STATE OF SOUTH CAROLINA
In the Court of Common Pleas

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Honorable Cynthia Graham Howe, Master-In-Equity

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,

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RESPONDENTS' INITIAL BRIEF IN RESPONSE TO INITIAL BRIEF OF APPELLANT SOUTH CAROLINA ASSOCIATION OF REALTORS

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STATEMENT OF THE ISSUES ON APPEAL

I. WHETHER A REAL ESTATE AGENT WHO DOES NOT HAVE A WRITTEN AGREEMENT WITH ANY PARTY TO A REAL ESTATE TRANSACTION, AND ADMITS NOT KNOWING ANYTHING ABOUT THE REAL ESTATE TRANSACTION UNTIL SHORTLY BEFORE CLOSING, IS ENTITLED TO A COMMISSION FROM SUCH REAL ESTATE TRANSACTION.

STATEMENT OF THE CASE

This case arises out of a dispute over whether or not Appellants, Michael Cousins[1] (hereinafter "Cousins") and Founders Five, LLC d/b/a Sperry Van Ness Founders Group (hereinafter "SVN") (hereinafter collectively, "Realtor Appellants"), were due a commission on a real estate transaction involving multiple golf courses in the Myrtle Beach, South Carolina area, during which a group of buyers and their entity, Founders National Golf, LLC, were represented by SC Coast Properties, LLC d/b/a Keller Williams[2] (hereinafter "Keller Williams") and its agent, Jane Zheng.[3] It is uncontested that Realtor Appellants did not have a written agency agreement with either the buyers or the seller. In fact, Realtor Appellants admit not having any knowledge about the multiple golf course deal until shortly before the closing occurred. (Affidavit of Cousins, Ex. 11; December 3, 2014 Email Correspondence).[4]

Realtor Appellants' Circuit Court Action

On March 20, 2015, Realtor Appellants chose to initiate this dispute by filing an action in Circuit Court against Keller Williams, Randy Wallace, Jane Zheng, National Golf Management,

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[1] Appellant Cousins was the Broker-In-Charge of Sperry Van Ness.
[2] Respondent, Andrew Waldo, was the Broker-In-Charge for Keller Williams.
[3] Nick Dou, a representative of the buyers in the transaction at issue, executed two agency agreements with Respondent, Jane Zheng, which cover the period during which the transaction at issue took place. (Buyer Agency Contracts). Both agreements specify that Jane Zheng of Keller Williams was to be the buyers' "exclusive agent." (Id.).
[4] Wherein Appellant Cousins emails Jane Zheng stating "I do not understand what is happening here. What is the 13 [golf course] deal you refer to with Bob?"

LLC,[5] Xian (Nick) Dou, Yang Wang, and Kang Xou.[6] (Realtor Appellants' Compl.). In their Complaint, Realtor Appellants alleged they were the "procuring cause" of certain real estate transactions between the Seller and Buyers[7] and sought the following: (1) that any commission from these golf course real estate transactions obtained by Keller Williams, Randy Wallace and/or Jane Zheng be set aside at closing and held in escrow, (2) that it be awarded one-half of any commissions received by Keller Williams, Randy Wallace, and/or Jane Zheng; and (3) that it be awarded treble damages, costs, and attorney's fees. (Id.). However, during the pendency of the Circuit Court case, Cousins gave sworn testimony that the Buyers' agent for the transaction at issue was Jane Zheng and/or Keller Williams, his relationship was only with the Seller, his commission was solely due from the Seller, and that Realtor Appellants did not have a signed listing or commission agreement with Seller. (Affidavit of Cousins, pp. 2, 6, 7, paras. 9, 27, 31, 32). In sum, in the Circuit Court case, Cousins testified he was entitled to a commission from the ***Seller***. (Id., p. 7, para. 32).

In early May 2015, Keller Williams, Randy Wallace, Jane Zheng, and National Golf Management, LLC all moved to dismiss Realtor Appellants' Circuit Court action. On June 29, 2015, Realtor Appellants dismissed Randy Wallace from the case. (Stip. of Dismissal). On or around August 2015, Defendants Keller Williams and Jane Zheng were dismissed from the case upon knowledge and belief that their commission dispute with Realtor Appellants would be arbitrated by a panel chosen by the South Carolina Association of Realtors (hereinafter the "Association" or "Appellant Association"), should there be any matters left to arbitrate pending

[5] National Golf Management, LLC is hereinafter referred to as "Seller."
[6] Xian (Nick) Dou, Yang Wang, and Kang Xou are collectively referred to hereinafter as "Buyers."
[7] Realtor Appellants also acknowledged in their Complaint that their alleged "arrangement for the split of the real estate commission...is recognized as a standard ***oral*** contractual relationship." (Realtor Appellants' Compl., p. 5, para. 22).

the outcome of Realtor Appellants' Circuit Court action. On or around September 2015, Respondent, Andrew Waldo, submitted a Request and Agreement to Arbitrate to the Appellant Association on behalf of Keller Williams and Jane Zheng. (Req. and Ag. to Arb).

On September 22, 2015, Seller filed a Memorandum in Support of its previously filed Motion to Dismiss in the Circuit Court action, arguing: (1) that Realtor Appellants never represented Seller in the real estate transactions at issue and (2) that South Carolina law requires a written agreement to form an agency or dual agency relationship, of which there was none. (August 16, 2018 Order Vacating Arb. Award, p. 3). The Court agreed; and, on January 11, 2016, the Court granted Seller's Motion to Dismiss, holding that, pursuant to South Carolina statutory law, an agency relationship in the context of a real estate transaction cannot exist without a written agreement. (January 11, 2016 Order Dismissing Appellants' Case). In its Order, the Court noted that Realtor Appellants' claims were premised upon an alleged representation of the ***Seller***[8] and stated, "No such written listing agreement has been alleged to exist, and [Realtor Appellants] concede[] that the nature of the alleged agreement arose orally and by implication." (Id. at p. 2). 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 [Realtor Appellants'] argument. (Id. at ps. 3-4).[9] That Order was not appealed and is now the law of the case.

The Arbitration Between Realtor Appellants and Respondents

As of January 11, 2016, only the arbitration between the Realtor Appellants and the Respondents remained. In preparation for arbitration, which was scheduled for February 2, 2016,

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[8] "[Realtor Appellants'] causes of action are each premised on ***[Seller's]*** alleged attempt to deprive [Realtor Appellants] of a brokerage commission alleged to have been earned in connection with [Realtor Appellants'] service as broker/agent for ***[Seller]*** during the sale of such real property." (January 11, 2016 Order Dismissing Realtor Appellants' Case, pp. 1-2).

[9] 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. (Id. at pp. 1-4).

Respondents provided the Appellant Association with a copy of the 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, Realtor Appellants were not entitled to a commission for the real estate transactions at issue. However, despite having knowledge of: (1) the Court's January 11, 2016 Order, (2) South Carolina statutory law, and (3) the absence of any written agreement between Realtor Appellants and any of the interested parties in the transaction, including Respondents, Seller, or the Buyers and/or their entity,[10] on February 2, 2016, the Appellant Association's Arbitration Panel found that Respondents owed Realtor Appellants a $250,000.00 commission on the real estate transaction at issue. (Award of Arbitrators). The Arbitration Panel's award is a single sentence that does not contain any findings of fact or conclusions of law relied upon as the basis for its decision. (Id.). It also does not provide any explanation whatsoever as to why it completely disregarded the Circuit Court's January 11, 2016 Order dismissing Realtor Appellants' Circuit Court action[11] and South Carolina statutory law that is clearly and directly on point. (Id.). In fact, the ***only evidence*** of the Panel's basis for its decision is the following statement made by the Chairman of the Panel during the arbitration hearing:

> 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] Not only did Cousins not have a written agency/listing agreement with the Buyers, the Buyers had an exclusive agency agreement with Respondent, Jane Zheng, of Keller Williams. (Buyer Agency Contracts).

[11] The holdings in the January 11, 2016 Order include that Realtor Appellants claim they represented the Seller in this multiple golf course deal and that Realtor Appellants are not entitled to a commission with regard to this multiple golf course real estate transaction. (January 11, 2016 Order Dismissing Realtor Appellants' Case).

(Audio of Arbitration Panel Hearing, 02:00:55-02:01.45) (emphasis added). Thus, the Chairman made it exceptionally clear that the Panel intended to wholly disregard South Carolina law by stating that the Panel was not going to go into an agency analysis under South Carolina law; rather, the Panel would only deal with Cousins' "procuring cause" argument. (Id.).

