THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

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.

FINAL BRIEF OF APPELLANT SOUTH CAROLINA ASSOCIATION OF REALTORS®

Marcus A. Manos, SC Bar #011876
Christopher R. Hampton, SC Bar #102262
NEXSEN PRUET, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, South Carolina 29202
(803) 771-8900
MManos@nexsenpruet.com
CHampton@nexsenpruet.com

Attorneys for Appellant South Carolina Association of REALTORS®

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STATEMENT OF THE CASE

This is an appeal seeking to reinstate and enforce an arbitral award that was vacated by the court below. Respondents Andrew Waldo and Jane Zheng are real estate brokers. Respondent Zheng works at Respondent SC Coast Properties, LLC d/b/a Keller Williams Realty, a real estate brokerage firm. Appellant Michael Cousins is a real estate broker. Appellant Founders Five, LLC d/b/a Sperry Van Ness Founders Group is Appellant Cousins's brokerage firm.

On September 28, 2015, Respondent Waldo and Appellant Cousins agreed to submit a dispute regarding a commission to binding arbitration before Appellant South Carolina Association of REALTORS® ("Association"). The Association found in favor of Appellant Cousins. [R. p. 18]. On March 1, 2016, Respondents appealed the Award of Arbitrators. [R. pp. 69-71]. After the parties briefed the issues and argued at a hearing on June 21, 2017, the court below vacated the Arbitral Award on August 16, 2018. [R. pp. 37-57]. The Association appeals the order of the court below vacating the Arbitral Award to defend the overall fairness, due process, and efficiency of the procedure it uses to resolve disputes between REALTORS®. The Association served its Notice of Appeal on counsel of record on September 4, 2018.

FACTS

Respondent Waldo ("Waldo") submitted an application to the Coastal Carolinas Association of REALTORS® [R. p. 387, lines 5-8; and R. pp. 389-391] and became a member of that association on August 15, 2014. Pursuant to this agreement, Waldo agreed to abide by the Rules, Regulations, and Code of Ethics of the National Association of REALTORS®, the South Carolina Association of REALTORS®, and the Coastal Carolinas Association of REALTORS®. [R. p. 387, lines 5-8; R. pp. 389-391; R. p. 387, lines 9-11; R. pp. 393-395; R. p. 387, lines 12-14; and R. pp. 397-399]. The NAR Code of Ethics requires arbitration between REALTORS® in any dispute arising out of their real-estate practice. [R. p. 371, lines 1-2; and R. pp. 365-367]. Likewise, the Bylaws and Rules of both the Association and the Coastal Carolinas Association require the same. [R. p. 371, lines 3-5; and R. pp. 374-377].

Respondent Waldo and Appellant Cousins dispute whether a commission was due on certain real-estate transactions involving golf courses. Cousins's brokerage firm originally sued Waldo's brokerage firm, along with several property sellers, in the case styled Founders Five, LLC v. The Real Estate Company et al., Case No. 2015-CP-26-2066. Although he now attacks the arbitration award, Waldo demanded in 2015 that the parties arbitrate their dispute and he initiated proceedings with the Association. [R. pp. 64-65]. Although Cousins and Waldo agreed to carve out their claims and arbitrate them, Cousins's claims against the sellers of the property remained in the circuit court. On January 11, 2016, the circuit court dismissed Cousins's claims against National Golf Management, LLC on the basis that Cousins, as broker, did not have a written agreement with National Golf Management, LLC, as seller. [R. pp. 14-17].

