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SC Court of Appeals

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 Betty S. Amick, as Personal Representative of the Estate of C. Ray Amick.....Respondents

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FINAL REPLY BRIEF OF APPELLANTS

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In this Reply Brief, Appellant will address only certain material assertions of Respondent Betty Amick ("Amick"). Appellants' failure to take up any particular argument, sub-argument, statement, or other matter set out in Respondents' brief or reassert any matter raised in Appellant's brief is not intended to and does not constitute an abandonment or waiver of any point by Appellant. Instead, in the interest of brevity and conservation of the Court's time and resources, the purpose of this Reply Brief is to point to those specific errors of law and fact set forth in the Respondents' brief that are not otherwise specifically addressed in Appellant's brief.

ARGUMENT

Amick's brief is 43-pages of circular reasoning and, with respect to the material questions raised in this appeal, fails to address the arguments propounded by Appellant setting out, in many cases, mere conclusory statements without adequate supporting cites to the record. For the reasons set forth herein and in the Appellant's brief, the lower court should be reversed, the deed to Respondent Amick set aside, and the contract between the Lions Club and the Appellants ordered to be specifically performed such that Amick is refunded his $300,000 and Respondent Newberry Lions Club ("Lions Club") receives the greater amount of $325,000 to be applied to its charitable purposes.[1]

I. THE TRIAL COURT ERRED IN IMPROPERLY WEIGHING THE EQUITIES AND IN FAILING TO FIND AND CONCLUDE THAT THE EQUITIES FAVOR APPELLANTS.

There is no evidence in the record below that would indicate any wrongdoing on the part of the Appellants. Importantly, Amick does not even assert any inequitable conduct on the part of Appellants, and that is for good reason: the record indicates Appellants' only wrote letters seeking

[1]Such a result would also put an end to all of the remaining litigation on the easement issues which is otherwise certain to be before this Court in the near future.

to understand what the Lions Club was doing concerning the sale of the Lions Club Point (as defined in Appellants' brief) property following their submission of the highest bid.

The Lions Club entirely ignored Appellants' overtures and gave in to every demand made by Amick. (R. p. 699, lines 11-14; R. p. 700, line 18-p. 702, line 15; R. p. 942, line-p. 943, line 2; R. p. 1126). This began with the terms of its January 2017 letter at the center of this case. (R. p. 1044). When the board of the Lions Club presented the proposed letter at its January 24, 2017, meeting, Amick asked that he be given until June 1, 2017, to "make a decision as to whether he could purchase" the Lions Club Point property. (R. p. 1032; R. p. 652, lines 2-6; R. p. 749, line 12 -p. 750, line 12; R. p. 756, lines 2-8 and lines 19-21). Amick was confounded at the notion the board would be sending the letter to the adjoining landowners at all. (R. p. 1032, penultimate paragraph). Everything he did following that was an effort to thwart not only the claims of Appellants but each of the conditions of the sale set by the Lions Club board. (R. p. 1032; R. pp. 667, lines 15-22; R. p. 668, lines 5-12; R. p. 669, lines 2-9).

The Lions Club Point property was, at that time, burdened by certain encroachments. The Appellants, as required by the Lions Club 2017 letter, agreed to purchase the property despite the presence of these encroachments as these were well known in the neighborhood. (R. pp. 449, lines 6-11; R. p. 1051). The only communication the Lions Club made with Appellants following the January 2017 letter was a June 5, 2017, letter from its attorney, James Verner, indicating that the Lions Club decided "not to sell" the property "at [that] time". (R. pp. 1055-1056). This letter apparently stemmed from the Lions Club board's May 23, 2017, meeting wherein they decided to send letters to "those who had shown interest in purchasing the lake property" stating that "all offers were being withdrawn to sell the property." (R. p. 1042).

At this time, only three bids had been received by the Lions Club in response to its 2017 letter: that of Appellants, Amick's and a bid from adjoining landowner, Claude Schumpert. (R. p. 1051). Each of these parties had agreed to accept the property notwithstanding the encroachments. What was not stated in Mr. Verner's letter and thus not disclosed to Appellants was that the action of the board at the May 23, 2017, meeting was in direct response to Amick's insistence that he no longer was willing to purchase the property with the encroachments in place (R. p. 1042) and was withdrawing his bid. (R. p. 669, lines 5-9). Moreover, the board nonetheless gave into Amick's demands and attempted to withdraw "all offers to sell the property" and did so despite having received Appellants' May 15, 2017, letter in which their counsel implored the Lions Club to refrain from making any conveyance of the property to anyone other than the Appellants and warned that if it did so, they would be "forced to bring a declaratory judgment action" to protect their rights to the property. (R. p. 1053).

What makes this action on the part of the Lions Club even more egregious is that the board, again, without any notice to Appellants, had previously agreed at its March 28, 2017, meeting to sell the property to Amick for the lesser sum of $300,000 "***provided*** that closing would take place by June 1st at which time other offers would be considered if the closing has not occurred by the June 1st deadline."[2] (emphasis added). (R. p. 1032). Lions Club President, Gene Crocker, testified that the June 1 deadline was a "hard deadline". (R. p. 890, lines 9-18). Therefore, not only was the board now going to affirmatively remove the encroachments and dispense with the "hard" June 1 deadline at Amick's behest, the Lions Club board would do so without uttering nary a word to

[2] The Rices had no knowledge of the March 28, 2017, meeting or of the action taken by the board. (R. p. 464, lines 10-21).

