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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master in Equity

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Appellate Case No. 2022-001165

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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

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# FINAL BRIEF OF INTERVENOR/RESPONDENT THE CHARLESTON COUNTY SCHOOL DISTRICT

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**STATEMENT OF ISSUES ON APPEAL**

II. Did the Master Abuse His Discretion in Granting the Motion for Nonsuit?

II. Did the Master Abuse His Discretion in Granting the Charleston County School District's Motion to Intervene and Allowing the Charleston County School District to be Heard?

III. Did June Wells Lack the Authority to Execute the PSA and Sell the Pitt Street Property on Behalf of FKAC?

IV. Did the Master Correctly Exclude the Transcript of CCSD's Rule 30(b)(6) Deposition?

V. Respondent CCSD Joins in Sections I, II, III and IV of Respondent The South Carolina Attorney General's Brief.

**STATEMENT OF THE CASE**

This action was commenced on December 4, 2018, in the Charleston County Circuit Court by the filing of a Summons and Complaint by Michael D. Royal ("Royal"), seeking specific performance and damages. (R. pp. 106-163 ). The Complaint also sought "consequential and incidental damages with prejudgment and post-judgment interest[.]" The Free Kindergarten Association of Charleston ("FKAC") filed an Answer on January 7, 2019. (R. pp. 164-173). The South Carolina Attorney General ("Attorney General" or "SCAG") 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. at pp. 743-770; R. pp. 771-789; R. at pp. 790-810). The action was referred to the Master-in-Equity by Order of March 21, 2019. (R. pp. 104-5). Following a hearing on June 4, 2019 on SCAG's and CCSD's Motion to Intervene, the Master granted both Motions to Intervene by Form Order filed June 7, 2019. (R. pp. 102-3). CCSD filed an Answer, Counterclaim, Crossclaim, and Request for Declaratory Judgment on June 24, 2019. (R. pp. 174-86). FKAC filed a Reply to the Request for Declaratory Judgment on July 1, 2019. (R. pp. 189-92). The Master filed a formal Order granting the Attorney General's Motion to Intervene on July 10, 2019. (R. pp.

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. pp. 199-204). By Order of August 22, 2019, the Court filed a formal Order granting CCSD's Motion to Intervene. (R. pp. 78-92).

By Order of February 22, 2021, the Court appointed Joseph K. Qualey, Esquire, as Receiver for FKAC. (R. pp. 74-7). Charleston Chapter No. 4, United Daughters of the Confederacy filed a Motion to Intervene on Jun 17, 2021. The Court granted the Motion by Order of August 10, 2021. (R. pp. 1121-8; R. pp. 52-4). These parties were later dismissed pursuant to a Stipulation of Dismissal filed October 28, 2021. (R. pp. 205-6).

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 Royal's request for specific performance and claim for damages in this action. (R. pp. 26-51). Royal filed a Motion to Reconsider on April 8, 2022 and an amended Motion to Reconsider on April 10, 2022. (R. pp. 1485-1506; R. pp. 1528-51). On April 8, 2022, CCSD filed a Motion to Exclude and Strike. (R. pp. 1507-27). Following a hearing on May 20, 2022, the Court denied Royal's Motion to Reconsider by Order of July 18, 2022. (R. pp. 13-17). Also on July 18, 2022, the Court granted in part and denied in part CCSD's Motion to Strike and Exclude. (R. pp. 18-25).

This appeal follows.

**STATEMENT OF FACTS**

The Free Kindergarten Association of Charleston ("FKAC") was established as a nonprofit

corporation on January 24, 1901. (R. pp. 638-642).[1] The mission of the FKAC was to provide a free kindergarten education to students whose parents could not afford to pay (R. p. 28).

On February 5, 1971, the South Carolina Secretary of State certified an amendment to the charter of FKAC pursuant to a Resolution of FKAC, authorized and certified by a majority of the Board of Directors of FKAC, whereby FKAC resolved 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. (Pl. Ex. 61 and 62, R. pp. ). During the 20th century, public schools took on the role of providing kindergarten education to children in South Carolina. (R. p. 28).

In 1967, the South Carolina General Assembly enacted Act 340, 1967 S.C. Acts 340. Act 340 created the Charleston County School District, which encompassed all of Charleston County. Act 340 consolidated the eight existing school districts located in Charleston County (including Charleston County School District #20) into the single and newly created county-wide school district to be known as the Charleston County School District. Act 340 designated the Charleston County School District a body of politic and corporate as provided in Section 21-111 of the Code of Laws of South Carolina, 1962, and vested Charleston County School District "with all of the powers, duties, and assets" of the eight school districts. In addition to being vested with the assets, including real property assets, of the eight school districts, the Charleston County School District was expressly empowered to authorize the purchase or sale of land, the planning and construction of new school facilities, the maintenance and repair of existing buildings and grounds, and the development of long-range planning for physical facilities and the educational program in the

[1] The original name was the South Carolina Kindergarten Association of Charleston. The name was changed to Free Kindergarten Association of Charleston by amendment to the Charter on January 20, 1931. (R. pp. 643-6).

county. The eight districts continued their existence as special districts for administrative purposes only as expressly set forth in Act 340 and were labeled "constituent districts", including Charleston County School Constituent District #20, which covers downtown Charleston and encompasses the schools located on the Charleston peninsula. Under Sections 1, 6, 7 and 8 of Act 340, the constituent districts retained their independent boards of trustees and independent administrative authority, subject in certain instances to the approval of the CCSD, over the very distinct and limited functions expressly delegated to the constituent districts in the Act. These limited functions include "(1) employment and assignment of teachers or other professional employees; (2) employment of constituent district personnel; (3) pupil assignments and student discipline; and (4) limited oversight over school bus transportation." Act 340, sections 6, 7, and 8.

FKAC has not operated as a kindergarten since the early 2000's. **(**R. p. 29). Aside from miscellaneous personal property of *de minimis* value, the only known asset of the FKAC is real property and improvements located at 34 Pitt Street, Charleston, South Carolina (the "Property"). *Id.*

Appellant Royal testified that he first became aware of and interested in the Property at 34 Pitt Street on December 3, 2011, when he was driving along Pitt Street and observed that the Property did not appear occupied or in active use. (App. Br. p. 8). He testified he then did some research to determine who owned and controlled the Property and that a staff person at the City of Charleston led him to the name of June Murray Wells ("June Wells"). *Id.* Thereafter, sometime between December 2011 and November 2012, Appellant Royal contacted Wells. *Id.* While Appellant Royal testified that Wells "was very sharp, friendly . . . that she intended to sell [the Property] (App. Brief p. 9), his deposition testimony, submitted with his Pre-Trial Brief to the

Court, stated that "I can't remember what her response was at the time except that I did not get the response saying that she was willing to sell it to me right then and there, or I didn't have in my mind a sense that we were moving quickly towards a sale transaction by the end of that conversation." (R. p. 1199). The first time Appellant Royal visited the 34 Pitt Street Property with June Wells occurred on November 4, 2012. (R. p. 1201; R. p. 594). The November 4, 2012 on site meeting with June Wells was the first time Appellant Royal ever entered the Property. (R. p. 280, lines 14 – 16.) Thereafter, Royal requested access to the building to allow Michael Robinson MAI, SRI ("Robinson")[2], of Charleston Appraisal Services to appraise the property. (R. p. 595). Prior to Robinson seeing the building and based on Royal's description of the property, Royal had suggested to Ms. Wells that "there is a potential that [Robinson's] value conclusion may be "lot value" – and she didn't seem phased by that at all, thankfully." *Id.* Robinson thereafter prepared a 2012 appraisal of the property for Appellant Royal. (R. pp. 573-85).

On January 14, 2013, Royal sent Ms. Wells a copy of the Robinson appraisal and a proposed real estate contract that he had drafted. (R. pp. 596-600). That proposed contract included a purchase price of $315,200.00. *Id.* In the Spring of 2013, June Wells also received a Notice of Intent to purchase the Property for $400,000.00 from another party other than Royal. (R. p. 429, lines 6 – 12; R. p. 41). June Wells did not respond to Royal's proposed contract. (R. p. 299, lines 17-23).

The Court found that June 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 she did not have actual, implied or apparent

[2] Robinson was qualified as an expert in the field of real estate appraising at trial and concerning Charleston County real estate in this particular matter. (R. p.226, lines 2 – 20.)

authority to enter into the Agreement on behalf of FKAC for the sale of the Pitt Street Property. (R. p. 35).

Despite this lack of authority, on April 23, 2013, Appellant Royal and his assistant, a notary, went to the Confederate Museum to have Ms. Wells sign a Real Estate Purchase and Sale Agreement[3] ("PSA" or "Agreement") for the real Property at 34 Pitt Street, Charleston, SC. (R. p. 1239, lines 2-17; R. pp. 601-4). On that date, Appellant Royal and June Wells, designated as "authorized agent" of the FKAC, signed the PSA which was notarized by Appellant Royal's assistant. (*Id*). The Agreement stated the closing date was to be April 9, 2018 "or such prior date chosen by the Seller upon reasonable notice to the purchaser." (R. pp. 601-604). Appellant Royal also prepared Wells' title block which read "Authorized Agent". (R p. 303, line 17 – p. 304, line 8).

