THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Mikell R. Scarborough, Master-In-Equity

Appellate Case No. 2022-001165

Michael D. Royal, Appellant,

v.

Free Kindergarten Association of Charleston, Respondent,

The Attorney General of the State of South Carolina and
The Charleston County School District, Intervenors/Respondents.

INITIAL BRIEF OF APPELLANT

Jeffrey S. Tibbals S.C. Bar No. 72628
jst@bybeetibbals.com
Evan P. Williams S.C. Bar No. 101981
ewilliams@bybeetibbals.com
BYBEE & TIBBALS, LLC
735 Johnnie Dodds Blvd., Suite 104
Mt. Pleasant, South Carolina 29464
P.O. Box 1542 (29465)
Telephone: 843.881.1623

Counsel for Appellant Michael D. Royal

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CASES

[1] Appellant is cognizant of Rule 268(d)(2), SCACR, however the unpublished orders and unrelated complaint cited herein are only addressed due to the lower court's reliance on the same. Copies of these unpublished orders and complaint are included in the record. R. pp. __-__.

STATUTES

COURT RULES

OTHER AUTHORITIES

STATEMENT OF ISSUES ON APPEAL

1. Did the lower court err in granting the motion for non-suit dismissal of Appellant's claims?

2. Did the lower court err in finding Respondent Free Kindergarten Association of Charleston ("FKAC") was governed by the South Carolina Nonprofit Corporation Act of 1994, S.C. Code Ann. §§ 33-31-101, *et seq.* ("1994 Act")?

3. Did the lower court err in finding June Wells did not have express or implied authority to bind FKAC to the purchase and sale agreement between Appellant Michael D. Royal ("Royal") and FKAC ("Agreement") for real estate located at 34 Pitt Street, Charleston, South Carolina?

4. Did the lower court err in finding the PSA was contrary to public policy and therefore void?

5. Did the lower court err in ruling on unconscionability of the Agreement without consent of the parties when that issue was not presented in the pleadings?

6. Did the lower court err in failing to order specific performance of the Agreement?

7. Did the lower court err in finding Intervenor/Respondent The Attorney General of the State of South Carolina's ("AG") has authority to disapprove of or seek nullification of the Agreement?

8. Did the lower court err in granting CCSD's motion for intervention and in determining substantive issues in ruling on CCSD's requested intervention?

9. Did the lower court err in allowing CCSD to file claims seeking affirmative relief and in granting CCSD's requested relief when its claim was not presented for consideration?

10. Did the lower court err in excluding the transcript of the deposition of CCSD's Rule 30(b)(6) designated witness from evidence in this case?

STATEMENT OF THE CASE

Royal filed the underlying civil action on December 4, 2018, asserting claims for breach of contract and specific performance of the Agreement for the purchase and sale of real estate

identified as 34 Pitt Street, Charleston, South Carolina 29401 ("Property"), owned by FKAC. Until the early to mid-2000s, FKAC provided free kindergarten education in the building on the Property. On April 23, 2013, Royal and FKAC executed the agreement ("PSA" or "Agreement"), which provided FKAC the right to select any date from April 23, 2013 through April 9, 2018 on which to close the sale. FKAC waited until the very end of that period, and on April 4, 2018, gave the AG advance notice of the closing. The AG demanded that FKAC halt the sale, claiming the power to nullify the PSA due to purchase price. After two extensions of the closing date, FKAC would not close without AG approval, and Royal filed a Complaint as a pro se plaintiff.

On March 21, 2019, the case was referred by consent order to the Charleston County Master-In-Equity, the Honorable Mikell R. Scarborough. Prior to this reference, the AG and CCSD filed separate motions to intervene on January 28 and February 7, 2019, respectively. The AG asserted that statutory and common law governing charitable trusts granted him authority over the sale of FKAC's last known substantial asset, the Property. CCSD claimed an interest pursuant to a February 5, 1971 amendment to FKAC's charter, reflecting a resolution of the members that upon the corporation's dissolution, its residual assets would "be turned over to Charleston School District #20, part of the South Carolina State School System[.]" Pl. Ex. 62 ("1971 Amendment").

Via a June 7, 2019 form order, the lower court granted the AG's request to intervene as a matter of right and allowed CCSD to permissively intervene. CCSD filed its Answer, Counterclaim and Crossclaim on June 24, 2019, requesting a declaratory judgment that: a) CCSD is the owner of FKAC's assets, and/or the sale proceeds of such assets; b) the PSA is null and void; and c) upon FKAC's dissolution, its assets and/or sale proceeds would belong to CCSD.

Subsequently, the lower court entered formal orders on July 10 and August 22, 2019, as to intervention by the AG and CCSD, respectively. On February 22, 2021, Joe Qualey was appointed

as Receiver for FKAC and was directed to take possession of the Property.[2]

The master conducted a non-jury trial of this matter on December 15, 2021. On March 31, 2022, the lower court entered an order with its findings and conclusions from trial ("Order"). In relevant part, the Order found that: FKAC's assets, upon dissolution, shall pass to CCSD; Wells did not have sufficient authority to execute the PSA on FKAC's behalf; and the AG had authority to approve or disapprove the PSA under certain statutory and common law sources. At trial, before Royal completed his case in chief, the master ordered non-suit dismissal of Royal's claims under Rule 41(b), SCRCP, pursuant to the following exchange with the AG's counsel:

> THE COURT: All right. Okay. Now, Ms. Jowers, back to you, do you have a motion?
>
> MS. JOWERS: I don't think I have a motion. I was going to have two comments. I don't think so. Oh, yes, I do. Your Honor, we would move for directed -- well, can I request two things?
>
> MR. TIBBALS: We hadn't rested.
>
> MS. JOWERS: Okay.
>
> THE COURT: Well, you can go ahead and make the motion because I'm going to grant it. Go ahead and make the motion.
>
> MS. JOWERS: Okay. Your Honor, I would make a motion for directed verdict at this time.
>
> THE COURT: It's a motion for nonsuit.
>
> MS. JOWERS: I'm sorry. Your Honor, I would make a motion for nonsuit, that the -- this action, that this contract and this potential sale was against public policy because it was less than fair market value.[3]

Tr. 324:18–325:14. There is no monetary judgment on appeal, but the amount of the PSA's

[2] On August 10, 2021, Charleston Chapter No. 4 of the United Daughters of the Confederacy and the Confederate Museum were granted intervention, based on ownership of materials stored at the Property, and they were dismissed on October 28, 2021 after removing said materials.

[3] While the lower court's *sua sponte* motion for non-suit dismissal constitutes reversible error, additional, more substantive, issues warranting reversal are addressed herein.

purchase price is $315,200. The lower court's orders on appeal include the March 31, 2022 Order, the orders entered July 18, 2022 as to CCSD's motion to exclude and strike exhibits offered at trial, and denying Royal's motion and amended motion to reconsider, as well as the intervention orders specified in Royal's Notice of Appeal, served and filed August 17, 2022.

STATEMENT OF THE FACTS

I. INITIAL MEETINGS AND DISCUSSIONS REGARDING A SALE (2011-2013).

Although the heart of this dispute is the enforceability of a four-page, two-party agreement to purchase and sell real property, the other parties' defenses and allegations necessitate review of an extended timeframe of relevant facts. In 2011, planning a move home to Charleston, Royal was searching for a property downtown suitable for both residential and business uses. Tr. 51:8–52:7. On December 3, 2011, Royal drove by the Property and immediately identified it as the property he had been seeking. Tr. 52:8–53:12. Located in a residential neighborhood, it featured an approximately 2,800 square foot one-story abandoned building. *Id.*; Pl. Robinson Ex. 1 p.5.[4]

Royal took photographs of the Property and began his search to find the owner. Tr. 53:8–54:18; Pl. Exs. 1-3. Title and tax records at that time indicated that the City of Charleston ("City") held an interest in the Property. Tr. 55:17-24, 80:2–81:24. Royal met with City staff in December 2011, who advised him the Property was owned by FKAC and to contact June Murray Wells ("Wells") on behalf of FKAC. Tr. 55:25–56:11, 61:16–62:8, 69:15–71:2.

Royal met Wells for the first time in 2012 and discussed FKAC and the Property. Tr. 71:3-14, 72:24–74:13. During that meeting and in subsequent conversations, Wells advised that she was

[4] Royal's first two exhibits were marked and filed post-trial with different identifiers than shown in the transcript. The December 19, 2012 appraisal was marked and filed as Plaintiff's Robinson Exhibit 1 (R. pp. __-__) but shown as Plaintiff's Exhibit #1 in the transcript (Tr. 4:13). And the transcript's Plaintiff's Exhibit #1A (Tr. 4:14) was marked as Plaintiff's Exhibit 1 (R. p. __).

the last remaining member of FKAC's board of directors, that she held the authority to sell the Property, and that no other person had any authority with respect to the Property. *See, e.g.*, Tr. 77:16–79:2, 82:1–83:5; *see also* Tr. 75:2–77:11. Royal expressed his desire to purchase the Property, and Wells indicated that FKAC was open to selling since its kindergarten operations had ceased. *See, e.g.*, Tr. 79:18–80:10, 83:24–84:3. Royal left that first meeting with the impression that Wells "was very sharp, friendly. … that she intended to sell [the Property]." Tr. 74:17-23.

In the fall of 2012, aware of Royal's significant interest in purchasing the Property, Wells invited him to see the Property, and she gave him a tour of the grounds and building on November 4, 2012. Pl. Ex. 8. Wells was storing personal property inside the building and continuously told Royal she was busy moving items out and would soon have the building vacant. Pl. Ex. 46; Tr. 146:9–147:8, 148:11–149:9, 220:11–221:1. While Wells gave every indication that she wanted FKAC to sell the Property, Royal sensed her apprehension about being forced to move the personal property under a tight deadline. *See, e.g., id.*; Tr. 89:11–90:4, 104:3–106:3.

Royal asked Wells if an appraiser, Michael Robinson ("Robinson"), could inspect and appraise the Property, to inform Royal's purchase offer. Tr. 83:24–84:24; Pl. Ex. 9. Royal and Robinson met Wells at the Property on November 28, 2012, and she unlocked the building and showed Robinson around. Tr. 84:22–86:4. Robinson, an MAI-accredited appraiser, produced an appraisal report on January 11, 2013, estimating a fair market value of $315,200.00 effective December 19, 2012. Tr. 86:5-18; Pl. Robinson Ex. 1 p. 2. Prior to making any offer, and on multiple occasions thereafter, Royal encouraged Wells to engage an attorney on FKAC's behalf to review any offer or proposed contract, but she never did so. Tr. 83:6-23, 136:1-9, 241:18–242:11, 289:1-7, 295:16–297:1.

On January 14, 2013, Royal mailed Wells an offer, in the form of a signed agreement, to

purchase the Property for $315,200, the fair market value reflected in Robinson's appraisal. Pl. Ex. 10; Tr. 87:1-25. Aware of Wells' concern about removing all of the materials stored at the Property, the proposal gave FKAC exclusive possession until June 30, 2013, over five (5) months from the date of offer. Pl. Ex. 10; Tr. 89:11-14, 89:23–90:4. The March 30, 2013 closing date reflected Royal's desire for a quick closing, but the proposal also allowed FKAC to extend closing to December 31, 2013. Pl. Ex. 10; Tr. 93:4-16. FKAC did not countersign the contract offer and in subsequent conversations, Royal determined the hesitation was due to Wells' concern about creating a vacate date by which to remove personal property. Tr. 94:2–95:6.

II. ROYAL AND FKAC EXECUTE THE REAL ESTATE AGREEMENT (2013).

Royal decided to make one more attempt to purchase the Property, and on April 23, 2013 ("Effective Date"), visited Wells at the museum where she worked, her preferred meeting place, and presented a second contract offer. Tr. 134:1–135:25. This offer also contained the $315,200.00 purchase price, but Royal had drafted this version to include language intended to assuage Wells' trepidation about a move-out deadline. *Id.*; Pl. Ex. 11. Rather than fix a concrete closing deadline, this second offer gave FKAC extreme flexibility, allowing it to unilaterally set a date for closing on any day from the Effective Date until April 9, 2018 ("PSA Closing Deadline"). Pl. Exs. 11, 31; Tr. 103:25–106:2, 134:24–135:3. Royal proposed a flexible closing date to alleviate pressure on Wells to meet a closing/move-out deadline, and only included it to accommodate and benefit FKAC. *Id.*; Tr. 285:8-22; Royal Br. Ex. 4 at 93:11-20.[5]

Wells felt she needed ample time to ensure that each item in the building reached its proper recipient, whether it be a book, document, or museum artifact (the Property was for a time used as

[5] This case did not involve a standard pre-trial briefing or hearing process. Rather, pre-trial briefs were submitted, and reviewed by the lower court, immediately before trial. Tr. 7:9-14.

a museum in the 1990s). Pl. Ex. 32 pp. 1-2 ("I [Royal] have committed to helping Ms. Wells transition the items in the school building to their future homes . . . Ms. Wells exercises great caution with the items in her care."). Royal and Wells, on FKAC's behalf, executed the PSA in the presence of a notary and two witnesses. Tr. 96:24–98:23, 134:1–135:25, 138:1–139:3; Pl. Exs. 11, 31.[6] Notwithstanding the PSA's potentially expansive closing provision, Royal expected to close soon after the Effective Date as Wells gave him reason to believe that would happen. Tr. 147:1–149:21, 285:3-22. Royal perceived that it was the deadline itself, the idea of a day certain move, that created Wells' unease about setting closing, not the actual moving of property or the ability to complete such a move. Tr. 220:11–222:16.

