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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	IN THE FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	
	)	
Andrew Waldo; Jane Zheng; and SC Coast Properties, LLC d/b/a Keller Williams Realty,	)	CIVIL ACTION NO.: 2016-CP-26-03338
Appellants,	)	
vs.	)	
Michael Cousins; Founders Five, LLC d/b/a Sperry Van Ness Founders Group; and South Carolina Association of REALTORS®,	)	
Respondents.	)	

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AUG 30 2018
SC Court of Appeals

ORDER VACATING ARBITRATION AWARD

This matter was before the Court on June 21, 2017. Present were: Douglas M. Zayicek and Holly M. Lusk, attorneys for the Appellants; Marcus A. Manos, attorney for Respondent South Carolina Association of Realtors; and L. Sidney Connor, IV, attorney for Respondents Michael Cousins and Founders Five, LLC d/b/a Sperry Van Ness Founders Group.

This case involves the appeal of an arbitration decision made by the Arbitration Panel of Respondent, South Carolina Association of REALTORS®, which awarded a $250,000.00 commission to Respondent Michael Cousins for his alleged involvement in a commercial real estate transaction involving thirteen (13) golf courses in the Myrtle Beach, South Carolina area.[1] In addition to Appellants' appeal of that arbitration award, Respondents filed a Motion to Confirm the Arbitration Award. After thorough review of the pleadings, memoranda submitted by the parties, the parties' exhibits, oral arguments, and relevant South Carolina law, the Court hereby

[1] For simplicity, Respondent Cousins and Sperry Van Ness are referred to herein as "Cousins;" Respondent Association's Arbitration Panel and Procedural Review Board are referred to as "Association;" and Appellants Waldo, Zheng, and Keller Williams are referred to as "Appellants" or "Keller Williams."

ORDERS the Association's arbitration award be vacated[2] for the following reasons: (1) Association manifestly disregarded or perversely misconstrued South Carolina statutory and common law by awarding Cousins a commission, and there was not a colorable claim allowing Association to award Cousins a commission; (2) Cousins did not represent either Seller or Buyer in the underlying transaction; (3) the Circuit's Court's Order in 2015-CP-26-02066 was binding on Respondents and this Court, and Cousins is barred by collateral estoppel, and res judicata from alleging he represented anyone but the Seller in the underlying transaction; and (4) Respondent Association did not comply with S.C. Code §§15-48-180 and -50.

FACTS AND PROCEDURAL HISTORY

This case arose out of a dispute over whether Cousins[3] was due a commission on certain real estate transactions involving golf courses in the Myrtle Beach, South Carolina area, during which the buyers were exclusively represented by Appellants via written representation agreements.[4] It is undisputed that Cousins did not have any written representation agreement with either the seller or buyer.

On March 20, 2015, Cousins brought a Circuit Court action (2015-CP-26-02066) against Keller Williams, Randy Wallace, Jane Zheng, National Golf Management, LLC (or otherwise referred to as "Seller"), Xian (Nick) Dou, Yang Wang, and Kang Xou (together, "Buyers"). In its Complaint, Cousins alleged it was the "procuring cause" of certain real estate transactions between the Seller and Buyers[5] and sought one-half of any commissions received by Appellants. However, in an affidavit filed by Cousins on November 16, 2015, he acknowledged Appellants were the

[2] In addition, the Court denies Respondents' Motions to Confirm Arbitration Award.
[3] Respondent Cousins is a real estate agent and/or broker employed by Sperry Van Ness.
[4] Nick Dou, a representative of the Buyers, executed two agency agreements with Jane Zheng of Keller Williams covering the period during which the transactions at issue took place. Both agreements specify that Jane Zheng of Keller Williams was to be the Buyers' "exclusive agent."
[5] Sperry Van Ness also acknowledges in its Complaint that its alleged "arrangement for the split of the real estate commission…is recognized as a standard *oral* contractual arrangement."

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Buyers' exclusive agent, his relationship was only with the Seller, and that he did not have any written agreement with Seller.

In June 2015, Cousins dismissed Randy Wallace from the case. On or around September 2015, Keller Williams and Jane Zheng were dismissed from the Circuit Court action upon the agreement that any dispute with Cousins would be arbitrated by a panel chosen by Association, should there be any matters left to arbitrate pending the outcome of the Circuit Court action. Thereafter, Appellants submitted a Request and Agreement to Arbitrate to the Association, which was received by the Association on September 28, 2015.

