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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

Supreme Court Case No.: 2025-001189
Court of Appeals Case No.: 2022-001165
Trial Court Case No.: 2018-CP-10-05739

Michael D. Royal, Petitioner,

v.

Free Kindergarten Association of Charleston, Respondent,

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

RETURN OF RESPONDENT FREE KINDERGARTEN ASSOCIATION OF CHARLESTON TO PETITION FOR WRIT OF CERTIORARI

FREE KINDERGARTEN ASSOCIATION OF CHARLESTON
PATRICK F. STRINGER (S.C. Bar: 5396)
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QUESTION PRESENTED

Did the Court of Appeals correctly follow established authority in affirming the Master's Order granting the Attorney General's Motion for Nonsuit which had the effect of denying the Petitioner's request for specific performance?

INTRODUCTION

This is an action related to the proposed sale of real property located at 34 Pitt Street in downtown Charleston ("Property") owned by the Free Kindergarten Association of Charleston ("FKAC"), a nonprofit corporation. (R. 29). Petitioner 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). The Attorney General was notified of the sale over five years after the Agreement was signed, and he did not approve the sale. When the closing did not take place, Royal filed this action, seeking specific performance of the Agreement. (R. 106-114). Following a nonjury trial, the Charleston County Master-in-Equity granted the Attorney General's Motion for Nonsuit, which had the effect of denying Petitioner's request for specific performance.

The Court of Appeals found that the South Carolina Nonprofit Corporation Act of 1994, S.C. Code Ann. § 33-31-101, *et seq.*, applies to FKAC. The Court found there was no valid contract to enforce because Wells did not have express or implied authority to enter into the Agreement on FKAC's behalf. The Court further found that the Attorney General and the Charleston County School District ("CCSD") were not estopped from denying her authority. The Court also found that CCSD is the proper beneficiary to receive the remaining proceeds when FKAC dissolves.

Royal filed a Petition for Certiorari. This Court should not grant certiorari because there is no special or important reason to grant certiorari in this matter. First, the Court of Appeals followed established authority. Second, there are no novel questions of law. Lastly, there was no dissent in the Court of Appeals, and the Court of Appeals' decision is consistent with prior decisions of this Court and statutory authority. For these reasons, this Court should deny the Petition for Writ of Certiorari.

It should be noted that the Respondent (FKAC) joined the Brief of the Attorney General in the Court of Appeals action. In that Brief, the Attorney General did not take a position on the authority of Wells. In joining in the Attorney General's Brief, the FKAC likewise took that position as well. The FKAC now continues the same position in this Return, essentially joining in the Return of the Attorney General.

STATEMENT OF THE CASE AND FACTS

This is an action involving the proposed sale of real property owned by FKAC. The Property 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, Royal signed the Agreement with Wells, who purported to sign on behalf of FKAC. (R. 116-119). While Royal and Wells signed the Agreement on April 23, 2013, the Attorney General was notified of the proposed sale for the first time in February 2018—almost five years later. The Attorney General obtained a new appraisal and learned that the proposed sale price for the Property was over $200,000 less than its current fair market value, so, largely for this reason, he would not approve the sale. Without the approval of the Attorney General, FKAC refused to close on the Property. (R. 33-34). Royal filed this action on December 8, 2018, seeking specific performance of the Agreement. (R. 106-114). Both the Attorney General and CCSD moved to intervene in the action, and the Court granted both motions to intervene. (R. 102, 744-747, 774, 775).

FKAC was originally established as a nonprofit corporation on January 24, 1901. For many years, FKAC provided 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, 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." 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 the 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 testified that he first noticed the Property, which did not appear to be occupied or in active use, on December 3, 2011, and he learned that the Property was owned by FKAC. (R. 269-270). Through internet and other research, he discovered that Wells had a connection to the Property, so he reached out to her. (R. 277-280). Royal met with Wells and communicated his interest in purchasing the Property from FKAC. (284-285). On April 23, 2013, Royal and Wells, as "authorized agent" of the FKAC, signed the Agreement, drafted by Royal, for the property with a purchase price of $315,200. The Agreement provided for a closing date of April 9, 2018 "or on such prior date chosen by the Seller upon reasonable notice to the purchaser." (R. 116-119).

