

CAUSE No. 42448-7-II

IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

DIANA PERSON and ROBERT PERSON,
Petitioners,

v.

GREGORY L. BOWMAN and STACY BOWMAN,
Respondents,

And

ALEX HERRING,
Defendant.

BRIEF OF RESPONDENTS BOWMAN

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I. INTRODUCTION

This appeal arises out of a negligence claim for injuries sustained by petitioner Diana Person in an accident involving a horse-drawn buggy operated by defendant Alex Herring on April 18, 2009. The ultimate issue on appeal is ownership of the horse involved in the accident. Respondents Gregory Bowman and Stacy Bowman contend and the trial court concluded that under an October 4, 2006 purchase agreement, Tammy Herring, Alex Herring's mother, purchased the horse, Toby, from the Bowmans. Because the Bowmans did not own the horse at the time of accident, they are immune from liability under the Equine Activities Statute, RCW 4.24.530-.540, and the trial court properly granted summary judgment in their favor.

II. ASSIGNMENT OF ERROR

Ms. Person contends that the trial court erred in concluding there were no genuine issues of material fact respecting ownership of the horse¹ and therefore erred in granting summary judgment in favor of the Bowmans.

¹ In her brief, Ms. Herring contends there are issues respecting both ownership and control of the horse for purposes of RCW 4.24.540. (Herring Br. 9.) As the issue of control was not raised in the trial court, pursuant to RAP 9.12 it is not before this Court on appeal.

III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

- A. Did the trial court exclude parol evidence?
- B. Did the trial court err in interpreting the October 4, 2006 contract and concluding as a matter of law that the Bowmans did not own the horse?

IV. STATEMENT OF THE CASE

This matter is before the Court of Appeals on discretionary review by petitioners Diana and Robert Person, seeking to reverse the trial court's July 22, 2011 Order granting summary judgment to the Bowmans. The trial court found that the Bowmans did not own the horse involved in the accident that is the subject of this case, and therefore were immune from liability under the Equine Activities Statute, RCW 4.24.530-.540. (RP 3; CP 139.) The Persons appeal on the grounds that the trial court erred in failing to consider parol evidence in interpreting the contract for sale of the horse, and erred in concluding no material facts were in dispute regarding ownership of the horse.

On October 4, 2006, Tammy Herring purchased the horse, Toby, from Greg and Stacy Bowman. (CP 87.) She paid a \$300.00 down payment and entered into an agreement to purchase the horse for a total price of \$2,200. (CP 87, 134.) The contract, titled "Bill of Sale – Purchase Agreement," provides that Tammy Herring is the Buyer and Greg and Stacy Bowman are the Sellers, and that the Seller agrees to sell

and the Buyer agrees to buy the horse. (CP 87 ¶¶ 1-2.) The final paragraph of the contract provides, “By signing below the buyer acknowledges this Sale is Final and they have purchased the horse ‘As Is.’” *Id.* at ¶ 14 (emphasis in the original). Following execution of the purchase agreement, Ms. Herring paid monthly fees to board the horse at Summit Stables, the Bowmans’ stables, in addition to making payments on the balance owed for the horse, which she paid until December 2009 when the horse was paid for in full. (CP 133.)

Ms. Person’s April 18, 2009 accident involving Tammy Herring’s horse and her daughter, Alex Herring, occurred over two and a half years after Ms. Herring’s October 4, 2006 purchase of the horse.

V. ARGUMENT

A. Standard of Review

The Court of Appeals reviews a summary judgment *de novo*. *Paradiso v. Drake*, 135 Wn.App. 329, 143 P.3d 859 (Wash. Ct. App. 2006), *review denied* 160 Wn.2d 1024 (Wash. 2007). Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Id.* (citing CR 56(c)).