The South Carolina Association of REALTORS®'s Constitution and Bylaws states that disputes where two listing brokers claim entitlement to compensation may be submitted to arbitration and that the arbitration of disputes shall be governed by the Code of Ethics and Arbitration Manual of the National Association of REALTORS®. [R. pp. 375-376]. Waldo initiated an arbitration before the Association seeking a determination that the commission need not be split with Cousins. [R. p. 371, lines 6-10; and R. pp. 64-65]. The agreement between Waldo, Cousins, and the three Associations requires mandatory arbitration and is enforceable under both the Federal Arbitration Act and the South Carolina Uniform Arbitration Act. [R. pp. 393-395; R. p. 397-399; R. pp. 365-367; and R. pp. 374-377]. Thus, Waldo voluntarily submitted to the arbitration process by filing his request for arbitration on September 28, 2015. [R. p. 371, lines 6-9; and R. pp. 64-65]. At the conclusion of the initial arbitration hearing, Waldo admitted that the hearing had been fair and that he had an adequate opportunity to testify, present evidence and witnesses, and conduct cross-examination. [R. p. 409, line 13 - p. 410, line 8]. The arbiters awarded Cousins one-half of the commission paid, totaling $250,000. [R. p. 18].

At Waldo's request, the Association scheduled an appellate review of the current arbitration decision from March 30, 2016. [R. p. 371, lines 10-14; R. pp. 67-68 (with referenced attachments at R. pp. 14-18); and R. p. 379]. Respondent Waldo requested a continuance of the review hearing to a later date, which was rescheduled to April 18, 2016, and again rescheduled to May 2, 2016 at the request of the parties to the arbitration. [R. pp. 381, 383, and 385]. On May 2, 2016, the Procedural Review Hearing Tribunal affirmed the award, concluding the arbitration process. [R. p. 19].

The contract of arbitration between Waldo, Cousins, and the three associations requires that arbitration awards only contain a simple statement of the prevailing party and any amount owed. [R. p. 622]. Respondent Waldo requested a court reporter at the limited procedural review. The contract of arbitration between Waldo, Cousins, and the three associations forbids any record of the limited procedural review proceedings. [R. p. 462]. Respondent Waldo acted as a broker on behalf of Keller Williams Realty, Inc., a national real estate brokerage firm located in Austin, Texas. [Supplemental **Exhibit A** attached, Keller Williams website].

In this case, Cousins and Waldo, both REALTORS®, dispute whether Waldo was entitled to keep the entire $500,000 commission for the sale of property that closed in early 2015. Cousins claims he is entitled to $250,000. The Association takes no side in this dispute, but simply defends the process it used to arbitrate the dispute. The process is one used by the National Association of REALTORS® (NAR) and all of its members, nationwide, for decades. The ruling below orders several important expensive changes in the time tested, quick, fair, and inexpensive NAR arbitration process.

STANDARD OF REVIEW

Determinations of arbitrability are subject to de novo review. Stokes v. Metro Life Ins. Co., 351 S.C. 606, 609-10, 571 S.E.2d 711, 713 (Ct. App. 2002).

ARGUMENT

I. THE REVIEWING COURT BELOW ERRED IN VACATING THE ARBITRATION AWARD AND SUBSTITUTING ITS OWN JUDGMENT FOR THAT OF THE ARBITERS IN VIOLATION OF THE CONTRACT FOR ARBITRATION BETWEEN THE ARBITRATING PARTIES AND APPLICABLE FEDERAL AND STATE LAW.

The reviewing court below erred in vacating the arbitration award because the narrow exceptions allowing a court to vacate an arbitration award were not met. When a case is

submitted to arbitration, arbiters decide issues of both law and fact. Once an award is entered, it is generally conclusive, and "courts will refuse to review the merits of an award." Gissel v. Hart, 383 S.C. 235, 241, 676 S.E.2d 320, 323 (2009). A court can properly vacate an award only if the arbiter "exceeds his or her powers and/or manifestly disregards or perversely misconstrues the law." Id.; S.C. Code § 15-48-130.[1] "Judicial review of an arbitration award is limited in scope." White v. Preferred Research, Inc., 315 S.C. 209, 212, 432 S.E.2d 506, 508 (Ct. App. 2003).

Arbiters exceed their powers only if the arbitrated issue is not within the scope of the arbitration agreement. Harris v. Bennett, 332 S.C. 238, 244, 503 S.E.2d 782, 785 (Ct. App. 1998). For example, if an arbiter awards punitive damages when the agreement expressly excludes them, the arbiter has exceeded his or her powers. But "[f]actual and legal errors by arbitrators do not constitute an abuse of powers, and a court is not required to review the merits of a decision so long as the arbitrators do not exceed their powers." Gissel at 242, 676 S.E.2d at 324.