Appellants despite having knowledge of Appellants' claim to the property and their resolve to assert it.[3]

Appellants, through their counsel, again wrote the Lions Club on November 21, 2017. (R. p. 1058). In this letter, Appellants counsel specifically inquired if there had been anything relating to the sale of the property which had not been disclosed to Appellants. It was also made clear that the Appellants were ready, willing, and able to close in accordance with their $325,000 bid. Importantly, through out, the letter made clear that the Appellants asserted a right to the property. Nevertheless, the Lions Club did not disclose any of its actions in the preceding ten months.

Inexplicably, the lower court found that the equities favored Amick based on this record. (R. p. 64). This is error. Again, there is not even an assertion of any inequitable conduct on the part of the Appellants, much less any evidence of it.

Amick understandably barely touches on the equities of the case in his brief. In what limited treatment the equities receive on Page 34 of the brief, he asserts that the equities favor him because the Appellants are "sophisticated" and were represented by counsel[4]. It should be evident that sophistication or the lack thereof has nothing to do with the conduct of the parties. The implication being that the least sophisticated party should always prevail in a specific performance case. Mr. Rice is an attorney. All judges of courts of record in South Carolina are as well. In Amick's view, no contract is specifically enforceable if the non-performing party is a non-attorney. This, of course, is absurd.

[3] Had the Lions Club simply stopped and communicated with Appellants at any time before attempting to sell the property to Amick in February 2018, it is likely, if not certain, that this entire litigation, both on the contract and easement claims, could have been avoided. Instead, it chose to conceal its intentions.

[4] The Court should note that this portion of Amick's brief is lifted verbatim from the lower court's Order.

Amick faults the Appellants for waiting "to assert their alleged rights until well after the Lions Club agreed to sell to Mr. Amick twice." (Amick's brief, p. 34). First of all, if the assertion is that Appellants were slow to assert their rights, then Amick ignores the fact that the Appellants repeatedly did so after submitting their February 2017 bid. More to the point, such an assertion would also entirely disregard the fact that the Appellants were never apprised of any of Amick and the Lions Club's actions[5]. Clearly, it is difficult to protect against actions contrary to one's rights when one does not know such actions are taking place.

Whether the parties were represented by counsel is equally immaterial to the conduct of the parties and the equities of the case. Appellants submit that were Amick represented, this case might have been avoided altogether. Nevertheless, it is the parties' conduct that is relevant, not whether that conduct was carried out on the advice of counsel. After all, were Amick and the Lions Club represented yet engaged in the same conduct, the conclusion is the same: the Respondents acted inequitably and Appellants are the only parties in the case that did nothing wrong.

The Respondents' brief ignores the inequities of the Lions Club in its dealings with Amick's closing attorney, Lisa Lee Smith, who requested the Lions Club to provide her with the minutes of the 2017 board meetings. (R. p. 634, lines 4-24). Her file showed that she received 2017 minutes for January, February, March, April, June, October, and December and January 2018 (R. pp. 634-638), but that she had never seen the minutes of the meetings on November 28, 2017, nor had she seen the November 21 letter from Appellants' attorney (R. p. 1058) which was read at that meeting (R. p. 639, lines 7-14). She also never saw the letter of Rices' attorney dated May 15, 2017. (R. p. 1053; R. p. 642, lines 2-4) or the minutes of May 23, 2017. The fact that the Lions Club withheld

[5] Rice testified that other than his original telephone conference with Lions Club Secretary Simpson in January 2017, the Lions Club had no contact with him and that he learned about the actions between Amick and the Lions Club and the board meetings of the Lions Club only during discovery in this case. (R. p. 464, lines 3-21).

giving attorney Smith the very documents that are critical to this case further shows that the Lions Club understood that its conduct was underhanded and inequitable.

This action for specific performance is one in equity tried by a judge alone; thus, this Court may find the facts in accordance with its own view of the evidence. Townes Association, Ltd. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976). See also the case of Parr v. Parr, 268 S.C. 58, 231 S.E.2d 695 (1977), where the Supreme Court reversed the findings of the trial court and awarded specific performance of a contract to convey land. In doing so, the Court ruled that as a matter of equity, the preponderance of the evidence supported plaintiff/appellant's claim for relief.

Accordingly, this Court should reverse and find and conclude that the equities favor the Appellants as a result of the inequitable conduct of the Respondents.

II. THE PAROL EVIDENCE RULE AND STATUTE OF FRAUDS DID NOT APPLY WHERE RESPONDENT LIONS CLUB WAIVED ITS OBJECTION BY FAILING TO OBJECT AT TRIAL.

The lower court erroneously ruled that the Statute of Frauds and the parole evidence rule mandated the exclusion of critical evidence proffered by Appellants. Appellants have asserted in their brief that Amick did not have standing to assert any objection to this evidence and because only the Lions Club could have made such objections but failed to do so, those objections were waived and the lower court should have considered the evidence.

A. The Trial Court Erred in Ruling that the Appellants Could Not Raise Their Argument that the Parol Evidence Rule and Statute of Frauds Objections Were Waived Below.

Amick asserts in his brief that the lower court was right to rule that the Appellants waived their argument that Amick was barred from objecting to the parol evidence pointed to by Appellants because Appellants did not raise the issue until asserting it in their motion to reconsider. This is incorrect.

