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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.

FINAL BRIEF OF INTERVENOR/RESPONDENT THE ATTORNEY GENERAL OF THE STATE OF SOUTH CAROLINA

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STATEMENT OF THE CASE

This matter was commenced on December 4, 2018, in the Charleston County Circuit Court by the filing of a Summons and Complaint by Michael D. Royal, seeking specific performance and damages. (R. 106-114). The Free Kindergarten Association of Charleston ("FKAC") filed an Answer on January 7, 2019. (R. 164-167). The South Carolina Attorney General filed a Motion to Intervene on January 28, 2019, and the Charleston County School District ("CCSD") filed a Motion to Intervene on February 7, 2019. (R. 744-747, 773-775). The action was referred to the Master-in-Equity by Order of March 21, 2019. (R. 104-105). By Form Order filed June 7, 2019, the Master granted both Motions to Intervene. (R. 102). CCSD filed an Answer, Counterclaim, Crossclaim, and Request for Declaratory Judgment on June 24, 2019. (R. 174-185). FKAC filed a Reply to the Request for Declaratory Judgment on July 1, 2019. (R. 189-191). The Master filed a formal Order granting the Attorney General's Motion to Intervene on July 10, 2019. (R. 93-101). On July 25, 2019, the Attorney General filed his Answer/Reply to CCSD's Request for Declaratory Judgment and his Answer to the Complaint. (R. 192-197). By Order of August 22, 2019, the Court filed a formal Order granting CCSD's Motion to Intervene. (R. 78-92).

By Order of February 22, 2021, the Court appointed Joseph K. Qualey, Esquire, as Receiver for FKAC. (R. 74-77). Charleston Chapter No. 4, United Daughters of the Confederacy, and the Confederate Museum filed a Motion to Intervene on June 17, 2021. The Court granted the Motion by Order of August 10, 2021. (R. 1121-1124, R. 55-57). These parties were later dismissed pursuant to a Stipulation of Dismissal filed October 28, 2021. (R. 205-206).

The non-jury trial of this action was before the Master on December 15, 2021. By Order filed March 31, 2022, the Court granted the Attorney General's Motion for Nonsuit which had the effect of denying the request for specific performance. (R. 26-51). Royal filed a Motion to

Reconsider on April 8, 2022, and an amended Motion to Reconsider on April 10, 2022. (R. 1485-1506, 1528-1551). On April 8, 2022, CCSD filed a Motion to Exclude and Strike. (R. 1507-1508). Following a hearing on May 20, 2022, the Court denied Royal's Motion to Reconsider by Order of July 18, 2022. (R. 13-17). Also on July 18, 2022, the Court granted in part and denied in part CCSD's Motion to Strike and Exclude. (R. 18-25).

This appeal follows.

STATEMENT OF FACTS

This is an action involving the proposed sale of real property owned by Free Kindergarten Association of Charleston ("FKAC"), a nonprofit corporation. The property, located in downtown Charleston at 34 Pitt Street, has been an asset of FKAC for many years, and FKAC operated a school on the property until the 2000s. (R. 29). On April 23, 2013, Michael D. Royal ("Royal") signed a Real Estate Purchase and Sale Agreement ("Agreement") with June Murray Wells ("Wells") who purported to sign on behalf of FKAC. (R. 116-119). When the Attorney General was notified of the proposed sale almost five years later in February 2018, as required by S.C. Code Ann. § 33-31-1202(f), he obtained an appraisal and learned that the sale price was over $200,000 less than the current fair market value of the property. (R. 33). The Attorney General would not approve the sale. Without the approval of the Attorney General, FKAC refused to close on the property. (R. 33-34). Royal then filed this action, seeking specific performance of the Agreement. (R. 106-114).

FKAC was originally established as a nonprofit corporation on January 24, 1901. The mission of the FKAC is to provide a free kindergarten education to students whose parents could not afford to pay for a kindergarten program during a time when kindergarten programs cost money. (R. 28, 640-641). On February 5, 1971, upon petition of FKAC, the South Carolina Secretary of State certified an amendment to the charter of FKAC pursuant to a Resolution passed by a majority of the Board of Directors of FKAC. The amendment stated that "[i]n the event of dissolution, the residual assets of the Free Kindergarten will be turned over to Charleston School District #20, part of the South Carolina State School System for general use in this said Charleston School District #20." Over time, public schools took over the role of providing free kindergarten education. FKAC has not operated as a kindergarten since the 2000s, as public schools took on the role of providing kindergarten education to children in South Carolina. Aside from

miscellaneous personal property of *de minimis* value, the only known asset of FKAC is real property and improvements located at 34 Pitt Street. The sale of this property will be the sale of all or substantially all of FKAC's assets. (R. 28-29).

Royal grew up in Charleston and is a licensed attorney in New York State. He holds a JD and MBA from the University of Virginia, and a Master's Degree in Real Estate Finance from the University of Cambridge. (R. 43). Royal testified that he was living in Texas and planning a move back to Charleston in 2011. He first noticed the property at 34 Pitt Street on December 3, 2011, when he was driving around and saw that the property did not appear to be occupied or in active use. (R. 257-259). He learned that the property was owned by FKAC. (R. 269-270). Through internet and other research, he learned that Wells had a connection to the property and that she lived in Folly Beach. He reached out to her and met her in her neighborhood. (R. 277-280)

Royal and Wells discussed the property. Royal testified that Wells had access to the property and a key to the building. (R. 284-285). The Court found that Wells had some authority but not absolute authority to act on behalf of FKAC. Her authority was from her "sole remaining position as somebody with knowledge about the FKAC." The Court found that she did not have actual, implied, or apparent authority to enter into the Agreement on behalf of FKAC for the sale of the Pitt Street property. (R. 35).

Despite this lack of authority, on April 23, 2013, Royal and Wells, as "authorized agent" of the FKAC, signed a Real Estate Purchase and Sale Agreement, drafted by Royal, for the real property at 34 Pitt Street. The purchase price in the Agreement is $315,200. The Agreement states the closing date was to be April 9, 2018 "or on such prior date chosen by the Seller upon reasonable notice to the purchaser." (R. 116-119). Around the same time, Wells also received another offer

to purchase the Property for $400,000.00 from a party other than Royal. (R. 429). There was no evidence that the property was ever listed for sale to the public.

Other details of the Agreement include the following: (1) a provision that the Purchaser shall bear any court costs associated with petitioning the Court to establish Wells' authority to dispose of the property; and (2) a provision allowing Royal to back out of the Agreement if he determines, in his sole discretion, that the purchase is not suitable for him financially. (R. 116-119).

On April 23, 2013, Royal recorded a Memorandum of Purchase and Sale Agreement at the Charleston County Register of Deeds Office. This Memorandum states that the parties entered into an agreement for the purchase and sale of the Pitt Street property. The Memorandum does not include the sale price. It was not enrolled in the name of or otherwise provided to the Attorney General or CCSD. (R. 32, 116-119, 528).

By March 2018, FKAC had retained Patrick Stringer as its closing attorney, and Royal had retained Treadwell Josey. Prior to the proposed closing date, by letter of April 4, 2018, Stringer provided notice to the Attorney General's Office of the proposed sale, as required by S.C. Code Ann. § 33-31-1202(f). (R. 151-152). This was the first notice the Attorney General received of the sale. (R. 32-33).