Other details of the Agreement include the following: a provision that the Purchaser shall bear any court costs associated with petitioning the Court to establish Wells' authority to dispose of the property; (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; (3) a provision that FKAC was to convey a limited warranty deed, rather than a general warranty deed; and (4) a provision that FKAC would not be in default if there was a title defect but rather FKAC would be required to incur any expense to make the title marketable. (R. pp. 601-4).

While Appellant Royal testified that he "encouraged Wells to engage an attorney on FKAC's behalf to review any offer or proposed contract" (Appl. Brief p. 9), there is no written evidence of same. Rather, the only written evidence of Appellant advising Ms. Wells to consult

[3] The PSA was drafted entirely by Appellant Royal. (Trial Tr. Pg 97 lines 15 – 16.)

another regarding any transactions between himself and FKAC is where he advised her to discuss his plan to close on the property and let her lease it back with "seller financing" with her son, who Royal indicated "seems like [a] good person to consult with on such things". (R. pp. 631-2).

Also on April 23, 2013, Appellant Royal recorded a Memorandum of Purchase and Sale Agreement at the Charleston County Register of Deeds office. (R. pp. 620-2). This Memorandum stated that the parties entered into an agreement for the purchase and sale of the Pitt Street Property. *Id*. The Memorandum did not include the sales price nor was it enrolled in the name of nor otherwise provided to the Attorney General of South Carolina or Charleston County School District. *Id*.

Appellant Royal testified about his activity related to the Property from April 2013 to March 2018. (R. p. 288, line 13 – p. 345, line 3.). This included taking steps to release a cloud on the title which would be necessary for his acquisition of the Property. (R. pp. 623-4). Also, he began using the Property as his mailing address although he did not own the Property, but when he realized that the closing would not occur as soon as he thought, he stopped using it as his mailing address. (R. p. 32). Throughout the time period from April 2013 to March 2018, FKAC was never ready to close. (*Id*).

In March 2018, FKAC retained Patrick Stringer ("Stringer") as its closing attorney, and Appellant Royal had retained Treadwell Josey as his legal counsel for the closing. (R. p. 366, lines 10 – 22; R. pp. 634-5). Some time thereafter, Josey notified Stringer that notice needed to be made to the Attorney General pursuant to S.C. Code Ann. § 33-31-1202(f). (R. p. 524, line 13 – p. 525, line 11). 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, including a copy of the Purchase and Sale

Agreement, as required by S.C. Code Ann. § 33-31-1202 (f). (R. p. 636-7). This was the first notice the Attorney General received of the sale. (*Id*; R. p. 371, line 11 – p. 372, line 3). Thereafter, Appellant Royal and June Wells executed two addenda extending the closing date. (R. p. 136; R. p. 140).

After receiving notice of the proposed sale in April 2018, the Attorney General inquired about the sale and was provided the 2012 appraisal prepared by Robinson (R. pp. 662-4; R. pp. 121-34). The 2012 Appraisal, which valued the Property at $315,200 as of December 19, 2012, included a $15,000.00 deduction to the price for demolition of the existing building. (R. p. 127). This was deducted despite that Appellant had indicated he intended for the building to remain, leaving an actual appraised value of the property "as-is" at $330,200. (R. p. 544, lines 17 – 24). The Attorney General contacted Robinson who completed another appraisal at the request of the Attorney General. (R. pp. 559-72). Robinson determined the fair market value of the Property as of June 7, 2018, was $522,500. *Id*. At trial, Robinson explained his opinion that the building had no value, and he took the cost of demolition into consideration in valuing the Property. (R. p. 232, line 7 – p. 233, line 6). Despite its location in the downtown Charleston area, Robinson did not believe that the building would be classified as a historic structure. (R. p. 246, lines 9 – 17). He testified that the highest and best use of the Property, would be residential. (R. p. 229, line 20 – p. 230, line 1). Regarding how long an appraisal can be considered valid, Robinson 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, and sometimes a little more time can be acceptable. (R. p. 247, lines 5 – 18).

FKAC was never in a position to close as it would not agree to close without the Attorney General's consent. (R. p. 382, line 20 – R. p. 383, line 1). The Attorney General subsequently

advised Appellant Royal and/or his closing attorney that he would not consent to the sale of the Property because the purchase price was substantially below current market value, in addition to the concerns about the Agreement's unusual provisions. (R. p. 383, line 23 – p. 384, line 25).

By letter of May 11, 2018, FKAC notified Appellant Royal that it would not close on the Property. (R. p. 670).

## ARGUMENTS

### I. The Master Did Not Abuse His Discretion in Granting the Motion for Nonsuit

### (A): The Master's Order Of Nonsuit In This Case Is Procedurally Proper

This matter came before the Master for trial on December 15, 2022. Following the testimony of Royal, as Royal's final witness in his case in chief, and the Court's exchange with Royal's counsel thereafter, the Court entertained motions and heard oral arguments on the parties' motions and various legal issues. (R. p. 298, line 4 – p. 300, line 17). After considering oral arguments, the testimony received and the documentary exhibits admitted into evidence, the Court issued its ruling from the bench, to be followed by a formal order, dismissing the case pursuant to Rule 41(b), SCRCP.

Royal complains that he had not completed his case in chief at the time the Master ordered a nonsuit of Royal's case. Royal's complaint lacks merit. South Carolina jurisprudence holds that a nonsuit may be made at any time during the trial of the case. *Ahrens v. McDaniel*, 287 S.C. 63, 336 S.E.2d 505 (1985); Rule 41(b), SCRCP. A judge may grant a nonsuit on his own motion as well as on motion of counsel, including a motion of counsel for nonsuit solicited by the court. *Id.*

Under the circumstances of the present case, it was not error for the Master to grant a nonsuit after its consideration of the parties' motions, oral arguments, and the testimony and documentary

evidence presented to the Court. Royal received a full and fair opportunity to present his case in chief before the Court and fully testified as his only witness in his case in chief. The material facts presented during Royal's case in chief on the salient issues of the PSA, June Wells' alleged authority to execute the PSA on behalf of FKAC, the PSA's violation of public policy and principles of fairness, justice and equity, the Attorney General's role and responsibilities in connection with the PSA, and CCSD's interest in the Property were before the Master at the time he granted the nonsuit. Those material facts established the Respondents' right to judgment as a matter of law at this juncture of the trial, even before the Respondents had the opportunity to present their cases in chief to the Court.

Royal, thereafter, filed his Motion to Reconsider alleging, *inter alia*, procedural error in the Master's nonsuit. The Master held a hearing on Royal's Motion to Reconsider and CCSD's Motion to Exclude and Strike on May 20, 2022. At the hearing, the Master allowed Royal the opportunity for full oral argument as to additional and contested documents which he sought to admit as evidence in his case. Following oral arguments, and after full review and consideration of both Motions, the Master: (a) granted in part and denied in part, CCSD's Motion to Exclude and Strike (thus, allowing Royal a second opportunity and permitting him to enter additional documents into evidence in support of his case) and (b) thereafter, reaffirmed his order of nonsuit and denied Royal's Motion for Reconsideration. In short, the Master's nonsuit was procedurally proper in this case.

**(B) The Master did not abuse his discretion in granting the Motion for Nonsuit because June Wells did not have Authority to Execute the PSA, the Agreement violates public policy and is not fair, just, or equitable and the Agreement was not approved by the Attorney General.**

Respondent craves reference to Section III of its Brief herein as to June Wells' lack of

authority. Further, Respondent CCSD hereby joins in Sections I. A. (Motion for Nonsuit Standard of Review), I. B. (Specific Performance Standard of Review), I.C. (The Master did not abuse his discretion in granting the Motion for Nonsuit) of Respondent The South Carolina Attorney General's Brief as to the proper rulings by the Master finding the Agreement violates public policy, is not fair, just, or equitable and was not approved by the Attorney General, as well as the standard of review upon such rulings. Accordingly, these sections and all subparagraphs, including legal authorities, therein, are hereby incorporated herein by reference.

**II The Master did not abuse his discretion in granting the Charleston County School District's Motion to Intervene and allowing the Charleston County School District to be heard.**

**(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). "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.* "Moreover, the error of law must be so opposed to the trial court's discretion 'as to amount to a deprivation of the legal rights of the party.'" *Id.*

**(B) The Master did not abuse his discretion in granting CCSD's Motion to Intervene and allowing the District the opportunity to be heard.**

On February 7, 2019, Respondent CCSD filed a motion to intervene in this action. Respondent CCSD filed a memorandum in support of its motion on May 29, 2019, prior to oral arguments on the motion. Respondent's memorandum included the submission of Respondent FKAC's Amended Charter (R. p. 955) and Application for Amendment of Eleemosynary Charter with its Resolution (R. p. 956) as exhibits in support of its motion to intervene.

