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SC Court of Appeals

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.

APPELLANT'S INITIAL REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF CASES AND OTHER AUTHORITIES2
REPLY ARGUMENT3
I. Respondents Urge this Court to Apply a Standard of Review They Admit is Not Applicable..4
II. Nonsuit Dismissal Was Improper Under Rule 41(b), SCRCF5
III. In Arguing the PSA is Against Public Policy, Respondents Lack Supporting Evidence and
Contradict Established Law.....6
A. No Basis Offered for Respondents’ Date of Valuation Argument.6
 1. *The Order Admitted that the AG’s Sole Source of Reliance, Opinions Interpreting the
Internal Revenue Code’s Provisions on 501(c)(3) Entities, Is Not Applicable.* 8
 2. *Argument that Public Listing Was Required Is Not Preserved for Appeal*10
B. No Party Alleged or Established that Purported Relative Bargaining Power Would Make
the PSA Violative of Public Policy.11
C. Respondents Offer No Authority that the PSA’s “Unusual Provisions” are Unusual (or
Contrary to Public Policy)11
 1. *Paragraph 6’s Example of Possible Contract Expense for the Buyer Is Not Unjust.*..12
 2. *The Limited Termination Clause Does Not Violate Public Policy*.....13
 3. *The Provision Giving the Seller the Choice to Delay Cannot Logically Make the PSA
Unfair, Unjust, or Inequitable to the Seller.*13
IV. The Inapplicability of the 1994 Nonprofit Act; No Evidence of FKAC Being Governed by
Title 33, Chapter 31 of the 1976 Code.15
V. Without Any Legal Basis to Disrupt the PSA, the AG Creates and Attacks Straw Man
Arguments Regarding Intervention16
A. Even if the 1994 Act Governs, No Provision Grants Authority for the AG’s Actions.....16
 1. *The AG Mischaracterizes Royal’s Argument as to §§ 33-31-128 and -302*.....16
 2. *S.C. Code Ann § 33-31-1202(f) Grants No Authority in this Action*.....17
 3. *The AG Did Not Bring an Action or Claim Invoking Statutory Authority, and Royal
Does Not (and Cannot) Challenge FKAC’s Ability to Act*17
 4. *The AG’s Inapposite Summary of a Tennessee Opinion Offers No Support*18
B. The AG’s Conclusory Statements as to His Authority and FKAC’s Charitable Status Are
Unavailing.....20
 1. *The “Charity Stream” Argument Fails to Account for the Facts of this Case.*20
 2. *The Case Does Not Implicate a Sufficient Public Interest*21
 i. *With No Interests of the Public at Large, Parens Patriae is Irrelevant*21
 ii. *Published South Carolina Case Law Favors Enforcing the PSA*22
 3. *The AG Ignores the Trust Code’s Explicit Provisions that Render it Inapplicable*24
VI. Admissions by the AG and CCSD that Their Interests are in Conflict Warrant Reversal25
VII. CCSD Lacks Ability to Intervene and Standing For Its Claim26
A. CCSD’s Claims Cannot Be Decided by Lower Court’s Improper Material Findings Made
on a Motion to Intervene.....27
B. CCSD Lacks Standing to Allege Its Claim27
VIII. No Valid Ground Cited for Excluding the Transcript of CCSD’s Rule 30(b)(6) Deposition.28
A. Respondents are Estopped from Objecting to the Transcript’s Admission.....30
B. The Transcript was Proffered and is Admissible Under Rule 32(a), SCRCF30
IX. CCSD’s Sprawling Arguments Against June Well’s Authority, in which FKAC Did Not
Join, Are Without Basis.....31

A. Contrary to CCSD’s Repeated Contentions, Pleadings Need Not Be Verified.....	31
B. FKAC’s Pleadings and Its Stipulation Require Reversal.....	32
C. CCSD Misconstrues the Issues in and Effects of the Probate Order.	32
D. CCSD’s Unsupported Speculations on Express Authority Fail to Hit Home.	33
1. <i>FKAC’s Stipulation Negates Argument as to Wells’ “Alleged” Membership</i>	33
2. <i>FKAC’s Governing Documents Are Unequivocally Clear that It Is a Member-Controlled Entity</i>	35
3. <i>CCSD’s Meek Argument as to 1994 Act Compliance is of No Consequence</i>	36
E. CCSD Misapprehends Royal’s Argument on Apparent Authority	37
F. Respondents Are Estopped from Denying Wells’ Authority.....	39
1. <i>CCSD’s Statement That It Has No Obligation to Oversee FKAC’s Assets Conflicts with Its Assertions of Authority Over the Same</i>	39
2. <i>The AG’s Decision to Forego Pursuing Judicial Dissolution of FKAC in 2010 Placed Wells in a Position of Authority</i>	39
CONCLUSION.....	40

TABLE OF CASES AND OTHER AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Adams v. Willis</i> , 225 S.C. 518, 83 S.E.2d 171 (1954).....	9, 15
<i>Ahrens v. McDaniel</i> , 287 S.C. 63, 336 S.E.2d 505 (Ct. App. 1985)	5
<i>Anclote Psychiatric Ctr., Inc. v. Comm’r</i> , T.C. Memo. 1998-273, 76 T.C.M. 175 (1998).....	8, 9
<i>Atlas Food Sys. & Servs., Inc. v. Crane Nat’l Vendors Div. of Unidynamics Corp.</i> , 319 S.C. 556, 462 S.E.2d 858 (1995).	17
<i>Brown v. St. Luke’s Hosp. Ass’n</i> , 274 P. 740 (Colo. 1929).....	24
<i>Campbell v. Carr</i> , 361 S.C. 258, 603 S.E.2d 625 (Ct. App. 2004).....	9, 10
<i>Caracci v. Comm’r</i> , 118 T.C. 379 (2002).....	9
<i>Eadie v. H.A. Sack Co.</i> , 322 S.C. 164, 470 S.E.2d 397 (Ct. App. 1996)	40
<i>Epworth Children’s Home v. Beasley</i> , 365 S.C. 157, 616 S.E.2d 710 (2005).....	24
<i>Froneberger v. Smith</i> , 406 S.C. 37, 748 S.E.2d 625 (Ct. App. 2013)	37
<i>Furman Univ. v. McLeod</i> , 238 S.C. 120 S.E.2d 865 (1961)	24
<i>Gordon v. Lancaster</i> , 419 S.C. 48, 795 S.E.2d 857 (Ct. App. 2016).....	4-5
<i>Hinton v. Designer Ensembles, Inc.</i> , 335 S.C. 305, 516 S.E.2d 665 (Ct. App. 1999)	4
<i>Hous. Auth. of Charleston v. Olasov</i> , 282 S.C. 603, 320 S.E.2d 478 (Ct. App. 1984).....	8
<i>Holly Hill Lumber Co., Inc. v. McCoy</i> , 201 S.C. 427, 23 S.E.2d 372 (1942).....	9
<i>Jamison v. Ford Motor Co.</i> , 373 S.C. 248, 644 S.E.2d 755 (Ct. App. 2007).....	29
<i>Johnson v. J.P. Stevens & Co.</i> , 308 S.C. 116, 417 S.E.2d 527 (1992)	5, 6
<i>Louisiana v. Texas</i> , 176 U.S. 1 (1899)	22
<i>Pye v. Estate of Fox</i> , 369 S.C. 555, 633 S.E.2d 505 (2006)	10
<i>Regions Bank v. Wingard Props., Inc.</i> , 394 S.C. 241, 715 S.E.2d 348 (Ct. App. 2011)	4
<i>Reid v. Reid</i> , 280 S.C. 367, 312 S.E.2d 724 (Ct. App. 1984).....	8
<i>R & G Constr. v. Lowcountry Reg’l Trans. Auth.</i> , 343 S.C. 424,540 S.E.2d 113 (Ct.App. 2000). 39	39
<i>S.C. Dep’t of Mental Health v. McMaster</i> , 372 S.C. 175, 642 S.E.2d 552 (2007).....	23, 24
<i>S.C. Dep’t of Mental Health v. Wilson</i> , 2011-CP-40-00875 (June 10, 2011).....	23
<i>Shannon v. Freeman</i> , 117 S.C. 140, 109 S.E. 406 (1921).....	9
<i>Shirey v. Bishop</i> , 431 S.C. 412, 848 S.E.2d 325 (Ct. App. 2020)	12
<i>State ex rel. Adventist Health Care Sys./Sunbelt Health Care Corp. v. Nashville Mem’l Hosp.</i> , 914 S.W.2d 903 (Tenn. Ct. App. 1995)	19, 20, 27, 28

Wilson v. Dallas, 403 S.C. 411, 743 S.E.2d 746 (2013) 21, 22, 23, 24, 25

Statutes

	<u>Page</u>
Internal Revenue Code (Title 26, U.S. Code of Laws) § 501(c).....	1, 8, 9
Act 219, 1900 S.C. Acts 390 (“1900 Act”).....	7, 17, 37
1967 S.C. Acts 340.....	36
Title 33, Chapter 31 of the 1976 Code of Laws of South Carolina (“1976 Act”).....	1, 15, 16
S.C. Code of Laws § 33-31-10 (1976).....	16
S.C. Code Ann. § 1-7-117.....	20
S.C. Code Ann. § 1-7-130.....	20, 21
S.C. Code Ann. § 12-37-930.....	10
S.C. Code Ann. § 15-53-30.....	28
S.C. Code of Laws, Title 33, Chapters 1 through 20.....	16
S.C. Code Ann. § 33-20-103.....	16
S.C. Code Ann. §§ 33-31-101, <i>et seq.</i> (“1994 Act”).....	1, 2, 6, 15, 16, 18, 19, 20, 36, 38
S.C. Code Ann. § 33-31-128.....	16
S.C. Code Ann. § 33-31-170.....	18, 19
S.C. Code Ann. § 33-31-171.....	18
S.C. Code Ann. § 33-31-302.....	7, 16, 17
S.C. Code Ann. § 33-31-304.....	18, 27
S.C. Code Ann. § 33-31-701.....	36, 37
S.C. Code Ann. § 33-31-801.....	36
S.C. Code Ann. § 33-31-1202.....	1, 16, 17
S.C. Code Ann. § 33-31-1403.....	17
S.C. Code Ann. § 33-31-1404.....	16
S.C. Code Ann. § 33-31-1430.....	40
S.C. Code Ann. § 33-31-1701.....	16
S.C. Code Ann. § 33-56-100.....	20
S.C. Code Ann. § 62-7-102.....	24
S.C. Code Ann. § 62-7-201.....	24
S.C. Code Ann. § 62-7-401.....	24
S.C. Code Ann. § 62-7-405.....	24
Tenn. Code Ann. § 48-51-701.....	19, 20
Tenn. Code Ann. § 48-53-104.....	28

Rules and Other Authorities

	<u>Page</u>
Rule 11(a), SCRCP.....	31, 32
Rule 30(b)(6), SCRCP.....	1, 6, 28, 30, 31, 34, 39
Rule 32(a), SCRCP.....	1, 30, 31
Rule 41, 41(b), SCRCP.....	5
Rule 61, SCRCP.....	29
Rule 86, SCRCP.....	5
Rule 103, SCRE.....	29
Susan Larson, <i>Right of a State to Sue as Parens Patriae</i> , 19 Wake Forest L. Rev. 471 (1983).....	22

REPLY ARGUMENT

The State of South Carolina’s resources have been brought down on an innocent, good faith

contract purchaser to extract a higher purchase price. Royal and FKAC freely and above board entered into a contract for the purchase and sale of real property, and were prepared to close, only to be shut down due to the AG's purported power to "protect" the interests of a limited number of citizens in one of South Carolina's municipalities.¹ In the absence of persuasive law, facts, or logic, Respondents argue that South Carolina law should be contravened, and new precedent established, to set a floating valuation date, because market fluctuations would benefit a former local educational entity that ceased operating in the early 2000s and, with the AG's assistance, was defunded more than two years before the PSA's execution.