Courts interpret unambiguous contracts as a matter of law. *State v. Brown*, 92 Wn.App. 586, 594, 965 P.2d 1102 (Wash. Ct. App. 1998) (citing *Mayer v. Pierce County Med. Bureau, Inc.*, 80 Wn.App. 416, 420, 909 P.2d 1323 (Wash. Ct. App. 1995)). “In construing a written contract, basic principles require that (1) the intent of the parties controls; (2) the court ascertains the intent from reading the contract as a whole; and (3) a court will not read an ambiguity into a contract that is otherwise clear and unambiguous.” *Id.* Where a contract is unambiguous, summary judgment is proper even if the parties dispute the legal effect of certain provisions. *Id.*

B. The Trial Court Did Not Exclude Parol Evidence

The Persons misconstrue the trial court’s ruling when they assert that the court, “effectively ruled that no parol evidence would be considered to interpret the agreement or the intent of the parties.” (Petr.’ Br. 9.) Notwithstanding their claim that it is “inherent in the court’s decision” that the evidence they offered was not taken into account, (Petr.’ Br. 5-6), the record in this case makes clear that the trial court did not exclude any evidence and did take all the evidence into account in its ruling.

The trial court’s July 22, 2011 order specifies that the court considered all of the files and records in the case, then lists all of the

pleadings and documents filed by the parties and considered by the court. (CP 138.) Those documents include the declarations of Tammy Herring and Diana Person, as well as the deposition testimony of Stacy Bowman, which was attached to the declarations of David Lancaster and Antoni Froehling. *Id.* The precise evidence the Persons argue the court “refused to accept,” (Petr.’ Br. 10), is included in the list of materials the court considered.

Further, in issuing its oral ruling, the court acknowledged struggling with the factual issues in this case. The court stated:

The issue of whether the Bowmans owned the horse, I’ve struggled with this a fair bit 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’ve paid in full. They are the owners of the horse for these purposes.

(RP 3:17-25.)

There is no record of the trial court issuing any orders to exclude any evidence in this case. To the contrary, the record demonstrates that the Court considered all of the evidence before it in its ruling. Not only does the court explicitly state that it considered the evidence at issue in the Persons’ brief, the court’s discussion of the Bowmans’ security interest

and whether Ms. Herring owned the horse free and clear demonstrates that the court considered both the evidence and the issues the evidence raised in making its decision.

As the trial court did not exclude any parol evidence, it could not have erred in excluding parol evidence and should not be overturned on that basis.

C. The Trial Court Did Not Err In Interpreting The October 4, 2006 Contract And Concluding As A Matter Of Law That The Bowmans Did Not Own The Horse

The trial court likewise did not err in concluding as a matter of law that Ms. Herring owned the horse and the Bowmans did not. The contract entered into by Ms. Herring and the Bowmans on October 4, 2006 operates to make Ms. Herring the owner of the horse as of the signing of the contract. (CP 87 ¶ 14.) The contract is clear and unambiguous and ownership of the horse under the contract is a question of law, not fact. *Mayer*, 80 Wash.App. at 421. There are no facts in dispute in this case, rather the parties dispute the legal effect of the undisputed facts. Construing all facts in the light most favorable to the Persons, the Bowmans did not own the horse and summary judgment in their favor was proper.

1. Interpretation of an unambiguous contract is a question of law and parol evidence is only admissible to determine intent and the meaning of what is actually contained in the contract.

In interpreting a contract, parol evidence is admissible “for the limited purpose of construing the otherwise clear and unambiguous language of a contract in order to determine the intent of the parties.” *Bort v. Parker*, 110 Wash.App. 561, 573, 42 P.3d 980 (Wash. Ct. App. 2002), review denied, 147 Wash.2d 1013 (Wash. 2002) (citing *Berg v. Hudesman*, 115 Wash.2d 657, 669, 801 P.2d 222 (Wash. 1990)). Its purpose is to aid the court in interpreting what is contained in the contract, not for proving intent independent of the contract. *Id.* A contract provision is not ambiguous just because the parties suggest opposing meanings and ambiguity will not be read into a contract where it can be reasonably avoided. *Mayer*, 80 Wash.App. at 421. “Interpretation of an unambiguous contract is a question of law.” *Id.*

