THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM NEWBERRY COUNTY
In The Court of Common Pleas for the Eighth Circuit

J. Mark Hayes, II, Circuit Court Judge

Appellate Case No. 2023-001162

Lisa Summer Rice and Joseph F. Rice.....Appellants

v.

Newberry Lions Club and C. Ray Amick.....Respondents

INITIAL BRIEF OF APPELLANTS

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STATEMENT OF THE CASE

In this appeal, Appellants contend that they were the successful highest bidder in response to an offer presented by a letter of Respondent Lions Club to sell approximately five acres at Lake Murray and were entitled to specific performance. They seek reversal of the ruling of the Circuit Court, without a jury, finding and concluding that there was no offer, no acceptance, and thus no contract to be enforced between Appellants and the Lions Club.

The Summons and Complaint were filed on February 20, 2018, in the Newberry County Court of Common Pleas. The pleadings in this case also presented issues on the existence of an easement in favor of Appellants. A separate complaint of another plaintiff was commenced on the easement issue. By Order of the Chief Administrative Judge of the Eighth Judicial Circuit dated December 3, 2019, the Honorable Eugene C. Griffith, Jr. dated December 3, 2019, ordered that the cases be declared complex and that they be consolidated and assigned to the Honorable J. Mark Hayes for management and trial. The contractual and easement issues were later bifurcated for trial by Order of Judge Hayes.

The Summons and Complaint in this matter was amended several times, the final applicable pleading being the Fifth Amended Complaint dated August 31, 2021. The pertinent portion of this Complaint to the instant appeal sought a declaratory judgment that an enforceable agreement with the Lions Club for Appellants' purchase of its five acres at Lake Murray was formed. It also sought an Order setting aside the Lions Club conveyance to Respondent Amick and an Order directing the Lions Club to specifically perform the agreement with Appellants and for other relief related to the cause of action for specific performance.[1]

[1] This appeal only concerns the contractual claims tried by Judge Hayes on May 31, 2022, and June 1, 2022. The easement claims are not at issue and remain in the Lower Court.

The Answers of Respondents denied the causes of action. In Amick's Second Amended Answer and Crossclaim, he cross-claimed against Lions Club for indemnification, breach of deed warranty, and for damages and fees (Amick's Second Amended Answer and Crossclaim filed 5/24/22).

Substantial discovery was undertaken. On August 13, 2020, Respondent Amick moved for Partial Summary Judgment. By Order dated December 9, 2020, the Circuit Court granted the motion. Appellants filed a timely Motion to Reconsider/Alter or Amend that Order on December 18, 2020. Because of Covid, and lack of courtroom availability, the case proceeded slowly for many months.

In its Order (Form 4) dated December 8, 2021, the Lower Court granted Appellant's Motion to Reconsider the previous Order of August 13, 2020, and a trial was scheduled as soon as courtroom availability was possible.

The non-jury trial on the merits was conducted on May 31 and June 1, 2022, with Judge Hayes presiding. The Appellants presented the testimony of two witnesses and also published portions of the depositions of several witnesses: Lions Club President Eugene Crocker (two depositions); Lions Club Treasurer Pete Simpson (two depositions); and, Ray Amick (two depositions). Appellants presented 40 exhibits (two being submitted by proffer of an expert whose testimony the Court had previously ruled was not admissible).

Respondents presented the testimony of Lisa Lee Smith, Ray Amick, Eugene Crocker, and Pete Simpson, and had seven trial exhibits. Respondents also published portions of the depositions of Appellants.

On September 2, 2022, the Lower Court filed a Form 4 Order, with a lengthy memorandum attached, requesting that Respondents' counsel prepare a proposed Order ruling in favor of Respondents, with specific instructions. (Order dated September 2, 2022).

On October 25, 2022, the Order Finding in Favor of Respondents Newberry Lions Club and C. Ray Amick was filed on the contractual claims. On November 4, 2022, Appellants timely filed their Motion for Reconsideration and Motion to Alter or Amend. Respondent Amick filed on January 18, 2023, a Response in Opposition to Appellants' Motion for Reconsideration and to Alter or Amend. By Form 4 Order (with explanatory memo attached) filed on May 16, 2023, the trial court informed counsel that oral argument would not benefit the Court and directed Respondents' counsel to prepare an Order denying Appellants' Motion to Reconsider. (Order dated May 18, 2023). The Lower Court's Order Denying the Appellants' Motion for Reconsideration and to Alter or Amend was filed on June 22, 2023. (Order dated June 22, 2023). Appellants' Notice of Appeal from the Order of October 25, 2022, and from the Order of June 22, 2023, was filed on July 19, 2023, with the Clerk of Court of Newberry County and filed on July 20, 2023, with this Honorable Court.

STATEMENT OF FACTS

A. Background Through 2016

The Newberry Lions Club was formed in 1928 as a South Carolina non-profit charitable corporation (Plaintiffs' Exhibit 1 and 2; Simpson deposition on 10/22/18, pp. 5-6). The object of the Lions Club is set forth in its Constitution and By-Laws: "...for service-minded people to serve their community without personal financial reward and to encourage and promote high ethical standards in commerce and private endeavors." (Plaintiffs' Exhibit 2).

The Lions Club property in Newberry County is known as "Lions Club Point", a peninsula on Lake Murray which included a small clubhouse where the Lions Club held its meetings and events. The property was acquired in the 1930's initially consisting of seven to ten acres. The Lions Club during the 1970's sold several lots of the land to members who built cabins or homes on those parcels.

Membership in the Lions Club had declined precipitously by 2015 (Crocker deposition, p. 2). By 2016, the Board of Directors of the Lions Club had stopped meeting at the clubhouse. (Simpson deposition on 10/22/18, p. 10). Beginning in 2015, the Board discussed selling the remaining Lions Club property (Simpson deposition on 10/22/18, pp. 11 and 18), which then consisted of approximately 5.5 acres (Plaintiffs' Exhibit 6). The Board of Directors deliberated about how the Lions Club should go about selling the property. (Plaintiffs' Exhibit 3 and Exhibit 4). Listing the property with a real estate broker was rejected because it would involve the cost of a realtor's commission (Crocker deposition on 10/22/18, p. 14).

Per vote of the Board of Directors, the property was appraised in 2016. (Plaintiffs' Exhibit 4). The Club had previously decided that the proceeds from a sale would go to charity (Crocker deposition on 10/22/18, p. 11; Simpson deposition on 10/22/18, p. 19).

At a Board Meeting on September 27, 2016, Amick (not a member of the Board) attended and expressed interest in buying the Lions Club property. (Plaintiffs' Exhibit 4). Lions Club President Gene Crocker stated that Amick had informally expressed his interest in buying the property several times prior to that (Crocker deposition, p. 10).

B. From January 2017 to June 1, 2017

The Appellants, residents of Charleston County, were not Lions Club members and they did not attend any Board Meetings. (Transcript, pp. 38, 62). They learned of the meetings only

from discovery during this litigation.[2] The minutes of the meeting of the Lions Club Board of Directors on January 24, 2017, reflect that Club President Crocker presented the Board with a proposed letter to the adjoining property owners "to send to them regarding the proposed sale of the property." (Plaintiffs' Exhibit 5, Simpson deposition, p. 28). Respondent Amick was not a member of the Board of the Lions Club in 2017, but he attended all but the April meeting that year. (Amick deposition, pp. 25-26; Plaintiffs' Exhibit 5). This was unusual, but he attended the meetings because he wanted to buy the property. (Amick deposition, p. 20). Simpson agreed that it would be highly unusual if a non-member attended board meetings with a "personal agenda." (Simpson deposition, p. 88).

When Crocker presented his proposed letter to the Board at the meeting, Amick spoke up and told the Board that "he wanted to have until June 1st to make a decision as to whether he could purchase [the property]" and the Board agreed to his request to extend the date until June 1st (Plaintiffs' Exhibit 5; Amick testimony, p. 250; Simpson deposition pp. 29-30). Crocker's letter was amended to provide for a deadline of June 1 and the letter, as amended, was approved by the Board at the meeting. (Simpson deposition, p. 30; Plaintiffs' Exhibit 6 and Exhibit 7).

The Lions Club letter, authored by President Crocker, amended by the Lions Club Board, and signed by Secretary Pete Simpson was sent to 12 adjoining property owners (Plaintiffs' Exhibit 9). The terms of the letters to each property owner were identical. (Plaintiffs' Exhibits 6 and 7). The specific terms and conditions of the offer of the Lions Club were stated in the letter as follows:

[2] This Statement of Facts is based upon the record developed in discovery. Mr. Rice testified that the only access he had to information about the Lions Club was his initial conversation with Simpson and the letter of June 5, 2017, from Lions Club attorney Verner. Everything else he learned during 2017, he received from lake neighbor Claude Schumpert, based on hearsay and rumors. He had seen no Board meeting minutes of the Lions Club or documents prior to discovery in this case. (Transcript, p. 62). The Lions Club never called him in 2017, nor did it answer the letters his attorney sent to the Lions Club in February, May, and November of that year. (Transcript, pp. 52, 59)

Dear _____:

The Newberry Lions Club was chartered in 1928 and has a rich history of serving Lions International and a large number of charitable causes in Newberry County and the state of South Carolina. From the beginning we had a large and enthusiastic membership, and many years ago arrangements were made to purchase property on Lake Murray for a club house. In subsequent years some of that property was sold to individuals for lake front homes.

At the present time, the Lions Club owns 5.5 acres including the club house. As with many civic clubs, the membership in the Newberry Lions Club has fallen in recent years. We no longer are able to use the club house as we once used it, and the maintenance of the property has become a burden on the current members. We have reluctantly decided to offer the property for sale. We have also decided to make the property available first to those individuals whose property adjoins the Lions Club property.

A recent plat was prepared, which we are including with this letter. Also, a recent appraisal determined a current value of $369,000.00 for this property. The club members have decided to ask $300,000.00 if we can make the sale without involving a realtor. If you have an interest in the property please let us know right away. We will be happy to answer any questions you might have. First consideration will be given to current members of the Newberry Lions Club.

As an additional note, the presence of a septic tank and well adds value to the property. Any encroachments will have to be settled after the property is sold.

This offer is valid until June 1, 2017, at which time the property will be advertised for sale to the public.

Yours truly,

Pete Simpson,
Secretary, Newberry Lions Club (Plaintiffs' Exhibits 6 and 7)

Each of the Lions Club officers acknowledged that the letter required any bid meet the following conditions: (1) payment of at least $300,000; (2) must be from an adjacent property owner; (3) acceptance of encroachments; (4) first consideration would be given to current Lions Club members; and, (5) the offer would be valid until June 1, 2017, after which time the property would be advertised for sale to the public. (Simpson deposition, p. 39; Crocker deposition, p. 17). President Crocker testified that this was a "hard deadline." (Crocker deposition, p. 69) and that the intent of the letter was that if Amick was going to buy the property he had to buy it with

encroachments by June 1 or it would be offered to the public. (Crocker deposition in *Schumpert*, p. 39). Mr. Amick submitted a bid in response to the Lions Club offer in February. (Plaintiffs' Exhibit 32).