At the time Keller Williams and Jane Zheng were dismissed from the Circuit Court action, Seller also had a motion to dismiss the action pending before the Court. In its Motion, Seller argued: (1) Cousins never represented Seller in the real estate transactions at issue (either orally or in writing); and (2) South Carolina law requires a written agreement to form an agency or dual agency relationship in a real estate transaction, which Cousins admitted did not exist. The Court agreed with Seller; and, on January 11, 2016, the Court granted Seller's Motion to Dismiss, holding that, pursuant to South Carolina law, an agency relationship in the context of a real estate transaction cannot exist without a written agreement. In its Order, the Court stated, "No such written listing agreement has been alleged to exist, and [Cousins] concedes that the nature of the alleged agreement arose orally and by implication." As a result, the Court concluded that because "[t]he South Carolina General Assembly has definitively spoken on [this issue]...such statement is dispositive of [Cousins'] argument.[6] The Circuit Court's Order was not appealed and is now the law of the case. *See, e.g., ML-Lee Acquisition Fund, L.P. v. Deloitte Touche*, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997).

[6] The Court's Order provides a clear and explicit outline of South Carolina statutory law regarding the requirement of a writing to create an agency and/or dual agency relationship in the real estate transaction context.

Therefore, as of January 11, 2016, only the arbitration between Appellants and Cousins, remained. Prior to the arbitration, Appellants provided Association with a copy of the Circuit Court's January 11, 2016 Order specifying that without a written agency/listing agreement and/or without a written dual agency agreement, of which there were none, Cousins was not entitled to a commission for the underlying real estate transactions. Despite having knowledge of the Court's January 11, 2016 Order, applicable South Carolina statutory law, and the admitted absence of any written listing or commission agreement involving Cousins,[7] on February 2, 2016, Association found Appellants owed Cousins a $250,000.00 commission on the underlying real estate transaction. The Chairman of the Association's arbitration panel indicated before the hearing that Association's goal was to achieve an equitable result, even though the National Association of Realtors' rules, allegedly followed by the Association, specifically required that state law be followed. In addition, the Chairman indicated that no issue regarding agency was to be considered by the panel in reaching its decision.

In its one-sentence decision, Association did not provide any specific findings of fact or conclusions of law relied upon as the basis for its decision, even though its own rules provide that its counsel shall prepare findings of fact and conclusions of law to support the panel's decision.

On February 24, 2016, Appellants filed a Request for Procedural Review with the Association.[8] Appellants provided Association with relevant documents, inclusive of the Court's January 11, 2016 Order and other materials. Even though Appellants had a Court reporter present

[7] Not only did Cousins not have a written agency/listing agreement with the Buyers, the Buyers had an exclusive agency agreement with Appellant Jane Zheng of Keller Williams.

[8] Shortly after filing its Request for Procedural Review, on March 1, 2016, Appellant Waldo filed a Notice of Appeal of the Association's arbitration award ("Appeal I") in the Horry County Court of Common Pleas, which was captioned C/A No. 2016-CP-26-01498.

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and the Procedural Review is a part of Association's arbitration hearing process, Association banned Appellants' court reporter from the proceeding.

Association held a Procedural Review Hearing on May 2, 2016, during which Appellants were informed, for the first time, that the basis for the Association's arbitration award of a $250,000.00 commission to Cousins was the existence of an alleged oral and implied agency agreement with Cousins, which the Circuit Court already ruled in its January 11, 2016 Order was illegal and unenforceable under South Carolina law. Association affirmed the award of a $250,000.00 commission to Cousins. By Association issuing a one-sentence decision with no findings of fact or conclusions of law to support that decision, and barring a court reporter from transcribing the Procedural Review hearing wherein those findings were actually provided, Appellants argue Association has attempted to place its decision beyond judicial review, contrary to the text, intent, and spirit of the South Carolina Arbitration Act.

On May 17, 2016, Appellants filed a second Notice of Appeal, which was captioned C/A No. 2016-CP-26-03338 ("Appeal II").[9] Shortly thereafter, Appellants filed a Motion to Consolidate Appeal I and Appeal II.

Prior to consolidation, in both Appeals, Association filed a Motion to Dismiss or, in the Alternative, for Summary Judgment, which Cousins joined. Cousins also filed a Motion to Confirm Arbitration Award. On September 6, 2016, the Circuit Court heard all pending motions. On September 7, 2016, by Form 4 Order, the Circuit Court consolidated the appeals with the consent of the Parties, denied Respondents' Motions to Dismiss or, in the Alternative, for Summary Judgment, and Denied Cousins' Motion to Confirm Arbitration Award and Enter

[9] The allegations in Appeal II are identical to Appeal I, with the exception that Appeal II also encompasses the Procedural Review Board's decision.