After receiving notice of the proposed sale in April 2018, the Attorney General inquired about the sale and was provided the 2012 appraisal of Michael Robinson, MAI, SRI, of Charleston Appraisal Services, which valued the property at $315,200 as of December 19, 2012. (R. 33, 574). Because the appraisal was several years old, the Attorney General contacted Robinson, and Robinson completed another appraisal at the request of the Attorney General. (R. 228-229). He found that the fair market value of the property as of June 7, 2018, was $522,500. (R. 560, Tr.,

230). At the trial, Robinson was qualified as an expert in the area of real estate appraising. He testified as to his opinion that both in 2012 and in 2018 the building had no value, and he took the cost of demolition into consideration in valuing the property. (R. 231-232). Despite its location in the downtown Charleston area, he did not believe that the building would be classified as a historic structure. (R. 239-240, 246). He testified that the highest and best use of the property would be residential. (R. 242-243). Regarding how long an appraisal can be considered valid, he stated that lending institutions don't like to use anything more than six months old, though sometimes other users will go up to a year, sometimes a bit more. (R. 247-248).

FKAC was never in a position to close, as it would not agree to close without the Attorney General's consent. By letter of May 11, 2018, FKAC notified Royal that it would not close on the property. (R. 142). Subsequently, on December 4, 2018, Royal filed the complaint which is the subject of this action, with claims for specific performance and breach of the Agreement; the complaint also sought "consequential and incidental damages with prejudgment and post-judgment interest[.]" (R. 106-114). The Attorney General and CCSD moved to Intervene. The Court granted the Motions to Intervene of both the Attorney General and CCSD. (R. 78-101, 744-747, 773-775).

The nonjury trial of this action was on December 15, 2021. By Order filed March 31, 2022, the Court granted the Attorney General's Motion for Nonsuit, which had the result of denying the claim for specific performance. The Court found that the Agreement violates public policy and is therefore void. The Court also found that Wells did not have actual, implied, or apparent authority to enter the Agreement on behalf of FKAC. (R. 26-51).

ARGUMENT

I. The Master did not abuse his discretion in granting the Motion for Nonsuit because the Agreement violates public policy and is not fair, just, or equitable. (Appellant's Issues 2, 4, 5, and 6)

A. Motion for Nonsuit Standard of Review

Because the issue on appeal is whether the Court properly granted the Motion for Nonsuit, the Court should review using the abuse of discretion standard. A Motion for Nonsuit pursuant to Rule 41(b) "allows the judge as fact finder to weigh the evidence and determine the facts." *Johnson v. J.P. Stevens & Co.*, 308 S.C. 116, 118, 417 S.E.2d 527, 529 (1992). Therefore, this appeal is from the Master's factual findings as a judge in a non-jury action at law. *Id.*; *Waterpointe I Property Owner's Association, Inc. v. Paragon*, 342 S.C. 454, 459, 536 S.E.2d 878, 880 (Ct. App. 2000) (citing *South Carolina Fed. Sav. Bank v. Thornton–Crosby Dev. Co.*, 310 S.C. 232, 235, 423 S.E.2d 114, 116 (1992)). "On appeal of an action at law tried without a jury, we will not disturb the trial court's findings of fact unless no evidence reasonably supports the findings." *Jordan v. Judy*, 413 S.C. 341, 347–48, 776 S.E.2d 96, 100 (Ct. App. 2015). The Court must use an abuse of discretion standard. *See Cunningham v. Independence Ins. Co.*, 182 S.C. 520, 189 S.E. 800 (1937); *Armitage v. Seaboard Air Line Ry. Co.*, 166 S.C. 21, 164 S.E. 169 (1932).

"The trial court's factual findings in a law action are equivalent to a jury's findings." *Jordan*, 413 S.C. at 348, 776 S.E.32 at 100 (citing *Chapman v. Allstate Ins. Co.*, 263 S.C. 565, 567, 211 S.E.2d 876, 877 (1975). "Questions regarding credibility and the weight of the evidence are exclusively for the trial court." *Id.* (citing *Sheek v. Crimestoppers Alarm Sys.*, 297 S.C. 375, 377, 377 S.E.2d 132, 133 (Ct. App. 1989)). The appellate court "may not consider the case based on [its] view of the preponderance of the evidence, but must construe the evidence presented to

the trial court so as to support its decision wherever reasonably possible." *Id.* The appellate court "must look at the evidence in the light most favorable to the respondents and eliminate from consideration all evidence to the contrary." *Id.*

B. Specific Performance Standard of Review.[1]

The granting of the Motion for Nonsuit had the effect of denying the request for specific performance. An action for specific performance is one in equity. *Lewis v. Premium Inv. Corp.*, 351 S.C. 167, 170 n. 2, 568 S.E.2d 361, 362 n. 2 (2002); *Wright v. Trask*, 329 S.C. 170, 176, 495 S.E.2d 222, 225 (Ct. App. 1997). "It is now well settled that this court has jurisdiction in appeals in equity cases to find the facts in accord with our view of the preponderance or greater weight of the evidence, in the absence of a verdict by a jury; and may reverse a factual finding by the lower court in such cases when the appellant satisfies this court that the finding is against the preponderance of the evidence." *Crowder v. Crowder*, 246 S.C. 299, 301, 143 S.E.2d 580, 581 (1965). The requirement for the Court to make its own findings "does not, however, command [the Court] to ignore the findings of the trial judge who heard the witnesses." *Thomas v. Mitchell*, 287 S.C. 35, 38, 336 S.E.2d 154, 155 (Ct. App. 1985). Decisions relative to the veracity and credibility of witnesses "can best be made by the trial judge who heard the witnesses and observed their demeanor." *Id.* "Specific performance should be granted only if there is no adequate remedy at law and specific enforcement of the contract is equitable between the parties." *Ingram v. Kasey's Assocs.*, 340 S.C. 98, 105, 531 S.E.2d 287, 291 (2000). "[E]quity will not decree specific performance unless the contract is fair, just, and equitable." *Anthony v. Eve*, 109 S.C. 255, 263, 95 S.E. 513, 515 (1918); *McChesney v. Smith*, 105 S.C. 171, 176, 89 S.E. 639, 641 (1916).

C. The Master did not abuse his discretion in granting the Motion for Nonsuit.

[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.

The Master did not abuse his discretion in granting the Motion for Nonsuit. In the Complaint, Royal specifically asked the Court to "order [FKAC] to convey marketable fee simple title to Property to Royal . . ." (R. 113-114). In granting the Motion for Nonsuit, the Court properly found that Royal showed no right to specific performance as requested in his complaint.

The Motion for Nonsuit was made pursuant to Rule 41(b), SCRCP, which states that "After the plaintiff in an action tried by the court without a jury has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief." "Under Rule 41 in a nonjury trial, the trial judge clearly may dismiss the action even though the plaintiff may have established a prima facie case. Rule 41(b) allows the judge as the trier of facts to weigh the evidence, determine the facts and render a judgment against the plaintiff at the close of his case if justified." *Johnson v. J.P. Stevens & Co.*, 308 S.C. 116, 118, 417 S.E.2d 527, 529 (1992) (citing H. Lightsey & J. Flanagan, *South Carolina Civil Procedure* at 368 (1985)). Because Royal showed no right to relief, the Master did not abuse his discretion in granting the Motion for Nonsuit.

The complaint was an action for specific performance, and in granting the Motion for Nonsuit, the Master denied the request for specific performance. The Complaint also sought "consequential and incidental damages with prejudgment and post-judgment interest[.]" In denying the request for specific performance, the Court also properly denied these requests.

"In order to compel specific performance, a court of equity must find: (1) clear evidence of an agreement; (2) that the agreement has been partly carried into execution on one side with the approbation of the other; and (3) that the party who comes to compel performance has performed on his part, or has been and remains able and willing to perform his part of the contract." *Shirey*

v. Bishop, 431 S.C. 412, 422, 848 S.E.2d 325, 330–31 (Ct. App. 2020) (citing *Gibson v. Hrysikos*, 293 S.C. 8, 13–14, 358 S.E.2d 173, 176 (Ct. App. 1987)). "Generally, specific performance should be granted only if there is no adequate remedy at law and specific enforcement of the contract is equitable between the parties." *Id. at* 412, 422, 848 S.E.2d at 330 (citing *Campbell v.* Carr, 361 S.C. 258, 263, 603 S.E.2d 625, 627 (Ct. App. 2004)). "Equity will not decree specific performance unless the contract is fair, just, and equitable." *Campbell*, 361 S.C. at 263, 603 S.E.2d at 627. Accordingly, "specific performance of a contract to sell real property will be ordered whe[n] the contract 'is fair and was entered into openly and aboveboard.'" *Amick v. Hagler*, 286 S.C. 481, 485, 334 S.E.2d 525, 527 (Ct. App. 1985) (quoting *Adams v. Willis*, 225 S.C. 518, 528, 83 S.E.2d 171, 176 (1954)).