I. RESPONDENTS URGE THIS COURT TO APPLY A STANDARD OF REVIEW THEY ADMIT IS NOT APPLICABLE

Curiously, Respondents set forth two inconsistent standards of review, concluding an abuse of discretion standard should apply. AG Br. I.A.-B. Yet they admit this is an action in equity to which a preponderance of the evidence standard applies. AG Br. I.B.; *id.* at n.1 ("The specific performance standard of review is included here since **the ultimate effect of granting the Motion for Nonsuit was to deny the request for specific performance.**").²

Respondents blithely ignore binding precedent. *See Hinton v. Designer Ensembles, Inc.*, 335 S.C. 305, 318 n.3, 516 S.E.2d 665, 671 n.3 (Ct. App. 1999), *rev'd on other grounds*, 343 S.C. 236, 540 S.E.2d 94 (2000) (nonsuit motions in equity actions are reviewed "to determine whether there is sufficient evidence" for a claim). The theory that nonsuit dismissal turns solely on whether the master abused his discretion is inapt. *See, e.g., Regions Bank v. Wingard Props., Inc.*, 394 S.C. 241, 249, 715 S.E.2d 348, 352 (Ct. App. 2011); *Gordon v. Lancaster*, 419 S.C. 48, 63, 795 S.E.2d

¹ Unless otherwise noted, capitalized terms are defined as stated in Royal's amended brief ("Royal Br."). "Br. _" refers to initial brief pages or argument sections. FKAC joined the AG's brief; CCSD joined the AG's arguments except Sec. V, stating he takes no position as to Wells' authority.

² All emphases are added and all internal citations are omitted, unless otherwise noted.

857, 865 (Ct. App. 2016) (“In reviewing [] rulings of ... involuntary nonsuit, this court must review the evidence and all inferences in the light most favorable to the nonmoving party. If more than one reasonable inference can be drawn from the evidence, the motion for nonsuit must be denied.”).

Because Respondents erroneously urge a standard of review applicable to an “appeal of an action at law[,]” (AG Br. I.A.), this Court should disregard and set aside the AG’s argument Section I, parts of Sections II and III, and his first three Issues on Appeal, and CCSD’s argument Section I, part of Section II, and its first two Issues on Appeal.

II. NONSUIT DISMISSAL WAS IMPROPER UNDER RULE 41(b), SCRCP

Seeking to uphold the dismissal, Respondents muster two case opinions that only serve to highlight the lower court’s procedural errors. CCSD proffers *Ahrens v. McDaniel*, 287 S.C. 63, 336 S.E.2d 505 (Ct. App. 1985) (CCSD Br. I.A.), decided prior to the effective date of the South Carolina Rules of Civil Procedure.³ *Ahrens* contains no mention of Rule 41, nor any other rule of civil procedure, and has never been cited by our State’s jurisprudence on the issue of nonsuit dismissal. Rule 41(b), SCRCP, and the interpreting caselaw do not permit the court to make its own or solicit a party’s motion for nonsuit. Rather, Rule 41(b) clearly states a defendant may only move after the plaintiff completes the presentation of his case (not at any time during trial).

In the AG’s misplaced reliance on *Johnson v. J.P. Stevens & Co.*, 308 S.C. 116, 417 S.E.2d 527 (1992), which supports reversal, he acknowledges Rule 41(b)’s procedural requirement. The trial’s procedural posture in *Johnson*, unlike here, allowed for a proper request and order of nonsuit dismissal. *Id.* at 117, 417 S.E.2d at 528 (“*At the end of the plaintiff’s case*, the master-in-equity granted the employer’s motion to dismiss under Rule 41(b)[.]”). “Rule 41(b) allows the judge as the trier of facts to weigh the evidence, determine the facts and render a judgment against the

³ Pursuant to Rule 86, SCRCP, the effective date of the rules was July 1, 1985. Although the opinion was issued November 15, 1985, the case was heard on May 20, 1985, prior to Rule 41’s existence.

plaintiff *at the close of his case* if justified.” AG Br. I.B. (quoting *id.* at 118, 417 S.E.2d at 529).

CCSD further argues that because Royal supposedly received a full and fair opportunity to present his case in chief at trial and argue at the hearing on his motion to reconsider, that nonsuit dismissal was proper. CCSD Br. I.A. This position is based on a make-believe universe, not the facts of this case. Tr. 324:18–325:4; *also* 5/20/22 Tr. 6:24–7:4, 21:16-18. CCSD is also incorrect that Royal’s case in chief (at least the part he was allowed to present) provided the master with all salient facts on all issues. No facts or evidence were presented on CCSD’s claimed interest in the Property, and no fact or expert testimony supported the AG’s claimed authority or CCSD’s alleged interest. Indeed, the master excluded evidence on those issues, even excluding CCSD’s Rule 30(b)(6) deposition transcript, a record Royal was not permitted to argue at the hearing on CCSD’s motion to strike. 5/20/22 Tr. 37:24–41:16. Cementing its errors, the lower court ruled on unequal bargaining power and unconscionability of the PSA without a request or supporting evidence for the same, and without providing Royal an opportunity to respond. Royal Br. III.B., C.1-2.

III. IN ARGUING THE PSA IS AGAINST PUBLIC POLICY, RESPONDENTS LACK SUPPORTING EVIDENCE AND CONTRADICT ESTABLISHED LAW

Respondents posit three arguments in asserting the PSA violates public policy, one of which was never presented for ruling. First, the sales price FKAC freely agreed to, the fair market value at the contract date, is less than the amount the AG found acceptable after FKAC’s chosen closing date. Second, they wish to uphold the master’s improper rulings on unequal bargaining power, an issue never raised for adjudication. Finally, the PSA’s “totality of the circumstances,” comprised of three purportedly “unusual” provisions, allegedly make the contract unfair. Royal appeals to this Court to see through Respondents’ confused, unsupported, and logically challenged claims.

A. No Basis Offered for Respondents’ Date of Valuation Argument.

If the 1994 Act governs, the AG’s argument to toss out established law regarding date of

valuation conflicts with statutory law giving nonprofits the same rights and powers as individuals. S.C. Code Ann. § 33-31-302; *see also* 1900 Act § 4. In arguing that valuing property at the date of contract violates public policy, not a single source of relevant legal authority is cited in support.⁴

The AG argues that “[a] proper valuation of the assets is vitally important to protect the public interest[,]” because sales for less than market value provide the purchaser a private benefit. AG Br. I.D. These contentions have nothing to do with the valuation date, only with the fairness of the value negotiated and contracted for. Picture the script of this case in reverse. Royal and FKAC execute the PSA in 2013 on the same terms. FKAC periodically contacts Royal, the party setting the closing date, asking if he is ready to close; Royal keeps delaying until the last possible closing date in April 2018. Instead of tensions at that time between the U.S. and North Korea easing, they reach an all-time high, such that the economy and real estate values plummet, and the Property loses \$50-75,000 in value between 2013 and the closing date. Royal refuses to close.

Would the AG support FKAC in a lawsuit to enforce the contract? Of course he would. Would Royal, who willfully delayed closing, succeed in claiming the contract violated public policy and should not be enforced? Of course not. And that is why, in South Carolina, the date of valuation is the date of contract, regardless of who is selling or buying the property. Neither party should be allowed to back out of the contract due to a change in market value. Yet, that is exactly what the AG is attempting to do here, despite FKAC’s denial that the delay in closing resulted in devaluation or waste of the Property. *Compare* CCSD Answer ¶¶42, 49, *with* FKAC Reply ¶1).

There is no standard length of time between contract execution and closing that sets a cutoff between a “usual” and “unusual” waiting period – that is a matter to be determined by the contract

⁴ Aside from the void of legal support, the AG’s argument that the Property’s valuation date should fluctuate with the market due to public charity and charitable trust concerns is without premise. FKAC was not a public charity and no charitable trust is at issue. *Infra* Sec. V.B.; Royal Br. V.C.

parties and no other, especially when no financing is involved, as here.⁵ Respondents fail to give any reason for why nonprofit organizations in South Carolina should be excluded from freedom of contract. In virtually every sale, the land value changes between contract and closing, thus, the length of time in between is no basis to void the agreement, especially where the delay was solely attributable to the seller, FKAC. It is far too speculative and prejudicial to one of the parties (depending on the market's direction) to require valuation or re-valuation at closing.

1. *The Order Admitted that the AG's Sole Source of Reliance, Opinions Interpreting the Internal Revenue Code's Provisions on 501(c)(3) Entities, Is Not Applicable.*

Lacking any legal basis, most of Respondents' argument to value the Property on (or after) closing, including statements of purported law, contain no supporting citations. The scant support referenced, U.S. Tax Court opinions interpreting the Internal Revenue Code,⁶ and the AG's attempted proffer of Fannie Mae Guidelines for Fannie Mae single family home transactions (AG Br. 23-24), have no application to the case at hand. Setting aside its irrelevance, as no financing or single-family residence is involved, the AG's use of Fannie Mae Guidelines constitutes improper reliance on evidence outside the record on appeal. It is not a source of law and should be disregarded entirely. The US. Tax Court opinions are likewise of no consequence — this case does not involve income taxes nor a 501(c)(3) tax exempt entity. The Order acknowledged the irrelevance of the Tax Court opinions that the master and AG rely on. Order 17, 17 n.4 (specifying such authority provides guidance for 501(c)(3) nonprofits and FKAC is not a 501(c)(3) entity).

The Order does not reveal the full absurdity of the reliance on *Anclote Psychiatric Ctr., Inc.*

⁵ The AG's repetitive references to lending concerns are wholly off-topic. Even then, the testimony of his expert appraiser witness offers no guidance as to what constitutes a "usual" delay in closing.

⁶ The AG does cite two South Carolina appellate court opinions for the general premise or definition of fair market value. One was an appeal of a condemnation award, and the other involved the division of marital assets. AG Br. 22 (citing *Hous. Auth. of Charleston v. Olasov*, 282 S.C. 603, 320 S.E.2d 478 (Ct. App. 1984); *Reid v. Reid*, 280 S.C. 367, 312 S.E.2d 724 (Ct. App. 1984)).

v. Comm'r, 76 T.C.M. 175 (1998), an unpublished memo opinion. *Anclote* held “that when a [§] 501(c)(3) tax-exempt entity sells its assets for less than fair market value to a for-profit corporation whose shareholders are directors of the tax-exempt entity, the sale constitutes inurement and revocation may be appropriate.” *Caracci v. Comm'r*, 118 T.C. 379, 473 (2002) (summarizing *Anclote*). Thus, *Anclote*, analyzing an “insider” transaction, cannot be considered in this case, and the terms “private benefits” and “prohibited inurement” are used out of context by the AG.