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Judgment.[10] Subsequently, Cousins filed a Motion for Reconsideration of the Court's Order denying its Motion to Confirm Arbitration Award, which the Court denied on February 1, 2017.[11] By Order dated April 3, 2017, the consolidated Appeals were referred to the Master-In-Equity and were heard on June 21, 2017.

LEGAL STANDARD

Arbitration is a favored method of dispute resolution in South Carolina. Gissel v. Hart, 382 S.C. 235, 240, 676 S.E.2d 320, 323 (2009). When parties submit a dispute to arbitration, the arbitrator determines both questions of law and fact. Id. at 241; See also S.C. Code Ann. § 15-40-180 ("[W]hen a dispute is submitted to arbitration, the arbitrators shall determine questions of both law and fact.").

"Generally, an arbitration award is conclusive and courts will refuse to review the merits of an award." Id. However, under certain circumstances, such as when the arbitrator manifestly disregards or perversely misconstrues the law, a court can vacate an arbitration award. Id. (citing Technical College v. Lucas and Stubbs, 286 S.C. 98, 333 S.E.2d 781 (1985) and S.C. Code § 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, 403 at 241 (citing Weimer v. Jones, 364 S.C. 78, 610 S.E.2d 850 (S.C. Ct. App. 2005)); See also C-Sculptures, LLC v. Brown, 403 S.C. 53, 58, 742 S.E.2d 359, 361-62 (2013) (holding

[10] The Court's Form 4 Order was followed by a formal written Order, which was entered on September 23, 2016.
[11] With its denial of Respondent Cousins' Motion to Reconsider, the Court did clarify by Order dated February 21, 2017, that nothing in the Court's September 23, 2016 Order was meant to determine the merits of the Appeals.

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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.").

ANALYSIS

I. ASSOCIATION MANIFESTLY DISREGARDED AND/OR PERVERSELY MISCONSTRUED KNOWN, WELL-DEFINED, EXPLICIT, AND CLEARLY APPLICABLE SOUTH CAROLINA LAW IN AWARDING COUSINS A COMMISSION WITHOUT A WRITTEN AGREEMENT SHOWING HE REPRESENTED EITHER THE SELLER OR THE BUYER.

It is uncontested that Cousins has nothing in writing showing he represented anyone in the underlying real estate transaction. His only allegation in the Circuit Court Complaint is that his alleged representation was solely based on an alleged oral agreement with Seller. Seller denied any such agreement, and prevailed in the Circuit Court action.

South Carolina statutory law is well defined, explicit, and clear about the fact that in the context of real estate transactions, an agency relationship can only be created with a buyer or seller by written agreement. See S.C. Code Ann. § 40-57-139(G) (1976, as amended) (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.") and S.C. Code Ann. § 40-57-139, Subsections (B) and (C) (1976, as amended) (stating that a licensee who becomes either a seller's or a buyer's agent shall provide an agency disclosure form to the respective seller or buyer

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at the time an agency agreement is signed and that there must be an acknowledgment of receipt of that form in the agency agreement) (1976, as amended).[12]

South Carolina statutory law also provides that 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); See also S.C. Code Ann. § 40-57-135(D)(4)(d) (1976, as amended) ("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.")

South Carolina statutory law also prohibits subagency and/or dual agency agreements between agents/brokers without buyer and/or seller knowledge and consent. South Carolina Code Annotated Section 40-57-137, Subsections E, J, M(1), and Q state:

> (E) A licensee acting as a seller's agent may not offer a subagency relationship to other brokers or offer to compensate another broker who represents a buyer without the knowledge and consent of the seller client.
>
> (J) A licensee acting as a buyer's agent may not offer a subagency relationship to other brokers or offer to compensate another broker who represents a seller without the knowledge and consent of the buyer client.
>
> (M)(1) A licensee may act as a disclosed dual agent only with the prior informed and written consent of all parties. The informed consent must be evidenced by a dual agency agreement, promulgated by the commission, and must be signed by the buyer before writing an offer and by the seller before signing the sales contract.
>
> (Q) The provisions of this section which are inconsistent with applicable principles of common law supersede the common law,

[12] S.C. Code Ann. §§ 40-57-135, 40-57-137, and 40-57-139 are all effective through December 31, 2016 and apply to this case.

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and the common law may be used to aid in interpreting or clarifying the duties described in this section.

(1976, as amended). Thus, the law adopted by the General Assembly is defined, explicit, clear, and expressly prohibits the exact scenario present in this litigation—a real estate agent trying to obtain a commission in a real estate transaction in which there is no written agency agreement, whatsoever.