Specifically in the present case, the totality of the circumstances shows that the Agreement is not fair, just, or equitable, and it is against public policy. *See* 30 S.C. Jur. *Contracts* § 4 ("As a general rule, agreements or contracts against established public policy are also illegal and will not be enforced."). In *Shirey*, 431 S.C at 428, 848 S.E.2d at 334, the Court considered many factors when looking at the equities of the transaction, including the following: (1) who drafted the deed; (2) whether the advice of counsel was sought; (3) a provision requiring one party to indemnify the other of issues related to illegality or fraud concerning the transaction; and (4) one party struggled with mental health issues while the other did not. "The rule is well settled that the granting of specific performance is not a matter of absolute right, but rests in the sound or judicial discretion of the court, guided by established principles, and exercised on a consideration of *all the circumstances of each particular case*." *Miller v. Dillon*, 432 S.C. 197, 214, 851 S.E.2d 462, 471 (Ct. App. 2020) (citing *Bishop v. Tolbert*, 249 S.C. 289, 298, 153 S.E.2d 912, 917 (1967)) (emphasis added).

Moreover, "[f]reedom of contract is subordinate to public policy, and agreements that are contrary to public policy are illegal." *Nationwide Mut. Ins. Co. v. Rhoden*, 398 S.C. 393, 728 S.E.2d 477 (2012). While private parties are free to contract as they desire, when the public interest is involved, such as in the sale of a nonprofit's assets, public policy trumps the freedom of contract. Because the sale price was less than fair market value and the totality of the circumstances make the Agreement void and not fair, just, or equitable, the Master did not abuse his discretion. Further, if this Court uses the standard of review for specific performance rather than the Motion for Nonsuit standard, the Master must be affirmed for the same reason: the contract is not fair, just, or equitable and is against public policy.

D. The sale price for less than fair market value is contrary to the public interest and violates public policy.

A main reason the Agreement violates public policy is that the sale price is for less than fair market value and is grossly inadequate. Nonprofit corporations hold assets in trust to be used in furtherance of their charitable purposes for which money was raised or donated. They can't divert the assets for a use that is not consistent with this purpose. The sale of nonprofit assets creates a risk that charitable assets will be diverted for private benefit; this risk is the main reason the Attorney General reviews these transactions. If a nonprofit sells its assets for less than fair market value, then it is not receiving the full value of its assets, and it is instead providing a private benefit to the purchaser.

When nonprofit assets are sold, they must be sold for fair market value so that the value of the assets will be maintained in the "charity stream" - so that the full value of the assets continues to be perpetually dedicated for charitable purposes. The fair market value is "[t]he price that a seller is willing to accept and a buyer is willing to pay on the open market and in an arm's-length

transaction; the point at which supply and demand intersect." *Black's Law Dictionary* 11th ed. 2019); *see Hous. Auth. of Charleston v. Olasov*, 282 S.C. 603, 608, 320 S.E.2d 478, 481 (Ct. App. 1984) ("Fair market value is the price which a willing buyer will pay a willing seller, neither being under compulsion to buy or sell . . ."); *Reid v. Reid*, 280 S.C. 367, 373, 312 S.E.2d 724, 727 (Ct. App. 1984) (stating the generally accepted definition of fair market value is the amount a willing, but not obligated, buyer would pay to a willing, but not obligated, seller).

A proper valuation of the assets is vitally important to protect the public interest. An undervaluation, as would be the case involving a sale for less than fair market value, provides a benefit to private interests to the detriment of the public--the ultimate, beneficial owner of the charitable entity's assets. For example, a sale following an undervaluation of a non-profit assets results in a non-charitable benefit to the buyer of the difference between market value and the consideration based on an improper valuation.

In the present case, FKAC is a nonprofit corporation registered with the South Carolina Secretary of State. The Nonprofit Corporation Act explains that a "corporation" means a public benefit, mutual benefit, or religious corporation. S.C. Code Ann. § 33-31-140(7). This means that the entity cannot provide a private benefit. However, selling an asset for less than fair market value provides a private benefit to the buyer. If Royal, a private citizen, is allowed to purchase the property for less than fair market value, he will receive a private benefit which will be the difference in the fair market value and the purchase price. This benefit is a loss to FKAC and ultimately a loss to the public, as it prevents the assets from remaining in the "charity stream."

In *American Campaign Academy v. Commissioner*, 92 T.C. 1053 (1989), the U.S. Tax Court provided a definition of private benefit: "nonincidental benefits conferred on disinterested persons that serve private interests." In the present case, the sale of the property for less than fair

market value would provide a nonincidental benefit to Royal, a disinterested person, and this would serve his private interest rather than any public interest of FKAC. The Tax Court noted that a nonprofit's conferral of benefits on disinterested persons may cause it to serve a private interest rather than a public one. *See also Anclote Psychiatric Ctr., Inc. v. Comm'r*, 76 T.C.M. (CCH) 175 (T.C. 1998), *aff'd sub nom*, *Anclote Psychiatric v. Comr. of IRS*, 190 F.3d 541 (11th Cir. 1999), (finding that a sale for less than fair market value resulted in a "prohibited inurement"). In this case, the difference in the fair market value and the contract price will result in a benefit to Royal, to the detriment of the charitable interest and ultimately the public.

Royal contends that the date of valuation for the purpose of determining fair market value is the date of the contract. This argument is without merit, given the facts of the present case. Usually, a contract is executed shortly before closing. However, in the present case, the contract was signed on April 23, 2013. Not only was there a 5 year window to close, until April 9, 2018, but Royal could decide not to close if he determined that a "purchase of the Property is not suitable for himself financially[.]" (R. 116-119). Thus, the Agreement attempted to obligate FKAC to close, but allowed Royal to change his mind if it was not financially suitable for him.

Robinson testified about to how long an appraisal can be valid. He explained that lending institutions do not like to use an appraisal more than six months old, though sometimes other users will go up to a year, and sometimes a little more is acceptable. (R. 246-247). The requirements of the Federal National Mortgage Association (Fannie Mae), while not specifically applicable to this closing, provide instruction and guidance related to the timing of an appraisal. Pursuant to B4-1.2-03 of the Fannie Mae Guidelines in connection with a Fannie Mae transaction, when the effective date of the original appraisal report is more than four months but less than 12 months from the date of the note and mortgage, the appraiser must perform an appraisal update. When the

effective date of the original appraisal report is more than 12 months from the date of the note and mortgage, a new appraisal report is required. *Appraisal Age and Use Requirements*, B4-1.2-03, *Selling Guide: Fannie Mae Single Family*, 542 (Fannie Mae 2023). This shows the importance of a recent appraisal. (R. 1396)

Significantly, FKAC was never in a position to close, as it would not agree to close without Attorney General consent. Thus, there was never a willing buyer and a willing seller for any price – not on April 23, 2013, nor later when the Attorney General was notified and this litigation began. (R. 41).

Royal cites *Adams v. Willis*, 225 S.C. 518, 526-27, 83 S.E.2d 171, 175-76 (1954) to argue that the date of the contract is the date of valuation in determining fair market value. This case is distinguished because it involved a party who had an option to purchase for a certain price. When the party decided to exercise the option fifteen years later, the value of the property had increased. The purchaser was still allowed to exercise his option, even though the property increased in value. The Court explained that the adequacy of price for the option was to be considered as of the date of the option contract. The present case is distinguished in that it does not involve an option and instead involves a nonprofit with an unusual 5-year window to close where the seller would not close without Attorney General approval of the sale.