"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. House v. Vance Ford-Lincoln-Mercury Inc., 328 P.3d 1239, 1247 (Ok. App. 2014) (applying FAA); Home Owners Management Enterprises, Inc. v. Dean, 230 S.W.3d 766, 768-69 (Tex. App. 2007) (in a

[1] A court will also vacate an award if (1) the award was procured by corruption, fraud, or undue means; (2) the arbiters were unfairly biased; (3) the arbiters refused to postpone the hearing despite due cause; or (4) there was no actual arbitration agreement. S.C. Code Ann. § 15-48-130. But, Respondent Waldo has not raised these issues to the reviewing court below.

case under Texas Uniform Arbitration Act related to sale of real property, citing federal law that manifest disregard is a "very narrow standard or review").

As to a manifest disregard of the law, a party must show "something beyond a mere error in construing or applying the law." Gissel v. Hart, 382 S.C. 235, 241, 676 S.E.2d 320, 323 (2009). "Even a 'clearly erroneous interpretation of the contract' cannot be disturbed." Id. The focus is on the conduct of the arbiter, and setting aside an award on this basis requires proof that "the arbitrator knew of the governing principle yet refused to apply it." Id. (emphasis added). Further, "the governing law ignored by the arbitrator must be well defined, explicit, and clearly applicable." Id.

Under the Federal Arbitration Act ("FAA"), similar to South Carolina law, "[r]eview of an arbitrator's award is severely circumscribed." Apex Plumbing Supply, Inc. v. U.S. Supply Co., Inc., 142 F.3d 188, 193 (4th Cir. 1998). "Indeed, the scope of review of an arbitrator's valuation decision is among the narrowest known at law because to allow full scrutiny of such awards would frustrate the purpose of having arbitration at all—the quick resolution of disputes and the avoidance of the expense and delay associated with litigation." Id. To vacate an award under the FAA, an applicant must show that the arbiter manifestly disregarded the law; the award was procured by fraud or corruption; the arbiter was partial or corrupt; the arbiters were guilty of misconduct; or the arbiters "exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." Id.; 9 U.S.C. § 10.

The burden on the applicant seeking to vacate an award is "heavy." MCI Constructors, LLC v. City of Greensboro, 610 F.3d 849, 857 (4th Cir. 2010). As a matter of law, "neither

misinterpretation of a contract nor an error of law constitutes a ground on which an award may be vacated." Id. at 861. So long as there is an arguable basis for the arbiter's decision, it should be upheld. Id. at 862.

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. Merely misapplying the law is not enough to vacate an award.

Appellant Cousins and Respondent Waldo arbitrated their broker-versus-broker dispute on February 2, 2016 before a panel of five Association arbiters. After reviewing the evidence and hearing arguments, the panel found in favor of Cousins and awarded him $250,000, which was half of the $500,000 commission. [R. p. 18]. Waldo then appealed to the Association's Procedural Review Hearing Tribunal, which affirmed the award on May 2, 2016. [R. p. 19].

There is no evidence before the court below that the dispute was outside the arbitration agreement, nor is there any evidence that the arbitration panel exceeded the authority provided in its Code of Ethics. Indeed, Waldo admitted at the hearing that the hearing had been conducted fairly, and that he had had an opportunity to testify, present evidence and witnesses, and cross-examine any hostile witnesses. [R. p. 409, line 13 – p. 410, line 8].

Further, as argued in detail in the sections below, there was no evidence before the court below that the arbiters manifestly disregarded the law. Because there was no evidence before the court below that the arbiters exceeded his or her powers and/or manifestly disregarded or perversely misconstrued the law, the court had no basis to overturn the decision of the arbiters. Gissel v. Hart, 383 S.C. 235, 241, 676 S.E.2d 320, 323 (2009).