The central issue of this case is whether a contract was formed between the Lions Club and the Appellants. Amick is, thus, not a party to the contract in dispute. As noted on page 19 of Appellants' brief, a third party to an alleged agreement cannot assert the statue of frauds or parol evidence rule. *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); Baptist Foundation for Christian Edu. v Baptist College at Charleston, 282 S.C. 53, 317 S.E.2d 453 (Ct. App. 1984); Nelson v. United Fire Ins. Co., 275 S.C. 92, 267 S.E.2d 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).

Amick, citing the same authority as the lower court, asserts that appellants waived this argument by not raising it at trial. That this is mistaken is illustrated by the fact that where the lower court did not invite argument on any objections during the course of the trial, Appellants were not presented with any prompt or opportunity to raise the matter. Along the same lines, Appellants would have raised the issue during closing arguments after the close of the record; however, the lower court declined closing arguments as well. (R. p. 67).

A party seeking to enter evidence is not required to argue in opposition to an objection to that evidence in order to preserve the matter for appeal. In fact, a party is prohibited from doing so unless the lower court requests that argument be made on the objection. Rule 43(i), *South Carolina Rules of Civil Procedure*. Instead, as to the propriety of a trial court's exclusion of evidence, all that is required to preserve the issue is a proffer of the evidence or testimony such that the record is sufficient for the reviewing court to determine whether the evidence proffered is

admissible or was properly excluded. *e.g.*, TNS Mills, Inc. v. SCDOR, 331 S.C. 611, 503 S.E.2d 471 (1998). Here, Appellants were permitted to proffer all of the extrinsic evidence pointed to in this appeal. As a result, Appellants have properly preserved the issue for review.

B. The Trial Court Erred in Ruling that the Lions Club Joined in Amick's Objections to Extrinsic Evidence and Thus Did Not Waive Its Objections Based on the Parol Evidence Rule and Statute of Frauds.

The lower court ruled that the Lions Club did not waive its objections to the extrinsic evidence presented by Appellants on the basis of the parole evidence rule and Statute of Frauds. Amick asserts that where Lions Club counsel stated in the course of pre-trial argument on Amick's motion in limine that "we [the Lions Club] stand with Mr. Amick's attorneys", the Lions Club properly asserted its objections. This is error.

It is well settled that making a motion in limine to exclude evidence at the beginning of trial does not preserve an issue for review because a motion in limine is not a final determination of the exclusion or admission of evidence. Watson ex rel. Watson v. Chapman, 343 S.C. 471, 540 S.E.2d 484 (Ct. App. 2000); State v. Simpson, 325 S.C. 37, 479 S.E.2d 57 (1996). The moving party must make a contemporaneous objection when the evidence is introduced. Id.

Consequently, the Lions Club's joinder to Amick's argument on the motion in limine did not relieve the Lions Club from making objections at the time the extrinsic evidence was introduced. In fact, the lower court also told the parties that they would need to make contemporaneous objections following argument on Amick's motion in limine stating "but on the specifics as to what would be excluded, I can't tell you 'cause I don't know what that is yet." (R. p. 415, l. 20-p. 416, line 3).

The lower court erred in excluding the evidence and in failing to find that the parole evidence rule and Statue of Frauds objections were waived by the Lions Club. Watson, *supra*. (a

contemporaneous objection must be made and ruled upon by the trial judge to preserve the issue for appellate review).

C. Amick Was a Stranger to the Contract in Dispute and Could Not Assert Objections on Behalf of the Lions Club.

Amick argues that he stepped in the shoes of the Lions Club as its grantee, and as a result, Amick could assert objections for the Lions Club. While Amick cites to authority in the course of this argument, he does not cite any authority that supports the proposition that he can object to evidence for the Lions Club on the basis of the parol evidence rule and Statute of Frauds.

On the contrary, the case cited by Amick expressly supports the Appellants' position. Our Supreme Court in the case of City of Orangeburg v. Buford, 227 S.C 280, 87 S.E.2d 822 (1955), notes the precise reasoning behind the rule that third parties cannot raise the parole evidence rule. The court explained that "[t]his is so because a stranger, not having assented to the instrument, is not bound by it and is free to vary or contradict it, and consequently his adversary must be equally free to do so." Id. at 824.

Here, the agreement in dispute is one between the Appellants and the Lions Club. Appellants do not assert that Amick became a party to that agreement at any time or in any way. Therefore, for the reasons stated by our Supreme Court, Amick cannot seek to avail himself of the parol evidence rule in a contest relating to a contract to which he is not a party.

To further illustrate the correctness of this rule, one need only observe that while Amick seeks to prevent the admission of the extrinsic evidence by the Appellants, he nonetheless introduced his own extrinsic evidence at trial. Amick introduced testimony of the Lions Club officers about their interpretation of the January 2017 letter, their insistence that there was no bidding process, their intent behind the words used in the letter, the content of the Lions Club

board's deliberations regarding the sale of the Lions Club Point property, and other similar matters. In doing so, Amick illustrates the need for the rule espoused by the Orangeburg court.