During the Arbitration, the Association not only had knowledge of this clearly applicable South Carolina statutory scheme (legislating its very profession), it also possessed a copy of the Circuit Court's January 11, 2016 Order, which unequivocally sets forth this law and holds that absent a written listing/agency agreement, of which Cousins admits there is none, he is not entitled to a commission in the underlying transaction.[13] This law covers all real estate transactions in South Carolina, and does not distinguish between commercial and residential real estate transactions. See S.C. Code Ann § 40-57-10 (1997). Thus, the Association's award of a commission in light of governing South Carolina statutory law is a manifest disregard, or a perverse construction, of such law.

A. Cousins Did Not Have a Written Listing/Agency Agreement with Either the Sellers or Buyers.

Appellants correctly argue that in the absence of a written agreement with either the Seller or the Buyer, Cousins could not have represented either party in the transactions at issue; therefore, an award of a real estate commission to Cousins is a manifest disregard and/or a perverse misconstruing of South Carolina law. In support of their position, Appellants cite to the fact that Cousins admits in his affidavit in the Circuit Court action: (1) Appellants were the Buyers' agent;

[13] The January 11, 2016 Order also explicitly holds that Respondents Cousins and Sperry Van Ness did not represent the Seller in the transactions at issue; therefore, pursuant to the aforementioned South Carolina statutory law, they were not entitled to a commission under either an agency theory or a dual agency theory.

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and (2) no written agreement existed between Cousins and Seller. Regardless of the contradictory positions Cousins has taken while under oath in regards to whom he asserts he "represented" in the real estate transactions at issue, his arguments that he is entitled to a commission all fail under South Carolina law in the absence of a written agency/listing agreement with either the Seller or the Buyers.[14]

Cousins has not presented any evidence of a written listing/agency agreement with the Buyers or the Seller in the real estate transaction at issue. Both the Buyers and the Seller have denied that such documents exist. Further evidencing the fact that Cousins never represented the Buyers are the two, written agency agreements between the Buyers and Jane Zheng, both of which state that Ms. Zheng of Keller Williams is to be the Buyers' "exclusive" agent during the time period the transactions at issue took place. As to Cousins' relationship with the Seller, this issue was resolved by this Court's January 11, 2016 Order, wherein the Court held Cousins was not the Seller's representative in the transactions at issue.

Pursuant to South Carolina Code Annotated Sections 40-37-135(C)(4) and (D)(4) (1976, as amended), a written representation agreement is required by law before a broker/agent may represent anyone in a real estate transaction. For this reason, Cousins cannot establish as a matter of law that he represented any party to the real estate transactions in this case, as he admits that there was no requisite written agreement between himself and either Seller or Buyers.

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[14] The Circuit Court's January 11, 2016 Order explicitly states Cousins and Sperry Van Ness cannot recover a commission on the transactions at issue because they had no written agreement, nor did they allege the existence of any written agreement, with the Seller. Therefore, the Circuit Court has already held Cousins did not represent the Seller, and such ruling is the law of the case. Also, it is exceptionally clear from the facts in this case that Cousins did not represent the Buyers, as there is no written agency agreement between Cousins and the Buyers. To the contrary, there are written agency agreements showing Jane Zheng of Keller Williams was the Buyers' **exclusive** agent.

Accordingly, Cousins has no right to a commission and the Court finds the Association's award of a commission to Cousins is in manifest disregard of South Carolina law.

Simply put, an agency relationship cannot be established based on the unilateral representations of the alleged agent—there must be some manifestation of intent from the principal in order to create an agency relationship. The South Carolina General Assembly has expressly indicated that in the context of a real estate transaction, the principal's intent must be in the form of a writing executed by the principal. In this case, the evidence shows that both the Seller and Buyers vehemently denied Cousins represented either of them in the underlying transaction, and Cousins admits there is nothing whatsoever in writing indicating that he represented either the Buyers or Sellers.

i. Cousins' "Procuring Cause" Argument Does Not Entitle Him to a Commission In the Absence of a Written Agency/Listing Agreement with the Buyers Or the Seller.

Cousins argues, and it appears the Association agreed, he is entitled to a commission because he was the "procuring cause" of the real estate transactions at issue. The Court disagrees, as Cousins' "procuring cause" argument also fails in the absence of a written agreement with the Buyers or the Seller.

As discussed above, South Carolina statutory law expressly 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).[15] See S.C. Code Ann. §40-37-139(G) (1976, as amended).

[15] 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.

