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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Honorable Cynthia Graham Howe, Master-In-Equity

Unpublished Opinion No. 2021-UP-368 (S.C. Ct. App. filed October 27, 2021)
Appellate Case No.: 2018-001590

Andrew Waldo; Jane Zheng; and SC Coast Properties, LLC d/b/a Keller Williams Realty ..... Respondents

v.

Michael Cousins; Founders Five, LLC d/b/a Sperry Van Ness Founders Group; and South Carolina Association of REALTORS ..... Appellants,

Of Whom Andrew Waldo; Jane Zheng; and SC Coast Properties, LLC d/b/a Keller Williams Realty are the……Petitioners.

PETITIONER'S BRIEF

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CASE SUMMARY

Appellants, Michael Cousins and Founders Five, LLC, were awarded a $250,000.00 real estate commission by a South Carolina Association of REALTORS' Arbitration Panel even though Appellants did not represent either the Buyers or the Seller in the underlying real estate transaction. Appellants did not comply with South Carolina statutory law requiring a written and signed listing or representation agreement, and, in fact, had no knowledge of the underlying transaction until shortly before closing. Accordingly, the Horry County Master-in-Equity vacated the arbitration award. The Court of Appeals reversed the Horry County Master-in-Equity's decision and re-instated the Arbitration Award, holding that written agency agreements are not required under South Carolina law, pursuant to Batten v. Howell, 300 S.C. 545, 389 S.E.2d 170 (Ct. App. 1990) and other cases, regardless of statutory law. As such, the Court of Appeals did not even address the controlling statutory law.

Petitioners respectfully request this Honorable Court reverse the Court of Appeals' Opinion on the grounds that it: (1) completely disregards and is contrary to express South Carolina statutory law requiring written representation agreements; (2) shields the South Carolina Association of REALTORS from compliance with the very specific South Carolina law that governs its profession; and (3) eviscerates the "manifest disregard of the law" standard for vacating an arbitration award.

QUESTIONS TO BE CONSIDERED

1. Did the Court of Appeals' err by ignoring the South Carolina General Assembly's requirement that a real estate agent have a written agency agreement before being entitled to a real estate commission, and that any common law to the contrary was superseded?
2. Did the Court of Appeals err by reversing the Master-in-Equity's finding that the South Carolina Association of REALTORS' Arbitration Panel manifestly disregarded South Carolina law by awarding a commission to Appellant Cousins in the absence of any written agency agreement?
3. Did the Court of Appeals err in reversing the Master-in-Equity's finding that the South Carolina Association of REALTORS prejudiced Petitioner's rights by not including findings of fact and conclusions of law in its award?
4. Did the Court of Appeals err by reversing the Master-in-Equity's finding that the South Carolina Association of REALTORS prejudiced Petitioners' rights by prohibiting a court reporter from recording of the Procedural Review Hearing, which is an integral part of the Association's arbitration process?

STATEMENT OF CASE

This case arises out of a dispute over whether Appellants, Michael Cousins[1] and Founders Five, LLC d/b/a Sperry Van Ness Founders Group (hereinafter collectively, "Realtor Appellants"), were due a commission on a real estate transaction involving multiple golf courses in the Myrtle Beach, South Carolina area. Realtor Appellants did not represent either the Buyers or the Seller in the subject real estate transaction.[2] It is uncontested that the Realtor Appellants did not have a written listing or representation agreement with either the Buyers or the Seller in the subject real estate transaction; and Realtor Appellants admittedly did not have any knowledge of the multiple golf course deal until shortly before the closing occurred. (R. pp. 337-338).[3] Realtor Appellants thus had no involvement in the subject real estate transaction, period.

Nonetheless, on March 20, 2015, Realtor Appellants brought an action in Circuit Court against Petitioners, National Golf Management, LLC (hereinafter, the "Seller"), Xian (Nick) Dou, Yang Wang, and Kang Xou.[4] (R. pp. 58-63). In their Complaint, Realtor Appellants alleged they were the "procuring cause" of certain real estate transactions between the Seller and Buyers[5] and sought, amongst other damages, one-half of any commissions received by Petitioners for the subject real estate transaction. (R. pp. 58-63). It is important to note that during the pendency of Realtor Appellants' Circuit Court case, Cousins acknowledged: Petitioners were the Buyers' agent

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[1] Appellant Cousins was the Broker-In-Charge of Sperry Van Ness. Appellant Michael Cousins is hereinafter referred to as "Cousins"

[2] The buyers in the subject real estate transaction were represented by Petitioners, SC Coast Properties, LLC d/b/a Keller Williams[2] (hereinafter "Keller Williams") and its agent, Jane Zheng. Nick Dou, a representative of the buyers in the transaction at issue, executed two agency agreements with Petitioner Zheng, which cover the period during which the transaction at issue took place. (R. pp. 319-322, 810-813). Both agreements specify that Jane Zheng of Keller Williams was to be the buyers' "exclusive agent." (Id.). Likewise, Realtor Appellants did not represent the Seller in the underlying transaction. (See R. pp. 14-17).

[3] Wherein Appellant Cousins emails Petitioner Jane Zheng stating "I do not understand what is happening here. What is the 13 [golf course] deal you refer to with Bob?"

[4] Xian (Nick) Dou, Yang Wang, and Kang Xou are collectively referred to hereinafter as "Buyers."

[5] Realtor Appellants also acknowledged in its Complaint that its alleged "arrangement for the split of the real estate commission…is recognized as a standard ***oral*** contractual relationship." (R. p. 62, lines 3-5) (emphasis added).

for the transaction; Cousins' relationship was only with the Seller; Cousins' commission was solely due from the Seller, and Realtor Appellants did not have a signed listing or commission agreement with Seller. (R. pp. 354, lines 16-17, p. 358, lines 3-7, 22-23, p. 359, lines 1-8). Thus, in the Circuit Court case, Cousins argued he was entitled to a commission from the ***Seller***. (R. p. 7, lines 4-8).

