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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Unpublished Opinion No. 2021-UP-368 (S.C. Ct.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.

PETITIONERS' REPLY TO SOUTH CAROLINA ASSOCIATION OF REALTORS' RESPONSE IN OPPOSITION TO PETITIONER'S BRIEF

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ARGUMENT IN REPLY

Petitioners, Andrew Waldo ("Waldo"), Jane Zheng ("Zheng"), and SC Coast Properties, LLC d/b/a Keller Williams Realty ("KW") (collectively, "Petitioners"), hereby submit this Reply to the Brief of Respondent, South Carolina Association of REALTORS ("SCAR"). In its Brief, SCAR argues the South Carolina Court of Appeals correctly reversed the Horry County Master-In-Equity's[1] August 16, 2018 Order, wherein the Master vacated an arbitration award issued by SCAR's Arbitration Panel, because: (1) South Carolina statutory law does not govern the commission dispute between the Petitioners and Realtor Respondents[2] and (2) the Arbitration Panel had a colorable basis for awarding a commission to Cousins based upon an alleged oral and/or implied commission agreement between Cousins and Zheng. Both of the foregoing arguments are fatally flawed and should be rejected by this Court because South Carolina's comprehensive real estate statutory scheme clearly applies to the dispute at issue herein; the statutory scheme requires divisions of commissions be explained in writing within a representation agreement and signed by the parties; and said statutory scheme supersedes common law that previously permitted oral and/or implied commission agreements.

Like each of its prior briefings in this case, SCAR makes numerous assertions within its Brief that are either mischaracterizations or are untrue. SCAR seeks to frame this case as an attempt by Petitioners to upend SCAR's entire arbitration process. (SCAR Brief, p. 16). However, this appeal only concerns whether **one** SCAR arbitration panel manifestly disregarded South Carolina law in reaching **one** arbitration decision – i.e., awarding a $250,000.00 commission to Realtor Respondents in the absence of any written representation agreement. It is noteworthy that

[1] Hereinafter, the Horry County Master-in-Equity shall be referred to as the "Master."
[2] Respondents Michael Cousins ("Cousins") and Founders Five, LLC d/b/a Sperry Van Ness Founders Group ("SVN") shall be referred to collectively herein as "Realtor Respondents."

SCAR considers the vacation of this single arbitration award to be an upheaval of its entire arbitration process because, while it is true this case has far-reaching implications for South Carolina realtors and their clients, those implications only affect whether realtors are required to comply with South Carolina statutory law governing the real estate profession – and do not affect SCAR's mandatory arbitration requirement. SCAR has thus made it clear that the upheaval to its arbitration process is not Petitioners' appeal of this one specific award; instead, it is the judiciary having the authority to vacate an award issued by a SCAR arbitration panel.[3] In sum, SCAR's position throughout the entirety of this case has demonstrated SCAR's ultimate goal is to ensure its arbitration process is beyond judicial review, no matter how prejudicial or how much an award runs afoul of South Carolina law.

A reversal of the Court of Appeals' October 27, 2021 Opinion does not eradicate or upend SCAR's arbitration requirement; rather, it clarifies: (1) South Carolina statutory law requires all compensation/commissions be known and consented to by buyers and sellers in writing within a representation agreement and; (2) all common law to the contrary, which allowed oral or implied commission agreements prior to the enactment of the statutory scheme, has been superseded by such statutory scheme. In contrast, an affirmation of the Court of Appeals' October 27, 2021 Opinion, which would allow the Arbitration Panel's award to stand, will result in conflicting statutory and common law and effectively communicate to South Carolina realtors that they do not have to comply with South Carolina statutory law. Further, in a case such as this, where the arbitration award was plainly issued in manifest disregard of South Carolina law, failing to vacate

[3] SCAR asserts "the trial court's ruling created several important, expensive changes in the time tested, quick, fair, and inexpensive [National Association of REALTORs ("NAR")] arbitration process, with none justified by statute." (SCAR Brief, p. 8). However, SCAR provides no evidence in support of such assertion, nor identifies any of the alleged changes made. Further, if the NAR had to change something about its arbitration process, it begs the question of what was being done improperly that required such a change.

the arbitration award will serve to insulate arbitrations in South Carolina from any meaningful judicial review and will eviscerate the "manifest disregard" standard of review for vacating an arbitration award. For the reasons set forth herein, and in Petitioners' prior briefs in this case, Petitioners respectfully request this Court reverse the Court of Appeals' October 27, 2021 Opinion.