E. The Master did not err in ruling that Royal and Wells had unequal bargaining power.

Another circumstance considered by the Court was the unequal bargaining power of the parties. Royal argues the trial court erred in ruling on the issue of "contract unconscionability, in the form of unequal bargaining power[.]" This argument is without merit.

The Court found that there was "a huge disparity in bargaining power between these two parties." (R. 544). The Court went on to state that "Mr. Royal has regaled us today with his knowledge and expertise in negotiating contracts. He doesn't even agree with me that something is a draft. Okay? So I don't understand that, but it is what it is. But there's a huge disparity in the negotiation of the contracts." (R. 544). The Order noted that Royal was a licensed attorney in New York State and held a Master's Degree in Real Estate Finance from the University of Cambridge. Wells, born in 1934, was a College of Charleston graduate who taught kindergarten for over 40 years and who was Director of the Confederate Museum for over 40 years. (R. 43).

In making its finding on unequal bargaining power, the Court was ruling based on its observations of the evidence presented, specifically Royal's own testimony about his knowledge and expertise regarding contracts. At one point in his testimony, Royal's counsel moved to admit a document he (counsel) called a draft. After the document was admitted without objection, Royal stated "Your Honor, I wouldn't call this a draft, if I may." The Court asked what he would call it if it was not signed, and Royal stated that he would call it an offer. The Master stated that he would call it a draft. (R. 301-302). By offering his own views of real estate documents, which were at times contrary to the court and his own counsel's views, Royal demonstrated his confidence in his own real estate acumen, even if it was contrary to that of the court and counsel.

Because there is evidence to support the trial judge's findings regarding unequal bargaining power, the trial court's findings must be affirmed. The trial judge did not err in including in his order specifics about the educational background of Wells and Royal, as it was presented to the Court and not disputed by the parties. (R. 1396-1397). However, even if there was an error, it was merely harmless. The Court had sufficient evidence to find that the parties had unequal

bargaining power even without considering the educational backgrounds of Royal and Wells. Further, the unequal bargaining power was just one factor in the totality of the circumstances.

F. Other aspects and circumstances of the contract make it contrary to public policy.

In addition to the fact that the price is for less than fair market value and the parties had unequal bargaining power, there are other aspects of the Agreement that make it contrary to public policy. While any one factor may not itself be against public policy if it were part of the Agreement, these factors combined render the Agreement against public policy. In *Campbell v. Carr*, 361 S.C. 258, 266, 629, 603 S.E.2d 625 (Ct. App. 2004), the Court found specific performance was inequitable where the price was less than fair market value and other factors were considered. The Court explained as follows: "Mere inadequacy of consideration is not a ground for refusing the remedy of specific performance; in order to be a defense, the inadequacy must either be accompanied by other inequitable incidents, or must be so gross as to show fraud." *Id.* at 264, 603 S.E.2d 628 (citing *Ingram v. Kasey's Assocs.*, 340 S.C. 98, 105, 531 S.E.2d 287, 291 (2000)).

Similarly, there are inequitable incidents as part of the Agreement that provide additional grounds for granting the Motion for Nonsuit and denying specific performance. First, paragraph 6 of the Agreement states that the Purchaser shall bear any court costs associated with petitioning the Court to establish Mrs. Wells' authority to dispose of the property on behalf of the Seller. (R. 116-119). This provision suggests there was some concern about her authority, as this language would not be needed if her authority was clear.

Second, the property was never listed for sale to the public. While this is not required for fair market value, the seller was never able to obtain information about what other buyers would be willing to pay and when. Significantly, the testimony indicates Wells received a higher offer

of $400,000 around the same time as Royal, and without a public listing, there is no way to know what a potential buyer would have offered. (R. 429). A reasonable time for exposure of the property on the open market can provide a fair market value for the property. For example, bankruptcy courts have held that exposure to the market is part of fair market value. *See, e.g.*, *In re Mitchell*, 103 B.R. 819, 824 (Bankr. W.D. Tex. 1989) ("The appropriate valuation standard is thus 'fair market value,' incorporating as it does an exposure of the item to the appropriate market for a reasonable period of time."); *In re Kerbs*, 207 B.R. 211, 214–15 (Bankr. D. Mont. 1997) (explaining that fair market value means "The price a willing seller and a willing buyer under no compulsion would agree upon after a reasonable period of exposure to the market, where the buyer is knowledgeable of all uses and purposes for which the property is adopted and for which it was or is capable of such use."). Also, S.C. Code Ann. § 12-37-930, related to the valuation of property for the assessment of property taxes, shows that exposure to the market is an important factor in determining fair market value: "All property must be valued for taxation at its true value in money which in all cases is the price which the property would bring *following reasonable exposure to the market*, where both the seller and the buyer are willing, are not acting under compulsion, and are reasonably well informed of the uses and purposes for which it is adapted and for which it is capable of being used." (emphasis added).

Third, paragraph 8 of the Agreement allows Royal to back out of the contract if he determines, in his sole discretion, that a purchase of the property "is not suitable for himself financially[.]" (R. 116-119). This allows Royal to get out of the contract, but there is no comparable provision for the seller. Royal, the author of the Agreement, admitted that this was "almost like an option" but "not exactly the same." He agreed it gave him significant discretion as the buyer. (R. 418-419).

Fourth, as discussed above, the closing date was to be April 9, 2018, or on a prior date. This is five years after the date of the contract. (R. 116-119). This is unusual, especially given that property values can change over time. The value of the property did in fact increase significantly, so this term favored Royal to the detriment of FKAC. As the Master stated in his order, by the time of the closing, the same appraiser determined the fair market value had increased 65% over the original sale price. (R. 42).

II. The Master did not abuse his discretion in granting the Attorney General's Motion to Intervene and allowing the Attorney General the opportunity to be heard. (Appellant's Issue 7)

A. Motion to Intervene Standard of Review

"The decision to grant or deny a motion to join an action pursuant to Rule 19, SCRCP, or intervene in an action pursuant to Rule 24, SCRCP, lies within the sound discretion of the trial court." *Ex parte Builders Mut. Ins. Co.*, 431 S.C. 93, 98–99, 847 S.E.2d 87, 90 (2020) (citing *Ex parte Gov't Emps. Ins. Co. (Ex parte GEICO)*, 373 S.C. 132, 135, 644 S.E.2d 699, 701 (2007). "On appeal, this Court will not disturb the trial court's decision absent a manifest abuse of discretion that results in an error of law." *Id.* (quoting *Jeter v. S.C. Dep't of Transp.*, 369 S.C. 433, 438, 633 S.E.2d 143, 145 (2006)). "Moreover, the error of law must be so opposed to the trial court's sound discretion 'as to amount to a deprivation of the legal rights of the party.'" *Id.*

A. The Attorney General protects the public interest in connection with charitable trusts and nonprofits, and he also has authority pursuant to the Nonprofit Corporation Act.

This action was filed without notice to the Attorney General, although he had requested to be notified if an action was filed. (R. 746). The Attorney General filed a Motion to Intervene, and the Court granted the Motion by Orders of June 7, 2019, and July 10, 2019. (R. 93-102, 743-747).