Amick cites to a handful of cases on Pages 24-26 of his brief and quotes the Supreme Court from its decision in Estate of Holden v. Holden, 343 S.C. 267, 539 S.E.2d 703 (2000), to the effect that it is proper to exclude extrinsic evidence "even if no objection is made". The Holden case concerned the effect of disclaimers signed by certain heirs to the estate. It, unlike the case at bar, did not concern a contract, nor does Holden or any other case cited by Amick for that proposition involve the application of the parol evidence rule and Statute of Frauds where asserted by a third party. Therefore, the rule espoused there would not apply to the case at bar for the very reasons stated in Orangeburg.

Where the Lions Club did not contemporaneously object to the introduction of the Appellants extrinsic evidence, it waived those objections, and the lower court committed reversable error in excluding it for the reasons stated above.

III. THE LOWER COURT ERRED IN FAILING TO FIND THE JANUARY 2017 LETTER OF THE LIONS CLUB WAS AN OFFER TO SELL THE LIONS CLUB POINT PROPERTY TO THE HIGHEST BIDDER, THAT THE APPELLANTS' BID CONSTITUTED THE HIGHEST BID, AND THAT THE CONTRACT THEREBY FORMED SHOULD BE SPECIFICALLY PERFORMED.

The trial court erroneously ruled that the Lions Club's January 2017 letter to the adjoining landowners did not constitute an offer to sell the Lions Club Point property to the highest bidder. The lower court further erred in failing to find that the Appellants' February 2017 response to the Lions Club letter was an acceptance. Due to these errors, the court below refused to order the specific performance of the contract formed between the Appellants and the Lions Club. Based on the record, the trial court should be reversed and judgment entered for the Appellants.

A. The Lions Club January 2017 Letter Was An Offer to Sell to the Highest Bidder.

The Appellants have extensively briefed and delineated the lower court's error in failing to find the Lions Club letter was an offer. The Appellants' analysis in its brief on this question is incorporated herein. Here, the Appellants will address several points raised by Amick in his brief which were not adequately dealt with in their brief.

Amick, just as the lower court, cites McLaurin v. Hamer, 165 S.C. 411, 164 S.E. 2 (1932) and Prescott v. Farmers Tel. Co-op, Inc., 335 S.C. 330, 516 S.E.2d 923 (1999) for the proposition that in order to constitute an offer, the communication must be such that it will "justify another person in understanding that his asset to that bargain is invited and will conclude it." Amick implies that there is no such thing as an offer which creates separate powers of acceptance in multiple parties. Amick suggests that the law does not recognize an offer to the highest bidder. This is obviously incorrect. That such an offer is and has been recognized by the law is evidenced by the fact that there is an entire section discussing the concept in the Restatement (Second) of Contracts. See § 29, comment b (1981). In fact, the language quoted by Amick from these cases is itself a quote of § 24 of the Restatement. Clearly, the authors of the Restatement did not intend by the language used in one section to foreclose the legal possibility of the concepts described in a later section.

Section 29 of the Restatement provides, "[a]n 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. Where one acceptor only *is to be selected*, various *methods of selection* are possible: for example, ...*the highest bidder*. Who can accept, and how, is determined by interpretation of the offer." (emphasis added). Offers creating separate powers of

acceptance in any number of recipients are common. An offer to "first come, first served", the "winner of a contest", or "while supplies last" are but a few additional examples. Id.

Where an offeror "knows or has reason to know that he is creating *an appearance of assent, he may be bound by that appearance*. Id. (emphasis added). The idea that the terms of the offer control its legal effect apply equally to the identity of the offerees and the manner in which acceptance to be made together with the substance of the exchange. Id. The offeror is the "master of his offer", and the "making of any offer at all can be avoided by appropriate language or other conduct". Id. However, any conduct from which a reasonable person in the offeree's position would be justified in inferring a promise in return for the requested act, amounts to an offer for contract purposes. Prescott, *supra*. It is, therefore, the objective import of the language of the communication that controls, and the offeror is bound by the reasonable perception of his intention manifested by the terms of the offer. Restatement (Second) § 29.

In this case, the question is not what the Lions Club's officers now, after the fact, say their subjective intentions were with respect to the January 2017 letter, it is instead what is the objective import of the language they used.

The terms of the January 2017 letter plainly purport to be an offer as it explicitly says it is an offer twice. Therefore, it is impossible to conclude any reasonable person receiving the letter would perceive it as anything other than an offer. The letter precisely describes the property which is the subject of the offer by reference to a recent survey. It set out $300,000 as the minimum price expected by the Lions Club, requested any interested recipient to respond, and ended with the statement: "[t]his offer is valid until of June 1, 2017, at which time the property will be advertised for sale to the public." (R. p. 1044). The only reasonable view of the language actually employed

in the Lions Club letter is that the Lions Club intended to sell the Lions Club Point property to the highest bidder.

Contrary to the lower court and the argument of Amick, the letter contained no language that indicated any further action on the part of the Lions Club was required to form the deal. The lower court held the Lions Club's use of the phrase "[f]irst consideration will be given to current members of the Newberry Lions Club" showed that "more work remained before concluding a bargain". (R. p. 48). Neither the court below nor Amick has delineated how this language shows what it is contended to show. Instead, this language did nothing more or less than advise the recipient that the offer was conditional and where the bids received were of the same amount, the Lions Club member's bid would be selected. This language does not render the letter a mere invitation for negotiations. It merely describes the manner in which the "acceptor is to be selected". Restatement (Second) Contracts, § 29, comment b (1981).