In early May 2015, Petitioners and Seller moved to dismiss Realtor Appellants' Circuit Court action. On or around August 2015, Petitioners were dismissed from the case upon knowledge and belief that Realtor Appellants' commission dispute with Petitioners would be arbitrated by a panel chosen by Appellant South Carolina Association of REALTORS (hereinafter, the "Association"), should there be any matters left to arbitrate pending the outcome of Realtor Appellants' Circuit Court action. In or around September 2015, Petitioner Waldo submitted a Request and Agreement to Arbitrate to the Association on behalf of Petitioners. (R. pp. 64-65).

On January 11, 2016, the Circuit Court entered an Order dismissing Realtor Appellants' claims against the Seller, finding: (1) Realtor Appellants conceded the nature of Realtor Appellants' alleged agreement for the subject real estate transaction arose orally and by implication; and, ***pursuant to South Carolina statutory law, an agency relationship in the context of a real estate transaction cannot exist without a written agreement***. (R. pp. 14-17) (emphasis added).[6] In its January 11, 2016 Order, the Circuit Court concluded:

- "The South Carolina General Assembly has definitively spoken on the issue before this court[;]"
- South Carolina's overhauled statutory scheme prohibits oral or implied commission agreements; and

[6] The January 11, 2016 Order expressly references South Carolina's entire statutory scheme governing real estate transactions in the state, and reviews multiple sections from within the statutory scheme. (R. pp. 15-16).

- any common law to the contrary is superseded by the statutory scheme.

(R. pp. 15-17) (internal citations omitted). The January 11, 2016 Circuit Court Order thus bars Realtor Appellants from seeking a commission ***from anyone involved in the underlying real estate transaction in the absence of a written agreement.*** (R. pp. 15-17) (emphasis added). The January 11, 2016 Order was not appealed and is the law of the case.

Realtor Appellants and Petitioners proceeded with arbitration before the Association's Arbitration Panel on February 2, 2016. In preparation for arbitration, Petitioners had provided Appellant Association with a copy of the Circuit Court's January 11, 2016 Order. However, despite having knowledge of: (1) the Circuit Court's January 11, 2016 Order (i.e., the law of the case), (2) South Carolina statutory law governing all South Carolina real estate transactions, and (3) the absence of any written agreement between Realtor Appellants and any of the interested parties in the transaction, including Petitioners, Seller, or the Buyers and/or their entity,[7] on February 2, 2016, Appellant Association's Arbitration Panel found that Petitioners owed Realtor Appellants a $250,000.00 commission for the real estate transaction. (R. p. 18).

The Arbitration Panel did not provide any findings of fact or conclusions of law with its decision or provide an explanation why the Panel disregarded South Carolina law and the Circuit Court's January 11, 2016 Order.[8] (Id.). However, during arbitration, the Chairman of the Panel indicated that although he understood South Carolina's agency and writing requirements; the Panel should instead focus on Cousins' "procuring cause" argument. (Audio of Arbitration Panel

[7] Not only did Cousins not have a written agency/listing agreement with the Buyers, the Buyers had an exclusive agency agreement with Petitioner, Jane Zheng, of Keller Williams. (R. pp. 319-322, 810-813).

[8] The January 11, 2016 Circuit Court Order demonstrates Realtor Appellants claimed to represent the Seller in the transaction in the Circuit Court action; and clearly holds South Carolina statutory law bars Realtor Appellants from seeking a commission from anyone involved in the underlying real estate transaction in the absence of a written agreement therewith. (Id. at 14-17). Therefore, Realtor Appellants' implied oral agreement argument (referred to by Realtor Appellants as their "procuring cause" argument) is not viable under South Carolina law.

Hearing, 02:00:55-02:01.45).[9] In sum, the Panel Chairman's statements clearly demonstrate the Arbitration Panel was instructed to manifestly disregard governing South Carolina statutory law and Circuit Court Order, and to instead focus on Realtor Appellants' oral and/or implied commission agreement theory – a theory superseded by state statutory law and the same theory the Circuit Court rejected in its January 11, 2016 Order. (See R. pp. 14-17). During the arbitration hearing, Petitioner Waldo voiced his belief that the issue of agency was important for the Panel to consider, to no avail.[10]

On February 24, 2016, Petitioner Waldo submitted a Request for Procedural Review of the arbitration with Appellant Association. (R. pp. 67-68, 14-18). Petitioner Waldo also filed a Notice of Appeal with the Circuit Court on March 1, 2016. (R. pp. 69-71, 18, 14-17). Appellant Association held a Procedural Review Hearing on May 2, 2016, where the parties were informed, for the first time, that the basis for Appellant Association's award of a $250,000.00 commission to Cousins ***was the existence of an oral and implied agency agreement with Cousins***.[11] Appellant Association then affirmed the award. (R. p. 19). Appellant Association refused to allow for the recording and/or transcription of the proceeding. (R. pp. 405-406). As such, nothing regarding the Procedural Review Hearing was preserved for the record. On May 17, 2016, Petitioners filed

[9] Panel Chairman: "Prior to closing statements…I have, as Chair, a couple of questions…there has been discussion from the complainant about representation, who represents who in the transaction, what was in writing and I just want to remind all the parties here, including the Panel, that we are not at a grievance hearing. We are at an arbitration hearing. We're here to talk about the money in dispute. And I understand the conversation. What we need to focus on is the procuring cause."

[10] Panel Question: "Do each of you feel that this hearing has been conducted fairly?" Answer – Andrew Waldo: "I do believe that agency does play a part in this discussion so, I, uh, ***other than that I feel like it was***. But I feel that that is a large part of what we do as real estate agents and a big part of the National Association of Realtors following the ethics standards and practices so in my opinion that is a large part of it…" (Audio of Arbitration Panel Hearing, 2:26:26 – 2:27:10) (emphasis added).

[11] This was the same oral and/or implied agreement theory the Circuit Court rejected as illegal and unenforceable under South Carolina law in its January 11, 2016 Order (R. pp. 14-17).

a second Notice of Appeal, which encompassed the additional actions of Appellant Association's Procedural Review Board. (R. pp. 83-87, 408, 19, 18, 14-17).

