No. 05-09-00544-CV

In the Fifth Court of Appeals
Dallas, Texas

BOB DIXON AND ADRIENNE DIXON

Appellants

V.

ASHLI HERMAN, MATT CYPHERT, AND JH & AH ENTERPRISES, INC.

Appellees

APPEAL FROM CAUSE NO. 07-4832
116TH JUDICIAL DISTRICT COURT OF DALLAS COUNTY, TEXAS
THE HONORABLE BRUCE PRIDDY, PRESIDING

APPELLANTS' BRIEF

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ORAL ARGUMENT REQUESTED

STATEMENT REGARDING ORAL ARGUMENT

Appellants request oral argument.

The district court granted a multi-ground motion for summary judgment and disposed of appellants' entire case without explaining why. Appellants believe oral argument would aid the decisional process by addressing the Court's questions about the legal issues presented and how the appropriate standards of review should apply to the summary-judgment evidence. *See* TEX. R. APP. P. 39.1.

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TO THE HONORABLE FIFTH COURT OF APPEALS:

Appellants, Bob Dixon and Adrienne Dixon ("the Dixons"), file this brief requesting that the trial court's summary judgment be reversed.

STATEMENT OF THE CASE

Nature of the Case:	This is a breach of contract, breach of warranty, deceptive trade practices, and fraud case arising from the sale of a show horse. CR 38-44.
Course of Proceedings:	The Dixons sued the sellers and others involved in the sale, including appellees Ashli Herman, Matt Cyphert, and JH & AH Enterprises, Inc. ("the Sellers"). CR 38-41. The Sellers filed a traditional motion for summary judgment, asserting several grounds. CR 53-62.
Trial Court's Disposition:	The district court granted the Sellers' motion and rendered a final summary judgment that the Dixons take nothing. CR 198-99 (App. Tab A).

ISSUES PRESENTED

1. Does the absence of direct communications between a buyer and seller, without more, preclude recovery for breach of contract, breach of warranty, deceptive trade practices, or fraud under Texas law?

2. Were the Sellers entitled to summary judgment based on a lack of agency absent evidence conclusively disproving the existence of principal-agent relationships between them and others involved in the transaction?

3. In a summary-judgment proceeding, may an "as is" provision in a bill of sale be enforced against the buyer without evidence that the buyer signed the document?

4. If the "as is" clause is otherwise enforceable, were the Sellers entitled to summary judgment on the Dixons' breach-of-warranty claim, when no evidence indicates that the clause was freely negotiated and there is more than a scintilla of proof that the provision was induced by the Sellers' misrepresentation or concealment?

5. Did the Sellers meet their summary-judgment burden on the affirmative defense of ratification when they presented no evidence of intent?

6. Did the Dixons raise genuine issues of material fact precluding summary judgment on damages?

7. Did the district court err by granting the Sellers' traditional motion for summary judgment and rendering a take-nothing judgment on all claims?[1]

STATEMENT OF FACTS

The Transaction: Ashli Herman or JH & AH Enterprises, Inc. owned a Belgian Warmblood[2] gelding now known as "Paramour."[3] CR 86, 149, 166. In the summer of 2005, the owners asked Matt Cyphert, a professional horseman who had boarded the animal at his farm in Argyle, Texas since 2002, to sell the horse on their behalf for an asking price of $125,000. CR 86-87, 120; *see* CR 73, 137. Cyphert consigned the sale to another horse professional, Daniel Bedoya, who took Paramour to Indio, California for a

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[1] This issue is framed broadly out of an abundance of caution and in compliance with *Malooly Brothers, Inc. v. Napier*, 461 S.W.2d 119, 121 (Tex. 1970).

[2] *See* http://en.wikipedia.org/wiki/Belgian_Warmblood (last visited Aug. 4, 2009).