Additionally, the Agreement included 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). Significantly, Wells also received another offer, from a party other than Royal, to purchase the Property for $400,000.00. (R. 429). There was no evidence that the Property was ever listed for sale to the public.

On the same day they signed the Agreement, 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. Importantly, the Memorandum does not include the sale price, and it was not enrolled in the name of or otherwise provided to the Attorney General or CCSD. (R. 32, 116-119, 528).

Prior to the proposed closing date of April 9, 2018, counsel for FKAC sent a letter to the Attorney General to provide him notice 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 the notice, 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 requested that Robinson update his appraisal. (R. 228-229). Robinson found that the fair market value of the Property as of June 7, 2018, was $522,500. (R. 560). At the trial, Robinson was qualified as an expert in the area of real estate appraising. Regarding how long an appraisal can be considered valid, he explained that lending institutions do not 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).

After learning that the proposed sale was for significantly less than the fair market value of the Property, the Attorney General notified the parties that he would not approve of the sale, as the sale was not in the public interest, largely because it was for less than fair market value. FKAC was not in a position 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 held 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 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). The Court found that Wells had some authority stemming from her "sole remaining position as somebody with knowledge about the FKAC," but she did not have absolute authority to act on behalf of FKAC. (R.35).

Royal appealed to the Court of Appeals. By its opinion filed on February 19, 2025, the Court of Appeals affirmed the Master-in-Equity. The Petitioner filed a Petition for Rehearing, which the Court of Appeals denied on May 16, 2025. The Petition for Certiorari was filed on June 16, 2025.

ARGUMENT

This Court should deny the Petition for Writ of Certiorari. A Writ of Certiorari should only be granted for special and important reasons. Rule 242(b), SCACR. "Further, Rule 242(b), SCACR, emphasizes the discretionary authority of the Court to review decisions of the Court of Appeals, stating a writ of certiorari will be granted only when there are special and important reasons, such as when there are novel questions of law; a dissent in the decision of the Court of Appeals; the decision of the Court of Appeals is in conflict with a prior decision of this Court; substantial constitutional issues are directly involved; or a federal question is included, and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court." *S.C. Dep't of Soc. Servs. v. Benjamin*, 430 S.C. 235, 236, 844 S.E.2d 373, 373 (2020). "On certiorari, this Court will review only errors of law and will not review factual findings unless wholly unsupported by the evidence." *Hollman v. Woolfson*, 384 S.C. 571, 577, 683 S.E.2d 495, 498 (2009) (citing *S.C. Bd. of Exam'rs in Optometry v. Cohen*, 256 S.C. 13, 180 S.E.2d 650 (1971)).

None of the reasons for granting Certiorari are present in this case. The opinion of the Court of Appeals does not contain any errors of law or any factual findings not supported by the evidence. There is no novel issue of law, nor are there conflicting appellate court decisions. There is no dissent in the decision of the Court of Appeals, and its decision is not in conflict with any prior decision of this Court. Further, there are no substantial constitutional issues involved, nor is there a federal question.

I. Authority of June Murray Wells. (Petitioner's Issues I, II, III, IV, V, and VI)

FKAC did not take a position on the authority of June Murray Wells in the Court of Appeals. As stated in his brief before in the Court of Appeals, the Attorney General did not contest the findings of the Master on this issue. By joining in the Attorney General's Court of Appeals Brief, neither did FKAC. The FKAC also does not contest the findings of the Court of Appeals on this issue and does not believe there is any reason for this Court to grant the Writ of Certiorari on this issue.

II. The Court of Appeals followed binding authority in affirming the Master in Equity's Order. (Petitioner's Issue VII)

Royal argues that he used greater due care than either the Attorney General or the judiciary in ascertaining Wells' authority. (Petitioner's Issue VII). This issue was not raised or ruled upon below and is therefore not preserved for review, and it is not a reason for this Court to grant certiorari.

The Attorney General protects the public interest in connection with nonprofits, such as FKAC, to include situations such as the present case where real property is conveyed to and/or owed by a nonprofit. The South Carolina Nonprofit Corporate Practice Manual explains as follows: "oversight [by the Attorney General] is intended to ensure that public benefit corporations do not operate for private benefit. By definition, public benefit corporations operate to benefit the public, and most donations are made to public benefit corporations with the assumption that the donation will be used for public purposes. For this reason, the Attorney General has broad authority to oversee public benefit corporations." *See South Carolina Nonprofit Corporate Practice Manual*, 3rd ed., p. 14.