Implying *Adams v. Willis*, 225 S.C. 518, 83 S.E.2d 171 (1954), is Royal’s only supporting authority, the AG casts it aside as a mere “option contract” case. AG Br. 24.⁷ However, the *Willis* holding is not limited in application to option contracts – to the contrary, the court held that “adequacy of price must be considered as of the date of the contract,” without any qualification. See *Willis*, 225 S.C. at 527, 83 S.E.2d at 175 (“***We must look to the situation as it existed when the contract was made***, not as it may have been” at the time of closing.). The AG also overlooks the fact that *Willis* relied on long-standing South Carolina precedent, quoting *Holly Hill Lumber Co., Inc. v. McCoy*, 201 S.C. 427, 445, 23 S.E.2d 372, 380 (1942), which in turn cited *Shannon v. Freeman*, 117 S.C. 140, 109 S.E. 406 (1921). Moreover, applicable precedent demonstrates that the duration between contract and the latest closing date is of no consequence. Whether it is fifteen years, as in *Willis* (225 S.C. at 527-28, 83 S.E.2d at 173), or two months, as in *Holly Hill Lumber* (201 S.C. at 433, 23 S.E.2d at 374), date of contract is paramount for price adequacy determination.

South Carolina jurisprudence is not limited to cases involving option contracts. Royal Br. III.A. One such opinion, *Campbell v. Carr*, which the AG relies on (AG Br. 26), evaluated the fair

⁷ Respondents’ strategy alternates between arguing the PSA either is or is not an option, depending on whether it suits their argument. Under the PSA, Royal could not walk away for any reason at all (as with a pure option) as termination was limited to “the bounds of financial hardship[.]” Tr. 246:25 – 248:4. When CCSD’s counsel challenged that he did not pay a fee for the option, Royal testified, “if you want to call this an option, I paid \$5,000 for it.” Tr. 248:6–249:4.

market value on the date “the contract was executed” to deny specific performance. *Campbell v. Carr*, 361 S.C. 258, 261-62, 265, 603 S.E.2d 625, 627, 629 (Ct. App. 2004) (“The \$54,000 sales price ... was significantly below the appraised value of \$162,000” as of the date of contract.).

2. Argument that Public Listing Was Required Is Not Preserved for Appeal.

Respondents make a valuation argument not presented to or ruled on by the lower court, contending FKAC would not have any “information about what other buyers would” pay, and the PSA would not be fair and equitable, unless the Property was publicly listed for sale. AG Br. I.F. at 26-27.⁸ This contention is not preserved for appeal. *See Pye v. Estate of Fox*, 369 S.C. 555, 564, 633 S.E.2d 505, 510 (2006).

Even if it was, it is negated by the AG’s statements made within the very same argument, wherein he posits that FKAC received another purchase offer around the same time as Royal’s.⁹ And in the trial testimony cited, there was other interest in the Property around the time the contract was executed. Royal responded to the AG’s question on cross as to whether there was other interest around the time of contract execution stating that his “understanding, from conversations with Ms. Wells, was that other people had expressed an interest in the property, yes.” Tr. 222:25 – 223:5.

The AG cites Texas and Montana bankruptcy court opinions and a South Carolina Tax Code section, which actually support enforcing the PSA, as FKAC and Royal were both “willing, [] not acting under compulsion, and reasonably well informed of the uses and purposes for which [the Property] is adapted and ... capable of being used.” *Id.* (quoting S.C. Code Ann. § 12-37-930); *also, e.g.*, Pl.Exs. 55, 66 at #3 (FKAC admitting that “**FKAC, as of March 29, 2018, intended to**

⁸ Interestingly, the AG also relies on *Campbell v. Carr* as support. But *Campbell* indicates that tax assessments are not reliable valuation sources. *Id.* at 265, 603 S.E.2d at 629 (tax assessor’s fair market value was over \$58,000 less than the “appraised value of \$162,000[.]”).

⁹ CCSD goes a step farther and crosses the line, referencing an alleged Notice of Intent to purchase the Property (CCSD Br. 9). The reference is improper as there is no such document in the record and the Order erred in referencing the same (Order 7).

close on the sale of the Property to Royal for \$315,200.00.”); Royal Br. IV; FKAC Joinder p. 1.

Finally, the testimony of the AG’s expert appraiser, Michael Robinson, is conclusive that the PSA’s purchase price reflected fair market value at the time of contract. Tr. 41:5-15 (testifying that appraisals, when lending institutions are not involved, are valid for “up to a year; sometimes a little bit more[.]”). Thus, Mr. Robinson’s undisputed opinion as to the Property’s value, set forth in his December 19, 2012 appraisal, was validly relied on as fair market value when the PSA was signed four months later, in April 2013. Tr. 30:17 – 31:8 (discussing Pl. Robinson Ex. 1); Pl.Ex.11.

B. No Party Alleged or Established that Purported Relative Bargaining Power Would Make the PSA Violative of Public Policy.

The AG’s “proof” of supposed “unequal” bargaining power is (a) that Royal, during his testimony at trial, referred to a proposed contract as an offer, rather than a draft, and (b) the Order’s prejudicial, uneven statements relying on evidence not in the record. AG Br. I.E.¹⁰ More importantly, no party (nor the Order) has claimed that the alleged unequal bargaining power was coupled with unconscionability or coercion, or that the alleged disparity was so great it compromised FKAC’s free will. Royal Br. III.B.-C. Nor do they attempt to articulate how alleged unequal bargaining power led to the PSA being fundamentally unfair. The lower court’s findings as to unequal bargaining power should be overturned.

Should CCSD’s unfounded contentions in its statement of facts be considered, its claim there is no written evidence of Royal encouraging Wells to engage an attorney for FKAC (CCSD Br. 10-11) is refuted by the evidence. The PSA itself contains written evidence. Pl.Ex.11 ¶3; *see also* Tr. 100:7 – 101:8, 203:5 – 204:5, 295:16 – 296:10.

C. Respondents Offer No Authority that the PSA’s “Unusual Provisions” Are

¹⁰ To the extent such statements are considered, they must be balanced with the facts that Wells was well educated and had been a member, officer, and the Director of FKAC, and in charge of FKAC’s finances and records. *E.g.*, FKAC Reply ¶ 2; FKAC Mot. Appt. Rcv’r; Pl.Ex.14.

Unusual (or Contrary to Public Policy).

Beyond the sales price, the “totality of the circumstances” that sink the PSA, according to the Order, consists of three (3) contract provisions that are neither unfair nor prejudicial: 1) part of paragraph 6, providing if it was necessary to petition a court to establish Wells’ authority, Royal would bear any associated court costs; 2) paragraph 8, allowing Royal to terminate the PSA under certain circumstances, and 3) part of paragraph 7, granting FKAC sole authority to set a closing date on or before April 9, 2018. AG Br. I.F.; Pl.Ex.11. No legal basis exists to support the contention that “unusual provisions” render a contract void. Moreover, Respondents cite no authority showing the foregoing provisions are unusual, unfair, or in conflict with public policy.¹¹

Finally, Respondents and the master overlook a critical provision, the PSA’s severability clause (¶12), rendering it enforceable even if any “unusual” term is found to violate public policy.

1. Paragraph 6’s Example of Possible Contract Expense for the Buyer Is Not Unjust.

The objectionable “clause” in paragraph 6 burdened the purchaser, Royal, with a potential cost. Pl.Ex.11 ¶6. It does not suggest that a proceeding was necessary or even contemplated. Tr. 92:15-19, 102:1–103:24. The trial testimony is clear that Royal had zero doubt as to Wells’ authority and that the reason this language was included, because a lot of FKAC’s “corporate records had been burned in a fire[,]” does not suggest Royal had such concerns. Royal Br. III.C.3. n.24; Tr. 90:15 – 92:19, Tr. 208:4 – 210:22. Indeed, the AG had taken action to hold out Wells as an authorized for FKAC, which admitted her authority in its pleadings. *Compare* CCSD Ans. ¶36, *with* FKAC Reply ¶¶1, 2. Finally, if this single sentence is found to affect the validity of the PSA, then it can be severed pursuant to the contract’s severability clause without affecting the validity

¹¹ The AG proffers equitable factors this Court considered in a prior specific performance ruling based on facts of that case that are not present here, namely, an indemnification clause for all issues and for illegality or fraud concerning the transaction, and a party’s mental health issues. AG Br. I.C. (citing *Shirey v. Bishop*, 431 S.C. 412, 428, 848 S.E.2d 325, 334 (Ct. App. 2020)).

of the remaining provisions of paragraph 6 and the PSA. Pl.Ex.11 ¶12.

2. *The Limited Termination Clause Does Not Violate Public Policy.*

Respondents place great emphasis on the provision in paragraph 8, which, if exercised, would have allowed Royal to terminate the PSA under limited circumstances (the “LTC”). Respondents ignore that the LTC was limited by Royal being contractually bound to close if FKAC had set the closing on or before May 31, 2013 (another distinction between the PSA and a pure option, which makes the PSA, compared to an option, less favorable to Royal). Pl.Ex.11 ¶8. Royal desired to quickly consummate the sale, but FKAC requested flexibility in determining a closing date. Thus, they agreed to a **limited** termination right in exchange for Royal’s concession to allow FKAC to select a future closing date. As a result of, and included in, this consideration, Royal was forced to account for the unknown contingency of his financial status at that future date. Importantly, nowhere do Respondents or the lower court look at the PSA to determine, even if it was a pure option, whether its terms, on the whole, are fair, equitable, and just.

Respondents also ignore the facts that paragraph 8 is moot, as Royal never exercised the LTC – he always intended and was able to close on the transaction, and made his intentions known to FKAC (Royal Br. III.C.3); and the clause was severable by the terms of the contract (¶12), such that the PSA would still be enforceable on its remaining terms.

3. *The Provision Giving the Seller the Choice to Delay Cannot Logically Make the PSA Unfair, Unjust, or Inequitable to the Seller.*

A core component of Respondents’ public policy attack, they contend the closing date provision is unfair because it “is unusual especially given that property values can change over time.” AG Br. I.F. at 28. The fact that property values change over time is a non-sequitor. The closing date was wholly within the seller’s, FKAC’s control. Pl.Ex.11 ¶7 (the “Seller’s Choice Clause” or “SCC”). The delay in closing was a choice made solely by FKAC, which accepted the

potential risks and benefits associated with the decision it made each and every day to postpone the closing. Put differently, FKAC's right to choose a closing date within a 5-year period is the same as FKAC successively extending the closing date by 24 hours every day for 5 years. FKAC chose to delay and is solely responsible for any change in market value, and the lower court held Royal's PSA unenforceable as unfair because the seller voluntarily exercised its option, not obligation, to delay the closing. This obtuse conclusion unravels further upon consideration of the Seller's right to delay on a day-by-day basis.

Phrased in yet another way, imagine the contract required closing on the contract date, April 23, 2013. No unfairness results for the seller. But now imagine that just before the deed is signed and money exchanged, the seller asks for a contract amendment allowing the seller to push the closing back to the following day, and the purchaser agrees. Has this amendment converted a perfectly fair contract into one which is now unfair, unjust, and inequitable? The answer is a resounding NO, and the reason is the parties' contractually agreed upon Seller's Choice Clause gives the seller an OPTION BUT NOT ANY OBLIGATION to delay the closing.