III. ROYAL'S REPEATED ATTEMPTS TO CLOSE EXPEDIENTLY (2013-2018).

Royal was and has been ready, willing, and able to close on the Property from the Effective Date until the present day. Tr. 176:5-15. From contract execution until the spring of 2018, Royal politely but persistently contacted FKAC seeking to close the Agreement, many times offering assistance in relocating personal property. *See, e.g.*, Compl. ¶13, Exs. D, H; Tr. 146:9–147:12 ("I called her somewhat regularly to see if I could be helpful."). On numerous occasions, Royal took actions or made proposals to assist FKAC and facilitate closing. Tr. 139:4–146:8, 148:22–152:5. For example, Royal proposed, via letter on January 26, 2015, to close immediately and preserve FKAC's right of possession until April 9, 2018. Pl. Ex. 47. Royal offered to make a $30,0000 down payment and pay taxes and insurance while FKAC occupied the building rent-free. *Id.*; Tr. 153:13–154:18. Additionally, Royal repaired the Property at his expense (Tr. 261:14-19), and resolved a cloud on title (*see infra* pp. 15-16).

[6] Pl. Ex. 31 is a Memorandum of Real Estate Purchase and Sale Agreement ("PSA Memo"), recorded with the Charleston County, South Carolina Register of Deeds Office, in Book 0325, at Page 703, to give record notice of the PSA. Tr. 137:6–138:25.

Despite all of Royal's efforts, and even though the Property was no longer in use for FKAC's corporate mission, Wells continued to store her personal property in the building at 34 Pitt Street, forcing Royal to wait the full five years for a closing date. Tr. 148:8–149:21, 156:4-20. On March 29, 2018, FKAC's attorney assured Royal that FKAC would close by April 9, 2018, stating a deed had been prepared and a bank account opened for FKAC to receive the sale proceeds. Pl. Ex. 55. A week later, on April 4, 2018, FKAC gave the AG notice of the sale, believing it was required under S.C. Code Ann. § 33-31-1202(f). Pl. Ex. 56; *see infra* pp. 12-13, 33-34.

IV. THE AG HALTS THE SALE (2018).

Thereafter, FKAC's counsel requested the closing date be extended until April 26, 2018, as the AG's twenty-day notice period expired April 25, and a PSA addendum to this effect was executed. 165:11 – 168:6; Compl. ¶14, Ex. C. FKAC then requested a second extension, to which Royal agreed, but FKAC had not provided its executed second addendum by April 26, 2018, the amended closing date. Compl. ¶15, Exs. D, E. Consequently, Royal sent FKAC's counsel an e-mail on April 26, tendering performance. *See id.* He requested FKAC provide the signed second addendum or advise of the location for closing and wiring instructions. *See id*. On April 27, FKAC provided its executed copy of the second addendum (signed April 24, 2018), and the parties extended the closing to May 25, 2018 ("Final Closing Deadline"). Compl. ¶16, Ex. E.

Also on April 26, 2018, Royal participated in a conference call with Sonny Jones, Senior Assistant Deputy Attorney General ("Jones"), and Mary Frances Jowers, Assistant Deputy Attorney General, during which Jones insisted that the AG had independent power to nullify the PSA. Tr. 181:13 – 182:5; Pl. Ex. 69 p. 3. Jones further stated that the AG was voiding the contract unless Royal agreed to pay more than the contract purchase price. Tr. 182:5-10. Royal asked Jones to identify the source of the AG's authority to nullify or renegotiate the terms of the PSA,

and Jones cited S.C. Code Ann. § 33-31-1202.[7] *Id.* at 182:11-19. When Royal questioned the AG's interpretation of that statute, Jones responded, "That's the way we do it." *Id.*

On May 11, 2018, FKAC sent Royal a letter refusing to close "without approval of the Attorney General." Tr. 184:10–185:6. When he received FKAC's letter on May 14, Royal sent FKAC's counsel, Rick Stringer, an email advising the letter amounted to anticipatory breach of the PSA. Compl. ¶18, Ex. G. Unbeknownst to Royal, the AG separately corresponded with Stringer after the sale notice, exhorting FKAC to resist the sale. Royal Br. Exs. 8-9; Compl. Ex. L.

V. FKAC REFUSES TO CLOSE (2018).

The Final Closing Deadline passed, but Royal still hoped to avoid litigation. On June 1, 2018, Stringer notified CCSD of FKAC's agreement to sell the Property to Royal. Pl. Ex. 85 p.10 no. 32. More than a month after the Final Closing Deadline, FKAC's counsel emailed Royal on June 28, 2018, stating that FKAC refused to consummate the sale. Compl. Ex. L. FKAC was unwilling to close because the AG would not approve the sale, based upon an appraisal commissioned by the AG. *Id.* As the AG had not provided him a copy, Royal was unaware of this appraisal, which valued the Property as of June 7, 2018. *Id.*; Royal Br. Ex. 10; Order p.8.

Responding to FKAC's email, with counsel for the AG and CCSD copied, Royal gave FKAC notice of default and demanded that the parties close the transaction. Compl. Ex. L. CCSD's counsel, in its first communication with Royal, responded and falsely claimed FKAC was in the dissolution process and the Property was to be conveyed directly to CCSD, asserting CCSD was the sole beneficiary of residual assets.[8] Tr. 194:19–195:20. Following FKAC's continued

[7] The AG has admitted, and the lower court found, that FKAC's April 4 notice (Pl. Ex. 56) satisfied the requirements of the statute (assuming FKAC is subject thereto). Order p.15.

[8] It is not in dispute that FKAC was and still is in good standing and authorized to do business in South Carolina. Nor has any dissolution proceeding been initiated with regard to FKAC.

refusals to close, and CCSD and the AG's continued interference, Royal was forced to initiate this action on December 4, 2018.

STANDARD OF REVIEW

The appellate court "'reviews all questions of law de novo[,]'" and may resolve such questions "'with no particular deference to the trial court.'" *Lollis v. Dutton,* 421 S.C. 467, 477, 807 S.E.2d 723, 728. (Ct. App. 2017) (internal citations omitted). The standard of review as to the lower court's "factual findings, however, depends on . . . whether the underlying action is an action at law or an action in equity." *Fesmire v. Digh,* 385 S.C. 296, 302, 683 S.E.2d 803, 807 (Ct. App. 2009). For actions at law, "findings of fact will not be disturbed unless found to be without evidence which reasonably supports the [lower] court's findings." *Stanley v. Atlantic Title Ins. Co.*, 377 S.C. 405, 409, 661 S.E.2d 62, 64 (2008). Conversely, the appellate "court can find facts in accordance with its view of the preponderance of the evidence[]" in actions at equity. *West v. Newberry Elec. Coop., Inc.*, 357 S.C. 537, 593 S.E.2d 500, 542 (Ct. App. 2004).

This appeal involves Royal's claim for specific performance and breach of contract. Compl. pp. 6-7 (¶¶26-35). If a case concerns both equitable and legal claims, the appellate court's determination of the "main purpose" of the action dictates the applicable standard of review. *See Fesmire,* 385 S.C. at 303, 683 S.E.2d at 807. This determination is primarily made by reviewing the body of the complaint, but, if necessary, the court may also consider "'the prayer for relief and any other facts and circumstances which throw light upon the main purpose of the action.'" *Lowcountry Open Land Trust v. Charleston S. Univ.*, 376 S.C. 399, 406-407, 656 S.E.2d 775, 779 (Ct. App. 2008) ("*LOLT*") (internal citation omitted); *see also Fesmire,* 385 S.C. at 303, 683 S.E.2d at 807 ("this Court must look to the action's main purpose as reflected by the nature of the pleadings, evidence, and character of the relief sought[]") (internal citation omitted).

The *LOLT* opinion is relevant here as it provides guidance as to the applicable standard for cases involving both specific performance and breach of contract claims. There, the respondent alleged that "the master was interpreting the contract, so the action [wa]s one at law and this court's scope of review should extend only to the correction of errors of law." *LOLT*, 376 S.C. at 406 n.4, 656 S.E.2d at 779 n.4. Although the respondent's pleading alleged a breach of contract claim, it "primarily asserted a claim for specific performance" and "the relief sought is specific performance. This is an action in equity." *Id.* at 406, 406 n.4, 656 S.E.2d at 779, 779 n.4.

Because this action's main purpose is specific performance of the PSA, it lies in equity. *See, e.g.*, *Ingram v. Kasey's Assocs*., 340 S.C. 98, 105, 531 S.E.2d 287, 290 (2000). Therefore, this Court may find facts based upon its own view of the preponderance of the evidence. In the instant appeal, the lower court's rulings must be overturned. The lower court erred in its conclusions of law and made factual findings not supported by the preponderance of the evidence. Indeed, the record does not contain reasonable support for many of the lower court's findings.

ARGUMENT

At its core, this action is simple: Royal seeks to enforce a valid and binding Agreement for the purchase and sale of real estate. Royal proved at trial, with overwhelming and uncontroverted evidence, all elements of contract, breach, and specific performance, negating CCSD's assertion that June Wells did not have authority to execute the PSA. No party has questioned Wells' thoughtfulness or intention, nor her mental acuity or capacity, and FKAC itself admits that Wells had full agency and authority to take binding acts on its behalf. Likewise, no party has challenged Royal's good faith in all of his dealings with FKAC.

The AG and CCSD have bitterly fought the consummation of the PSA, cloaking their contract interference as "public interest" concerns. But CCSD's clear motivation is to secure a

windfall profit by ignoring the sanctity of contract and selling to the highest bidder. The AG seeks an extraordinary expansion of power – the unfettered discretion to nullify a private contract involving a defunct educational corporation. Unsupported by the facts or law of this case, the AG and CCSD's defenses are cynical attempts to muddy the water and distract the court with public relation buzzwords: the greater public good, charitable intent, public charity, etc. Their arguments are all optics, no substance, and depend on this Court buying into the crafted narrative that their contract interference is based on promoting the good of society.

Yet this Court must not allow the Respondents' vacuous sloganeering to distract from the plain facts and basic principles of contract law involved in this case. The simple four-page PSA was negotiated and executed by a private citizen and a privately funded corporation for the sale of property, which the corporation acquired not by donation, but for monetary consideration. Long before the PSA's execution, FKAC, with the AG's knowledge, ceased all operations and therefore provided no benefit, charitable or otherwise, to the public. By FKAC's own admission, its signatory to the contract had authority to represent FKAC. This Court should reverse the lower court's rulings and hold that Royal is entitled to specific performance of the Agreement.

I. FKAC IS NOT GOVERNED BY THE 1994 NONPROFIT ACT.

The Order contains frequent references to the 1994 Act. Order pp. 7, 12-14, 17, 24. Yet, the Order fails to address Royal's argument at trial that the 1994 Act does not govern FKAC. The question of whether the 1994 Act applies touches on two primary issues on appeal – Wells' authority to act for FKAC and the powers asserted by the AG to invalidate the PSA.

FKAC was incorporated under and is governed by Act No. 219, 1900 S.C. Acts 390 ("1900 Act"). Tr. 300:18–305:16; Pl. Ex. 59 (Jan. 24, 1901 Certificate of Incorporation, stating it is

incorporated under and governed by the 1900 Act).[9] By the plain language of the 1994 Act, FKAC is excluded from its purview. First, FKAC does not meet the 1994 Act's definition of a "corporation." *See* 1994 Act §§ 33-31-140(7), (12), (30) (referencing §§ 33-31-201 – -207, -1707). Under the 1994 Act, public benefit corporations are only those entities a) incorporated on or after March 2, 1994; or b) incorporated between the 1976 Act's effective date and March 1, 1994.[10] *Id.* Second, FKAC is not subject to the 1994 Act as specified under § 33-31-1701, "Application to Existing Domestic Corporations." FKAC was never governed by the 1976 Act, has not filed "with the Secretary of State an irrevocable election to be governed by the" 1994 Act, and is not the product of a merger. 1994 Act §§ 33-31-1701(a)-(c). FKAC's failure to satisfy any of the three criteria envisioned by the Legislature compels a finding that FKAC is not subject to the 1994 Act.

II. THE LOWER COURT ERRED IN FINDING JUNE WELLS DID NOT HAVE AUTHORITY TO EXECUTE THE PSA ON BEHALF OF FKAC.

Devoting one paragraph to the issue, the Order held that "the extent of Wells [sic] limited authority does not constitute actual, implied or apparent authority to" execute the PSA on FKAC's behalf. Order p.10.[11] Although the AG never alleged Wells lacked authority, the Order included its finding on this issue as a basis for granting the AG's motion for non-suit. *Id.* at pp. 9-10. The Order lacks any analysis or application of South Carolina law on implied or apparent authority and fails to satisfy the preponderance of evidence standard. The Order's holding flies in the face of overwhelming evidence presented at trial proving Wells' express and apparent authority, and even appears to contradict the master's acknowledgement at trial that Wells in fact possessed requisite

[9] The 1900 Act is referenced, as 1900 (23) 390, in the legislative history of various sections of the 1994 Act. *See, e.g.*, S.C. Code Ann. §§ 33-31-120, -140.