I. THE COURT OF APPEALS ERRED IN REVERSING THE MASTER'S DECISION VACATING THE SUBJECT ARBITRATION AWARD BECAUSE SUCH AWARD WAS ISSUED IN MANIFEST DISREGARD OF WELL-DEFINED SOUTH CAROLINA LAW AND THERE IS NO COLORABLE BASIS FOR THE AWARD.

Petitioners' prior briefs in this case outline, in detail, why the Master was correct in holding that SCAR's Arbitration Panel acted in manifest disregard of South Carolina law. Petitioners thus adopt and incorporate herein all of their prior briefings in this matter and will not belabor the law on this point. However, within its Brief, SCAR makes two arguments in support of affirming the Court of Appeals' October 27, 2021 Opinion that are wholly incorrect and necessitate additional discussion. First, SCAR argues South Carolina's real estate statutory scheme, codified in South Carolina Code Annotated Section 40-57-5, et. seq., does not apply to the dispute between Petitioners and Realtor Respondents (i.e., disputes between realtors). Second, SCAR argues the Arbitration Panel's award was at least barely colorable because South Carolina common law allows a realtor to recover a commission from another realtor without a written agreement where the commission agreement is oral or may be implied. Both of these arguments are gross misstatements of the law and should be rejected by this Court for the reasons set forth in Petitioners' prior briefs and hereinbelow.

A. South Carolina's Comprehensive Real Estate Statutory Scheme Governs Real Estate Commissions and the Dispute At Issue In This Matter.

This Court should reverse the Court of Appeals' October 27, 2021 Opinion because South Carolina's comprehensive real estate statutory scheme governs the dispute at issue in this case, prohibits oral and/or implied commission agreements, and supersedes any common law to the contrary, as is clear from review of the express language of South Carolina statutory law and the January 11, 2016 Order entered by the Circuit Court in this case, which was never appealed.

1. On Its Face, South Carolina Statutory Law Clearly Encompasses the Commission Dispute At Issue Herein.

Effective January 1, 1998, the South Carolina legislature enacted a comprehensive statutory scheme, which governs the entire range of real estate transactions and relationships between parties involved in real estate transactions, including: seller and buyer agency, dual agency, subagency/co-broker relationships, and commission splits between cooperating brokers. See S.C. Code Ann. § 40-57-5, et. seq.[4] Nonetheless, in its Brief, SCAR argues the real estate statutory scheme does not apply to this case because this case concerns a commission dispute between realtors, rather than between a realtor and client. (SCAR Brief, pp. 15-17). Review of the express language of South Carolina statutory law demonstrates the exact opposite - that South Carolina's real estate statutory scheme encompasses alleged commission splits between realtors and SCAR's argument should be rejected accordingly.

[4] As mentioned in Petitioners' Brief, multiple sections of Title 40, Chapter 57 were amended, effective January 1, 2017. In this Reply (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 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.

First, South Carolina Code Annotated Section 40-57-135 (C)(4), states that a broker[5]/agent may not even advertise, market, or offer to conduct a real estate transaction without first obtaining written representation agreement. See also S.C. Code Ann. § 40-57-139 (E) (emphasis added).[6] The statutory scheme then goes a step further by requiring that the ***"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, contrary to SCAR's argument, South Carolina Code Annotated Section 40-57-135 ***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 the parties***. S.C. Code Ann. § 40-57-135 (D)(4) (emphasis added). As such, 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). 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. South Carolina Code Annotated 40-57-137(Q) further expressly states, "The provisions of this section which are inconsistent with applicable principles of common law **supersede the common law**…" (emphasis added).

[5] 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).

[6] "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).

It could not be any clearer that the foregoing statutes apply to and govern the dispute in this case (i.e., whether Cousins is entitled to a commission split with Zheng). It is also abundantly clear the General Assembly recognized contradictory common law existed and expressly stated such contradictory common law was ***superseded*** by the statutory scheme. See S.C. Code Ann. § 40-57-137(Q).