The Court below went through a detailed analysis of statutes meant to protect consumers contracting with REALTORS® to reach a conclusion having nothing to do with the facts of the relationship and actions between the REALTORS®. The very analysis considered by the Master-in-Equity shows that at most, the arbiter made a legal mistake, while doing equity between the cooperative brokers. Such a result in not "manifest disregard" nor "perverse application." Accordingly, the lower court's order vacating the arbitral award was made in error and should be reversed.

II. THE REVIEWING COURT BELOW ERRED BY FINDING THAT THE ARBITERS FAILING TO APPLY A REAL ESTATE STATUTE PROTECTING CLIENTS OF REALTORS® BY REQUIRING THE CLIENT TO SIGN ANY COMMISSION AGREEMENT, WHEN THE REALTORS® EXCHANGED WRITTEN EMAIL REGARDING A SUB-AGENCY AND COMMISSION AND HAD A COURSE OF DEALING WHERE A COMMISSION HAD BEEN SPLIT IN A PRIOR, SIMILAR TRANSACTION, MET THE EXTRAORDINARY STANDARD OF A MANIFEST DISREGARD OF THE LAW.

To establish a manifest disregard of the law, a party must show "something beyond a mere error in construing or applying the law." Gissel v. Hart at 241, 676 S.E.2d at 323. "Even a 'clearly erroneous interpretation of the contract' cannot be disturbed." Id. The focus is on the conduct of the arbiter, and setting aside an award on this basis requires proof that "the arbitrator knew of the governing principle yet refused to apply it." Id. (emphasis added). Further, "the governing law ignored by the arbitrator must be well defined, explicit, and clearly applicable." Id. In order to convince this Court to vacate the award on this narrow common law ground, there must be a showing that the arbiters knew of a controlling legal principle and purposefully ignored it. Harris v. Bennett, 332 S.C. 238, 246, 503 S.E.2d 782, 787 (Ct. App. 1998). If there is a legal argument supporting the award, then it cannot be a "manifest disregard" so long as the argument is "barely colorable." Id. South Carolina's interpretation of

the act is consistent with those of sister states. Groceman v. Pulte Homes Corp., 53 S.W.3d 599, 602 (Mo. App. 2001) (Party moving to vacate bears heavy burden of demonstrating arbiter knew of and correctly stated the controlling legal rule and then ignored it); Chrobak v. Edward D. Jones & Co., 46 Ark. App. 105, 112, 878 S.W.2d 760, 763 (1994) (Party seeking to vacate cannot simply complain that award violates law, but must specifically show arbiter knew the law and expressly ignored it).

Here, the court below relied on a statute that protects real estate sellers and does not apply to relationships between REALTORS®. The statute states:

> For all real estate transactions, no agency relationship between a buyer, seller, landlord, or tenant and a brokerage company and its affiliated licensees exists **unless the buyer, seller, landlord, or tenant and the brokerage company and its affiliated licenses agree, in writing, to the agency relationship.** No type of agency relationship may be assumed by a buyer, seller, landlord, tenant, or licensee or created orally or by implication.

S.C. Code Ann. § 40-57-139(G) (emphasis added). Thus, the "governing law" cited by the court below is not "well defined, explicit and clearly applicable" so as to support the common law "manifest disregard" exception to confirming the arbitration award. The statute on its face does not apply to the transaction in arbitration—a dispute between brokers/licensees over a commission.

The circuit court's dismissal of Cousins's claims against National Golf Management based on § 40-57-139(G) makes sense because the statute states that, between broker and seller, a written agreement is required. Real estate agents owe a fiduciary duty to their clients. Darby v. Furman Co., Inc., 334 S.C. 343, 346, 513 S.E.2d 848, 849 (1999). The statue created a requirement that this fiduciary relationship be in writing. But the statute does not specifically address claims between brokers. The statute states that an agency relationship between

"buyer, seller, landlord, or tenant," on one hand, and a "brokerage company and its affiliated licensees," on the other hand, requires a written agreement. The statute does not address agreements between brokers to share a commission. The circuit court in Founders Five relied solely on this statute in making its decision.