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Further, South Carolina common law confirms that a real estate broker cannot be the "procuring cause" of a 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),[16] Hobbs v. Hudgens, 223 S.C. 88, 96, 74 S.E.2d 425, 427-28 (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.") (emphasis added), Smith v. Peeples, 177 S.C. 479, 181 S.E. 653, 656 ("A broker is entitled to his commissions, if **during the continuance of his agency**, he is the efficient or procuring cause of the sale.") (emphasis added); Roberts v. Gaskins, 327 S.C. 478, 487, 486 S.E.2d 771, 775 (Ct. App. 1997) (wherein the South Carolina Supreme Court cited to Goldsmith v. Coxe, 80 S.C. 341, 346-47, 61 S.E. 555, 557 (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).[17] Thus, even if Cousins were to solely rely on a procuring cause argument as the basis for being entitled to a commission, South Carolina common law still requires proof of an agency relationship, which our General Assembly requires to be in writing.

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[16] 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.

[17] Emphasis added. Appellants reference King v. Bennett, No. 2013-UP-459, 2013 WL 8541636 (S.C. Ct. App. Dec. 11, 2013), wherein a real estate professional sought compensation following a real estate transaction for alleged services she provided to the buyers. Appellants acknowledged that King v. Bennett case is an unpublished opinion and not a controlling authority; however, its facts and legal analysis are directly on point to this matter. Like Cousins, in King, the realtor never obtained a written agency agreement with any party to the real estate transaction and argued that her claims for compensation were based upon equity rather than contract. Id. at *1. The Court of Appeals disagreed with the realtor's arguments and upheld the trial court's dismissal of the realtor's claims, holding that a realtor cannot recover any compensation in the absence of a written agreement. Id.

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Finally, the Court cannot overlook the email Cousins sent to Appellant Jane Zheng, wherein he expressly admits not having any knowledge of the thirteen (13) golf course transaction at issue in this case. It is axiomatic that one cannot be the procuring cause of something they admit knowing nothing about.[18]

Therefore, the Association's award of a commission to Cousins on the basis of an alleged implied, oral, or otherwise tangential relationship, or in the alternative based on a procuring cause theory, directly contravenes South Carolina statutory and common law, is not "barely colorable,"[19] and was made in manifest disregard or a perverse misrepresentation of clearly applicable law.

B. Cousins Did Not Have the Requisite Prior Informed, Written Consent of Either the Buyers or the Seller to Be a Disclosed Dual Agent.

Directly comparable to the non-existence of a written agency/listing agreement between Cousins and the Buyers or Seller, Cousins presented no written evidence of any dual agency agreement with regard to the real estate transactions at issue. Pursuant to South Carolina law, "A licensee may act as a disclosed dual agent only with the prior informed and written consent of all parties [and] the informed consent must be evidenced by a dual agency agreement[.]" S.C. Code Ann. 40-57-137(M)(1) (1976, as amended). Neither Seller nor Buyers gave prior informed, written consent to such an agreement and Cousins is required to produce that written agreement, which he has not done. See Id. Additionally, the Circuit Court held its January 11, 2016 Order that Cousins had no agency relationship with Seller; therefore, it must follow that Cousins cannot be a dual

[18] In another email exchange, Appellant Jane Zheng instructed Cousins to get a representation agreement to protect himself. Cousins chose to ignore that advice.

[19] A court may choose to vacate an arbitration award if the basis of such award is not at least "barely colorable." See Harris v. Bennett, 332 S.C. 238, 246, 503 S.E.2d 782, 787 (S.C. Ct. App. 1998) (holding that courts are allowed to intrude upon an arbitrator's decision when the arbitrator commits error that was obvious and capable of being instantly perceived by the average person qualified to be an arbitrator and/or when the arbitrator appreciates the existence of a clearly governing legal principle, but decides to ignore or pay no attention to it).

agent of both the Seller and the Buyers. As a result, Cousins is not entitled to a commission under a dual agency argument.

C. Cousins Did Not Have the Requisite Knowledge and Written Consent of Either the Buyers or the Seller to Serve as Co-Broker(s) in the Transactions at Issue.

Finally, Cousins attempts to argue that the arbitration concerned a co-broker dispute, rather than a dispute between himself and the Buyers or Seller. This argument similarly fails under South Carolina statutory law.

Prior to brokers establishing any type of co-broker agreement on behalf of a buyer or seller, the buyer and/or the seller, respectively, must: (1) have knowledge of the subagency agreement and (2) must consent to such an agreement. See S.C. Code Ann. §§ 40-37-137(E) and (J) (1976, as amended). Therefore, regardless of whether Cousins argues his alleged oral agreement to split a commission for the transactions at issue was with Appellants, rather than with the Buyers or Seller, the Buyers and/or the Seller must still have knowledge of and consent to any such alleged agreement. Additionally, South Carolina Code Annotated Section 40-57-135(D)(4)(d) provides the 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." (1976, as amended). 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. It is uncontested that there is no evidence of any such agreement.