[10] "1976 Act" refers to Title 33, Chapter 31 of the 1976 Code of Laws of South Carolina.

[11] Additionally, the lower court found that Wells possessed "some authority but not absolute authority to act on behalf of the FKAC[,]" and "[w]hatever authority Wells had to sign the Agreement on behalf of FKAC . . . is subordinate to the public interest." *Id.* The Order did not elucidate as to the circumstances in which the public interest would invalidate agency law.

authority to bind FKAC to the PSA. Tr. 339:14-17 ("One of the issues in this case is whether or not Ms. June Wells had the authority to act. I'm going to find that she did have the authority to act, but that's not statutory."). *See also* Tr. 57:25–59:25, 75:11–77:11, 305:6–308:6, 317:25–318:9, 320:3–321:14 (discussing evidence supporting Wells' agency authority).

The only party to dispute June Wells' authority was CCSD, the author of the Order, a permissive intervenor seeking to nullify the PSA. Yet CCSD presented no evidence to refute Wells' authority. The weight of the evidence supports only one conclusion: June Wells possessed the requisite authority to execute the PSA and consummate the sale on FKAC's behalf.

A. <u>FKAC's Pleadings, Prior Rulings, and Sworn Statements Affirm Wells' Authority</u>.

The Order is directly contradicted by FKAC's own pleadings confirming Wells' authority to act on its behalf. FKAC Reply to Crossclaim ¶2 ("Wells[] was and is the duly authorized director and last surviving member of the [FKAC] and that as such she has authority and had authority since approximately 1990 to represent the [FKAC]."); *see also id.* at ¶1.[12]

Moreover, the Order's ruling conflicts with a December 2010 Charleston County Probate Court order recognizing Wells as the only person in the world with authority to act on FKAC's behalf. Pl. Ex. 29 ("Probate Order"). The Probate Order terminated the Marion Stuart Hanckel Trust ("Hanckel Trust")[13] and distributed its assets to the Coastal Community Foundation. *Id.* The probate court relied heavily on the fact that "**Wells expressed her consent on behalf of the Free Kindergarten Association** to the" requested termination of the Hanckel Trust. Pl. Ex. 29 (emphasis added). Shockingly, the AG championed Wells' authority and consent, by way of an affidavit prepared by the AG's Office and sent to Wells by Mary Frances Jowers, Assistant Deputy

[12] FKAC denied paragraphs thirty-one and thirty-three of CCSD's cross-claim, which alleged Wells lacked authority to exercise FKAC's corporate powers and lacked legal authority to execute the PSA. *Compare id.* at ¶ 1, *with* CCSD's Answer, Counterclaim, and Cross-claim ¶¶ 31, 33.
[13] The Hanckel Trust was FKAC's sole source of funding. Pl Exs. 29, 29A ¶¶ 4-5.

Attorney General, counsel of record in this action. Pl. Ex. 28; Tr. 125:3–126:10, 132:17–133:2. Based on the affidavit drafted and promoted by the AG (Pl. Ex. 29A), the court found:

> June Murray Wells is the last living advisory board member of the Free Kindergarten Association with capacity to act on behalf of the Association. She is the **only known person with capacity to act on behalf of the Association**.

Pl. Ex. 29 p.2 (emphasis added). In finding this evidence has no relevance to Wells' authority to bind FKAC to the PSA, the Order portrays the affidavit and Probate Order as relating only to FKAC's operational status, funding, and equitable deviation of the Hanckel Trust. Order pp.5-6. The Order erred in failing to consider the nature of this evidence as establishing Wells' general authority to take corporate actions on FKAC's behalf. Pl. Exs. 29, 29A. It is inexplicable that Wells could have the requisite authority to authorize termination of FKAC's funding, but no power to convey an asset FKAC could no longer afford. Pl. Exs. 29A ¶¶5-7, 29 p.2. The probate court's "only known person with capacity to act" phrasing is not limited and translates to other corporate powers, such as asset disposal. Pl. Ex. 29 p. 2; *see also* Tr. 128:1-15, 132:17–133:20, 318:1-9.

Indeed, FKAC itself filed the Probate Order to support its request that the Court determine "whether the sole surviving member of [FKAC] is June Murray Wells and is therefore authorized to sell the aforesaid property." FKAC Counterclaim ¶7, Ex. A.[14]

Wells executed another sworn affidavit evidencing her authority in 2013 when the City conveyed its revisionary interest in the Property to FKAC. Pl. Ex. 38. In 1963, FKAC executed a Declaration of Trust giving the City a reversionary one-half interest in the Property, which it extinguished via payment of $15,000, but the parties failed to record any confirming instrument. Tr. 139:9–144:21, 192:6–193:5; Pl. Exs. 32, 38. Royal worked to clear this title defect on FKAC's

[14] FKAC and Royal also executed a Stipulation of Fact that June Wells "was the sole member of FKAC from November 23, 2010 until the date of her death, November 29, 2020[.]" Pl. Ex. 79.

behalf, and the City granted FKAC a quitclaim deed, which listed the $15,000 previously "paid at and before the sealing of these presents by June Wells, on behalf of the [FKAC]" as consideration. Pl. Ex. 38 p.1. Indicating the transfer was for consideration and subject to a recording fee, Wells signed an affidavit attached to the deed as the "Authorized agent of the purchaser ([FKAC])." *Id.* at p.3 ¶8. In addition to the wealth of evidence discussed below establishing Wells' express and implied authority, the Probate Order, Wells' affidavits, and FKAC's pleadings provide conclusive proof of Wells' authority to execute the PSA and consummate the Property's sale.

B. June Wells Possessed Express Authority to Execute the PSA on FKAC's Behalf.

To bind the principal to the actions carried out, an agent may have express or apparent authority to act. *See, e.g.*, *Froneberger v. Smith*, 406 S.C. 37, 46-51, 748 S.E.2d 625, 630-31 (Ct. App. 2013). Wells' express authority to act for FKAC arose from her roles in the organization.

1. Wells Held a 100% Membership Interest in a Member-Controlled Entity.

Contrary to the Order, FKAC was not controlled by a board of directors; rather, by the terms of its Constitution and By-Laws, FKAC's members formed the governing body vested with authority to approve its business matters and transactions. *See, e.g.*, Pl. Exs. 58 pp. 5-6 (FKAC's Constitution and By-Laws, providing FKAC transacted business, and could amend its governing documents, via a vote of its members), 60 (1931 resolution of FKAC's members changing its corporate name), 61 and 62 (1971 application to amend charter, and 1971 Amendment, incorporating the dissolution clause adopted "pursuant to law, at a meeting of the members").[15]

June Wells was the sole surviving member of FKAC from at least November 23, 2010, until the date of her death in November 2020. Pl. Exs. 29, 29A, 38, 79, 80 pp. 1-2, 83 pp. 1-2 nos.

[15] It is this 1971 resolution, passed by members and not any board of directors, upon which CCSD relies for its alleged interest in this case. Yet if the membership is not FKAC's governing authority, as CCSD claims, then the 1971 Amendment and CCSD's alleged interest are invalidated.

1-2; FKAC Reply to Crossclaim ¶2; Compl. Exs. C, E; Tr. 167:19–168:13, 174:13–175:4. Wells possessed 100% of the voting power of FKAC's governing body, its members, at all relevant times.

2. Wells' Other Various Roles Also Made Her the One and Only Agent of FKAC.

Although neither the 1900 Act nor FKAC's constitution require or even mention a "board of directors," it appears that decades after FKAC's founding, certain members, including Wells, came to hold themselves out as directors on a board. This is likely because by the 1990s financial and government bodies expected nonprofit entities to have boards of directors. Tr. 197:9–198:15, 230:1–233:22. To the extent there was a group calling itself FKAC's board of directors, Wells was its sole remaining member, and therefore she herself held 100% of that group's voting power during the relevant time period. Pl. Exs. 16 (FKAC's 1997 Resolution, Wells was named as a Board member and signed as the Director), 80 p. 2 no. 2, 83 p. 2 nos. 3-4.

Additionally, Wells held other roles proving agency, including her position as "Director" in the sense of the chief administrative officer. Pl. Ex. 16; FKAC Reply to Crossclaim ¶2; Tr. 231:23–232:25; FKAC Mot. Appt. Receiver. Much of the record evidences her corporate actions performed for FKAC. *See e.g.*, Pl. Exs. 12-16, 28-29, 29A, 38. Conversely, there is not a shred of evidence to support the Order's finding that Wells lacked authority. The record clearly demonstrates that Wells had multiple sources of express authority to bind FKAC to the PSA.

3. CCSD's Argument that FKAC Did Not Strictly Comply with the 1994 Act Is Of No Import.

CSSD's only argument against Wells' authority was that the PSA was not executed in strict compliance with the 1994 Act, by a quorum of FKAC's board of directors. CCSD Br. p.4. Yet neither the lower court nor any party has offered any evidence or argument to show that FKAC is governed by the 1994 Act. But FKAC is governed by the 1900 Act, not the 1994 Act, which does not mention or contemplate a "board of directors." *See supra* pp. 12-13, 16-17. The 1900 Act

provides that corporations chartered thereunder have the same powers as individuals to "acquire and transfer property, both real and personal, under such regulations as may be fixed in the by-laws of the said corporation[.]" 1900 Act § 4; *see also* Tr. 229:21–233:18; Pl. Ex. 58. FKAC's by-laws vested its members with authority to exercise its corporate powers. Pl. Ex. 58. Alternatively, if found that FKAC is subject to the 1994 Act, its members are vested with the powers otherwise exercised by a board, as permitted by S.C. Code Ann. § 33-31-801(c).

C. June Wells Unquestionably Had Apparent Authority to Act on FKAC's Behalf.

Our courts have found apparent authority exists when "persons of ordinary prudence, reasonably knowledgeable with business usages and customs are led to believe the agent has certain authority and they in turn deal with the agent based on that assumption." *Fernander v. Thigpen*, 278 S.C. 140, 143, 293 S.E.2d 424, 426 (1982) (internal citation omitted). The elements necessary to "establish apparent agency are: (1) that the purported principal consciously or impliedly represented another to be his agent; (2) that there was a reliance upon the representation; and (3) that there was a change of position to the relying party's detriment." *Graves v. Serbin Farms, Inc.*, 306 S.C. 60, 63, 409 S.E.2d 769, 771 (1991) (internal citation omitted).

Under South Carolina law, "[a]gency is a question of fact. The relationship of agency . . . may be, and frequently is, implied from the words and conduct of the parties and the circumstances of the particular case." *Gathers v. Harris Teeter Supermarket, Inc.*, 282 S.C. 220, 226, 317 S.E.2d 748, 752 (Ct. App. 1984) (internal citation omitted); *see also Beasley v. Kerr-McGee Chem. Corp., Inc.*, 273 S.C. 523, 526, 257 S.E.2d 726, 727 (1979) (providing that extrinsic evidence outside the contract may establish an agency relationship).

The record contains an astounding amount of testimony and documentary evidence establishing Wells' authority, as the issue was a focal point of Royal's case at trial. *See, e.g.*, Tr.

320:3–321:14. Wells herself handed these documents to Royal around the period the two negotiated the PSA's terms, during which she repeatedly told Royal she had authority to sell the Property. Tr. 79:7-10, 92:2–93:19, 102:1–103:4, 130:9-13. The manifestations of agency by both principal and agent are countless, and an exercise of "ordinary prudence" in the evaluation of Wells' agency leads to only one conclusion, a finding of authority. *See, e.g.*, *supra* pp. 4-8; *see also* Tr. 69:15–71:2; 74:17–79:2, 320:3–321:14. Royal was deliberate in his efforts to determine and confirm the person with authority to convey the Property. *Id.*; *see infra* pp. 29-31; *see also, e.g.*, Tr. 53:8-12, 54:22–57:8, 61:3–65:4, 67:1–68:12, 69:7–72:20, 91:2–92:19; Pl. Ex. 4.

Wells held herself out to third parties as being an agent authorized to act on FKAC's behalf. *See id.*; *see supra* pp. 4-5, 8; Pl. Exs. 11-16, 28-29, 29A, 31-32, 38, 55, 56, 83 pp. 1-3 nos. 1-7; Compl. Exs. C, E. Wells retained legal counsel on FKAC's behalf in anticipation of the closing and for this litigation, and upon her death FKAC's counsel requested a Receiver be appointed. FKAC Mot. Appt. Receiver; NOA Ex. 8. All parties to this action accepted Wells' designation as FKAC's corporate witness to testify on its behalf pursuant to Rule 30(b)(6), SCRCP. Wells was the only person with access to the gated Property and a key to the building. Order p. 5; Tr. 78:17–79:10. Wells handled FKAC's finances, including tax and utility payments, was an authorized signatory on its bank account, and was issued a refund from the South Carolina Department of Revenue on FKAC's behalf. Pl. Exs. 13-16, 38; Tr. 139:4–140:7.