It is undisputed none of the written agreements required by South Carolina's statutory law exist in this case.[7] (Audio of Arbitration Panel Hearing, 01:44:35-01:45:38). Therefore, Realtor Respondents are not entitled to a commission for the subject real estate transaction. The Arbitration Panel was well-aware of South Carolina statutory law and expressly chose to disregard such law in issuing its award. (Audio of Arbitration Panel Hearing, 02:00:55-02:01.45). SCAR's argument that South Carolina's statutory scheme does not apply to the dispute in this matter is invalid and should be rejected accordingly.

2. The Circuit Court's January 11, 2016 Order, Which Was Never Appealed, Holds That South Carolina's Real Estate Statutory Scheme Prohibits Oral or Implied Commission Agreements and Supersedes Any Prior Common Law to the Contrary.

In addition to the plain language of South Carolina's real estate statutory scheme, on January 11, 2016, the Circuit Court entered an Order in this case, which held Realtor Respondents conceded the nature of their alleged agreement for the subject real estate transaction arose orally and by implication and, pursuant to South Carolina statutory law, Realtor Respondents were prohibited from relying upon an oral or implied agreement theory to recover a commission in the

[7] The Circuit Court's January 11, 2016 Order holds Realtor Respondents did not represent the Seller in the subject real estate transaction. (R. pp. 14-17). Therefore, it must follow that Realtor Respondents 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 Respondents 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).

subject real estate transaction. (R. pp. 14-17) (emphasis added). Despite the express language of South Carolina's real estate statutory scheme and the language in the Circuit Court's January 11, 2016 Order, SCAR and Realtor Respondents have relied upon outdated and superseded common law throughout the pendency of this litigation for the premise that oral and/or implied commission agreements are valid in South Carolina. (SCAR Brief, pp. 18-19). The Court of Appeals also erroneously relied upon such outdated and superseded law in reversing the Master's Order vacating the arbitration award in this case. See Waldo, et. al. v. Cousins, et. al., Unpub. Op. 2021-UP-368, at p. 3 (S.C. Ct. App. dated Oct. 27, 2021).

Based on the foregoing, it is important to revisit the Circuit Court's January 11, 2016 Order, which succinctly analyzes the superseding effect South Carolina's real estate statutory scheme has on contradictory common law decided prior to its enactment:

> 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. p. 16) (emphasis added). The Circuit Court's January 11, 2016 Order was never appealed and is thus the law in this case. See Judy v. Martin, 381 S.C. 455, 458-59, 674 S.E.2d 151, 153 (2009) (holding a party may not seek relief from a prior unappealed order because the order has become the law of the case).

The cases Respondents and the Court of Appeals have relied upon in support of the premise that South Carolina law permits oral and implied commission agreements were decided **well-prior to the enactment of South Carolina's comprehensive real estate statutory scheme.** See Batten v. Howell, 300 S.C. 545, 389 S.E.2d 179 (Ct. App. 1990), Hackler v. Earl Wiegand Real Estate, Inc., 295 S.C. 396, 368 S.E. 686 (Ct. App. 1988), Hilton Head Island Realty, Inc. v. The Skull Creek Club, 287 S.C. 530, 339 S.E.2d 890 (Ct. App. 1986). SCAR admits this fact within its own Brief. (SCAR Brief, p. 21) (stating "*Hackler* and *Batten* were decided long before the General Assembly enacted Sections 40-57-137 and 40-57-139.").

Even more noteworthy, in a case comparable to this appeal decided by the South Carolina Court of Appeals ***after*** the enactment of the real estate statutory scheme, the Court of Appeals held a realtor cannot recover any compensation in a real estate transaction in the absence of a written agreement. King v. Bennett, No. 2013-UP-459, 2013 WL 8541636 (S.C. Ct. App. Dec. 11, 2013).[8] This is consistent with the language in the Circuit Court's January 11, 2016, wherein the Circuit Court stated, "the same findings [of an oral or implied commission agreement] could not be made in light of today's statutory environment." (R. p. 16). Therefore, based upon the express language

[8] Respondents present King v. Bennett because its facts and legal analysis are directly on point to this case. However, Respondents acknowledge that this is an unpublished opinion and are not citing to this case as controlling authority.