The Circuit Court has already held in its January 11, 2016 Order that Respondents did not represent the Seller in the transactions at issue. Therefore, it must follow that Respondents could not be a co-broker representing the Seller. Likewise, no evidence of a subagency agreement

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between Appellants and Respondents has been produced, nor has any evidence been produced that the Buyers had knowledge of or consented to such a subagency agreement.

Contrary to Cousins' alleged "co-broker" argument, the Buyers had a written agency agreement with Jane Zheng specifying that Ms. Zheng was their **exclusive** agent. There is also nothing in writing setting forth any agreement between Appellants and Cousins to split a commission for the transactions at issue, as required by South Carolina law. As a result, without the Buyers' knowledge and consent to a subagency agreement, and without written documentation of a division of compensation agreement, as required by South Carolina Code Annotated § 40-57-135(D)(4)(d) (1976, as amended), there can be no such agreement between brokers.[20] Therefore, Cousins is not entitled to the recovery of a commission under any alleged subagency agreement and/or co-broker agreement in the matter at hand.

D. Association Had Knowledge of the Aforementioned Well Defined, Explicit, and Clearly Applicable South Carolina Law When it Awarded Cousins a Commission In Manifest Disregard of that Law, and Created an Illegal and Unenforceable Agreement.

When arbitration was held, Association was in possession of a copy of the Court's January 11, 2016 Order. In addition, it is axiomatic that everyone is charged with knowledge of the law, especially in this case when the law governs the exact conduct of the parties.

In its Order, the Circuit Court, which considered these very arguments, held that without a written agreement, which Cousin admits he did not have, his argument that he is due a commission must fail. The Order explicitly outlines directly applicable South Carolina statutory law on this

[20] The only evidence before the Association was that Andy Waldo was the broker-in-charge of Respondent Keller Williams, and that he did not know about any such commission-splitting agreement, much less agree to any such arrangement. Also, Cousins presented no evidence whatsoever that Appellant Jane Zheng could in any way bind Respondent Keller Williams. The law is clear that a commission belongs to the agency, not an individual agent, and that the parties to the real estate transaction control who earns the commission. Individual agents cannot have "side deals" to circumvent the intent of the General Assembly, nor are other transactions between the parties relevant to the case at bar.

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issue, which supports the Court's dismissal of Cousins' claims in Circuit Court. Additionally, the Court rejected Cousins' argument that South Carolina common law allows for oral and/or implied agreements between agents/brokers for commissions, holding that the cases Cousins relied on were decided prior to the existing aforementioned statutory framework and the courts cannot allow oral or implied commission agreements under the current statutory scheme.

Therefore, when the Association made its initial arbitration decision, and again at the Procedural Review hearing, it had actual knowledge of both the Circuit Court's Order and of South Carolina law that clearly governs the issues in this matter. The Association's holding that Cousins was entitled to a commission based on an oral or implied agreement, created an illegal contract which directly contravenes South Carolina statutory and common law, which cannot be enforced by this Court. See Ward v. West Coast Oil Co., Inc., 387 S.C. 268, 274, 692 S.E.2d 516, 519 (2010) (holding that the Court will not lend its assistance to carry out the terms of a contract that violates statutory law or public policy) (internal citations omitted), Mason v. Mason, 412 S.C. 28, 56-57, 770 S.E.2d 405, 420 (Ct. App. 2015) ("'An illegal contract is unenforceable. The general rule is that courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution.' The Court 'will not lend its assistance to carry out the terms of a contract that violates statutory law or public policy.'") (internal citations omitted), and The Beach Company v. Twillman, Ltd., 351 S.C. 56, 566 S.E.2d 863 (Ct. App. 2002) (holding that South Carolina courts will not enforce an illegal contract, i.e., a contract that violates statutory law.)

The Association's award was not simply an erroneous application of the law; it was a complete and manifest disregard of South Carolina law and a Circuit Court Order involving the very same transaction at issue in this case and created an illegal contract that this Court cannot enforce. Both South Carolina and the Circuit Court Order clearly prohibit Cousins from receiving

a commission on the exact real estate transactions at issue before the Association. As stated in Appellants' Notice of Appeal, the Association's award of a commission to Cousins "now requires a buyer/seller to pay a commission to an agent/broker in which it has no knowledge of, and never agreed to compensate, all directly contrary to state law."