The two Circuit Court appeals were consolidated as Civil Action No. 2016-CP-26-3338 and referred to the Horry County Master-In-Equity. (R. pp. 34-36). On August 16, 2018, the Master-In-Equity entered an Order vacating the Arbitration Award on the grounds that Appellant Association's Arbitration Panel manifestly disregarded and/or perversely misconstrued known, well-defined, explicit, and clearly applicable South Carolina law in awarding a commission in the absence of a written agreement showing Cousins represented either the Buyers or the Seller in the transaction at issue, and in light of the Circuit Court's January 11, 2016 Order. (R. pp. 43-55). The Master-In-Equity further held Petitioners' rights were substantially prejudiced by the Association's Arbitration Panel's failure to include findings of fact and conclusions of law with its award and by disallowing recording of the Procedural Review Hearing. (R. pp. 56-57). Both Realtor Appellants and Appellant Association appealed the Master-in-Equity's August 16, 2018 Order vacating the Arbitration Award. The two appeals were consolidated under Appellate Case No. 2018-001590.

On October 27, 2021, the Court of Appeals reversed the Master-in-Equity's Order, finding there was a "barely colorable justification" for the Arbitration Panel's award. Waldo, et. al. v. Cousins, et. al., Unpub. Op. 2021-UP-368, at p. 3 (S.C. Ct. App. dated Oct. 27, 2021). In doing so, the Court of Appeals did not address South Carolina statutory law governing real estate transactions, and based its reversal on the fact that "[s]everal cases have upheld the division of real estate commissions without written agreements," and that such cases have not been "clearly and explicitly overruled." (Id.). The two cases relied upon by the Court of Appeals are South Carolina Court of Appeals decisions issued in 1988 and 1990, respectively, both of which were decided

well-prior to the enactment of the statutory law governing the transaction at issue. (Id.). The Court of Appeals also reversed the Master-in-Equity's findings that Appellant Association prejudiced Petitioner's rights in the manner of its Arbitration Panel's award and its failure to allow recording of the Procedural Review Hearing. (Id. at pp. 3-4). Petitioners petitioned the Court of Appeals for rehearing and rehearing *en banc*, to no avail.

On February 9, 2022, Petitioners filed a Petition for Writ of Certiorari with the South Carolina Supreme Court. By Order dated September 8, 2022, the Supreme Court granted Petitioners' Petition for Writ of Certiorari and agreed to consider questions one (1), two (2), five (5), and six (6) set forth within Petitioner's Petition. Petitioners now submit this Brief in support of reversal of the Court of Appeals' Opinion in this matter.

STANDARD OF REVIEW

An arbitration award may be vacated under narrow and limited circumstances. See C-Sculptures, LLC v. Brown, 403 S.C. 53, 56, 742 S.E.2d 359, 360 (2013), Gissel v. Hart, 382 S.C. 235, 241, 676 S.E.2d 320, 323 (2009). "An arbitrator's award may be vacated when the arbitrator exceeds his or her powers and/or manifestly disregards or perversely misconstrues the law." Gissel, 382 S.C. at 241, 676 S.E.2d at 323 (citing Trident Technical College v. Lucas and Stubbs, 286 S.C. 98, 333 S.E.2d 781 (1985), S.C. Code Ann. § 15-48-130(a)). In order for a court to vacate an arbitration award based upon an arbitrator's manifest disregard of the law, the governing law ignored by the arbitrator must be well defined, explicit, and clearly applicable. Id.; see also C-Sculptures, 403 S.C. at 56, 742 S.E.2d at 360 (internal citations omitted). The focus should be on the conduct of the arbitrator and an arbitration award should be overturned under the "manifest disregard" standard "when the arbitrator knew of a governing legal principle yet refused to apply it." Gissel, 382 S.C. at 241, 676 S.E.2d at 323-24 (internal citations omitted).

ARGUMENT

The Court of Appeals' October 27, 2021 Opinion should be reversed for three key reasons: (1) the Opinion completely disregards and is contrary to express South Carolina statutory law; (2) the Opinion eviscerates the "manifest disregard of the law" standard for vacating an arbitration award; and, as such (3) the Opinion effectively shields the South Carolina Association of REALTORS from compliance with South Carolina law.

The outcome of this case will significantly affect realtors' compliance with South Carolina law and the standard for vacating arbitrations in South Carolina. At issue herein is whether the enactment of South Carolina's comprehensive statutory law, which requires signed, written listing or representation agreements in all real estate transactions, supersedes and overrules common law decided prior to such enactment, which allowed for oral and/or implied agreements. Although, on its face, South Carolina statutory law appears to clearly supersede common law decided prior to its enactment, the Courts of Appeals' October 27, 2021 Opinion in this case indicates a public policy that licensed realtors do not have to comply with South Carolina statutory law governing the real estate profession.

This case also significantly affects the standard for vacating an arbitration award. Here, the Chairman of the Association's Arbitration Panel expressly admitted he was disregarding applicable state statutory law in reaching a decision.[12] There cannot be a clearer occurrence of a "manifest disregard of the law" than is present in this case. If the Court of Appeals' October 27, 2021 Opinion is not reversed, South Carolina's "manifest disregard of the law" standard for vacating an arbitration will be insurmountable. As a result, the Court of Appeals' Opinion shields Appellant Association from any obligation to comply with the very South Carolina law that

[12] (Audio of Arbitration Panel Hearing, 02:00:55-02:01.45).

governs its profession, as its arbitration process is completely insulated from judicial review. Realtors such as Petitioner Zheng, who are members of Appellant Association, rely on the Association to follow South Carolina law in good faith. Without an obligation to follow the law, the Association is free to do as it pleases, without recourse, to the detriment of South Carolina realtors and all buyers and sellers of real estate. Petitioners thus respectfully respect this Honorable Court reverse the Court of Appeals' October 27, 2021 Opinion for the reasons set forth herein. Petitioners shall address each of the questions before the Court for consideration in turn, as follows.