[3] The horse had been registered under the name "Islander" and had also been called "Puck" or "Red." CR 65-66, 142. After buying the horse, the Dixons re-named it "Paramour." CR 65, 84, 130.

series of hunter/jumper shows. CR 87, 120; *see* CR 68, 137. Both Cyphert and Bedoya were to be compensated on a commission basis. CR 87, 131.

Adrienne Dixon is an equestrian trained to ride in hunter-jumper, equitation, and jumping events. CR 145. In February 2006, a third horseman, John French, approached Adrienne or one of her trainers, Carrie Atkinson and Benson Carroll, and indicated that Paramour was for sale. CR 67, 70, 145. French asked whether Adrienne was interested in riding Paramour competitively in exchange for taking over the horse's board. CR 67-69. The Dixons agreed, and Adrienne and Paramour began to compete together. CR 72.

In May 2006, Adrienne's father, Bob Dixon[4], offered to buy Paramour for $100,000. CR 73, 87. Before doing so, Dixon was led to believe that Paramour was eleven years old, a factor of paramount importance to him. CR 130-31. Dixon conveyed the offer through either Atkinson or Carroll, whom he asked to approach French and inquire whether the owners were interested in selling Paramour for $100,000. CR 73, 146. The offer made its way from French to Bedoya to Cyphert, who, after discussing it with the owners, accepted on their behalf. CR 87; *see* CR 57.

Dixon wired the purchase money upon receiving instructions from Cyphert. CR 74, 87, 130. At the time, Dixon received no documentation of any kind. CR 130. Several weeks after wiring payment, Dixon called Cyphert and asked him to send a bill of sale, as well as Paramour's United States Equestrian Federation ("USEF") number and passport. CR 130. In mid-June 2006, Cyphert sent Dixon a bill of sale that bore what

[4] As used in this brief, "Dixon" refers to Bob Dixon only.

purported to be Ashli Herman's signature and, consistent with previous representations, expressly stated that Paramour was approximately eleven years old. CR 89 (App. Tab B), 130, 149. Cyphert later acknowledged that he or his wife had signed Herman's name on the bill of sale and that his wife had signed the document as a witness. CR 115-16.

The Dispute: After completing the transaction and receiving a new USEF certificate, the Dixons noticed that Paramour was listed as having been born in March 1993, meaning that the horse was thirteen rather than eleven years old when purchased. CR 130; 143, 146. Bob Dixon immediately contacted Cyphert and informed him of the discrepancy. CR 130. Cyphert assured Dixon that the horse was indeed eleven and stated that the USEF may have made a mistake. CR 130, 146. Dixon asked Cyphert for proof that the horse was eleven years of age, but despite several requests, Cyphert never provided any. CR 130.

In October 2006, the Belgian Warmblood Association confirmed that Paramour was in fact thirteen years old. CR 131. Dixon confronted Cyphert with this information and asked to return the horse or to be refunded part of the purchase price. CR 131. Cyphert offered to pay Dixon $10,000, but refused to contact the prior owners about rescinding the sale or to put Dixon in touch with them. CR 131. Dixon declined Cyphert's offer. CR 131.

The Lawsuit and Ruling: The Dixons brought this action, asserting that the Sellers breached a contract, breached an implied warranty, violated the Deceptive Trade Practices—Consumer Protection Act ("DTPA"), and committed fraud. CR 38-44. More specifically, the Dixons alleged that the Sellers—through their agents, French and

Cyphert—misrepresented Paramour's age throughout sale process and failed to disclose that the horse previously suffered physical injuries. CR 40-41. The Dixons sought actual damages, additional damages under the DTPA, and attorneys' fees. CR 45-46. Alternatively, the Dixons sought the equitable remedy of rescission. CR 44-45.

The Sellers answered and asserted affirmative defenses. CR 34-36. Ultimately, the Sellers moved for a traditional summary judgment on the following grounds:

- All the asserted claims fail because the Dixons did not communicate directly with any defendant before purchasing the horse. CR 54, 56-58.
- No agency relationship existed to support liability. CR 54, 61-62.
- The Dixons' implied-warranty claim fails because, under the bill of sale, this was an "as is" transaction. CR 54, 58-59.
- The Dixons ratified the sale. CR 55, 60.
- The Dixons suffered no damages. CR 61.