As a result of the foregoing, Respondent Waldo submitted a Request for Procedural Review of the arbitration with the Appellant Association on February 24, 2016. (Req. for Procedural Rev.). Respondent Waldo also filed a Notice of Appeal with the Circuit Court on March 1, 2016, Civil Action No. 2016-CP-26-01498. (March 1, 2016 Notice of Appeal). The Appellant Association held a Procedural Review Hearing on May 2, 2016, during which Respondents were informed, for the first time, that the basis for the Appellant Association's award of a $250,000.00 commission to Cousins ***was the existence of an oral and implied agency agreement with Cousins***,[12] which the Circuit Court had already ruled was illegal and unenforceable under South Carolina law in its January 11, 2016 Order. The Appellant Association's Procedural Review Board affirmed the award of a $250,000.00 commission to Cousins, despite the Court's January 11, 2016 Order and applicable South Carolina law. (Decision of the Procedural Review Board Tribunal). Further, the Appellant Association refused to allow for the recording and/or transcription of the proceeding. (April 27, 2016 Email Corr. Re. Recording of Proc. Rev. Hearing), which directly contradicts its own express policies and procedures. (See Policy of SC Realtors Governing State Prof. Standards Procedures, p. 3) ("All Professional Standards Panel hearings shall be recorded..."). Therefore, nothing regarding the Procedural Review Hearing was preserved for the record. On May 17, 2016, Respondents filed a second Notice of Appeal, Civil Action No. 2016-CP-26-0338, which

[12] This aligns with the Panel Chairman's statement during the arbitration hearing that indicated the Panel intended to disregard South Carolina statutory law governing real estate transactions. (See Audio of Arbitration Panel Hearing, 02:00:55-02:01.45).

encompassed the additional actions of the Appellant Association's Procedural Review Board. (May 17, 2016 Notice of Appeal).

Respondents' Appeal of the Arbitration Award

Subsequently, the two Circuit Court appeals concerning the Appellant Association's Arbitration Panel Award and affirmation of the award by the Procedural Review Board were consolidated in the Circuit Court as Civil Action No. 2016-CP-26-3338 and referred to the Horry County Master-In-Equity. (April 3, 2017 Consent Order of Reference). On August 16, 2018, the Master-In-Equity entered an Order vacating the Appellant Association's Arbitration Panel Award on the ground that the Appellant Association's Arbitration Panel manifestly disregarded and/or perversely misconstrued known, well-defined, explicit, and clearly applicable South Carolina law in awarding Cousins 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 trial court's January 11, 2016 Order Dismissing Realtor Appellants' case. (August 16, 2018 Order Vacating Arb. Award, pp. 7-19). The Master-In-Equity further held that the Respondents' rights were substantially prejudiced by the Appellant Association's failure to follow its own policies and procedures, as well as South Carolina law, by failing to provide any evidence that it decided all issues of law and fact, pursuant to South Carolina Code Section 15-48-180, and by refusing to allow for the transcription or recording of the Procedural Review Hearing. (Id. at pp. 20-21). This appeal followed.

The Association's Attempt to Place Its Arbitration Process Beyond Judicial Review

In its Brief, the Association makes numerous assertions that are either mischaracterizations or are wholly untrue. The Association attempts to characterize Respondent Waldo's Request and Agreement to Arbitrate as a contract that included terms limiting the Panel to only providing a

statement of the prevailing party and monetary amount of an award, as well as prohibiting recordings of procedural review proceedings. (App. Association's Brief, pp. 5, 6). To the contrary, there is nothing whatsoever in the Request and Agreement to Arbitrate that states either of these things. (See Req. and Ag. To Arb.).[13]

Further, Appellant exhaustively argues that the National Association of Realtors ("NAR"), the Association, and the local Coastal Carolinas Association all ***require*** arbitration between realtors "in any dispute arising out of their real-estate practice." (App. Association's Brief, pp. 3). Noteworthy, it was Realtor Appellants who initiated this action in ***Circuit Court*** rather than abiding by what the Association asserts is a mandatory arbitration process. (See Realtor Appellants' Compl.). Appellant Association also emphasizes that Respondent Waldo "voluntarily submitted to the arbitration process," as though to imply Waldo's cooperation with the Association's "mandatory" arbitration policy somehow limits his right to judicial review of the Panel's award. (See App. Association's Brief, pp. 3, 4). Under a similar implication, the Association attempts to rely upon an assertion that Respondent Waldo admitted that the arbitration hearing had been fair. (Id., pp. 4-5). This assertion by the Appellant Association is a mischaracterization of Respondent Waldo's testimony, and is without proper context. Although the Panel did question Respondent Waldo as to whether he believed the hearing was conducted fairly; it did so prior to the Panel's decision being made and Respondent Waldo responded to such questioning by stating, first and foremost, that he felt the issue of agency was an important issue

[13] These provisions originate in the National Association of Realtors Manual ("NAR Manual"), which is more than 350 pages long, and which also states that the "procedures by which arbitration requests are received, hearings are conducted, and awards are made must be in **strict conformity with the law.**" ("NAR Manual, p. 160) (emphasis added). The NAR Manuel's own express purpose is "to ensure due process in...the arbitration of business disputes arising out of the real estate business" and that the policies and procedures of the NAR Manual should be consistent with applicable state law. (Id at p. 1). Therefore, it is arguable that where terms of the NAR Manual impede and/or contradict state law, the NAR does not intend to uphold such provisions.

for the Panel to consider, and that he believed the hearing to have been fair, ***with the exception of the agency issues***.[14] (Audio of Arbitration Panel Hearing, 2:26:26 – 2:27:10) (emphasis added).

Therefore, while the Association states that it takes no side in this dispute, and simply defends the process it used to arbitrate the dispute;[15] what is made abundantly clear is that the Association's ultimate goal is to ensure its arbitration process is beyond judicial review. (App. Association's Brief, p. 6).

STANDARD OF REVIEW

The Association's Standard of Review mischaracterizes this matter as a determination of "arbitrability." (App. Association's Brief, p. 6). None of the parties have disputed the arbitrability of the underlying issues; rather, this case concerns whether the Association's Arbitration Panel manifestly disregarded the law in awarding Realtor Appellants a $250,000.00 commission on a real estate transaction in which they represented no party and had no knowledge of until shortly before the transaction closed.

Although, "[g]enerally, an arbitration award is conclusive and courts will refuse to review the merits of an award[,]" under certain circumstances, such as when the arbitrator manifestly disregards or perversely misconstrues the law, the court may vacate an arbitration award. Gissel v. Hart, 382 S.C. 235, 241, 676 S.E.2d 320, 323 (2009) (internal citations omitted). For a South Carolina court to vacate an arbitration award on the grounds that the arbitrator manifestly disregarded the law, the governing law ignored by the arbitrator must be "well defined, explicit,

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[14] 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..."

[15] The Association further states that its arbitration process "is one used by the National Association of Realtors (NAR) and all of its members, nationwide, for decades." The Association provides no support for this contention and there is simply no evidence that this is true. (App. Association's Brief, p. 6).

and clearly applicable." Id. (internal 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 that 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). An arbitration award may be vacated pursuant to this common law standard regardless of whether the Federal Arbitration Act ("FAA") or the South Carolina Uniform Arbitration Act ("SC UAA") applies to a particular arbitration. See Apex Plumbing Supply, Inc. v. U.S. Supply Co., Inc., 142 F.3d 188 (4th Cir. 1998), Swentor v. Swentor, 336 S.C. 472, 486, 520 S.E.2d 330, 336 (Ct. App. 1999).

ARGUMENT

I. THE CIRCUIT COURT DID NOT ERR IN VACATING THE ARBITRATION PANEL'S AWARD.

A. The Circuit Court Did Not Substitute Its Own Judgment By Vacating the Arbitration Panel's Award On the Ground That the Panel Manifestly Disregarded of South Carolina Law Where The Panel's Chairman Expressly Stated That It Was His Intent That the Panel Disregard South Carolina Law.

The Circuit Court did not substitute its own judgment for that of the Arbitration Panel when it vacated the Arbitration Panel's award under the aforementioned "manifest disregard" standard of review. Although Appellant Association sets forth law on several different grounds for vacating an arbitration award, including, but not limited to, where arbiters "exceed their powers," "abuse of powers," and where the dispute was "outside of the arbitration agreement,"[16] Respondents only

[16] (App. Association Brief, pp. 7-9).

argued, and the Circuit Court only held, that the Association's Arbitration Panel's award was vacated because the Panel "manifestly disregarded or perversely misconstrued South Carolina statutory and common law by awarding Cousins a commission, and there was not a colorable claim allowing [Panel] to award Cousins a commission[.]" (August 16, 2018 Order Vacating Arb. Award, pp. 2, 21). In sum, the Circuit Court vacated the Arbitration Panel's award based solely upon the manifest disregard standard and none of the other standards Appellant Association discusses in its Brief.

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). It is uncontested that the "manifest disregard" standard is not contained within the Federal Arbitration Act ("FAA") or the South Carolina Uniform Arbitration Act ("SC UAA"), rather it arises out of common law and is applicable regardless of which of the two statutory schemes applies to the arbitration. (App. Association's Brief, p. 7). As the Association stated in its Brief, the "focus is on the conduct of the arbiter, and setting aside an award on [a manifest disregard] basis requires proof that 'the arbitrator knew of the governing principle yet refused to apply it.'" (App. Association's Brief, p. 8) (citing Gissel, 382 S.C. at 241, 676 S.E.2d at 323). It is exceptionally clear that this is exactly what occurred during the arbitration at issue herein and is evidenced by the Panel Chairman's express statement with regard to understanding South Carolina's real estate agency law but choosing not to focus thereon. (See Audio of Arbitration Panel Hearing, 02:00:55-02:01.45).