1. The Court of Appeals Erred By Ignoring the South Carolina General Assembly's Requirement That a Real Estate Agent Have a Written Agency Agreement In Order to Receive a Commission, and the General Assembly's Intent That All Common Law to the Contrary Be Superseded.

The Court of Appeals' October 27, 2021 Opinion reversed the Master-in-Equity's finding that the Association's Arbitration Panel manifestly disregarded South Carolina law in awarding Appellant Cousins a commission. The grounds the Court of Appeals provides for doing so are that two cases, both of which were decided ***prior*** to the enactment of governing South Carolina statutory law, have upheld the division of real estate commissions without written agreements. Waldo, et. al. v. Cousins, et. al., Unpub. Op. 2021-UP-368, at p. 3 (S.C. Ct. App. dated Oct. 27, 2021). Respectfully, the Court of Appeals has erred in its conclusion because the applicable statutory law governing real estate transactions in South Carolina supersedes the common law relied upon by Appellants throughout this case and by the Court of Appeals.[13]

The South Carolina legislature enacted a comprehensive statutory scheme that governs the real estate profession in South Carolina, which became effective on January 1, 1998. See S.C.

[13] See S.C. Code Ann. § 40-57-137(Q) ("The provisions of this section which are inconsistent with applicable principles of common law supersede the common law…").

Code Ann. § 40-57-5, et. seq.[14] The statutory scheme governs the entire range of real estate transactions and relationships between parties involved in real estate transactions, including: seller and buyer agency, dual agency, sub-agency/co-broker relationships, and commission splits between cooperating brokers. See Id.[15] Title 40, Chapter 57 of the South Carolina Code thus applies to the real estate transaction at issue herein, and absolutely and unequivocally ***prohibits Realtor Appellants from receiving a commission*****,** regardless of whether Appellants argue Cousins represented the Seller or the Buyers, acted as a dual agent, or acted as a co-broker (i.e., a broker-to-broker dispute), all of which are positions Realtor Appellants have taken throughout the litigation and arbitration herein. South Carolina Code Annotated Section 40-57-137, which sets forth realtors' duties to parties in a real estate transaction and defines permissible agency relationships also expressly states that it supersedes common law contrary to such section. See S.C. Code Ann. § 40-57-137(Q).

Under South Carolina Code Annotated Sections 40-57-135 (C)(4) and (D)(4), a written representation agreement is ***required by law*** before a broker/agent is entitled to a commission in a real estate transaction. See also S.C. Code Ann. § 40-57-139 (E) (emphasis added).[16] South Carolina Code Annotated Section 40-57-30 (3) specifically defines a "Broker" ***as someone who has the intent or expectation of receiving a commission.*** (emphasis added). Therefore, to receive

[14] The statutory scheme's legislative history reveals it was created by 1997 S.C. Act No. 24, and became effective January 1, 1998.

[15] Multiple sections of Title 40, Chapter 57 were amended, effective January 1, 2017. In this Brief (and in Petitioners'/Respondents' Final Briefs filed previously), all citations to Sections within Title 40, Chapter 57 are to the version of the Code that was in effect through December 31, 2016, as this version of the code was applicable to the real estate transaction at issue herein, which occurred prior to the enactment of the Code amendments.

[16] "A licensee who has substantive contact with a potential buyer or seller shall provide to the potential buyer or seller an agency disclosure form at the first substantive contact. At the time of contract, it is presumed that the potential buyer or seller is to be a customer of the licensee as defined by this chapter and that the licensee shall offer services to a customer…only until the potential buyer or seller requests representation; however, before ratification of the real property sales agreement, the real estate licensee **must represent** either the buyer or seller in an agency capacity in order to be in compliance with this chapter." (emphasis added).

a commission, a "Broker" must comply with all statutory requirements of Title 40, Chapter 57, which include obtaining a written representation agreement (specifying how compensation is to be determined). See S.C. Code Ann. § 40-57-139 (E).

South Carolina statutory law is well defined, explicit, and clear that in all real estate transactions, an agency relationship is only created with a buyer or seller by ***written agreement***. See S.C. Code Ann. § 40-57-139 (G) (prohibiting oral agreements and stating, **"*No type of agency relationship may be assumed by a buyer, seller, landlord, tenant, or licensee or created orally or by implication.*"**) (emphasis added). A licensee may not "advertise, market, or offer to conduct a real estate transaction involving real estate owned in whole or in part by another person without ***first obtaining a written listing agreement from the owner…"*** S.C. Code Ann. § 40-57-135 (C)(4) (1997) (emphasis added). The legislature goes a step further by requiring that a ***"listing or buyer's representation agreement must be in writing and must set forth all material terms of the parties' agency relationship including, but not limited to…an explanation of how compensation will be divided among participating or cooperating brokers, if applicable."*** S.C. Code Ann. § 40-57-135 (D)(4)(d) (emphasis added). Therefore, to be compensated in a real estate transaction, a real estate agent must have a written agreement with the party he/she represents.

S.C. Code Ann. § 40-57-135 also directly addresses co-broker situations by specifying where co-brokers intend to share a commission, such division of compensation must be explained, ***in writing and executed by one of the parties***. (Id.) (emphasis added). Thus, any alleged co-broker agreement regarding division of compensation must: (1) not only be known by and consented to by the buyer, (2) it must also be documented in writing within the buyer's representation agreement. S.C. Code Ann. § 40-57-135 (D)(4)(d). South Carolina Code Annotated 40-57-137, Subsections E, J, M(1), and Q similarly prohibit subagency/co-broker

and/or dual agency agreements between agents/brokers without buyer and/or seller knowledge and consent.