Following a hearing, the district court granted the Sellers' motion without stating specific grounds and rendered a final summary judgment that the Dixons take nothing. CR 198-99 (App. Tab A). The Dixons timely filed a notice of appeal. CR 200.

SUMMARY OF THE ARGUMENT

The Sellers challenged each of the Dixons' causes of action on the basis that no direct communication took place between the parties and no agency relationships filled in the gaps. Lack of direct communication is insufficient by itself to support judgment as a matter of law, and the Sellers failed to meet their burden of establishing a right to summary judgment on the agency issue.

The Sellers likewise failed to establish a right to summary judgment based on grounds aimed at the Dixons' specific claims, including the existence of "as is" language in the bill of sale, ratification, or the absence of damages. Reviewing the summary judgment de novo, this Court should reverse and remand this case for trial.

STANDARDS OF REVIEW

A summary judgment presents a question of law and is therefore reviewed de novo. *See Valence Operating Co. v. Dorsett,* 164 S.W.3d 656, 661 (Tex. 2005); *McMahon Contracting, L.P. v. City of Carrollton,* 277 S.W.3d 458, 467 (Tex. App.—Dallas 2009, pet. denied). The standard of review for a traditional summary judgment is threefold: (1) the movant must show that no material fact issue existed and that it is entitled to judgment as a matter of law; (2) in deciding a material fact issue precluded summary judgment, the court must take all evidence favorable to the nonmovant as true; and (3) the court must indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *See* TEX. R. CIV. P. 166a(c); *Nixon v. Mr. Prop. Mgmt. Co.,* 690 S.W.2d 546, 548-49 (Tex. 1985); *McMahon Contracting,* 277 S.W .3d at 467.

To prevail on a traditional summary-judgment motion, a defendant must either: (1) conclusively disprove at least one essential element of the plaintiff's causes of action; or (2) plead and establish each essential element of an affirmative defense as a matter of law. *See Doe v. Boys Clubs of Greater Dallas, Inc.,* 907 S.W.2d 472, 476-77 (Tex. 1995); *McMahon Contracting,* 277 S.W .3d at 467. If the defendant has satisfied either standard, the burden shifts to the plaintiff to present evidence raising a genuine issue of

material fact precluding summary judgment. *See City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979); *McMahon Contracting*, 277 S.W.3d at 467.

ARGUMENT

In the district court, the Sellers claimed to have defeated an essential element of every cause of action the Dixons asserted and to have conclusively proved one or more affirmative defenses. CR 54. They did neither. Applying settled standards of review, the district court's summary judgment should be reversed.

I. The Absence of Direct Communication Between the Parties Before the Sale, Without More, Does Not Negate Any Element of the Dixons' Claims

As their first ground for summary judgment, the Sellers asserted that the absence of any direct communication between them and the Dixons before the purchase precludes all recovery. CR 54, 56-58. The Sellers repeated various shades of this argument throughout their motion.

Essentially, the Sellers' position in the district court was that no contract could have been formed, no warranty could have been breached, and no deceptive trade practice or fraud could have occurred because Dixon did not deal personally with Ashli Herman, Matt Cyphert, or JH & AH Enterprises before the sale. CR 56-58. Similarly, the Sellers claimed to have established that Cyphert was not an agent of the other Sellers and that Bedoya and French were not agents or subagents of any defendant, apparently to try and defeat liability for representations originating with them. CR 53-54. The Sellers did not deny or attempt to disprove that someone on their side of the transaction represented to the Dixons during negotiations that Paramour was eleven years old.