As both Judge Hocker, in Realtor Appellants' Circuit Court action, and the Judge Howe, on Respondent's appeal of the arbitration award in Circuit Court, outlined extensively in their

respective January 11, 2016 and August 16, 2018 Orders, South Carolina has a statutory scheme that governs South Carolina's real estate profession and requires written agreements prior to a Broker being entitled to receive a commission. (See January 11, 2016 Order Dismissing Realtor Appellants' Case, pp. 2-4, August 16, 2018 Order Vacating Arb. Award, pp. 7-9).[17] The Arbitration Panel received a copy of the January 11, 2016 Order and 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). However, the Panel Chairman expressly 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 real estate transaction dispute, knew that Realtor Appellants did not have a written agreement with any party to the transaction, and wholly disregarded such law when issuing the award to Realtor Appellants.

Therefore, contrary to the Association's argument that the Circuit Court substituted its own judgment for the judgment of the Arbitration Panel because "there was no evidence before the Court below that the arbiters manifestly disregarded the law[;]" the Panel Chairman's statement is both direct evidence **and the only evidence** of what the Panel based its decision upon (i.e. a

[17] See also infra Section I(B) hereinbelow for a full analysis of such statutory scheme as applied to the facts of this matter.

complete disregard for known, governing South Carolina law).[18] (emphasis added). The Association's arguments that there was an arguable basis or colorable claim for the award, or that it was "at most" a "legal mistake," likewise all fail as a result of the Chairman's clear acknowledgment that the Panel was going to disregard South Carolina agency law in making its decision. Also contrary to the Association's argument that the Circuit Court's analysis of governing South Carolina law demonstrates a simple legal mistake,[19] the Circuit Court's analysis of governing South Carolina law, as applied to the facts of the case (and as outlined in detail hereinbelow), only further demonstrates that the Panel's award was far greater mere legal mistake, and was a complete and total disregard of South Carolina law. Accordingly, the Circuit Court did not substitute its own judgment in vacating the Arbitration Panel's award; rather it properly held that the Panel manifestly disregarded well-defined, explicit, and clearly applicable South Carolina law in awarding Realtor Appellants a $250,000.00 commission in the absence of any written agreement, knowledge, or consent of the parties to that transaction.

B. The Circuit Court Did Not Err By Finding That The Arbitration Panel Manifestly Disregarded South Carolina Law In Awarding a Commission to Realtor Appellants Where The Arbitration Panel: (1) Had Knowledge of Well-Defined, Clearly Applicable South Carolina Law Requiring A Realtor To Obtain A Written Agreement With And Consent From A Party To A Real Estate Transaction In Order to Earn A Commission From Such Transaction, And (2) Realtor Appellants

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[18] The Association also attempts to support its argument that there is no evidence the Arbitration Panel manifestly disregarded the law by pointing to a mischaracterized statement that Respondent Waldo told the Panel he believed the hearing had been conducted fairly. (App. Association's Brief, p. 9). As previously explained, the Association's assertion with regard to Respondent's statement is without proper context, as Respondent Waldo actually stated that **with the exception of the agency issues** (i.e. the issues directly relevant to the South Carolina law governing the real estate transaction here), he believed the hearing was fair. (Audio of Arbitration Panel Hearing, 2:26:26 – 2:27:10) (emphasis added).

[19] The Association implies a number of bases regarding how the Panel reached its decision; however, all such bases or attempted explanations with regard to how the Panel came to its decision are pure speculation and irrelevant. The Panel's award was a single sentence that only identified the prevailing party and the amount of the monetary award. (Award of Arbitrators). The Award, on its face, gives absolutely no explanation or basis for its conclusion. (Id.). Therefore, the only shred of evidence as to the basis of the Panel's award is the Panel Chairman's statement during the arbitration hearing, when he informed the parties that although he understood South Carolina agency law governing the real estate profession; the Panel **was not going to consider on such law**. (Audio of Arbitration Panel Hearing, 02:00:55-02:01.45) (emphasis added).

Admittedly Did Not Have Such Written Agreement With and Consent From Any Party to the Transaction.

The Association characterizes this dispute as a "dispute between broker and broker." (See App. Association Brief, pp. 11-13, 16-17). It then argues that South Carolina's statutory scheme governing real estate transactions within the state does not contemplate or apply to such broker-to-broker situations. (Id.). The Association is incorrect and its argument contravenes South Carolina law. Not only does South Carolina's statutory scheme with regard to real estate transactions directly and expressly contemplate cooperating broker situations such as the one Appellants allege is at issue herein, it also expressly supersedes any common law to the contrary, which the Association attempts to rely upon to support its incorrect contention that an agreement between brokers regarding the split of a real estate commission may be oral and/or implied. Pursuant to South Carolina's statutory scheme regarding real estate transactions, regardless of how Appellants characterize Realtor Appellants' alleged role in the real estate transaction at issue, Realtor Appellants are not entitled to a commission therefrom. As a result, the Circuit Court did not err in holding that the Arbitration Panel manifestly disregarded South Carolina law by awarding a commission to Realtor Appellants in the absence of any written agreement between Realtor Appellants and any of the parties to the transaction.

1. **South Carolina Statutory Law Clearly and Unambiguously Prohibits Realtor Appellants From Earning A Commission Under the Facts of This Case, Regardless of Whether This Dispute is Characterized as Being Between Brokers or Between Realtor Appellants and the Buyers and/or Seller.**

The South Carolina legislature enacted a statutory scheme that governs the real estate profession in South Carolina. See S.C. Code Ann. § 40-57-5, et. seq.[20] Appellant Association

[20] Multiple sections of Title 40, Chapter 57 were amended, effective January 1, 2017. In this Brief, 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

incorrectly asserts that this statutory scheme "is silent regarding agreements between agents where buyers or sellers are not affected." (App. Association's Brief, p. 12).[21] To the contrary, the statutory scheme governs a full 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 S.C. Code Ann. § 40-57-5, et. seq. Therefore, Title 40, Chapter 57 of the South Carolina Code applies to the real estate transaction at issue herein, and ***prohibits Realtor Appellants from receiving a commission***, regardless of whether the Association characterizes Appellant Cousins as representing the Seller, the Buyer, a dual agent, or a co-broker (i.e. a broker-to-broker dispute), all of which are positions Realtor Appellants have taken at some point throughout litigation and arbitration of this matter. (emphasis added).

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).[22] 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, in order to receive a commission, a "Broker" must comply with all statutory requirements of Title 40, Chapter 57,

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enactment of the Code amendments.

[21] There is no evidence that the Buyers and Seller would not be affected by half of the commission in this transaction being awarded to Realtor Appellants. South Carolina's statutory scheme expressly accounts for co-broker commission splits by requiring that buyers and sellers have knowledge of and consent to multiple brokers being involved in a transaction. (S.C. Code § 40-57-137, Subsections E, J, M(1)). It also expressly requires a written agreement as to how compensation is to be divided amongst cooperating brokers (S.C. Code Ann. § 40-57-135(D)(4)(d)).

[22] "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).

which include obtaining a written representation agreement (including how compensation is to be determined). See S.C. Code Ann. § 40-57-139(E).

i. Realtor Appellants Did Not Represent The Seller or the Buyers In the Real Estate Transaction Because They Did Not Have a Written Representation Agreement With Either.

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). Subsections B and C of South Carolina Code Annotated Section 40-57-139 add 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 at the time an agency agreement is signed and that there must be an acknowledgment of receipt of that form in the agency agreement. Further, 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)[23] (emphasis added). Therefore, in order to be compensated in a real estate

[23] Appellant Association attempts to distinguish the transaction at issue herein as a "broker-to-broker" dispute; however, South Carolina's statutory scheme makes is exceptionally clear that there must be a written agreement that sets forth how compensation will be divided among "participating or cooperating brokers." (See App. Association's Brief, pp. 11-12, 16-17; see also S.C. Code Ann. § 40-57-135(D)(4)(d)). Likewise, if a broker is going to act as a sub-agent or dual agent, the buyer/seller must have knowledge thereof and consent thereto. S.C. Code. Ann. § 40-57-137. This is important, as the Association continually asserts that the statutes do not contemplate issues between brokers working together.

transaction, a real estate agent must have a written agreement with the party he/she represents. Moreover, in direct contravention of Appellant Association's argument that the statutory scheme does not contemplate broker-to-broker commission agreements, the statute 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).

In Realtor Appellants' Circuit Court action, Appellant Cousins testified: (1) that Respondents were the Buyers' agent and (2) that no written agreement existed between Cousins and the Seller. (See Affidavit of Cousins, pp. 2, 6, 7, paras. 9, 27, 31). Then, at the Arbitration Hearing, under oath and subject to perjury, Cousins gave conflicting testimony, during which he (1) disavowed being Seller's agent (2) stated, in direct contradiction to his November 16, 2015 Affidavit, that he could be characterized as representing both the buyer and seller, (3) stated that he never had contact with the Buyers, and, (4) ultimately, asserted that it did not matter who he represented because he was the "procuring cause" of the transactions. (See Audio of Arbitration Panel Hearing, 00:17:00–00:17:50, 00:21:30-00:21:40, 00:27:05-00:27:13, 01:44:35-01:45:38, 01:44:05-01:45:38, 01:51:10-01:51:35). In fact, at the June 21, 2017 hearing on Respondent's Motion to Vacate the Arbitration Award, counsel for Realtor Appellants stated that Cousins did not know whom he represented in the transaction. (June 21, 2017 Hearing Transcript, pp. 72-77). Regardless of the multiple, contradictory positions Cousins has taken while under oath with regard to whom he asserts he "represented" in the real estate transaction at issue, his arguments that Realtor Appellants are entitled to a commission **all fail** under South Carolina law in the absence

of a written agency/listing agreement with either the Buyers or the Seller.[24] (See January 11, 2016 Order Dismissing Appellants' Case, Affidavits of Nick Dou, Matthew Brittain, and Jane Zheng) (emphasis added).