While he did not initially receive the letter due to a mishap with his address, Mr. Rice testified that after learning about the offer letter from the Lions Club, he called Mr. Simpson, the signatory on the letter, and that Simpson told him that the sale was "going to the highest bidder." (Transcript, p. 46-47).[3] Based on that conversation, Mr. Rice had his attorney, Sid Boone, write a letter dated February 14, 2017, accepting all conditions and submitting a bid of $325,000. (Transcript, p. 47-48; Plaintiffs' Exhibit 13). Rice testified that he was willing to accept encroachments because these encroachments were matters known by all in the neighborhood for decades. (Transcript, p. 74). Rice also pointed out that "you buy properties all the time that have encroachments, whether it be easements or power line situations. As long as it's disclosed, it's not a problem." (Transcript, p. 48). The Lions Club never responded to Rice's bid that attorney Boone sent on February 14, 2017. (Transcript, p. 49).

Claude Schumpert is an adjacent landowner who received the Lions Club letter. He testified that after he received the letter, he called Pete Simpson who referred him to Club President Gene Crocker. Schumpert then called Crocker to inquire about the process for the sale and Crocker said the Lions Club was offering the property to the "highest bidder." (Transcript, p. 128). Schumpert made contemporaneous notes during the call and wrote on his copy of the offer letter "Gene Crocker" and "highest bid." (Plaintiffs' Exhibit 41). Crocker assured Schumpert in this call that the letter was intended exactly as Schumpert wrote: the property would be sold to the "highest bidder." (Transcript, pp. 128-129).

[3] Simpson then sent the letter to Rice. (Transcript, p. 44).

The Lions Club offer letter, according to its President Crocker, was described as an offer:

> "...which would remain until June the 1st prior to being publicly offered. So it was an exclusive offer until June the 1st for the lake property owners."
>
> (Crocker deposition, p. 29) (emphasis added)

Rice later heard (inaccurately) from Mr. Schumpert that Amick's bid was $325,000 and, if a member of the Lions Club offered the same price, that member would have the right to buy the property. (Rice testimony, pp. 49-50; Plaintiffs' Exhibit 14). Mr. Schumpert also had responded to the Lion's Club offer letter accepting all terms and conditions and agreeing to a price of $300,000. (Schumpert testimony, p. 129). He wrote an email to Mr. Rice on April 18, 2017, about a conversation he (Schumpert) had with President Crocker in which Crocker told him that Amick had matched the highest bid offered from other recipients of the offer letter and "he (Amick) has until June 1 to close on the offer." (Plaintiffs' Exhibit 14).[4]

Later, Mr. Rice, not having received any confirmation about the bid submitted on February 14, instructed his attorney Sid Boone write another letter dated May 15, 2017, which stated that the Rices were the successful highest bidder and that they wanted to close. (Plaintiffs' Exhibit 15). Because of inaccurate information he received from Schumpert, it further stated that if the Lions Club was using a different bid process, the Rices wanted to participate in same. The letter concluded by stating, based on the original offer of the Lions Club, "please do not make any conveyance to any parties except the Rices. Otherwise, we will be forced to bring a declaratory

[4] Secretary Simpson was asked in deposition if he told Appellant Rice that Lions Club was offering the property for sale to adjacent property owners until June 1 and he responded that he did not deny, but did not recall, that statement. (Simpson deposition, pp. 34-35). He said he did not recall telling Rice that the Lions Club was selling the property to the highest bid received from an adjacent property owner. (Simpson deposition, p. 35). At trial he denied telling Mr. Rice that.

judgment action to establish the Rices as the successful bidders for the property pursuant to their original bid." (Plaintiffs' Exhibit 15). Mr. Rice testified that, at this point, before the June 1 deadline, as the high bidder, he was ready to close. (Transcript, p. 54). Rice also stated that the May 15 letter of Mr. Boone was consistent with what Simpson told Rice about the highest bidder getting the property. (Transcript, p. 55).

At the May 23, 2017, meeting, Amick addressed the Board and withdrew his February bid stating that he no longer accepted the encroachments. This was confirmed by the Board minutes (Plaintiffs' Exhibit 5a) which reflect that Amick wanted "clear title" to the property. (Plaintiffs' Exhibit 5a). President Crocker acknowledged that the intent of the Lions Club offer letter was that whoever bought the property would have to buy it subject to the encroachments. (Crocker deposition in *Schumpert* case, p. 39). Mr. Amick had originally agreed to all conditions, including encroachments, in the Lions Club offer letter, but at the May 23, 2017, Board Meeting, he withdrew his bid because he did not want encroachments. (Crocker deposition in *Schumpert* case, pp. 53-54).

Amick understood, as he testified in deposition, that the Lions Club offer letter required a buyer to accept the property with encroachments (Amick deposition in *Schumpert* case, p. 33), and that on May 23, 2017, he told the Lions Club Board that he did not want to buy the property because of the encroachments. He admitted that by doing so before June 1, he withdrew his bid. (Amick deposition in *Schumpert* case, p. 35-36). In fact, Amick also testified at trial that it was "probably right" that he withdrew his bid at this meeting. (Transcript, p. 267). Amick further testified in his deposition that he understood that if he did not decide to buy the property by June 1, 2017, then the property could be sold to another adjoining landowner. (Amick deposition in *Schumpert* case, pp. 22-23).

As of the June 1, 2017, deadline of the Lions Club, the only bids by adjacent property owners were those of Appellants submitted by letter of February 14, 2017 (Plaintiffs' Exhibit 13) and of Schumpert. Crocker acknowledged that neither Rice nor Schumpert withdrew their bids as of the June 1 deadline (Crocker deposition, p. 66).

Nevertheless, the minutes of the May 23, 2017, Board Meeting reflect that a motion passed that "all offers were being withdrawn to sell the property." (Plaintiffs' Exhibit 5a). It then instructed its attorney to write "those who had shown an interest in purchasing the property" that "all offers to sell" were withdrawn.

C. From June 1, 2017, to February 22, 2018

After the June 1 deadline, the Lions Club attorney wrote a letter to Amick and to Sid Boone dated June 5, 2017, that the Newberry Lions Club Board of Directors "voted not to sell the property located at Lake Murray at this time because they are not able to convey a good fee simple marketable title thereto because of encroachments." (Plaintiffs' Exhibit 16 and Exhibit 17).

At their meeting on June 27, 2017, the Board of Directors initiated steps to correct an "encroachment issue." (Plaintiffs' Exhibit 5). In part, the Board was looking to sell a sliver of the property encroached upon by a structure belonging to an adjoining landowner, Joseph and Gena McCrackin. (Plaintiffs' Exhibit 20).

In fact, Rice learned from Schumpert in early June 2017 that the Lions Club was going to clear up the McCrackin easement. (Transcript, p. 53, Plaintiffs' Exhibit 38). Rice explained that although his bid had accepted encroachments he was not upset that the Lions Club was going to fix that encroachment because it was not necessary as he believed he had the highest bid and he had the property under contract (Transcript, pp. 53-54). He also learned the Lions Club would be getting a new survey, which he did not object to.

He still had heard no response from the Lions Club to his letters of February 14, 2017, and May 15, 2017. (Transcript, pp. 49, 50, 52). Because he was also aware that the Lions Club was inactive and did not function in the summer months (Transcript, p. 56), he waited for the survey notwithstanding his belief that he was high bidder. (Transcript, p. 56).

On November 16, 2017, Rice first learned in an email from Claude Schumpert that the Lions Club was planning to sell the property to Ray Amick for $300,00. (Plaintiffs' Exhibit 18, Rice testimony, p. 57). He then contacted his attorney, Michael Scardato, a partner of Sid Boone. Scardato wrote the Lions Club and its attorney, Jay Verner, a letter dated November 21, 2017, which stated:

> "...the Rices submitted the successful bid offer of $325,000...and reaffirming that the Rices are ready, willing, and able to follow through on their successful high bid." (Plaintiffs' Exhibit 19)

Neither the Lions Club nor its counsel replied to that letter from Scardato. (Transcript, p. 59).

The Lions Club Board held a meeting on November 28, 2017. Amick was present again despite not being a member of the Board. The entire letter from Scardato was read out loud by Crocker, and he testified in his deposition that Amick was present when he read the letter (Crocker deposition, p. 41). Notwithstanding this knowledge, Amick in January 2018 presented an offer to buy the property for $300,000.

At its January 23, 2018, meeting, the Lions Club Board voted to accept Amick's offer and sell the lake property to Amick for $300,000 (Plaintiffs' Exhibit 21), and Crocker wrote a letter of the same date to Amick that his offer of $300,000 was accepted. (Plaintiffs' Exhibit 22).

On February 14, 2018, a contract of sale was executed by the Lions Club and Amick. On February 20, 2018, the Summons and Complaint in this action was filed. (Plaintiffs' Exhibit 26). A Lis Pendens on the property was filed on February 21, 2018, at 1:48pm. (Plaintiffs' Exhibit 27).

Amick's deed, while signed on February 20, 2018, was recorded on February 22, 2018, at 3:55pm. (Plaintiffs' Exhibit 29).

At the close of Appellants' case, counsel for the Lions Club argued the position of the Lions Club as follows:

> "From the very beginning, there was a prejudice toward Mr. Amick because the Lions Club members, particularly the Board, wanted him to end up with the property..."
>
> (Transcript, p. 184)

Amick contacted attorney Lisa Smith in February 2018 to handle the closing for him. (Transcript, p. 211). She asked for the minutes of the Lions Club Board Meetings for 2017 (Transcript, p. 232) and her file reflected she received and reviewed what was presented: the minutes for meetings held in January, February, March, April, June, October, and December, as well as the minutes of the January 2018 meeting. (Transcript, pp. 232-235). The Lions Club did not provide to attorney Smith the minutes for the May or November 2017 meetings (Transcript, p. 236), nor had she ever seen any of the three letters that the Rices' attorney wrote to the Lions Club. (Transcript, pp. 237, 244). Regarding the letter of Appellants' attorney Boone dated May 15, 2017 (Plaintiffs' Exhibit 15), Smith stated that if she had seen it she "would have wanted to know more facts." (Transcript, p. 238). Smith was asked if the property can be sold with encroachments if a buyer and seller agree. She testified that "it would be a title issue but people can close with title issues." (Transcript, pp. 231-232).

Mr. Amick was presented as a witness for the defense at trial. He admitted it was "probably right" that he withdrew his offer on May 23 because he would not take encroachments. (Transcript, p. 267). He acknowledged that he did not close by the June 1 deadline and that, if he did not buy it, somebody else could buy it. (Transcript, p. 267).

Crocker testified at trial that he agreed that the Lions Club letter could be interpreted as an offer to sell. (Transcript, p. 289). He stated that he never showed the Lions Club attorney Verner any of the three letters from the Rices' attorney. (Transcript, p. 302).

The final defense witness at trial was Pete Simpson who testified that he did not respond to any of the three letters sent from Appellants' counsel and that he did not see any reason to give Amick's closing attorney Smith any of the letters from Appellants' counsel. (Transcript, pp. 317-318).

At the conclusion of the trial testimony, the trial judge stated that if he wanted closing arguments he would advise the parties (Transcript, p. 328). The Court did not reconvene the case for oral arguments. (Form 4 Order dated May 16, 2023).

STANDARD OF REVIEW

An action for specific performance of a contract lies in equity. Holly Woods Association of Residence Owners v. Hiller, 392 S.C. 172, 708 SE2d 787 (Ct. App. 2011); Fesmire v. Digh, 385 S.C. 296, 303-04, 683 SE2d 803, 807 (Ct. App. 2009) In an action at equity, heard by the trial judge alone, the appellate court can find facts in accordance with its own view of the preponderance of the evidence. Doe v. Clark, 318 S.C. 274, 276, 457 SE2d 336, 337 (1995).