How about on Day 2? What if the seller asks for, and the purchaser agrees to, a second contract amendment, allowing the Seller to extend closing to Day 3? Has this second amendment now converted the perfectly fair contract into one which now is unfair and inequitable? No. Again, the Seller's Choice Clause has given the seller an option but not any obligation to delay the closing.

THE QUESTION IS, AT WHAT POINT IN TIME DOES THE SELLER'S CHOICE CLAUSE CONVERT THE PSA FROM A PERFECTLY FAIR CONTRACT TO ONE WHICH IS UNFAIR, UNJUST, AND INEQUITABLE? The PSA's Seller's Choice Clause is no different than a 5-year series of extensions for which FKAC actively bargained (after rejecting Royal's contract offer which did not contain a similar clause). **At no point along the timeline does the contract**

become unfair to the seller by virtue of the seller’s continuous choice to delay closing.

FKAC, like other parties, was free to contract on terms it deemed fit. While similar to but the same as an option (Tr. 247:1–248:4), and arguably FKAC held the option, *Willis* shows why the PSA must be enforced:

[I]t cannot be overlooked that people make their own contracts; they have a right to grant fifteen year options if they so desire; and the holder of an option may exercise it at any time while it is in force, even on the last day; . . . the Court must be governed by the rules of law and equity, and will enforce a contract which is fair and was entered into openly and aboveboard.

Willis, 225 S.C. at 527-28, 83 S.E.2d at 176; *also id.* at 526-27, 83 S.E.2d at 175 (even if increase in value is “duly considered, specific performance should nevertheless be granted, since it is well settled that a mere change in the value of land will not justify a refusal to grant such relief[]”). FKAC willingly agreed to the closing date provision, and ***willfully chose to delay closing***, and its pleadings deny unfairness or prejudice. *Compare* CCSD Ans. ¶¶42, 49, *with* Reply ¶1.

IV. THE INAPPLICABILITY OF THE 1994 NONPROFIT ACT; NO EVIDENCE OF FKAC BEING GOVERNED BY TITLE 33, CHAPTER 31 OF THE 1976 CODE.

The perplexity of the AG’s harmless error argument on this issue must be noted. AG Br. II.B.4. at 39 (asserting “the result is still the same even if the [1994] Act does not apply[]”). If the 1994 Act does not apply, then, pursuant to the Order and the AG’s brief, the AG would have no basis to interfere with the closing, disapprove the sale, obtain a post-closing appraisal, and introduce said appraisal and object to the sale at trial. Royal Br. V.A.B.1.; *compare* AG Br. 34, *with* Order 12. Without the 1994 Act, there would be no evidence through which the lower court could find that the fair market value sales price was allegedly unfair.

The crux of Respondents’ argument is the 1994 Act governs FKAC because FKAC was previously governed by Title 33, Chapter 31 of the 1976 Code (“1976 Act”). AG Br. II.B.4.; CCSD Br. III.A. However, FKAC remained outside the purview of the 1976 Act. Even if FKAC “qualified

under” § 33-31-10, it did not apply to the Secretary of State for its certificate of incorporation, nor was one issued, under the 1976 Act. FKAC’s Certificate of Existence (Pl.Ex.63) specifically states FKAC was organized under the laws existing in 1901, and its only reference to the 1994 Act is the Secretary of State’s statement that he has not mailed notice of administrative dissolution via an action under § 33-31-1404. A statement of a non-event does not evidence FKAC being subject to the 1994 Act. The plain language of S.C. Code Ann. § 33-31-1701 of the 1994 Act does not contemplate application to entities formed under previous versions of nonprofit corporation statutory schemes besides the 1976 Act. Thus, FKAC is not subject to the 1994 Act. Royal Br. I.

Finally, without explaining its relevancy, Respondents argue that the General Assembly has the power to provide, amend, or repeal statutes governing entities subject to Title 33, Chapters 1 – 20 of the S.C. Code of Laws. AG Br. II.B.4. Yet, Title 33, Chapters 1 – 20 do not apply to nonprofit corporations governed exclusively by the 1994 Act. S.C. Code Ann. § 33-20-103.

V. WITHOUT ANY LEGAL BASIS TO DISRUPT THE PSA, THE AG CREATES AND ATTACKS STRAW MAN ARGUMENTS REGARDING INTERVENTION

The AG’s arguments focus on intervention, but fail to address Royal’s fundamental position that the AG lacked authority to approve, disapprove, interfere with, and/or prevent the sale.

A. Even if the 1994 Act Governs, No Provision Grants Authority for the AG’s Actions.

1. The AG Mischaracterizes Royal’s Argument as to §§ 33-31-128 and -302.

Royal did *not* argue “that allowing the [AG] to intervene conflicts with [S]ections 33-31-128(c) and 33-31-302.” AG Br. II.B.1. Royal argued the master erred in finding that the purpose of Section 33-31-1202(f) is to give the AG standing to pursue nullification of the PSA (without bringing any claim), in conflict with §§ 33-31-128(c) and 33-31-302(5). Royal Br. V.B.1. at 37.

Moreover, the master’s ruling, “that the contract is not to be enforced between the parties because they did not get approval from the Attorney General’s Office[,]” clashes with relevant

statutory provisions. *See* S.C. Code Ann. § 33-31-302(5) (every nonprofit “has **the same powers as an individual** including, **without limitation, power ... to ... dispose of all or any part of its property.”); *see also* 1900 Act § 4 (providing that corporations chartered thereunder have the same powers as individuals “to acquire and transfer property, both real and personal”). Individuals do not require AG approval to contract. The AG also asserts the tenet of a specific statute *prevailing* over a more general one, such that Section 33-31-302 should be *read in conjunction with* Section 33-31-1202(f). However, the principle only applies if there is conflict between two statutes, such as in the case cited by the AG, *Atlas Food Sys. & Servs., Inc. v. Crane Nat’l Vendors Div. of Unidynamics Corp.*, 319 S.C. 556, 558, 462 S.E.2d 858, 859 (1995).**

2. S.C. Code Ann. § 33-31-1202(f) Grants No Authority in this Action.

Contrary to the AG’s and Order’s contentions, the *only* authority contemplated in Section 33-31-1202(f) is his ability to issue a waiver of the section’s notice requirement. Indeed, the provisions of §§ 33-31-1202(a)-(b) are clear that AG authorization is not needed for a sale of all or substantially all assets. And relevant here, § 33-31-1202 in no way contemplates any AG review or approval power, or any ability to request materials or extend the 20-day statutory review period.

He admits that the statute’s only requirement involving the AG, notice, was satisfied (AG Br. 30)), and omits reference to the South Carolina Reporter’s Comments. Therein, the notice provision is referred to as a mere “**reporting requirement**,” indicating its purpose is to assure the buyer it is receiving good title — not to allow the AG to disapprove and nullify the sale. S.C. Code Ann. § 33-31-1202, S.C. Reporters’ Comments 2.c.; *compare* S.C. Code Ann. § 33-31-1403 (Notices to the Attorney General) (specifically providing the AG authority, after receiving notice of dissolution, to disapprove of a nonprofit’s sale of assets). Thus, Section 33-31-1202 would specify any approval power conferred on the AG if the General Assembly had intended the same.

3. The AG Did Not Bring an Action or Claim Invoking Statutory Authority, and

Royal Does Not (and Cannot) Challenge FKAC's Ability to Act.

The AG suggests this is a proceeding brought under § 33-31-304(b), enabling him to intervene and prevent the sale via § 33-31-170. As these are **both statutes he raises for the first time on appeal**, this argument is waived. More importantly, this is not such a proceeding and § 33-31-304 has no bearing on this case (Am. MTR ¶13.b.). Sections 33-31-304(a)-(b) provide:

(a) Except as provided in subsection (b), the validity of corporate action may not be challenged on the ground that the corporation lacks or lacked power to act.

(b) A corporation's power to act may be challenged in a proceeding against the corporation to enjoin an act where a third party has not acquired rights. The proceeding **may be brought by the Attorney General, a director, or by a member or members in a derivative proceeding.**

S.C. Code Ann. § 33-31-304(a)-(b). First, this is not an action challenging the validity of FKAC's corporate act on the ground it lacked power to act – it is a proceeding brought to pursue the opposite relief – to enforce a contract entered into by the corporation. Tr. 208:4–209:13.

Second, no party eligible to bring a proceeding under subpart (b) filed any such claim in this or any other lawsuit. The AG concedes, and even trumpets, his statutory ability to bring an action (AG Br. 31, 35), but never initiated a proceeding under § 33-31-304, nor alleged any cross-claim or counterclaim, or any affirmative defenses. AG Answer; *see also* CCSD Int. Mem. 14. No party was required to give the AG notice of this action because it was not brought under § 33-31-304, meaning he does not have authority to intervene or be heard under § 33-31-170. The AG's argument as to statutory authority under the 1994 Act is legally untenable. Moreover, it was not preserved for appeal as neither the AG nor the lower court ever referenced §§ 33-31-170 or 33-31-304 in discussing the AG's purported authority.¹² AG Mot. Int.; Royal Opp. 1, 9-12; NOA Ex. 10.

4. The AG's Inapposite Summary of a Tennessee Opinion Offers No Support.

¹² The AG's pre-trial Memorandum of Law errantly cited § 33-31-170, instead of § 33-31-171, in discussing the AG's ability to investigate nonprofit corporations. AG Mem. 2.

Left without support under South Carolina law, the AG resorts to promoting a Tennessee Court of Appeals opinion.¹³ *Adventist* sets forth no details of or facts disclosed by the Tennessee Attorney General’s (“TN AG”) investigation into the proposed sale; it does not even mention a purchase price or any asset valuation. *Adventist*, 914 S.W.2d at 906, 909. *Adventist* does discuss sections of the Tennessee Nonprofit Corporations Act (“TN Act”) regarding ultra vires actions, intervention, and commencement that are “similar” to the associated 1994 Act sections (§§ 33-31-170, -304). But there are two crucial distinctions in *Adventist* that support enforcing the PSA.

First, the AG fails to disclose that *Adventist* did not rely on the TN Act’s notice statute. Its holding is entirely based on the TN AG “**fil[ing] his own lawsuit. On the basis of this lawsuit,** the Chancery Court entered a consent decree which, with minor qualifications required by the [TN AG], approved the sale[.]” *Id.* at 909; *also id.* at 910. Instead of initiating a statutory proceeding, the AG declared nullification solely on the basis of the notice statute. Second, *Adventist* mainly relied on a provision in TN Act § 48-51-701 not found in the 1994 Act, which gives the TN AG far broader authority. *Id.* at 907-08 (“The [TN AG] retains the right to bring whatever action or proceeding he subsequently comes to believe is required by the public interest.”) (quoting TN Act § 48-51-701(c)(5)). Unlike TN Act §§ 48-51-701(a)-(b), there are no acts or transactions powers in 1994 Act §§ 33-31-170(a)-(b), and the AG receiving notice of the PSA’s sale has no significance.

Additionally, subsections (c)(1)-(5) of TN Act § 48-51-701, not duplicated in 1994 Act § 33-31-170, allow the TN AG, when notice of legal action *or* proposed sale is required, to request documents, conduct investigations, and exercise any authority granted under the TN Act. The AG exercised these powers over the PSA without any statutory authority. *E.g.*, Royal P-T Br. 6, Ex.9;

¹³ AG Br. II.A. at 31-32 (discussing *State ex rel. Adventist Health Care Sys./Sunbelt Health Care Corp. v. Nashville Mem’l Hosp.*, 914 S.W.2d 903 (Tenn. Ct. App. 1995) (“*Adventist*”).

