

**FILED**

FEB 19 2014

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

**No. 320103**

COURT OF APPEALS, DIVISION III  
THE STATE OF WASHINGTON

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CUSTOM AG SERVICES, INC.

Appellant,

v.

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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RESPONDENTS' BRIEF

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## I

### INTRODUCTION

Summary Judgment dismissing Custom Ag Services, Inc. (“CA”) case was granted after CA failed to present any sworn evidence that Loren Watts or Doug Watts (Respondents collectively “Watts”) knew or should have known of a change in the water right being auctioned with farm ground in Benton County. The Watts brothers refused to sign a Real Estate Purchase Agreement (“Agreement”) because it did not include a description of the water right as described in the auction brochure.

## II

### STATEMENT OF FACTS

An auction brochure (“brochure”) was prepared, circulated and placed on the tables at the auction. CP 33, 68. The brochure described a water right for the property of 1,100 acres. CP 74. The brochure also put the bidders on notice that they should “arrive prior to the scheduled auction time to review any changes, corrections or additions to the property information”. CP 75.

CA says the information about the water right in the brochure “was not correct” and that there was a clarification by a consultant. Appellant Brief p. 3. CA claims that the consultant’s clarification was “available online” and in a binder “available “ at the auction. CP 68. The clarification reduced the water right to 825 acres. CP 79.

There was no evidence presented that prospective bidders, including Watts, knew of or were advised of the online information. There was no evidence presented

that prospective

bidders, including Watts, knew of or were advised of binders containing a change being available at the auction. There was no evidence presented that prospective bidders, including Watts, were advised “prior to the scheduled auction time” of any changes to the water rights.

Prior to the conclusion of the auction neither Loren Watts nor Doug Watts received information that changed the 1,100 acre water right. CP 32, 36.

Loren Watts was high bidder on two of the parcels of land but refused to sign the Agreement when he was told the water right was less than 1,100 acres and because the 1,100 acre water right was not described in the Agreement. CP 33, 49.

### III

#### ARGUMENT

##### A. **Standard of Review**

A summary judgment is reviewed de novo. *Oltman v. Holland Am Line*, 163 Wn.2d 236, 243(2008).

##### B. **CA Failed to Show Formation of a Contract When it Failed to Show That Offer and Acceptance Were the Same**

It is hornbook law that a contract requires a meeting of the minds.

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.

*Blue Mt. Construction Co., v Grant Co. School Dist.*, 49 Wn.2d 685, 688, 306 P.2d 209 (1957)(Emphasis added).

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

“Generally, a purported acceptance which changes the terms of the offer in any material respect operates only as a counter-offer, and does not consummate the contract.”

*Sea-Van Investments v Hamilton*, 125 Wn.2d 120, 126, 881 P.2d 1035 (1994).

CA's purported acceptance with 275 acres less water right represented a prorated loss of value to Loren Watts of approximately \$714,810 (1,132 acres/1,742 acres x \$1,100,000 in water right value). CP 33, 73. On a \$3.5 million purchase, this is clearly a material change.

In, *Sea-Van, supra*, the parties were negotiating the purchase and sale of real property. They had agreed on most of the terms but differed only on closing details and payments on the promissory note. The trial court found there was no meeting of the minds. The Court of Appeals reversed concluding that a reasonable closing date could be implied. The Supreme Court reinstated the trial court and held that there was no meeting of the minds and thus no contract.

Regardless of whether the change was a 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 is no evidence that that was done.

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 is no evidence that that was done.

The brochure advised prospective bidders that prior to the start of the auction prospective bidders would be apprised of “changes, corrections, or additions to the property information.” There is no evidence that the change in a water right being transferred having a value of approximately \$1.1 million, clearly a change or correction, was discussed prior to the auction.

Finally, during the course of the auction, the water right issue could have been addressed. The brochure provided:

ANNOUNCEMENTS MADE BY THE AUCTIONEERS AT THE AUCTION PODIUM DURING THE TIME OF THE SALE WILL TAKE PRECEDENCE OVER ANY PREVIOUSLY PRINTED MATERIAL OR ANY OTHER ORAL STATEMENTS MADE.