The construction of written instruments is a question of law. *e.g.*, Clardy v. Bodolosky, 383 S.C. 418, 424–25, 679 S.E.2d 527, 530 (Ct. App. 2009); Zemurray v. Menos, 107 S.C. 361, 92 S.E. 1039 (1917). "A legal question in an equity case receives review as in law." Sloan v. Greenville County, 356 S.C. 531, 546, 590 S.E.2d 338, 346 (Ct. App. 2003). " Questions of law may be decided with no particular deference to the trial court." S.C. Dept. of Transp. v. M & T Enters. of Mt. Pleasant, LLC, 379 S.C. 645, 654, 667 S.E.2d 7, 12 (Ct. App. 2008). An appellate court may correct errors of law in both legal and equity actions. Id.

I. THE LOWER COURT ERRED IN FINDING AND CONCLUDING THAT THE EQUITIES FAVORED THE RESPONDENTS WHEN, IN FACT, THE EQUITIES FAVORED THE APPELLANTS, SUPPORTING AN AWARD OF SPECIFIC PERFORMANCE.

The Order of the trial court included only one paragraph about the equities and it erroneously concluded that the equities were in favor of Amick. (Order, p. 29). In doing so, it erroneously ignored the inequitable conduct of Amick and the Lions Club.

An action for specific performance is one in equity and in equity cases tried by a judge alone this court may find the facts in accordance with its own view of the evidence. Townes Association, Ltd. v. The City of Greenville, 266 .C. 81, 221 SE2d 773 (1976). Here, the greater weight of the evidence shows the equities clearly favor the Appellants. In fact, Appellants are the only parties in this proceeding who have done nothing wrong.

The trial court barely considered the balance of the equities presented at trial at all. The lower court declared the equities to favor Amick merely because it concluded Appellants are "sophisticated" and were represented by counsel. (Order of October 25, 2022, p. 29). It further erroneously found Appellants waited to assert their rights "until well after the Lions Club agreed to sell to Mr. Amick twice."

A party's sophistication or representation by counsel or lack thereof has no bearing on whether party's conduct is equitable, and while a party's delay in asserting a claim may have some relevance to an equitable matter, whether it does or does not is dependent first on whether the pleadings raise the issue of delay and, if so, whether the parties said to have been dilatory had knowledge of facts which supposedly should have led to more diligence.

Here, neither respondent raised any defense premised on delay in their pleadings, nor did either respondent raise at trial any issue of timing of Appellants' assertion of their claim to the property. Therefore, the lower court's finding is improper. Moreover, it disregards the fact that

Appellants were not Lions Club members, do not live in Newberry County, and were thus in no position to have knowledge of what the Lions Club was or was not planning to do with Amick and the property following its January 2017 letter. Appellants were instead completely ignored by the Lions Club who failed to communicate with Appellants despite Appellants diligently asserting their rights in letters to the Lions Club in May and November.

The record below simply does not support the trial court's findings. On the contrary, the trial court overlooked entirely the following facts indicating the equities favor Appellants:

a. Appellants have "clean hands"; whereas, the Lions Club has unclean hands in yielding to, and allowing, Amick to pursue his personal interest in buying the property for a reduced price by acquiescing in all of Amick's repeated requests to change the details of its offer to sell the Lions Club property despite sending the offer letter to the adjoining land owners;

b. Respondent Lions Club was well-aware of the fact that Appellant Lisa Rice's family spent their summers at Lions Club Point, that her late father was a former President of the Lions Club, and that buying the Lions Club property was of great interest to Appellants; yet, it completely ignored her repeated inquiries concerning her bid;

c. Lions Club officers knew Appellants (and Schumpert) would rely on the Lions Club letter and on what these officers said about the meaning of it– that the Lions Club intent was to sell the property to the highest bidder;

d. The Lions Club acceded to request after request of Amick to alter its conditions with respect to the sale without any notice to Appellants (or Schumpert) beginning with a personal request by Amick in January 2017 to extend the offer period to June 1;

e. The Lions Club on May 23, 2017, decided, without notice to Appellants (or Schumpert) to scrap the sale of the property after Amick stated at its board meeting that he no longer would accept the property with the encroachments (Plaintiffs' Exhibit 5a);

f. The Lions Club then, without Appellants' (or Schumpert's) knowledge, agreed to handle the encroachments for Amick (which was directly contrary to the Lions Club offer letter in January 2017) (Plaintiffs' Exhibit 5a);

g. Appellants agreed to purchase the property for $25,000 more than Amick; nevertheless, the concessions by Lions Club to Amick's demands at the January and May meetings were to benefit Amick, not the Lions Club;

h. The Lions Club ignored the June 1 deadline and the fact that as of that deadline Amick's bid had been withdrawn and Appellants' bid was highest received;

i. The Lions Club allowed Amick to attend all board meetings in 2017 (Plaintiffs' Exhibit 5) even though his only purpose in attending was to look after his own personal interest in trying to buy the property at a reduced price (Amick deposition, pp. 22-24);

j. The Lions Club knew that the Appellants were arms-length outsiders willing to pay more for the property, whereas Amick was an "insider" pursuing his personal agenda to purchase it for less;

k. Despite the Lions Club officers' acknowledgment that Appellants' bid complied with each of the conditions set forth in the January 2017 letter and even though their bid was the highest received by the Lions Club, no one ever communicated to Appellants that their bid was not compliant with the terms of the offer by Lions Club or that it would not be considered (Crocker deposition, p. 40, 61);

l. Even though the Lions Club has acknowledged that it wanted to sell for the "top net proceeds" (Crocker deposition, pp. 62-63) by offering the sale to adjoining landowners, its conduct has been to give favorable treatment to Amick whose bid was $25,000 less than Appellants;

m. The Lions Club, after correcting encroachments at Amick's special request during 2017, accepted the offer of Amick in January 2018 to buy the property for $300,000, (without notice to or knowledge of Appellants) even though it knew that Appellants were high bidders as of the date of the deadline and knowing that counsel for Appellants had written the Lions Club claiming a right to the property and threatening suit;

n. The Lions Club knew that Appellants lived in Charleston County and were not privy to what was happening at the 2017 Board Meetings of the Lions Club or of Amick's lobbying campaign to get concessions from the Lions Club so that he could buy the Lions Club property;

o. Both the Lions Club and Amick knew that Appellants asserted a binding contract for the purchase of the property (Crocker deposition, p. 41). Nevertheless, they both proceeded to surreptitiously conclude their side deal in hopes of defeating Appellants' claims to the property;

p. The Lions Club and Amick understood that Amick had until June 1 to make a decision about buying the property (Crocker deposition, p. 18) and that the Board had voted that if Amick did not close by June 1, other bids/offers would be considered (Amick deposition in *Schumpert*, pp. 22-23, 29; Crocker deposition, p. 30). Notwithstanding this, the Lions Club ignored the June 1 deadline at which time the Appellants were high bidders;

q. Appellants, through counsel, wrote three letters to the Lions Club during the period January through November 2017, all of which were ignored by the Lions Club. By ignoring Appellants, the Lions Club has forced them to bring suit;

r. Even though Appellants were willing to pay more than $325,000 for the property, the Lions Club never approached the Appellants to ascertain what amount they would pay. (Transcript, p. 51);

s. The Lions Club acted inequitably when, after Amick's closing attorney Smith asked for the minutes of the board meetings for 2017, it failed to give her copies of the minutes for the May meeting (when Amick rescinded his offer) and the November meeting when Plaintiffs' Exhibit 19 was read in Amick's presence (Transcript, pp. 237-238);

t. The Lions Club acted inequitably in failing to give attorney Smith any of the letters from Plaintiffs' counsel to the Lions Club threatening suit. (Plaintiffs' Exhibits, 13, 15, and 19; Transcript, p. 237-238); and,

u. The Lions Club never showed their attorney James Verner the three letters from the Rices' attorney (Transcript, p. 302), which accepted all encroachments. This shows their secrecy and intent about receiving alleged legal advice that it was unable to sell the property with encroachments and falsely using this "advice" (on the issue of a fee simple marketable title with the existence of the encroachments) as an pretext to withdraw its "offer" and avoid a sale to Appellants, and later carryout a "side deal" to sell to Amick in February 2018, despite the fact that Amick's closing attorney rightly testified at trial that "people can agree to close with title issues (encroachments)." (Transcript, p. 232).

The record is clear. The Lions Club wanted to sell the property because it was too much a burden upon its dwindling membership. Amick wanted to purchase it, but did not readily want to pay what the club thought it was worth. Knowing in January 2017 that the plan was for the club to offer it for sale to others, he asked that the club give him until June 1, 2017, to decide if he wanted to go through with the purchase. The club agreed to that timeline but decided it would give

the adjoining land owners an opportunity to bid as well, given the Lions Club's desire was to obtain the "top net proceeds". Despite receiving a higher bid from Appellants, the Lions Club ultimately relented to unending pressure from Amick in his pursuit to obtain the property. In doing so, both Amick and the Lions Club acted inequitably and underhandedly in a joint effort to defeat Appellants claim to the property.

Counsel for the Lions Club acknowledged the mutual effort when the following statement was made:

> "...I think one thing is critically important to this, from the very beginning there was a prejudice toward Mr. Amick, because the Lions Club members, particularly, the board, wanted him to wind up with the property." (Transcript, p. 184) (emphasis added).

This explains why the Lions Club was ignoring the letters of counsel for Appellants, why it was acquiescing in all of Amick's personal demands which were not in the Lions Club's interest, and why it surreptitiously entered a side deal for Amick to buy the Lions Club property in February 2018.

This Court's de novo review of this appeal must consider all of the equitable circumstances involved. Shirey v. Bishop, 431 S.C. 412, 427, 848 S.E.2d 325, 333 (Ct. App. 2020). While the salient issues concerning the formation of the contract between the Lions Club and Appellants are matters of law, the equities in this case favor Appellants and support an order of specific performance. Id. (holding that "specific performance of a contract to sell real property will be ordered when the contract is fair and was entered into openly and aboveboard.").

II. THE LOWER COURT COMMITTED REVERSIBLE ERROR IN FINDING AND CONCLUDING THAT THE LIONS CLUB LETTER OF JANUARY 2017 WAS NOT, IN FACT, AN OFFER TO SELL TO THE HIGHEST BIDDER VALID UNTIL JUNE 1, 2017, AND THAT AS OF THAT DEADLINE, THE HIGHEST BID, AND THEREFORE, THE RIGHT TO THE SUBJECT PROPERTY, BY ORDER OF SPECIFIC PERFORMANCE, BELONGED TO APPELLANTS.

A. The Statements Made by the Lions Club President and Its Secretary Admitting that the Offer Letter was an Offer to Sell to the Highest Bidder Were Disregarded by the Lower Court and Were Erroneously Excluded from Admission into Evidence Based on the Parol Evidence Rule and the Statute of Frauds.

The trial court erroneously found that the parol evidence rule and the statute of frauds apply so as to prevent consideration of the extrinsic evidence proffered by Appellants. It did so by sustaining objections to such evidence made by Amick. This was reversible error.