Royal Br. V.B. The 1994 Act does not contain the provisions that *Adventist* relied on from TN Act § 48-51-701 relating to powers arising from notices of proposed sales (the Order’s *sole* source of “power”). The AG’s reliance on *Adventist*, as with his efforts to void the PSA, lacks any basis.

B. The AG’s Conclusory Statements as to His Authority and FKAC’s Charitable Status Are Unavailing.

The charity stream, public interest, and Trust Code arguments fail on their face, meaning there is no legal basis for the AG’s interference with the PSA in this case. *See, e.g.*, Royal Br. 34.

1. The “Charity Stream” Argument Fails to Account for the Facts of this Case.

A significant portion of the AG’s justification for disallowing the contract price is that the sale proceeds must remain in trust, or the charity stream, for public benefit, or else the sale would take “money away from the original donors’ ... intent.” AG Br. 34. This theory is obliterated due to the fact that FKAC did not possess money or property granted to it from any donor. Royal Br. V.C.1.-2., D.3.; Pl.Exs 29, 29A ¶5. By the time FKAC executed the PSA, it had exhausted its funds. *Id.*; *infra* Sec. IX.C. FKAC purchased the Property, its “last known asset,” with proceeds from the condemnation of the parcel it previously owned, where it had operated its kindergarten.¹⁴

THE COURT: . . . there was reference to the day in the documentation that the Huger Street property was condemned for the creation of I-26 over there. There was some amount of money, \$21,000-some-odd that was generated from that - -

THE WITNESS: Yes.

THE COURT: - - that was referenced in there. That led to the purchase of 34 Pitt, which got them from one location to another.

Tr. 294:21 – 295:6. The AG also overlooks the fact that no actual or implied public charity exists and § 1-7-130, discussing “*enforc[ing] the due application of funds given or appropriated to*

¹⁴ Under §§ 1-7-117(A)-(B), the AG is responsible for the Division of Public Charities and for enforcing the Solicitation of Charitable Funds Act (S.C. Code of Laws, Title 33, Chapter 56). He has never alleged FKAC is a charitable entity under, let alone in violation of, said act, such as its mandate to keep “true fiscal records as to its activities in this State.” S.C. Code Ann. § 33-56-100.

public charities[,]” does not confer any authority in this case. Additionally, the AG did not plead that a breach of trust occurred, and FKAC was not required to file any reports with the General Assembly contemplated in § 1-7-130 because it was not a public charity.¹⁵ The Order directed the Property be sold and the sale proceeds used to benefit kindergarten students. Order 22, 24-25.¹⁶ Because there is no evidence that FKAC would not carry out the 1971 Amendment’s directive after the PSA’s consummation, charity stream and equitable deviation principles are incapable of voiding the PSA.¹⁷ The premise of the AG’s entire argument, couched in various terms of public vs. private benefit, charitable intent, and the charity stream, is without support and fails.

2. The Case Does Not Implicate a Sufficient Public Interest.

The AG’s brief repeats the theme of “public interest.” But, as Respondents admit (*infra* Sec. VI), the public interest is not sufficiently implicated by a sale of property that provided part-time kindergarten to some of the children on the City of Charleston’s peninsula over 20 years ago.

i. With No Interests of the Public at Large, *Parens Patriae* is Irrelevant.

The AG assumes the mantle of *parens patriae* power to argue “public interest” authority (AG Br. 33). The Order, with one passing reference to the doctrine, erred in failing to consider parameters and in applying it in this case. The *parens patriae* power originated in English common law, created to account for the king’s responsibility for dependents or incompetents (*id.*). Under the doctrine’s American expansion, “a state [may] act in a sovereign [or quasi-sovereign] capacity

¹⁵ The AG has not formed an opinion as to where the “charity stream” from a sale should flow (Pl.Exs. 82 #6, 94; Royal Br. 41, 49), casting doubt upon efforts to aid any public beneficiary.

¹⁶ Here too the Order erred, directing the proceeds be used for kindergartners in all of Charleston County, rather than those students on the Charleston peninsula, as was FKAC’s intent. Reply 2 ¶ 2 (residual assets “should be paid ... only ‘for general use in [] Charleston School District #20.’”).

¹⁷ See *Wilson v. Dallas*, 403 S.C. 411, 456, 743 S.E.2d 746, 771 (2013) (Toal, J., concurring) (“The authority of the attorney general over charitable trusts does not extend beyond the performance of th[e] function[s]” of “oversee[ing] the activities of the trustees **to the end that the trust is performed and maintained in accordance with the provisions of the trust document**, and to bring any [trustee] abuse or deviation ... to the attention of the court[.]”).

... only when there is an interest in the controversy shared by the state and its citizens[;]” the AG cannot “sue merely for the benefit of a group of citizens when [the state] does not have an interest independent of those citizens.” Susan Larson, Note, *The Right of a State to Sue as Parens Patriae*, 19 Wake Forest L. Rev. 471, 473 (1983); *id* at 473-74 (the state must “have a greater than nominal interest”).¹⁸ South Carolina case law likewise restricts the doctrine to cases sufficiently implicating interests of *all the state’s citizens*. Royal Br. 41-42. Here, there is no interest sufficient to warrant AG involvement, much less interference, via *parens patriae* powers.

Attempting to rely on *Dallas* for the first time, the AG’s vague and overly broad contentions as to the opinion’s value do not hold sway. Contrary to *Dallas*, this case does not involve an express trust with terms specifying it was to benefit all school children in South Carolina. *Dallas*, 403 S.C. 411, 445, 456, 743 S.E.2d 746, 765, 771 (2013) (only mentioning *parens patriae* for the AG’s ability to act “as *parens patriae* of charitable trusts[.]”). No statewide harm arises from FKAC’s distribution of its residual assets to Charleston School District #20 (now Constituent District #20).

ii. Published South Carolina Case Law Favors Enforcing the PSA.

Departing partially from the Order’s reliance on unpublished case law and trial court pleadings, Respondents cite a few published opinions from South Carolina courts. However, these cases weigh *in favor* of granting Royal’s claim for specific performance. For example, while the AG claims *Wilson v. Dallas* supports affirmance, this case presents the same flaw exposed in the *Dallas* opinion. As with the circuit court in *Dallas*, the lower court here “did not engage in meaningful independent review of the [contract] because the court wrongly assumed that the AG

¹⁸ The U.S. Supreme Court “isolated two important elements of the concept of *parens patriae* [] still important today: first, **the injury must be one which creates an actual controversy between the state and the defendant**; second, **the harm must affect the citizens as a whole** rather than particular individuals.” *Id.* at 475 (discussing *Louisiana v. Texas*, 176 U.S. 1 (1899)).

had discretion to settle the estate, with the court merely required to ‘rubber-stamp’ any agreement presented to it by the AG.” *Dallas*, 403 S.C. at 456, 743 S.E.2d at 770 (Toal, J., concurring).

No party requested, and the lower court did not make, a finding that a charitable trust exists. But, assuming, *arguendo*, that one does, the AG discarded the settlor’s intent and replaced it with his own. The AG admits “[h]e did not participate in any negotiations regarding the contract.” AG Br. 33. He instead unilaterally altered the terms FKAC agreed to for the “trust,” i.e., the Property.

In general[,] government oversight is premised on **a view of nonintervention in the substantive decision-making and operations of foundations.** . . . With few exceptions, **the law neither attempts to control the decisions of managers, made in good faith, as to how the purposes will be achieved, nor how their organizations will be administered.**

Dallas, 403 S.C. at 458, 743 S.E.2d at 772 (Toal, J., concurring). Without offering Royal any basis (Royal Br. 12), the AG unilaterally prevented consummation of contract terms that were negotiated in good faith (for the sale of an asset that could not be used after his office worked to defund FKAC). If, as the AG urges, a charity or charitable trust is present, his actions violate South Carolina law.

The [AG] does *not* ... have a right to regulate the actions of a charity ... Courts have denied the [AG] authority to intervene in suits contesting wills involving charities, to enforce obligations owing to charities, to intervene or appear for the establishment of an invalid charitable trust, or to authorize deviations from trust provisions.

Dallas, 403 S.C. at 457-58, 743 S.E.2d at 771 (Toal, J., concurring) (internal quotations omitted) (emphasis in original). The AG’s actions here cannot be condoned. Royal Br. 43-44.

Additionally, the AG finds no support in *S.C. Dep’t of Mental Health v. McMaster*, 372 S.C. 175, 642 S.E.2d 552 (2007) (“*DMH*”). Royal Br. V.C.1., V.D.3. *DMH*’s use of the equitable deviation doctrine stands as support for enforcing, not voiding, the PSA. *DMH*, 372 S.C. at 184, 642 S.E.2d at 557.¹⁹ Consistent with *DMH*, if the PSA is consummated and the Property sold to

¹⁹ Despite his efforts to proffer precedential case law, the AG resorts back to citing the subsequent Circuit Court order in *DMH 2* in an attempt to bolster *DMH*’s utility. AG Br. 32 (citing AG Mem. Ex. B, containing *S.C. Dep’t of Mental Health v. Wilson*, 2011-CP-40-00875 (June 10, 2011)).

Royal for the contracted fair market value, then the sale proceeds, FKAC's assets, can be held in trust or distributed for the benefit of kindergarteners in downtown Charleston.

Finally, the AG's and Order's references to *Epworth Children's Home v. Beasley*, 365 S.C. 157, 616 S.E.2d 710 (2005), and *Furman Univ. v. McLeod*, 238 S.C. 475, 120 S.E.2d 865, 867 (1961) are misplaced. Chief Justice Toal's concurring opinion in *Dallas*, discussing *Epworth* and *Furman*, offers insight into why the AG's actions here are impermissible:

[T]hese cases cannot be read as broadly as Respondents urge. In my view, these cases illustrate the traditional role of the AG's enforcement and oversight role in charitable trust administration, but do not grant the AG a "blank check" authorizing the AG to do what he will when it comes to charitable enforcement.

Dallas, 403 S.C. at 455, 743 S.E.2d at 770 (Toal, J., concurring); also Royal Br. V.D.1. n.33, V.D.3.

3. The AG Ignores the Trust Code's Explicit Provisions that Render It Inapplicable.

In arguing South Carolina statutory law applies to provide the AG authority, Respondents generically proclaim that nonprofit assets are impressed with charitable trusts to which the Trust Code presumptively applies. To bolster this contention, the AG quotes the *DMH* opinion — a decision void of any reference to the Trust Code. The only other sources the AG relies on are the extra-jurisdictional case law pre-dating 1955 cited within *DMH*, which are all inapposite. AG Br. II.B.3. One case, without referencing statutory law, held that a nonprofit hospital was not liable for alleged personal injury damages. *Brown v. St. Luke's Hosp. Ass'n*, 274 P. 740, 741-42 (Colo. 1929).

Glaringly absent from the AG's brief is any rebuttal of the statute's own plain language rendering it irrelevant. Royal Br. V.C.2.; Royal Opp. Int. 10-11. In addition to §§ 62-7-102 and 62-7-401, the AG fails to address S.C. Code Ann. § 62-7-201(a), which requires the type of actions his brief contemplates to be heard in a probate court. The AG did not allege any jurisdictional (or other) defense to the Complaint, or otherwise object to this case being heard in the Circuit Court. No provision of the Trust Code, including § 62-7-405, is relevant to the case at hand.

