

CAUSE No. 42448-7-II

COURT OF APPEALS, DIVISION TWO
IN THE STATE OF WASHINGTON

DIANA PERSON and ROBERT PERSON, Appellants,

v.

GREGORY L. BOWMAN and STACY BOWMAN and ALEX HERRING,
Respondents.

BRIEF OF RESPONDENT HERRING

Jill R. Skinner, WSBA No. 32762
David P. Lancaster, WSBA No. 11500
Attorneys for Respondent Herring

Hollenbeck, Lancaster, Miller & Andrews
15500 SE 30th Place, Suite 201
Bellevue, WA 98007
Telephone: (425) 644-4440
Fax: (425) 747-8338
Email: jill.skinner@farmersinsurance.com
david.lancaster@farmersinsurance.com

TABLE OF CONTENTS

I. Assignment of Error3
 Issue Pertaining to Assignment of Error.....3

II. Statement of the Case3

III. Argument6
 A. De Novo Review is the Standard by which to Review
 a Decision on Summary Judgment6
 B. There are Issues of Fact as to Who Owned the
 Horse7

IV. Conclusion11

TABLE OF AUTHORITIES

Cases

<u>Berrocal v. Fernandez</u> , 155 Wn.2d 585, 121 P.3d 82 (2005)	6
<u>Hannum v. Dep't of Licensing</u> , 144 Wn. App. 354, 181 P.3d 915 (2008)	6
<u>Hutchins v. 1001 Fourth Ave. Assocs.</u> , 116 Wn.2d 217, 802 P.2d 1360 (1991)	6
<u>Owen v. Burlington N. Santa Fe R.R. Co.</u> , 153 Wn.2d 780, 108 P.3d 1220 (2005)	6, 7
<u>Patrick v. Sferra</u> , 70 Wn. App. 676, 855 P.2d 320 (1993)	8, 9
<u>Young v. Key Pharmaceuticals</u> , 112 Wn.2d 216, 770 P.2d 182 (1989)	6

Statutes

RCW 4.24.530	7, 8
RCW 4.24.540	7, 8

Regulations and Rules

CR 56(c)	6
----------------	---

I. ASSIGNMENT OF ERROR

The trial court erred in granting the Bowmans' motion for summary judgment on July 22, 2011.

ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Diana Bowman claims she was injured when she fell or was thrown from a horse-drawn buggy on the Bowmans' property. The buggy was being driven by 13-year-old Alex Herring. Did the trial court err when it dismissed all claims against the Bowmans, finding that the Bowmans did not own the horse as a matter of law and are therefore immune under the Equine Activities Statute, even though there are genuine issues of material fact regarding whether the Bowmans or Ms. Herring's mother owned the horse?

II. STATEMENT OF THE CASE

Alex Herring wishes to add a few details to the Persons' Statement of the Case. As the Persons noted, there are issues of fact as to who owned the horse involved in the accident. It is undisputed that the accident occurred on the Bowmans' property. CP 19-21.

Tammy Herring, Alex Herring's mother, testified in her declaration that she and the Bowmans had entered into an agreement for Tammy to purchase the horse from the Bowmans.

CP 134. Tammy Herring also testified that after she had fallen behind on payments, Stacy Bowman told her that Stacy would consider the money Tammy had paid to be lease payments. CP 134. On another occasion, Stacy called Tammy and told Tammy that Stacy had heard that Tammy's other daughter, Ariel, was telling people that Ariel owned the horse. CP 134. Stacy wanted an acknowledgement from Tammy that Tammy understood that the horse was being leased and Tammy did not own it. CP 134.

The agreement involving the purchase of the horse contains language that creates issues of fact as to who owned the horse at the time of the accident. CP 87. For example, the agreement states that the horse is to be kept at the Bowmans' stables until the horse is paid in full. CP 87 at ¶7. The agreement also states in two separate places that Tammy Herring is to return the horse if she is unable to fulfill her part of the agreement. CP 87 at ¶¶8 and 12. The agreement further states that the Bowmans will not provide registration papers until all payments are made in full. CP 87 at ¶11.

In addition, Stacy Bowman actually testified at her deposition, in response to her own counsel's questioning, that

Tammy Herring did not own the horse outright at the time of the accident:

Q. Mr. Froehling, in his question, specifically used the word 'lease,' that you called it a 'lease' when you called her.

Would you have used that word?