It is undisputed none of the requisite written agreements exist in this case. Therefore, it is clear Realtor Appellants are not entitled to a commission for the subject real estate transaction. Inexplicably, and despite the foregoing, the Court of Appeals found that because the cases of Batten v. Howell, 300 S.C. 545, 549, 389 S.E.2d 170, 172 (Ct. App. 1990) and Hackler v. Earl Wiegard Real Est., Inc., 295 S.C. 396, 398, 368 S.E.2d 686, 687 (Ct. App. 1988), wherein oral or implied agreements regarding real estate commissions were upheld ***prior*** to the enactment of South Carolina's real estate statutory scheme, have not been clearly and explicitly overruled, such cases provide at least "barely colorable" justification for the Arbitration Panel's award. Waldo, et. al. v. Cousins, et. al., Unpub. Op. 2021-UP-368, at p. 3 (S.C. Ct. App. dated Oct. 27, 2021). Respectfully, the Court of Appeals has erred in its holding, as these cases ***have*** been explicitly overruled by South Carolina statutory law and by the Circuit Court's January 11, 2016 Order, both of which the Association's Arbitration Panel had knowledge.

First, as stated above, South Carolina Code Section 40-57-137(Q), which requires buyer and seller knowledge and written consent to any compensation/commission splits, expressly states its provisions ***supersede contradicting common law***. (emphasis added). Second, the Circuit Court's January 11, 2016 Order provides the following analysis of the statutory law's superseding effect:

> A review of the legislative history of the [South Carolina statutory scheme governing real estate transactions] reveals that the operative amendments became effective on January 1, 1998 (twelve years following the South Carolina Court of Appeals decision in [Hilton Head Island Realty, Inc. v. The] Skull Creek [Club, 287 S.C. 530, 339 S.E.2d 890 (Ct. App. 1986)]. Pursuant to the 1997 S.C. Act No. 24 (the "1997 Act"), each of Sections 40-57-135 and 40-57-139 was codified into law for the first time. In addition, beginning with the

> 1997 Act, and as further amended by 2000 S.C. Act Nos. 285 and 218, the following provision was added to Section 40-57-135:
>
> **The provisions of this Section *which are inconsistent with applicable principles of common law supersede the common law*, and the common law may be used to aid in interpreting or clarifying the duties described in this section.**
>
> S.C. Code Ann § 40-47-13[7](Q) (Supp. 2014). Moreover, the Court in Skull Creek premised its decision on the fact that 'the evidence and the reasonable inferences drawn therefrom support the finding that an implied contract to pay a commission existed between the parties…" Skull Creek, 287 S.C. at 536, 339 S.E.2d at 894. ***Clearly, the same finding could not be made in light of today's statutory environment.*** See S.C. Code Ann. § 40-57-139 (G) (stating "No type of agency relationship may be assumed by a buyer, seller, landlord, tenant, or licensee or created orally or by implication."). ***The South Carolina General Assembly has definitively spoken on the issue before this court, and such statement is dispositive…***

(R. pp. 16) (emphasis added). Based upon the express language of the statutes within S.C. Code Ann. § 40-57-5, et. seq. and the Circuit Court's January 11, 2016 Order, common law that was decided prior to enactment of the General Assembly's statutory scheme ***cannot form the basis of the Arbitration Panel's decision and does not make such decision colorable in any way, shape, or form.*** Even if this Court believes the language contained in S.C. Code Ann. §§ 40-57-5, et. seq and the Circuit Court's January 11, 2016 Order are not explicit enough to overrule common law decided prior in time to the enactment of S.C. Code Ann. §§ 40-57-5, et. seq., it is incumbent upon this Court to clarify that the enactment of such statutory scheme overrules the common law decided prior in time to the South Carolina General Assembly making it abundantly clear that, absent a written agreement, a commission cannot not be awarded in a real estate transaction. If this Honorable Court does not reverse the Court of Appeals' Opinion and clarify the statutory law's superseding effect, South Carolina realtors will be shielded from compliance with South Carolina statutory law governing real estate transactions within the state, to the detriment of the public. The

South Carolina General Assembly enacted this statutory scheme to prevent these lawsuits from occurring in the first place—if a realtor expects a commission, the realtor must obtain a written representation agreement. See S.C. Code Ann. §§40-57-30(3) - 40-57-135.

It is important to note the South Carolina General Assembly recognizes the money at issue in a real estate transaction belongs to the buyer and the seller. And thus it is completely up to the buyer and the seller to determine and control who represents them in a real estate transaction, via a written representation agreement. No one, like Appellant Cousins, can simply unilaterally claim to have represented either the Buyers or Seller in this transaction. The Buyers and Seller in the underlying transaction obviously did not want Appellant Cousins to represent either of them, and thus neither executed a representation agreement in his favor. It is a manifest disregard of the law for the Arbitration Panel, and the Court of Appeals, to force an agency relationship on the Buyers or Seller, in complete disregard of the law and the Buyers' and Seller's intent.

For these reasons, Petitioners respectfully request this Honorable Court reverse the Court of Appeals' Opinion entered on October 27, 2021.

2. The Court of Appeals Erred By Reversing the Master's Finding That the South Carolina Association of REALTORS' Arbitration Panel Manifestly Disregarded South Carolina Law In Awarding Appellant Cousins a Commission In the Absence of Any Written Agency Agreement.

The Master-in-Equity properly found the Association's Arbitration Panel manifestly disregarded and/or perversely misconstrued South Carolina law in awarding Appellant Cousins a $250,000.00 real estate commission in a real estate transaction where Appellant Cousins had no written agreement with ***any party*** involved in the transaction. The evidence in this matter clearly demonstrates the Association's Arbitration Panel manifestly disregarded and/or perversely misconstrued South Carolina law in issuing its award. Therefore, the Court of Appeals erred in reversing the Master-in-Equity's decision.