Appellant objected to CCSD's motion to intervene and filed a memorandum in opposition to Respondent CCSD's motion. (R. pp. 811-957). Appellant's opposing memorandum submitted twenty-six (26) exhibits, including the FKAC Application for Amendment of Eleemosynary Charter with its Resolution *Id.* Appellant argued against Respondent CCSD's motion, claiming that CCSD had no interest in the Pitt Street Property or transaction which is the subject to this action and had no claims or defenses that had questions of law or fact in common with Appellant's action. The Master rejected Royal's argument and granted CCSD's motion to intervene by a Form 4 Order, entered June 7, 2019 and a formal Order, entered August 22, 2019, respectively. (R. pp. 102-4; R. pp. 78-92). Royal failed to file a motion for reconsideration of the Master's orders, but argues on appeal that these orders contain erroneous substantive rulings unaddressed at trial, despite Royal's full opportunity to challenge these rulings at trial. The Master's Orders comply with South Carolina law in all respects and do not constitute an abuse of discretion.

In 1967, the South Carolina General Assembly enacted Act 340, 1967 S.C. Acts 340. Act 340 created the Charleston County School District, which encompassed all of Charleston County. Act 340 consolidated the eight existing school district located in Charleston County (including Charleston County School District #20) into the single and newly created county wide school district to be known as the Charleston County School District. Act 340 designated the Charleston County School District a body of politic and corporate as provided in Section 21-111 of the Code of Laws of South Carolina, 1962, and vested Charleston County School District "with all of the powers, duties, and assets" of the eight school districts. In addition to being vested with the assets, including real property assets, of the eight school districts, the Charleston County School District was expressly empowered to authorize the purchase or sale of land, the planning and construction of new school facilities, the maintenance and repair of existing buildings and grounds, and the

development of long-range planning for physical facilities and the educational program in the county.

The eight districts continued their existence as special districts for administrative purposes only as expressly set forth in Act 340 and were labeled "constituent districts", including Charleston County School Constituent District #20 (District #20), which covers downtown Charleston and encompasses the schools located on the Charleston peninsula. Under Sections 1, 6, 7 and 8 of Act 340, the constituent districts retained their independent boards of trustees and independent administrative authority, subject in certain instances to the approval of the CCSD, over the very distinct and limited functions expressly delegated to the constituent districts in the Act. These limited functions include "(1) employment and assignment of teachers or other professional employees; (2) employment of constituent district personnel; (3) pupil assignments and student discipline; and (4) limited oversight over school bus transportation." Act 340, sections 6, 7, and 8.

In summary, pursuant to Act 340, all fiscal and administrative powers and duties, as well as all assets held by the eight school districts were absorbed by and vested in the CCSD, saving only those narrow administrative functions for the constituent districts cited above. (R. pp. 78-92); *United States II,* 960 F.2d 1227 (4th Cir. 1992); Act 340. None of these limited functions reserved to the eight Constituent School Districts retain or grant property rights to the constituent school districts. Instead, all assets of the constituent school districts (including District #20), including all real and personal property, pass to and become the property of the Charleston County School District. *See* Act 340.

In addition to Act 340, additional statutory and general laws of South Carolina establish that upon consolidation of school districts, the consolidated district succeeds to all of the assets of the

former districts. *See Smythe v. Stroman,* 251 S.C. 277, 162 S.E.2d 168 (S.C. 1968); *Walker v. Bennett*, 125 S.C. 389, 118 S.E. 799 (S.C. 1923); *Boatwright v. McElmurray*, 247 S.C. 199, 146 S.E.2d 716 (S.C. 1966); S.C. Code of Laws § 59-17-70 (1976).

The above precedent establishes that Charleston County School District #20's interest in the Pitt Street property, and the property and/or all proceeds of the sale therefrom, shall inure to the benefit of the CCSD. (R. pp. 78-92). In addition to this precedent, CCSD hereby joins in Section III of Respondent, The South Carolina Attorney General's Brief as to the issue of CCSD's intervention. Accordingly, this section and all subparagraphs, including legal authorities, therein are hereby incorporated herein by reference.

The Master ruled properly and did not abuse his discretion in allowing CCSD to intervene in this action.

**III June Wells Lacked the Authority to Execute the PSA and Sell the Pitt Street Property On Behalf of FKAC.**

**(A) The 1994 Nonprofit Act Applies to FKAC**

Appellant wrongly contends that FKAC is not governed by the current 1994 Nonprofit Act ("1994 Act"). His contention is based on three arguments: 1) that FKAC is and has remained governed by Act No. 219, 1900 S.C. Acts 390 ("1900 Act") since its incorporation in 1901; (2) that FKAC does not meet the 1994 South Carolina Nonprofit Act's definition of a "corporation" and/or "public benefit corporation"; and (3) that to be governed by the 1994 Nonprofit Act ("1994 Act"), SC Code § 33-31-1701 (b) requires FKAC to have either filed an irrevocable election to be governed by the 1994 Act or be the product of a merger. In taking this position, Appellant errs in ignoring FKAC's original charter and subsequent resolution, subsequent Certificates of the South

Carolina Secretary of State and the predecessor statutes and prior legislative history related to the 1994 Act.

The above documentation and legal precedent establish that FKAC is indeed governed by the 1994 Act as a public benefit corporation. Prior to February 19, 1900, nonprofit corporations in South Carolina were chartered by the legislature and/or cities or other local governments. (*See* § 33-31-305; *accord* South Carolina Reporters' Comments at § 33-31-305 and §-1701(b)). On February 19, 1900, the General Assembly of South Carolina enacted Act No. 219, 1900 S.C. Acts 390 ("1900 Act"). The 1900 Act transferred that power to charter nonprofit corporations to the Secretary of State.

FKAC was originally incorporated as an eleemosynary corporation in 1901 pursuant to the 1900 Act by its January 24, 1901 Certificate of Incorporation which is recorded in Records of the Secretary of State, Corporation Charter Division, Eleemosynary Charter Number 44 on deposit with the South Carolina Department of Archives and History. (R. pp. 638-42; R. p. 647). FKAC's Certificate of Incorporation states in relevant part:

> "NOW, THERERFORE, I, M.R. Cooper, Secretary of State, by virtue of authority in me vested, do hereby declare the said [FKAC] to be a body politic and corporate, with all of the rights, powers, privileges and immunities, and subject to all the limitations and liabilities conferred by an Act of the General Assembly of South Carolina, entitled: 'An Act to Provide for the Incorporation of Religious, Educational, Social, Fraternal or Charitable Churches, Lodge, Societies, Associations or Companies, and for Amending the Charters of those already formed, and to be formed, "approved February 19, A.D. 1900, **and other provisions of law**." (emphasis added). (R. pp. 638-42).

Between the dates of enactment of the 1900 Act and the current 1994 Act, the legislature promulgated several versions of South Carolina acts related to the formation of nonprofit corporations. Of specific note are the 1962 version contained in Chapter 13 Charitable, Social and

Religious Corporations §§ 12-751 *et seq.* ("1962 Code") and the 1976 version contained in S.C. Code Ann. §§33-31-10 *et seq.* (1976) Nonprofit Corporations Generally ("1976 Code"). The 1900 Act was first legislation to empower the Secretary of State to issue certificates of incorporation to various entities, including schools, etc., for, *inter alia*, educational, charitable or eleemosynary purposes. *See* Sect. 1, 1900 Act; *accord,* SC Code §12-751 (1962) and SC Code §33-31-10 (1976). Filing requirements of the 1962 Code and the 1976 Code remained virtually unchanged from the filing requirements under the 1900 Act. *See* Sect. 2, 1900 Act; *accord*, SC Code § 12-752 (1962) and SC Code §33-31-20 (1976).

While some additions have been made, the 1994 Act filing requirements also require that same information. *See* SC Code §33-31-202. The 1900 Act expressly states the powers held by corporations chartered thereunder, such powers which are also included in the 1962 Code and the 1976 Code. *See* Sec. 4, 1900 Act; *accord*. SC Code § 12-758 (1962) and SC Code § 33-31-100 (1976).

Finally, the 1900 Act allowed for amendments to the Charter of these corporations with provisions for amendments continuing throughout the ensuing years under further codifications of the South Carolina nonprofit laws. *See* Section 8, 1900 Act; *accord* SC Code §12-761 (1962) and SC Code §33-31-130 (1976); SC Code § 33-31-302.

On January 16, 1971, FKAC filed its Application for Amendment of Eleemosynary Charter, thereby requesting an amendment such that the residual assets of FKAC would be turned over to Charleston School District 20 upon its dissolution. (R. p. 647). That application certified compliance "in all respects with Title 12-761, of the Code of Laws of South Carolina, 1962, and all amendments thereto." *Id.* On February 5, 1971, the Secretary of State certified that amendment

to the Charter, and its compliance in all respects with the provisions of the 1962 Code, and all amendments thereto. (R. p. 648).