In sum, no statute provides the AG with the powers he exerted in this case. “[I]n the absence of a statute, **this power [of supervision and investigation] does not extend to the continuous oversight of a charity’s administration when the settlor’s intent is clear** and there is no allegation of actual or threatened breach [of trust by a charitable trustee].” *Dallas*, 403 S.C. at 446, 743 S.E.2d at 765 (last alteration in original). FKAC, the settlor, made its intentions to close on the PSA with Royal clear, and there is no allegation of a breach of trust.

Moreover, there is no common law authority that allows the AG to interfere with the PSA and pursue, without filing any claim, its nullification. Without any legal basis, the AG and his office willfully acted to void the contract because that is just “the way [they] do it.” Tr. 181:13 – 183:1; *see also* Tr. 183:25 – 184:9; Royal Br. Facts Sec. IV at 12.

VI. ADMISSIONS BY THE AG AND CCSD THAT THEIR INTERESTS ARE IN CONFLICT WARRANT REVERSAL

Respondents incorrectly assert that Royal’s brief argued that CCSD’s claimed interests are protected by the AG. AG Br. III at 43. Royal’s brief on file contains no such argument. Regardless, Respondents’ assertion that the AG does not protect CCSD’s claimed interests in this case conflicts with their attacks on the PSA and completely undercuts the Order’s ruling.

First, in stating the AG’s interest is different from CCSD’s, and that the AG cannot act on behalf of CCSD’s claimed interest, **Respondents assert that the AG is not acting in the interest of preventing potential misapplication, loss, devaluation, or waste of FKAC’s assets**, the assets supposedly belonging to the “public at large” (or at least to kindergartners in downtown Charleston).

The second consequence involves the AG’s statement that while “the Attorney General’s role is to protect the public interest[,] . . . CCSD protects its own interest.” The logic follows, then, that **CCSD does not act to protect the public’s interest, and that CCSD’s receiving of the proceeds of the sale of the Property is not in the public interest**. Even before its request to

intervene was granted, CCSD admitted that its interests consist of “legal and economic interests of [CCSD],” giving rise to a direct economic interest in the case’s outcome, distinct from the public interest. CCSD Int. Mem. 13; Interv. Tr. 18:9-12. Thus, either the Property is not an asset subject to nonprofit/public benefit “charity stream” considerations, and the AG has no place in this litigation, or if it is, CCSD had no right to intervene and attempt to derail the PSA.

Finally, by this admission, the parties acknowledge that there is not a sufficient statewide interest at issue in this case to warrant the AG’s involvement. The AG states he does not protect CCSD’s interest in this action, preventing potential misapplication, devaluation, and waste of FKAC’s assets. AG Br. 43. Supported by South Carolina law as noted herein, CCSD states that, “[a]s a state agency, the Attorney General’s office is focused on a broad representation of the general statewide public interest[.]” CCSD Int. Mem. 13. Additionally, the **AG does not protect “the more narrow and parochial proprietary and financial interest of [CCSD] in the Pitt Street Property.”** *Id.* Thus, CCSD, which has no interest in the Property until FKAC dissolves (*see infra* Sec. VII.B.; *see also* Royal Br. VI.B.), is only interested in maximizing the return on the Property’s sale. *See, e.g.*, CCSD Int. Mem. 14 (arguing the Property’s valuation date should be a floating “present day” target and the AG’s June 2018 appraisal was outdated).²⁰

Either way, these admissions require that the lower court be reversed and the PSA enforced. The AG had no right to object to the sale or present a post-closing Property valuation because he is not acting to protect FKAC’s assets. Public policy would be contravened by CCSD’s receipt of the sale proceeds, as Respondents admit CCSD does not protect the public interest. Even more, the AG, as protector of the State’s public at large, lacks a sufficient interest in this proceeding.

VII. CCSD LACKS ABILITY TO INTERVENE AND STANDING FOR ITS CLAIM

²⁰ As admitted in its deposition, CCSD has no ability to assert such allegations. *Infra* Sec. VII.B.

CCSD is precluded from challenging the validity of the PSA and June Wells' authority. Additionally, it testified that it does not possess a sufficient interest to contest the PSA's purchase price. Thus, CCSD lacked standing to assert the claim alleged in its pleading.

A. CCSD's Claims Cannot Be Decided by Lower Court's Improper Material Findings Made on a Motion to Intervene.

The lower court's grant of permissive intervention (issued prior to CCSD filing its pleading) cannot decide the merits, especially without any presentation of evidence or argument. CCSD has no basis to claim that findings made in the intervention order somehow comprise the "law of the case," given that FKAC and the AG denied CCSD's alleged entitlement to FKAC's residual assets. *Compare* CCSD Ans. ¶40, with FKAC Reply ¶¶1, 2, Prayer for Relief, and AG Reply ¶17; *see also* Pl.Ex.82 #6 (as to the proper party in interest, the AG stated, on October 20, 2021, "[t]his is an issue of fact and law for the Court to decide."); Opp. MIL 2-8. Contrary to a full opportunity to challenge those rulings (CCSD Br. II.B.), the master disregarded Royal's counsel raising the matter of CCSD's claims being granted without any presentation of its case, and thereafter solicited the AG's motion for nonsuit. Tr. 323:9-325:11;²¹ *see also* Am. MTR ¶14.1.

B. CCSD Lacks Standing to Allege Its Claim.

Alternatively, if found that CCSD properly intervened, its claim should be dismissed and arguments challenging the PSA and Wells' authority set aside for lack of standing. P-T Br. 14-18, 20 (Fact in Controversy #4); Am. MTR ¶13.b.; Royal Br. VI.B. Pursuant to § 33-31-304 (Ultra vires), CCSD does not have standing to challenge the validity of FKAC's actions or the PSA (*supra* V.A.3.). The Tennessee opinion Respondents rely on for alleged AG powers, *Adventist*, 914 S.W.2d 903 (*id.*), supports dismissing CCSD's claims. Relying on the Tenn. Act's ultra vires statute, the

²¹ As set forth in his pre-trial brief and opposition to CCSD's motion in limine, Royal did and does dispute CCSD's right to assert its claim. P-T Br. 17-18; Opp. MIL; *see also* Am. MTR ¶13.b.

claims brought by the “Adventist plaintiffs” as relators (*id.* at 905) were dismissed on standing.

The plaintiffs, in the quo warranto action, **lack standing to bring any action to challenge the sale** of Memorial Hospital to HealthTrust **on grounds of either the reasonableness of the price or the corporation’s power to sell** the hospital because they were not the Attorney General or directors or members of the corporation[.]

Adventist, 914 S.W.2d at 908 (relying on Tenn. Code Ann. § 48-53-104).

Moreover, CCSD’s testimony, when read in conjunction with relevant statutory law, clearly establishes it does not have standing. CCSD believes the PSA is void for only two reasons: 1) Wells lacked authority; and 2) “the value of the sale as it relates to the requirements of the [AG][.]” Royal P-T Br. Ex. 11, 76:20–78:23; *see also id.* at 68:25–69:10.²² Yet, pursuant to South Carolina statutory law that Respondents cite, CCSD cannot bring either of these challenges, and it admitted it has no authority to determine the Property’s purchase price. *Id.*; *see also id.* at 67:24–68:13.

Demonstrating it lacks standing under S.C. Code Ann. § 15-53-30, CCSD testified it has no right to approve of or object to the PSA. *Id.* at 69:18-25, 70:7–71:21, 73:19–74:4. Moreover, CCSD never previously exercised its “right” to prevent devaluation or waste of FKAC’s assets, because its alleged interest does not arise until dissolution. *Id.* Crucially, **CCSD testified it does not own, has no control over, and is not claiming any interest in FKAC’s assets, including the Property, until FKAC is dissolved.** *Id.* at 63:10–64:22, 73:19–74:4. There is no justiciable controversy involving CCSD allowing it to seek declaratory relief. *Id.* at 85:17-24; Royal Br. VI.B.

VIII. NO VALID GROUND IS CITED FOR EXCLUDING THE TRANSCRIPT OF CCSD’S RULE 30(b)(6) DEPOSITION

In granting CCSD’s motion to strike and exclude the deposition transcript of its designated Rule 30(b)(6) witness (Pl.Ex.74) from the trial record, the lower court failed to apply South Carolina law. Court action is only warranted if “substantial justice” or a “substantial right of the

²² “I don’t know if we necessarily disagree because the -- directly because of the value, but we just believe that it’s a null and void contract because Ms. Wells did not have the authority[.]” *Id.*

party” is impacted by the evidentiary error. Rule 61, SCRCP; Rule 103, SCRE. In moving for and ordering reversal of the transcript’s admission, CCSD and the master do not mention any prejudice or harm resulting from its admission. NOA Ex. 3; *see also* CCSD and AG Brs. IV (void of any allegation of harm to Respondents); CCSD P-T Br. (transcript identified as a potential trial exhibit).

Responding to the master’s inquiry at the hearing, CCSD’s counsel struggled to articulate any resulting harm. It ultimately claimed it would be substantially prejudiced because the transcript is “full of objections” and has “a lot of problems” relating to examination on the issue of CCSD’s and District 20’s relationship (5/20/22 Tr. 39:6–40:17), a topic in Royal’s notice of CCSD’s deposition which CCSD moved to quash. CCSD Br. 46.²³ In its post-deposition ruling on the motion, the lower court did not strike any part of CCSD’s testimony. Regardless, the existence of a handful of objections does not affect a substantial right, and CCSD is estopped from claiming harm, as its Designation of Matter includes the 20 transcript pages attached to Royal’s pre-trial brief, some of which include CCSD’s counsel’s objections and ensuing directives to respond.²⁴

Conversely, the exclusion of CCSD’s testimony negating its arguments as to the Property’s valuation, Wells’ authority, and its interest in and ability to pursue its alleged claim, would cause fundamental injustice and harm Royal’s substantial right to prosecute his claim and enter evidence, including party admissions, to prove the same. *See supra* Sec. VII. Thus, the lower court abused its discretion in excluding the transcript of CCSD’s deposition testimony.

²³ CCSD’s counsel did not make a standing objection at the start of the deposition. And, upon her “specific objections” (six (6) in total) that a question was outside the scope of topics it thought permissible, CCSD’s counsel instructed the witness to answer, or Royal’s counsel clarified that the question fell under a topic not addressed in CCSD’s pending motion. *See, e.g.*, Opp. MIL Ex. I at 112:2-18, 113:23–114:25; Royal P-T Br. Ex. 11 at 63:2-9. CCSD moved to quash more than a month after receiving the topics, and after agreeing to a deposition date. Opp. Mot. Quash 2-3, n.1.

²⁴ Thus, the record shows what the rejected testimony would have been, satisfying the AG’s cited case law, *Jamison v. Ford Motor Co.*, 373 S.C. 248, 644 S.E.2d 755 (Ct. App. 2007) (AG Br. 45).