The lower court and Amick's reliance on McLaurin is similarly misplaced. In that case, the writing alleged to constitute an offer contained terms such as "suggest" and "think". The offeror in McLaurin wrote that he and another discussed a suggestion that they purchase the interest of others in a development in Florida and stated that he could not pay cash but thought he might be able to obtain security for financing if the others wanted to be bought out. The McLaurin court held that the result reached there was a foregone conclusion because the writings in that case impermissibly left material terms for future settlement. Id. at 5. As a result, the McLaurin court found that the alleged offer was nothing more than an invitation to negotiate.

Here, the Lions Club letter has no such indefinite language like that at issue in McLaurin. The letter contains all of the material terms. It identifies the property that is the subject of the bargain, a minimum price expected, the conditions on which the sale will occur and invites the

submission of bids. The fact that the letter requested the recipients to let the club know right away of any interest they may have in the property does not amount to anything other than a solicitation of bids. To find otherwise would necessarily require the Court to supply terms not actually used in the Lions Club letter, which the Court cannot do. *See* Blakeley v. Rabon, 266 S.C. 68, 221 S.E.2d 767 (1976).

The Appellants assert that the facts of the McLaurin case and the one before the Court are inapposite. The language used in the writing involved in McLaurin is in no way similar to that used in the January 2017 letter. Amick's reliance on McLaurin is an exercise in wish casting.

The Lions Club January 2017 letter is clearly an offer. The objective import of the language used in the letter conveys an intent to offer the sale of the Lions Club Point property to the highest bidder. No reasonable recipient would perceive that the letter, calling itself an offer, as anything but an offer. To conclude otherwise is error.

B. The February 2017 Response of Appellants Was An Acceptance Complying With the Conditions Set Forth by the Terms of the Lions Club Letter.

The Appellants' the question of their February 2017 response to the Lions Club letter in their brief is incorporated herein. What follows in this section is intended to address matters raised in Amick's brief not adequately addressed in the Appellant's brief.

Amick contends that the Appellants' February 2017 response to the Lions Club letter cannot be construed as an acceptance because it is violative of the "mirror image" rule. While the Appellants have addressed this argument in their brief, a further discussion of the authorities relied on by Amick is prudent.

Amick cites the cases of Sossamon v. Littlejohn, 241 S.C. 478, 129 S.E.2d 124 (1963), and Columbia Hyundai, Inc. v. Carll Hyundai, Inc., 326 S.C. 78, 484 S.E.2d 468 (1997), as authority indicating that the Appellants' response cannot be an acceptance. This reliance is misplaced.

In Sossamon, the offer required the payment of cash at the time of delivery of the property that was the subject of that bargain. The response of the opposite party, however, qualified the acceptance upon entirely different payment terms. The response would have required the sale to have a specified effective date and allowed for the payment of the purchase money as much as sixty days after delivery of the property. The Sossamon court found that these additional qualifications "clearly constituted a counter proposal to the offer". Sossamon, at 127.

The Appellants' response made no additional conditions to alter the terms of the Lions Club letter. The Appellants' response agreed to accept the property described in the Lions Club letter, on the conditions imposed by the Lions Club, and agreed to pay in excess of the Lions Club's stated minimum. The response was compliant in every respect. The Lions Club president testified that the Appellants' response met every condition imposed by the January 2017 letter (R. p. 873, lines 1-12; R. p. 873, line 24-p. 874, line 2; R. p. 884, line 10-p. 885, line 1) and admitted that he did not recall saying anything to indicate that the Rices' response would not be fully considered by the Lions Club. (R. p. 884, line 10-p. 885, line 1).

Just as with the McLaurin case, the Sossamon decision is entirely based on the terms of the writings at issue in that case. Because the writings in this case are unique to the bargain described in the parties letters, Sossamon is of no real instruction here.

The same is true with regard to Columbia Hyundai. There, the response to the offer clearly imposed new and different terms than that of the offer. The offer in Columbia Hyundai took the form of a written contract for the sale of all of the offeror's "new Hyundai vehicles". In response,

the opposite party signed the contract but added the words "current year" before the phrase "new Hyundai vehicles". When the offeror received the contract with the new words written in, the offeror advised the opposite party that his "counter offer" was rejected. The case was then tried and the question of the existence of the contract was submitted to the jury, which found there was no contract. In that appeal, the Columbia Hyundai court was merely asked to decide whether S.C. Code § 36-2-207 applied. The court held it did not and that the question was properly submitted to the jury.

In so much as the Columbia Hyundai court was not asked and therefore did not pass on the implication of the "mirror image" rule, the Appellants contend the case does not have any bearing in this appeal. This is particularly true where the Columbia Hyundai court expressly confined its decision to the "limited factual circumstances presented [there]". Id. at 82.

Both Amick and the lower court assign to the appellants the assertion of an "auction" theory. The Appellants have not at any stage of this case asserted any such "auction" theory. Thus, the portion of the lower court's order "rejecting" this supposed theory is superfluous. (R. p. 53). Amick seems to assign this "auction" theory to the Appellants merely because the Appellants correctly point out that Amick withdrew his bid submitted in response to the January 2017 letter by his statements at the May 23, 2017, meeting indicating that he was no longer willing to accept the property with the encroachments, an express condition of the Lions Club letter. (R. pp. 1042, 1044). Amick testified at trial that it was "probably right" that he withdrew his bid at that time. (R. p. 669, lines 5-9). Lions Club President Gene Crocker also admitted that Amick withdrew his bid. (R. p. 888, line 14-p. 889, line 5).