Parol evidence is admitted to interpret the meaning of what is actually contained in a contract, not to alter its terms, and does not convert a written contract into a partly oral, partly written contract. *DePhillips v. Zolt Const. Co., Inc.*, 136 Wn.2d 26, 32, 959 P.2d 1104 (Wash. 1998). “Moreover, the ‘parol evidence rule’ precludes use of parol evidence to add

to, subtract from, modify, or contradict the terms of a fully integrated written contract.” *Id.* at 32 (citing *Berg*, 115 Wash.2d at 670).

Washington follows the context rule, and the intent of the parties may be derived from the actual language of the agreement as well as from viewing the contract as a whole, the subject matter and objective of the contract, the circumstances surrounding its making, the subsequent acts and conduct of the parties, and the reasonableness of their respective interpretations. *Scott Galvanizing, Inc. v. N.W. EnviroServices, Inc.*, 120 Wash.2d 573, 579-80, 844 P.2d 428 (Wash. 1993) (citing *Berg* 115 Wash.2d at 667).

“Extrinsic evidence is to be used to illuminate what was written, not what was intended to be written.” *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 695, 974 P.2d 836 (Wash. 1999) (quoting *Nationwide Mut. Fire Ins. Co. v. Watson*, 120 Wash.2d 178, 189, 840 P.2d 851 (Wash. 1992)). It does not include “(1) evidence of a party's unilateral or subjective intent as to the meaning of a contract word or term, (2) evidence that would show an intention independent of the contract, or (3) evidence that varies, contradicts or modifies the written language of the contract.” *Id.*

2. The contract is not ambiguous and under its clear terms Ms. Herring owns the horse.

The contract signed by Ms. Herring and Stacy Bowman is not ambiguous and the Persons are not asking the Court to consider parol evidence to interpret the contract's terms; they are asking the Court to use the evidence to directly contradict the plain language of the contract and to find an intention wholly independent of the contract.

They contend that a question of fact exists as to whether the parties' contract was a lease in which the sale only became final when the last payment was made, or a purchase that became final when the document was executed. (Pets. Br. 12.) The contract's language does not lend itself to the meaning put forward by the Persons. The word "lease" does not appear anywhere in the document, while the words "seller," "buyer," "sale" and "buy" appear throughout. (CP 87.) The Persons ask the Court to find ambiguity where it can reasonably be avoided and to accept an opposing meaning that clearly contradicts the language of the contract. Their interpretation does not derive from the contract's actual language. Rather, they ask the Court to look beyond the contract's unambiguous terms to statements of one party's unilateral, subjective

intent to find an intention independent of and contrary to that contained in the contract itself.²

3. Parol evidence demonstrates that Tammy Herring intended to purchase the horse.

In her declaration, Ms. Herring states that she had previously purchased one horse from the Bowmans and decided to purchase another, but was unable to pay for it all at once and so entered into the October 4, 2006 contract. (CP 133-34.) In so stating, she acknowledges that her intention was to purchase the horse. Her subsequent statements that despite the language in the contract the arrangement was a lease and she did not own the horse, (CP 134), are not admissible to contradict or modify the contract. They are evidence of her unilateral, subjective intent. “Unilateral or subjective purposes and intentions about the meanings of what is written do not constitute evidence of the parties' intentions.” *Lynott v. Nat'l Union Fire Ins. Co.*, 123 Wash.2d 678, 684, 871 P.2d 146 (Wash. 1994). Her statements show an intention completely independent of the contract, directly contradict the written language of the contract, and are not admissible to modify or contradict the written agreement.

² The Persons offer statements of Diana Person respecting ownership of the horse, in addition to Ms. Herring's statements. As Ms. Person was not a party to the contract, her belief as to ownership of the horse offers scant help in determining the intent of the contracting parties or interpretation of the contract's terms.

