintiff signed but the defendants did not sign, has language that says: "The Buyer is familiar with the subject property and agrees to accept the Subject Premises in their current condition. Seller provides no warranty as the condition of the Subject Premises, personal property or crops, and all property is sold "AS IS". CP 12, 49.

If the "as is-where is" issue is, as argued by the defendants, "confused at best," CP 83, there are genuine issues of material fact regarding this issue. If so, the motion for summary judgment should have been denied.

IV.

CONCLUSION

The defendants' bid for parcels 1 and 3 was accepted by the auctioneer. The parcels were sold "as is-where is" with all warranties excluded. The defendants refused to complete their purchase of parcels 1 and 3, causing damage to the plaintiff. The trial court was in error when it granted the defendants' motion for

summary judgment. This court should reverse the trial court and remand for further proceedings.

DATED this 20 day of December, 2013.

MINNICK-HAYNER

By: 

Tom Scribner, WSBA #11285
Of Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of December, 2013, I caused to be served a true and correct copy of **APPELLANT'S 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 20 day of December, 2013
at Walla Walla, Walla Walla County, WA