Cousins has never 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. (See Id.). Further evidencing the fact that Cousins never represented the Buyers are the two, written agency agreements between the Buyers and Respondent, 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. (See Buyer Agency Contracts) (emphasis added). 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. (See January 11, 2016 Order Dismissing Realtor Appellants' Case). For these reasons, Appellant Association cannot establish as a matter of law that Realtor Appellants represented any party to the real estate transactions in this case, as Cousins has admitted that there was no requisite written agreement between himself and either the Buyers or Seller. (See Affidavit of Cousins, pp. 6-7, para. 31). Accordingly, Cousins has no legal right to a commission.

[24] Again, the Court's January 11, 2016 Order explicitly states that Realtor Appellants 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. (See January 11, 2016 Order Dismissing Realtor Appellants' Case). Therefore, there is already an Order in place holding that Cousins did not represent the Seller. Also, despite conflicting testimony from Cousins, it is exceptionally clear from the facts in this case that Realtor Appellants did not represent the Buyers, as there is no written agency agreement between Realtor Appellants and the Buyers. To the contrary, there ***are*** written agency agreements between Jane Zheng and a representative of the Buyers, which specify that Ms. Zheng, of Keller Williams, is to be the Buyers' ***exclusive*** agent. (See Buyer Agency Contracts) (emphasis added).

ii. Realtor Appellants Are Likewise Not Co-Brokers or Dual Agents In the Real Estate Transaction

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. S.C. Code Ann. § 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***, and the common law may be used to aid in interpreting or clarifying the duties described in this section.

(emphasis added). Therefore, again, contrary to Appellant Association's argument, South Carolina's statutory scheme ***does*** expressly contemplate co-broker situations, and explicitly states that ***an agent may not be a co-broker without the knowledge and consent of the client.*** See Id. (emphasis added). These statutes unequivocally bar Appellant Association's argument that Realtor Appellants can have any agreement with another agent behind the backs of the Buyers and Seller, and without their knowledge and consent.

The Circuit Court's January 11, 2016 Order, which the Arbitration Panel had a copy of, expressly holds that Realtor Appellants did not represent the Seller. (January 11, 2016 Order

Dismissing Realtor Appellants' Case). 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.). Likewise, there was no subagency agreement between Appellants and Respondents 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 Affidavits of Nick Dou, Matthew Brittain, and Jane Zheng). To the contrary, Buyers had a written agency agreement with Jane Zheng, which specifies that Ms. Zheng was the Buyers ***exclusive*** agent. (See Buyer Agency Contracts).

Additionally, as set forth above, South Carolina Code Annotated Section 40-57-135(D)(4)(d) provides that 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***." (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. (Id.). No such agreement exists in this matter. Therefore, Appellant Association's assertion that the statutory scheme does not apply to "broker-to-broker" situations is completely false. Moreover, its argument that Realtor Appellants are somehow entitled to a commission because this is an alleged "broker-to-broker" dispute, rather than a dispute with Buyers and Seller, likewise fails in light of the relevant statutory sections, where such an agreement is between brokers is prohibited by South Carolina law in the absence of knowledge and consent of the client(s).[25] To adopt the Association's argument would

[25] Also noteworthy, Appellant Association's entire argument is premised upon an alleged oral/implied agreement between "brokers;" however, Jane Zheng, who represented the Buyers through an express, written agency agreement, is ***not*** a broker and had no authority to bind Keller Williams or its Broker-In-Charge, Andrew Waldo to any kind of "broker-to-broker" agreement. (Audio of Arb. Hearing, 00:37:44 – 00:37:57) (emphasis added). There is no evidence whatsoever that the two brokers involved in this dispute, Appellant Cousins and Andrew Waldo, ever even communicated about this transaction, much less reached a broker-to-broker agreement regarding splitting this commission. This simple fact is fatal to Appellants' entire legal argument.

effectively give brokers the right to do whatever they wanted, without repercussion, in spite of a buyer's or seller's wishes. This runs afoul of South Carolina's statutory scheme.

iii. South Carolina Statutory Law Governing the Real Estate Transaction At Issue Supersedes Common Law Contrary to Such Statutory Law and Hackler v. Earl Wiegand Real Estate, Inc. 295 S.C. 396, 368 S.E.2d 686 (Ct. App. 1988), Relied Upon By Appellant Association In Its Brief, Is Not Applicable.

In its Brief, Appellant Association asserts that courts recognize "an independent claim to split commission between brokers." (App. Association Brief, p. 13). Appellant Association relies upon Hackler v. Earl Wiegand Real Estate, Inc. 295 S.C. 396, 368 S.E.2d 686 (Ct. App. 1988) in support of this argument. (Id.). First, as outlined hereinabove, South Carolina Code Section 40-57-137, ***which requires knowledge and consent of clients to any subagency agreements (i.e. co-broker agreements)***, states that its provisions ***supersede contradicting common law***. Second, the Hackler case, which was decided in 1988, is not comparable to this matter because it was decided well prior to the enactment of the current South Carolina statutory provisions requiring written agreements, outlined hereinabove, on January 1, 1998. (See January 11, 2016 Order Dismissing Appellants' Case, pp. 3-4).[26]

In its Brief, Appellant Association seeks to characterize Hackler as a case on point, because, in Hackler the appellant challenged a jury award to the respondent of a real estate commission, and the award was upheld, seemingly absent of any written agreement between the

[26] In support of its argument in opposition to the dismissal of Realtor Appellants' Circuit Court action against the Buyers and National Golf Management, LLC, Realtor Appellants cited to Hilton Head Island Realty, Inc. v. The Skull Creek Club, 287 S.C. 530, 339 S.E.2d 890 (Ct. App. 1986), 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 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." (January 11, 2016 Order Dismissing Appellants' Case, pp. 2-3) (citations omitted).

agents, buyer, and/or seller. However, like the Skull Creek case, which Realtor Appellants' attempted to rely upon in their original Circuit Court lawsuit, and which was discussed in detail by the Circuit Court in such lawsuit, Hackler 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, the case cannot be compared to this matter and is irrelevant to the Panel's manifest disregard of current governing South Carolina statutory law. In sum, Hackler is not applicable to the facts of this case, as it was decided prior to the enactment of South Carolina's governing statutory scheme; however, even if it was a more recent case, it would be superseded by the statutory scheme, pursuant to Subsection Q of South Carolina Code Annotated Section 40-57-137.

iv. Appellant Association's "Course of Conduct" and/or "Procuring Cause" Argument Does Not Entitle Realtor Appellants to A Commission In the Absence of a Written Agency/Listing Agreement with the Buyers Or the Seller.

The Circuit Court properly held that an award presumptively based upon Realtor Appellants' "procuring cause" argument was likewise in manifest disregard of South Carolina law. Realtor Appellants' procuring cause argument fails in the absence of a written agreement with the Buyers or the Seller. 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).[27] See S.C. Code Ann. § 40-57-139 (G). 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),[28] 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 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).

In a comparable case before the South Carolina Court of Appeals, a real estate professional sought compensation following a real estate transaction for alleged services she provided to the

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[27] 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 Affidavit of Cousins, p. 5, para. 24, Ex. 11, p. 2) (emphasis added). Also noteworthy, in a previous real estate transaction for the sale of the Aberdeen golf course, the Agreement of Sale expressly names Appellants as the seller's agent and Respondents as the buyers' agent. (October 29, 2014 Agreement of Sale). 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." (Excerpt of April 22, 2015 Agreement of Purchase and Sale, para. 16).

[28] 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.

buyers. See King v. Bennett, No. 2013-UP-459, 2013 WL 8541636 (S.C. Ct. App. Dec. 11, 2013).[29] Like Cousins in this case, in King, the realtor never obtained a written agency agreement with any party to the real estate transaction. Id. at *1. Also like Cousins, the realtor in King argued that her claims for compensation were based upon equity rather than contract. Id. At *1. However, the Court of Appeals 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.

Here, the Association relies upon the Hackler case and previous real estate transactions as a basis for awarding a commission in this unrelated, separate thirteen golf course transaction. (App. Association's Brief, p. 14). However, there are no findings of fact or conclusions of law to support the Association's assertion that "the case law and course of dealing show the arbiters' ruling could not have been made in manifest disregard of the law." In fact, the opposite is true. The case law the Association relies upon is outdated and superseded by statutory law governing the issue in this case; and there is simply no evidence of what the Panel relied upon in making its decision with the exception of the Panel Chairman's statement that the Panel was going to focus on "procuring cause," which, pursuant to South Carolina law, would essentially be enforcing an illegal and unenforceable contract, as outlined below.