As argued in Section 1 above, South Carolina statutory law makes it explicitly clear that a written representation agreement is required before a broker/agent is entitled to a commission in a real estate transaction.[17] The Circuit Court's January 11, 2016 Order holds Realtor Appellants did not represent the Seller in the subject real estate transaction. (R. pp. 14-17). Therefore, it must follow that Realtor Appellants could neither be a dual agent of both the Buyers and the Seller, nor can they be a co-broker representing the Seller. (Id.). There was no subagency agreement between Realtor Appellants and Petitioners as to representing the Buyers, nor is there any evidence whatsoever that the Buyers had knowledge of and provided written consent to such a subagency or co-broker agreement. (See R. pp. 368-369, R. pp. 400, 14-17, R. pp. 401-404). To the contrary, Petitioner Zheng was the Buyers' ***exclusive*** agent. (See R. pp. 319-322, 810-813) (emphasis added).

South Carolina Code Annotated Section 40-57-135(D)(4)(d) provides that a buyer's representation agreement ***must be in writing and must set forth "an explanation of how compensation will be divided among participating or cooperating brokers***." (emphasis added). Thus, any alleged co-broker agreement regarding division of compensation must: (1) not only be known by and consented to by the buyer, (2) it must also be documented in writing within the buyer's representation agreement. S.C. Code Ann. § 40-57-135(D)(4)(d). ***No such agreement exists in this matter.***

Appellant Association's Arbitration Panel received a copy of the January 11, 2016 Circuit Court Order, which explains South Carolina's statutory scheme and explains why common law

[17] See S.C. Code Ann. § 40-57-5, et. seq., see also 40-57-139(G) (prohibiting oral agreements and stating, **"*No type of agency relationship may be assumed by a buyer, seller, landlord, tenant, or licensee or created orally or by implication.*"**) (emphasis added), and S.C. Code Ann. § 40-57-137, Subsections E, J, M(1), and Q (holding South Carolina statutory law also prohibits subagency/co-broker and/or dual agency agreements between agents/brokers without buyer and/or seller knowledge and consent).

pre-dating the enactment of such statutory scheme is no longer valid. (R. pp. 14-17). It was uncontested that Realtor Appellants had no written agreements with any party to the real estate transaction at issue. (Audio of Arbitration Panel Hearing, 01:44:35-01:45:38). Yet, the Arbitration Panel's Chairman stated:

> Prior to closing statements…I have, as Chair, a couple of questions…there has been discussion from the complainant about representation, who represents who in the transaction, what was in writing and I just want to remind all the parties here, including the Panel, that we are not at a grievance hearing. We are at an arbitration hearing. We're here to talk about the money in dispute. ***And I understand the conversation. What we need to focus on is the procuring cause.***

(Audio of Arbitration Panel Hearing, 02:00:55-02:01.45) (emphasis added). Based upon the foregoing, it could not be clearer that the Arbitration Panel knew the law governing this dispute, knew that Realtor Appellants did not represent or have a written agreement with any party to the transaction, and manifestly disregarded such law when awarding a commission to Realtor Appellants. Further, not only did the Panel disregard all of the foregoing, but the Panel Chairman instructed the Panel to focus on a theory the Panel knew was expressly superseded by governing statutory law and rejected by the Circuit Court. (See S.C. Code Ann. 40-57-137, R. pp. 15-17). This case presents a glaring example of an Arbitration Panel choosing to disregard clear and express South Carolina real estate law in favor of the arbitrators' own opinions or desires about how the law should be.

And, ironically, South Carolina case law confirms that a real estate broker cannot be the "procuring cause" of the sale in the absence of an agency relationship. See United Farm Agency v. Malanuk, 284 S.C. 382, 325 S.E.2d 544 (1985) (holding that a broker has generally earned his

commission when he acts ***during his agency*** as the efficient or procuring cause of a sale),[18] Hobbs v. Hudgens, 223 S.C. 88, 74 S.E.2d 425 (1953) ("[T]he broker must not only show that his efforts were the procuring cause of the sale but must further show that his intervention was during the continuance ***of an agency to sell or find a purchaser***."), Smith v. Peeples, 177 S.C. 479, 181 S.E. 653 ("A broker is entitled to his commissions, if during the ***continuance of his agency***, he is the…procuring cause of the sale."), Roberts v. Gaskins, 327 S.C. 478, 486 S.E.2d 771 (Ct. App. 1997) (wherein the South Carolina Supreme Court cited to Goldsmith v. Coxe, 80 S.C. 341, 61 S.E. 555 (1908), holding that a broker is entitled to his commissions, "***if during the continuance of his agency***," he is the efficient or procuring cause of the sale). As already argued in depth above, the South Carolina General Assembly has expressly stated there can be no ***agency*** relationship in a real estate transaction without a written representation agreement.

South Carolina law allows for the vacation of an arbitration award where an arbitrator manifestly disregards and/or perversely misconstrues well-defined, explicit, and clearly applicable law. See Gissel v. Hart, 382 S.C. 235, 241, 676 S.E.2d 320, 323 (2009) (internal citations omitted). The Court of Appeals' Opinion finds that the Arbitration Award should not have been vacated because common law decided prior to the enactment of South Carolina statutory law provides at least "barely colorable justification" for the Arbitration Panel's award. Waldo, et. al. v. Cousins, et. al., Unpub. Op. 2021-UP-368, at p. 3 (S.C. Ct. App. dated Oct. 27, 2021). Such a conclusion is perplexing considering the Arbitration Panel admittedly had knowledge of applicable statutory law prohibiting oral and/or implied commission agreements and possessed the Circuit Court's

[18] The Malanuk case was decided in 1985, prior to our current statutory scheme that now requires ***written*** agency agreements between brokers and buyers and/or sellers. Moreover, in Malanuk, the South Carolina Supreme Court stated that although, at that time, oral commission agreements were often enforceable, the better practice was requiring a written listing agreement. 284 S.C. at 384, 325 S.E.2d at 545. Therefore, the enactment of the current statutory scheme barring oral commission agreements is in line with what the Supreme Court believed to be the best practice prior to its enactment. See Id.