The distinction is important because the arbitration between Cousins and Waldo was not a dispute between a broker and a seller, but rather a dispute between broker and broker. Section 40-57-139(G), therefore, did not apply. This distinction is crucial, because the purpose of the statutory scheme in S.C. Code Ann § 40-57-5 et seq. and the Real Estate Commission it created is "to protect the public's interest when involved in real estate transactions." S.C. Code Ann. § 40-57-5. The public is, of course, the buyers and sellers who should be protected from unscrupulous agents, who owe them fiduciary duties. To protect the public, the statutory scheme requires written agreements between brokers and the public. But it is silent regarding agreements between agents where buyers or sellers are not affected. If Appellant Cousins were in a dispute with the buyer or seller, the lower court's reasoning might have been correct. In this case, it is not.

Finally, S.C. Code Ann. § 40-57-137 makes clear that it applies only to disputes between brokers/agents and their client sellers and buyers. "A real estate brokerage company that provides services through an agency agreement for a client is bound by the duties of loyalty, obedience, disclosure, confidentiality, reasonable care, diligence, and accounting as set forth in this chapter." S.C. Code Ann. § 40-57-137 (emphasis added). Because the focus of the statute is to protect the public at large, it does not address disputes between agent and agent, where written agreements are not required. In fact, the statute states that "[e]xcept as otherwise

stated, nothing in this section precludes an injured party from bringing a cause of action against licensees, their companies, or their brokers-in-charge." Id. at § 40-57-137(Q).

The courts recognize an independent claim to split commissions between brokers. See, e.g., Hackler v. Earl Wiegand Real Estate, Inc., 295 S.C. 396, 368 S.E.2d 686 (Ct. App. 1988). The agreement to divide a commission need not be in writing or even expressed. Such an agreement between brokers can be implied. Id. at 398-99, 368 S.E.2d at 686. As such, there was no evidence before the court below to support its conclusion that the arbiters manifestly disregarded the law.[2]

Similarly, under federal law, in order to demonstrate manifest disregard of the law, there must have been a showing that an arbiter knew about a clearly defined legal principle, not subject to debate, and then refused to apply it. Wachovia Securities, LLC v. Brand, 671 F.3d 472, 483 (4th Cir. 2013). As discussed above, the statute cited by the court below does not clearly and unarguably apply and there is no evidence the arbiters ignored it. As the Fourth Circuit noted:

> When parties consent to arbitration, and thereby consent to extremely limited appellate review, they assume the risk that the arbitrator may interpret the law in a way with which they disagree. Cf. Remmey v. PaineWebber, Inc., 32 F.3d 143, 146 (4th Cir. 1994) (explaining that arbitration is an alternative to litigation); Safeway Stores v. Am. Bakery & Confectionery Workers, 390 F.2d 79, 84 (5th Cir. 1968) ("The arbiter was chosen to be the Judge. That Judge has spoken. There it ends."). Any more probing review of arbitral awards would risk changing arbitration from an efficient alternative to litigation into a vehicle for protracting disputes.

Id. at 478 n. 5.

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[2] This case was decided prior to the amendments to the real estate code but still provides sound guidance.

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. An arbiter does not need to state reasons; the challenger faces a heavy burden; and merely misapplying the law is not enough to vacate an award.

The course of conduct between Appellant Cousins and Respondent Zheng, where a commission had been split in a prior, similar transaction, further shows that the court below erred by finding that the arbiters acted in manifest disregard of the law. In June, 2014, Appellant Cousins and Jane Zheng of Keller Williams were successful in bringing the parties together in an agreement to purchase Colonial Charters Golf Course. [R. p. 353, line 8 – p. 354, line 8; R. pp. 306-307; and R. p. 341]. There was an Agreement of Purchase and Sale, but no signed commission agreement. The six percent commission was split three percent to Keller Williams and three percent to Sperry Van Ness. [R. p. 354, lines 5-8]. Subsequently, in late 2014, a contract of sale was entered into for the sale of Aberdeen Golf Course. [R. p. 354, line 9 – R. p. 355, line 6; and R. pp. 304-305]. When that transaction closed, the six percent commission was paid, three percent to Keller Williams and three percent to Sperry Van Ness. [R. pp. 337-338].