At trial, Royal presented and testified extensively as to the substantial amount of evidence he relied upon as proof of Wells' authority. *See id.*; *see also* Tr. 102:1–103:24, 125:3-18, 127:22–128:21, 129:11–133:25, 206:17–207:13, 250:6–251:8, 268:1–270:1, 273:1–276:4, 285:25–289:2; *see supra* pp. 13-17. This evidence consisted, *inter alia*, of tax notices, utility bills, bank statements, bank resolutions, legal documents and correspondence with various banks and local

and state governmental entities. *See, e.g.*, Tr. 110:7–111:21, 114:9–120:18; Pl. Exs. 12-16, 28-29, 29A, 38. Indeed, the lower court indicated the issue of her apparent authority had been thoroughly established when it cut off Royal's presentation of evidence on the subject at trial, deeming the remaining evidence "cumulative."

> THE COURT: Why don't you just put that [Probate Court order] in? I'll let you proffer all the other ones, but you can put that one in.
>
> MR. TIBBALS: Because it's the accumulation of the documents and the evidence.
>
> THE COURT: Well, he [Royal] can -- he can testify to that. He can testify to what he did and what he saw. Okay? Just proffer them. . . . that's just cumulative evidence. He's already saying, he thinks she had the authority. . . . But I'm telling you, you've got a court order that says something. You've got multiple documents, you know. Go ahead and ask the question. But I don't see the need to go through 100 documents if you've got -- he's already testified to what he believes. He can state the basis for his belief. I don't have a problem with that.

Tr. 108:22–110:5; *see also* Tr. 77:24–78:13 ("You've already established, and it's been admitted; so it's in. All right? You got it. She claims to be the sole authority for it. … I don't need cumulative evidence to that effect[.]"), 106:4–108:6, 120:19–122:8 ("I'm not going to let you go anymore. … I had enough.").

After Royal's cross-examination, his counsel renewed his proffer and request to admit the "cumulative" authority evidence. Tr. 282:23–283:13. Although the lower court indicated they were admitted, ("I'm going to allow you to, provided we don't go into them. . . . They're just in the record." (*id.* at 283:7-24)), it later granted, in error, CCSD's motion to exclude and strike the same (NOA Ex. 3).[16] The Order plainly erred in finding Royal only relied upon three documents and one fact as proof of Wells' authority. Order pp. 5-6.[17] The Order also erred in citing the PSA

[16] In this regard, the lower court chose to prohibit Royal's presentation of his full case in chief, which prejudiced his ability to seek relief, and his abilities on this appeal. The evidence of Wells' authority that was proffered but not admitted included Royal's exhibits numbered 17-27, 27A, 30.
[17] Notably, the finding that Royal did not rely upon FKAC's 1997 Resolution (Pl. Ex. 16) is clear error, directly contradicted by the record. *Compare* Order p.6, *with* Tr. 119–120:25.

to refute Royal's belief of Wells' authority. *Id.* at 18. Finally, the Order erred in failing to consider testimony as to the intent of and rationale for including the subject PSA provision, paragraph 6. Royal testified that he had no question about Wells' authority. *See infra* p. 29 n.25.

In addition to the lower court's direct affirmations of Wells' authority at trial, its statements that the contract would be enforceable except for the purported requirement of AG approval shows that Wells' authority had been proven. Tr. 335:16-20, 337:5-17 ("Given, if this were a private contract between two parties, I would uphold [Royal's] argument[]" to enforce the PSA.), 341:22–342:10, 343:7-18 ("the contract is not to be enforced between the parties because they did not get approval from the [AG]"). Apparent authority was established by far more than a preponderance of the evidence. To Royal's clear detriment, he reasonably relied upon Wells' manifestations that she possessed the requisite authority to execute the PSA. *See supra* pp. 4-6, 13-17.

D. <u>Wells' Agency by Estoppel</u>.

Additionally, all parties are estopped from denying Wells' agency because they placed or permitted Wells to be "in a position impliedly manifesting h[er] authority[.]" *Eadie v. H.A. Sack Co.*, 322 S.C. 164, 171, 470 S.E.2d 397, 401 (Ct. App. 1996) ("there is no true difference between apparent authority and agency by estoppel"). Although only FKAC is the principal, the AG and CCSD attempted to step into FKAC's shoes by alleging powers or ownership over FKAC's assets.

The AG is estopped due to its previous promotion of Wells via affidavit, adopted in the Probate Order. *See supra* pp.14-15. FKAC is estopped due to its affirmative statements of authority in its pleadings and other evidence in the record. *See supra* pp.14-17. CCSD, based on FKAC's 1971 Amendment, claims ownership of FKAC's assets and the right to protect against waste and misapplication. Counterclaim ¶¶40, 49. Yet from 1971 through June 2018, it made no effort to monitor FKAC's activities or assets, including the Property. Royal Br. Ex. 11, 70:24–71:21; Pl.

Exs. 78 nos. 10-11, 87 nos. 10-11. Having permitted Wells to manage FKAC's affairs for decades, CCSD is estopped from denying her authority, especially when the 2010 Probate Order and 2013 PSA Memo were filed as public record and its offices are less than a mile from the Property.

All parties knew or should have known that FKAC stopped operating in the 2000s, lost funding in 2010, and only one living person was associated with FKAC. Even if Wells' authority "arose because of her sole remaining position as somebody with knowledge about [] FKAC[]" (Order p.10), the AG and CCSD's allowance of and failure to oversee FKAC's continued existence placed her in this position that impliedly manifested her authority.

III. THE ORDER ERRED IN FINDING THE PSA VIOLATES PUBLIC POLICY.

The Order fashions a gossamer wisp of a public policy argument, employing circular logic in its attempts to define the public policy allegedly violated. *See, e.g.,* Order pp.19-20 ("In the present case, the contract is void because it is against public policy. . . . the parties cannot make a contract in violation of law.").[18] The scant reasoning was hurriedly employed, because public policy arguments first emerged only one week before trial, via the AG's Pre-Trial Brief and Memorandum of Law ("Mem. Law"). R. pp. __-__. In three years of vigorous litigation, no party had raised a "public policy" argument. The AG had steadfastly relied upon a theory of statutory omnipotence to terminate contracts with unbridled discretion.

The Order mistakenly found the PSA violative of South Carolina public policy because: a) the fair market value of the Property increased between the dates of execution and closing; and b) the PSA contained "several unusual provisions[.]" Order pp.16-18. These are not recognized public policies sufficient to invalidate the contract. More specifically, the lower court erred: in

[18] *See also* Tr. 330:20-24 (in support of non-suit dismissal, the AG stated, "freedom of contract is subordinate to public policy. Agreements that are contrary to public policy are legal [sic]. This agreement is contrary to public policy, whether or not Ms. Wells had authority.").

misapplying established law regarding date of valuation; in failing to establish a foundation to accept a June 7, 2018 appraisal as controlling evidence of fairness; in refusing to recognize FKAC as a willing seller at all times prior to AG interference; and in finding unequal bargaining power when the issue was not presented for review and the record contains no support.

A. <u>The Date of Valuation Is the Date of Contract Under South Carolina Law</u>.

The lower court erroneously adopted a public policy argument to allow future market conditions to not only trump a contract purchase price, but to void the entire contract. In determining fair market value, South Carolina law is well established that the proper valuation date is the date of contract.

> [I]t is well settled that a mere change in the value of land will not justify a refusal to grant [specific performance]. . . . "The question of **adequacy of price must be considered as of the date of the contract, and the subsequent enhancement in value would not justify refusal of specific performance**." . . . The same rule applies if the value of the property should go down instead of up.

Adams v. Willis, 225 S.C. 518, 526-27, 83 S.E.2d 171, 175-76 (1954) (quoting *Holly Hill Lumber Co., Inc. v. McCoy*, 201 S.C. 427, 23 S.E.2d 372, 380 (1942) (quoting *Shannon v. Freeman*, 109 S.E. 406, 409 (1921))) (emphasis added); *see also Campbell v. Carr*, 361 S.C. 258, 261-62, 603 S.E.2d 625, 628 (Ct. App. 2004) (evaluating fair market value on the date "the contract was executed" to determine specific performance claim); *Bannon v. Knaus*, 282 S.C. 589, 593, 320 S.E.2d 470, 471 (Ct. App. 1984) ("Interpretation of the contract is governed by the objective manifestation of the parties' assent at the time the contract was made.") (internal citation omitted). Even the Order, in discussing the AG's role over sales of assets, relies on opinions that considered fair market value at the time of contract. Order pp. 11-15, and case law cited therein.

Accordingly, the lower court erred in "find[ing] that the sales price is less than fair market value[.]" Order p.16. The only evidence in the record of fair market value at the date of contract

is the appraisal produced January 11, 2013 by Mike Robinson,[19] MAI certified, commissioned to establish the purchase price under the PSA. *Compare* Pl. Robinson Ex. 1 p.2, *with* Pl. Ex. 11 ¶2.

1. There Is No Public Policy Requiring that a Buyer Agree to Adjust the Purchase Price Based on Market Fluctuations.

Misapplying Black's Law Dictionary, the master summarily concluded that FKAC and Royal did not agree to a fair market value sales price. Order p.16.[20] The master's determination contains no analysis as to why the binding and essential term of purchase price should not be upheld, and implies that no purchase price may be fixed until the closing date, in contravention of basic contract and free market principles. Indeed, the purchase price is an essential term of a contract to buy or sell real estate. The absence or uncertainty of an essential term renders a contract indefinite and unenforceable.

The record is devoid of evidence that Royal expected or encouraged a five (5) year delay, and he could not have possibly divined that the real estate market would appreciate, or to what extent, during that time. Pl. Exs. 46, 47, 55, 57, 67 p.2, 69; Compl. Ex. G; Tr. 41:19–42:4, 221:3–222:16.[21] Delay on the part of the seller does not prejudice the buyer's right to enforce the contract, and the mere fact that a property increases in value after contract execution does not support a finding that the contract is invalid. "One who has himself prevented performance or tender of performance at the time set cannot take advantage of the delay." *Shannon v. Freeman*, 109 S.E. at 409 (internal citations omitted). The market could have declined instead, leading the AG and CCSD to strictly enforce the contract sales price. Tr. 334:14–337:14. The lower court failed to

[19] Robinson was found to be a "very competent appraiser" and "well qualified" expert. Tr. 10:19, 20:9. Robinson conducted the AG's 2018 appraisal and was called as an expert at trial by the AG.
[20] The Order's cited authority actually supports the PSA's price as fair market value. *Id.* ("The fair market value is the price that a seller is willing to accept, and a buyer is willing to pay on the open market and in an arm's-length transaction[.]" (citing Black's Law Dictionary (11th ed. 2019))).
[21] In his appraisal produced in January 2013, Robinson noted that "[t]he real estate market has been flat for several years." Pl. Robinson Ex. 1 p. 6.

recognize that hindsight always provides perfect clarity.

Even though it errantly determined June 2018 was the date of valuation, the lower court perplexingly "note[d] there was testimony Wells received another offer of $400,000 to purchase the Property around the same time as the Royal offer[.]" Order p.16. There was no testimony, nor any other evidence, that such an offer was ever communicated to or considered by FKAC. In making this finding, the lower court relied upon Royal's testimony that he had received an email from an agent expressing interest in the Property. Tr. 224:8–225:7. The trial court's reliance on this testimony, which related to a non-binding letter of intent, and contradicted the opinion testimony of the "well-qualified" expert appraiser Robinson, constitutes clear error.

2. The Master Erred in Relying on a June 2018 Appraisal as Evidence of Fair Market Value.

The trial court accepted the AG's flawed argument that an appraisal with an arbitrary date of valuation in June 2018, rendered the PSA void as against public policy. Tr. 324:18–326:11; AG Mem. p.9 (contending FKAC "selling property for significantly less than fair market value is a sufficient reason to find that the contract cannot be enforced[]").[22] The June 2018 appraisal also was unreliable because it assumed the existing structure on the Property, Royal sought to preserve, could be demolished, in violation of the City of Charleston's zoning ordinance. Tr. 32:1–33:22.

B. <u>In Finding the PSA Unconscionable, the Master Ruled on an Issue Not Presented in the Pleadings Without Consent of the Parties</u>.

The lower court improperly considered and ruled upon the issue of contract unconscionability, in the form of unequal bargaining power, as it was not contained in the pleadings, presented for review, nor tried by implied consent. *See Shirey v. Bishop*, 431 S.C. 412, 423-25, 848 S.E.2d 325, 331 (Ct. App. 2020). No party presented any evidence on the matter, and

[22] The AG's Memorandum of Law (R. pp. __-__) was submitted with his pre-trial brief and referenced by the master multiple times during trial. Tr. 326:10-17, 337:5-9, 340:9-10.

the issue was barely touched upon at trial. *See Fraternal Order of Police v. S.C. Dep't of Revenue,* 352 S.C. 420, 435, 574 S.E.2d 717, 725 (2002). The extent of its "discussion," during this entire case, was a brief mention by the AG in moving for non-suit, to which Royal's counsel objected on the ground that nothing on the issue "came into evidence." Tr. 329:24–330:7.

The lower court, in the absence of a pleading raising the issue or any testimony or other direct evidence in the record,[23] made findings as to bargaining power and unconscionability, which served as a basis for dismissing Royal's claims. The findings on these issues, and conclusions drawn therefrom to nullify the PSA, constitute reversible error.