Appellant Association relies heavily upon an argument that the Arbitration Panel based its award upon Appellant Cousins and Jane Zheng alleged prior dealings together and "course of conduct." (App. Association's Brief, p. 14). However, there is not even a shred of evidence in the Arbitration Award that this was an actual basis for the Panel's award. But even if prior transactions are somehow relevant to this transaction, the facts concerning such prior transactions are fatal to Appellants' argument.

[29] 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.

In a previous real estate transaction for the sale of the Aberdeen golf course, the Agreement of Sale expressly names Realtor Appellants as the seller's agent and Respondents as the buyers' agent, and is signed by the buyer and seller, as required under South Carolina law. (October 29, 2014 Agreement of Sale, p. 2). In direct contrast, in the multi-golf course real estate transaction at issue in this case, 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." (Excerpt of April 22, 2015 Agreement of Purchase and Sale, para. 16).

Further, in dealings with regard to another real estate transaction, Ms. Zheng expressly asks Appellant Cousins to provide her with a commission agreement. (Affidavit of Cousins, p. 3, para. 15). Therefore, contrary to Appellants' assertion that Appellant Cousins and Ms. Zheng had a course of dealing of proceeding with oral commission agreements, Ms. Zheng specifically requests a written commission agreement in order to comply with South Carolina law.[30] (Id). Based upon the foregoing, the so-called "course of conduct" relied upon by Appellant Association does not establish a history of Appellant Cousins and Jane Zheng acting without buyer's and seller's written consent to Appellant Cousins receiving a commission. In fact, it demonstrates the opposite.

The Association's argument regarding "course of conduct" is analogous to a situation in which an attorney represents a client during a transaction. Without some form a representation agreement which defines their relationship, the attorney's representation for a prior transaction does not mean that the attorney represents that same client in every transaction that client takes part in throughout the future. Comparable to an attorney/client relationship, and the rules that

[30] Ms. Zheng was under no duty to tell Appellant Cousins, a licensed real estate broker, what to do in order to protect his right to a commission. Appellant Cousins' flagrant disregard for South Carolina law is solely attributable to his own acts and omissions.

function to govern such relationship, South Carolina's statutory scheme with regard to real estate transactions functions to define of the agent/client relationship, requiring that such relationship be set forth in writing, as well as an explanation of how commission is to be divided among cooperating brokers. Ultimately, the statutory scheme is structured to prevent situations such as this, where a broker somehow does not know whom he represents in the transaction, yet still demands a commission.

v. The Arbitration Panel Had Knowledge of The Governing South Carolina Statutory Law and Manifestly Disregarded Such Law In Awarding Realtor Appellants A Commission Absent A Written Agreement.

The Arbitration Panel not only had knowledge of this clearly applicable South Carolina law governing their profession, it also possessed a copy of the Court's January 11, 2016 Order, which unmistakably sets forth this law and holds that absent a written listing/agency agreement, of which there is none, Cousins is not entitled to a commission. This law does not distinguish between commercial and residential real estate transactions. See S.C. Code Ann. § 40-57-10. The Circuit Court's January 11, 2016 Order explicitly outlines directly applicable South Carolina statutory law on this issue, which supports the Court's dismissal of Cousins' claims in Circuit Court. (January 11, 2016 Order Dismissing Realtor Appellants' Case). Additionally, the Circuit Court rejected Cousins' argument that South Carolina common law allows for oral and/or implied agency agreements, 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. (Id. at pp. 2-3). The Panel's alleged holding that there was an oral or implied agreement involving Cousins thus created an illegal contract which directly contravenes South Carolina statutory law, as outlined hereinabove, and violates South Carolina common law. See Ward v. West Coast Oil Co., Inc., 387 S.C. 268, 692 S.E.2d 516 (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, 770 S.E.2d 405 (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 argument that there can be an oral and/or implied broker-to-broker agreement expressly violates South Carolina Code 40-57-135(D)(4)(d).[31] The Association repeatedly asserts that the Arbitration Panel's award was based upon the existence of an oral and/or implied agreement between brokers. There is nothing whatsoever in the record to support this assertion, as the Arbitration Panel's award contains only a single sentence; however, if Appellant's assertions are true, such a basis for the Panel's award would violate South Carolina statutory law and create an illegal and unenforceable contract as outlined hereinabove.

The Arbitration Panel's award was not simply an erroneous application of the law, as Appellant Association has argued,[32] it was a complete and manifest disregard of South Carolina law and an Order of the Circuit Court involving the very same transaction, which clearly applied to prohibit Cousins from receiving a commission on the exact real estate transaction at issue before the Panel. Appellant Association argues that "[i]n order to convince this Court to vacate the award

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[31] S.C. Code § 40-57-135(D)(4)(d) provides that 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.***" (emphasis added).

[32] (See App. Association's Brief, p. 10) ("The very analysis considered by the Master-in-Equity shows that at most, the arbiter made a legal mistake, while doing equity being the cooperative brokers.").

on this narrow [manifest disregard] common law ground, there must be a showing that the arbiters knew of a controlling legal principle and purposefully ignored it." (App. Association's Brief, p. 10). This is exactly what occurred in this matter. Rather than applying the aforementioned clearly applicable, controlling South Carolina law, the Panel chose to wholly disregard the law by expressly advising the parties that although there was a lot of discussion about agency and the law requiring written agreements it was going to place its focus on a concept not allowed pursuant to South Carolina law.[33] As stated in Respondents' Notice of Appeal, the Arbitration Panel'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." (See Affidavits of Nick Dou, Matthew Brittain, and Jane Zheng).

C. The Circuit Court Properly Found That The January 11, 2016 Order Was Binding On Realtor Appellants And That The Law of the Case Doctrine and the Doctrines of Res Judicata and Collateral Estoppel Govern This Action.

Appellant Association argues that there is no basis for applying res judicata or collateral estoppel to the arbitration proceeding. (App. Association Brief, pp. 15-18). In support thereof, Association reiterates that because Respondent Waldo initiated the arbitration proceedings,[34] Respondents are prohibited from a judicial review of the arbitration award. The Association relies upon Garrell v. Blanton, 316 S.C. 186, 447 S.E.2d 840 (1994) for the premise that "a party who voluntarily participates in arbitration waves any objection to the arbitration of a commission dispute." (App. Association Brief, p. 15). Not only does this premise directly contradict South

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[33] "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).

[34] Noteworthy, the Association continues to assert that Respondent Waldo voluntarily initiated arbitration proceedings; however, Respondent Waldo simply complied with what the Association alleges is a ***mandatory*** arbitration policy. (emphasis added).

Carolina law, which provides a number of grounds upon which an arbitration may be vacated,[35] it is also a gross mischaracterization of the South Carolina Supreme Court's holding in the Garrell case.

The Garrell case concerned a real estate commission dispute between two realtor parties. 316 S.C. at 187, 447 S.E.2d at 840. In Garrell, Blanton, the realtor seeking a portion of the commission, initiated arbitration proceedings. 316 S.C. at 187-88, 447 S.E.2d at 840-41. The opposing party, Garrell, was informed arbitration was mandatory because both realtors were members of the Horry County Board of Realtors. 316 S.C. at 188, 447 S.E.2d at 841. However, Garrell later learned that due to a lapse in Blanton's membership with the Horry County Board of Realtors, the arbitration proceeding may not have been mandatory. Id. Subsequent to the conclusion of the arbitration proceeding, Garrell challenged the arbitration on the basis that the irregularities in Blanton's Horry County Board of Realtors membership status rose to the level of fraud or undue means, requiring the award be set aside. Id. The South Carolina Supreme Court stated that Garrell had waived any objection to proceeding with arbitration because he had an opportunity to discover Blanton's membership status prior to arbitration, the questions concerning Blanton's status arose at the arbitration hearing, and Garrell did not object at that time. Id. The Supreme Court thus concluded that ***because "Garrell does not contend that the award itself was fraudulent or unfair,*** but, rather, contests the arbitration itself[,] [h]e has not established fraud or undue means" within the meaning of the SC UAA's statute listing grounds for vacating an arbitration award. Id. (emphasis added). Therefore, directly contrary to what the Association has argued, the holding in the Garrell case does **not prohibit** any party who voluntarily participates in

[35] See S.C. Code Ann. § 15-48-130 (listing the grounds upon which an arbitration award may be vacated), Gissel v. Hart, 382 S.C. 235, 676 S.E.2d 320 (2009) (setting forth the standard for vacating award pursuant to an arbitrator's manifest disregard of the law).

an arbitration from judicial review of an arbitration award. (emphasis added). Rather, the Court in Garrell simply found that the grounds upon which Garrell challenged the proceeding did not fall within South Carolina's grounds for vacating an arbitration award. Id. Based upon the foregoing, the Garrell case has no relevance to the matter at issue here.