CP 75 (Capitalized in original). There is no evidence of a statement being made during the course of the auction to correct the clear express provision in the brochure that 1,100 acres of water right would accompany the property.

Loren Watts’ offers for parcels 1 and 3 based on a water right of 1,100 acres were not accepted. There was no contract formed.

**C. Plaintiff’s Failure to Establish a Meeting of the Minds Requires Summary Judgment of Dismissal.**

A defendant is entitled to a summary judgment if the initial burden of showing the absence of a material issue of fact is met and the plaintiff fails to make a factual showing sufficient to establish the existence of each essential element of the

cause of action; a failure of proof as to an essential element of the plaintiff's case renders all other facts immaterial. *Howell v Blood Bank*, 117 Wn.2d 619, 625, 818 P.2d 156 (1991). CA has failed to present specific facts showing there is a genuine issue for trial. CA has presented evidence of water rights related to the property other than that described in the brochure. CA presented no evidence that the Watts knew of the change of the water right. CA has not even presented evidence of an attempt by it or the auctioneer at giving notice to the Watts of a water right other than that described in the brochure. More importantly, CA has presented no evidence of the exact terms of the offer it claims was made by the Watts. And finally, CA has presented no evidence of acceptance of an offer made by Watts.

**D. The Restatement Supports Summary Judgment**

CA cites Restatement (Second) of Contracts, Section 28 (1981) and emphasized “bids at an auction embody terms made known by advertisement, posting or other publication of which bidders are or should be aware”. This rule does in fact resolve CA's claim. The evidence is clear that the 1,100 acre water right was published in the brochure and that the brochure was circulated by mail and made available on the tables at the auction. CP 74, 68. 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.

It is noteworthy that the same section of the Restatement allows for the auctioneer to “modify” terms by announcement “when the goods are put up” or

“prior to the scheduled auction time”. Again, there was no evidence presented that a change of the water right was announced by the auctioneer.

**E. CA’s Reliance on As Is-Where Is Language is Misplaced**

The authority cited and relied upon by CA applied “as is-where is” language to either the condition of the property or to warranties. Loren Watts’ refusal to sign the Agreement was based on the change in the water right. His refusal was not based on the condition of the property or a warranty related to the property. As is-where is simply inapposite.

CA attempts to extend the reach of as is-where is to the description of the property being sold. Such an extension is both disingenuous and at odds with the conduct of CA and the auctioneer. If the water right being sold could be changed without adequate notice to the buyer why would CA and the auctioneer go to the trouble of describing it in the first place or to the trouble of having a consultant explain the “misstatement”. CA’s contention, carried to its logical conclusion, would allow a seller to create a property description after the auctioneer has struck his hammer. Contract law does not abide such mischief.

**IV**

**CONCLUSION**

CA made a clear, unambiguous, unequivocal description of the water that would accompany the purchase of the farm property. Loren Watts’ high bids were offers for the property and a prorated share of 1,100 acres of water right. CA failed to produce any evidence that the Watts knew or should have known of a change to

that water right. CA's auctioneer's "acceptance" which was apparently based on the transfer of a prorated share of 825 acres was no acceptance at all. There was no meeting of the minds. CA failed to produce any evidence to the contrary.

The Trial Court's dismissal should be affirmed.

RESPECTFULLY SUBMITTED this 17<sup>th</sup> day of February, 2014.



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Terry E. Miller, WSBA #14080  
Attorney for Defendants, Loren Watts  
and Jane Doe Watts and Doug Watts  
and Jane Doe Watts

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STATE OF WASHINGTON  
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No. 32010-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

CUSTOM AG SERVICES,	)	
INC.,	)	
	)	CERTIFICATE
	)	OF SERVICE
Appellant	)	
	)	
vs.	)	
	)	
LOREN WATTS et ux and	)	
DOUG WATTS et ux	)	
	)	
Respondents,	)	
_____	)	

I hereby certify that on this 17<sup>th</sup> Day of February, 2014, a true and correct copy of the RESPONDENTS' BRIEF and this CERTIFICATE OF SERVICE was sent via regular U.S. Mail, postage prepaid to the following:

Tom Scribner  
P O Box 1757  
Walla Walla WA 99362

DATED this 17<sup>th</sup> day of February, 2014.

  
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Terry E. Miller