C. The Record Contains No Support for a Finding that the PSA Was Unconscionable.

Even if this Court finds that unconscionability was properly before the lower court, its rulings are without merit or support. This Court has held, even where contract price is inadequate, that alone "is not a ground for refusing the remedy of specific performance . . . the inadequacy must" be accompanied by foul play, fraud, or undue influence for the contract to be invalidated. *Campbell v. Carr*, 361 S.C. at 264, 603 S.E.2d at 627. As with valuation, proof of fraud or undue influence must be as of the date of contract. *See id.* at 265, 603 S.E.2d at 628 (concurring opinion questioning whether there was sufficient proof of seller's mental illness at the time of contract).

1. No Fraud or Foul Play was Alleged.

No party raised any issue as to the propriety of Royal's interactions with FKAC via its agent, Wells, nor alleged Royal fraudulently induced FKAC into executing the contract, concealed any terms, or made any other similar allegations of manipulation, mental illness, or foul play. Indeed, even though CCSD sought to nullify the PSA, the only supporting grounds alleged were

[23] Even if the record contains evidence relevant to unconscionability, implied consent to try the issue cannot be found because "*all of the parties did not recognize it as an issue during trial,*" and such evidence was necessarily "*introduced as relevant to some other issue*[.]" *Shirey*, 431 S.C. at 424, 425, 848 S.E.2d at 332 (internal citations omitted) (emphasis in original).

adequacy of consideration, and Wells' alleged lack of authority. Counterclaim ¶¶39-50. Simply put, there is absolutely no evidence showing either subterfuge or bad faith on the part of Royal.

2. No Evidence Whatsoever Exists Regarding the Parties' Relative Bargaining Power or Real Estate Acumen.

To find unconscionability, the evidence must show "an absence of meaningful choice on the part of [FKAC] due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Carolina Care Plan, Inc. v. United Healthcare Servs., Inc*. 361 S.C. 544, 554, 606 S.E. 2d 752, 757 (2004) (internal citation omitted). Most often found in adhesion contracts, factors such as relative disparity in bargaining power and the parties' relative sophistication should be considered as to the meaningful choice criterion. *See Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 25, 644 S.E.2d 663, 668 (2007) (internal citation omitted). "Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process[.]" *Gladden v. Boykin*, 402 S.C. 140, 148, 739 S.E.2d 882, 886 (2013) (internal citation omitted).

None of the parties' pleadings raised any allegations, and no evidence exists, regarding respective bargaining power or undue influence. But the lower court found "there was a huge disparity in bargaining power between these two parties[]" because "Mr. Royal has regaled us today with his knowledge and expertise in negotiating contracts." Tr. 338:7-11. Royal's testimony on contract negotiations consisted of his interactions with and efforts to accommodate FKAC via the PSA terms, including the closing timeline. And while Royal testified as to his intent in drafting the PSA provisions, none of his testimony indicates expertise, nor was he qualified as an expert in any area.[24] Moreover, Royal gave no testimony, on direct or cross-examination, on any secondary

[24] Indeed, in response to Royal's counsel's request to call Royal as an expert on lost profit damages, the master's three-sentence ruling was: "All right. Denied. He's the plaintiff." Tr. 7:23–8:7.

or higher-level education or work experience.

Just as, if not more, important is the record's complete void of any evidence indicating Wells' real estate acumen, sophistication, or bargaining power. Without any sustaining testimony or evidence in the case record, the Order recites Royal's educational background, while at the same time minimizing Wells' scholarly and career achievements. Order p.18 (stating Wells was born in 1934, taught kindergarten for 40 years and was the Confederate Museum's director). While the Order stated she graduated from College of Charleston, it failed to include her degree type, specify if she obtained an advanced degree, or state that she was a member and the Director of FKAC, and in charge of its finances and records. *See, e.g.*, FKAC Reply ¶2; Pl. Ex. 14. It is difficult to conceive why the lower court found a disparity in bargaining power without a shred of evidence on the issue, nor any such allegation. Nevertheless, this finding constitutes reversible error.

3. The PSA's Provisions Are Not Oppressive; Many Favor FKAC.

In addition to retrospective application of market value appreciation, the Order deemed the PSA violated public policy based on "unusual provisions" in paragraphs 4 through 8. Order pp. 18-19 (errantly identifying paragraph 8 as number 7 on p. 18). To begin, there is no legal basis to support a finding that "unusual provisions" in a contract make it contrary to public policy.

The Order erred in considering paragraph 8 of the PSA, providing the purchaser with a termination right, as violating public policy. Order pp.18-19. Although not a standard clause based on a due diligence period, executory contracts are not uncommon, and parties are free to negotiate and agree to specific terms. The lower court also failed to consider evidence that the provision was only included due to the closing date accommodations made, and that paragraph 8 was entirely moot because all the evidence showed that Royal always was able to and desired to close as quickly as possible. *See, e.g.*, Tr. 147:19–148:14, 210:23-212:11, 247:17–248:4. The lower court erred in construing this section as an option and as one that contravenes public policy,

as it failed to consider testimony refuting the notion that the PSA was an option, and in any event, failed to explain why FKAC would be prohibited from executing such a contract. Tr. 245:4–249:4.

The Order misapprehended the provisions in paragraphs 4 and 5, which actually favored the buyer and supported enforcement. Order pp.18-19; Pl. Ex. 11 ¶¶4-5 (requiring seller only furnish a lower quality limited warranty deed and providing that seller would not be in default if a title defect existed). The Order also failed to consider the trial testimony regarding the benefit of these provisions to FKAC. Tr. 204:6 – 206:16.[25] Finally, the Order's "unusual provision" analysis failed to consider that many standard terms in form real estate contracts were eliminated to favor FKAC. No brokerage or commission fees were assessed to FKAC, Royal paid all closing costs, agreed to reimburse a fixed amount of attorneys' fees, was not entitled to a due diligence period, and there were no contingencies as to inspection or financing. Pl. Ex. 11 ¶¶2, 3; Compl. ¶¶12.a.-d.

The PSA, while unique, was not fundamentally unfair nor did it favor the buyer. In fact, it was skewed in FKAC's favor. Its terms were fair and equitable and resulted from good faith negotiations. Royal operated under good faith and fair dealing, resolved tax and title issues, and worked with Wells to develop a strategy to clear the building. Pl. Exs. 32, 38; Tr. 141:17–149:9.

IV. AS ROYAL IS ENTITLED TO SPECIFIC PERFORMANCE, THE LOWER COURT ERRED IN DISMISSING HIS CLAIMS.

A. <u>All Elements of Royal's Specific Performance Claim Are Established and the Terms of the PSA Must be Enforced</u>.

To compel specific performance, the following elements must be established:

> "(1) clear evidence of an agreement; (2) that the agreement has been partly carried into execution on one side with the approbation of the other; and (3) that the party who comes to compel performance has performed on his part, or has been and

[25] As established herein, paragraph 6 of the PSA was not at issue. The evidence proves Royal had no question about Wells' authority before and after signing the PSA and establishes the rationale for the PSA's inclusion of the language in question. *See, e.g.*, Tr. 90:22– 92:19, 200:13–201:4 (stating third parties, such as title companies, may require specific documentation), 202:16–203: 4 ("I had every reason to believe that [Wells] did have authority when she signed [the PSA].").

remains able and willing to perform his part of the contract."

Shirey v. Bishop, 431 S.C. at 422, 848 S.E.2d at 339 (internal citation omitted). "[S]pecific performance of a contract to sell real property will be ordered where the contract 'is fair and was entered into openly and aboveboard.'" *Amick v. Hagler*, 286 S.C. 481, 485, 334 S.E.2d 525, 527 (Ct. App. 1985) (internal citation omitted). The record conclusively establishes the existence of a valid contract freely entered into by a willing buyer and a willing seller for fair market value consideration at the time of execution. *See, e.g.*, Tr. 28:20–29:14, 30:18–31:17, 79:18–80:1, 82:1–84:11, 153:13–154:22, 163:10–165:10, 221:3–222:16; Pl. Robinson Ex. 1; Pl. Exs. 10-11, 31, 46, 47, 55; *see also supra* pp. 4-7, 22-29; *infra pp.* 31.

The record is also replete with evidence that Royal and FKAC partly carried the contract into execution with the approbation of the other. *See, e.g.*, Pl. Exs. 32, 38,[26] 46, 47, 55, 56; Tr. 139:4–147:12, 261:14-20. The lower court expressly acknowledged Royal's efforts to close:

> I don't think there's any question about that. Is that an issue? We wouldn't be here if he wasn't trying to act in furtherance of the contract. This thing has been going on for about nine years now. . . . All right. I don't think there's any doubt that Mr. Royal is pursuing this thing. . . . Extremely diligently, I might add.

Tr. 141:1-13. At all times since the Effective Date through present, Royal has been and remains ready, willing, and able to close, and has repeatedly advised FKAC of the same. Pl. Exs. 46-47, 54-55; Compl. Exs. C-E; Tr. 147;19–148:10, 150:23–154:15 (during presentation of Pl. Exs. 46-47, the lower court stated, "These all go to say he's [Royal] trying to move forward with the sale, right?" (Tr. 152: 9-10)), 176:5-15; *see also supra* pp. 6-9.

Royal and FKAC are entitled to freedom of contract without interference. *See supra* pp. 22-29; *infra* pp. 32-46. By more than a preponderance, the evidence establishes that the PSA is

[26] Royal's efforts to remove the cloud placed on title by the City's reversionary interest, with FKAC's knowledge, is further proof that he acted in good faith, relied upon Wells' representations of authority, and that he was trying to close the sale as quickly as he could. Pl. Exs. 32, 38.

fair, just, and expresses the parties' true intent. "Interpretation of the contract is **governed by the objective manifestation of the parties' assent <u>at the time the contract was made</u>**. It does not depend on the subjective, after the fact meaning one party assigns to it." *Bannon v. Knaus*, 282 S.C. at 593, 320 S.E.2d at 472 (Ct. App. 1984) (internal citation omitted) (emphasis added).

Accordingly, and because it is unambiguous and explicit, the PSA must be construed and enforced in accordance with the terms agreed to by FKAC and Royal, "to be taken and used in their plain, ordinary sense." *U.S. v. Metric Constructors, Inc.*, 325 S.C. 129, 136, 480 S.E.2d 447, 450 (1997) ("A party to a written contract, where there is no ambiguity or indefiniteness in the essentials, cannot say their minds did not meet." (*id.*)).

South Carolina common law is clear that the lower court did not have authority to alter or rewrite the contract, or "impose unwanted obligations and terms under the guise of specific performance or judicial construction." *Lowcountry Open Land Trust v. Charleston S. Univ.* 376 S.C. 399, 410-11, 656 S.E.2d 775, 781 (Ct. App. 2008). Nor does the law does not allow the AG to arbitrarily choose the valuation date in contradiction of the parties' negotiated terms. Tr. 337:5-6. If the Charleston real estate market had declined, the AG would have approved the sale because the contract price would have exceeded fair market value on the closing date.

In accordance with South Carolina law, the lower court's dismissal of Royal's claims should be reversed, and specific performance ordered.

B. <u>The Order's Finding that FKAC was Not a Willing Seller Is Contrary to the Evidence</u>.

The lower court's finding that FKAC was not a willing seller is wholly without support and contradicted by the record. FKAC was willing to close and never indicated otherwise until May 11, 2018. Pl. Ex. 47; Compl. Ex. G; Tr. 147:19–149:9, 153:13–154:22, 163:10–165:10. There is an abundance of evidence detailing the actions of both Royal and FKAC to complete the transaction by the original closing date, April 9, 2018. *See, e.g.*, Pl. Exs. 54, 55, 56, 66 p.1 no. 3.

V. THE AG DOES NOT HAVE AUTHORITY TO INVALIDATE THE AGREEMENT.

In concluding the AG has veto power over the PSA, the Order relies upon inapplicable law and ignores the facts of this case. Order pp.11-15, 17. And although it attempts to make the public policy attack on the PSA a more prominent part of the analysis, the lower court defended the AG's claim to independent powers, both in the Order and via statements at trial, essentially telling Royal to ask "how high?" when the AG commands Royal to jump. Tr. 348:13-24.

While the lower court trumpets notions of the greater public good as the basis for AG control, what lies beneath that façade is a policy allowing the AG to arbitrarily pick and choose which real estate sales should proceed. If contract provisions deviate from the norm, or if the AG disagrees with the parties' agreed upon date of valuation, he can withhold his approval and seek to nullify the agreement. Essentially, the Order gives the AG unfettered authority to determine public policy on a whim to fit the contours of a specific case.

No recognized legal authority, nor any of the sources cited by the lower court, support the AG's participation under the facts and circumstances of the case at hand, which does not involve a charitable trust, a statewide public interest, or an entity operating on donated property or public funds. Perhaps more importantly, no authority cited by the lower court or the AG demonstrates that an otherwise enforceable contract may be voided solely on the basis of a change in market conditions.[27] The jurisprudence offered by the AG, and relied on by the Court, can only be read to require a purchase price that is reasonable and fair at the time of the contract's execution. Yet here, the public interest apparently required FKAC and Royal to execute a contract with a floating purchase price to be fixed on the date of closing – a date to be chosen by FKAC.