The specific performance cause of action tried by Judge Hayes concerns an agreement between Appellants and Respondent Lions Club. Respondent Amick is not a party to the agreement in dispute. He is a stranger to that agreement, and, as such, cannot assert the statute of frauds or the parol evidence rule. A third party to an alleged agreement cannot assert the statue of frauds. *e.g.*, Hatcher v. Harleysville Mut. Ins. Co., 266 S.C. 548, 225 SE2d 181 (1976) (the statue of frauds is a personal privilege of the parties to the agreement, and a stranger to the agreement cannot avail himself of the fact that the statue of frauds renders the contract unenforceable). Parol evidence rule cannot be applied in a controversy between a third party and one of the parties to the agreement in question and, thus, parol evidence is admissible. Baptist Foundation for Christian Edu. v Baptist College at Charleston, 282 SC 53, 317 SE2d 453 (Ct. App. 1984); Nelson v. United Fire Ins. Co., 275 SC 92, 267 SE2d 604 (1980); City of Orangeburg v. Buford, 227 S.C. 280, 284, 87 S.E.2d 822, 824 (1955) (holding the rule that parol evidence is one for the benefit of the parties to the instrument and is generally limited to them).

The Lions Club did not make a single objection to any evidence at trial. A party's failure to make an objection at the time evidence is offered constitutes a waiver of the right to object to that evidence. Carson v. CSX Transp., Inc., 400 S.C. 221, 734 S.E.2d 148 (2012). Therefore,

because Amick has no standing to make such objections, there is no basis for excluding any of the extrinsic evidence proffered by Appellants and all such evidence must therefore be considered.

In its order denying Appellants' motion to alter amend dated June 22, 2023, ruled that Appellants could not raise the issue of Amick's standing to object to the proffered extrinsic evidence in a post-trial motion.[5] This is incorrect. It is well settled that a party preserves the issue of the admissibility of evidence excluded by ruling of the trial court by proffering such testimony on the record, and the appellate court will consider the question where the record on appeal shows fairly what the excluded testimony would have been. *e.g.*, State v. Santiago, 370 S.C. 153, 163, 634 S.E.2d 23, 29 (Ct. App. 2006). All of the excluded evidence was placed on the record at trial and thus appears in the transcript, which clearly provides this Court with the ability to determine whether the testimony was properly excluded. It was not and the Court should reverse.

While the lower court's order purports to consider and dispense with the extrinsic evidence proffered by Appellants, it completely fails to consider the very evidence Appellants' have pointed to at every stage of the proceeding as supporting their positions in this case: the testimony of Appellant Joe Rice and witness Claude Schumpert concerning their respective phone calls with Secretary Pete Simpson and Lions Club President Gene Crocker.

Both Secretary Simpson and President Crocker, as set forth above, told Appellant Rice (Transcript, pp. 45-46, 53, 79-80, 90, 116) and witness Schumpert (Transcript, pp. 127-132) that the intent of the Lions Club offer letter was to sell the property to the highest bidder. Simpson was the signatory on the offer letter and Crocker was its author. They are officers of Respondent Lions Club, and as such they are "party-opponents." Pursuant to the provisions of Rule 801(d)(2),

[5] The Lions Club's failure to object could not be raised by Appellants until the trial ended. Appellants would have raised this issue at closing argument stage, but the Court declined to have closing arguments. (Transcript, p. 328, Form 4 Order dated May 16, 2023). Thus, the failure of the Lions Club to object to the extrinsic evidence was raised in Appellants' Rule 59 Motion. (Plaintiffs' Motion to Reconsider dated November 4, 2022).

admissions by party-opponents concerning a matter within the scope of their agency are admissible. Since the Lions Club January 2017 letter appears to an objective reader to be an offer to sell to the highest bidder, both of these officers have confirmed that fact and that is the very reason why the Rice Bid of attorney Boone used the term "bid." (Plaintiffs' Exhibit 13). Rice talked to Simpson before he received the offer letter and his response via Sidney Boone confirmed that. Also important is that contemporaneously with his call with Mr. Crocker wherein Mr. Crocker confirmed that the intent of the Lions Club, as set out in its letter, was to sell to the highest bidder, Mr. Schumpert he wrote on his copy of the letter "highest bid...Gene Crocker." (Plaintiffs' Exhibit 41). (Transcript, pp. 127-128). This evidence is important and should not have been excluded.

There are also reasons why the application of the statute and the parol evidence rule are inappropriate based on the facts in this case, even if Amick could assert them. First, it is important to understand the paradigm Respondents want to impose regarding the rule. They have essentially taken the position: "Judge, you must consider our extrinsic evidence showing that 'offer' doesn't mean 'offer' because these are lay people, etc., but you must not consider anything extrinsic from Plaintiffs." Clearly, that is both unfair and a misstatement of the law. If the parol evidence applies to anything, it would exclude their attempts to "explain" how the Lions Club did not intend an "offer" when its letter explicitly said it was intended as an "offer."

Second, the Crocker and Simpson statements regarding a sale to the highest bidder do not vary or contradict anything in the January 2017 letter. The parol evidence rule only applies to exclude evidence which tends to (1) vary or contradict the (2) material terms of a writing that is BOTH (3) unambiguous; and, (4) fully integrated (contains all of the material terms and is intended to contain all such terms). *See*, Rodarte v. University of South Carolina, 419 S.C. 592, 799 S.E.2d 912 (2017). It is, therefore, fairly limited in its application. Where the written evidence of a

contract does not contain all of the terms of the transaction between the parties, parol evidence (not contradicting the writing) is admissible for the purpose of showing the true intent of the parties by use of the terms set forth in the instrument. *e.g.*, Parr v. Parr, 268 S.C. 58, 231 S.E.2d 695 (1977). These statements, rather than contradict, explain the Lions Club's intent as expressed by the terms of the letter itself.

Third, as to Appellants' extrinsic evidence , the rule does not apply. Here, you have Respondents attempting to make "offer" mean something other than its plain, ordinary meaning. To find the letter is not an offer despite it saying it is twice, the lower court must have considered the Lions Club officers' testimony that it was a mere invitation for offers. If the court is to consider that evidence, then the court must also consider the extrinsic evidence proffered by Appellants. In the event "offer" is to mean something else, an ambiguity arises. Parol evidence is competent to elucidate the parties' intent where a writing is ambiguous. Frewil, LLC v. Price, 411 S.C. 525, 530, 769 S.E.2d 250, 253 (Ct. App. 2015) (noting that it is virtually impossible for a contract to encompass all of the many possibilities which may be encountered by the parties, and holding that neither law, nor equity, requires every term or condition to be set forth in a contract and where certain situations are unaddressed in a contract, the court may look to the circumstances surrounding the bargain, i.e., extrinsic evidence, as an aid in determining the parties' intent.), *see* also, Soulios v. Mills Novelty Co., 198 S.C. 355, 17 S.E.2d 869 (1941) (holding that where a writing is silent on any issue pertinent to the agreement, then parol evidence is admissible to reveal the intent of the parties).

Fourth, there are no parts of the writings in this case which show the parties intended the letters to include each term of the deal. So, the rule does not apply to the Crocker and Simpson statements. Frewil, *supra*.

In short, if the court is to consider testimony from Lions Club board members about their "true" intent regarding the sale of the property set out in their letter, the court must also consider Rice and Schumpert's testimony which directly contradicts it. It cannot exclude the evidence. *See* 29A Am. Jur. *Evidence* § 1140 (noting the general rule that if one party is allowed to offer parol evidence of the facts and circumstances of the parties leading up to and connected with the making of the writings, the other party may introduce evidence as to the same matters, even if such evidence tends to vary or contradict the writing). The Crocker/Simpson statements proffered by Appellants do not vary or contradict the letter, whereas, respondents' "'offer' doesn't actually mean 'offer'" testimony does contradict the writing.

Fifth, the parol evidence rule does not apply to parol evidence of subsequent or after-the-fact discussions. *e.g.*, Adamson v. Marianne Fabrics, Inc., 301 S.C. 204, 391 S.E.2d 249 (1990). The Crocker and Simpson statements recounted by Mr. Rice and Mr. Schumpert were made subsequent to the writing and delivery of the January 2017 letter and explain why Appellants responded as they did. The letter of the Appellant's attorney used the term "bid" because just before the letter Simpson had told Mr. Rice that the intent of the offer letter was to sell to the highest "bidder." (Transcript, pp. 45-47).

Finally, the parol evidence rule does not apply in situations where extrinsic evidence is given for the purpose of connecting several written instruments and showing that they are all part of one transaction. 29A Am Jur. *Evidence* § 1106. Appellants did not actually get the letter initially; Mr. Rice, instead, first had the phone call with Simpson; and, only after that call does Mr. Boone send the Lions Club the Rice Bid. (Transcript, pp. 43-48). The phone call with Simpson is necessary to show that the two are interconnected.

The court further erroneously ruled that these admissions against intent were excluded from evidence based on the statute of frauds. The statute of frauds, codified in S.C. Code § 32-3-10, provides that no action can be brought whereby:

> ...(4) "to charge any person upon any contract or sale of lands... unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or someone thereunto by him lawfully authorized."

In this case, the contract consists of the Lions Club offer letter and the Rice Bid. Thus, there are writings in this case, which satisfy the statute. The dispute concerns the meaning of such writings. Appellants have merely proffered the evidence of the Crocker and Simpson phone calls in support of their position in that dispute.

To satisfy the statute of frauds, there must be writings that reasonably identify the subject matter of the contract, sufficiently indicate a contract has been made between the parties, and state with reasonable certainty the terms of the agreement. Here, both the Lions Club letter and the Rice Bid sufficiently identify Lions Club point as the subject matter, and lay out the purchase price to be paid and other stipulations. Accordingly, the statute of frauds is satisfied and cannot serve as any basis to exclude the testimony regarding the Crocker and Simpson calls.

The trial court's order cites several cases for the proposition that no parol evidence is admissible in cases where letters between contracting parties form the writings required by the statute of frauds. Generally, resort to extrinsic evidence is improper where the statute of frauds applies, but there are exceptions where such evidence is admissible. The trial court's order cites several cases for the proposition that no parol evidence is admissible in cases where letters between contracting parties form the writings required by the statute of frauds. While it is true that resort to parol evidence cannot be had to prove the essential terms of the contract, Appellants did not

offer the extrinsic evidence to prove the essential terms of the contract as those are clearly and explicitly set forth in the Lions Club January 2017 letter and the Rice Bid. There, the parties, property, and price are all clearly identified, along with other conditions such as the matter of the encroachments and deadlines. Instead, Appellants offered the evidence concerning the Crocker and Simpson calls, not to contradict or vary the terms used by the Lions Club or the Rice Bid, but as "simply explanatory of what the parties meant by the words" they used. Parr, *supra*; see also Frewil, *supra.*

Even if the statute of frauds did apply so as to exclude the testimony regarding the Crocker and Simpson phone calls, the Lions Club is estopped to assert it in the first place. *See*, *e.g.*, Florence Printing Co. v. Parnell, 178 S.C. 119, 182 S.E. 313 (1935) (holding that seller making oral agreement under contract otherwise subject to the statute of frauds which is relied upon by buyer to his detriment cannot avoid enforcement of such agreement by claiming benefit of statute). After learning of the Lions Club letter offer, Appellant Joe Rice called Lions Club Secretary who confirmed the intent of the letter was to offer to sell the property to the highest bidder. Appellants relied on this statement in obligating themselves to the purchase of the property for $25,000 more than the minimum purchase price set by the Lions Club. These statements further caused Appellants to conduct themselves differently than they otherwise would have in order to protect their interests and claims to the property. Respondents are, therefore, estopped from asserting the Statute of Frauds.