The Sellers cited no cases supporting the proposition that Texas law requires direct communication between the parties to a transaction before liability can attach. To the contrary, it is well settled that an agent may contract for the benefit of a disclosed principal. *See, e.g.*, *Eppler, Guerin & Turner, Inc. v. Kasmir*, 685 S.W.2d 737, 738 (Tex. App.—Dallas 1985, writ ref'd n.r.e.). Moreover, "[a] principal is liable for the fraudulent acts and misrepresentations of its authorized agent, even though the principal had no knowledge of the fraud and did not consent to it, whether or not the principal derives a benefit from it." *III Forks Real Estate, L.P. v. Cohen*, 228 S.W.3d 810, 814 (Tex. App.—Dallas 2007, no pet.); *cf. Ernst & Young, L.L.P. v. Pac. Mut. Life Ins. Co.*, 51 S.W.3d 573, 579 (Tex. 2001) (acknowledging that "a misrepresentation made through an intermediary is actionable if it is intended to influence a third person's conduct"). And when an agent acts with apparent authority, such acts bind the principal even if the agent lacked actual authority to commit them. *Biggs v. U. S. Fire Ins. Co.*, 611 S.W.2d 624, 629 (Tex. 1981); *Maccabees Mut. Life Ins. Co. v. McNiel*, 836 S.W.2d 229, 233 (Tex. App.—Dallas 1992, no writ.).

The Dixons specifically alleged that Cyphert acted as the other Sellers' agent and that he acted through subagents, namely French and Bedoya.[5] CR 39, 93, 96-97. The Sellers acknowledged that the Dixons negotiated with French and Bedoya, or else this

[5] A subagent is "a person appointed by an agent to perform some duty, or the whole of the business relating to his agency. He may be the agent of the agent, or he may be the agent of the principal depending upon the agreement creating the primary agency, or upon the circumstances." *St. Paul Surplus Lines Ins. Co. v. Dal-Worth Tank, Co.*, 917 S.W.2d 29, 49 (Tex. App.—Amarillo 1995) (citing *Janes v. CPR Corp.*, 623 S.W.2d 733, 740 (Tex. Civ. App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.).), *rev'd in part on other grounds*, 974 S.W.2d 51 (Tex. 1998) (per curiam). One may be a subagent without any contractual relationship with the principal. *Id.*

transaction could not have taken place. CR 57. Under basic agency law, the mere absence of direct communication between the Dixons and the Sellers was not sufficient to support summary judgment. *See III Forks*, 228 S.W.3d at 814 (acknowledging that appellant alleged fraud by agent, not direct representations by appellees). To the extent the district court relied on this ground, its judgment should be reversed.

II. The Sellers Did Not Conclusively Disprove Agency

As a corollary to their first ground, the Sellers also contended that no agency relationship existed capable of supporting liability in this case. CR 54, 61-62. Instead, the Sellers suggested that everyone on their side of the transaction acted as an independent contractor and that liability therefore cannot be imputed through Cyphert to the other Sellers. CR 54, 61-62.

The Sellers' argument misapprehends the scope of agency law. Generally, an agent acts on behalf of another person and subject to that person's control. *See Crooks v. Moses*, 138 S.W.3d 629, 637 (Tex. App.—Dallas 2004, no pet.); *Pratt-Shaw v. Pilgrim's Pride Corp.*, 122 S.W.3d 825, 833 (Tex. App.—Dallas 2003, pet. denied). An independent contractor may act on another's behalf, but does not yield control over the details of the task. *See St. Joseph Hosp. v. Wolff*, 94 S.W.3d 513, 542 (Tex. 2002); *Ross v. Texas One P'ship*, 796 S.W.2d 206, 210 (Tex. App.—Dallas 1990), *writ denied per curiam*, 806 S.W.2d 222 (Tex. 1991). Thus, in determining liability for the conduct of another, "the key question is whether the principal has the right to control the agent with respect to the details of that conduct." *III Forks*, 228 S.W.3d at 814. But independent contractor and agent status are not mutually exclusive, as the Sellers' position suggests.