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.***

B. It Is Uncontested That There Was No Written Commission Agreement Between Petitioners and Respondents For the Real Estate Transaction At Issue Herein.

SCAR spends a significant portion of its Brief discussing real estate transactions between Cousins and Zheng that either do not concern the real estate transaction at issue herein or have no bearing on the subject real estate transaction. (SCAR Brief, pp. 8-12, 18-19). As such, SCAR's discussions thereof are simply intended to be a distraction from the real issue in this appeal, which is that Realtor Respondents did not enter into any written agreement that would enable them to earn a commission for the subject real estate transaction.

As set forth above, a broker/agent is not entitled to a commission unless he/she has a signed, written representation agreement with a buyer or seller. See supra Section I(A), S.C Code Ann. § 50-47-5, et. seq. South Carolina's statutory law supersedes common law, which previously permitted oral or implied commission agreements. Id. Despite all the misleading facts SCAR presents within its brief regarding other real estate transactions Zheng and Cousins worked on, it is uncontested Realtor Respondents had no written representation agreement with any party to the real estate transaction at issue ***in this case***.[9] (Audio of Arbitration Panel Hearing, 01:44:35-01:45:38).

SCAR's Arbitration Panel had knowledge of the fact that Realtor Respondents did not have a written agreement with any party to the subject real estate transaction. (Id.). The Arbitration

[9] See supra fn 5.

Panel also had knowledge of South Carolina's governing real estate statutory scheme and the Circuit Court's January 11, 2016 Order holding such statutory scheme superseded common law that previously permitted oral or implied commission agreements. 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 Respondents 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 Respondents. Further, not only did the Panel disregard all of the foregoing facts and governing law, but the Panel Chairman instructed the Panel to focus on a theory the Panel knew was expressly superseded by governing statutory law and had been rejected by the Circuit Court in this very same case. (See S.C. Code Ann. 40-57-137, R. pp. 15-17). SCAR's references to and reliance upon interactions between Zheng and Cousins on other real estate transactions and to draft, unexecuted term sheets are thus meaningless to the real estate transaction at issue here, where **no written agreement exists**. Without such written agreement, there is no colorable basis upon which the Arbitration Panel could have awarded Cousins a commission for the subject real estate transaction. Therefore, SCAR cannot argue the Arbitration Panel properly considered outside transactions as evidence of an oral or implied commission split agreement.

C. Even Under A Procuring Cause Argument, The Arbitration Panel Had No Colorable Basis For Awarding Realtor Respondents A Commission In the Absence of a Written Representation Agreement.

Even Respondents' "procuring cause" argument fails in the absence of a written agreement with the Buyers or the Seller in the subject real estate transaction. South Carolina statutory law strictly prohibits agency relationships in the real estate context absent a written agreement (i.e. Cousins could not have been the "procuring cause" of transactions when he did not legally represent either party).[10] See S.C. Code Ann. § 40-37-139 (G). South Carolina common 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),[11] 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 (1935) ("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

[10] In addition to the fact that South Carolina statutory law does not provide for the recovery of a real estate commission under a "procuring cause" theory, Cousins' own Affidavit demonstrates that he ***could not*** have been a procuring cause of the real estate transactions at issue because, as he points out in series of emails attached as Exhibit 11 to his Affidavit, he did not even have knowledge of the thirteen (13) golf course deal that is the subject of this commission dispute. (See R. p. 357, lines 12-19, R. p. 338) (emphasis added). Also noteworthy, in a previous real estate transaction for the sale of the Aberdeen golf course, the Agreement of Sale expressly names Realtor Respondents as the seller's agent and Petitioners as the buyers' agent. (R. pp. 333-336). However, in the real estate transaction at issue here, the Agreement of Purchase and Sale states that "no broker's or real estate commissions will be due…other than commissions due to the Purchaser's agent, Keller-Williams office in Myrtle Beach, South Carolina (Jane Zheng, agent) under separate commission agreement." (R. p. 815, lines 18-37).

[11] 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.