E. Batton v. Howell, 300 S.C. 545, 389 S.E.2d 170 (S.C. Ct. App. 1990) and Other Cases Relied Upon By Respondents, Are Not Applicable Because They Predate the Statutory Law.

Respondents rely upon the Batton v. Howell case, which is not comparable to this matter because, like Cousins' argument in his 2015 Circuit Court action, the Batton case was decided prior to the enactment of the current South Carolina statutory provisions requiring written agreements, outlined above, on January 1, 1998.[21] Respondents have sought to characterize Batton as "a case almost on point," because, in Batton, the appellant challenged an arbitration award to the respondent of a $10,000.00 real estate commission, and the award was upheld, seemingly absent of any written agreement between the agents, buyer, and/or seller.[22] However, like the cases relied upon by Cousins in the Circuit Court action, Batton was decided prior to the General Assembly's significant overhaul of the statutory framework governing the creation of agency relationships in the context of real estate transactions. As such, those cases are not comparable to

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[21] In support of its argument in opposition to the dismissal of its Circuit Court action against the Buyers and Seller, Cousins cited to Hilton Head Island Realty, Inc. v. The Skull Creek Club, a 1986 decision by the South Carolina Court of Appeals, wherein the Court held that a signed writing is not required in order for a licensed real estate broker or agent to recover a commission in a real estate transaction. It its January 11, 2016 Order granting Seller's Motion to Dismiss, the Court stated, "Since the court's decision in Skull Creek, however, the South Carolina General Assembly has undertaken a significant overhaul of the statutory framework governing the creation of agency relationships in the context of real estate transactions. Such overhaul included the enactment of...statutes that even more clearly require a written agreement in order to establish an agency or dual agency relationship...Clearly the same finding [as in Skull Creek] could not be made in light of today's statutory environment."

[22] No written agreement between the buyer, seller, or agents is mentioned within the Batton case and it is unclear from the facts what the arbitration panel's decision was based upon when it awarded Respondent Howell a commission in that matter. See Batton, 300 S.C. 545.

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this matter and are irrelevant to the Association's manifest disregard of current governing South Carolina statutory law.[23]

II. ASSOCIATION VIOLATED S.C CODE § 15-48-180 BY FAILING TO DECIDE ALL MATTERS OF LAW AND FACT, FURTHER EVIDENCING ITS MANIFEST DISREGARD FOR GOVERNING SOUTH CAROLINA LAW.

"[W]hen a dispute is submitted to arbitration, the arbitrators shall determine questions of both law and fact." S.C. Code Ann. § 15-48-180; See also Gissel v. Hart, 382 S.C. at 241. An arbitration panel cannot know of a governing legal principle, yet, refuse to apply it. Id. Nor can a court enforce an illegal contract. See Mason, 412 S.C. 28, 770 S.E.2d 405 and Twillman, 365 S.C. 178, 617 S.E.2d 125.

Here, Association knew of the governing South Carolina statutory law, was provided a copy of the Court's January 11, 2016 Order, and intentionally chose **not** to address or decide issues of agency between the parties, instead creating an illegal alleged oral commission contract in direct contravention of South Carolina statutory and common law.

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During the arbitration, as Appellants were attempting to show Cousins was not an agent of either party to the transaction and therefore not entitled to a commission, Association's Panel Chairman cut off Appellants, and stated on the record that he wanted to remind everyone that the proceeding was not a grievance hearing and that although he understood what the issues before the Panel were, the Panel was not going to get into the agency analysis. The Chairman further stated that the focus only should be on whether Cousins was the "procuring cause" of the real estate transactions.

[23] The findings and conclusions above support the Court's ruling that Cousins is barred by judicial estoppel, collateral estoppel, and res judicata from alleging he represented anyone but the Seller in the underlying transaction, which was previously decided by the Circuit Court.

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Yet even under a "procuring cause" analysis under South Carolina common law, Association was required to hear and decide the agency issues. As discussed above, a realtor is not entitled to a commission under a procuring cause analysis unless the sale was procured **during the course or its agency**. Thus, Association's Panel Chairman prevented Appellants from presenting their case in full, and essentially admits not even considering the agency issues (much less deciding them), even though the agency issues are fundamental under both statutory law, and the common law regarding procuring cause. Thus, there is no conceivable argument that can be made to show Association considered and ruled upon all relevant issues of law and fact, as required by statute. Association was charged with reaching a result that comported with the law, not seeking an equitable result in spite of the law.