A. Respondents Are Estopped from Objecting to the Transcript's Admission.

The AG and FKAC, which never objected to or argued against admission of the transcript of CCSD's Rule 30(b)(6) deposition (Pl.Ex.74), cannot now take issue with the same on appeal.²⁵ CCSD did not assert a contemporaneous or other objection at trial to admission of the entire transcript. It then waited three and a half months after Royal circulated copies of all his exhibits to the parties on December 23, 2021, and 40 days after the trial transcript was produced on February 25, 2021, to make any objection. CCSD waived any ability it had to seek exclusion of the deposition transcript. Opp. Mot. Strike 1-3, 5, 7, Exs. B-C; 5/20/22 Tr. 29:18 – 31:16.

B. The Transcript Was Proffered and Is Admissible Under Rule 32(a), SCRPC.

In his second Argument Section IV.B., the AG argues that the transcript is not admissible pursuant to Rule 32(a), SCRPC, because Royal did not cite said rule at trial. AG Br. 46. Royal is unaware of any requirement to cite a specific Rule of Civil Procedure when proffering evidence at trial. Moreover, the lower court never gave Royal the opportunity to argue for its admission or, if one was required, explain the purpose for the same. And while he raised Rule 32(a) in opposing CCSD's motion to strike, Royal again was not provided an opportunity for oral argument on the transcript's admissibility at the motion hearing. 5/20/22 Tr. 37:22–41:3. But, setting that aside, the AG's brief and cited trial transcript portions prove that the document was proffered and admitted.

MR. TIBBALS: I have got a lot of stuff to do before I close my case.

THE COURT: Okay. Tell me, what do you seek to add to the case?

MR. TIBBALS: I've got discovery responses, interrogatory answers[,] ... request to admit answers. **I've got [a] 30(b)(6) deposition transcript that comes in and - -**

THE COURT: **Particularly of?**

MR. TIBBALS: **CCSD.**

²⁵ Additionally, their contention that the March 30, 2022 cover letter from Royal's counsel to the Circuit Court was an attempted proffer is entirely inaccurate (AG Br. IV). As stated in the letter, it enclosed the exhibits for e-filing, as was the master's instruction to Royal's counsel. 3/30/22 Letter.

THE COURT: **The school district? Okay.**

Tr. 298:11-23. Thereafter, Royal’s counsel confirmed he was tendering the entire transcript (Tr. 299:19-23) and, prior to the close of trial, confirmed, to the best of his ability under the procedural constraints placed by the lower court, the admission of the discovery exhibits, such as CCSD’s deposition transcript, with the lower court (Tr. 345:9-15; *see also* 5/20/22 Tr. 30:1-25).

Finally, the master’s ruling erred in failing to conform to Rule 32(a), SCRCP.

I’m not going to allow the 30(b)(6) deposition. **That should have been done in excerpts**, and we would have had a chance to review it at that time. **And there’s going to be too much to add at this point.** Okay?

5/20/22 Tr. 40:24–41:3.²⁶ The ruling conflicts with Rule 32(a), SCRCP, which allows use of “any part or ***all of a deposition***[,]” does not require testimony be used in excerpts, and only requires advance notice if excerpts are proffered. Rule 32(a), (a)(5), SCRCP. Nor does the hassle or extra work of “adding” a trial exhibit already filed of record provide a basis for exclusion.

IX. CCSD’S SPRAWLING ARGUMENTS AGAINST JUNE WELLS’ AUTHORITY, IN WHICH FKAC DID NOT JOIN, ARE WITHOUT BASIS

CCSD, lacking authority to do so (*supra* Sec. VII.B.), expends a great deal of effort to contort the record and argue against June Wells’ authority established at trial.²⁷ FKAC and the AG, consistent with their denials of CCSD’s pleaded allegations, did not join in the 26-page argument.

A. Contrary to CCSD’s Repeated Contentions, Pleadings Need Not Be Verified.

In attempting to discredit partial reliance on “unverified” pleadings (CCSD Br. III.B., III.C.), CCSD ignores the text of Rule 11(a), SCRCP, providing, in relevant part, that “[e]xcept when otherwise specifically provided by rule or statute, pleadings need not be verified or

²⁶ In ruling, the lower court did not consider whether the witness was available.

²⁷ In addition to statements at trial indicating a finding that Wells had authority (only to adopt an order drafted by Respondents ruling to the contrary), the master, at the May 20, 2022 hearing on CCSD’s motion to strike, stated, “I think I did find that she had authority. That was hotly contested by the school district.” May 20, 2022 Tr. 18:10-14.

accompanied by affidavit.” Rule 11(a), SCRCP; *see also* Rule 11(a), SCRCP, Note (the Rule “*eliminates the verification of pleadings* and places on the lawyer who signs a pleading the duty of good faith in preparing the pleading.”). Accordingly, CCSD’s argument fails.

B. FKAC’s Pleadings and Its Stipulation Require Reversal.

FKAC’s pleadings contain party admissions as to Wells’ authority (Tr. 74:17–77:7), via its affirmative statements therein (Royal Br. II.A.), and denials of, *inter alia*, CCSD’s allegations that:

- a. Wells lacked the legal authority to execute the PSA on behalf of FKAC (*compare* CCSD Ans. ¶¶33, 47, 48, *with* FKAC Reply to Crossclaim ¶1, and FKAC Reply ¶1);
- b. Wells was never a duly appointed board member and was never authorized to exercise any powers which would otherwise be exercised by FKAC’s board of directors (*compare* CCSD Ans. ¶31, *with* FKAC Reply ¶1); and
- c. “Royal and [FKAC] were aware of a question concerning Ms. Wells[’] legal authority to execute the Agreement on behalf of [FKAC] and the potential for a declaratory judgment action on this issue at the time of execution of the Agreement.” (*compare* CCSD Ans. ¶36, *with* FKAC Reply ¶1).

FKAC moved to appoint a receiver on the basis that the passing of Wells left the entity without a person of sufficient authority to manage its affairs (Mot. Appt. Rcv’r). By granting FKAC’s motion (NOA Ex. 8), the lower court acknowledged Wells’ ability to act for FKAC.

CCSD errantly contends that FKAC’s Counterclaim requests two separate declarations as to Wells’ membership and her authority to close. CCSD Br. III.B. at 26. These are posed as a single, intertwined issue in FKAC’s pleading, such that *Wells’ membership results in her possessing authority*. Countercl. ¶7 (requesting the lower court determine “whether the sole surviving member of [FKAC] is June Murray Wells and **is therefore authorized** to sell the aforesaid property[’]”). Thus, FKAC’s stipulation that Wells was FKAC’s sole member from November 2010 through November 2020 (Pl.Ex.79) requires a finding that she possessed requisite authority.

C. CCSD Misconstrues the Issues in and Effects of the Probate Order.

CCSD’s criticism of the Probate Order and Wells’ 2010 affidavit (Pl.Exs. 29, 29A) is

meager, consisting of the AG's oral arguments at trial and a single cite to the Order.²⁸ To begin, the lower court itself acknowledged that the Order's characterization of these documents was an issue to be argued and decided on appeal, meaning CCSD cannot rely upon the Order to support its conclusions on the same. 5/20/22 Tr. 13:20-23 (discussing Mot. Reconsider ¶6). And, contradicting its position on appeal, CCSD's counsel argued at trial that the instant matter is related to the subject Probate Court case. Tr. 128:22–129:9; Am. Mot. Reconsider ¶2.i.

June Wells' participation, and the Probate Order's related findings, were not limited to the presentation of her affidavit and her assent to the Hanckel Trust funds' equitable deviation. CCSD Br. 25. Wells consented, on FKAC's behalf, to terminating FKAC's sole source of funding (CCSD Ans. ¶33), such that FKAC could never operate again, meaning the court recognized Wells' authority to make crucial decisions that would forever impact the corporation. Wells advised as to the status of the Property and FKAC's operations and funding, and attested to her beliefs, on FKAC's behalf, regarding its ability to continue functioning and maintaining the Property. The Probate Order recognized Wells as someone qualified to evaluate the condition of FKAC's corporate operations and assets and its best course of action. Wells also opined as to whether the contemplated post-termination distribution of funds was consistent with the Hanckel Trust's charitable intent. Pl.Ex.29A ¶¶8-9. CCSD's discussion of Wells' other sworn statement, the quitclaim deed (Pl.Ex.38), fails to analyze the deed or make any argument as to its relation to her authority. Instead, CCSD denies that clearing FKAC's title defect via the deed benefited FKAC.

D. CCSD's Unsupported Speculations on Express Authority Fail to Hit Home.

1. FKAC's Stipulation Negates Argument as to Wells' "Alleged" Membership.

²⁸ CCSD relies on the AG's counsel's oral arguments even though its brief later disparages Royal for citing discussions between his counsel and the lower court (CCSD Br. 36), and even though the AG takes no position on Wells' authority (AG Br. V).

Labeling its argument as one on “Wells’ ‘Alleged’ Membership in FKAC,” CCSD attempts to sweep FKAC’s stipulation under the rug by arguing it does not address the issue of authority. Yet it directly refutes CCSD’s denial that “June Wells was the sole surviving member of FKAC, possessing 100% of the voting power of FKAC’s governing body, the members[.]” CCSD Br. 29. The stipulation is an admission by the party, the principal, that June Wells was at all relevant times the sole member of FKAC. Pl.Ex.79. Additionally, CCSD advances no analysis or facts showing that FKAC is anything other than a member-controlled entity. *See infra* Sec. IX.D.2.-3.

After attempting to discredit the stipulation, CCSD reverses course, arguing that other statements by FKAC (and its attorney) undercut Wells’ authority, citing FKAC’s responses to Royal’s discovery requests. CCSD Br. 30-31. In fact, FKAC’s responses do not question Wells’ capacity during the relevant time period – they state Mr. Stringer, the attorney that signed the responses, has no knowledge prior to his representation of FKAC (Pl.Ex.66 at #6).

Mr. Stringer’s representation began as FKAC’s closing attorney, whereby he prepared a deed to be executed by June Wells for FKAC to convey the Property. *E.g.*, Pl.Ex.55; Mot. Appt. Rcv’r. In addition, FKAC’s attorney’s statements as to Wells’ mental competency only reference her January 2020 deposition and October 2020 stroke.²⁹ Thus, by all appearances, including Mr. Stringer’s agreement with Wells to represent FKAC, she was fully competent and able to act for FKAC to convey the Property in April and May 2018. Finally, no pleading filed in this case contains any allegation or defense regarding the mental capacity of June Wells, meaning the issue was never raised and cannot be considered by this Court. *See supra* Sec. III.B.; Royal Br. III.C.1-2. CCSD’s attempt to raise doubt about Wells’ mental capacity during the relevant time has

²⁹ There is no record of Wells being deposed in 2019 in this case (CCSD Br. 31). Rather, she was deposed as FKAC’s Rule 30(b)(6) witness on January 9, 2020. (Royal P-T Br. Ex. 4 p. 2).

absolutely no basis in fact and is a transparent attempt to misguide this Court and create prejudice.

2. FKAC's Governing Documents Are Unequivocally Clear that It Is a Member-Controlled Entity.

FKAC's governing documents, including amendments to its charter, specify that it is a member-controlled entity. While FKAC's Constitution and Charter established an Executive Committee, said committee was vested with the limited ability to carry out the business actions that were voted on and approved by FKAC's members. Only in emergencies did it have an ability to act independent of the membership. Pl.Ex.58 (Art. VII, Sec. 2). Thus, the quorum requirement for the committee is set forth in the Constitution for the purposes of emergency actions (and likely in the event of a vote to increase the number of committee members under Article VII, Section 1).