B. The Lions Club's Intent to Offer the Property for Sale to the Highest Bidder was Clear from Its "Offer Letter," as well as from the Facts in the Record, and Its Offer was Accepted by Appellants.

The trial court found and concluded that the Lions Club letter sent to adjoining landowners after the Board Meeting on January 24, 2017, was not an "offer" to sell. (Order, p. 11). It further

ruled that if it was an offer, the Appellants did not accept it. (Order, p. 11). Based on the record in this case, the trial court committed reversible error.

(1) The Lions Club Letter was an Offer.

Under South Carolina law whether a communication constitutes an "offer" is based on an objective standard. In other words, a communication is an offer if a reasonable person, reading it as a manifestation of the offeror's willingness to enter a bargain, would consider that his assent to that bargain is invited and will conclude it. Prescott v. Farmers Telephone Co-Op, Inc., 335 S.C. 330, 516 S.E.2d 923 (1999), *citing*, RESTATEMENT (SECOND) OF CONTRACTS § 24 (1981). The key concept in determining whether a communication is an offer is the giving of the addressee the "apparent power to conclude a contract without further action by the other party." RESTATEMENT (SECOND) OF CONTRACTS § 24, comment a (1981) . Thus, the offering party's subjective "intention" is irrelevant to the question. Instead, the question is determined by looking to the objective import of the language of communication, and the offeror is bound by the reasonable perception of his manifested intention. RESTATEMENT (SECOND) OF CONTRACTS § 29, comment a (1981) .

The manifestation of the Lions Club's intention to offer the land for sale is contained in the January 2017 letter to the adjoining landowners. The letter itself uses the term "offer" twice. The letter states that the Lions Club had "decided to offer the property for sale. We [referring to the Lions Club] have also decided to make the property available first to those individuals whose property adjoins the Lions Club property." (Plaintiffs' Exhibit 6). The letter went on to provide a recent survey depicting the exact property offered, a minimum price $300,000 and concluded with the following: "[t]his offer is valid until of June 1, 2017, at which time the property will be advertised for sale to the public." In doing so, the letter properly describes all essential terms of the contract.

The letter gave no indication that any further action on the part of the Lions Club was necessary to manifest its assent to any resulting contact. It did not reserve the right to reject any bid or mention any further thing the Lions Club needed to do in order to form an agreement. Any reasonable person reading this letter would understand it to be an offer to sell to the highest bidder. This is particularly true given that the Lions Club itself characterized the letter as an "offer".

Yet, the trial court ruled that the June 2017 offer letter did not constitute an offer because the Lions Club did not intend it to be an offer, but rather the letter "merely opened negotiations" for the property. There is no indication of that in the letter, which is the only manifestation of the Lions Club's intent communicated to the adjoining landowners and therefore the only evidence relevant to the Court's determination of the question. The letter does not contain any language which invites anyone to make an offer or which evidences a reservation to reject any or all bids.

In arriving at this interpretation, the trial court both disregard the terms actually used and supplied words that do not appear in the letter. This was error. The court is without authority to consider a party's secret intentions, and therefore words cannot be read into or out of a contract to impart an intent unexpressed by the writing itself. *See* Blakeley v. Rabon, 266 S.C. 68, 221 S.E.2d 767 (1976). Therefore, the January 2017 letter constitutes an offer acceptable by compliance with its terms.

Respondents argued below that the letter was sent to multiple recipients or that no offer can be made to more than one addressee. This was mistaken. An offer may create separate powers of acceptance in an unlimited number of persons, and the exercise of the power by one person may or may not extinguish the power of another. RESTATEMENT (SECOND) OF CONTRACTS § 29, comment b (1981). Where only one acceptance is to be selected, various methods of selection are possible such as the highest bidder as is the case at bar. Id. In those circumstances, each bid operates as an

acceptance creating rights and duties in both the offeror and the party submitting the bid conditional on no higher bid being received. Id. Here, the Lions Club letter is, according to its terms, an offer to sell to the highest bidder.

Nevertheless, the lower court erroneously adopted the Lions Club's subjective contention that the January 2017 letter is not an offer but simply an invitation to bid. Lions Club's position as to intent is based on extrinsic evidence.[6] On the contrary, the letter repeatedly expressly purports to be an offer made to the recipients. The lower court erred in finding an intention in the letter that does not arise from the language actually used. Again, the trial court has no power to do so. Blakeley, *supra*.

The trial court further supported its finding that the Lions Club letter was not an offer by referring to the terms used in the Rice Response (as defined by the Order). (Order, p. 14). The court placed significance on the Appellant's use of the term "bid" in their letter of February 14, 2017, responding to the Lions Club Letter. This was error. Again, whether the Lions Club letter was an offer or not cannot be determined with reference to the Rice Response (*See* RESTATEMENT (SECOND) OF CONTRACTS § 29, comment a (1981)), but can only be determined by reference to the objective meaning of the letter itself. Prescott, *supra*. Nonetheless, even assuming arguendo that the Appellants February 2017 response is relevant to the question, Appellants' use of the term "bid" only further supports the Appellants' position because this is exactly the term customarily used to describe an acceptance in the context of a sale to the highest *bidder*. The Court overlooks that the use of the term "bid" in the Rice Response is intended in the plain, ordinary meaning of such term in the context of an auction to the highest bidder as explained by Joe Rice in his trial testimony. By making a "bid" in a sale to the highest bidder, one is agreeing to pay the specified amount for

[6] If the offer letter was an "invitation to bid," according to the Lions Club, such interpretation of intent would have to come from extrinsic evidence, as it is not expressed in the letter.

the purchase of the auctioned property on the terms first indicated in the notice thereof and can be held liable in contract for payment of his bid. *See* 6 S.C. Jur. *Auctions and Auctioneers* § 24 (2022). *See* also, Cauthen v. Cauthen, 79 S.C. 456, 61 S.E. 112 (1908); Boinest v. Leignez, 31 S.C.L. (2 Rich.) 464 (1846). Thus, use of the term "bid" by the Rices does not imply any meaning other than that associated with the term in the context of the "sale to the highest bidder" described by the Lions Club officers to Joe Rice and Claude Schumpert.

The lower court also found that the Lions Club letter could not be an offer despite its description to that effect because it stated that "[f]irst consideration will be given to current members of the Lions Club." The court below interpreted this language to mean that "more work remained before concluding a bargain". There is nothing about this language or any other portion of the letter which imports this meaning, and the court did not attempt to cite any. Instead, the lower court overlooked that such phrase, appearing in the letter just after the "asking" or minimum price of $300,000, can only reasonably be interpreted to mean that any tie among the bids received would go to the Lions Club member. This interpretation is supported by testimony in the record regarding Lions Club officers' description of the Lions Club intent to sell the property to the highest bidder.

Both the officer drafting the letter (Gene Crocker) and the officer signing it (Pete Simpson) told Claude Schumpert and Joe Rice, respectively, that the intent of the letter and that of the Lions Club was to sell the Property to the highest bidder who agreed to pay at least $300,000, accepted the encroachments, and submitted their bid prior to June 1, 2017. (Transcript, p. 80). While it is true, as the Court notes, that these officers denied that they made these statements to Rice and Schumpert at trial, these very same officers admitted that the letter can be properly construed as constituting an offer to sell. (Crocker deposition, pp. 51-52). Crocker testified at his deposition

that the offer letter was not ambiguous in expressing that Lions Club's intent to offer the property for sale, that the offer was valid until June 1, and that the letter "could be interpreted" as an offer to sell. (Crocker deposition in *Schumpert*, pp. 51-52).

The Court further ignored the incentives at play with regard to the denials of these officers in light of the fact that Amick has brought crossclaims against the Lions Club for damages, including the $300,000 purchase price, plus attorney's fees and costs, if Appellants are awarded specific performance, an outcome that becomes unavoidable if the officers admit that Joe Rice and Claude Schumpert are telling the truth in reporting their conversations regarding the January 2017 letter. It is no small wonder then that they testified as they did.

Where the actual terms of the letter are juxtaposed with the greater weight of the evidence in the record regarding these conversations, it is clear the Lions Club letter was exactly what its author and signatory said it was: an offer to sell to the highest bidder.

(2) Appellants' February 2017 Response was an Acceptance.

Acceptance of an offer is itself a manifestation of assent to the terms thereof made by the offeree in the manner invited or required by the offer. Electro-Lab of Aiken, Inc. v. Sharp Constr. Co. of Sumter, Inc., 357 S.C. 363, 593 S.E.2d 170 (Ct. App. 2004), *citing*, RESTATEMENT (SECOND) OF CONTRACTS § 50 (1981).

In response to receiving the Lions Club January 2017 offer letter, Appellants counsel and attorney in fact wrote the Lions Club placing a bid for the purchase of the property for $325,000 and accepted all conditions imposed by the Lions Club letter ("Rice Bid"). The trial court erroneously found the Rice Bid was not an acceptance because it "described itself as a 'bid'" and "added additional terms."

As noted above, the Lions Club letter required that any bid be at least $300,000, accept the conditions (i.e., encroachments) set in the letter, and be made before June 1, 2023. The Rice Bid complied with each term: (a) it constituted the highest bid ($325,000) to the Lions Club offer; (b) it accepted all conditions in the Lions Club letter; and, (c) it was submitted over 3½ months before the June 1 deadline.

The lower court found that the Rice Bid attempted to add new terms in violation of the "mirror image" rule. Specifically, the trial court incorrectly concluded that the Rice Bid added three additional conditions: "good title", " 30 days to close", and "different price". While it is true that the Rice Bid mentioned that it was "subject... to the property having good and marketable title, that Appellants would need 30 days to close, and bid the $325,000, none of these matters amount to different or additional terms or conditions in violation of the mirror image rule.

In order to constitute a violation of the mirror image rule, the purported acceptance must vary the terms of the offer. RESTATEMENT (SECOND) OF CONTRACTS § 59 (1981). The Rice Bid does not vary any term of the Lions Club letter. The Rice Bid does nothing more or less than expressly state terms first implied in the Lions Club letter by law. The Rice response's reference to "needing 30-days notice to close the sale" did not add an additional condition; rather, it identified what the Rice's perceived to be a reasonable time for closing. Where no time is provided in a contract a "reasonable" time is imputed. *See*, *e.g.*, Cloniger v. Cloniger, 261 S.C. 603, 193 S.E.2d 647 (1973) (holding that in a parol contract for the sale of land where time for performance is not specified, the law implies that "it shall be done within a reasonable time, which is sufficient"), *citing*, McMillan v. McMillan, 77 S.C. 511, 58 S.E. 431 (1907); *See* also, Smith v. Spratt Machine Co., 46 S.C. 511, 24 S.E. 376 (1896); Drews Company v. Ledwith-Wolfe, 296 S.C. 207, 371 S.E. 2d 532 (1988).