Association clearly knew the issues of fact and law before it (i.e. issues of the creation of an agency, subagency, and/or dual agency) and had knowledge of South Carolina's governing law on those issues. However, the Panel manifestly disregarded governing law by awarding Cousins a commission based upon a "procuring cause" theory and/or oral/implied commission theory, all of which directly contravene South Carolina law.[24] Thus, by failing to consider all matters of fact and law before it, the Association manifestly disregarded and refused to apply clearly applicable South Carolina law.

[24] Cousins could not be a procuring case of the real estate transactions at issue when he did not represent anyone involved in the transactions. See S.C. Code Ann. §§ 40-57-135, 139; Malanuk, 284 S.C. 382, 325 S.E.2d 544 (1985), Hobbs, 223 S.C. 88, 74 S.E.2d 425 (1953), Peeples, 173 S.C. 479, 181 S.E. 653 (1935), and Gaskins, 327 S.C. 478, 486 S.E.2d 771 (Ct. App. 1997). Cousins admitted having no knowledge of the thirteen (13) golf course deal negotiated between Jane Zheng and/or Keller Williams and Seller. Further, no written agreements exist to create any type agency relationship between Cousins and any of the parties for the real estate transactions at issue.

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III. APPELLANTS' RIGHTS WERE SUBSTANTIALLY PREJUDICED BY THE FAILURE OF THE ASSOCIATION TO FOLLOW THEIR OWN POLICIES AND PROCEDURES AND SOUTH CAROLINA LAW.

In addition to the Association's manifest disregard for South Carolina law, Association substantially prejudiced Appellants by failing to abide by South Carolina statutory law and by failing to follow its Policy Governing State Professional Standards Procedures (the "Policies"). According to their own Policies, "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. The decision is made by the Panel, not the Association Counsel." No statements of facts or summary of the reasons supporting the Association's decision were ever made or provided to Appellants. As such, Association has not provided any basis for their decision other than the one-sentence arbitration order, which provides no basis whatsoever to support Association's decision.[25] Thus, Association has not provided any evidence whatsoever that it in any way complied with S.C. Code § 15-48-180, and in fact did decide all issues of law and fact. By issuing a one-sentence Order, Association attempts to place its decision beyond judicial review, despite the provisions and intent of the South Carolina Arbitration Act. In order for S.C. Code § 15-48-180 to have any meaning, there must be something more than "Respondent Cousins wins."

Similarly, upon review of the Arbitration Panel's decision, Association substantially prejudiced Appellants' rights by refusing to allow the Procedural Review Hearing to be either transcribed or recorded. First, the South Carolina Uniform Arbitration Act provides that "upon

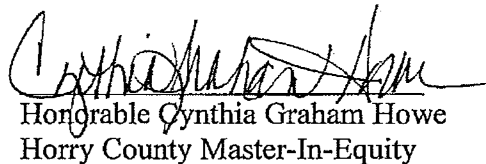
[25] Respondents argued in their Memorandum In Support of their Motions to Dismiss, that at the arbitration hearing, Appellant Waldo testified that he believed the arbitration hearing to be fair. However, upon review of the audio recording of the arbitration, not only was Appellant questioned as to the fairness of the hearing prior to the Panel's decision being made, but Appellant also specified that he felt that the issue of agency was an important issue for the Panel to consider, and, aside from the agency issues, he believed the hearing to have been fair.

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." S.C. Code Ann. § 15-48-50 (1976, as amended). Second, the Association's Policies state, "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." Counsel for Appellants contacted the Association prior to the Procedural Review Hearing in an attempt to employ a court reporter for the Hearing. However, ignoring the Policies outlined hereinabove, and state law, the Association refused to allow the recording and/or transcription of the proceeding. Again, on the day of the Procedural Review Hearing, the Association similarly refused to allow the recording and/or transcription. These violations of the Association's Policies and state law have substantially prejudiced Appellants.

Association splits up its arbitration process into two hearings—the initial hearing and a procedural review hearing. Both are hearings and a part of the arbitration process.

NOW, THEREFORE, for the reasons set forth above, Association manifestly disregarded and/or perversely misconstrued South Carolina law, and there is no colorable claim to award Cousins a $250,000.00 commission. Accordingly, the Court **ORDERS** the Association's arbitration award be vacated and this matter dismissed with prejudice, and **DENIES** Respondents' Motion to Confirm Arbitration Award. In addition, any commission being held may be immediately disbursed to Appellants Keller Williams and Jane Zheng, without recourse.

IT IS SO ORDERED!



Honorable Cynthia Graham Howe
Horry County Master-In-Equity

Dated: August 14, 2018
Conway, South Carolina

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