Furthermore, of paramount significance, §33-31-90 of the 1976 Code expressly states that "[a]ny corporation ***heretofore formed for any of the purposes enumerated in §33-31-20*** (emphasis added) shall be deemed to have qualified under the provisions of §33-31-10. Under § 33-31-20, any school, association, company or corporation organized for educational, charitable or eleemosynary purposes shall be deemed to qualify under the provisions of §33-31-10.

By the express language of the 1994 Act, Chapter 31 of Title 33 "applies to all domestic corporations which on this chapter's effective date were governed by Title 33, Chapter 31 of the 1976 Code." SC §33-31-1701(a).

Certainly, FKAC's charter and resolution establish that is organized for a charitable purpose and upon dissolution must distribute its assets to another charitable entity. Thus, FKAC qualifies as a public benefit corporation under the 1994 Act. SC Code SC §33-31-101, *et seq*.

Appellant ignores the above statutory provisions and the progression of the nonprofit laws in South Carolina and improperly argues that FKAC must have either filed an irrevocable election or be the product of a merger to be governed by the 1994 Act; [Appellant contends that an irrevocable election] must be filed or FKAC must be the surviving corporation resulting from a merger per SC §33-31-1701(b) and (c). (*See also* South Carolina Reporters' Comments regarding §1701(b) which state in part: "Amended Title 33, Chapter 31 applies only to corporations chartered under former Title 33 Chapter 31 ***and its predecessors*** (emphasis added) and not, therefore, to entities organized under any other chapter including, for example, Title 33, Chapters 35 [public

service districts], 37 [Business Development Corporations], 39 [County Business Development Corporations], 45 [Cooperative Associations], 47 [Marketing Cooperative Associations], 49 [Electric Cooperatives] and 53 [Business Trusts]…")

The flaw in Appellant's argument is further illustrated by SC Code §33-31-305 under the 1994 Act which holds that for nonprofits that were chartered **prior** to enactment of the 1900 Act, the process contained within §33-31-1701(b) provides a vehicle for them to be governed by the 1994 Act through merger into a nonprofit governed by the 1994 Act or by filing an irrevocable election. (*See* South Carolina Reporters' Comments §33-31-305.) FKAC was chartered after enactment of the 1900 Act. Even as to charitable corporations created prior to 1900, SC Code §33-31-305 grants in addition to the powers theretofore granted to such charitable corporations, all powers enumerated in §33-31-302 of the 1994 Act. This particular statute also has a long history reflecting the evolution of the nonprofit statutes in South Carolina. (*See* §33-31-110 1976 Code, §12-759 1962 Code, and citations to the 1952 Code, 1942 Code, and 1932 Code cited therein).

In addition, on or about August 23, 2013, Royal requested and received a Certificate of Existence for a Non-Profit Corporation from the SC Secretary of State. (R. p. 378, line 10 – p. 379, line 5). The Certificate of Existence from the Secretary of State further establishes that the 1994 Act governs FKAC and reads in part:

> FREE KINDERGARTEN ASSOCATION OF CHARLESTON, a Non-Profit Corporation duly organized under the laws of the State of South Carolina on January 24th, 1901, has as of the date hereof filed as a non-profit corporation for religious, educational, social, fraternal, charitable, or other eleemosynary purpose, and has paid all fees, taxes and penalties owed to the Secretary of State, that the Secretary of State has not mailed notice to the company that it is subject to being dissolved by administrative action pursuant to section 33-31-1404 of the South Carolina code and that the non-profit corporation has not filed articles of dissolution as of the date hereof. (R. p. 649).

**(B) FKAC's Pleadings, Prior Rulings, and Sworn Statements Do Not Affirm June Wells' Authority to Execute the PSA for FKAC.**

**FKAC's Reply to Crossclaim**

Appellant argues that the trial court's Order is directly contradicted by the allegations in FKAC's Reply to Crossclaim alleging some authority of June Wells to represent FKAC. FKAC's Reply, however, is an unverified pleading setting forth allegations and denials to be proven at trial. FKAC's Reply is not evidence. It was never entered into evidence as an exhibit at trial. Furthermore, the specific affirmative allegation of authority of June Wells set forth in FKAC's Reply is limited to some unspecified authority to "represent" FKAC. It does not state that June Wells had authority to sell the Pitt Street Property. In fact, FKAC expressly denies that the PSA was a valid contract in FKAC's Answers to Plaintiff Michael D. Royal's First Requests for Admission admitted into evidence at trial. FKAC's pleadings do not constitute clear evidence of actual or apparent authority conferred by FKAC on June Wells to execute the PSA.

**2010 Charleston County Probate Court Order, 2010 Affidavit of June Wells and FKAC's Counterclaim ¶7**

Appellant argues that the trial court's Order conflicts with a 2010 Charleston County Probate Court order and alleges the order recognizes June Wells as "the only person in the world with authority to act for FKAC". (Appl. Br. p. 17). The trial court properly noted that the Charleston County Probate action and resulting Probate Court order was limited to the issue of the equitable deviation of the Marion Stuart Hanckel Trust and not the sale of FKAC's remaining assets or FKAC's conferring of authority upon June Wells to enter into a contract for the sale of such asset. (R. p. 31).

June Wells' participation in the Probate Court proceeding was limited to the presentation

of her affidavit. Ms. Wells executed the affidavit in her individual capacity. While referencing FKAC in the text of her affidavit, Ms. Wells' sworn statement claimed that she was solely an advisory member of FKAC. Ms. Wells did not identify herself as a voting member of FKAC nor as a member of the board of directors of FKAC. Upon considering Ms. Wells' affidavit, the Probate Court found June Wells to be the "last living advisory board member" of the FKAC, a position, in fact, holding no voting authority and reserved only for "gentlemen members" under the FKAC Constitution. (R. pp. 654-661).

Furthermore, the Probate Court proceeding and resulting order made no findings whatsoever as to FKAC authorizing June Wells to sell the Pitt Street property, being the remaining assets of FKAC. Indeed, the Probate Court's finding of June Wells' "capacity" to act on behalf of FKAC in connection with the Probate Court proceeding was limited to the presentation of June Wells affidavit setting forth the current financial and non-operational status of the FKAC and voicing no objection to a request initiated by the Hanckel Trust for equitable deviation. An agency relationship allowing Mr. Wells to execute the PSA for the sale of FKAC's last remaining asset cannot be established legally or factually solely by her words and actions in the Probate Court action. *Young v. S.C. Dep't of Disabilities & Special Needs,* 374 S.C. 360, 649 S.E.2d 488, 491 (2007); *Shropshire v. Prahalis,* 309 S.C. 70, 419 S.E.2d 829 (Ct. App. 1992).

Nonetheless, Appellant argues that the AG himself championed June Wells' authority and consent, by preparing Ms. Wells' affidavit which Mary Frances Jowers, the AG's counsel of record in this action, sent to Ms. Wells. To the contrary, and with respect to the issue of the sale of the Pitt Street property under the PSA, Ms. Jowers, as the AG's counsel, responded to the trial court's query at trial as follows:

Although the AG was "not taking a position on authority, [it would] note, as [CCSD's counsel] pointed out, you know, authority to sell a building and do the final steps is different from authority to comment on an equitable deviation action, just to tell the Court, hey, here's what's going on in our operating. That's a different standard…"

(R. p. 532, line 23 – p. 533, line5).

Also, Ms. Jowers, as the AG's counsel, further engaged the trial court on this issue as a follow up to her earlier comments in the colloquy below:

AG's Counsel: "…Ms. Wells' authority, to comment on it, to tell the Court what was happening in…with the Free Kindergarten because she was the only person left maybe at that time is different from her authority to sell a building. So in terms of that…

The Court: The last remaining asset…

AG's Counsel: Correct.

The Court: …of the entity?

AG's Counsel: Correct, correct.

(R. p. 533, line 14 – p. 534, line 1).

Finally, Appellant points to FKAC's Counterclaim ¶7 to argue that FKAC itself filed the Probate Order to support its request that the Court determine "whether the sole surviving member of FKAC is June Murray Wells and is therefore authorized to sell the aforesaid property." (Appl. Br p. 18.)

Once again, Appellant's citation to a pleading of FKAC (i.e., FKAC's Counterclaim), cites an unverified pleading setting forth allegations to be proven at trial. FKAC's Counterclaim is not evidence. It was never entered into evidence as an exhibit at trial.

Furthermore, Appellant's assertion mischaracterizes FKAC's Counterclaim ¶7 inasmuch as that paragraph does not make an affirmative statement as to June Wells' being authorized to sell the Pitt

Street property, but instead, requests the court to make a declaration as to the questions of Ms. Wells membership status with FKAC and whether she has authority to sell the property. The trial court did, in fact, determine and declare that Ms. Wells did not have authority to sell the Pitt Street property under the PSA in this action.