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). Therefore, even if it were proper for the Arbitration Panel to analyze "procuring cause" the complete absence of any written agency agreement still renders any procuring cause argument in this case futile.

D. SCAR Does Not Seek the Proper Application of South Carolina Law, Rather It Seeks Only To Insulate Its Arbitration Process From Judicial Review.

In its Brief, SCAR makes numerous assertions that are either mischaracterizations or are simply untrue. For example, SCAR frames this case as "Petitioners' attempt to upend [the National Association of REALTORS' ("NAR")] decades old arbitration practice…" (SCAR Brief, p. 16). SCAR even goes so far as to state Zheng "intentionally concealed" the real estate transaction from Cousins and asserts the Court of Appeals found Petitioners' alleged secretive conduct of cutting another realtor out of a real estate transaction unjust. (SCAR Brief, pp. 1, 4). The foregoing allegations are patently false, as the Court of Appeals' October 27, 2021 Opinion contains no language even remotely resembling such an assertion. Waldo, et. al. v. Cousins, et. al., Unpub. Op. 2021-UP-368 (S.C. Ct. App. dated Oct. 27, 2021).

However, it is noteworthy that ***Realtor Respondents initiated this action in Circuit Court*** rather than abiding by what SCAR asserts is a mandatory arbitration process. (See R. pp. 58-63) (emphasis added). It was Petitioners who reminded Realtor Respondents of the parties' obligation to arbitrate the dispute and it was upon Waldo's request that arbitration was conducted herein. (R. pp. 64-65). Petitioners voluntarily complied with SCAR's arbitration requirement and participated in the arbitration process from start to finish. Only upon receipt of an arbitration decision that completely disregarded South Carolina law did Petitioners file an appeal, as they had every right

to do, pursuant to South Carolina law. See C-Sculptures v, 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).

SCAR emphasizes that Waldo "demanded that the parties arbitrate their dispute" as though to imply Waldo's cooperation with the SCAR's "mandatory" arbitration policy somehow limits his right to judicial review of the Arbitration Panel's award. (See SCAR Brief, p. 6). Under a similar implication, SCAR asserts Waldo admitted that the arbitration hearing had been fair. (Id., p. 6). This assertion by SCAR is a mischaracterization of Waldo's testimony, and is without proper context. Although the Arbitration Panel did question Waldo as to whether he believed the hearing was conducted fairly; it did so prior to the Panel's decision being made and Waldo responded to such questioning by stating, first and foremost, that he felt the issue of agency was an important issue for the Panel to consider, and that he believed the hearing to have been fair, ***with the exception of the agency issues***.[12] (Audio of Arbitration Panel Hearing, 2:26:26 – 2:27:10).

Therefore, while SCAR claims to take no side in this dispute;[13] SCAR is the only Respondent who opposed Petitioners' Petition for Writ of Certiorari and the only Respondent who has opposed Petitioners' Brief before this Court. Even if SCAR has not formally acknowledged this fact, it is apparent SCAR is now arguing on behalf of itself and on behalf of Realtor Respondents in this appeal. It is also abundantly clear SCAR's ultimate goal is not to ensure fairness, justice, and judicial economy – it is, instead, to ensure its arbitration process is beyond judicial review. All of SCAR's mischaracterizations and gross exaggerations are simply a smokescreen to distract from the real issue in this case – whether SCAR's Arbitration Panel

[12] 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…"

[13] See SCAR Brief, p. 8.

manifestly disregarded clear, well-defined South Carolina law in awarding Realtor Respondents a commission in a real estate transaction where Realtor Respondents did not represent any party to the transaction and never entered into any written agreement concerning the transaction.

II. THE COURT OF APPEALS ERRED IN REVERSING THE MASTER'S HOLDING THAT SCAR'S ARBITRATION PANEL PREJUDICED PETITIONERS BY FAILING TO ISSUE FINDINGS OF FACT AND CONCLUSIONS OF LAW WITH ITS AWARD AND BY SCAR'S PROCEDURAL REVIEW BOARD PROHIBITING PETITIONERS FROM HAVING A COURT REPORTER TRANSCRIBE THE PROCEDURAL REVIEW HEARING.