In support of its argument that the Circuit Court's January 11, 2016 Order does not apply to the arbitration proceeding, the Association also reiterates its argument that South Carolina's statutory scheme does not apply to disputes between brokers; and asserts that the Circuit Court's January 11, 2016 Order relied solely upon South Carolina Code Annotated Section 40-57-139(G) in its holding. (App. Association's Brief, pp. 15-16). Both of these assertions are incorrect. As outlined in great detail hereinabove, South Carolina's statutory scheme with regard to real estate transactions expressly addresses broker-to-broker situations by providing that there must be a written agreement specifying how a commission is to be split between "cooperating brokers,"[36] and by including an entire section requiring that clients consent to and have knowledge of any co-broker or dual agency relationships between brokers. See S.C. Code Ann. § 40-57-137, Subsections (E), (J), and (M); see also supra Section I(B)(1)(ii), pp. 19-20. Moreover, the holding in Circuit Court's January 11, 2016 Order is not limited to solely an analysis of South Carolina Code Annotated Section 40-57-139(G). (See January 11, 2016 Order Dismissing Realtor Appellants' Case). Rather, the Order expressly cites to the entire statutory scheme, S.C. Code Ann. § 40-57-5, eq. seq., and proceeds to review multiple sections within the statutory scheme, including S.C. Code Ann § 40-57-135(D)(4), which outlines the requirements for a listing

[36] "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).

agreement, including an explanation of commission splits between cooperating brokers. (Id. at pp. 2-3).

Directly applicable to the arbitration proceedings, the January 11, 2016 Order also explicitly holds that South Carolina's overhauled statutory scheme ***prohibits oral or implied commission agreements and that any common law to the contrary is superseded by the statutory scheme***. (Id. at pp. 2-3) (internal citations omitted) (emphasis added).[37] For this reason, as the Circuit Court discusses in its January 11, 2016 Order, case law decided prior to the statutory scheme's overhaul cannot be applied to this matter, as the courts would not reach the same decision today, in light of South Carolina statutory law. (Id.). This is why none of the Appellants have been able to provide any case law holding in favor of an oral or implied commission split agreement between brokers that ***post-dates*** the overhaul of South Carolina Code Section 40-57-5, et. seq.

Contrary to the Association's arguments, it is beyond question that an Order that has not been appealed is, in fact, the law of the case. See, e.g., Shirley's Iron Workers, Inc. v. City of Union, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) ("An unappealed ruling is the law of the case..."), ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) ("This unappealed ruling is the law of the case..."). In light of the Circuit Court's January 11, 2016 Order, by proceeding with the arbitration and by the Arbitration Panel Chairman expressly stating the agency issue was irrelevant to its decision, the Association's Arbitration Panel allowed an impermissible collateral attack on a Circuit Court Order. See, e.g., Judy v. Martin, 381

[37] The Association again relies upon Hackler v. Earl Wiegand Real Estate, Inc. 295 S.C. 396, 368 S.E.2d 686 (Ct. App. 1988) in support of its assertion that courts recognize an oral or implied commission split agreement between brokers. (App. Association's Brief, p. 16). For the reasons discussed in detail hereinabove, i.e. that the Hackler case was decided prior to the overhaul of South Carolina's statutory scheme with regard to real estate transactions in the state, the Hackler case is not applicable to this matter. (See supra Section I(B)(1)(iii), pp. 21-22).

S.C. 455, 458, 674 S.E.2d 151, 153 (2009) (holding that a party may not seek alternate relief from an unappealed order of the circuit court).

The January 11, 2016 Order is not limited in any way to commissions sought against "sellers" of real property, as the Association implies in their argument. As stated above, the January 11, 2016 Order holds that Appellant Cousins is not entitled to a commission in the absence of a written agreement. (January 11, 2016 Order Dismissing Realtor Appellants' Case, pp. 2-3). The findings and conclusions in the January 11, 2016 Order are not limited to only Cousins as an alleged representative of the Seller in this transaction. (Id.). The only reason the word "seller" even appears in the January 11, 2016 Order is because Cousins alleged that who he represented in his Affidavit. The order simply bars Cousins from seeking a commission from ***anyone involved in the underlying transaction in the absence of a written agreement***. (Id.) (emphasis added).

Here, the doctrine of res judicata bars the Realtor Appellants from raising issues which were adjudicated in Realtor Appellants' Circuit Court action and any issues which might have been raised in that action. See Plum Creek Dev. Co. v. City of Conway, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999). To establish res judicata, the following elements must be shown: "(1) The parties must be the same ***or their privities***; (2) the subject matter must be the same; and (3) while generally the precise point must be ruled, yet where the parties are the same or are in privity the judgment is an absolute bar not only of what was decided but of what might have been decided." Nunnery, 289 S.C. at 209, 345 S.E.2d at 743 (emphasis added). "Where an action has been so dismissed [with prejudice], the judgment operates, in a subsequent action involving the same subject matter, 'so as to conclusively settle not only all matters litigated in the earlier proceedings, but also all matters which might have been litigated therein.'" Id. (internal citations omitted). Therefore, completely contrary to the Association's argument, the parties do not have

to be identical in two proceedings for res judicata to apply. Rather, the party raising res judicata needs only to be in privity as to the subject matter previously decided. See Yelsen Land Company, Inc. v. The State of South Carolina, et. al., 397 S.C. 15, 723 S.E.2d 592 (2012), Nunnery v. Brantley Constr. Co., 289 S.C. 205, 209, 345 S.E.2d 740, 742-43 (Ct. App. 1986). The law as it relates to privity is, in pertinent part, as follows: "For purpose of res judicata, however, the concept of privity rests ***not on the relationship between the parties asserting it, but rather on each party's relationship to the subject matter of the litigation.***" Yelsen, 397 S.C. 15, 22, 723 S.E.2d 592, 596 (emphasis added).

Likewise, collateral estoppel (i.e. issue preclusion) "prevents a party from relitigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same." Carolina Renewal, Inc. v. S.C. DOT, 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009) (internal citations omitted). The party asserting collateral estoppel must demonstrate that the issue in the present matter was litigated in the prior action, directly determined in the prior action, and necessary to support the prior judgment. Id. (internal citations omitted). Traditionally, the use of a collateral estopped required "mutuality of parties to bar relitigation;" however "modern courts recognize the mutuality requirement is not necessarily for the application of collateral estoppel where the party against whom estoppel is asserted had a full and fair opportunity to previously litigate the issues." Id. (internal citations omitted).

Here, the issue is Realtor Appellants' right to a commission in a thirteen golf course transaction in which Cousins admits not having any written representation agreement and admits knowing nothing about until shortly before closing, and where the Seller, Buyers, and Buyer's exclusive agent, all vehemently deny Cousins' involvement and right to a commission. Realtor Appellants chose to initiate a Circuit Court action against the Seller, Buyers, and Respondents.

The Circuit Court's January 11, 2016 explicitly holds that Realtor Appellants are not entitled to a commission in the absence of a written agreement, ***period***. (January 11, 2016 Order Dismissing Realtor Appellants' Case, pp. 1-4). The January 11, 2016 also clearly and expressly holds that any common law regarding oral or implied commission split agreements is superseded by South Carolina statutory law. (Id.). These holdings directly govern the very issues addressed in arbitration.[38] Therefore, the "law of the case" doctrine, res judica, and collateral estoppel all apply to anyone who challenges Cousins' right to a commission in the absence of a written agreement in the underlying transaction, regardless of the forum (Circuit Court, Master-In-Equity, or arbitration).[39]

D. The Circuit Court Did Not Err In Holding That Respondents Were Substantially Prejudiced By Appellant Association's Arbitration Panel's Failure to Set Forth Findings of Fact and Conclusions of Law In Its Award, Where Its Own Policies And Procedures Require Such Findings of Fact and Conclusions of Law.

The Association substantially prejudiced Appellants by failing to abide by South Carolina statutory law and by failing to follow its Policy of the South Carolina Realtors Governing State Professional Standards Procedure (hereinafter the "Policy"). 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. The decision is made by the Panel, not the Association Counsel."*** (Policy of SC Realtors Governing State Prof. Standards Procedures, p. 4) (emphasis added). Therefore, the

[38] Also noteworthy, in its argument against the application of the "law of the case" doctrine, res judicata, and collateral estoppel, the Association completely ignores the concept of judicial review. This is yet another attempt by the Association to place its arbitration process beyond judicial review. Simply because arbitration is favored within the state does not mean that arbitrators can wholly disregard South Carolina law in making a decision, as the Association would have this Court believe. If this were the case, the manifest disregard standard of vacating an award would not exist. Therefore, the Association's arguments that enforcing the "law of the case" doctrine, res judicata, and collateral estoppel is somehow against public policy must fail.

[39] The August 16, 2018 Order also states that Cousins is barred by judicial estoppel from alleged he represented anyone but the Seller in the underlying transaction. The Association does not appear to challenge this holding.