**2013 Quitclaim Deed**

Royal argues that he worked to clear a title defect on FKAC's behalf resulting in a quitclaim deed containing a sworn affidavit of June Wells evidencing her authority whereby the City of Charleston conveyed a reversionary interest in the Pitt Street property to FKAC. In fact, Royal's own letter to Ms. Carducci (R. p. 623-4) belies this argument by establishing his efforts to clear title were in his own interest stating the "[b]efore I get ahead of myself with planning and neighborhood meetings, I would like to ensure that title to the Property is clear" and that his "acquisition of the Property would depend on removing this cloud from the title…". Therefore, Royal asked the City of Charleston to write a quitclaim deed and referenced the PSA as the source of legal authority for the sale. Royal prepared the PSA designating June Wells as FKAC's "authorized agent" which, notably, is the same designation assigned to June Wells in the quitclaim deed affidavit. June Wells was not copied on Royal's letter and the quitclaim deed was a product of the collaboration between Royal and the City of Charleston and filed by Royal's LLC (Pareto Group LLC) with the Charleston County RMC.

**(C) June Wells Did Not Possess Express Authority to Execute the PSA on FKAC's Behalf.**

Appellant argues that June Well's had express authority to act for FKAC by virtue of alleged roles he claims she had in the organization. Appellant's argument speaks in general terms and fails

to establish express authority on the part of June Wells to execute the PSA. The trial court rejected Appellant's claim of express authority and found that June Wells did not have express authority to execute the PSA on behalf of FKAC. The trial court's ruling correctly applies the law of express authority in South Carolina and is supported by the evidence in the case.

In South Carolina, express authority must be expressly conferred upon the agent by the principal. *Richardson v. PV, Inc.*, 383 S.C. 610, 615, 682 S.E.2d 263, 265 (2009). The roles Appellant alleges June Wells held in FKAC do not expressly confer actual authority upon Ms. Wells to execute the PSA.

**June Wells' Alleged Membership in FKAC**

Appellant argues FKAC is a member-controlled entity and that was not controlled by a board of directors, but instead that its members formed the governing body vested with authority to approve its business matters and transactions. Further, Appellant argues that June Wells held a 100% membership interest in FKAC. Appellant claims that these arguments constitute sufficient proof of June Wells' "express authority to act for FKAC". Appellant's argument lacks merit as set forth below.

Appellant's misplaced argument that FKAC is a member-controlled entity is based upon his misinterpretation of FKAC's Constitution and Charter ( R. pp. 654-61), 1931 Certificate of Resolution adopted by the South Carolina Kindergarten Association (R. pp 643-6), 1971 Application for Amendment of Eleemosynary Charter of FKAC (R. p. 647), and the 1971 South Carolina Secretary of State certification of FKAC's 1971 amendment to its charter (R. p. 648).

A review of these documents; however, establish that they neither, individually nor

collectively, confer express authority upon June Wells to execute the PSA and sell the last remaining asset of FKAC.

First, the records cited by Appellant contain abundant evidence of the existence and operation of a board of directors for FKAC.

Article VII of FKAC's Constitution and Charter expressly references and establishes a board of directors in the form of the Executive Committee. (R. 654-61). The Executive Committee was expressly charged with the duty to transact the necessary business of the FKAC and required a quorum of four members to do so. FKAC never amended its Constitution and Charter to dissolve its Executive Committee or otherwise repeal, amend or modify its duties or quorum requirements.

The 1931 Certificate of Resolutions shows adoption of the name change resolution at a meeting of the members by motion duly made and seconded. (r. PP. 643-6). The Certificate reflects that it required the sworn signatures of two officers of FKAC (i.e., President and Secretary) and expressly notes approval of the board in the lower left hand corner of the document. *Id.*

The 1971 Application constitutes a petition of the expressly recognized authorized managing board petitioning the South Carolina Secretary of State to amend the FKAC charter per the resolution distributing the residual assets of FKAC. (R. p. 648).

The 1971 South Carolina Secretary of State certification expressly recognizes the existence of a Board of Directors for FKAC and identifies by name the individuals constituting a majority of the Board. (R. p. 649). June Wells was not identified as a member of the Board of Directors. Upon petition of the majority of the Board of Directors, [the SC Secretary of State] certified the amendment to the charter of FKAC pursuant to the resolution, authorized and certified by a majority

of the Board of Directors, whereby FKAC resolved 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." *Id.*

Second, the above-referenced documents fail to prescribe express voting rights or otherwise confer express authority on any single member or group of members to sell all or substantially all, of the assets of FKAC.

Appellant's further argument that June Wells was the sole surviving member of FKAC, possessing 100% of the voting power of FKAC's alleged governing body, the members, at all relevant times lacks merit and does not cure the above defects in Appellant's proof. Specifically, the records is devoid of evidence of June Wells' satisfaction of the requirements of membership in FKAC (i.e., Appellant failed to produce evidence of June Wells' nomination and election by two-thirds of the members present, that her name was proposed at one meeting and voted on a the next, or of her payment of annual dues). (R. pp. 656-7).

Moreover, Appellant's citations to particular documents in his Brief record as support for Appellant's argument do not establish clear evidence of express authority conferred by FKAC on June Wells. *See Brief of Appellant, Pg. 19, Lines 12-13*. The deficiencies of proof in Pl. Exs. 29, 29A and 38 have previously been discussed.

Pl. Ex. 79 is a Stipulation of Fact, dated September 30, 2021, between Appellant and FKAC, through its counsel, dated September 30, 2021. (R. pp. 679-80). It stipulates that June Wells was the sole member of FKAC from November 23, 2010 until the date of her death, November 29,

2020. *Id.* The Stipulation; however, does not address the issue of authority at all. It fails to stipulate to any general express authority conferred by FKAC upon June Wells or any specific express authority conferred by FKAC upon Ms. Wells to sell all or substantially all, of FKAC' property (including authority to execute the PSA selling the Pitt Street property). Likewise, it fails to stipulate to any such express authority conferred upon June Wells simply by virtue of membership in FKAC.

Following this Stipulation, FKAC, in its answers to Appellant's Requests for Admission, dated October 11, 2021 (barely a month after its Stipulation), denied that the PSA was a valid contract as of the date of execution in 2013. (R. p. 650). In providing a basis for that denial, FKAC stated in answers to Appellant's interrogatories that "this denial is based on the issues that have been raised relative to June Wells' capacity to execute the contract. These issues have to do with the formalities of the [FKAC]including but not limited to Ms. Wells being a Board Member or not, whether her mental capacity at the time was sufficient to execute such a contract without legal advice or assistance, and whether her status as the sole surviving member of the FKAC and her acting as director of same entitled her to sign the contract." (Plaintiff's Ex. 81, R. p. 1483).

In addition, FKAC in its answers to Appellant's Requests for Admission called into question June Wells' mental competency during the time period, 2010 through approximately May 25 of 2018 [and] acknowledged that it could neither admit nor deny that June Wells was mentally competent during the time period, 2010 through approximately May 25 of 2018. (R. pp. 651-2). Specifically, FKAC acknowledged that June Wells mental competency waned in her later years prior to her death in 2020 and that it was clear from FKAC's review of her deposition in 2019 that she was often confused and could not remember dates and otherwise appeared to have some

diminution regarding her mental capacity. (*Id*).

**June Wells' Statements**

Pl Ex. 80 contains the Attorney General's Responses to Appellant's First Requests for Admission to the Attorney General. (R. p. 681-5). The Attorney General's Reponses reference the description of June Wells as an advisory member of the FKAC with capacity to act on behalf of the FKAC as contained in affidavits of Ms. Wells, dated June 23, 2010 and November 29, 2020, as well as June Wells' description of herself as a board member at times in her 2019 deposition. However, the Attorney General's Responses denied that June Wells had authority to sell the Pitt Street property on behalf of FKAC during the period of 2010 until the time of her death, November 29, 2020. The Attorney General's responses do not constitute evidence of express authority conferred upon June Wells to execute the PSA on behalf of FKAC.

In addition, the issue of June Wells' affidavit statements claiming to be an advisory member of the FKAC have previously been discussed and do not establish express authority to execute the PSA and sell FKAC's last remaining asset.

Furthermore, Royal had the opportunity to move to enter June Wells' deposition testimony, or parts thereof, into evidence at trial but chose not to do so.

Finally, and regardless of the above flaws in Royal's proof of agency, any agency relationship between FKAC and June Wells cannot be established solely by the words and actions of Ms. Wells.

The remaining exhibit cited in Appellant's Brief is Pl. Ex. 83. Exhibit 83 contains the

answers of Charleston Chapter No. 4, UDC and the Confederate Museum's Answers to First Set of Requests [of] Admission by Plaintiff. (R. pp. 695-9). These entities qualify their responses by stating that they lack specific information to either admit or deny the truth of the matters relating to June Wells' membership status with FKAC, whether June Wells' was a board member of FKAC and whether June Wells had authority to act on behalf of FKAC and, more specifically, authority to sell the Pitt Street property on behalf of FKAC. These responses then refer to hearsay statements of June Wells but then acknowledge that June Wells never quantified the extent of the authority (including the scope and limits thereof) she had to act on behalf of FKAC. (*Id*.)