A. No, she was buying the horse. She was – well, it's kind of funny, and I can see where that can gets [sic] confusing.

It's a lease to own the horse. So as far as – hum, let's figure out how this works. I'm trying to think how this... I think it could be called lease to own the horse, or it could be called bill of sale. I mean, I don't – I can see where either one would be said, so... (Pause.)

Q. But would you have – my question was, would you have used the word 'lease' when you talked to her?

A. I could have because **she didn't outright own the horse yet.**

Q. Okay.

A. So I wouldn't have said just board because she hadn't – **the horse wasn't fully purchased,** so... (Pause.)

Q. Okay. That's all I have.

CP 99 at 36:22 – 37:16 (emphasis added).

Despite these factual issues, the trial court found that the Herrings were the legal owners of the horse and dismissed the Bowmans from the case. CP 138-39; RP 5. The trial court declined to decide other matters argued in the summary judgment pleadings because the issue of the horse's legal ownership was dispositive. RP 5.

III. ARGUMENT

A. **De Novo Review is the Standard by which to Review a Decision on Summary Judgment.**

Appellate courts review an order granting summary judgment de novo. Hannum v. Dep't of Licensing, 144 Wn. App. 354, 359, 181 P.3d 915 (2008).

Summary judgment is properly granted only where the pleadings, affidavits, depositions, and admissions on file demonstrate that there is no genuine issue of material fact and that the moving party is entitled to summary judgment as a matter of law. CR 56(c); Hutchins v. 1001 Fourth Ave. Assocs., 116 Wn.2d 217, 220, 802 P.2d 1360 (1991). The moving party bears the initial burden of establishing its right to judgment as a matter of law. Young v. Key Pharmaceuticals, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). Once the moving party satisfies its initial burden, the burden then shifts to the nonmoving party to show that a triable issue exists. Id.

In reviewing a summary judgment, the court considers all facts, and reasonable inferences from those facts, in the light most favorable to the nonmoving party. Berrocal v. Fernandez, 155 Wn.2d 585, 590, 121 P.3d 82 (2005). "If reasonable minds can

differ, the question of fact is one for the trier of fact, and summary judgment is not appropriate.” Owen v. Burlington N. Santa Fe R.R. Co., 153 Wn.2d 780, 789, 108 P.3d 1220 (2005).

B. There are Issues of Fact as to Who Owned the Horse.

The issue of the horse’s ownership is a controlling question here because ownership determines whether a person is immune under the laws referred to as the “Equine Activities Statute.” The Equine Activities Statute consists of two statutes: RCW 4.24.530, Limitations on liability of equine activities—Definitions; and RCW 4.24.540, Limitations on liability for equine activities—Exceptions.

The Equine Activities Statute states that an equine activity sponsor or an equine professional shall not be liable for an injury that occurred in an incident involving an equine. RCW 4.24.540. There are a few exceptions to this immunity, one of which is relevant here:

- (i) If the equine activity sponsor or the equine professional:
 - * * *
 - (B) Provided the equine and failed to make reasonable and prudent efforts to determine the ability of the participant to engage safely in the equine activity, determine the ability of the equine to behave safely with the participant, and determine the ability of the participant to safely manage the particular equine.

RCW 4.24.540(2)(b)(i)(B). An “equine activity sponsor” is

an individual, group or club, partnership, or corporation, whether or not the sponsor is operating for profit or nonprofit, which sponsors, organizes, or provides the facilities for, an equine activity including but not limited to: Pony clubs, 4-H clubs, hunt clubs, riding clubs, school and college sponsored classes and programs, therapeutic riding programs, and, operators, instructors, and promoters of equine facilities, including but not limited to stables, clubhouses, ponyride strings, fairs, and arenas at which the activity is held.

RCW 4.24.530(3). There is likely no dispute at this point that the Bowmans were “equine activity sponsors” given that the Bowmans owned and operated the stables where the accident occurred and/or provided the facilities for the equine activity that the parties were engaging in when the accident occurred.