Contrary to the court below, the Rice Bid that the purchase was "subject only to the property having good and marketable title" was not a material change of any condition provided in the Lions Club letter because marketable title is a fundamental requirement of any seller's performance of a real estate contract and is therefore a covenant implied by law. *See* Kennedy v. Gramling, 33 S.C. 367, 11 S.E. 1081 (1890). *See* also *e.g.*, Sales Intern. Ltd v. Black River Farms, Inc., 270 S.C. 391, 242 S.E.2d 432 (1978) (holding that it is axiomatic that a purchaser cannot be required to take unmarketable title), *citing*, Laurens v. Lucas, 27 S.C.Eq. (6 Rich) 217 (1854), 77 Am. Jur. 2D *Vendor and Purchaser* § 168, and 57 A.L.R. 253, 1301, et seq. (1928), and followed by, Sanders v. Costal Capital Ventures, Inc., 296 S.C. 132, 370 S.E.2d 903 (Ct. App. 1988). It is simply black letter law that the acceptance of an offer to sell land which makes no specifications or limitations as to title is not made conditional merely by including a provision requiring marketable title. *See*, 2 WILLISTON ON CONTRACTS § 6:15 (4th ed.); 1 Corbin, Contracts, § 86.

Finally, the addition of $25,000 over and above the "asking" price does not constitute an additional condition in violation of the mirror-image rule. Instead, it complies with the minimum price. After all, if the Lions Club condition you must pay $300,000, then by paying $325,000, you have complied with that condition. If anything, this is the emphatic acceptance of the price demanded. It is, truly however, evidence that further corroborates the testimony in the record that the officers of the Lions Club told both Joe Rice and Claude Schumpert that the intent of the Lions Club letter was to offer the sale of the property to the highest bidder. Therefore, rather than being a reason to rule against Appellants, it is evidence that makes the testimony of Rice and Schumpert all the more credible. After all, why else would an otherwise rational person volunteer an additional $25,000?

In ruling that the Rice Bid was not an acceptance, the lower court places significance on the use of the term "bid" indicating that it is evidence that the Rice Bid was not an acceptance. The court, by ignoring and excluding the statements of the Lions Club officers that the letter was intended as an offer to the highest bidder, overlooked the context of the use of that term. Where the statements of the Lions Club officers made to Rice and Schumpert are considered in tandem with the terms of the Lions Club letter indicating a sale to the highest ***bidder***, the use of the term "bid" leads to the opposite conclusion. Rather than use of the term "bid" constituting a basis on which to deny Appellants relief, it is instead all the more corroboration of the evidence in the record that a sale to the highest bidder is precisely what the Lions Club intended. (Deposition of Gene Crocker, pp. 62-63) (getting the top net proceeds was important.); (Deposition of Gene Crocker, p. 47 (witness agreed that it might have been prudent to get the most money to go to charity); and, Deposition of Gene Crocker, pp. 62-63 (board member thought it should go to highest offer).

The lower court further emphasized that Black's Law Dictionary defined the term "bid" as an "offer", and therefore, the court reasoned that an "offer" cannot be an acceptance. This emphasis was misplaced. The definition of the term "bid" is nothing more or less than "a statement of what one will give or take for something". Merriam Webster.com Dictionary, https: www.merriam-webster.com/dictionary. Another dictionary may use different terms in its definition of "bid", the point being that what words are used to define a term in any given dictionary should not form the basis for the court's conclusion as to whether the Rice Bid constitutes their acceptance, particularly in the absence of any consideration of the context in which the term is used. When such context is considered, the definition cited in the court's order is irrelevant.

The use of the term "bid" in the Rice Bid is intended in the plain, ordinary meaning of such term in the context of an auction to the highest bidder as explained by Joe Rice in his trial testimony. By making a "bid" in a sale to the highest bidder, one is agreeing to pay the specified amount for the purchase of the property on the terms first indicated in the notice thereof and can be held liable in contract for payment of his bid. *See* 6 S.C. Jur. *Auctions and Auctioneers* § 24 (2022). *See* also, Cauthen v. Cauthen, 79 S.C. 456, 61 S.E. 112 (1908); Boinest v. Leignez, 31 S.C.L. (2 Rich.) 464 (1846). Thus, use of the term "bid" by Appellants does not imply any other meaning other than that associated with the term in the context of the "sale to the highest bidder" described by the Lions Club officers to Joe Rice and Claude Schumpert.

The lower court further erroneously concluded that the Rice Response did not manifest an acceptance because their attorney, Sidney Boone, "did not purport to act as Joe Rice's attorney-in-fact but as counsel for the Rices." The court ignored evidence, uncontradicted in the record, that Mr. Boone was and is the attorney-in-fact for Joe Rice under a power of attorney dated August 17, 2004. (Plaintiffs' Exhibit 46).

The court further erroneously concluded that "[a]ttorneys engaged as counsel do not ordinarily bind their clients through letters sent on their behalf...". (Order, p. 17, dated October 25, 2022). In fact, the general rule is quite the opposite. The acts of an attorney are directly attributable to and binding upon his client. *e.g.*, Costas v. First Federal Sav. and Loan Ass'n, 283 S.C. 94, 321 S.E.2d 51 (1984). This is particularly true, as is the case here, where the client ratifies the actions of the attorney and confirms the attorney's authority. Mr. Rice confirmed that Mr. Boone was fully authorized to act on Appellants' behalf. (Transcript, pp. 48, 83-85, 88; Plaintiffs' Exhibit 46).

The lower court further erred in ruling that Boone was not acting at Rice's attorney-in-fact (Order, p. 17) but only as attorney for Appellant. The court's finding in this respect is error as there is no evidence in the record regarding the subject, apart from the testimony of Joe Rice affirming the Mr. Boone's authority (Transcript, p. 48), which is obviously contrary of the court's finding.

For the reasons stated above, the Appellants' February 14, 2017, letter constitutes an acceptance of the Lions Club offer to sell the property to the highest bidder. No Lions Club officer or representative ever wrote Appellants or their attorney to say that the Appellants' letter did not comply with the terms of the Lions Club offer. (Crocker deposition, pp. 40, 61). In fact, each Lions Club officer acknowledged that the Rice Bid complied with each condition of the Lions Club January 2017 letter. Because Appellants' bid was the highest bid remaining on the deadline of June 1, 2017, a binding contract was formed between Appellants and the Lions Club and the Appellants were entitled to specific performance, which is discussed below.

C. In the Alternative, the Lions Club Letter was Ambiguous as to Whether It Was or Was Not an Offer to Sell The Property to the Highest Bidder Such that Extrinsic Evidence Was Admissible to Explain the Intent of the Terms Used in the Letter, Which the Lower Court Should have Considered and Should Have Concluded the Letter Was An Offer to Sell to the Highest Bidder.

The evidence at trial demonstrated that Appellants were asserting that the Lions Club letter was an offer to sell to the highest bidder and the defense asserted that the letter was not an offer at all. If the Lions Club letter was not clearly an offer to sell to the highest bidder, it was ambiguous and the record shows that it was in fact intended to convey the property to the highest bid received by the deadline of June 1, 2017.

On Page 14, the Order erroneously concludes that if the Lions Club Letter was ambiguous, it was so ambiguous that the court should not enforce it stating that "if other evidence was

necessary to prove the [Lions Club] offer, then the court is not persuaded that it can infer terms and impose them on the parties." This is error.

Instead, where a contract is ambiguous this court may consider parol evidence to ascertain intent of the parties. Estate of Revis v. Revis, 326 S.C. 470, 484 S.E. 2d 112 (Ct. App. 1997); Carolina Ceramics, Inc. v. Carolina Pipeline Co., 251 S.C. 151, 161 S.E. 2d 179 (1968) (summary judgment was reversed where contract was ambiguous and parol evidence was admissible to show intent).

In Wallace v. Day, 390 S.C. 69, 700 S.E.2d 446 (Ct. App. 2010); cert denied January 26, 2012, there was an action for breach of contract of sale. The Master-in-Equity granted summary judgment in favor of buyer. The Court of Appeals reversed that ruling and stated "a contract is ambiguous when the terms of the contract are reasonably susceptible to more than one interpretation", Id. *citing* South Carolina Department of Natural Resources v. Town of McClellanville, 345 S.C. 617, 550 S.E. 2d 299 (2001).

In this case, Crocker testified that the January 2017 letter he drafted could be interpreted as an offer to sell. (Transcript, p. 289). Appellant Joe Rice testified that he certainly read it that way. Clearly, if the author and recipient of the letter agree that it can be reasonably interpreted as an offer to sell, then it is either an offer or it is, at minimum, ambiguous. And, where it is ambiguous, parol evidence is admissible to show its true meaning. *e.g.*, Bruce v. Blalock, 241 S.C. 155, 127 S.E.2d 439 (1962). In fact, where the construction...of contract is doubtful, "then *it would be the duty of the Court...* to inform itself of the circumstances which surrounded the parties at the time...not for the purpose of allowing any variation or contradiction of its terms, but to the end that the language employed be so construed as to give it such effect, and none other, as the parties intended at the time the contract was made." (emphasis added). Breedin v. Smith, 126 S.C. 346,

120 S.E. 64 (1923) (reversing a directed verdict and finding a contract ambiguous and parol evidence admissible).

The statements of Crocker and Simpson made to Appellant Rice and Schumpert are admissible and should have been considered by the lower court. When the same are properly considered, it is clear that the Lions Club letter was an offer to sell to the highest bidder and the Rice Bid represents Appellants acceptance thereof, and given they were the highest bidder as of the June 1, 2017, deadline, they were entitled to an order of specific performance.

III. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FINDING AND CONCLUDING THAT THERE WAS NO CONTRACT FORMED BETWEEN THE LIONS CLUB AND APPELLANTS AND IN DENYING SPECIFIC PEROFRMANCE.

A. Appellants Established that a Contract Was Formed Between Lions Club and Appellants and They Were Entitled to Prevail on the Cause of Action for Specific Performance.

The trial court committed reversible error in failing to find and conclude that Appellants are entitled to specific performance of their contract. The decision to grant or refuse specific performance of a contract to sell real estate is within the sound discretion of the trial judge. *e.g.*, Amick v. Hagler, 286 S.C. 481, 334 S.E.2d 525 (Ct. App. 1985). A contract to sell land will be specifically enforced where it is fair and was entered into openly and aboveboard. Id.

For the reasons set forth above, the Lions Club January 2017 letter constituted an offer to sell to the highest bidder and the Rice Bid was their acceptance of such offer and the highest bid existing as of the June 1, deadline. Therefore, an enforceable contract existed between the parties as of that date, and the lower court erred by concluding otherwise and denying specific enforcement.

At its heart, the trial court's error in this regard is based on two simple fallacies: 1) the exclusion of the testimony regarding the Crocker and Simpson phone calls; and, 2) the acceptance

of Crocker and Simpson's denials that each told Appellant Joe Rice and Claude Schumpert, respectively, that the intent of the Lions Club letter was to sell to the highest bidder.

While initially not recalling the conversations recounted by Appellant Joe Rice and Claude Schumpert, both Crocker and Simpson denied at trial telling anyone that the offer was to sell to the highest bidder (Transcript, pp. 288 and 309). Crocker admitted that the letter could be construed as an offer to sell. (Transcript, p. 289). The trial court overlooked this testimony.