These entities' lack of knowledge on these issues and their inability to either admit or deny such matters disqualifies these responses as clear evidence of June Wells' express authority to execute the PSA and sell FKAC's last remaining asset. Furthermore, Ms. Wells' hearsay statements as referenced in these responses cannot establish an agency relationship between FKAC and Ms. Wells, much less the express authority to execute the PSA and sell the Pitt Street Property. *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC,* 422 S.C. 544, 813 S.E. 292 (Ct. App. 2018)

Two additional documents cited in Appellant's Brief; i.e., FKAC's Reply to Crossclaim and Appellant's Complaint constitute allegations contained in pleadings required to be proven by Royal and/or previously discussed as failing to clearly establish authority to execute the PSA and sell the Pitt Street Property, the last remaining asset of FKAC.

**<u>June Wells' Alleged Other Roles With FKAC</u>**

Appellant argues that to the extent there was a group calling itself FKAC's board of directors, June Wells was its sole remaining member and, therefore, held 100% of that group's voting power during the relevant time. Appellant cites Pl. Exs. 16, 80 and 83 for this proposition. These documents have been previously discussed and fail to establish apparent authority.

Appellant further alleges June Wells held the position of "Director" (in the sense of "chief administrative officer") for FKAC and cites additional Pl. Exs. 12-16, 28-29, 29A, and 38, as well as FKAC's Reply and Motion for Appointment of Receiver in his failed attempt to prove agency encompassing the authority to execute the PSA on behalf of FKAC. FKAC's Receiver motion and the previously cited and discussed pleading and exhibits do not establish June Wells express authority to execute the PSA and sell the Pitt Street Property.

**FKAC's Failure to Execute The PSA In Compliance With The 1994 Act**

The South Carolina Nonprofit Corporation Act governs FKAC and the execution and performance of the PSA. The South Carolina Nonprofit Corporation Act requires in relevant part that: (a) each nonprofit corporation must have a board of directors; (b) all corporate powers must be exercises by or under the authority of and the affairs of the corporation managed under the direction of the board; (c) the board of directors must consist of three (3) or more directors; (d) the number of directors may be increased or decreased, but to no fewer than three (3), by amendment to or in the manner prescribed in the articles or bylaws; (e) a quorum of the board of directors consists of a majority of the directors in office immediately before a meeting begins, but in no event may the articles or bylaws authorize a quorum of fewer than the greater of one-third of the number

of directors in office or two directors; (f) if a quorum is present when a vote is taken, the affirmative vote of a majority of directors present is the act of the board; and the dale of all, or substantially all, of a nonprofit corporation's property must be approved by the Board of Directors and by the members of a nonprofit corporation. SC Code ¶§§ 33-31-801, 33-31-803, 33-31-824, and 33-31-1202.

The record in this case is devoid of evidence that the sale of the 34 Pitt Street Property was approved by a quorum of the Board of Directors of FKAC, duly constituted of the required minimum of three (3) directors and by the members of FKAC in accordance with the above-cited mandatory statutory provisions of the South Carolina Nonprofit Corporation Act.

**(D) June Wells Did Not Possess Apparent Authority To Execute The PSA On FKAC's Behalf.**

Appellant argues that June Well's had apparent authority to act for FKAC by virtue of alleged roles he claims she had in the organization. Appellant's argument speaks in general terms and fails to establish apparent authority on the part of June Wells to execute the PSA and sell FKAC's last remaining asset. The trial court rejected Appellant's claim of apparent authority and found that June Wells did not have apparent authority to execute the PSA on behalf of FKAC. The trial court's ruling correctly applies the law of apparent authority in South Carolina and is supported by the evidence in the case.

In South Carolina, apparent authority is based on "representations made by the principal to the third party and reliance by the third party on those representations." *Young v. S.C. Dep't of Disabilities & Special Needs*, 374 S.C. 360, 367, 649 S.E.2d 488, 491 (2007). Apparent authority must be established based upon manifestations by the principal, not the agent. *Shropshire v.*

*Prahalis,* 309 S.C. 70, 419 S.E.2d 829 (Ct. App. 1992). To prove apparent authority, a party must show (1) purported principal consciously or impliedly represented another to be his agent; (2) reliance on the representation by a third party; and (3) change in position by third party in reliance on the representation. *Cowburn v. Leventis*, 366 S.C. 20, 39-40, 619 S.E.2d 437, 448 (Ct. App. 2005).

South Carolina law provides that an agency relationship cannot be established solely by the words and actions of the purported agent. *Id.* For apparent authority to exist, "[e]ither the principal must intend to cause the third person to believe the agent is authorized to act for him, or he should realize his conduct is likely to create such belief." *R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.,* 343 S.C. 424, 433, 540 S.E.2d 113, 118 (Ct. App. 2000).

In the present case, the legal burden is on Appellant Royal to prove that the purported agent, June Wells, had apparent authority to execute the PSA on behalf of FKAC. *Frasier v. Palmetto Homes of Florence, Inc.*, 323 S.C. 240, 473 S.E.2d 865 (Ct. App. 1996) (holding the legal burden is on the party asserting that an agency exists). Appellant Royal must show that all necessary elements of apparent authority exercised by the purported agent, June Wells, under her alleged agency relationship with FKAC are "clearly established" by the facts. *Id.* Further, Appellant Royal had a duty to use due care to ascertain the scope of the purported agent's authority (i.e., June Wells' authority) to act on behalf of FKAC.

Appellant Royal's evidence at trial fails to satisfy his burden of proof on this issue of apparent authority. At trial, the sole witness called by Appellant Royal to testify as to June Wells' alleged apparent authority was Appellant Royal himself. Appellant Royal is neither the principal, FKAC, nor the purported agent, June Wells.

The videotape deposition of June Wells was taken in this action on January 9, 2020. This action was tried by the Master on December 15, 2021. Appellant Royal had ample opportunity to move for the admission of June Wells' videotape testimony, or selected excerpts therefrom, into evidence at trial to attempt to support his claim that FKAC represented Ms. Wells to be its agent with sufficient authority to sell the last remaining asset of FKAC. Appellant Royal chose not to do so.

Instead, at trial and now on appeal, Appellant Royal relies upon self-serving and conclusory statements of his own, arguments of his legal counsel, alleged hearsay statements of staff members at the City of Charleston, alleged hearsay statements and conduct of June Wells and certain selected documents, some of which are incomplete, in his attempts to "clearly establish" June Wells' apparent authority to execute the PSA on behalf of FKAC. Appellant Royal failed to carry his burden of proof on this issue and the trial court rejected his argument of apparent authority. The trial court's ruling is proper under the law of agency and is supported by the evidence at trial.

As an initial matter, of course, Appellant Royal's counsel's arguments at trial (App. Br., Pg. 21 Tr. 320:3 – 321:14 (R. p. 526, line 3 – p. 527, line 14); Pg. 22 Tr. 106:4 – 108:6 (R. p. 312, line 4 – p. 314, line 6)) are not evidence and do not constitute proof of June Wells' apparent authority.

Appellant Royal's self-serving and conclusory statements include, to wit: (1) that prior to sending an unsolicited draft PSA prepared solely by Appellant Royal to June Wells at her home address on Folly Beach, SC in January 2013, he absolutely believed that she had authority to act on behalf of FKAC (App. Br. Pg. 21, Tr. 92:2 – 93:19 (R. p. 298, line 2 – 299, line 19); (b) that on the date June Wells signed the PSA prepared by Appellant Royal, he absolutely believed June Wells had authority to execute the PSA (App. Br. Pg. 21, Tr. 102:1 – 103:4 (R. p. 308, line 1 – p. 309,

line 4)); (c) that Appellant Royal believes June Wells had authority (App. Br. Pg. 22, Tr. 108:22 – 110:5 (R. p. 314, line 22 – 316, line 5)); (d) that between December 2011 and November 2012 is when Appellant Royal found out that June Wells controlled FKAC (App. Br. Pg. 21, Tr. 69:7 – 72:20(R. p. 275, line 7 – p. 278, line 20)). None of these statements, individually or collectively, establish June Wells' apparent authority.

Appellant Royal's testimony as to a City of Charleston staff member was limited to the statement that some interaction with the City of Charleston is where he got June Wells name from during his research into FKAC – specifically, he believed a City of Charleston staff person named Colleen Carducci led him to the name of June Wells. (App. Br. Pg. 21, Tr. 69:15-71:2(R. p. 275, line 15 – p. 277, line 2)). However, the City of Charleston's vague indication of some affiliation of June Wells with FKAC does not constitute a statement of her authority, or the scope thereof, if any, much less the authority to sell 34 Pitt Street, the last remaining asset of FKAC. Moreover, Pl. Ex. 4 (R. p. 589) – Email states Director of Real Estate Management for Charleston County, Colleen Carducci, has not been able to locate any information about FKAC other than that they own the property in question): (a) directly contradicts Appellant's own testimony that Ms. Carducci gave him June Wells' name in connection with FKAC, (b) limits Ms. Carducci's knowledge solely to the issue of FKAC's ownership of the property, and (c) is completely devoid of any information or statement as to June Wells authority to act in any manner on behalf of FKAC, much less to sell FKAC's remaining asset.