See Robles v. Consol. Graphics, Inc., 965 S.W.2d 552 (Tex. App.—Houston [14th Dist.] 1997, pet. denied). "Indeed, a party 'who contracts to act on behalf of another and [is] subject to the other's control except with respect to his physical conduct' is an agent and also an independent contractor." *Id.* (quoting RESTATEMENT (SECOND) OF AGENCY § 14N (1958)).

The Sellers relied exclusively on an affidavit from Matt Cyphert as summary-judgment evidence on this issue. In it, Cyphert testified:

> 4. I agreed to take Paramour and to sell him for the Hermans' business. In connection with our sale arrangement, I agreed to take over the costs and expenses of marketing the horse and I decided how to go about selling the animal. The only decision left to the Hermans under this arrangement was whether to accept an offer below the asking price. At all times relevant, I had complete control over the means and details of selling the horse and was to be paid by the job.
>
> 5. In early 2006, another horse professional, Daniel Bedoya, told me he was looking for consignment horses to take and sell in Indio California during the annual HITS series of A circuit hunter/jumper shows. I agreed to place Paramour with Bedoya in exchange for which Bedoya would be entitled to a commission from the sale proceeds. This is commonly how show hunters and jumpers are sold. From the time Bedoya took Paramour, Bedoya controlled the means and details of how the horse was marketed and sold.

CR 86-87.

In the district court, the Sellers did not dispute that Cyphert acted on behalf of Ashli Herman and JH & AH Enterprises or that Bedoya (and French) acted for Cyphert. Rather, the Sellers appeared to focus on control. CR 59-60. Cyphert claimed to have assumed "complete control over the means and details of selling the horse" and then to have delegated "the means and details of how the horse was marketed and sold" to

Bedoya. CR 86-87. But Cyphert also acknowledged that the other Sellers retained the last word on whether any proposed sale would go through and that he merely assumed he was authorized to affix Ashli Herman's signature to a bill of sale. CR 86, 117, 119, 137. The Sellers did not attach as summary-judgment evidence any written agreement that may have existed spelling out the details of their arrangement.

"The scope of an agent's authority in a summary judgment proceeding cannot be established conclusively by the agent's testimony alone." *Farmer Enters., Inc. v. Gulf States Ins. Co.*, 940 S.W.2d 103, 112 (Tex. App.—Dallas 1996, no writ); *see Lyons v. Lindsey Morden Claims Mgmt., Inc.*, 985 S.W.2d 86, 90 (Tex. App.—El Paso 1998, no pet.) (same). But even if an affidavit from Cyphert or another putative agent could conclusively disprove agency, Cyphert's testimony stops short of establishing as a matter of law that the other Sellers had no ***right to control*** the sale, as was their burden. *See III Forks*, 228 S.W.3d at 814. Moreover, Cyphert's affidavit itself raises fact issues on agency because he testified that the other Sellers retained control of the sales price. *See Robles*, 965 S.W.2d at 558 (concluding that alleged independent contractor's claim that he lacked authority to bind principal actually supported agency finding because it was proof of control); *Williams v. Jennings*, 755 S.W.2d 874, 883 (Tex. App.—Houston [14th Dist.] 1988, writ denied) (holding that real estate broker was agent and not independent contractor when broker was given specific price to offer but could not change offer without principal's authority). Therefore, to the extent the district court relied on the Sellers' agency argument in granting summary judgment, it decision should be reversed.

III. The Bill of Sale's "As Is" Provision Did Not Entitle the Sellers to Summary Judgment on Breach of Implied Warranty

As their third ground for summary judgment, the Sellers contended that an "as is" clause in the bill of sale negates the Dixons' implied-warranty claim. CR 54, 58-59; *see* CR 49 (App. Tab B). This ground also lacks merit.

A. The Sellers Produced No Bill of Sale Signed by the Dixons

The Sellers presented no summary-judgment evidence that the Dixons signed the bill of sale Cyphert sent several weeks after the money changed hands. *See* CR 49 (App. Tab B). Without such a signature, the writing cannot be enforced against the Dixons. *See* TEX. BUS. & COM. CODE § 2.105(a) (defining and governing sales of goods); *id.* § 2.201(a) (App. Tab C) (providing that contract for sale of goods for $500 or more is unenforceable absent writing signed by party against whom enforcement is sought). Therefore, the Sellers' reliance on the bill of sale lacks evidentiary support in the summary-judgment record and must accordingly be rejected.