The reason why Amick and the lower court seek to "reject" this so-called "theory" is because otherwise one would have to grapple with the significance of Amick's conduct. If it were

truly immaterial, why then would the Lions Club President acknowledge it amounts to a withdrawal of his bid? If "bids" are really of no legal significance in this case, why would Amick himself agree that he withdrew his bid on May 23, 2017? As extensively explained in the Appellants' brief, the answer is that everyone involved knows full well that the Lions Club letter was, in fact, an offer to sell to the highest bidder and all of the after the fact protestations to the contrary on the part of the Respondents are simply an effort to avoid the consequences of their inequitable conduct.

Amick's brief also assigns fault to Appellants' February 2017 response to the Lions Club letter on the basis that it provides that the appellants would need 30-days from "notice that the bid was accepted". Because the sale was to be to the highest bidder and in light of the fact that the Appellants had to assume that there would be more than one bid submitted, the use of this language was nothing more or less than an acknowledgement that the Lions Club would necessarily in that event have to communicate to the bidder that the bidder had the highest bid.

Finally, Amick cites to authority for the proposition that ordinarily attorneys do not bind their clients through letters sent on their behalf. As explained in the Appellants' brief, the general rule is quite the opposite. *e.g.*, Costas v. First Federal Sav. and Loan Ass'n, 283 S.C. 94, 321 S.E.2d 51 (1984). However, the Appellants in reply point out that the very authority cited by Amick provides that "[*u]nless empowered to do so*, an attorney has no authority to bind or contract to purchase property for his or her client." (emphasis added) 7A C.J.S., Attorney & Client § 284. Here, it is undisputed that the Appellants' counsel was, in fact, expressly empowered to bind them. Doing so was the entire point of the February 2017 response.

For the reasons stated above and in the Appellants' brief, the Appellants' February 2017 response was an acceptance in accordance with the terms of the Lions Club January 2017 letter. The lower court's finding to the contrary is erroneous.

C. The Trial Court Erred by Denying Specific Performance.

The Appellants have made thorough arguments in their brief that specific performance is proper on the record of this case. Those arguments are incorporated here. The following expounds on certain portions of those arguments.

The trial court denied specific performance finding that the equities favored Amick and concluding that Appellants have an adequate remedy at law. (R. pp. 63-64).

Respondents and the trial court have overlooked the fact that the question of the specific performance of contracts concerning land is treated differently by the courts of this state. One seeking specific performance would typically have to show the absence of an adequate remedy at law. When the subject matter of the contract is land, however, "the jurisdiction of equity to enforce specific performance is undisputed, *and does not depend on the inadequacy of the legal remedy* in the particular case." (emphasis added). Adams v. Willis, 225 S.C. 518, 83 S.E.2d 171 (1954). In fact, that a party may have an adequate remedy at law "clearly constitutes no ground for denying specific performance of a written contract for the sale of land." Belin v. Stikeleather, 232 S.C. 116, 101 S.E.2d 185 (1957). Instead, a contract for the sale of real estate will be ordered provided "the contract is fair and was entered into openly and aboveboard." Amick v. Hagler, 286 S.C. 481, 334 S.E.2d 525 (Ct. App. 1985); Shirey v. Bishop, 431 S.C. 412, 848 S.E.2d (Ct. App. 2020)[6].

[6] The variance in the law with respect to land is a recognition of the fact that real estate is peculiar in and of itself. See Gregorie v. Bulow, 9 S.C.Eq. 235 (1832). Indeed, "real estate contracts are unique". Brazell v. Windsor, 384 S.C. 512, 682 S.E.2d 824 (2009).

There is nothing in the record indicating any unfair dealings on the part of the Appellants. The same is true with regard to the Lions Club at least up to the point of disseminating the January 2017 letter. In addition, it cannot be said that the receipt of more money under the Appellants contract is in any way unfair to the Lions Club. The contract was made openly and above board. As a result, the lower court should have granted Appellants specific performance and its order to the contrary should be reversed.

IV. AMICK WAS NOT A BONA FIDE PURCHASER FOR VALUE WITHOUT NOTICE.

The lower court found that Amick was a bona fide purchaser for value without notice of a prior claim only to the extent that no contract was formed between the Lions Club and the Appellants. However, Amick asserts in his brief as an alternative sustaining ground that Amick was a bona fide purchaser for value without notice of the Appellants claim without any such qualification. This argument is without merit.

The lower court correctly found that Amick knew by at least November 2017 that the Appellants and others had submitted a bid in response to the Lions Club January 2017 letter and claimed a right to the Lions Club Point property. (R. p. 62). The court stated that the evidence showed that the Appellants November 21, 2017, letter was read aloud during the November 28, 2017, Lions Club board meeting in Amick's presence. (R. p. 62). Therefore, the trial court concluded that Amick had actual knowledge of the Appellants' position, and, at a minimum, placed him on inquiry or constructive notice of the Appellants' claim to the property. (R. p. 63). The court also correctly noted that the Lis Pendens filed by the Appellants in this matter was recorded prior to the recordation of Amick's deed further establishing constructive notice of the Appellants' claims. See, S.C. Code § 30-7-10.