The court erred in giving credibility to the denials of the Lions Club officers over the positive testimony of Joe Rice and Claude Schumpert and failing to consider the greater weight of the evidence as recited herein supporting the fact that the Lions Club, by its January 2017 letter and the representations of its officers, did in fact offer the sale of the Property to the highest bidder, who agreed to accept the property with the encroachments, pay in excess of $300,000, and submitted their bid prior to June 1, 2017; that Appellants bid was the highest bid and complied with all of these conditions; and, that Appellants are ready, willing, and able to comply with their bid.

When critically analyzed, the court's ruling hinges almost entirely on the testimony of the Lions Club officers denying that the letter is an offer despite the fact that its terms plainly state that it is and their further denial that they told Joe Rice and Claude Schumpert that the intent of the letter and that of the Lions Club was to sell the Property to the highest bidder. All of the other evidence in the record belies these denials. *See*, Taylor v. Cox, 218 S.C. 488, 63 S.E.2d 470 (1951) (holding the interest of defendant testifying in case should properly be considered as bearing on the weight and probative value of the defendant's testimony); Paige v. Crisp, 303 S.C. 117, 399 S.E.2d 161 (Ct. App. 1990) (holding that while a fact finder is not required to believe testimony when reasonable persons could disagree as to facts, but it is not permitted to disbelieve testimony

unless there is good reason for questioning the credibility of the witness). Atlantic Works v. Brady, 107 U.S. 192 (1883) (a party's testimony could not be allowed to prevail against a course of conduct utterly at variance with it); Bose Corp. v. Consumers Union of US, Inc., 466 U.S. 485 (1984) (holding that discredited testimony is not considered a sufficient basis for drawing a contrary conclusion).

It is further error to give weight to the denials, as there is positive evidence to the contrary in the record. Claude Schumpert no longer has any interest in this case. While he did assert a claim to the property within this consolidated proceeding, he did not appeal this court's prior order dismissing his claims to the Property with prejudice. There is no reason, therefore, to question his credibility as he stands nothing to gain by saying one thing or the other.

Schumpert testified that Gene Crocker, the author of the Lions Club January 2017 letter, told him that the intent of the letter and that of the Lions Club was to sell the Property to the highest bidder making a bid consistent with the terms of the letter. (Transcript, pp. 127-128). Appellant Joe Rice testified about a similar conversation with the Club Secretary, Pete Simpson. (Transcript, p. 79). The only evidence in the record concerning the question is the disparate testimony of these Lions Club officers denying that they ever said such a thing. Schumpert's testimony together with his handwritten note "highest bid...Gene Crocker" (Plaintiffs' Exhibit 41) is positive evidence which is corroborated by other evidence in the record. It should, therefore, prevail over the negative evidence of Simpson and Crocker's denials. 29A Am. Jur. 2D *Evidence* § 1321; Eames v. Home Ins. Co., 94 U.S. 621 (1876) (negative evidence cannot prevail over positive evidence where other evidence supports its veracity).

If it is accepted that the sale was to go to the highest bidder, it is important to then consider what bids were received by the Lions Club. The evidence is uncontradicted that Amick originally

agreed in January 2017 to accept encroachments by submitting his bid. (Crocker deposition in *Schumpert*, pp. 53-54). However, his bid was withdrawn on May 23. (Transcript, p. 267). The only other bids received were from Appellants for $325,000 and Mr. Schumpert for $300,000. As of the June 1 deadline, Appellants' bid of $325,000[7] was highest remaining bid.

Secretary Simpson admitted that the Rice bid was opened at the May 23, 2017, Board Meeting. (Simpson deposition, p. 68). Yet the Lions Club and the trial court overlooked the significance of Amick's withdrawal of his bid on May 23. Lions Club attorney Verner's letter dated June 5, 2017, attempting to withdraw the Lions Club offer was too late (Plaintiffs' Exhibit 17)[8] and of no legal effect. What the Lions Club had set in motion in January 2017 in its offer letter – imposing a June 1 deadline – was complete.

On Page 11 of its Order, the court erroneously found that the Lions Club "never acted as if a contract was formed with the Rices or that the Lions Club intended to sell to the Rices." (Order, p. 11). This is error because the actions of Lions Club board members after the fact are irrelevant to the question before the Court as it relates to the formation of a contract and further overlooks evidence in the record that the Lions Club board voted to "withdraw all offers" on May 23, 2022. (Plaintiffs' Exhibit 5a). Clearly, if the Lions Club did not feel a contract was formed, there would be no need to go through that exercise of withdrawing "all offers."

Once the inequitable conduct of the Respondents following the January 2017 offer letter of the Lions Club is viewed in the proper light (see Argument I), the record before the Court plainly shows that the letter was an offer to sell to the highest bidder; that the Appellants' letter of February

[7] The Lions Club officers admit that they never told Rice or his attorney that his bid was not in acceptable form (Crocker deposition, p. 40) or was not in good order (Crocker deposition, p. 61).

[8] The lower court also misapprehended that if the Lions Club letter was not intended as an offer to sell to the highest bidder as originally described by Crocker and Simpson, the board would have not needed to instruct its attorney to write a letter at all.

14, 2017, constituted the acceptance of such offer; and, that the Appellants, being the highest bidder after the June 1, 2017, deadline, held a binding contract under South Carolina law enforceable upon its terms. It was error for the lower court to deny Appellants specific performance.

This Court should reverse and set the deed to Amick aside and ordered specific performance.

B. Based on the Evidence, Respondent Amick Was Not a Bona Fide Purchaser for Value Without Notice So As To Defeat Appellants' Claim for Specific Performance And the Lions Club Deed to Him Should be Set Aside.

The lower court concluded that Amick was a bona fide purchaser without notice. Based on the record in this case and the court's own findings, this finding should be reversed.

Appellants, becoming concerned that the Lions Club was not responding to the letters from their attorney about the Appellants being high bidder, wrote a final letter on November 21, 2017, asserting again their claim as high bidder. (Plaintiffs' Exhibit 19). This letter was read aloud at the Lions Club Board Meeting on November 28, 2017, and Amick was present. (Plaintiffs' Exhibit 5b; Crocker deposition, pp. 37-38). The lower court concluded that Amick had actual knowledge of the Appellants' claim to a contract to purchase the property by his presence at the board meeting. The trial court also found that Amick had constructive or inquiry notice of the Appellant's position based on his presence at the meeting.

Because the Lions Club ignored their attorney's letter and made no response and because Appellants had no knowledge of when Amick intended to close with the Lions Club, Appellants filed their Summons and Complaint on February 20, 2018. (Plaintiffs' Exhibit 26). Their Lis Pendens was filed on February 21, but the deed to Amick from Lions Club was recorded the next

day – on February 22, 2018. Consequently, Amick had both actual and constructive notice of Appellants' contractual claim as high bidder.

Despite his knowledge of the letter, which recited that the Appellants were high bidder and were ready, willing, and able to close on their successful bid, Amick proceeded to close on his "side deal" contract with Lions Club on February 21, 2018.[9]

South Carolina is a record notice (race to the courthouse) state, and S.C. Code §30-7-10 provides that all deeds are valid from the day and how they are recorded. It reads that "in the case of a subsequent purchaser of real estate...the instrument evidencing the subsequent conveyance must be filed for record in order for its holder to claim as a subsequent purchaser for value without notice, and the priority is determined by the time of filing for records." *See* Savannah Timber Co. v. Deer Island Lumber Co., 258 F. 777 (E.D. S.C. 1918). (Notice of real estate sales is given by actual record).

Amick's acquiring a deed in secret could no more affect the Appellants' claim than the Rices could affect Amick's if they had kept their claim silent. Thus, the record establishes that Amick was not a bona fide purchaser for value for any purpose, as he had both actual and record (constructive) notice of Appellants' claim.

Any finding of the lower court to the contrary is in error and should be reversed.

IV. THE LOWER COURT ERRED IN FAILING TO FIND AND CONCLUDE APPELLANTS HAD ESTABLISHED THEIR RIGHT TO THE PROPERTY UNDER THE DOCTRINE OF PROMISSORY ESTOPPEL.

Appellants pled promissory estoppel in the alternative. The trial court committed reversible error by excluding the testimony of Appellant Rice and Claude Schumpert regarding the

[9] Appellants had no knowledge of Amick's contract of sale with the Lions Club or of the closing date. But when Schumpert informed Rice on November 16 thatshe had "heard" that Lions Club was going to sell to Amick, Rice knew litigation would be necessary.

Crocker and Simpson phone calls and failing to consider such testimony and conclude that the January 2017 letter coupled with the representations of the Lions Club officers made in those calls regarding the offer to "sell to the highest bidder" amount to an unambiguous promise by the Lions Club enforceable against it in equity.

The elements of promissory estoppel are (1) an unambiguous promise by the promisor; (2) reasonable reliance on the promise by the promisee; (3) reliance by the promisee was expected by and foreseeable to the promisor; and (4) injury caused to the promise by his reasonable reliance. *e.g.*, N. Am. Rescue Prod., Inc. v. Richardson, 411 S.C. 371, 769 S.E.2d 237 (2015). Unlike a contract which requires a meeting of the minds and consideration, promissory estoppel looks at a promise, its subsequent effect on the promisee, and in certain cases bars the promisor from making an inconsistent disposition of the property. A&P Enterprises, LLC v. SP Grocery of Lynchburg, LLC, 422 S.C. 579, 812 S.E.2d 759 (Ct. App. 2018). The elements of promissory estoppel represent a balancing between affording a remedy where contract law cannot, and ensuring the doctrine's application is not, itself, an inequity against the party estopped. Id. The promise to be enforced through the doctrine of promissory estoppel must be unambiguous with clearly articulated, definite terms, while the sustained injury must result from an inconsistent disposition by the promisor. Id.

While the lower court inexplicably found that no reasonable person would foresee a recipient of the January 2017 letter would rely on its contents, it is nonetheless entirely reasonable for Appellants to rely on the letter and the representations of its officers. Simply put, there is no other reason for the letter to be sent in the first place except that Appellants and the other recipients rely on the professed intent to sell the property. The same is true with regard to the statements of

Crocker and Simpson. They were trying to sell the property after all. Therefore, Appellants' reliance was both expected and foreseeable.

Nevertheless, the Lions Club breached its promise by selling the property to Respondent Amick for an amount less than the Appellants' bid. Appellants are not only without ownership of the property, which is detriment in and of itself, but is also now threatened with being prohibited from using it in the manner they and their predecessors have for decades which has forced Appellants to assert the easement causes of action set forth in the complaint.

The court below further disregarded the greater weight of evidence, including the testimony of Claude Schumpert, the lone witness in the case that no longer has a "dog in the fight". The record contains ample evidence to corroborate Schumpert and Joe Rice's testimony that officers of the Lions Club represented that the intent of the January 2017 letter and that of the Lions Club was to sell the property to the highest bidder. The officers had to know that when Rice and Schumpert called to discuss the Property after receipt of the letter that each would rely on both the letter and whatever the officers told them. Appellants clearly did rely on this representation as is evidenced by the Rice Response and the subsequent letters to the Lions Club regarding their bid. Finally, it cannot be denied that Appellants were injured as a result of such reliance. After all, the Lions Club sold the Property to Amick, a property that, according to the Lions Club, was worth $369,000 or $44,000 more than the Appellants' bid. Thus, Appellants were damaged by both not obtaining the Property and the equity over and above their bid amount.

Had the representations not been made, Appellants could have conducted themselves in other ways to protect their interest in the Property. For example, Appellants could have made a larger bid or negotiated a resolution with Amick. Consequently, the Appellants did, in fact, prove each element of promissory estoppel, Satcher v. Satcher, 351 S.C. 477, 570 S.E.2d 535 (Ct. App.