B. Fact Issues Exist on the Dixons' Warranty Claim

If the bill of sale were enforceable against the Dixons, the Court should nevertheless conclude that the "as is" language did not entitle the Sellers to judgment as a matter of law.

In *Prudential Insurance Co. v. Jefferson Associates*, 896 S.W.2d 156 (Tex. 1995), the Texas Supreme Court discussed various factors to consider when determining the effect of an "as is" clause in a purchase agreement. A court should review the language of the contract, the nature of the transaction, and the totality of the circumstances

surrounding the agreement. *See id.* at 162. A buyer is not bound by an agreement to purchase something "as is" that is induced by the seller's fraudulent misrepresentation or concealment of information. *See id.*

The *Prudential* analysis applies to implied warranties. *See Welwood v. Cypress Creek Estates, Inc.*, 205 S.W.3d 722, 726-28 (Tex. App.—Dallas 2006, no pet.). In evaluating the nature of the transaction and the totality of the circumstances, "[w]hether the 'as is' clause is an important part of the basis of the bargain or an incidental or 'boilerplate' provision and whether the parties have relatively equal bargaining positions are factors to consider." *Id.*

The bill of sale plainly represents that Paramour was approximately eleven years old in June 2006, although the horse's true age at that time was thirteen years. CR 49 (App. Tab B), 130-31, 143, 146. The Dixons presented summary-judgment evidence that Paramour was represented to be younger during the negotiations, that the horse's age was a critical factor in their purchase decision, that being up to two years older was a significant misrepresentation, and that the difference in age substantially diminished the horse's value. CR 130-31, 142-43, 151-52.[6] Moreover, the Dixons have alleged and tendered summary-judgment proof that the Sellers failed to disclose injuries that the

[6] The district court sustained certain objections the Sellers raised to the Dixons' summary-judgment evidence "to the extent [they contain] inadmissible hearsay." CR 198. From reviewing the evidence at issue (paragraphs 2 and 3 of Bob Dixon's affidavit, paragraph 3 of Adrienne Dixon's affidavit, and paragraphs 3 and 4 of Carrie Atkinson's affidavit), it is apparent that none was offered to prove the truth of the matter asserted. *See* TEX. R. EVID. 801(d); CR 129-30, 141, 146. The ruling on these objections thus does not prevent this Court from considering all evidence in the record. In any event, other portions of the record cited, along with the summary-judgment standards of review, support the facts as described in this brief.

horse had suffered before the transaction, providing at least some evidence of concealment. CR 131-32, 143, 152-53.

Finally, there is no evidence that the "as is" provision was either freely negotiated or important to the bargain. Cyphert did not send the bill of sale to the Dixons until weeks after the purchase. CR 130. And Cyphert's testimony indicates that the "as is" language was akin to boilerplate, as it appears to have come from a form he uses on his own horse farm. CR 115. Considering the procedural posture of this dispute, these factors weigh against any conclusion that the "as is" clause in the bill of sale precludes the Dixons' implied-warranty claims. *See Welwood*, 205 S.W.3d at 727.

In sum, the Sellers failed to conclusively establish that the bill of sale's "as is" provision—if properly considered at all—barred the Dixons from recovering on their implied-warranty theory. Considering the nature of the transaction and the totality of the circumstances in the light most favorable to the Dixons, and indulging all inferences in their favor, the Sellers were not entitled to summary judgment on the implied-warranty claim. For this additional reason, the district court erred.

IV. The Sellers Failed to Establish Their Ratification Defense As a Matter of Law

The Sellers pleaded ratification as an affirmative defense and contended in their summary-judgment motion that the Dixons ratified the sale. CR 34, 55, 60. The Sellers' motion does not specify which of the Dixons' causes of action they intended to attack by raising the affirmative defense of ratification. CR 60.