Significantly, the Attorney General's role in this matter is to protect the public interest, including the interests of any unknown charitable beneficiaries, as is his duty in connection with charitable trusts and nonprofits. "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)). "[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 (2007) (citing *Wellesley College v. Attorney General*, 313 Mass. 722, 49 N.E.2d 220 (1943); *In Re Los Angeles County Pioneer Society*, 40 Cal.2d 852, 257 P.2d 1, 9 (Ca.1953)). In *McMaster*, the Court stated the following, quoting *Los Angeles County*: "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 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." FKAC notified the Attorney General of the proposed sale in this matter pursuant to this statute. After obtaining an appraisal – from the same appraiser the parties used when they first signed the Agreement – the Attorney General learned that the proposed sale was for significantly less than the fair market value of the Property. The Attorney General notified the parties that he would not approve of the sale, as the sale was not in the public interest, largely because the sale was for less than fair market value. FKAC rightly refused to close without such approval by the Attorney General.

The Attorney General protects the public interest in connection with the sale of all, or substantially all of the assets of a nonprofit. When nonprofit assets are sold, they must be sold for fair market value so that the full value of the assets will be maintained in the "charity stream" and be perpetually dedicated for charitable purposes. "Fair market value is the price which a willing buyer will pay a willing seller, neither being under compulsion to buy or sell . . ."). *Hous. Auth. of Charleston v. Olasov*, 282 S.C. 603, 608, 320 S.E.2d 478, 481 (Ct. App. 1984). A proper valuation and sale for fair market value is important to protect the public interest because a sale for less than fair market value benefits private interests to the detriment of the public—the ultimate, beneficial owner of the charitable entity's assets. *See American Campaign Academy v. Commissioner*, 92 T.C. 1053 (1989) (noting that a nonprofit's conferral of benefits on disinterested persons may cause it to serve a private interest rather than a public one); *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 the present case, the Property was owned by FKAC for public purposes in that the public benefits from the education of children. Here, Royal's request for specific performance would result in a significant benefit to himself - in that he would purchase the Property for significantly less than its fair market value. Thus, Royal would obtain a significant gain equivalent to the difference in the fair market value and the price he would pay pursuant to the Agreement. This gain to Royal would be a loss to the charitable interest.

In addition to the fact that the price is for less than fair market value, 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 that 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)). In the present case, the parties had unequal bargaining power, especially related to real estate. Royal has JD, MBA, and Masters in Real Estate Finance. Wells had a BA from the College of Charleston. (R. 43). Wells never listed the property, and it was not exposed to the open market. The Court noted several unusual provisions in the Agreement. For example, the Agreement provides that if the seller were unable to provide documentation of Wells' authority to sell the Property, the parties agreed to petition the Court to establish her authority, with the purchaser bearing any court costs. This indicates that Royal had questions as to her authority at the time he authored the Agreement, as the language would not be needed if her authority was clear. (R. 43). Also, a provision in the Agreement allows the Purchaser to get out of the contract if it is not suitable to him financially, but there is not a comparable provision allowing FKAC to get out. (R. 43).

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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July 15, 2025

THE STATE OF SOUTH CAROLINA
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Appeal from Charleston County
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Mikell R. Scarborough, Master-in-Equity

Supreme Court Case No.: 2025-001189
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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.

PROOF OF SERVICE

I certify that I have served the Respondent Free Kindergarten Association of Charleston's Return to Appellant's Writ of Certiorari on the above-named Appellant and Intervenors/Respondents, by means provided for in SCACR to their respective counsel of record on today's date at the addresses shown below:

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Respectfully submitted,

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July 15, 2025

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July 15, 2025

Hon. Patricia A. Howard
Clerk, Supreme Court of South Carolina
PO Box 11330
Columbia S.C. 29211

Re: Michael D. Royal v Free Kindergarten Association of Charleston, et al.
Case No: 2025-001189

Dear Ms. Howard:

Please find enclosed original and six copies of Respondent Free Kindergarten Association of Charleston's Return to Petition for Writ of Certiorari. Also enclosed is my Proof of Service for same.

I am also electronically filing these documents today.

With best regards, I am

Very truly yours,

s/Patrick F. Stringer

Patrick F. Stringer

PFS/gsr
Enc.