Association, itself, requires its counsel to prepare a statement of facts or summary of reasons supporting an arbitration panel decision.[40] 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 procedure 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 actually complied with South Carolina Code Section 15-48-180.[41]

Although counsel for the Arbitration Panel was present at the arbitration hearing,[42] Respondents are unware that any statements of facts or summary of the reasons supporting the Association's decision were ever made, and certainly none were ever provided to Respondents. As a result, Respondents could not provide the Procedural Review Board, nor the Circuit Court on appeal, nor this Court with a formal documentation of the Arbitration Panel's basis for its decision. Because the Association's Arbitration Panel failed to provide any basis for its award, it is impossible to determine whether the Panel decided all questions of law and fact. The overwhelming evidence indicates the opposite – that the Panel manifestly disregarded clearly applicable South Carolina law when it awarded Realtor Appellants a commission, and failed to

[40] If the Association truly believes that it 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. If the Association's argument is to be believed, the Association is violating what it alleges is South Carolina law by requiring its counsel to produce such findings of fact and bases for panels' decisions.

[41] As Judge Howe stated at the hearing on Respondent's 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?" (June 21, 2017 Hearing Transcript, p. 79).

[42] (See June 21, 2017 Hearing Transcript, p. 35).

decide the appropriate legal questions pertaining to agency.[43] Therefore, despite the Association's many attempts to present **what it believes** is the basis for the Arbitration Panel's decision, the only evidence that gives any indication of such basis, is the Chairman Panel's statement that the Panel is going to disregard South Carolina law on point to focus on procuring cause. (emphasis added).

In its Brief, the Association also argues that its policies and procedures prohibit review or appeal of an arbitration award. (App. Association's Brief, p. 20). This is completely false, pursuant to the Association's own policies and procedures, as well as South Carolina law. First, SC UAA applies to the parties' arbitration. See S.C. Code Ann. § 15-48-10. The SC UAA expressly provides for circumstances under which an arbitration award may be vacated. See S.C. Code Ann. § 15-48-130. In addition to the circumstances statutorily defined within the SC UAA, South Carolina courts have held that when an 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). Therefore, South Carolina law unequivocally provides for a right to appeal arbitration awards.[44]

Second, the Association's own guidelines and policies provide a right to appeal an arbitration award. Section IV of the Policy of the South Carolina Realtors Governing State

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[43] The Association attempts to rely upon Batton v. Howell, 300 S.C. 545, 389 S.E.2d 170 (Ct. App. 1990) as a case on point because in such case the Court upheld an arbitration decision without any mention of a detailed ruling and in the absence of a written agreement. As argued hereinabove, this case was decision well-prior to the enactment of South Carolina's real estate transaction statutory scheme and is not applicable to this matter. (App. Association's Brief, pp. 20-21). Further, the Association argues that in Batton, the Court did not require detailed factual findings in the arbitration award "so long as the factual inferences and legal conclusions supporting the award are 'barely colorable.'" Id. Contrary to Batton, the Circuit Court in this case held that the Panel's award was not barely colorable. (August 16, 2018 Order Vacating Arb. Award, pp. 2, 13).

[44] In the event, this Court should decide that the Federal Arbitration Act (the "FAA") applies to the parties' agreement to arbitrate, rather than the SC UAA, federal law similarly provides for the vacation of 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***.") (emphasis added).

Professional Standards Procedures, a copy of which was provided to Respondents by the Association, states, in pertinent part, as follows:

> Recordings or transcripts from ethics or arbitration hearings are to be used only for **the purpose of appeals, rehearing, or pursuant to any application to change award, application to confirm award, application for vacate of award or application to modification award,** pursuant to the Uniform [A]rbitration Act, §§ 15-48-100, 15-48-120, 15-48-130, and 15-48-140, Code of Laws of South Carolina, 1976, as amended, and may not be introduced into evidence for any other purpose.

(Policy of SC Realtors Governing State Prof. Standards Procedures, pp. 3-4) (emphasis added). This Policy clearly accounts for a right to appeal an arbitration award and the Policy expressly states that it is meant to address those discretionary areas not covered by the procedures of the NAR Manual as well as those areas of the arbitration procedures which are inconsistent with the South Carolina Uniform Arbitration Act. (Id. at p. 1).

Third, the National Association of Realtors Code of Ethics and Arbitration Manual (hereinafter "the NAR Manual") does not preclude Respondents from appealing the arbitration award at issue here. (See NAR Manual, pp. 1, iv, 150-151, 170). The very cover of the NAR Manual states that its purpose is "to ensure due process in...the arbitration of business disputes arising out of the real estate business" and that the policies and procedures of the NAR Manual should be consistent with applicable state law. (Id at p. 1). A section of the NAR Manual entitled "The Code and the Law" expressly states that the Code of Ethics is "**never opposed to the law**" and "**must always be construed harmoniously and consistently with the law.**" (Id at p. vi) (emphasis added). Further, under a section entitled "Factors for Consideration by Arbitration Hearing Panels," the Manuel states as follows: "The procedures by which arbitration requests are received, hearings are conducted, and awards are made must be in **strict conformity with the law.**" (Id at p. 160) (emphasis added).

Section 53 of Part 10 the NAR Manuel, which governs arbitration awards, sets forth a procedure for a party's appeal of an award. (Id. at pp. 150-151). This Section states, in pertinent part, the following: (1) that a non-prevailing party has twenty (20) days following transmittal of the award to notify the Professional Standards Administrator "that a **legal challenge to the validity of the award has been initiated[,]**" (2) that if the award is confirmed by the Board of Directors following a limited procedural review, "the nonprevailing party shall have an additional fifteen (15) days from the transmittal of the Directors' decision to **institute an appropriate legal challenge to the validity of the arbitration award**[,]" and (3) that any funds at issue will be held in escrow or a trust account, "pending the determination of the matter **by a court of competent jurisdiction**." (Id) (emphasis added). All of the foregoing indicates that the NAR Manual not only does not preclude an appeal of an arbitration award, but expressly provides for such right.

In sum, the Circuit Court's August 16, 2018 Order eloquently summarizes the Panel's prejudicial actions, as follows: "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.'" (August 16, 2018 Order Vacating Arb. Award, p. 20). It is also exceptionally clear from the Association's arguments that it seeks to place its Arbitration Panel's awards beyond the reach of any judicial review, no matter how baseless, arbitrary, or contrary to South Carolina law they may be.

E. The Circuit Court Properly Found That Respondents Were Substantially Prejudiced By Appellant Association's Failure to Allow For the Transcription of the Association's Procedural Review Hearing Where Both South Carolina

Law And The Association's Policies and Procedures Provide For Such Transcription.

The Circuit Court properly held that the Association's failure to allow Respondents to have a court reporter transcribe the Procedural Review Hearing substantially prejudiced Respondents in this matter. Both 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." The Association's Policy states that "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." (Policy of SC Realtors Governing State Prof. Standards Procedures, p. 3). Further, the copy of the NAR Manuel provided to Respondents ***does not state*** that court reporters and/or transcription is not allowed. (See NAR Manual, p. 32) (emphasis added). Contrary to South Carolina statutory law, public policy, and its own policies and procedures, the Association failed to allow Respondents to have a court reporter present to transcribe the Procedural Review Hearing, despite Respondents' requests prior to and on the day of such hearing. Therefore, as there is no formal documentation of the Association's basis for its decision, there is also no record of the Procedural Review Hearing that can be submitted on appeal. This prohibition similarly reeks of the Association's attempt to place its arbitration decisions beyond judicial review and this case is a prime example of exactly 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 this Court, should be 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." (NAR Manual, p. 202). This is the only time that the arbitrators themselves explain what they did and why. Yet, the Association attempts to argue that this is not relevant and should not be recorded and preserved for the record. This defies logic, judicial economy, and public policy. It is unfathomable that Appellant Association would attempt to argue that a proceeding that can be appealed to this Court could not be recorded by a court reporter upon a party's request.

Disallowing the transcription of directly relevant proceedings creates the very scenario that is 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 that is attempting to determine whether an arbitration panel manifestly disregarded the law. First, Appellants argue that the Arbitration Panel is prohibited from providing any bases for its award within the written award. However, the Association's own policies require the Panel Chairman to attend the Procedural Review Hearing and provide an explanation as to what the Panel did and why it made its decision. Then, Appellants argue that such proceeding should not be recorded or preserved for later review when the proceeding may contain the only evidence of why the Panel did what it did. This entire scenario evidences Appellants' attempt to place the arbitration process beyond judicial review. As a result, the Circuit Court properly held that the Association substantially prejudiced Respondents by failing to allow for the transcription of the Procedural Review Hearing.

F. The Association Never Argued That The SC UAA, Rather Than The FAA, Applied To The Arbitration; Therefore, The Association Has Waived Such Argument and Is Barred From Asserting It On Appeal.

In its Brief, Appellant Association 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; therefore, the Circuit Court improperly applied the SC UAA when it vacated the Association's Arbitration Panel award. (Appellant Association's Brief, pp. 24-26). First and foremost, the Association is barred from raising this argument from appeal, when it failed to ever do so in the underlying case. 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, 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 Respondents' Motion to Vacate the Arbitration Award and Appellants' opposing motions, counsel for the Association expressly stated that "the Association has taken no position as to which act applies here." (June 21, 2017 Hearing Transcript, p. 98). Therefore, the Association has waived any argument as to any alleged error of the Circuit Court's application of the SC UAA rather than the FAA.