Authority from this Court recognizes ratification as a defense to breach of contract and fraud. *See Martin v. Martin*, ____ S.W.3d ____, 2009 WL 988651, at *6 (Tex.

App.—Dallas 2009, no pet. h.); *LSR Joint Venture No. 2 v. Callewart*, 837 S.W.2d 693, 699 (Tex. App.—Dallas 1992, writ denied); *Spangler v. Jones*, 797 S.W.2d 125, 132 (Tex. App.—Dallas 1990, writ denied). "Ratification occurs when a person, induced by fraud to enter into an agreement, continues to accept benefits under that agreement after he becomes aware of the fraud or breach, or if he conducts himself so as to recognize the agreement as binding." *Spangler*, 797 S.W.2d at 131. This defense required the Sellers to prove as a matter of law that the Dixons knew about the fraud or breach, but intentionally and voluntarily ratified the contract despite that knowledge. *See Martin*, 2009 WL 988651, at *6; *LSR*, 837 S.W.2d at 699; *Spangler*, 797 S.W.2d at 131.

To support ratification, the Sellers relied on the fact that the bill of sale identifies Paramour by name and USEF card number. CR 60, 89. The Sellers also stated—without referring to any proof—that the Dixons transferred Paramour's USEF number into Adrienne Dixon's name, that the USEF card bears Paramour's birth date, and that information about the horse could have been searched online. CR 60.

Even if supported by summary–judgment evidence, none of these allegations is sufficient to conclusively establish ratification. Whether the Dixons took any of these actions with the intent to waive their fraud claims or to ratify an agreement is a question of fact to be determined based on all of the circumstances, including whether the Dixons had full knowledge of the alleged fraud at the time of any ratification. *See Martin*, 2009 WL 988651, at *6. "Questions of intent have historically been treated as uniquely within the realm of the fact finder because the determination of an individual's intent in taking a

particular action is so dependent on evaluation of witnesses and credibility." *Id*. (internal quotations omitted).

The Sellers presented no summary-judgment evidence of intent and therefore failed to establish their affirmative defense of ratification as a matter of law. Accordingly, to the extent the district court based its decision on this ground, the summary judgment should be reversed.

V. Genuine Issues of Material Fact Exist on Damages

As their final basis for summary judgment, the Sellers contended that the Dixons incurred no damages. CR 61. The Sellers base this argument primarily on testimony to the effect that the Dixons believed $100,000 was a fair purchase price at the time payment was tendered, when they were unaware of the age discrepancy and Paramour's pre-existing injuries. *See id*.; CR 75, 83.

The Sellers' position ignores the Dixons' evidence that Paramour's actual value was less than what they paid because the horse was represented to be younger than it actually was and because the Sellers failed to disclose prior injuries. CR 131, 143, 151-52. It also fails to consider that the Dixons pleaded for rescission in the alternative; damages were not the only remedy they sought. CR 44-45. Therefore, to the extent the district court's judgment turned on this ground, it was both erroneous and overbroad. *See Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 200 (Tex. 2001) (noting that summary judgment on all claims is improper if motion only addresses some claims).

Genuine issues of material fact precluded summary judgment on damages, and the Sellers were not entitled to more relief than they requested. The district court erred by granting summary judgment, and this Court should reverse.

CONCLUSION AND PRAYER

For the foregoing reasons, and pursuant to Texas Rule of Appellate Procedure 43, the Dixons ask this Court to sustain the issues presented, reverse the district court's final summary judgment, and remand the case for further proceedings. The Dixons request all other appropriate relief to which they are entitled.

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CERTIFICATE OF SERVICE

On August 10, 2009, in compliance with Texas Rule of Appellate Procedure 9.5, I served a copy of this brief upon all other parties to the trial court's judgment by first-class United States mail, properly posted and deliverable as follows:

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