The FKAC was established for the charitable purpose of offering a free kindergarten education to poor children at a time when kindergarten programs cost money. The Attorney General's role in supervising public charities and charitable trusts is well established in South Carolina. S.C. Code Ann § 1-7-130 provides "The Attorney General shall enforce the due application of funds given or appropriated to public charities within the State, prevent breaches of trust in the administration thereof . . ." S.C. Code § 62-7-405 governs charitable trusts and provides in relevant part: "(a) A charitable trust may be created for the . . . advancement of education . . . or other purposes, the achievement of which purposes is beneficial to the community . . . (c) The settlor of a charitable trust, the trustee and the Attorney General, among others may maintain a proceeding to enforce the trust." "The Attorney General is the proper party to protect the interests of the public at large in the matter of administering or enforcing charitable trusts." *Epworth Children's Home v. Beasley*, 365 S.C. 157, 172, 616 S.E.2d 710, 718 (2005) (citing *Furman Univ. v. McLeod*, 238 S.C. 475, 482, 120 S.E.2d 865, 868 (1961)). In addition, the South Carolina Nonprofit Corporation Act authorizes the Attorney General to investigate the organization, conduct, and management of a nonprofit in the State. S.C. Code Ann. § 33-31-170.

In addition to the general authority of the Attorney General related to charitable trusts and nonprofits, section 33-31-1202(f) provides specific authority to the Attorney General related to the sale of nonprofit assets. Section 33-31-1202(f), part of the South Carolina Nonprofit Corporation Act, states as follows: "A public benefit or religious corporation must give written notice to the Attorney General twenty days before it sells, leases, exchanges, or otherwise disposes of all, or

substantially all, of its property if the transaction is not in the usual and regular course of its activities unless the Attorney General has given the corporation a written waiver of this subsection." The Official Comment to this section explains that a "sale or other disposition of all, or substantially all, of a corporation's property other than in the usual and regular course of its activities must meet the requirements set forth in [this section]." Pursuant to this section, by letter of April 4, 2018, counsel for the FKAC provided notice to the Attorney General's Office of the sale. This was the first notice provided to the Attorney General, and it was the first time the Office was aware of the contract.

Section 33-31-141 governs notice under the South Carolina Nonprofit Corporation Act and applies to the written notice requirement of section 33-31-1202(f). Section 33-31-141(b) explains as follows: "Notice may be communicated in person; by telephone, telegraph, teletype, facsimile transmission (FAX), or other form of wire or wireless communication; or by mail or private carrier. If these forms of personal notice are impracticable, notice may be communicated by a newspaper of general circulation in the area where published; or by radio, television, or other form of public broadcast communications."

Royal's argument that the Memorandum of Purchase and Sale Agreement provided notice to the parties in 2013 is without merit. The Memorandum, which did not include the sale price or the contract itself, was filed with the Charleston County Register of Deeds on April 23, 2013. This filing did not list CCSD or the Attorney General, and they were not provided this document and did not become aware of it until after the April 4, 2018, notice was provided. This filing did not provide actual notice, as the Attorney General was not aware of the proposed sale until April 4, 2018. Moreover, this filing did not provide effective or statutory notice to the Attorney General because it did not meet the requirements of section 33-31-141(b).

Section 33-31-170(b)(2), part of the Nonprofit Corporation Act, also supports the granting of the Motion to Intervene. This section explains that "[w]henever a provision of this chapter requires that notice be given to the Attorney General before or after commencing a proceeding or permits the Attorney General to commence a proceeding: . . . (2) if a proceeding has been commenced by a person other than the Attorney General, the Attorney General, as of right, may intervene in the proceeding." Section 33-31-304(b) explains that "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." As explained by the Court in *State ex rel. Adventist Health Care Sys./Sunbelt Health Care Corp. v. Nashville Mem'l Hosp., Inc.*, 914 S.W.2d 903, 908 (Tenn. Ct. App. 1995), "[i]t is clear that the Attorney General is charged with bringing necessary actions to protect the public interest in connection with the sale by a public benefit corporation of all or substantially all its assets regardless of whether any other party may have initiated such an action." Thus, the Attorney General may bring an action regarding the sale of nonprofit assets. If another party brings a proceeding, as Royal did here, the Attorney General may intervene in the proceeding as of right pursuant to section 33-31-170(b)(2).

While the Court's Order cites several circuit court cases regarding the Attorney General's authority related to real property,[2] one appellate case of significance is *S.C. Dept. Mental Health v. McMaster*, 372 S.C. 175, 642 S.E.2d 552 (2007). In this case, the Supreme Court accepted in its original jurisdiction an action as to whether certain property owned by the Department of

[2] Royal contends the Master "heavily relied on unpublished trial court orders and pleadings[,]" contending this was "not only erroneous but inequitable." This argument is without merit. These Orders were attached to the Attorney General's Memorandum of Law to provide examples of actions, not offered as binding authority. Although some of these cases are discussed in the Order, there is no evidence that the Court "heavily relied" on the cases or considered them inappropriately.

Mental Health was held in trust, and whether and under what conditions it could be sold. The Circuit Court later approved the sale of the property after expert testimony about the fair market value of the property. (R. 1403-1410).

Other states have found the Attorney General has a role in connection with the sale of nonprofit assets. In Tennessee, the entity which controlled and operated Memorial Hospital gave notice to the Attorney General of its intent to sell the Hospital. The notice was provided pursuant to Tenn. Code Ann. § 48-62-102(g), a part of the Tennessee Nonprofit Corporation Act which is similar to the South Carolina Nonprofit Corporation Act. In that case, the Tennessee Attorney General described an investigation his office conducted into the proposed sale, the relevant facts disclosed by that investigation, the concerns of the community, and his opinion of the duties of nonprofit corporations in conjunction with the sale of assets. The Attorney General concluded the sale was in the public interest. Certain parties challenged this decision. The Court found that the Attorney General carefully scrutinized the sale and concluded it was in the public interest. *State ex rel. Adventist Health Care Sys./Sunbelt Health Care Corp. v. Nashville Mem'l Hosp., Inc.*, 914 S.W.2d 903, 906 (Tenn. Ct. App. 1995). Similarly in the present case, the Attorney General scrutinized the proposed transaction. He found that the proposed transaction was against the public interest and would not agree to it. FKAC would not agree to close without the Attorney General's consent, and Royal ultimately brought this action. Significantly, this is not a situation in which the Attorney General is opposed to the sale but both parties wanted to close and were ready, willing, and able to close. Instead, FKAC was never willing to close once the Attorney General let the parties know of this objection to the sale.

In *Wilson v. Dallas*, 403 S.C. 411, 431, 743 S.E.2d 746, 757 (2013), the Court recognized the authority of the Attorney General and his "duty to represent the unspecified charitable

beneficiaries." In the present case, the Attorney General represents the public interest and the unspecified charitable beneficiaries who were meant to benefit from the FKAC. Royal's argument that the Order in the present case "contravenes" *Wilson v. Dallas* is without merit. First, the Trust in *Wilson v. Dallas* was to benefit students who wanted to further their education. Similarly in the present case, the nonprofit, which is impressed with a charitable trust, is intended to benefit kindergarten students. As the Attorney General was properly allowed to intervene in *Wilson v. Dallas*, he was also properly allowed to intervene in the present case. Both cases involve the public charitable purpose of promoting education. Royal argues that the Attorney General has "taken control of FKAC's assets" which would not be allowed under *Wilson v. Dallas*. This argument is without merit, as the Attorney General has not taken control of the assets. To the contrary, the Attorney General has objected to a sale, which is his right and duty to do. He did not participate in any negotiations regarding the contract, and he was not even provided notice of it until almost 5 years after it was signed.

Royal's argument that the Attorney General's *parens patriae* authority has "no bearing on the case at hand" is without merit. Going back to historic common law, "The king, as *parens patriae*, has the general superintendence of all charities, which he exercises by the keeper of his conscience, the chancellor. And therefore whenever it is necessary, the attorney general . . . files ex officio an information in the Court of chancery to have the charity properly established." 3 Blackstone, *Commentaries* 47. The Attorney General represents the public at large, the ultimate beneficiary of charitable trusts. In the present case, the public is the ultimate beneficiary of the FKAC assets that are impressed with a charitable trust. Allowing the assets to be sold for less than fair market value would provide a benefit to Royal while taking the money away from the original

donors' (those who gave money or property for FKAC) intent which is ultimately also a harm to the public.