[27] Much of the AG's Memorandum of Law was adopted, verbatim, in the Order. *Compare* R. pp. __-__, *with* R. pp. __-__. The authorities proffered in both are also found in the AG's motion to intervene and errantly adopted in the order granting said motion. R. pp. __-__.

The Order cites varying statutory and common law sources as providing the AG power to override the PSA, although the analysis fails to articulate which specific authority is controlling. Order pp. 11-17. As a result, the lower court utilizes some amalgamation to find that vague general powers concerning public charity or the public interest support the AG's PSA interference.

A. As FKAC Is Not Subject to the 1994 Nonprofit Act, the Lower Court Erred in Finding Section 33-31-1202(f) Provides the AG With Authority and Standing.

First, because the lower court's conclusion rested on S.C. Code Ann. § 33-31-1202(f), part of the 1994 Act, a determination as to whether FKAC is subject to the 1994 Act is a necessary building block for finding that the AG has authority to prevent performance of a sale contract. However, the Order failed to make an examination or determination on this issue, even though Royal raised it at trial. Tr. 300:18–303:8. Instead, without any supporting evidence or analysis, the Order operates on an unstated assumption that the 1994 Act governs. *See, e.g.*, Order pp. 10, 14 (stating "the statute at issue in the present case" is S.C. Code Ann. § 33-31-1202(f)), 17.

This faulty assumption led to an erroneous result. The lower court held that FKAC was required to give the AG notice of the sale pursuant to Section 33-31-1202(f) (Order pp. 10-11), for which the legislature's intended purpose "was to notify the Attorney General and provide him with an opportunity to be heard." *Id.* at p. 12. But because FKAC is not subject to the 1994 Act (*see supra* pp. 12-13), it is not subject to the notice provisions of § 33-31-1202(f). As a result, pursuant to the lower court's interpretation of the statute, the AG was not entitled to object to or be heard regarding the PSA and sale thereunder. In turn, no evidence or argument was properly presented to support the conclusion that consummation of the PSA violates "public policy."

B. The Scope of the AG's Involvement Under S.C. Code Ann. § 33-31-1202(f) Is Limited to Receipt of Notice.

Should the Court find that FKAC is subject to the 1994 Act, Royal asserts that the lower court erred in its reading and application of S.C. Code Ann. § 33-31-1202(f). This statute, the

Order's main source cited in support of AG authority, provides as follows:

> A public benefit or religious corporation must give written notice to the Attorney General twenty days before it sells, leases, exchanges, or otherwise disposes of all, or substantially all, of its property if the transaction is not in the usual and regular course of its activities unless the Attorney General has given the corporation a written waiver of this subsection.

S.C. Code Ann. § 33-31-1202(f). Subsection (f), the only sentence of § 33-31-1202 that mentions the AG, contains no requirement to provide, and grants no authority to request, any materials or an appraisal, except for the sale notice. *Compare* S.C. Code Ann. § 33-31-1202 ("Notice Statute"), *with* Pl. Ex. 69 p. 2. Although the AG and lower court designate the Notice Statute as "the statute at issue in the present case," (AG Mem. p. 7; Order p. 14) no language can be found providing the AG any review or approval authority. In fact, the provisions of § 33-31-1202 expressly provide that such sales may proceed *without* AG approval. *See infra* pp. 35-36.

On its face, the Notice Statute confers no authority whatsoever except the ability to provide a written waiver of the statutory notice. Indeed, it is void of any text that contemplates any response by the AG to the notice. But despite receipt of the requisite notice (Order p. 10), the AG continued to affirmatively represent to Royal and FKAC that the sale could not proceed without the AG's approval and continued to demand a new appraisal be performed. Pl. Exs. 67, 69. The lower court erred by accepting the AG's argument that the Notice Statute provided him authority to approve or disapprove of the sale. Tr. 342:2-10, 343:8-11 ("I'm going to find that the contract is not to be enforced between the parties because they did not get approval from the [AG][.]").

In addition, the lower court erred in finding the Notice Statute granted the AG authority to determine the date of valuation, and amount, of the asset's purchase price. Order pp.15-17; Tr. 343:8-11. The lower court, without support, found the AG's approval of the sale was a legal requirement, endorsing the AG's ability to nullify the PSA based on his belief as to adequacy of the purchase price. *Id.*; AG Mem. pp.1-2; Pl. Ex. 69. The lower court reversibly erred in its

approval of the AG's conduct and conclusions as to powers granted under the Notice Statute.

1. The Lower Court's Interpretation of the Notice Statute's Purpose Is Unsupported and Contrary to Proper Statutory Construction.

The Order went even further, finding that the statute conferred standing upon the AG to "be heard and object to the sale of the nonprofit's assets at issue in this action" (Order p. 15), because "the only logical conclusion is that this purpose [of § 33-31-1202(f)] is to notify the Attorney General and provide him with an opportunity to be heard." *Id.* at p. 12.

The Order erred in this regard, as the statute does not confer any legal standing for the AG to intervene in litigation, brought by the purchaser to enforce the contract or otherwise, and affirmatively act to nullify the underlying contract. Not only is this purpose absent from the statute or surrounding sections,[28] it runs contrary to subsections (a) and (b) of the statute, which specifically permit a nonprofit to sell all of its property outside its usual and regular course of activities without the AG's approval. S.C. Code Ann. §§ 33-31-1202(a)-(b). Therefore, the AG's actions to void the PSA and prevent the sale run contrary to South Carolina statutory law and public policy thereunder as to the ability of nonprofit entities to carry out such transactions.

The lower court's interpretation also conflicts with §§ 33-31-128(c) and 33-31-302 of the 1994 Act. Pursuant thereto, FKAC's certificate of existence which Royal obtained from the Secretary of State (Pl. Ex. 63), could "be relied upon as conclusive evidence that the domestic or foreign corporation is in existence or is authorized to transact business in this State." S.C. Code Ann. § 33-31-128(c). Additionally, corporations subject to the 1994 Act have "**without limitation, power … to** sell, convey, mortgage, pledge, lease, exchange, and otherwise **dispose of all or any part of its property**." S.C. Code Ann. § 33-31-302(5) (emphasis added).

[28] Section 33-31-1403 contemplates notice to the AG but is inapplicable because FKAC was not in the process of dissolving (and still is not dissolved). S.C. Code Ann. § 33-31-1403; Order p.24.

These statutory provisions, in combination with §§ 33-31-1202(a)-(b), leave no doubt that FKAC had the ability and authority to sell the Property to Royal on terms agreeable to FKAC alone, without the AG's interference or approval. The Order failed to consider that these provisions of South Carolina statutory law are expressions of public policy which contradict its holdings.

Finally, the Order erred in failing to consider more logical purposes of § 33-31-1202(f) provided for within the 1994 Act. One clear purpose of requiring notice of a sale of all assets is to allow the AG to evaluate whether to initiate a judicial dissolution proceeding under the 1994 Act. *See* S.C. Code Ann. § 33-31-1430(a)(1)(iii)-(iv).[29] Another likely purpose would be to allow the AG time to initiate a proceeding to challenge a corporation's power to act under S.C. Code Ann. § 33-31-304. It also seems logical that this notice may aid the AG in determining whether to make investigations into a nonprofit corporation under S.C. Code Ann. § 33-31-170.[30] Regardless, the Order cites no support, and none is found in the record, for its ruling as to the Notice Statute's "only logical" purpose, which is refuted and contradicted by provisions of the 1994 Act. Accordingly, the lower court erred in permitting the AG's interference with the PSA and in refusing to enforce the PSA based upon the AG's impermissible objections.

2. The Lower Court Erred in Ruling that the Notice Statute Placed Any Obligation or Burden on the Purchaser, Royal.

The lower court erred in finding merit in and adopting the AG's argument that Royal, instead of the seller FKAC, was somehow obligated to provide notice of the sale and comply with the AG's review and demands, regardless of their nature. Pl. Ex. 69 pp. 2-5. Analogizing the situation to a parent attempting to extricate a child from DSS, the lower court stated:

[29] The AG has not commenced a dissolution proceeding, but such a determination should have been made in 2010, when his office provided Wells an affidavit stating that she consented to terminating FKAC's sole source of funding, and that the kindergarten "is not currently operating . . . and does not have plans to begin operating again." Pl. Ex. 29A at ¶¶ 5, 7, 8; *see also* Pl. Ex. 28.
[30] The AG himself proffered this authority as a relevant consideration. AG Mem. p.2.

> And if they say, jump, ask them how high. It makes things go a lot smoother when they hold all the cards. In this instance, the Attorney General's Office, the way I read the law, they hold the trump card. So when they ask for information, when they ask for a current appraisal, I would say, it was probably in their best interest to get that and work with them[.]

Tr. 348:9-22. The implication is clear: the AG's authority in these matters knows no limits. Yet FKAC gave notice of the sale to the AG on April 4, 2018, as he contends is required under the statute. Order p. 10. As a result, any requirement imposed by S.C. Code Ann. § 33-31-1202(f), if applicable, was satisfied and the terms of the PSA should have been consummated.

C. <u>Authority Granted by Charitable Trust and Public Charity Statutes Does Not Apply</u>.

As additional statutory authority supporting AG authority to override a real estate contract, the Order relied on S.C. Code Ann. §§ 1-7-130 and 62-7-405, finding that the AG had a duty thereunder to protect the public interest in public charities and charitable trusts, respectively, to the detriment of all others. Order pp.11-15. The lower court erred in both its reliance and ruling. The statutes and their overall schemes have no bearing on FKAC or the PSA because FKAC is not a public charity and no express trust or judicially created trust is at issue. But even if they were relevant, the limited powers conferred do not support the actions condoned in the Order.

1. The AG's Statutory Powers Over Public Charities Are Inapplicable.

If the AG's power arises from a statutory duty to protect the public or charitable interest, it must first be found that FKAC is a public benefit corporation or public charitable organization. *See* Order pp.10-15. First, as established *supra* pp. 12-13, FKAC is not a public benefit corporation subject to the 1994 Act. Second, it is not a public charitable organization, meaning any authority provided under S.C. Code Ann. § 1-7-130 has no bearing.

FKAC is not a 501(c)(3) organization, as the Order admits in a footnote to its application

of U.S. Tax Court opinions. Order p.17 n.4.[31] Moreover, there is no evidence that FKAC received public funding, and it is uncontroverted that the Property was purchased for monetary consideration by FKAC, not gifted to FKAC. Pl. Exs. 32, 38; Tr. 192:6–193:5 *see supra* pp. 15-16. As further examined *infra* (pp. 44-45), this is a key distinction because the South Carolina Supreme Court has construed the donation of property to a publicly funded entity as giving rise to the AG's public charity or charitable trust authority. *See S.C. Dep't of Mental Health v. McMaster*, 372 S.C. 175, 179 n.3, 182-83, 642 S.E.2d 552, 554 n.3, 555-56 (2007).

Thus, the Property was not a charitable gift necessitating that money be kept in the "charity stream," as argued by the AG and adopted by the lower court. Order p. 14; Tr. 328:21–329:3. Because there is no "charitable money" (Tr. 329:1-3) or appropriated public funds involved here, there is no public interest inviting the AG's protection. Accordingly, the PSA must be enforced.

There is also no evidence that FKAC operated for charitable or nonprofit purposes during the relevant time. To the contrary, per Wells' affidavit and the Probate Order it supported, FKAC ceased operating around 2005 and lost funding in 2010. *See supra* pp. 14-15. That the AG had full knowledge of FKAC's continued existence despite its lack of funding and cessation of operations, at least calls into question FKAC's informal or undefined "nonprofit" status. At all times relevant to this action, FKAC was not funded, privately or publicly, and was no longer engaged in any endeavors beneficial to the public. Order p.4; Pl. Exs. 29, 29A; AG Pre-Trial Brief p.3 ("This action is unusual in that the **FKAC was a nonprofit that is not currently operating**.") (emphasis added). FKAC is simply not a public charity which falls under the purview of S.C. Code Ann. §

[31] Thus, the lower court erred in: a) its application of federal tax law opinions, which have no precedential value or relevance; b) comparing the PSA's sale to an "illegal 'private inurement' under federal tax laws[;]" and c) relying on a law school journal article by the Texas Assistant Attorney General regarding charity authority of the Texas Attorney General. *Id.* at pp. 15, 17.

1-7-130 and the oft-cited statute does not give rise to any power over FKAC or the PSA.

2. The South Carolina Trust Code, by Its Own Terms, Cannot be Considered.

Section 62-7-405, part of the South Carolina Trust Code (S.C. Code Ann. §§ 62-7-101, *et seq.*), has no application to the matter at hand. Under its own plain language, the Trust Code only "applies to express trusts, charitable or noncharitable, and trusts created pursuant to a statute, judgment, or decree that requires the trust to be administered in the manner of an express trust." *See* S.C. Code Ann. § 62-7-102; *see also* S.C. Code Ann. § 62-7-401. As a result, § 62-7-405 is inapplicable. There is no express trust involved, and no trust, charitable or otherwise, for FKAC or its assets has been created pursuant to any statute, judgment, or decree. Indeed, no party requested a finding that a charitable trust existed, and no such decree is found in the Order.

The lower court's reliance on statutory law and findings as to public charity and charitable trust authority are clearly in error and should be reversed.