January 11, 2016 Order, which made clear that common law decided prior to the enactment of such statutory law was superseded by such statutory law. It is also clear that any consideration of "procuring cause" must include an agency discussion, but the Chairman of the Arbitration Panel stated that the agency issue was not relevant. (See Audio of Arbitration Panel Hearing, 02:00:55-02:01.45). It is nearly impossible to imagine a scenario that more clearly evidences a manifest disregard of the very law that governs the real estate profession. To find, under this set of facts, that a manifest disregard of the law did not occur, effectively guts the manifest disregard standard and places arbitration awards beyond judicial review.

As is set forth in Section 1 above, the express language of the statutes within S.C. Code Ann. § 40-57-5, et. seq. and the Circuit Court's January 11, 2016 Order, make clear that common law decided prior to enactment of the General Assembly's statutory scheme cannot properly form the basis of the Arbitration Panel's decision. For the Association's Arbitration Panel to rely upon such common law is, without a doubt, a manifest disregard for South Carolina statutory law and the Circuit Court's January 11, 2016 Order, which is the law of this case. Reliance upon common law decided prior to the enactment of South Carolina's statutory scheme governing real estate transactions, and superseding such prior common law ***does not make the Association's Arbitration Panel's decision colorable in any way, shape, or form.*** Therefore, the Court of Appeals' Opinion should be reversed accordingly.

3. The Court of Appeals Erred By Reversing the Master-in-Equity's Finding That Appellant Association Prejudiced Petitioners' Rights By Its Arbitration Panel Not Including Findings of Fact and Conclusions of Law With Its Award, Where the Association's Own Policies and Procedures Required Findings of Fact and Conclusions of Law.

Appellant Association's failure to include findings of fact and conclusions of law with its Arbitration Panel's Arbitration Award substantially prejudiced Petitioners. According to the

Association's own Policy, ***"Association Counsel, if present, shall prepare for review of the Panel Chairman and/or the President any statement of facts or a summary of the reasons supporting any decision made by the Panel."*** (R. p. 311) (emphasis added). Per the above, Appellant Association requires its counsel to prepare a statement of facts or summary of reasons supporting an arbitration panel decision.[19] Id. Likewise, South Carolina statutory law requires the Arbitration Panel ***to decide questions of law and fact***. See S.C. Code Ann. § 15-48-180 (emphasis added). Therefore, not only do the Association's own policies and procedures require the Association to draft a statement of facts or a summary of reasons supporting the Arbitration Panel's decision, but it is also is incumbent upon the arbitrators to actually provide some type of findings of fact and conclusions of law so not only the parties know the basis of the decision, but also a reviewing court can determine whether the arbitrators complied with South Carolina Code Section 15-48-180.

The Court of Appeals' October 27, 2021 Opinion states generally that the Association's policies only require the Arbitration Panel's counsel to draft findings of fact and conclusions of law – not that such findings of fact and conclusions of law are to be included in the public award. Waldo, et. al. v. Cousins, et. al., Unpub. Op. 2021-UP-368, at p. 4 (S.C. Ct. App. dated Oct. 27, 2021). However, as the Master-in-Equity stated at the hearing on Petitioners' Motion to Vacate the Arbitration Award on June 21, 2017:

> "***If [an arbitration award is only required to say who prevailed and if there is an amount, what that amount is] then how does anybody ever determine if in fact the award that the arbitrators perversely misconstrued or manifestly disregarded the law?…How does a reviewing court ever do that if all the court has in front of it is an award that says we decide that Mr. Cousins should have $250,000?***"

[19] If the Association is not required to present findings of fact and conclusions of law, it begs the question of why it requires its own counsel to do so.

(R. p. 245) (emphasis added). Such failure to make findings of fact and conclusions of law serves only to insulate the Arbitration Panel from judicial review, and to further insulate Appellant Association from compliance with South Carolina law.

For example, according to Appellant Association's counsel, the Arbitration Panel had at least one attorney present at the arbitration hearing, who prepared a draft of findings of fact and/or summaries of reasons supporting the decision made by the panel.[20] However, Appellant Association's counsel has made clear that such document is not discoverable, even under a Freedom of Information Act request. (See R. p. 280, 3-25, p. 281, lines 1-8). As a result, Petitioners could not provide the Association's Procedural Review Board, the Master-in-Equity, the Court of Appeals, or this Honorable Court with written and/or formal documentation of the Association's Arbitration Panel's findings of fact or conclusion of law. If not for the Arbitration Panel Chairman's verbal comments during the arbitration directing the Panel to disregard South Carolina law when making a decision,[21] and the fact that the award, given the evidence in this case, directly and clearly contradicts existing South Carolina law, it would be nearly impossible for an appellate court to conduct a meaningful review of the arbitration award in this case. Appellants and the National Association of Realtors, who was permitted by the Court of Appeals to file an *amicus curiae* brief herein, have used the absence of formal findings of fact and conclusions of law within the arbitration award at issue to their advantage throughout the entire appeals process by either inventing their own bases for the Arbitration Panel's award or suggesting the appellate courts did not have a sufficient information to make a determination that the award should be

[20] R. p. 200, lines 5-18, p. 279, lines 14-25, p. 280, lines 1-5.
[21] Audio of Arbitration Panel Hearing, 02:00:55-02:01.45.

vacated.[22] The foregoing underscores just how critical it is for an arbitrator to provide findings of fact and conclusions of law, and how prejudicial it is when that does not occur.

Moreover, if the Court of Appeals' Opinion is not reversed, the Association will have effectively been given the authority to put itself above the law and to deprive realtors, buyers, and sellers of their rights under South Carolina law, which is the exact opposite of the General Assembly's intent. In other words, the Court of Appeals' Opinion gives the Association the right to run its profession the way that it wants, not in the way the General Assembly demands.

Under the Court of Appeals' Opinion, the Association's Arbitration Panel has the ability to issue decisions without providing any basis whatsoever to support such decisions, legal or not. The Association is thus provided with unfettered discretion to disregard South Carolina law without an appellate court having the ability to undertake a meaningful judicial review of its arbitration decisions. Counsel for the Association made it clear the Association believes its arbitration process is above the law during the hearing before the Master-in-Equity, when stating, in pertinent part, as follows:

> Mr. Manos: What's happening in th[e arbitration] hearing is we tried to get behind the facts, Your Honor. It's exactly what arbitration is designed to award.
> Judge Howe: Review. Review. ***Arbitration is to prevent review[?]***
> Mr. Manos: ***Yes, it is in large part.***
> Judge Howe: It is.
> Mr. Manos: …But, yeah, in part it is ***to prevent detailed review***.