Petitioners adopt and incorporate herein their prior arguments with regard to the prejudicial effects of the Arbitration Panel's failure to include findings of fact and conclusions of law in its award and the Procedural Review Board's prohibition against transcription of the procedural review hearing. For purposes of brevity, Petitioners will not reiterate those points at length. However, it is important to note, SCAR's policies regarding the foregoing issues are a clear demonstration of how SCAR seeks only to insulate its arbitration process from proper judicial review.

SCAR has extoled the virtues of its internal dispute resolution process throughout the entirety of this litigation. Yet, as noted by the Master-in-Equity, SCAR conveniently forbids its arbitration panels from providing any material that a reviewing court can use to ascertain how a panel reached a decision in a dispute. (See R. p. 245).[14] This prohibition is even more curious considering SCAR's own policy governing arbitrations requires legal counsel for SCAR to be present at all arbitrations and to "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."

[14] "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?"

(R. p. 311). Therefore, either SCAR's legal counsel prepared findings of fact and bases for the Arbitration Panel's decision in this case or SCAR violated its own policy by failing to do so. Irrespective of what occurred, such findings of fact and conclusions of law have never been provided to Petitioners or the Court in this matter. The **only** logical basis for prohibiting findings of fact and conclusions of law from being disclosed together with an award is to prevent the judiciary system from being able to conduct a meaningful review of the Arbitration Panel's decision. At the hearing before the Master, counsel for SCAR even admitted the purpose of arbitration is, in large part, to prevent review. (R. p. 253, lines 22-25, p. 254, lines 1-18).

Likewise, SCAR forbids any record being made of a Procedural Review Hearing, which is the only time in SCAR's internal dispute resolution process where an arbitration panel may provide its reasoning for its award. Again, the **only** logical basis for such a prohibition would be preventing a meaningful review of the Panel's decision-making. All of the foregoing evidences how SCAR's policies have prejudiced Petitioners in this case.

III. SCAR WAIVED ITS ARGUMENT THAT THE FEDERAL ARBITATION ACT APPLIES TO THIS CASE BY FAILING TO RAISE SUCH ISSUE BEFORE THE MASTER; HOWEVER, IT IS WHOLLY IRRELEVANT WHETHER THE FEDERAL ARBITRATION ACT OR THE SOUTH CAROLINA UNIFORM ARBITRATION ACT IS APPLICABLE TO THIS CASE.

In its Brief, SCAR argues that the Federal Arbitration Act ("FAA"), rather than South Carolina's Uniform Arbitration Act ("SC UAA"), is the proper standard of review for this case. (SCAR Brief, pp. 27-29). SCAR is barred from raising this argument on appeal, when it failed to ever do so in the underlying case.[15] See Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) ("It is well-settled that an issue cannot be raised for the first time on appeal,

[15] The pages in the record SCAR cites to as evidence of SCAR raising and arguing the FAA "at every level of this case" are only references to prior briefs where SCAR recited provisions from the FAA as a failsafe "if the FAA applies." SCAR never argued at the trial level that FAA ***did apply to this case*** and has thus waived any such argument.

but must have been raised to and ruled upon by the trial court to be preserved for appellate review."). In fact, at the June 21, 2017 hearing on Petitioners' Motion to Vacate the Arbitration Award and Respondents' opposing motions, counsel for SCAR expressly stated that "the Association has taken no position as to which act applies here." (R. p. 264). Therefore, SCAR has waived its right to assert the FAA applies at this level.

Nonetheless, even if SCAR is allowed to argue the FAA applies to this matter, the very ground upon which the Master vacated the arbitration award - the Arbitration Panel's manifest disregard of South Carolina law - is a proper ground for vacating an arbitration award regardless of whether the FAA or the SC UAA applies to the arbitration process in this matter. (See Patten v. Signator Ins. Agency, Inc., 441 F.3d 230, 234 (4th Cir. 2006) (citing Apex Plumbing, 142 F.3d 188 (4th Cir. 1999), Gissel, 382 S.C. 235, 676 S.E.2d 320 (2009)) (emphasis added).