Contrary to the lower court's ruling, Amick argues that the Appellants' November 2017 letter did not put Amick on notice of Appellants' claim to a superior right to the property. Amick did not appeal this portion of the order. The lower court's rulings with regard to Amick's actual and constructive notice are not properly before this Court as a result and constitute the law of the case. Ulmer v. Ulmer, 369 S.C. 486, 632 S.E.2d 858 (2006) (holding that a portion of a judgment that is not appealed presents no issue for determination by the reviewing court and constitutes, rightly or wrongly, the law of the case); See also, Powell v. Powell, 231 S.C. 283, 98 S.E.2d 764 (1957) (noting that where the Respondent in the appeal did not appeal from a portion of the order which was the subject to the appeal, that portion is a final adjudication).

A purchaser of real property that has actual or constructive notice of an adverse claim to the property cannot be a bona fide purchaser for value. Spence v. Spence, 368 S.C. 106, 628 S.E.2d 869 (2006), *citing with approval*, Tauber v. Com. ex rel. Kilgore, 263 Va. 520, 562 S.E.2d 118 (2002) (holding a purchaser of real property is bound by both actual and constructive notice and has no right to shut his eyes or ears to the inlet of information, and then say he is a bona fide purchaser for value without notice). See also, S.C. Code § 30-7-10. Therefore, Amick cannot be a bona fide purchaser, and in that limited sense, the lower court should be affirmed.

V. THE LOWER COURT MADE ADDITIONAL MISCELLANEOUS ERRORS THAT WERE MATERIAL AND REVERSIBLE.

The Appellants have asserted in their brief that the trial court made several errors that are material to the proper resolution of this case. That portion of the Appellants' brief is incorporated here. The following is submitted to more fully address only certain of these errors.

A. The 1933 Resolution Was Not A Bar to Relief.

The court below found that the Lions Club 1933 Resolution to the effect that the Lions Club Point property could only be sold to Lions Club members was never amended or revoked.

As stated in the brief, the Lions Club, through its board, clearly and explicitly did, in fact, resolve to sell the property to non-members. The board caused the January 2017 letter to be sent to all of the adjoining landowners, none of whom are members of the club. (R. pp. 989, 1032, 1044, 1048). In that letter, the board indicated its intent to sell the property to any member of the public if no interest was shown by the recipients of the letter by June 1, 2017. (R. pp. 1044, 1046). To contend that this action by the board left the 1933 Resolution intact is absurd.

The minutes of the board meetings make clear that the Lions Club most certainly were resolved to sell the property to non-members. Were it not, the January 2017 letter would have never been drafted, voted on, and disseminated. This issue was not included in either of Respondents' pleadings. The finding of the lower court as to the 1933 Resolution should be reversed.

B. The Trial Court Erroneously Found that Amick Did Not Improperly Influence the Lions Club Board.

The lower court erred in finding that Amick did not improperly influence the Lions Club board in the course of his efforts to obtain the Lions Club Point property. Amick asserts in his brief that this finding was proper because he was merely pursuing his own interests. What Amick neglects to mention is that he attended every board meeting, even though he was not on the board, which is "highly unusual". (R. p. 801, line 24 -p, 802, line 10). He also fails to mention that he influenced the board to push back the deadline in the January 2017 letter to June 1 so that he could decide if he could purchase the property. Amick then convinced the board that he should not have to purchase the property with the encroachments and actually succeeded in influencing the board to "withdraw all offers to sell" made to the adjoining landowners and go about dealing with the

encroachments itself. Each and every condition the board found important in January 2017 was undone at Amick's urging in the next five months[7].

Amick's influence over the board lead the Lions Club to ignore the Appellants, never once giving them notice of its changes or its discussions with Amick despite being made aware of their claim to the property, which eventually caused the club to be caught up in this litigation.

The lower court's finding that Amick's actions do not amount to his improper influence of the Lions Club board is therefore reversible error.

VI. THE TRIAL COURT ERRED IN REFUSING TO ALLOW EXPERT SPITZ TO TESTIFY ON MATTERS WHICH WERE ADMISSIBLE UNDER VORTEX SPORTS V. WARE, 378 S.C. 197, 662 S.E.2D 444 (2008).

Respondents' brief argues that the Rices' proffer by affidavit of what expert Spitz would have testified to had it been allowed was correctly rejected in toto by the trial court. However, the contents of the testimony in the affidavit should not have been excluded in entirety and the trial court erred in so ruling.

The Respondents have not challenged the qualifications and expertise of expert Steve Spitz. Indeed, his credentials are extensive (R. p. 1118). In the case of Vortex Sports & Entertainment v. Ware, 378 S.C. 197, 662 S.E.2d 444 (2008), our Supreme Court held that, while an expert cannot opine about legal conclusions or tell the court how to rule, an expert can testify about his opinions relating to the material facts of the elements of a cause of action (breach of fiduciary duty in that case). Respondents' brief overlooks both the Vortex case and a prior court ruling in this case. On July 17, 2019, The Honorable Eugene C. Griffith, Jr. issued a Form 4 Order on Amick's motion to strike the Spitz affidavit and ruled that:

[7] The improper influence Amick asserted over the Lions Club is specifically addressed throughout Appellants' original brief and herein in the argument on equity.