Governance by FKAC's members is evidenced by Section 3 of FKAC's By-Laws, which specifies that FKAC's members, at their meetings, transacted FKAC's business. Pl.Ex.58 p.5. Its Constitution dictates there are two classes of members, Active and Associate. *Id.* at 3. The Associate membership, for which men were eligible, could not vote on FKAC's affairs or hold office. *Id.* FKAC's Active Members, comprised of women, not only held voting authority but also served as officers and members of committees, including the Executive Committee held in high regard by CCSD. *Id.* at 3-5 (Art. III, Sec. 2; Art. V; Art. VII). Thus, FKAC's female members were vested with authority to vote on and approve FKAC's corporate and business acts, as well as the power to amend its governing documents. *Id.* at 5 (Const., Art. VIII), 6 (By-Laws, Art. III).

Additionally, FKAC's charter amendments provide certain proof that FKAC was governed by its members. Each document specifies that the amendment to the charter was adopted by a majority vote of FKAC's members at a duly held meeting of the members. Pl.Exs. 60 p.3, 61, 62. Directors only certified the authenticity of the resolution adopted by the members. *Id.* Moreover, contrary to CCSD's allegation, it does not appear that any FKAC board noted its approval in the

lower left-hand corner of the 1931 Certificate. Pl.Ex.60 p.3. Parts of that notation are illegible, specifically the name or title of the “Board” which approved the request to amend the charter; however, it does not appear the handwriting states it is the Board of FKAC.

Also of note is that the 1971 application states it is to be signed by “a majority of the duly elected and qualified members present” at the members’ meeting. Pl.Ex.61. The 1971 Amendment, adopted after 1967 Act 340, does not state that a board authorized the charter amendment. Pl.Ex.62. These documents prove FKAC’s members had authority over conveyance of FKAC’s assets.

3. CCSD’s Meek Argument as to 1994 Act Compliance is of No Consequence.

CCSD’s argument as to strict compliance consists of paraphrasing select excerpts of the 1994 Act and summarily concluding FKAC did not comply. Yet the provisions CCSD proffers need not be strictly complied with in every transaction. Otherwise, under CCSD’s argument, the Property can never be sold. Wells’ service on FKAC’s boards, while commendable, has no bearing on authority. Board or committee members were not bestowed with voting authority for corporate acts (save for emergencies). *Supra* Sec. D.2. FKAC’s members were the voting, governing body.

CCSD ignores statutory provisions contradicting its argument, including those found in Section 33-31-801, providing that other persons may be authorized “to exercise some or all of the powers which would otherwise be exercised by a board. **To the extent so authorized, the person or persons shall have the duties and responsibilities of the directors, and the directors shall be relieved to that extent from the duties and responsibilities.**” S.C. Code Ann. § 33-31-801(c).

Consistent with S.C. Code Ann. § 33-31-701(e), and FKAC’s Constitution and Bylaws, FKAC’s members considered and acted upon matters raised at regular meetings to carry out FKAC’s business and operations. *Id.*; Pl.Exs. 58, 60-62. While CCSD relies on various statutory comments, it fails to mention the Official Comment to S.C. Code Ann. § 33-31-701.

In some cases these regular meetings [of members] deal with matters that might

otherwise be dealt with by the board of directors. [Model Act] Section 7.01(b) recognizes this practice and allows nonprofit corporations to hold regular meetings of members at times stated in or fixed in accordance with their bylaws.”

Id. Because FKAC’s governing documents specify that transaction of its business is conducted by members at regularly called meetings (Pl.Ex.58 p.5), the members possessed such responsibility, and the directors were relieved of the same.³⁰

E. CCSD Misrepresents Royal’s Argument on Apparent Authority.

Contrary to CCSD’s allegations, Royal did not submit documentary evidence of Wells’ apparent authority as proof of any direct act by FKAC to bestow authority (which would evidence express authority). Instead, the evidence demonstrates reasonable third-party reliance on FKAC’s words and conduct under the circumstances of this case, proving Wells’ apparent authority.

Initially, FKAC, through Wells, with the AG’s assistance, consented to termination of its sole source of funding, as noted in the Probate Order, a public record Royal relied upon. Tr. 130:3-24, 132:10–133:20. In a disjointed argument, CCSD takes aim at Royal’s documentary support for apparent authority. Some shots miss the target entirely. For example, Royal did not cite Pl.Ex.7 in arguing Wells’ apparent authority (Royal Br. II.C.). CCSD’s discussion of the same (CCSD Br. 39) is thus irrelevant. Other analysis by CCSD is simply inaccurate, as demonstrated below.

Pl.Ex. 16: In attempting to minimize FKAC’s 1997 Resolution, CCSD claims that it does not relate to the sale of all or substantially all of FKAC’s assets. Of course it doesn’t. FKAC, in 1997, was still operating and had no intention of selling its assets.³¹ However, the document does

³⁰ To the extent CCSD alleges corporate irregularities, “failure to hold an annual or regular meeting at a time stated in or fixed in accordance with a corporation’s bylaws does not affect the validity of a corporate action.” S.C. Code Ann. § 33-31-701(f); *see also* 1900 Act § 5 (“**all acts done and contracts entered into shall have the same force and effect as if no irregularity had existed[]**”).

³¹ Relatedly, in failing to dissolve after it ceased operations, when Wells was one of the few, if not only, authorized agents to act for it, FKAC knowingly caused or permitted Wells to be its agent. *Froneberger v. Smith*, 406 S.C. 37, 47-48, 748 S.E.2d 625, 630 (Ct. App. 2013).

prove Wells' broad scope of authority to carry out FKAC's financial corporate acts, including her ability to draw down the entirety of FKAC's funds, and even pay herself. Pl.Ex.16.³² CCSD's assertions as to the appearance of handwriting on the document, while hard to follow, are improper. It explicitly lists Wells as a member of FKAC's board, the entity CCSD errantly claims holds all corporate power. Pl.Ex.16 (Wells signed as one of the "Board Members," and her name and genuine signature was certified a present officer of FKAC). Because the record verifies a resolution of FKAC approving June Wells, as an officer, Board Member, and the Director, as a signatory, it is a representation by FKAC of Wells' authority to take corporate acts on FKAC's behalf.

Pl.Exs. 31, 56: The PSA Memo, signed by Wells as FKAC's Authorized Agent, was recorded with the Charleston County Register of Deeds (Pl.Ex.31) to give record notice to the public (Tr. 137:4 – 139:3). It is recorded in FKAC's name and lists FKAC's address as directed to the care of June Wells, an additional representation by FKAC of her authority. The 3-line letter from FKAC's counsel to the AG (Pl.Ex.56) gives no indication "that the PSA executed by June Wells would not comply with the 1994 Act[.]" CCSD Br. 45. Instead, FKAC enclosed the PSA Memo (Pl.Ex.31) as notice of the Property's sale. Pl.Ex.56. Thus, in providing the PSA Memo, FKAC, the principal, represented that June Wells was its authorized agent to consummate the sale.

Pl.Ex. 55: FKAC's counsel, in this March 29, 2018 email to Royal, his closing attorney, and Wells' son, recounts his steps taken to close the transaction. A bank account was opened for FKAC to receive the sale proceeds, and a deed prepared to convey title to the Property, to be executed by Wells for FKAC, as "FKAC's sole surviving member/director" with authority to represent FKAC. Pl.Ex.55; Mot. Appt. Rev'r 1; Reply ¶2. The deed was prepared to close on the

³² FKAC's certified resolution authorized the bank to "pay, without further inquiry, any draft or check against said account, bearing" a listed officer's signature, even if payable to said officer. *Id.*

PSA, which had been executed by Wells on behalf of FKAC. Thus, FKAC confirmed June Wells' authority to carry out the sale by acknowledging the validity of and preparing to close on the PSA.

Overall, CCSD's argument is consistent with its deposition testimony, that it was "not going to prove that Ms. Wells didn't have the authority." Royal P-T Br. Ex.11 at 97:7-10. Royal proved June Wells held the requisite authority and CCSD has not demonstrated otherwise.

F. Respondents Are Estopped from Denying Wells' Authority.

1. CCSD's Statement That It Has No Obligation to Oversee FKAC's Assets Conflicts with Its Assertions of Authority Over the Same.

It is perplexing that CCSD would "certainly" possess authority to protect and enforce its alleged interest in FKAC's assets and the Property, but lack any duty of oversight. CCSD Br. 45. CCSD alleges, based solely upon FKAC's 1971 Amendment, that it is the legal, beneficial, and equitable owner of FKAC's assets and/or the proceeds from the sale, and it has the right to protect against waste and devaluation. Ans. ¶¶34, 40, 43, 49. CCSD contends its allegations are the law of the case (although they are contradicted by the testimony of its Rule 30(b)(6) witness). *Supra* Sec. VII.B. CCSD's disavowal of any obligation to monitor or otherwise take any action with regard to the Property until 47 years later, in 2018, is wholly transparent and fails. CCSD, in addition to being statutorily prohibited (*id.*), is estopped from denying Wells' authority.

2. The AG's Decision to Forego Pursuing Judicial Dissolution of FKAC in 2010 Placed Wells in a Position of Authority.

The AG claims he is the protector of and holds power over FKAC's assets, and has authority to step into FKAC's shoes to opine on the fairness of and alter the contract terms. The AG intended to cause third persons (i.e., a probate court) to believe that Wells was authorized to act for FKAC, or should have realized his conduct was likely to create such beliefs. *R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 433, 540 S.E.2d 113, 118 (Ct. App. 2000).

Following his efforts in the Probate Court action (Royal Br. II.A.; Pl.Exs. 28, 29, 29A), the

AG never brought a proceeding to judicially dissolve FKAC, as is his right under S.C. Code Ann. § 33-31-1430(a)(1). Thus, the AG allowed FKAC to continue in legal existence after the Probate Order, knowing that June Wells was “the only known person with capacity to act on behalf of the Association” and that FKAC was not using, nor could it afford to maintain, the Property (Pl.Ex.29 p.2; Pl.Ex.29A ¶¶3, 5-8). Royal relied upon the court records documenting Wells’ authority in deciding to execute the PSA. Tr. 125:1-18, 128:1–130:24, 133:1-20. Therefore, the AG “placed [Wells] in a position impliedly manifesting [her] authority to” conduct FKAC’s affairs, including its corporate actions, such as negotiating and executing a contract to sell an asset it no longer used or could maintain. *Eadie v. H.A. Sack Co.*, 322 S.C. 164, 171, 470 S.E.2d 397, 401 (Ct. App. 1996).

CONCLUSION

Royal requests that this Court reverse the lower court’s rulings and find that: i) because the AG did not file a statutory proceeding, and is without other legal support, his disapproval of and attempts to nullify the PSA are improper; ii) as a result, and in addition to not being relevant to the proper valuation date, the June 2018 appraisal was improperly considered and is stricken from the record; iii) CCSD lacks standing to challenge the PSA, FKAC’s actions, and June Wells’ authority; iv) the lower erred in finding unequal bargaining power and that any such inequality rendered the PSA contrary to public policy; v) Wells had requisite authority to execute and consummate the PSA; and iv) the PSA must be enforced. Alternatively, Royal requests that this Court reverse the lower court’s rulings and remand for continuance of trial, with Royal and FKAC the only participants, without any evidence or argument presented challenging June Wells’ authority.

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