Royal contends that the scope of Attorney General's authority pursuant to section 33-31-1202(f) is limited to receipt of notice. This argument is without merit. "The cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the legislature." *Chem–Nuclear Sys., LLC v. S.C. Bd. of Health and Envtl. Control*, 374 S.C. 201, 205, 648 S.E.2d 601, 603 (2007). "The Court must presume the Legislature intended its statutes to accomplish something and did not intend a futile act." *Duvall v. S.C. Budget and Control Bd.*, 377 S.C. 36, 42, 659 S.E.2d 125, 128 (2008); *see State ex rel. McLeod v. Montgomery*, 244 S.C. 308, 314, 136 S.E.2d 778, 782 (1964) ("In seeking the intention of the legislature, we must presume that it intended by its action to accomplish something and not to do a futile thing."). The legislature intended S.C. Code Ann. § 33-31-1202(f) to have a purpose, and the logical conclusion is that this purpose was to notify the Attorney General and provide him an opportunity to be heard. An interpretation that does not allow the Attorney General to be heard would render the statute meaningless and would be contrary to rules of statutory interpretation.

Royal argues that the statute allows a sale to proceed without Attorney General approval because the notice must be given twenty (20) days before it sells the property. However, the fact that the Attorney General is given 20 days shows the legislature's intent for him to have time to review. If he was not required to do anything and was not allowed to object, then there would be no need to give him 20 days. All this means is that he may choose not to take action and let the 20 days expire without doing anything, which would allow the sale to proceed.

Royal also argues the Master erred in finding the Attorney General "has authority to disapprove of or seek nullification of the Agreement." Royal also argues the Attorney General

had "control over or [attempted] nullification of the PSA." These arguments do not consider that the Court makes the ultimate determination regarding a sale of assets. The Attorney General cannot void a contract on his own. Rather, if a party disagrees with the Attorney General regarding a sale of assets, then the party can file an action, as Royal did in this case. Also, the Attorney General himself can file an action if he objects to a sale or if he desires court approval.

B. Royal's additional arguments regarding Attorney General authority are without merit.

Royal argues several specific and additional reasons why the Attorney General should not have been allowed to intervene. Each of these arguments is without merit.

1. Royal's argument regarding sections 33-31-128(c) and 33-31-302 is without merit.

Royal argues that allowing the Attorney General to intervene conflicts with sections 33-31-128(c) and 33-31-302. This argument is without merit. These sections are not related to the Attorney General's intervention in this action.

Section 33-31-128(c) states that "Subject to any qualification stated in the certificate, a certificate of existence or authorization issued by the Secretary of State may be relied upon as conclusive evidence that the domestic or foreign corporation is in existence or is authorized to transact business in this State." While FKAC can conduct business in South Carolina, it is still subject to all applicable laws of the State, including the requirement to notify the Attorney General of any sale of assets to determine if they are against the public interest.

Section 33-31-302 provides for the general powers of a nonprofit corporation. Subsection 33-31-302(5) states that a nonprofit has the power "to sell, convey, mortgage, pledge, lease, exchange, and otherwise dispose of all or any part of its property." This statute must be read in

conjunction with the more specific provisions of 33-31-1202(f) which require notice to the Attorney General. "The general rule of statutory construction is that a specific statute prevails over a more general one." *Atlas Food Sys. & Servs., Inc. v. Crane Nat. Vendors Div. of Unidynamics Corp.*, 319 S.C. 556, 558, 462 S.E.2d 858, 859 (1995) (citing *Mims v. Alston*, 312 S.C. 311, 440 S.E.2d 357 (1994)).

2. Royal's argument that FKAC is not a public charitable organization is without merit.

Royal contends that FKAC is not a public benefit corporation or a public charitable organization, and therefore the Attorney General has no authority over the entity. This argument is without merit. The original Certificate of Incorporation for FKAC, dated January 24, 1901, under the original name of the South Carolina Kindergarten Association, states that the organization "holds, or desires to hold, property in common for a Religious, Educational, Social, Fraternal, Charitable, or other eleemosynary purposes, or any two or more of said purposes, and is not organized for the purpose of profit or gain to the members . . ." (R. 638-639). The Secretary of State approved the Certificate, stating that the entity would be subject to all the limitations and liabilities conferred by an Act of the General Assembly entitled "An Act to provide for the Incorporation of Religious, Educational, Social, Fraternal, or Charitable Churches, Lodges, Societies, Associations, or Companies . . . ." (R. 640-641).

The Certificate states more specifically that the purpose of FKAC is "to maintain a Training School for Kindergarteners and one or more Free Kindergartens, and to promote the knowledge of Froebel's educational principles." (R. 638-641). The purpose of the entity was to promote education, which is itself a charitable purpose. "Gifts for primary and secondary school education are charitable, as are gifts for the advancement of higher education." 5 S.C. Jur. *Charities* § 14.

Royal also argues that because FKAC was not operating during the "relevant time," it is not a public charity. However, just because a public charity ceases its operations, this does not mean that the funds are not held for the charitable purpose. If the Court were to find that the public charity funds were somehow converted to private use because the charity ceased operation, this would mean that any time a nonprofit entity ceased operations, its assets would be lost to its charitable purpose and no longer benefit the public. Pursuant to the doctrine of equitable deviation, if a particular charitable purpose becomes unlawful, impracticable, impossible to achieve, or wasteful, the trust does not fail, in whole or in part. Instead, "the court may deviate from the terms of the trust to modify or terminate the trust by directing that the trust property be applied or distributed, in whole or in part, in a manner consistent with the settlor's charitable intent." S.C. Code Ann. § 62-7-413. This shows that the law allows for a change in circumstances. In *South Carolina Dep't of Mental Health v. McMaster*, 372 S.C. 175, 184, 642 S.E.2d 552, 557 (2007), the Court found, "It is undisputed that the Bull Street property is no longer necessary to house mentally ill patients. . . . we hold that the proceeds from any sale of the property must remain in trust for the benefit of DMH for the care and treatment of the mentally ill." Similarly in the present case, FKAC is no longer providing free kindergarten opportunities. However, this does not mean its assets are converted to private use; it means that the assets must remain in trust for the benefit of the same beneficiaries – kindergarten students in Charleston.

Royal further argues that because FKAC is not a public charity, then section 1-7-130 does not apply. This argument is without merit. Section 1-7-130 explains that the "Attorney General shall enforce the due application of funds given or appropriated to public charities within the State . . ." Because FKAC is a public charity, this section applies.

3. **Royal's argument that the South Carolina Trust Code does not apply is without merit.**

Royal contends that the South Carolina Trust Code, specifically section 62-7-405, does not apply. This argument is without merit because assets of a nonprofit entity are impressed with a charitable trust to which the South Carolina Trust Code applies.

S.C. Code § 62-7-405 governs charitable trusts and provides in relevant part: "(a) A charitable trust may be created for the . . . advancement of education . . . or other purposes, the achievement of which purposes is beneficial to the community . . . (c) The settlor of a charitable trust, the trustee and the Attorney General, among others may maintain a proceeding to enforce the trust."