3. Even if the AG's Statutory Powers Over Trusts or Public Charities Applied, the Order Impermissibly Expanded the Limits of Any Authority Granted.

Even if the cited statutes could apply, they simply do not provide the AG with the unfettered power approved by the lower court. The law does not confer authority on the AG to choose an asset's date of valuation, or require a significantly higher purchase price based on his own appraisal valuation (conducted after the PSA's closing date). While the AG is vested with protective powers, some deference must be given to well-established legal principles and rights.

Section 1-7-130 only gives the AG the power to "enforce the due application of funds given or appropriated to public charities" and "prevent breaches of trust in the administration thereof[.]" S.C. Code Ann. § 1-7-130. This provision only ascribes ministerial duties of enforcement and administration. Similarly, in the context of charitable trusts, § 62-7-405(c) of the Trust Code only gives the AG the authority to "maintain a proceeding to enforce the trust." This

is not a proceeding maintained by the AG. And it is not a proceeding to enforce a trust, or prevent administrative malfeasance, because no trust exists. But even if one did, the AG's actions and powers conferred in the Order go far beyond ensuring the proceeds from the PSA's negotiated, fair market value, purchase are distributed with "charitable purpose." Order p. 15.

On this point, the Order erred in failing to support for its conclusion that the AG is concerned with whether nonprofit assets are "maintained in the 'charity stream[,]'" and in failing to define the quoted term, "charity stream." Order p. 15. Relatedly, the Order failed to consider the AG's statement that he has no opinion as to the proper entity entitled to receive FKAC's residual assets upon dissolution. Pl. Ex. 82 no. 17. It is unclear, then, how the AG will satisfy the purported statutory duty of maintaining FKAC's residual assets in the nebulous charity stream, and reliance on such a concept to support AG interference was in error.

The Order's reliance on S.C. Code Ann. §§ 1-7-130 and 62-7-405(c) only served as cover for the AG's improper interference. The lower court erred in its application of the two statutes and in finding that they conferred any power in this case.[32]

D. The Order Errantly Applied South Carolina Common Law Regarding the AG's General Powers for Charitable Trusts and the Public Benefit.

The Order lacks any analysis as to the circumstances in which a trust may have been created, and does not itself establish one, but agreed with the AG that general common law powers over charitable trusts allow him to prevent the sale to Royal. Order pp. 12, 15-16; Tr. 343:8-11.

1. The Order Contravenes Law Established by the Supreme Court of South Carolina in *Wilson v. Dallas*.

One such charitable trust power is the *parens patriae* doctrine, to which the Order contains a single isolated reference and fails to analyze. Order p.13 (quoting unpublished Court of Common

[32] Likewise, the lower court erred in finding they provided the AG with a statutory right to intervene in this case. NOA Ex. 10.

Pleas order from *Sisters of Charity v. Wilson*, Case No. 2016-CP-40-00087 (Jan. 27, 2016)). The doctrine's application is restricted to cases that sufficiently implicate a statewide public interest.[33] Here, no sufficient interest warranting AG involvement exists, as there is no statewide interest in, or potential statewide harm related to, distribution of FKAC's residual assets for the benefit of students on the City of Charleston's peninsula.[34] Pl. Ex. 82 at no. 17. As a result, the AG's *parens patriae* powers to protect the welfare of all the State's citizens have no bearing on the case at hand and certainly do not warrant the AG's contractual interference.

Moreover, the Order's reliance on *parens patriae*, and applications of general charitable trust authority, run contrary to the South Carolina Supreme Court's opinion in *Wilson v. Dallas*, 403 S.C. 411, 743 S.E.2d 746 (2013). While the doctrine's body of common law is mostly limited to family court or juvenile criminal matters, and neither the lower court nor the AG offered any published opinion applying the doctrine, the *Dallas* opinion is persuasive for the matter at hand.

One key consideration is that *Dallas* undoubtedly involved a matter impacting the general public interest of South Carolina. The testamentary trust at issue specified that its assets were to be applied to assist the poor and financially needy seeking "education at educational entities and/or institutions in the States of South Carolina and Georgia." *Dallas*, 403 S.C. at 417, 743 S.E.2d at 750. Additionally, as with every other charitable trust opinion discussed herein, *Dallas* involved disputes over an express trust, further cementing the limited circumstances of the authority's application. In the case, the AG sought to discard an existing charitable trust and replace it with

[33] *Furman Univ. v. McLeod*, 238 S.C. 475, 483, 120 S.E.2d 865, 867 (1961) ("[T]he [AG] is the proper party to **protect the interest of the members of the public at large, as distinct from those having 'immediate or peculiar interests.'**") (internal citation omitted) (emphasis added).
[34] If found that a sufficient quasi-sovereign interest is implicated, the AG cannot invoke his *parens patriae* powers because CCSD, the "charitable beneficiary" identified in the Order, albeit in error, needs no protecting. Based on its number of filings below, CCSD has been actively represented.

one of his own creation, which the court held was an abuse of the AG's limited charitable trust powers. *Id.* at 420-422, 444-47, 743 S.E.2d at 751-52, 764-66. In relevant part, the court found:

> [T]he AG has no authority to become completely entrenched in an action that began here as one to set aside a will and for statutory shares, direct the settlement negotiations, and then fashion a settlement that discards Brown's will and his 2000 Irrevocable Trust and replaces them with new trusts, only to give himself sole authority to select the managing trustee. By so doing, the AG has effectively obtained control over the bulk of Brown's assets and has given his office unprecedented authority to oversee the affairs of the parties that has not heretofore been recognized in our jurisprudence.

Id. at 445-46, 743 S.E.2d at 765. Many similarities exist in the present action.

From the start, the AG became completely entrenched in a negotiated contract to purchase real estate. After actively preventing the sale, which FKAC intended to close prior to the AG's interference, he turned to active participation in this litigation to combat Royal's request for specific performance, even going so far as moving for non-suit dismissal at trial. In no uncertain terms, the AG has taken control of FKAC's assets, directing the manner in which the Property may be sold, and giving himself authority to act as "trustee" to override agreed upon contractual terms.[35]

The AG's "'duty is to remedy abuses in trust management.' However, **the AG is <u>not</u> 'in the position of a super administrator of charities with <u>control over, or right to participate in, the contractual undertakings</u> of the charities**.'" *Id.* at 446, 743 S.E.2d at 765 (internal citations omitted).

The lower court's conclusions that the AG has authority to alter, direct, and control FKAC's contractual undertakings violate every aspect of legal precedent establishing his

[35] "Although the AG certainly has duties in regards to charitable trusts, if he believed [Wells or her attorney], as trustees, were not good stewards, the remedy would be to seek their removal and replacement. … 'The remedy for bona fide problems with the trustee is not rewriting a will or trust but replacing the trustee with a new trustee.[]'" *Id.* at 446-47, 743 S.E.2d at 766 (internal citation omitted). This excerpt from *Dallas* not only invalidates the AG's ability to alter the purchase price, but also supports June Wells' agency authority by estoppel. *See supra* pp. 21-22.

permissible powers. The Order and the PSA's nullification thereunder are "fundamentally flawed because the entire proposal is based on an unprecedented misdirection of the AG's authority[.]" *Id.* at 444, 743 S.E.2d at 764. Accordingly, the lower court's dismissal of Royal's claims should be reversed and the PSA enforced to consummate the sale specified therein.

2. The Order Heavily Relied on Unpublished Trial Court Orders and Pleadings.

In adopting the AG's proffered sources, support for the Order's legal conclusions consists mainly of unpublished opinions or case filings from previous matters involving the AG. Ms. Jowers appeared for the AG in these actions, and thus had opportunity to pick the more favorable opinions to present in this matter, while Royal was entirely unaware of their existence until he was provided copies of the same. The cited opinions and pleadings have no precedential value, and the master's reliance on them is not only erroneous but inequitable. Any rebuttal research is necessarily limited to the published opinions of South Carolina appellate courts, due to the constraints of research databases and Rule 268, SCACR.

Moreover, none of the cited "authorities" support the Order's conclusions. To being, they all share a common distinguishing thread: they each involved an undisputed express trust. Its only citation for *parens patriae* powers (Order p. 13), the facts and circumstances of *Sisters of Charity* (AG Mem. Ex. A) do not provide a basis for voiding the PSA based upon the AG's determination as to a date of valuation. The referenced orders in the *Baptist Foundation of S.C.* cases (Order pp. 14-15; AG Mem. Exs. F-G), in which the Horry County Probate Court modified the express trust's terms to give the trustee authority to sell its real property assets due to changed circumstances, support enforcement of the PSA.

In *Calhoun County Museum and Cultural Center*, a Probate Court again allowed beneficiaries to sell interests in the trust's real property assets under equitable deviation, but. did

not contemplate any input or approval by the court or AG for a future sale, and per the AG's request only required that the AG be provided notice "[u]pon the sale," not prior notice and approval authority. Order p.14; AG Mem. Ex. E. Finally, the lower court's reliance on the mortgage foreclosure complaint filed in *Sloan Brothers, LLC* is perplexing, if not troubling, as it contains allegations, nothing more, and a pleading in an unrelated matter has no place in a dispositive order. Order p.14; AG Mem. Ex. D.

3. Published Case Law Cited in the Order Is Irrelevant to the Facts of this Case.

The limited published opinions the Order does rely upon similarly fail to support the master's conclusions of permissible AG interference via charitable trust powers.

To support the AG's domineering presence, the Order quotes an opinion's footnote summarizing the AG's statutory duties to protect the public at large in administering or enforcing charitable trusts. Order p.11 (citing *Epworth Children's Home v. Beasley*, 365 S.C. 157, 163 n.3, 616 S.E.2d 710, 713 n.3 (2005)). As established *supra* (pp. 37-40), these statutory powers play no role in this case. Thus, the *Epworth* opinion, regarding trustee misdealings and interpretation of express trust language to prohibit termination, has zero application. The AG's response did not factor in the court's analysis, and the opinion indicates no active participation by the AG in the trust's affairs despite evidence of mismanagement. *Id.* at 165-72, 616 S.E.2d at 714-18.

Similarly, the reliance on *S.C. Dep't of Mental Health v. McMaster*, 372 S.C. 175, 642 S.E.2d 552 (2007) ("*DMH*") to void the PSA is misplaced. Order p. 12. There, the South Carolina Supreme Court was asked to determine if the state hospital property was held subject to a charitable trust, and the conditions in which a sale was permissible. *DMH*, 372 S.C. at 180, 642 S.E.2d at 554. The court found that a charitable trust existed over the property, based entirely upon language in the conveyances to the Department of Mental Health ("Department") as a gift "for the charitable

purposes of the State Hospital[,]" and the fact that the hospital received continued funding by the General Assembly. *DMH*, 372 S.C. at 182-83, 642 S.E.2d at 556 ("[T]he deeds and the legislative acts giving rise to the State Hospital clearly evidence the creation of a charitable trust.").[36]

Conversely, FKAC was not publicly funded, purchased the Property for monetary consideration with no evidence its purchase was conditioned on charitable use, and it ceased using the Property for any public purpose in the early 2000s. Tr. 80:15–81:24, 192:2-25; Pl. Ex. 29A. Moreover, it was the court, not the AG, that determined the existence of a trust in *DMH*. Here, no such determination or even a request for the same is in the record.

The *DMH* court found that "the doctrine of equitable deviation should be utilized to allow the property to be sold[,]" as the property was no longer needed to house the mentally ill. *DMH*, 372 S.C. at 184, 642 S.E.2d at 557. Thus, if the opinion should be utilized, it stands as support for enforcing the PSA's sale to Royal for fair market value, with the proceeds held in trust or distributed for Charleston-based kindergarten education.

In combination with *DMH*, the Order relied on an unpublished Circuit Court order entered in the Department's subsequent action filed to obtain approval of the property's sale. Order pp.12-13 (discussing *S.C. Dep't of Mental Health v. Wilson*, 2011-CP-40-00875 (June 10, 2011) ("*DMH 2*")). Setting aside the errant reliance on an additional unpublished opinion, *DMH 2* actually contradicts the lower court's voiding the PSA. The contract approved was for a sale of the property in "as is" condition for $15 million. AG Mem. Ex. B p. 3. In evaluating the contract, the court considered an appraised value that included development cost deductions, but the subject appraisal's "as is" valuation was $2.3-2.9 million more than the contract price. *Id.* at 3-4. And

[36] Supporting exclusive application to publicly appropriated property, the *DMH* Court further stated that "[p]roperty subject to a charitable trust may not be terminated or altered by the General Assembly, but rather, must be approved by the court." *Id.* at 183, 642 S.E.2d at 556.

contrary to the Order's finding that "unusual provisions" violate public policy (Order pp. 18-19), the *DMH 2* contract was a complex arrangement. The Department was to receive piecemeal installment payments (based on future valuations) paid after sale of parcels to be subdivided, or the developer itself could pay unspecified release prices in lieu of third-party sale, and the "purchase" contract had a 7-year term after which the buyer could opt-out. AG Mem. Ex. B p. 3.