R. p. 253, lines 22-25, p. 254, lines 1-8. (emphasis added). In the foregoing statements, the Association's counsel not only implies the purpose of arbitration is not to follow the law (rather,

[22] The Association prohibits the arbitrators deciding its realtors' disputes from providing the very information that an appellate court would need to determine whether or not the arbitrator manifestly disregarded or perversely misconstrued the law. In turn, the Association is able to rely on such procedure to argue South Carolina courts could not possibly be correct in finding that an arbitration award manifestly disregards or perversely misconstrues South Carolina law.

it is to do whatever the arbitrator wants without regard for the law), but also acknowledges the Association's position that its arbitration process should not be subject to review. In sum, the portion of the Court of Appeals' Opinion pertaining to whether the Association's Arbitration Panel should have provided findings of fact and conclusions of law within its award deals a fatal blow to the "manifest disregard" standard of review and insulates the Association's arbitration process from any meaningful judicial review. For these reasons, it is clear Petitioners have been prejudiced by the Panel's failure to provide findings of fact and conclusions of law and that the Court of Appeals erred in reversing the Master's finding on this issue. Petitioners respectfully request the Court of Appeals' Opinion be reversed on this issue.

4. The Court of Appeals Erred By Reversing the Master-in-Equity's Finding That Appellant Association Prejudiced Petitioners' Rights By Prohibiting a Court Reporter From Recording the Procedural Review Hearing, Which is An Integral Part of Association's Arbitration Process.

South Carolina law, public policy, and the Policy of the South Carolina Realtors Governing State Professional Standards Procedures allow for records to be made of arbitration proceedings. S.C. Code Ann. § 15-48-50 states that "upon the request of any party or arbitrator, the arbitrators shall cause to be made a record of the testimony and evidence introduced at the hearing." Appellant Association's Policy states, "All Professional Standards Panel hearings shall be recorded and the recording retained until after the prescribed date for any appeal or procedural review or ratification by the Executive Committee." (R. p. 310). Further, the copy of the National Association of Realtors Manuel ("NAR Manual") provided to Respondents does not state that court reporters and/or transcription is not allowed. (See R. p. 462). Therefore, there are no limitations that only an original arbitration hearing may be recorded.

Contrary to South Carolina statutory law, public policy, and its own policies and procedures, and despite Petitioners' requests prior to and on the day of the Procedural Review

Hearing, Appellant Association failed to allow Petitioners to have a court reporter present to transcribe the hearing. Therefore, as there is no formal documentation of the Arbitration Panel's basis for its decision within the arbitration award, there is also no record of the Procedural Review Hearing that can be submitted on appeal. This prohibition similarly reeks of Appellant Association's attempt to place its arbitration decisions beyond judicial review. This case is a prime example of why recordings and/or transcripts are a necessary component of these types of proceedings.

In addition to the above, public policy dictates that any proceeding that may be appealed to the Circuit Court, and therefore the Court of Appeals and this Honorable Court, should have a court reporter present should any party desire to pay for such expense. The NAR Manual provides that during a Procedural Review Hearing, "the original arbitration Hearing Panel Chairperson will have an opportunity to explain why the Award of Arbitrators should be upheld by [the] Procedural Review Hearing Tribunal." (R. p. 632). This is the only time the arbitrators, themselves, explain what they did and why. Yet, the Court of Appeals' Opinion inexplicably holds the Master-in-Equity erred in finding a lack of recording of this proceeding prejudiced Petitioners.

Disallowing the transcription of directly relevant proceedings creates the very scenario occurring in this case, where at least part of the proceedings below were not recorded, and Appellants attempt to assert their own bases for the Arbitration Panel's decision without any support therefor. Without a full and complete record of what actually occurred in the original proceedings, parties are left to assert their own unsupported conclusions. This also creates unnecessary difficulty for a reviewing court attempting to determine whether an arbitration panel manifestly disregarded the law. All of the foregoing has prejudiced Petitioners and the Court of Appeals has erred in reversing the Master-in-Equity's decision that Appellant Association

substantially prejudiced Respondents by failing to allow for the transcription of the Procedural Review Hearing. Petitioners thus respectfully request this Court reverse the Court of Appeals Opinion on this issue.

CONCLUSION

South Carolina statutory law clearly and unequivocally provides that a realtor is not entitled to a commission in a real estate transaction absent a written agreement entitling such realtor to a commission. It is uncontested no such written agreement exists in this case. With full knowledge of the foregoing, the Association's Arbitration Panel awarded Appellant Cousins a $250,000.00 commission. The Master-in Equity thus correctly found that the Association's Arbitration Panel manifestly disregarded South Carolina law in issuing its award to Appellant Cousins. Inexplicably, the Court of Appeals reversed the Master-in-Equity's decision on the grounds that common law, which is clearly superseded by South Carolina's comprehensive statutory scheme governing real estate transactions, provided a barely colorable basis for the Arbitration Panel's decision.

The outcome of this case shall affect far more than a single commission dispute; rather, it has far-reaching implications for all South Carolina realtors and all buyers and sellers of real estate, as well as the standard for vacating an arbitration award. The Courts of Appeals' Opinion in this matter establishes a public policy that neither realtors, nor the Association, need comply with governing South Carolina law, and places the Association's arbitration process beyond judicial review. Therefore, for the reasons set forth herein, and for the reasons set forth in Petitioners' prior briefs in this matter, Petitioners respectfully request this Honorable Court reverse the October 27, 2021 Court of Appeals' Opinion.

[SIGNATURE PAGE TO FOLLOW]

Respectfully submitted,

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