In addition to acknowledging her intent to buy the horse, Ms. Herring's conduct and subsequent acts demonstrate that she owned the horse and acted on that ownership. She paid the \$300.00 down payment when she signed the contract, made monthly payments for the horse's board, made payments toward its purchase price, and would take the horse off the property to go to horse shows. (CP 99, 134.) Ms. Herring's conduct and subsequent acts are consistent with her ownership of the horse under the contract.

4. The parol evidence rule precludes the use of Tammy Herring and Stacy Bowman's statements to modify or contradict the contract.

The parol evidence rule precludes use of Ms. Herring's statements of unilateral, subjective intent to modify or alter the agreement or turn it into a partly written, partly oral agreement. Further, the Persons point to no circumstances surrounding the making of the contract to support the position that the contract is a lease despite its clear terms.

Likewise, the parol evidence rule precludes the use of Stacy Bowman's statements to modify or alter the contract, or to find an intention independent of its terms. The Persons misstate Ms. Bowman's deposition testimony in an effort to bolster their interpretation of the contract. They assert that Ms. Bowman "acknowledge[d] that she did not know much about the ownership of the horse." (Petr.' Br. 3.) Ms.

Bowman's actual statement was in response to a question from opposing counsel as to whether she recalled having conversations with Ms. Herring after the accident regarding the ownership of the horse. In response she states:

I recall definitely having a conversation, if not two or three maybe or – yeah, a couple of conversation, not one for sure. I don't know so much about the ownership of the horse, but definitely on the fact that, you know, your daughter is responsible.

(CP 94 at 15:22-25, 16:1-4.) Read in context, it is clear Ms. Bowman is saying she does not know if she had conversations about the ownership of the horse, not, as the Persons suggest, that she does not know about the ownership of the horse generally.

Ms. Bowman consistently and repeatedly stated in her deposition testimony that the agreement between the Bowmans and Ms. Herring was for the purchase of the horse and that Ms. Herring had purchased the horse. (CP 98-99 at 33:18-20, 33:23-25, 34:8-15, 34:18-19, 37:1.) Her statement that Ms. Herring did not outright own the horse merely reflected that Ms. Herring had yet to pay for it in full. (CP 99 at 37:11-15.) She was clear that the agreement was not one to rent-to-own the horse, as suggested by opposing counsel, but an agreement to buy the horse outright. (CP 100 at 38:20-25.) She analogized the purchase of the horse

to the purchase of a car, where the owner signs a contract, makes a down payment, and continues to make payments to the dealership, i.e. does not own the car free and clear but owns it nevertheless. (CP 94 at 14:8-9; 100 at 38:11-15.)

5. The plain language of the contract does not lend itself to the Persons' interpretation of it.

Further, the contract as a whole and the actual language of the agreement does not lend itself to the Persons' interpretation and their interpretation is not reasonable. They point to several of the contract's provision as somehow inconsistent with the fact that the contract is for the sale rather than lease of the horse. (Petr. Br. 14.) The provisions are not inconsistent and readily comport with the plain language of the contract and the trial court's interpretation of it. The contract provides in paragraph eight that the horse will not be moved from the Bowman's stables without permission from the seller, and the buyer will return the horse in the event of a default. (CP 87.) Paragraph 11 provides that upon payment in full, the seller will execute all necessary papers including registration papers if the horse is registered. *Id.* Paragraph 12 further provides that in the event the buyer is unable to complete the transaction in full, the horse will be returned to the seller and the sale nullified. *Id.*

None of these terms is inconsistent with the contract being for the sale of the horse. To the contrary, the language of each paragraph confirms that the issue being discussed is a sale. The word “lease” is not present in any of these paragraphs or anywhere else in the contract. The Persons make the unpersuasive argument that such provisions are common to lease agreements. That there are terms dealing with the event of a default or nullification of the contract does not convert the sales agreement into a lease agreement. Further, there is no evidence in the record and no claim by the Persons that a default or nullification occurred under the contract. While Ms. Herring fell behind on some of her payments, she did not default on the agreement, and ultimately paid for the horse in full. (CP 133.) Likewise, there is no evidence that the horse was a registered horse. That Ms. Herring was behind on her payments at the time of the accident and registration papers, if any, had not been executed does not alter the fact that the contract was for the sale of the horse and per its explicit terms the sale occurred when Ms. Herring signed the contract.