In short, Appellant Royal's testimony in this regard provides no clear evidence of June Wells alleged apparent authority to execute the PSA on behalf of FKAC.

Appellant Royal testified and argues on appeal that he relied upon the statements and

conduct of June Wells in forming his belief that she possessed apparent authority to execute the PSA on behalf of FKAC.

Specifically, Royal testified at trial and argues on appeal that: (1) his impression of June Wells when he met her was that she intended to sell 34 Pitt Street (App. Br. Pg. 21, Tr. 74:17 – 79:2 (R. p. 280, line 17 – p. 285, line 2)) (contradicted by Royal's Pretrial Brief filing); (2) his impression of all of June Wells representations and statements to him led him to firmly believe that she was in fact the authorized agent for FKAC (App. Br. Pg. 21, Tr. 91:12 – 92:19 (R. p. 297, line 12 – p. 298, line 19)); (3) he relied on statements directly from Ms. Wells that led him to believe that June Wells had authority for FKAC (App. Br. Pg. 21, Tr. 74:17 – 79:2 (R. p. 280, line 17 – p. 285, line 2)); (4) he relied on all of the conduct that he observed from June Wells (App. Br. Pg. 21, Tr. 74:17 – 79:2(R. p. 280, line 17 – p. 285, line 2)); (5) he relied on the fact that she was the only person who had access to the property and a key to the building; (6) June Wells showed him the 34 Pitt Street Property on November 4, 2012 (App. Br. Pgs. 21-22, Tr. 78:17 – 79:2 (R. p. 284, line 17 – p. 285, line 2)); (7) he relied on documents that June Wells gave him over a period of time (App. Br. Pgs. 21 – 22, Tr. 79:7-10 (R. p. 285, lines 7-10) , Tr. 91:12 – 92:19 (R. p. 297, line 12 – p. 298, line 19), Tr. 102:1 -103:24 (R. p. 308, line 1 – p. 309, line 24).

Appellant Royal's arguments that June Wells' words and actions establish June Wells' apparent authority fail as a matter of law. It is an essential principle of South Carolina agency law, that an agency relationship cannot be established solely by the words and actions of the purported agent. *Cowburn v. Leventis*, 366 S.C. 20, 619 S.E.2d 437. Thus, June Wells' alleged words and conduct do not establish apparent authority to execute the PSA on behalf of FKAC.

Appellant's argument fails on a factual basis as well. The majority of Appellant's support

for his argument consists of conclusory allegations devoid of specific facts to establish apparent authority. *See supra CCSD Brief, Pg. 35-8.* The few statements of fact asserted by Appellant are limited to the fact that June Wells had access to the property, had a key to the building and showed Appellant the Pitt Street Property on November 4, 2012. These simple facts related to access to the Property do not rise to the level necessary to establish apparent authority for June Wells to execute the PSA for the sale of the last remaining asset of FKAC, i.e, the Pitt Street Property.

Likewise, Appellant's reliance on certain documents he claims June Wells gave him do not prove apparent authority to execute the PSA for sale of the Property on behalf of FKAC. A review of these documents below exposes Appellant's failure to satisfy his legal burden to prove June Wells' apparent authority to execute the PSA and sell the Property on behalf of FKAC thereunder:

Pl. Ex. 7 (R. pp. 590-3) – This newspaper article does not identify June Wells as a member of FKAC, a member of the executive committee of FKAC or a member of any board of directors of FKAC. The article identifies June Wells as simply "director of the school." Also, this article fails to address, much less clearly establish any authority conferred upon June Wells to execute a contract of sale for the Pitt Street Property (i.e., the last remaining asset of FKAC).

Pl. Ex. 12 (R. p. 605) – This letter was not authored by the principal, FKAC. The reference in this letter is to both FKAC and The Confederate Museum. The record reflects June Wells was a member of The Confederate Museum. (R. pp. 695-8). This letter is addressed to June Wells as an individual, does not reference June Wells in any particular representative capacity on behalf of FKAC, fails to identify June Wells as a member, officer, executive committee member, or member of any board of directors of FKAC, and fails to address, much less establish any authority conferred upon June Wells to execute a contract of sale for the Pitt Street Property (i.e., the last remaining

asset of FKAC). On the other hand, it is established that June Wells was a member of the Confederate Museum. In fact, Appellant acknowledges in documentation attached to his Pretrial brief that the proposed Lease attached to this letter was signed by June Wells on behalf of The Confederate Museum, not FKAC. (R. p. 1220).

Pl. Ex. 13 (R. p. 606) - This form was not authored by the principal, FKAC. This is a SC Department of Revenue form concerning withholding taxes. This form is addressed to June Wells as an individual, does not reference June Wells in any particular representative capacity on behalf of FKAC, fails to identify June Wells as a member, officer, executive committee member, or member of any board of directors of FKAC, and fails to address, much less establish any authority conferred upon June Wells to execute a contract of sale for the Pitt Street Property (i.e., the last remaining asset of FKAC).

Pl. Ex. 14 (R. pp. 607-8) – This is a letter from a Ms. Teresa Miller to the SC Tax Commission. Ms. Miller is not identified as holding any particular title, office or position in this letter. The letter is not issued under FKAC letterhead or otherwise indicative of being a business record of FKAC. This letter identifies June Wells as simply a "CONTACT PERSON". The letter fails to identify June Wells as a member, officer, executive committee member, or member of any board of directors of FKAC, and fails to address, much less establish any authority conferred upon June Wells to execute a contract of sale for the Pitt Street Property (i.e., the last remaining asset of FKAC).

Pl. Ex. 15 (R. p. 609) - This letter was not authored by the principal, FKAC. This is a SC Department of Revenue letter concerning a tax refund. This letter is addressed to June Wells as an individual, does not reference June Wells in any particular representative capacity on behalf of

FKAC, fails to identify June Wells as a member, officer, executive committee member, or member of any board of directors of FKAC, and fails to address, much less clearly establish any authority conferred upon June Wells to execute a contract of sale for the Pitt Street Property (i.e., the last remaining asset of FKAC).

Pl. Ex. 16 (R. pp. 610-11) – This document is limited solely to the simple transaction of FKAC opening a bank account at SouthTrust Bank. The document contains the purported signatures of Pauline I. O'Rourke, Irene F. Barnes and June Murray Wells. The notation "Board Members" is written in hand-writing after these signatures; however, this notation appears to be added after these signatures in a hand-writing different from the purported signatures of Ms. O'Rourke, Barnes and Wells and without evidence at trial (including handwriting evidence) as to the author of this notation. The signature lines actually executing the document assign the following titles to these three individuals:

June Murray Wells – Director

Pauline I. O'Rourke – Selected Board Member

Irene F. Barnes – Selected Board Member

The letter fails to identify June Wells as a member, officer, executive committee member, or member of any board of directors of FKAC. The sole designation for June Wells is "Director" and fails to address, much less establish any authority conferred upon June Wells to execute a contract of sale for the Pitt Street Property (i.e., the last remaining asset of FKAC).

The transaction of opening a bank account is not the equivalent of transaction for the sale of all, or substantially all of the assets of a nonprofit corporation. Likewise, the authority necessary to open a bank account for a nonprofit is not equivalent to the authority necessary to sell all, or

substantially all of the assets of a nonprofit. While it would be typical for a "Director" of a nonprofit to exercise authority to open a bank account for the nonprofit as part of their duties in managing the daily operations of a nonprofit, such authority certainly does not rise to the level of authority necessary to sell all, or substantially all of the assets of the nonprofit.

Finally, this document does not relate to the sale of all, or substantially all of the assets of FKAC. More specifically, it does not confer upon June Wells the authority to execute a contract of sale for the Pitt Street Property (i.e., the last remaining asset of FKAC).

In addition to the above documents Appellant claims to have received from June Wells, Appellant cites additional documents under which he argues that June Wells held herself out to third parties as being "an agent authorized to act on FKAC's behalf." Appellant's argument lacks merit on numerous grounds, to wit:

(1): Appellant's argument relies on the alleged actions of the purported agent, June Wells, and not the actions of the principal;

(2): Appellant's argument is framed on the basis of some general authority to act on FKAC's behalf. Consequently, Appellant's argument fails to consider any limitations on the scope of such authority (i.e., the authority to perform certain actions on behalf of company does not necessarily confer unfettered authority to perform all actions on behalf of a company) and is not determinative of the issue of whether June Wells held the authority necessary to execute the PSA for the sale of the Pitt Street Property as the remaining residual asset of FKAC.