"[P]roperties conveyed to a public charity are also impressed with a charitable trust." *S.C. Dep't of Mental Health v. McMaster*, 372 S.C. 175, 182, 642 S.E.2d 552, 555–56 (2007) (citing *Wellesley College v. Attorney General*, 49 N.E.2d 220 (Mass. 1943)); *In re Los Angeles County Pioneer Society*, 257 P.2d 1, 9 (Ca. 1953) ("In cases where property is conveyed without restriction to a charitable corporation . . . the charitable intent of the donor is ascertained by reference to the charitable purposes of the donee."); *In re Harrington's Estate*, 36 N.W.2d 577, 582 (Neb. 1949) (a gift or bequest by name, without further restriction or limitation as to use, to a corporation conducted solely for charitable purposes, will be deemed to have been made for the objects and purposes for which the corporation was organized); *Brown v. St. Luke's Hosp. Assn.*, 274 P. 740 (Colo. 1929) (St. Luke's Hospital came into being as, and continued to remain, a charitable institution such that all property held or acquired by it was impressed with a trust for the charitable uses and purposes)). Just as the property in *Dep't of Mental Health v. McMaster* was held in trust

for the Department of Mental Health, the property at 34 Pitt Street is held in trust for the FKAC. Accordingly, the South Carolina Trust Code applies.

4. **Royal's argument that the FKAC is not governed by the South Carolina Nonprofit Corporation Act is without merit. (Appellant's Issue 3)**

Royal contends that the Master erred in finding that FKAC is governed by the South Carolina Nonprofit Corporation Act ("Act"). This argument is without merit. Further, even if the Act does not apply, it is harmless error for the Court to apply it, as the result is still the same even if the Act does not apply.

Section 33-31-1701 states that the Act "applies to all domestic corporations which on this chapter's effective date were governed by Title 33, Chapter 31 of the 1976 Code." S.C. Code Ann. § 33-31-140(7) states that under the Act, a 'corporation' means public benefit, mutual benefit, and religious corporation." Section 33-31-140(12) explains that a "'domestic corporation' means a corporation." The law was effective on May 10, 1994, when Act number 384 of the 1994 legislative session was signed by the Governor.

FKAC was governed by Title 33, Chapter 31 of the 1976 Code in May 1994, and therefore the Act applies to it. As the South Carolina Reporters' Comments to Section 33-31-1701 explain, "Pursuant to section 33-31-1701(a), amended Title 33, Chapter 31 applies to all South Carolina corporations governed by former Title 33, Chapter 31 ("Nonprofit Corporations Generally"). The power to alter the statutory governance of existing corporations was reserved by the General Assembly by Code Section 33-1-102, which, by operation of Code Section 33-20-103 applies to nonprofit corporations organized under the provisions of Title 33, Chapter 31." The Comments to subsection b further explain that "Amended Title 33, Chapter 31 applies only to corporations chartered under former Title 33, Chapter 31 *and its predecessors* and not, therefore, to entities

organized under any other chapter . . .” (emphasis added). FKAC, pursuant to its 1901 Certificate of Incorporation, was originally organized and governed by Act No. 219 of 1900 which is a predecessor of both the 1976 Act and the 1994 Act. The following is the legislative history of the Nonprofit Corporation Act, as stated in the 1976 Code (published in 1977): 1962 Code § 12-751; 1952 Code §12-751; 1942 Code § 8158; 1932 Code §8158; Civ. C. ’22 §4344; Civ. C. ’12 §2862; Civ. C. ’02; 1900 (23) 390. This history is provided following section 33-31-10 in the 1976 Code, indicating that these sections are all predecessors to the current Nonprofit Corporation Act, which is itself a successor to the Act published in the 1976 Code.

Royal incorrectly argues that FKAC should have filed an irrevocable election to be governed by the provisions of the Act pursuant to section 33-31-1701(b). However, the entities that need to file this irrevocable election are those that were not formed under Title 33, Chapter 31 and its predecessors. These would be entities that were organized not as a nonprofit but with some other structure. The South Carolina Reporters’ Comments provides examples of these types of entities and explains this would include entities “organized under any other chapter including, for example, Title 33, Chapters 35, 37 [Business Development Corporations], 39 [County Business Development Corporations], 45 [Cooperative Associations], 47 [Marketing Cooperative Associations], 49 [Electric Cooperatives], and 53 [Business Trusts] . . .” Section 33-31-1701(b) also “permits corporations which were specifically legislatively chartered and those which may have been chartered by cities or other local governmental units to elect to be governed by this chapter.” Because FKAC was organized under Act No. 219 of 1900, a predecessor to the South Carolina Nonprofit Corporation Act, it did not need to file an election.[3]

[3] Act No. 219 of the Acts and Joint Resolutions of the South Carolina General Assembly of the Regular Session in 1900 was effective on February 19, 1900. This was an Act “to provide for the incorporation of religious, educational, social, fraternal or charitable churches, lodges, societies, associations or companies, and for the

Further, even if the Act does not apply to FKAC, the Master did not err, as the contract is void because it is against public policy, as explained above.

III. The Master did not abuse his discretion in granting CCSD's Motion to Intervene or in ruling on issues raised by CCSD. [4] (Appellant's Issues 8 and 9)

Royal argues the trial court erred in granting CCSD's Motion to Intervene. Related to this, Royal argues that the trial court erred in allowing CCSD to seek relief, in granting that relief, and in determining substantive issues in its order granting intervention. These arguments are without merit.

Rule 24, SCRCP, governs intervention. The Court granted CCSD's Motion for Intervention under Rule 24(b), which allows for permissive intervention upon timely application "when an applicant's claim or defense and the main action have a question of law or fact in common." It also directs the court, in exercising its discretion, to "consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Rule 24(b), SCRCP.

In its Order Granting Motion of Charleston County School District to Intervene, the trial Court considered both the timeliness of CCSD's Motion and whether its proposed claims and the main action have common questions of law or fact. First, the Court noted that South Carolina courts have adopted a four-part test for determining timeliness: (1) the time that has passed since the applicant knew or should have known of his or her interest in the suit; (2) the reason for the delay; (3) the stage to which the litigation has progressed; (4) the prejudice the original parties would suffer from granting intervention and the applicant would suffer from denial. *Ex parte State Ex Rel. Wilson*, 391 S.C. 565, 707 S.E. 2d 402 (2011); *Ex parte Reichlyn: In Re: SCDHEC v.*

amending the charters of those already formed, and to be formed." The Articles of Incorporation of FKAC expressly state that the entity is subject to the 1900 Act. (FKAC Articles of Incorporation).

[4] As explained in section II A, the abuse of discretion standard of review applies to a Motion to Intervene.

Columbia Organic Chemical Co., 310 S.C. 495, 427 S.E.2d 661 (1993); *see also Davis v. Jennings*, 304 S.C. 502, 405 S.E.2d 601 (1991). The Court addressed each of the factors in finding that the application was timely. It found that the application to intervene was filed about two months after the filing of the Complaint and that CCSD acted prudently in securing counsel and filing its Motion upon learning of the action. The Court found that the litigation was in its early stages, that the parties had not yet engaged in any discovery, that no scheduling orders had been entered, and that no factual or legal issues had been litigated. The Court further found that the parties would not be prejudiced by CCSD's intervention, but that CCSD would be prejudiced if its request for intervention was denied in that CCSD has a real and substantial and legally protectable interest in the real property at issue in the litigation. The Court specifically noted that the Appellant sought to force the sale of the property for less than fair market value which greatly affects CCSD's interest in the property and the proceeds of its sale. (R. 84-85).

Next, the Court addressed whether the main action and CCSD's claims or defenses have a common question of law or fact. (R. 86-87). There, the Court found that CCSD claimed a direct and substantial interest in the Pitt Street property and/or the proceeds from its sale, and that its interest was directly at issue in the litigation. Accordingly, the Court found that CCSD's claims regarding the property would be permanently lost or hampered if the Appellant succeeded. The Court reasoned that CCSD could assert its interest in a separate proceeding that would substantially duplicate the existing action. The Court further reasoned that CCSD's "intervention contributes to the just and equitable adjudication of the legal questions presented" and serves the interests of judicial economy by avoiding multiple lawsuits by disposing of all interested parties' claims and interests in the Pitt Street property in one action. (R. 86-87).