Ms. Herring’s argument that she did not fully own the horse because she had no authority to move it is equally not compelling. (Herring Br. 10.) The contract merely provides that the horse will be boarded at the stables and not be moved without the permission of the

seller. (CP 87 ¶¶ 7-8.) Ms. Herring in fact did remove the horse from the property, taking it to horse shows. (CP 99 at 34:18-20.)

6. Washington case law demonstrates that the trial court did not err and properly interpreted the contract.

Finally, the cases relied on by the Persons are not helpful to their position and are readily distinguished. They cite *Lopez v. Reynoso*, 129 Wn.App. 165, 118 P.3d 398 (Wash. Ct. App. 2005), and *Matter of Prior Bros., Inc.*, 29 Wn.App. 905, 632 P.2d 522 (Wash. Ct. App. 1981), cases that both discuss the issue of contract integration. That issue is not before this Court. The Persons never raised contract integration in the trial court and accordingly did not seek and were not granted review on that issue. RAP 9.12 governs review on summary judgment and provides that “the appellate court will consider only evidence and issues called to the attention of the trial court.” *See Berg*, 115 Wash.2d at 670 (citing RAP 9.12) (declining to consider the issue of integration where it was not raised in the trial court or renewed on review). Because the Persons did not raise contract integration in the trial court, they are precluded from raising it now. Accordingly, the consideration of parol evidence in *Lopez* to determine the terms of a partially integrated contract and in *Prior Bros.* to determine whether the contract was fully integrated is not on point.

On point is the court's use of parol evidence in *Go2Net, Inc. v. C I Host, Inc.*, 115 Wn.App. 73, 60 P.3d 1245 (Wash. Ct. App. 2003). There the court considered opposing meanings of the term "impression" in an internet advertising agreement. The court held that the meaning advanced by appellant was not a reasonable reading of the agreement because it was based on a definition of the term that the parties did not express in the contract and it contradicted the plain meaning of the contract's terms. *Id.* at 86-87. Likewise in *Mayer*, 80 Wn.App. at 421-22, where appellant argued that contract terms were ambiguous and inconsistent, the court declined to read ambiguity into a contract that read as a whole was neither ambiguous or inconsistent. *Id.* As in *Go2Net* and *Mayer*, the meaning advanced by the Persons is not a reasonable reading of the agreement and is not consistent with the contract as a whole.

Construing all of the facts in favor of the Persons and considering all the parol evidence before the Court, the trial court did not err in concluding as a matter of law that under the October 4, 2006 contract Ms. Herring owned the horse.

VII. CONCLUSION

The trial court did not exclude parol evidence and did not err in interpreting the contract and concluding the Bowmans did not own the horse. The trial court's conclusion that no questions of fact exist as to

ownership of the horse and its grant of summary judgment in favor of the Bowmans was proper, and the Bowmans respectfully request that the Court of Appeals affirm the trial court.

March 30, 2012

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that that I delivered a copy of the foregoing Motion on the Merits to Affirm the Trial Court via ABC Legal Messenger to Antoni H. Froehling, Diana Person and Robert Person's attorney, at 122 East Stewart Avenue, Puyallup, Washington 98372, and to Jill Skinner and David P. Lancaster, Alex Herring's attorneys, at 15500 S.E. 30th Place, Suite 201, Bellevue, Washington 98007, on March 30, 2012.

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