(3): The majority of the documents Appellant relies on to support his argument have previously been addressed herein and do not establish apparent authority for June Wells to execute the PSA

on behalf of FKAC. These documents include Pl. Exs. 12-16, 28-29, 29A, 38 and 83. *See supra*.

(4): The remaining documents, not previously discussed, which Appellant relies upon to support his argument are Pl. Exs. 31, 32, 55 and 56. These documents, discussed below, likewise do not present clear evidence of apparent authority and fail to carry Appellant's burden of proof on this issue:

Pl. Ex. 31 (R. pp. 620-2) – This document was not authored by FKAC. In fact, this document was drafted solely by Royal. Royal exercised full control over the language chosen for this Memorandum, including the signature block for June Wells. Notably, Royal fails to refer to June Wells as a member, director, officer, executive committee member, or director on the board of directors. Instead, Royal selects and assigns the generic title of "Authorized Agent" to June Wells. Moreover, Royal's reliance on this document stakes his argument to the alleged actions of himself and the purported agent and not the actions of the principal.

Pl. Ex. 32 (R. pp. 623-4) – This document was not authored by FKAC. In fact, this document was drafted solely by Royal. Royal exercised full control over the language chosen for this letter and asserts a number of self-serving statements with respect to his "Intention to Acquire and Use the Property." Notably, Royal refers to June Wells' "association" with FKAC as her being the "director" of the organization, a position not prescribed to June Wells by Royal at the time of his preparation or execution of the PSA. Also, Royal fails to reference the scope of any authority allegedly held by June Wells as "director" and further fails to refer to June Wells as a member, officer, executive committee member, or director on the board of directors Royal's letter fails to include June Wells' signature and she was not copied on this letter. The letter references June Wells' signing of the PSA, a document solely prepared by Royal in this transaction. Finally, this

letter states that on the same day the PSA was signed, "we (referring to Royal and June Wells) recorded a memorandum of agreement with the Charleston RMC." Royal's statement is incorrect inasmuch as it was Royal acting alone who recorded the memorandum of agreement with the Charleston RMC. *See* Pl. Ex. 32 (R. pp. 623-4). In addition, this letter contains Royal's description of an alleged hearsay statement of June Wells regarding payments to the City of Charleston, yet acknowledges a lack of supporting documentation for this hearsay statement. Finally, once again, Royal's reliance on this document stakes his argument to the alleged actions of himself and the purported agent and not the actions of the principal.

Pl. Ex. 55 (R. pp. 634-5) – This email chain was initiated by Royal, not FKAC. Royal directed his email to his real estate attorney, FKAC's real estate attorney (i.e., Patrick F. Stringer, Esq. retained five (5) years after execution of the PSA) and June Wells' son, Bill Wells. June Wells was neither a recipient of this email nor copied thereon. She did not respond to nor was she referenced in this email. Royal's email simply acknowledges that FKAC had [a] bank account and that FKAC's real estate attorney had prepared a deed.

Pl. Ex. 56 (R. pp. 636-7) – This is a letter from FKAC's real estate attorney to the Office of the Attorney General enclosing a Notice of Sale of 34 Pitt Street under the Memorandum of Real Estate Purchase and Sale Agreement (R. pp. 620-22) per the requirements of § 33-31-1202 of the South Carolina Nonprofit Act (the "1994 Act"). Mr. Stringer's letter copies June Wells and notifies her of the sale being subject to the requirements of the 1994 Act, including approval by the board of directors, members and any other persons whose approval is required by § 33-31-1202 and oversight by the South Carolina Attorney General. This letter indicates that the PSA executed by June Wells would not comply with the 1994 Act and would be subject to the Attorney General's

approval. Royal's reliance on this document is ironic considering his dispute with the application of the 1994 Act to this transaction and his position that the 1994 Act does not govern FKAC.

**(E) The Respondents Are Not Estopped From Denying June Wells' Alleged Agency.**

Royal cites *Eadie v. H.A. Sack Co.,* for his argument that the Respondents are estopped from denying June Wells' alleged agency. Royal's argument lacks merit for numerous reasons. First, the *Eadie* case holds that "there is no true difference between apparent authority and agency by estoppel". *Id* at 171. Royal failed to carry his burden and establish apparent authority in this case. Likewise, his claim of agency by estoppel fails on the same grounds. Second, the *Eadie* case is distinguishable as it is an appeal from a workers' compensation case and has nothing to do with nonprofits or the sale of the last remaining asset of nonprofits. Third, the establishment of agency in the *Eadie* case arose out of express hiring authorizations issued by H.A. Sack Co.'s undisputed agent (i.e., its project manager) to the Plaintiff who was also H.A. Sack Co.'s undisputed agent (i.e., its project superintendent). These facts are clearly distinguishable from the present case.

In addition, while CCSD certainly had the legal authority to intervene to protect and enforce its interest in the Property and/or all proceeds of sale therefrom in this Court, it had no duty to oversee FKAC's activities and assets, including the Pitt Street Property, as argued by Royal. (R. pp. 78-92; R. pp. 26-51). **(**Royal argues, without citing legal precedent in support, that CCSD had the duty to monitor the activities and assets of FKAC for over four decades (from 1972 through June 2018) on the basis of the 2010 Probate Order and 2013 PSA Memorandum (i.e., R. pp. 613-6 and R. pp. 620-2, respectively) and CCSD's physical proximity to the Property). Royal's arguments lack merit as properly held by the Master (R. pp. 26-51; R. pp. 13-17).

III. **The Lower Court Correctly Excluded the Transcript of CCSD'S Rule 30(b)(6) Deposition.**

(A): On November 11, 2021, CCSD filed a Motion to Modify Plaintiff's Notice of Rule 30(b)(6), SCRCP Deposition of Defendant CCSD and to Quash Portions Thereof and Motion for Protective Order, requesting that certain items contained in Plaintiff's Matters for Examination be quashed. (R. pp. 62-70). Due to the impending trial date, Mr. Jeff Borowy, COO of CCSD, was deposed as the SCRCP 30(b)(6) deponent on November 22, 2021 prior to the hearing on the motion. Counsel for CCSD placed a standing objection on the record and made specific objections in response to certain questions related to the items CCSD had requested quashed. A hearing was held on November 29, 2021 on CCSD's motion, where Plaintiff requested to reconvene Mr. Borowy's deposition to ask additional questions on those items which had been objected to during the deposition and were the subject of the motion. (R. p. 1628 line 11 – p. 1629, line 25). The Court granted CCSD's motion with one narrow exception. (R. p. 22, Fn. 2).

Mr. Borowy was also named by CCSD as a witness in the case.

During trial, Plaintiff indicated that there were a number of documents he wanted admitted as evidence, including, *inter alia,* the 30(b)(6) deposition transcript of CCSD. At that time, counsel for CCSD objected pursuant to SCRCP 32(a)(5) insomuch as excerpts had not been provided prior to trial. (R. p. 504, line 10 - p. 505, line 25.) In response, Plaintiff indicated he would submit the entire transcript as evidence, to which the Court objected. (*Id.*)

Despite that the Court ruled against submission of the entire transcript as evidence, Plaintiff filed the entire transcript as evidence. (R. pp. 18-25). In turn, CCSD filed a Motion to Exclude and Strike certain items filed as exhibits and a Reply to Plaintiff's Memorandum in Opposition to

Defendant CCSD's Motion to Exclude and Strike (R. pp. 1507-27; R. pp 1567-1629). A hearing was held on May 20, 2022 to address this motion and other items. (*Id.*). During that hearing, the Court excluded the 30(b)(6) deposition transcript of CCSD, noting that it "should have been done in excerpts, and we would have had a chance to review it at that time." (R. p. 1695, line 24 – p. 1696, line 2). "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, 742 S.E. 2d 49 (Ct. App. 2013) (internal citations omitted).

Further responding to Appellant's allegations related to the exclusion of CCSD's 39(b)(6) deposition transcript, Respondent CCSD hereby joins in Section IV of Respondent The South Carolina Attorney General's Brief. Accordingly, the following section, and all subparagraphs therein, are hereby incorporated herein by reference.

- Section 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)

**IV. Respondent CCSD Joins in Sections I., II., III. And IV of Respondent The South Carolina Attorney General's Brief.**

Respondent CCSD hereby joins in Sections I., II., III. and IV. of Respondent The South Carolina Attorney General's Brief. Accordingly, the following sections and all subparagraphs, including legal authorities, therein are hereby incorporated herein by reference.

- 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.

- 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.
- III. The Master did not abuse his discretion in granting CCSD's Motion to Intervene or in ruling on issues raised by CCSD.
- 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.

**CONCLUSION**

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

Respectfully submitted,


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October 13, 2023
Charleston, South Carolina

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master in Equity

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Appellate Case No. 2022-001165

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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

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CERTIFICATE OF COUNSEL

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I hereby certify that the Brief of Respondent Charleston County School District complies with SCACR 211(b).

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