The Circuit Court's August 16, 2018 Order Vacating Arbitration Award set forth the following standard:

> [U]nder certain circumstances, such as when the arbitrator manifestly disregards or perversely misconstrues the law, a court can vacate an arbitration award. (Gissel v. Hart, 382 S.C. 235, 676 S.E.2d 320 (2009) (citing Technical College v. Lucas and Stubbs, 286 S.C. 98, 333 S.E.2d 781 (1985) and S.C. Code Ann. § 15-480-130(a)). For a South Carolina court to vacate an arbitration award on the grounds that the arbitrator manifestly disregarded or perversely misconstrued the law, the governing law must be 'well defined, explicit, and clearly applicable.' Gissel, 403 S.C. at 241 (citations omitted). Further, "'[a]n arbitrator's manifest disregard for the law' as a basis for vacating an arbitration award occurs when the arbitrator knew of a governing legal principal yet refused to apply it." Gissel, [382 S.C.] at 241 (citing Weimer v. Jones, 364 S.C. 78, 610 S.E.2d 850 (Ct. App. 2005)); [s]ee also C-Sculptures, LLC v. Brown, 403 S.C. 53, 742 S.E.2d 359 (2013) (holding the manifest disregard standard is not insurmountable and vacating an arbitrator's award where the arbitrator was apprised of unambiguous, clearly applicable South Carolina statutory law and did not apply that law). **Likewise, the Fourth Circuit will also vacate an arbitration award where an arbitrator acts in**

> **manifest disregard of the law. See Apex Plumbing Supply, Inc. v. U.S. Supply Co., Inc., 142 F.3d 188 (4th Cir. 1998) ("Federal courts may vacate an arbitration award only upon a showing of one of the grounds listed in the Federal Arbitration Act, or if the arbitrator acted in manifest disregard of the law.")**.

(R. pp. 42-43) (emphasis added). Based upon the above, it is clear that the Master was aware that the manifest disregard standard was applicable to the facts of this case whether the SC UAA or the FAA governed this particular arbitration process, and that the Master applied the proper standard of review accordingly.

SCAR's arguments before both the Master and in its Brief before this Court further support the above. SCAR has acknowledged that an arbitration award may be overturned whether either the SC UAA or the FAA applies if the Master finds that the arbiter "manifestly disregarded the law." (R. p. 99,[16] R. p. 118, R. p. 156).[17] Therefore, regardless of whether the SC UAA applies or the FAA applies to this matter, the Master did not err in vacating the arbitration award on the basis that SCAR's Arbitration Panel manifestly disregarded and/or perversely misconstrued South Carolina law. Courts applying both Acts have provided for vacating an arbitration award where the arbitrator manifestly disregards the law, such as here, where the Arbitration Panel had knowledge of well-defined, clearly applicable South Carolina law governing real estate transactions and chose instead to ignore such law. (See Audio of Arbitration Panel Hearing, 02:00:55-02:01.45).[18] In sum, SCAR's argument for application of the FAA is barred by SCAR's failure to raise such argument in the lower court. However, regardless of the foregoing, SCAR's

[16] ("To vacate an award under the FAA an applicant must show that the arbiter manifestly disregarded the law…") (internal citations omitted).
[17] ("To vacate an award under the FAA an applicant must show that the arbiter manifestly disregarded the law…") (internal citations omitted).
[18] The statutes that are wholly disregarded by the Arbitration Panel are the very laws which govern real estate practice in South Carolina. In addition, the Panel had, in its possession, a copy of the January 11, 2016 Circuit Court Order, which is the law of this case, and chose to intentionally disregard it.

argument that the FAA governs the arbitration at issue here rather than the SC UAA is ultimately futile and immaterial.

CONCLUSION

South Carolina statutory law expressly 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. South Carolina statutory clearly applies to the dispute in this case, as evidenced by the plain language of the statutes and by the Circuit Court's January 11, 2016 Order. It is uncontested Realtor Respondents had no written agreement with regard to representation or commission splitting in the subject real estate transaction. With full knowledge of all of the foregoing, SCAR's Arbitration Panel awarded Realtor Respondents a $250,000.00 commission. The Master-in Equity thus correctly found that SCAR's Arbitration Panel manifestly disregarded South Carolina law in issuing its award. Inexplicably, the Court of Appeals reversed the Master'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 SCAR, need comply with governing South Carolina law, and places SCAR'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.

Respectfully submitted,

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