2002), and to refuse to enforce the promise made by the Lions Club would amount to sanctioning the inequitable conduct of the Lions Club. This Court should reverse the lower court and enforce the promise of the Lions Club.

V. THE LOWER COURT COMMITTED REVERSIBLE ERROR IN EXCLUDING THE EXPERT TESTIMONY OF STEVEN SPITZ PROFFERED BY APPELLANTS, WHERE AT LEAST PORTIONS OF HIS PROPOSED TESTIMONY WERE ADMISSIBLE UNDER VORTEX SPORTS V. WARE, 378 S.C. 197, 662 SE2D 444 (2008).

The Court erred in excluding in entirety the expert testimony of Steve Spitz, Esquire (Form 4 Order, p. 2 ; Plaintiffs' Exhibits 44 and 45[10]; Transcript, p. 147; Form 4 Order filed May 16, 2023), whose affidavits were proffered to the Court at trial as to what Mr. Spitz would testify if he had been allowed to. A proffer allows the reviewing court on appeal to evaluate to what extent the exclusion of testimony was prejudicial or erroneous. *See* State v. Moorer, Opinion 5987, South Carolina Court of Appeals, filed June 7, 2023.

While expert testimony pertaining to issues of law are not admissible, expert opinions are not objectionable simply because they embrace an ultimate issue to be decided by the trier of fact. *See* Dawkins v. Fields, 354 South Carolina, 58, 66, 580 SE 2d 433, 437 (2003) and Vortex Sports & Entertainment v. Ware, 378 South Carolina 197, 662 SE2d 444 (2008), where the Supreme Court ruled that an expert's opinions as to facts the expert considers critical or relevant to a cause of action are admissible.

In the instant case, Mr. Spitz's qualifications are exceptional. He has taught in the areas of property law, real estate transactions, and equity, all of which are relevant here. After reviewing depositions and relevant documents, Spitz noted the following facts relevant to the inequitable acts

[10] Exhibit 45 reaffirmed and expanded the contents of Exhibit 44, the affidavit dated February 19, 2019, so as to clarify that it (Exhibit 45) complied with recent decisions of our Supreme Court. *See* Dawkins v. Fields, 354 S.C. 58, 66, 580 SE 2d 433, 437(2003); and Vortex Sports & Entertainment v. Ware, 378 S.C. 197, 662 SE 2d 444 (2008).

of Lions Club and Amick: (a) The letter said it was an offer to sell (the concluding sentence said "valid until June 1, 2017, at which time it will be sold to the public") and the Appellants were successful bidders; (b) Appellants wrote two letters asserting they were high bidders and Lions Club ignored them; (c) Appellants' bid being in order was not questioned by Lions Club; (d) Amick attended board meetings with a personal agenda; (e) As of the June 1 deadline, Amick's bid had been previously rescinded and Appellants were high bidders; (f) Amick had actual and constructive notice of the Appellants' bid; and, (g) The Lions Club yielded to all of Amick's wishes (extending deadline and agreeing to clear encroachments for Amick), which is relevant to the Lions Club's actions being "unfair dealings."

Spitz's opinions are especially important because the trial court ignored critical events on the two most important dates: the May 23 repudiation by Amick and the status of the bids as of the Lions Club imposed deadline of June 1.

VI. THE COURT MADE OTHER ERRONEOUS MISCELLANEOUS FINDINGS OF FACT AND CONCLUSIONS OF LAW.

A. The Court Erred in Finding and Concluding that the 1933 Resolution Barred a Sale of the Property to Appellants, as They Were Not Members of the Lions Club.

The trial court erroneously found and concluded that after the Lions Club acquired the subject property, it passed a Resolution stating that the Club Trustees could sell only to Lions Club members and there is no evidence that the Lions Club ever amended the 1933 Resolution requiring sales to members of the Lions Club. (Order, p. 6).

The finding was erroneous because the record shows that the Board of the Lions Club voted to send the offer letter in January 2017 to adjacent property owners (Plaintiffs' Exhibits 2, 5, 6, and 9) and this action superceded the 1933 Resolution. The finding was erroneous because 1) neither respondent raised the 1933 Resolution in their pleadings as a bar to Appellants' claims;

2) it was not argued at trial as a bar and if it can be said to have been argued, neither respondent moved to amend their pleadings; and, 3) it is undisputed in the record that the 1933 Resolution is just that, a resolution, as opposed to a provision limiting the power of the board in the articles of incorporation, and that the board of the Lions Club voted in the manner provided in the corporation's bylaws to send the offer letter in January 2017 to adjacent property owners (Plaintiffs' Exhibits 2, 5, 6, and 9). *See* S.C. Code § 33-2-106(b), providing that "[t]he by laws of a corporation may contain any provision for managing the business and regulating the affairs of the corporation that is not inconsistent with the law or the articles of incorporation." Therefore, the action of the board in January of 2017 superseded the 1933 Resolution.

None of the adjacent property owners to whom the letter was sent were members of the Lions Club. (Plaintiffs' Exhibit 9).

B. <u>The Court Erred in Finding that Amick Did Not Attempt to Improperly Influence the Lions Club Board.</u>

The Order erroneously found that Amick did not attempt to improperly influence the Lions Club Board. (Order, p. 8). The record is replete with examples to his having unfairly and inequitably influenced the Board by pursuing his agenda (to buy the property on his terms) which was antagonistic to the Lions Club agenda to get "top net proceeds" (Crocker deposition, pp. 62-63) and to use the sales proceeds for clarity. Amick was an "insider" and Appellants were "outsiders" who lived in Charleston County and who did not attend any Lions Club Board Meetings. Amick came to meetings to pursue his agenda, not the charitable goals of the Lions Club and the Lions Club succumbed and acquiesced to everything he asked for.

Lions Club counsel stated at trial, the Lions Club wanted Amick to buy the property; however, rather than selling the property to Amick without offering it to the adjacent property owners, the Lions Club sent an offer letter to its twelve neighbors. The Lions Club placed into the

stream of commerce an offer to sell on specific terms and the offer was valid until June 1, 2017. For the Lions Club, the die was cast when the offer letter was sent, and it ignored that Amick rescinded his bid on May 23 and that Rice was high bidder on June 1. The argument on "equity" herein reflects that, while Amick was pursuing a selfish agenda to buy the property, the Lions Club acted inequitably in allowing his personal interests to drive the Board's decisions relative to a club asset to be sold, when the sale proceeds were going to charity.

C. The Trial Court Erred in Overlooking the Fact that Amick Withdrew His Bid at the May 23, 2017, Board Meeting.

A reading of the Order of May 18, 2023, on the merits and the Court's Order of June 22, 2023, denying the Appellants' Motion to Reconsider, shows that the trial court overlooked and did not address or rule on the uncontradicted evidence that Amick rescinded his bid at the May 23, 2017, Board Meeting.[11] This is critical because as of that date, there were two bids that were active: Appellants' bid of $325,000 and Schumpert's bid of $300,000. These bids remained viable up to the deadline date of June 1, 2017. Appellants' bid was highest as of the deadline date. This is undisputed in the record.[12] The trial court has ignored undisputed evidence so as to avoid a result that supports Appellants.

D. The Trial Court Erred in Finding and Concluding That The Lions Club and Amick Could Not Convey Marketable Title with Encroachments.

On Page 9 of the Order, the trial court found that "Amick and the Lions Club believed that the Lions Club could not convey marketable title with encroachments on the property." All persons are presumed to know the law and it is the law in South Carolina that "marketable title" does not

[11] On May 23, at the Board Meeting, Amick withdrew his bid so the Lions Club could clear the encroachments. (Transcript, p. 267).

[12] As of June 1, there were two offers and Appellants' was the highest. (Transcript, pp. 52, 67).

mean a flawless title. Gibbs v. G.K.H., Inc., 311 S.C. 103, 427 S.E.2d 701 (Ct. App. 1993) (holding an encroachment does not render a title unmarketable). There must be a reasonable probability of litigation with respect to title in order to render a title unmarketable. Sales Intern. Ltd. v. Black River Farms, Inc., 270 S.C. 391, 242 S.E.2d 432 (1978). The record is devoid of any evidence which would reveal such a probability with respect to the subject encroachments. On the contrary, the record reflects that the encroachments had existed and were known to all parties involved for decades without issue. Besides, Appellants had agreed to take title subject to the encroachments rendering Amick and the Lions Club's belief irrelevant and constitutes evidence that this claim with respect to encroachments was a mere pretext for the Lions Club's attempt to avoid the consequences of its January 2017 letter. Even if there were evidence in the record (which there is not) that would tend to show encroachments did render the title unmarketable, there is no law against a purchaser accepting unmarketable title.

Respondent Amick's lawyer Lisa Lee Smith testified on cross-examination as follows:

> Q: "...You can sell property with encroachments if the buyer agrees the seller agrees and that's not a title issue, is it?" (Transcript, p. 231)
>
> A: "It would be a title issue, but people can agree to close with title issues." (Transcript, p. 232)

The trial court also erred in finding that the Lions Club consulted an attorney who informed them that the Lions Club could not convey a marketable title with encroachments. (Order, p. 9). This was erroneous as the attorney did not testify and the only evidence on the issue of title with respect to encroachments was the referenced June 5, 2017, letter (Plaintiffs' Exhibit 16). Secondly, what the attorney allegedly told the Lions Club is inadmissible hearsay. Such "opinion" would in any event be contrary to South Carolina law as cited above. Thirdly, Crocker said that attorney Verner's advice was that one "cannot give fee simple title prior to clearing up encroachments."

(Crocker deposition, p. 64). This case is not about "fee simple"; if it were, Verner's alleged opinion would be correct.

E. The Trial Court Erred in Finding or Implying that Amick Was Not Present at the Lions Club Board Meeting on November 28, 2017.

On Page 10 of its Order, the trial court found that if Amick had been present at the November 28, 2017, board meeting, he would have known of the contents of the letter from the Rices' counsel which were read.

As set forth above, the minutes of the November 28, 2017, meeting state that Amick was indeed present (Plaintiffs' Exhibit 5b) and President Crocker affirmatively stated Amick was present when the letter was read. (Crocker deposition, pp. 37-38). While Amick said he did not remember whether he was present, his "failure to remember" cannot negate undisputed evidence that he was present when the McNair firm letter of November 21 (Plaintiffs' Exhibit 19) was read and therefore Amick had notice of the Appellants' assertion that they were high bidders and intended to close on their contract. As set forth above, the court erred in not ruling that Amick had both actual and constructive notice of the Appellants' position set forth in the letter of November 21, 2017. (Plaintiffs' Exhibit 19).

CONCLUSION

For the reasons set forth herein, the lower court committed reversible error in ruling for Respondents; in failing to rule that Appellants had an enforceable contract with Lions Club to purchase the property; and in failing to set the deed from Lions Club to Amick aside. This Court should reverse the trial court and order specific performance in favor of Appellants and set aside the Lions Club deed to Amick. It should direct that Respondent Lions Club deliver to Appellants a deed to the subject property upon Appellants payment of $325,000 after which the Lions Club would refund to Amick the $300,000 he paid to the Lions Club.

Respectfully Submitted,

POPE PARKER JENKINS, P.A.

October 4, 2023

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