The issue that is in dispute is whether the Bowmans “provided” the horse, as the term is used in RCW 4.24.540(2)(b)(i)(B). If the Bowmans did provide the horse, then they cannot seek immunity as a matter of law under the Equine Activities Statute. The issue would then be one of fact as to whether the Bowmans used the requisite care under RCW 4.24.540(2)(b)(i)(B). Unfortunately, the term “provided” is not defined in the Equine Activities Statute. There is one (and only one) case in another division that has examined the term. Patrick

v. Sferra, 70 Wn. App. 676, 855 P.2d 320 (Div. 1, 1993), review denied 123 Wn.2d 1008, 869 P.2d 1084. The court in Patrick defined the term as follows: “‘Provide’ within the context of the statute means to make available for use a horse that the sponsor either owns or controls.” Id. at 682.

Whether the Bowmans owned or controlled the horse is paramount in this case because ownership and control determine whether the Bowmans provided the horse. And if the Bowmans provided the horse, then they cannot seek immunity as a matter of law under the Equine Activities Statute and are potentially liable under any and all causes of action alleged by the Persons. The trial court found as a matter of law that ownership of the horse fully transferred at the time the Bowmans and Tammy Herring entered into the purchase agreement for the horse on October 4, 2006, and that the Bowmans did not own the horse at the time of the accident.

There are issues of fact as to who owned and controlled the horse at the time of the accident. Taking the facts in the light most favorable to Alex Herring, we find that Tammy Herring and Stacy Bowman had entered into a contract for Tammy to purchase the horse. The horse had to be kept at the Bowmans’ property until all payments were made in full. Tammy was in the process of making

payments but had fallen behind on her payments. Because Tammy had fallen behind, Stacy told Tammy that Stacy was keeping the down payment money and would consider the payments made up to that point to be lease payments. In fact, Stacy wanted a confirmation from Tammy that Tammy understood that the horse was being leased and the Herrings did not own it. Moreover, Stacy Bowman actually acknowledged in her deposition that Tammy did not own the horse outright at the time of the accident and the horse wasn't fully purchased yet.

The evidence shows that the Herrings did not fully own the horse at the time of the accident and had no authority to remove it from the Bowmans' property. This evidence creates a genuine issue of fact as to who owned the horse at the time of the accident. And the fact at issue is a material fact because ownership of the horse determines whether the Bowmans are immune from liability as a matter of law under the Equine Activities Statute. Because there is a genuine issue of material fact, summary judgment in favor of the Bowmans should not have been granted.

IV. CONCLUSION

Respondent Alex Herring respectfully requests that this Court reverse the trial court's order granting summary judgment to the Bowmans, thereby reinstating the Bowmans as parties in this lawsuit, and remand the case for trial.

RESPECTFULLY SUBMITTED this 7th day of March,
2012.

Hollenbeck, Lancaster, Miller & Andrews

By: Jill R. Skinner

Jill R. Skinner, WSBA No. 32762
David P. Lancaster, WSBA No. 11500
Attorneys for Respondent Herring
15500 SE 30th Place, Suite 201
Bellevue, WA 98007
Telephone: (425) 644-4440
Fax: (425) 747-8338
Email: jill.skinner@farmersinsurance.com
david.lancaster@farmersinsurance.com

DECLARATION OF SERVICE

I declare that I served the foregoing BRIEF OF RESPONDENT
HERRING on the attorneys below

Antoni H. Froehling
Attorney at Law
122 East Stewart Avenue
Puyallup, WA 98372
Attorney for Appellants, DIANA PERSON AND ROBERT
PERSON
Phone: (253) 770-0116
Fax: (253) 770-0144

Matthew T. Boyle
Law Offices of Matthew T. Boyle, PS
1001 Fourth Avenue
Suite 3714
Seattle, WA 98154
Attorney for Respondents, GREGORY L. BOWMAN AND
STACY BOWMAN
Phone: (206) 292-1212
Fax: (206) 682-4687

by causing a full, true and correct copy thereof to be
MAILED in a sealed, postage-paid envelope, addressed as shown
above, which is the last-known address for the party's office, and
deposited with the U.S. Postal Service at Bellevue, WA, on the
date set forth below;

By causing a full, true and correct copy thereof to be
HAND-DELIVERED BY ABC MESSENGER SERVICE to the
party, at the address listed above, which is the last-known address
for the party's office, on the date set forth below;

By causing a full, true and correct copy thereof to be
FAXED to the party, at the fax number shown above, which is the
last-known fax number for the party's office, on the date set forth
below.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed at Bellevue, Washington, on this 5th day of March, 2012.

Clarine S. Goodleaf

Clarine S. Goodleaf
Assistant to David P. Lancaster