Nonetheless, even if the Association were allowed to proceed with an argument that the FAA applies to this matter, the very ground upon which the Circuit Court 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 sets 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.").**

(August 16, 2018 Order Vacating Arb. Award, pp. 6-7) (emphasis added). Based upon the above, it is clear that the Circuit Court 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 Circuit Court applied the proper standard of review accordingly.

Appellant Association's arguments before both the Circuit Court and in its Brief before this Court further support the above. In each of the briefs filed by Appellant Association in the Circuit Court, Appellant Association acknowledges that an arbitration award may be overturned whether either the SC UAA or the FAA applies if the Circuit Court finds that the arbiter

"manifestly disregarded the law." (Association's June 20, 2016 Memo. In Supp. of Motion to Dismiss Appeal, p. 8,[45] Association's September 8, 2016 Reply to Keller William's Memo. In Opp. to Association's Motion to Dismiss, p. 4, Association's June 20, 2017 Memo. In Supp. of Motion to Confirm Arb. Award, p. 8).[46] In its June 20, 2016 Memorandum In Support of its Motion to Dismiss Respondent's appeal of the arbitration award, Appellant Association provides case law which supports the fact that arbitration awards may be vacated if the arbiter manifestly disregards the law, whether either the FAA or the SC UAA applies, and concludes by stating, as follows: "Thus, the analysis that a court uses for determining whether to vacate a federal arbitration award is largely the ***same analysis*** used under South Carolina law." (Association's June 20, 2016 Memo. In Supp. of Motion to Dismiss Appeal, p. 9). In both its June 20, 2017 Memorandum In Support of Motion to Confirm Arbitration Award before the Circuit Court and in its Brief herein, the Association states, in pertinent part, as follows:

> 'Manifest disregard for the law' as a basis for vacating an arbitration award does not appear in either the South Carolina Uniform Arbitration Act nor in the Federal Arbitration Act ("FAA"). ***Courts created the manifest disregard doctrine adding to the statutes and, therefore, courts apply it very narrowly under both the Uniform Arbitration Act and the FAA.***

(Association's June 20, 2017 Memo. In Supp. of Motion to Confirm Arb. Award, p. 4, App. Association's Brief, p. 7). Further, in its Brief herein, Appellant Association relies upon Gissel v. Hart, 382 S.C. 235, 676 S.E.2d 320 (2009) as case law that sets forth the manifest disregard ground for vacating an arbitration award, which is the same case law the Circuit Court used in its analysis and vacation of the arbitration award in this matter.

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[45] ("To vacate an award under the FAA an applicant must show that the arbiter manifestly disregarded the law...") (internal citations omitted).

[46] ("To vacate an award under the FAA an applicant must show that the arbiter manifestly disregarded the law...") (internal citations omitted).

Therefore, regardless of whether the SC UAA applies or the FAA applies to this matter, the Circuit Court did not err in vacating the arbitration award on the basis that the Association'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 by stating, as follows:

> 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).[47] In sum, Appellant Association's argument is barred for its failure to raise the argument in the lower court; however, regardless of the foregoing, Appellant Association's argument that the FAA governs the arbitration at issue here rather than the SC UAA is ultimately futile and immaterial to the Circuit Court's holding in this matter.

[47] 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.

CONCLUSION

For the foregoing reasons, the Circuit Court did not err in vacating the Arbitration Panel's arbitration award. Therefore, the Court of Appeals should uphold the Circuit Court's August 16, 2018 Order Vacating the Arbitration Panel's Award.

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April 16, 2019

STATE OF SOUTH CAROLINA
In the Court of Common Pleas

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Honorable Cynthia Graham Howe, Master-In-Equity

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,

PROOF OF SERVICE

The undersigned certifies that he is employed by the law firm of Bellamy, Rutenberg, Copeland, Epps, Gravely & Bowers, P.A., attorneys for the Respondents, Andrew Waldo, Jane Zheng, and SC Coast Properties, LLC d/b/a Keller Williams Realty, that he has mailed a copy of the Respondents' Initial Brief in Response to Initial Brief of Appellant South Carolina Association of Realtors, Designation of Matter to Be Included in the Record on Appeal, Certificate of Counsel, and Proof of Service to counsel listed below this 16th day of April, 2019, with property postage attached thereto.

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1220 Senate Street
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Re: Andrew Waldo; Jane Zheng; and SC Coast Properties, LLC d/b/a Keller Williams Realty, *Respondents* v. Michael Cousins; Founders Fiver, LLC d/b/a Sperry Van Ness Founders Group; and South Carolina Association of REALTORS, *Appellants*
Appellate Case No.: 2018-001590

Dear Ms. Kitchings:

Enclosed herewith please find the originals and one copy of each of the Respondents' Initial Brief in Response to Initial Brief of Appellant South Carolina Association of Realtors, Designation of Matter to Be Included in the Record on Appeal, Certificate of Counsel, and Proof of Service in the above-referenced matter. Please file the original documents and return the clocked copies to me in the self-addressed stamped envelope enclosed for your convenience.

If you have any questions or need additional information, please feel to contact me.

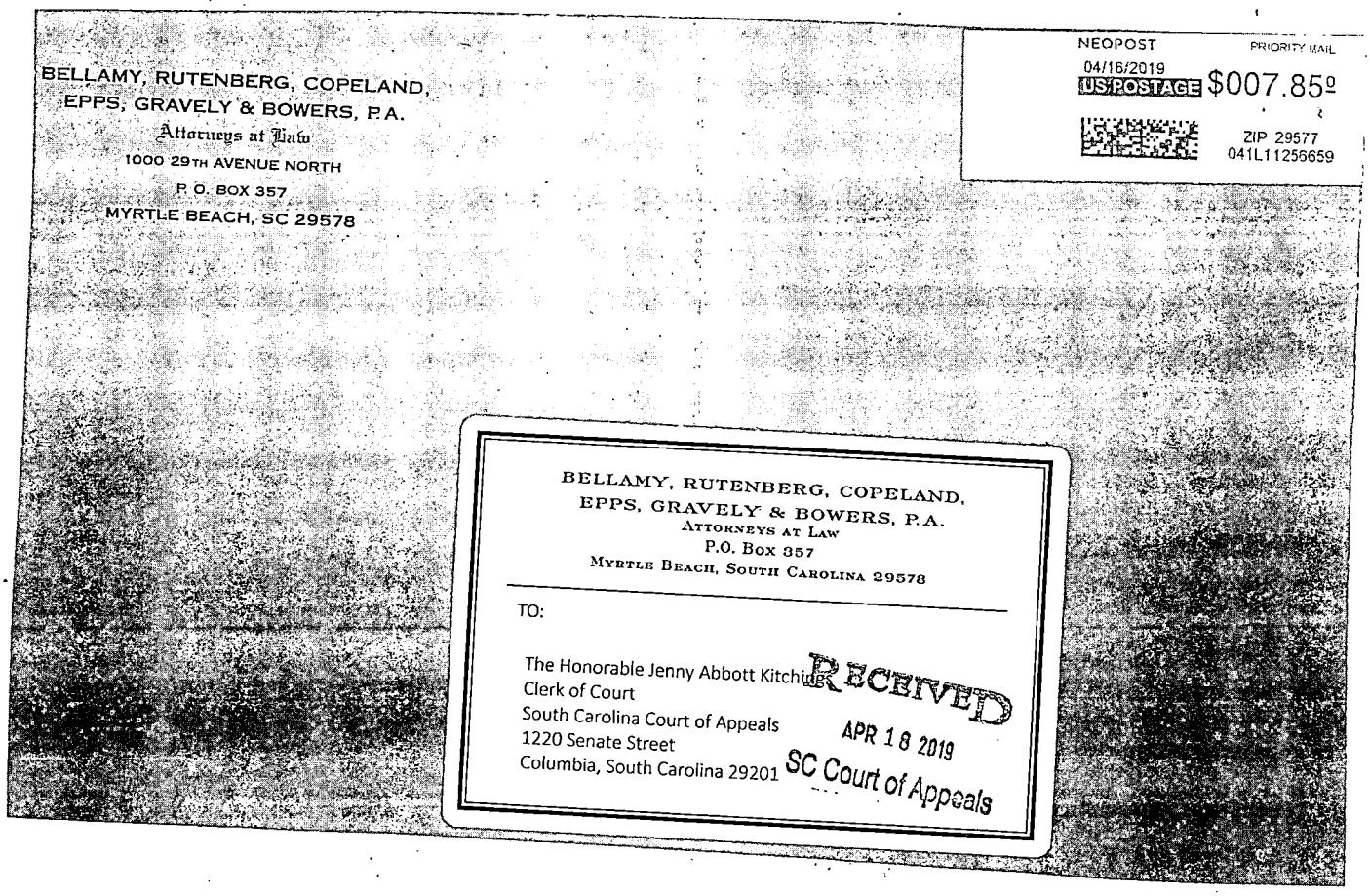
With kindest regards, I am

Yours very truly,

BELLAMY, RUTENBERG, COPELAND,
EPPS, GRAVELY & BOWERS, P.A.

Douglas M. Zayicek

Enclosures as noted
cc: Client
Lawrence Sidney Connor, IV, Esquire
Marcus Angelo Manos, Esquire



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TO:

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

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