Royal argues the Court erred in allowing CCSD's permissive intervention under Rule 24(b) of the South Carolina Rule of Civil Procedure because CCSD's interest in preventing potential misapplication, loss, devaluation, and waste of FKAC assets is protected by the Attorney General. This argument is without merit. Rule 24(a) of the South Carolina Rules of Civil Procedure governing intervention of right includes a consideration as to whether the applicant's interest is adequately protected by existing parties. Rule 24(a), SCRCP. Here, CCSD was granted permissive intervention under subsection (b), which contains no such requirement. Rule 24(b), SCRCP. Moreover, the Attorney General's role is to protect the public interest. *See Epworth*, 365 S.C. at 164, 616 S.E.2d at 714 (2005). CCSD protects its own interest. While a nonprofit often has the same interest and position as the Attorney General, there can be times when the Attorney General's position or interest is different from the nonprofit. For example, in this case, the Attorney General did not take a position on the authority of Wells, while CCSD did.

Royal is also mistaken in his argument that CCSD is not a proper party to this matter as FKAC's 1971 Amendment directs that residual assets pass to "Charleston School District # 20." The Court's Order thoroughly details the history of the CCSD's consolidation over the years and finds that the county-wide CCSD absorbed all fiscal and administrative powers and duties, as well as all assets held by the former school districts, with a few narrow exceptions that do not apply here. (R. 87-89). The Court's finding that CCSD is the proper party to assert its claims is amply supported by the applicable law and facts.

Royal further argues that the Master erred in ruling on issues raised by CCSD, such as making findings regarding CCSD's rights related to the dissolution clause. This argument is without merit. "Intervention is a procedural device whereby a third party who is not a named party in an existing lawsuit, but who has an interest in its outcome, may become a party to the action."

In re Horry Cnty. State Bank, 361 S.C. 503, 507, 604 S.E.2d 723, 725 (Ct. App. 2004) (citing Black's Law Dictionary 826 (7th ed. 1999)). Once the Motion to Intervene was granted, CCSD became a party and was entitled to file pleadings and seek relief like any other party.

IV. The exclusion of the transcript of CCSD's 30(b)(6) witness is not preserved for appellate review. Any error in excluding the transcript is harmless. (Appellant's Issue 10)

A. Standard of Review

"The admission of a deposition is an evidentiary issue that requires the trial court to exercise its discretion, and we will not disturb the trial court's decision unless we find an abuse of discretion." *Gibson v. Wright*, 403 S.C. 32, 47, 742 S.E.2d 49, 57 (Ct. App. 2013); *see also Conway v. Charleston Lincoln Mercury Inc.*, 363 S.C. 301, 307, 609 S.E.2d 838, 842 (Ct. App. 2005) ("The decision to admit or exclude evidence is within the trial court's sound discretion and will not be disturbed on appeal absent an abuse of discretion.").

B. The exclusion of the transcript of CCSD's 30(b)(6) witness is not preserved for appellate review because a proffer was not made.

Royal sought to introduce the 30(b)(6) deposition of CCSD. (R. 504). CCSD objected and argued that Royal had not provided excerpts of the deposition per the rules. (R. 505). The Court asked Royal if he sought to introduce the entire transcript, to which he responded "Sure. We will put the whole thing in." (R. 505). The Court responded saying "That ain't the way it works. I'm supposed to read this." (R. 505). The discussion then turned to another topic. After the Court's ruling, Plaintiff's counsel and the Court had the following discussion:

> MR. TIBBALS: May I ask two quick questions. First of all, may I complete the record as we were discussing --
> THE COURT: Sure, absolutely.
> MR. TIBBALS: -- and put in the documents and evidence that I need to do?
> THE COURT: Yep.

(R. 551) It is unclear if this was an attempt to make a proffer or an attempt to move documents in evidence. There is no indication that Royal could enter any documents he desired in the record without regard to the Rules of Evidence. Accordingly, Royal needed to either make a proffer of specific exhibits or move for and obtain the admission of specific exhibits into evidence in accordance with the Rules. He did neither.

Following the trial, by letter filed March 30, 2022, Royal attempted to offer the transcript as an Exhibit. (R. 1588-1592). He sent the Court a letter with a list of documents and stated he was "filing his exhibits admitted at the trial of this action." (R. 1588). CCSD filed a Motion to Exclude and Strike, seeking to strike certain of these exhibits that Royal attempted to offer as "trial exhibits." (R. 1507-1508). Included in the list that CCSD sought to strike was Exhibit 74, the 30(b)(6) deposition transcript. It had not been admitted at the trial as stated in Royal's letter. The Court granted the Motion as to the CCSD 30(b)(6) deposition transcript, finding that this transcript "shall not be admitted as evidence or received as a proffer in this case." (R. 22).

"The failure to make a proffer of excluded evidence will preclude review on appeal." *Jamison v. Ford Motor Co.*, 373 S.C. 248, 260, 644 S.E.2d 755, 761 (Ct. App. 2007). "It is well settled that a reviewing court may not consider error claimed in the exclusion of testimony unless the record on appeal shows fairly what the rejected testimony would have been." *Id.*

While Royal correctly notes that a proffer was not received, he neglects to mention that a proffer could not be received because he never sought to offer one at trial. (R. 504-505). Although he attempted a proffer later through his filings, this is a matter for the trial judge's discretion, and the Judge did not allow a proffer offered via letter after trial.

B. The Master did not abuse his discretion in excluding the transcript, and any error is harmless.

Royal argues that the Court's ruling conflicts with Rule 32(a) which allows use of "any part or all of a deposition" at trial. Rule 32(a), SCRCP. Royal did not argue this specific ground at trial or in his letter to the Court attempting to offer the transcript as an exhibit. In *Gibson*, *supra*, the Court noted that the Appellant "d[id] not provide for what purpose the deposition is allowed under the rules of evidence but stops the reading of 32(a) before 'in accordance with any of the following provisions.'" Based on this and the fact that the witness testified, the appellate court found that the "trial court did not abuse its discretion in excluding the deposition." *Gibson*, 403 S.C. at 48, 742 S.E.2d at 57. Similarly in the present case, Royal does not specifically state for what purpose the deposition is allowed, but rather argues it can be used "for any purpose." He further contends that under *Gibson*, he was not required to show the witness was unavailable for trial. While this is correct under *Gibson* since the witness testified in *Gibson*, a full reading of *Gibson* shows that the trial judge did not abuse his discretion in excluding the transcript, even if the witness is available. Of note, there was no discussion in the present case about whether the witness was available.

Further, Royal fails to articulate any prejudice which resulted from the exclusion of the deposition. Therefore, even if he could establish both that this issue was properly preserved for review and that the court committed an error of law in excluding the deposition, Royal does not even attempt to argue that the alleged error caused prejudice, as is required under this well-established framework. Accordingly, any error of law in the exclusion of the evidence is harmless and cannot constitute grounds for reversal. *Eadie v. H.A. Sack Co.*, 322 S.C. 164, 172, 470 S.E.2d 397, 401 (Ct. App. 1996) (where error was harmless, it was not subject to reversal).

V. Authority of June Murray Wells (Appellant's Issue 1)

The Attorney General takes no position related to the authority of June Murray Wells; the Attorney General also did not take a position on this issue in the lower court. The Attorney General does not contest the findings of the circuit court as to this issue.

VI. Conclusion

For the reasons set forth herein, the trial court should be affirmed.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Court of Common Pleas
Mikell R. Scarborough, Master-in-Equity

Appellate Case No.: 2022-001165

Michael D. Royal, Appellant,
v.

Free Kindergarten Association of Charleston, Respondent,

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

CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Brief of Intervenor/Respondent the Attorney General of the State of South Carolina complies with Rule 211(b), SCACR.

This 12th day of October, 2023.

s/Mary Frances Jowers
Mary Frances Jowers
Assistant Deputy Attorney General