E. <u>There is No Authority to Support the AG's Control Over or Nullification of the PSA</u>.

No justification exists for the AG's railroading of the sale or attempting to nullify the PSA. The AG's authority is limited to administering or enforcing the terms of a trust (Order p.3), but his efforts here far exceed that authority. The only permissible role the AG could potentially play is overseeing distribution of sale proceeds after PSA consummation. Even if the Order did not direct the distribution, such oversight is not needed. While Royal voiced no objection to educational use of the sale proceeds (Tr. 191:10-15), he has no power to direct distribution. And there is no evidence to suggest that FKAC would not follow the provisions of the 1971 Amendment.

Regardless, even if there is a scenario in which a trust exists, the only requirement is that FKAC sell the Property for fair market value as of the date of contract, and that the residual assets pass to Charleston School District #20. All of the evidence supports a finding that FKAC intended to carry out the purported trust's directive of distribution, and there is no evidence to the contrary.

In summary, the AG's presence in this action is entirely unwarranted and goes well beyond the claimed statutory and common law authority. The PSA and sale thereunder are consistent with all common law "authority" the AG cited and the lower court adopted. The sales price is for fair market value at the time of the contract, and the Supreme Court of South Carolina has specifically held that **the AG has no "<u>control over, or right to participate in, the contractual undertakings</u> of the charities**." *Wilson v. Dallas*, 403 S.C. at 446, 743 S.E.2d at 765. Invalidating a contract based upon market fluctuations has no support under South Carolina law. Therefore, the lower

court must be reversed and the PSA enforced.

VI. THE LOWER COURT ERRED IN ALLOWING CCSD'S INTERVENTION AND ITS FILING OF AFFIRMATIVE CLAIMS.

In short, CCSD, a permissive intervenor, has hijacked this litigation from the start, and the lower court's approving CCSD's excessive behavior and its claimed entitlement to FKAC's assets, without the presentation of any facts or evidence, is in error.

A. By Ruling on Substantive Issues in Granting CCSD Permissive Intervention, the Lower Court Erred.

CCSD's permissive intervention is based upon FKAC's 1971 Amendment, specifically directing that its residual assets pass to "Charleston School District # 20" ("District 20"). Pl. Ex. 62. During the hearing on CCSD's and the AG's motions to intervene, the master specifically advised Royal, *pro se* at the time, "that they only seek to intervene at this point in time, so it's really more of a procedural motion." Interv. Tr. 12:12-14. Following argument, the lower court advised CCSD's counsel that Royal raised "an interesting dilemma, and that is the distinction between [CCSD] and Charleston County [sic] School District No. 20." *Id.* at 29:15-19.

The lower court noted there was "previous litigation here between School District 20 and the school board. It clearly indicates that the beneficiary is School District No. 20, . . . I have to figure out who the proper party is." *Id.* at 30:1-18. CCSD's counsel confirmed that District 20 exists as a separate entity and was directed to consult with legal counsel for District 20 about the litigation. *Id.* at 29:15-21, 30:1-18; *see also id.* at 21:7–22:1. At the hearing, the master granted CCSD permissive intervention, and directed CCSD and the AG to prepare formal orders "that says exactly what we've talked about here today." *Id.* at 31:13-16.

Yet thereafter, no proof or evidence of the proper party, or that CCSD satisfied the Court's directive to consult District 20, was submitted. Royal Opp. MIL pp. 4-8. Despite this, and the fact that CCSD only permissively intervened, the order granting intervention made definitive findings

and conclusions as to CCSD's rights that altered FKAC's dissolution clause, and essentially granted the relief requested in CCSD's counterclaim (filed 2 months prior). NOA Ex. 9 ("Intervention Order")[37] pp. 13-14.[38] Thus, the lower court's assurances that it viewed the motion to intervene as only procedural, which was consistent with South Carolina law, were simply false. After giving Royal the impression he would have opportunity to refute any substantial claims, the Intervention Order's findings were inequitable, prejudicial, and violated the scope of authority allowed in adjudicating a motion under Rule 24, SCRCP. *See* Opp. MIL pp. 2-6.

Moreover, the Intervention Order erred in failing to recognize that any interest of CCSD's, who seeks to prevent "potential misapplication, loss, devaluation, and waste[]" of FKAC's assets, is protected by the AG. CCSD Counterclaim ¶49. Thus, the lower court erred in granting CCSD's intervention. *See S.C. Tax Comm'n v. Union Cty. Treasurer*, 295 S.C. 257, 260-61, 368 S.E.2d 72, 74 (Ct. App. 1988) ("When an applicant for intervention and an existing party have the same interests or ultimate objective in the litigation a presumption arises that its interests are adequately represented and the application should be denied[.]") (internal citation omitted). Additionally, it is hard to fathom CCSD arguing the exception of inadequate representation by the AG, due to "adversity of interest, collusion, or nonfeasance[,]" applies here. *Id.*

B. <u>The Record Shows No Justiciable Controversy Involving CCSD</u>.

Even CCSD left the hearing on its requested intervention with the impression that its burden of proof as to beneficiary rights remained. Its claim seeking a declaratory judgment on the issue was filed June 24, 2019 – after the hearing but prior to entry of the Intervention Order in

[37] Royal did not have the right to immediately appeal the interlocutory Intervention Order.

[38] The only support proffered for CCSD's purported entitlement is S.C. Act 340, enacted in 1967. NOA Ex. 9 pp.10-14; Pl. Ex. 88 pp.1-5 nos. 19-29; Order pp.19-22. Importantly, **FKAC approved the resolution underlying its 1971 Amendment *<u>after</u>* 1967 Act No. 340**, evidencing FKAC's clear intent that the beneficiary is specifically District 20.

August 2019. CCSD requested a declaratory judgment that: a) it is the legal, beneficial, and/or equitable owner of FKAC's assets and/or the proceeds from the sale of the same; b) the PSA is null and void; and c) CCSD is entitled to FKAC's assets, and/or the proceeds from the sale of the same, upon FKAC's dissolution. CCSD Counterclaim pp. 11-12. It is unclear why CCSD believed this claim necessary if it felt it had already proved the right to its requested relief.

More importantly, the claim fails on the merits. Initially, the requested relief is conflicting – claiming both present ownership of FKAC's assets and entitlement to the same upon FKAC's dissolution. To demonstrate a justiciable controversy and maintain a declaratory judgment claim as to a contract, the party must have a cognizable interest in, or demonstrate its rights or legal relations are affected by, the contract at issue. *See* S.C. Code Ann. § 15-53-30. Based upon its own pleading and the available evidence, there is no justiciable controversy involving CCSD – it is not a party to the PSA and it is not the named beneficiary of the residual assets of FKAC following its dissolution. Opp. MIL pp. 6 n.1, 7-8. Moreover, the AG, who alleges authority to maintain assets in the "charity stream" (Order p. 15), has not formed an opinion as to the beneficiary of FKAC's residual assets upon dissolution. *See supra* p. 40.

Even if CCSD is the beneficiary upon dissolution, its claim to FKAC's residual assets, the proceeds of the sale to Royal, has not matured because FKAC has not dissolved nor begun the process. As such, it has no active interest giving it a basis to affirmatively seek nullification of the PSA. It is a passive participant who, according to the Order, does not have a role in opining on or determining a fair purchase price thereunder. Order p. 24 (directing the Property be sold "for a price that must be approved by the Court after notice to the [AG]," without contemplating CCSD involvement). Therefore, CCSD has no cognizable interest in or rights to the PSA or the Property, as it is only entitled to accept whatever proceeds remain after a consummated sale of the Property

(following FKAC's dissolution). Interv. Tr. 18:9-12 ("[CCSD] is more concerned with the financial – its financial well-being as well as the well-being of the educational programs it has.").

Yet the Order held that CCSD is entitled to FKAC's residual assets upon dissolution, even though CCSD's claim for such relief was not before the court, no evidence or argument was presented on the issue, and the lower court previously assured Royal that such claims could be disputed. Order pp. 20-22. Accordingly, these rulings were made in error.

VII. THE LOWER COURT ERRED IN EXCLUDING THE TRANSCRIPT OF THE DEPOSITION OF CCSD'S RULE 30(b)(6) WITNESS.

The lower court erred in ruling that the transcript of the deposition of CCSD's Rule 30(b)(6), SCRCP, designated witness (Pl. Ex. 74) was not admitted as evidence or received as a proffer in this case. NOA Ex. 3. CCSD's only contemporaneous objection, with which the lower court agreed, was that Royal was required to furnish advance copies of the transcript excerpts he intended to use. Tr. 298:10–299:25; NOA Ex. 3. This ruling conflicts with Rule 32(a), which allows use of "part or all of a deposition," and allows an adverse party to use a Rule 30(b)(6) deposition "for any purpose." Rules 32(a), 32(a)(2), SCRCP. At trial, Royal's counsel never sought to admit transcript excerpts, only offering the entire transcript as evidence. Tr. 298:10–299:25. Additionally, Royal was not required to show the Rule 30(b)(6) deponent was unavailable to testify at trial. *See Gibson v. Wright*, 403 S.C. 32, 48, 742 S.E.2d 49, 57 (Ct. App. 2013) (providing that if the deposition is admissible under Rule 32(a)(2), SCRCP, including those of Rule 30(b)(6) designees, the adverse party need not demonstrate that the deponent was unavailable pursuant to Rule 32(a)(3), SCRCP) (internal citation omitted).

CONCLUSION

For the grounds and reasons set forth herein, the lower court's rulings should be reversed, and specific performance of the Agreement granted.

Respectfully submitted,

s/Evan P. Williams

Jeffrey S. Tibbals S.C. Bar No. 72628
jst@bybeetibbals.com
Evan P. Williams S.C. Bar No. 101981
ewilliams@bybeetibbals.com
BYBEE & TIBBALS, LLC
735 Johnnie Dodds Blvd., Suite 104 (29464)
P.O. Box 1542
Mt. Pleasant, SC 29465
Telephone: 843.881.1623

COUNSEL FOR APPELLANT
MICHAEL D. ROYAL

December 2, 2022
Mt. Pleasant, South Carolina

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Mikell R. Scarborough, Master-In-Equity

Appellate Case No. 2022-001165

Michael D. Royal, Appellant,

v.

Free Kindergarten Association of Charleston, Respondent,

The Attorney General of the State of South Carolina and
The Charleston County School District, Intervenors/Respondents.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellant and Appellant's Designation of Matter to be Included in the Record on Appeal on the above-named Respondents via email to their respective counsel of record, on December 2, 2022, containing the above-referenced documents as attachments in .pdf, sent to the addresses shown below.

A. Bright Ariail, Esq.
bright@brightariaillaw.com
Law Office of A. Bright Ariail, LLC
Warren W. Ariail, Esq.
warren@ariaillaw.com
Ariail Law Firm, LLC
125E Wappoo Creek Drive, Suite 202
Charleston, SC 29412

Counsel for Intervenor/Respondent The Charleston County School District

Mary Frances Jowers, Esq.
Assistant Deputy Attorney General
mfjowers@scag.gov
Kristin Simons, Esq.
Assistant Attorney General
ksimons@scag.gov
Office of the South Carolina Attorney General
P.O. Box 11549
Columbia, SC 29211

Counsel for Intervenor/Respondent The Attorney General of the State of South Carolina

Joseph K. Qualey, Esq.
Qualey Law Firm
23 Broad Street
Charleston, SC 29401
joequaley@qlawfirm.com

Court-Appointed Receiver for Respondent Free Kindergarten Association of Charleston

Patrick F. Stringer, Esq.
753 Folly Road
P.O. Box 12370
Charleston, SC 29422-2370
pfstringer@yahoo.com

Counsel for Respondent Free Kindergarten Association of Charleston

Respectfully submitted,

s/Evan P. Williams

Jeffrey S. Tibbals S.C. Bar No. 72628
jst@bybeetibbals.com
Evan P. Williams S.C. Bar No. 101981
ewilliams@bybeetibbals.com
BYBEE & TIBBALS, LLC
735 Johnnie Dodds Blvd., Suite 104 (29464)
P.O. Box 1542
Mt. Pleasant, SC 29465
Telephone: 843.881.1623

Counsel for Appellant Michael D. Royal

BYBEE & TIBBALS

735 Johnnie Dodds Blvd. Suite 104
Mount Pleasant, SC 29464
843.881.1623
bybeetibbals.com

Evan P. Williams
ewilliams@bybeetibbals.com
843.513.1036

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December 2, 2022

VIA E-MAIL

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201
ctappfilings@sccourts.org

Re: ***Michael D. Royal v. Free Kindergarten Association of Charleston, et al.***
Appellate Case No. 2022-001165

Dear Ms. Kitchings:

Please find enclosed for filing, on behalf of Appellant Michael D. Royal ("Appellant"), the following documents in the above-captioned matter:

1. Initial Brief of Appellant;
2. Appellant's Designation of Matter to be Included in the Record on Appeal; and
3. Proof of Service of the Initial Brief of Appellant and Appellant's Designation of Matter.

By copy of its counsel of record on the filing transmittal e-mail, Respondent and Intervenors/Respondents are served with Appellant's Initial Brief and Designation of Matter.

Yours Sincerely,

Evan P. Williams

Enclosures
cc (via e-mail only): A. Bright Ariail, Esq.
Warren W. Ariail, Esq.
Mary Frances Jowers, Esq.
Kristin Simons, Esq.
Patrick F. Stringer, Esq.
Joseph K. Qualey, Esq.
Zac Smith, Esq.