> "the legal conclusions continued in the affidavit must be stricken and disregarded. However, the remaining portions of the affidavit may be considered." (emphasis added)
> (R. p. 1)

Therefore, it was permissible for Professor Spitz to opine as to the significant, material facts as to contract/specific performance and equity. There were several pages of Professor Spitz's affidavit which list the relevant facts as to real estate issues and to the equities in the case. (R. pp. 1122-1127). Some of these are summarized as follows:

a. The Lions Club yielded to demands of Amick that encroachments be cleared up and his bid withdrawn (R. p. 1128);

b. The Lions Club ignored and did not respond to the three letters from Appellants' lawyer (R. p. 1122);

c. The Rices' bid was the highest bid on the June 1, 2017, deadline which the Lions Club imposed (R. p. 1123); and,

d. The Lions Club, by yielding to Amick's demand that it clean up encroachments, contrary to the offer letter, may constitute unfair dealing because the Lions Club had a contract for a higher amount than Amick's offer as of the June 1 deadline, yet refused to consummate the sale. (R. p. 1128).

The July 2019 Order of Judge Griffith properly interpreted and applied the holding in Vortex. It was reversible error for the trial court to deny the proffer of expert opinions which were relevant to the equity issues and which did not assert conclusions of law.

VII. THE LOWER COURT ERRED IN CONCLUDING THAT THE APPELLANTS DID NOT PROVE PROMISSORY ESTOPPEL.

The Appellants argument on the issue of promissory estoppel set forth in their brief is incorporated herein. Here, the Appellants merely address contention contained in Amick's brief that the promise or representation forming the basis of the Appellants' promissory estoppel claim is limited to the four corners of the Lions Club January 2017 letter.

On Pages 32 and 33 of Amick's brief, he argues against the Lions Club letter forming the basis of a promissory estoppel claim. While the letter is, in part, relied upon by the Appellants, they do not rest their entire case on it. The record below and the Appellants' brief make clear that this claim is primarily based on the testimony of Appellant Joseph F. Rice and Claude Schumpert regarding the statements of Lions Club President Gene Crocker and Secretary Pete Simpson made during their respective phone calls shortly after receiving the January 2017 letter.

Appellant Joseph F. Rice testified that the signatory of the letter, Pete Simpson, told him that that the sale was "going to the highest bidder." (R. pp. 448, lines 9-12; R. p. 448, line 25-p. 449, line 16). Mr. Rice's testimony is corroborated by a virtually identical phone conversation recounted by Claude Schumpert. Mr. Schumpert, who has no incentive to shade the truth one way or the other, testified that after receiving the January 2017 letter, he spoke to Lions Club President Gene Crocker about the process for the sale and Crocker told him that the Lions Club was offering the property to the "highest bidder." (R. p. 530, line 11-p. 531, line 6). Schumpert made contemporaneous notes during the call and wrote on his copy of the offer letter "Gene Crocker" and "highest bid." (R. p. 1108).

As more fully explained in the Appellants' brief, the subsequent denials of these statements by Crocker and Simpson should not be given any weight. They should also be disregarded because these Lions Club officers have every reason to deny making these statements. Amick, after all, has asserted a crossclaim against the Lions Club seeking not only the return of his $300,000 but also his attorneys fees and costs, which were sure to be a sizeable sum by the date of the trial.

In Amick's brief it stated that the Lions Club "never acted like the Rices had a contract". This too is subterfuge. The Lions Club's actions after January 2017 have no bearing on the Court's review of the Appellants' promissory estoppel claim.

Mr. Simpson had to know, or at least should have known, that Mr. Rice, calling about the sale of the Lions Club Point property, would rely on his representations regarding the January 2017 letter. The representations made to Mr. Rice and Mr. Schumpert were simple and to the point: the Lions Club intended by its letter to offer the sale of the Lions Club Point property to the "highest bidder". It is clear from each of the letters the Appellants sent to the Lions Club after Mr. Rice's phone call with Mr. Simpson that the Appellants relied on these representations.

Unfortunately, the Lions Club would break this promise, selling the property to Amick at a discount. In doing so, the Lions Club sought to deprive the Appellants of the property, which is an injury in and of itself, but to add to the insult Amick has prohibited the Appellants and their neighbors from using it in the manner they and their predecessors have for decades. If the promise made by the Lions Club officers is not enforced, the Appellants will also lose the value of the property. Appellants have clearly shown the element of damages. The lower court's conclusion on this cause should be reversed.

CONCLUSION

For the reasons stated in the appellants brief and this reply, the court below committed reversible error in ruling for Respondents; in failing to conclude the Appellants have an enforceable contract for the purchase of the Lions Club Point property; and in failing to set the deed to Amick aside and ordering the specific performance of the appellants' contract. This Court reverse the trial court in each of these respects and direct that Respondent Lions Club to deliver to Appellants a deed to the subject property upon their 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.

March 5, 2024

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SC Court of Appeals

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 Betty S. Amick, as Personal Representative of the Estate of C. Ray Amick.....Respondents

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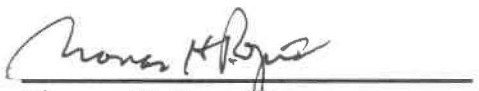
CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Reply Brief of Appellants complies with Rule 211(B), SCACR.

POPE PARKER JENKINS, P.A.



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