Thus, the case law and course of dealing show that the arbiters' ruling could not have been made in manifest disregard of the law. They correctly determined based on the law and evidence presented that an independent agreement between Cousins and Zheng to split the commission existed. See Hackler v. Earl Wiegand Real Estate, Inc., 295 S.C. 396, 368 S.E.2d 686 (Ct. App. 1988) (Recognizing an independent claim to split commissions between brokers). Thus, the lower court's order vacating the arbitral award was made in error and should be

overturned.

III. THE REVIEWING COURT BELOW ERRED IN FINDING AN ORDER IN RELATED CIRCUIT COURT LITIGATION AGAINST THE PURCHASER OF THE REAL ESTATE, BARRED THE TWO REALTORS®, (WHOSE CLAIMS AGAINST EACH OTHER WERE DISMISSED FROM THE RELATED CASE TO GO TO ARBITRATION), FROM REACHING A DIFFERENT RESULT IN THAT ARBITRATION.

There is no basis to apply res judicata or collateral estoppel to the arbitration. Appellant Cousins's brokerage firm originally sued Waldo's brokerage firm, along with several property sellers, in the case styled Founders Five, LLC v. The Real Estate Company et al., Case No. 2015-CP-26-2066. Although he has attacked the arbitration award, Waldo demanded in 2015 that the parties arbitrate their dispute and he initiated proceedings with the Association. [R. pp. 64-65]. In Garrell v. Blanton, 316 S.C. 186, 447 S.E. 2d 840 (1994), a case involving the very same arbitration rules and contracts, the Supreme Court of South Carolina held that a party who voluntarily participates in arbitration waives any objection to the arbitration of a commission dispute. Although Cousins and Waldo agreed to carve out their claims and arbitrate them, Cousins's claims against the sellers of the property remained in the circuit court. On January 11, 2016, the circuit court dismissed Cousins's claims against National Golf Management, LLC on the basis that Cousins, a broker, did not have a written agreement with National Golf Management, LLC, as seller. [R. pp. 14-17].

In dismissing Cousins's claim against National Golf Management, the circuit court relied on S.C. Code Ann. § 40-57-139(G). The circuit court's dismissal of Cousins's claims against National Golf Management based on § 40-57-139(G) makes sense because the statute states that, between a broker and seller, a written agreement is required. Real estate agents owe a

fiduciary duty to their clients. Darby v. Furman Co., Inc., 334 S.C. 343, 346, 513 S.E.2d 848, 849 (1999). The statute created a requirement that this fiduciary relationship be in writing.

But the statute does not apply to claims between brokers. The statute states that an agency relationship between "buyer, seller, landlord, or tenant," on one hand, and a "brokerage company and its affiliated licensees," on the other hand, requires a written agreement. The statute does not address agreements between brokers to share a commission. The circuit court in Founders Five relied solely on this statute in making its decision.

The distinction is important because the arbitration between Cousins and Waldo was not a dispute between a broker and a seller, but rather a dispute between broker and broker. Section 40-57-139(G), therefore, did not apply. Further, the court order relied on by Waldo for res judicata did not address the issue of brokers sharing a commission. The courts recognize an independent claim to split commissions between brokers. See, e.g., Hackler v. earl Wiegand Real Estate, Inc., 295 S.C. 396, 368 S.E.2d 686 (Ct. App. 1988). The agreement to divide a commission need not be in writing or even expressed. Such an agreement between brokers can be implied. Id. at 398-99; 368 S.E.2d at 686.[3]

The doctrine of res judicata requires that the parties in the first action be identical to the parties in the second action. Palmetto Homes, Inc. v. Bradley, 357 S.C. 485, 494, 593 S.E.2d 480, 485 (Ct. App. 2004). The court dismissed Waldo and his brokerage firm from the prior suit so they could pursue arbitration with Cousins. [R. pp. 14-17]. The dismissal occurred before the order claimed to have preclusive effect. Res judicata cannot apply.

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[3] Again, the decision was made prior to the current amendment but still provides guidance for disputes between brokers.

The doctrine of collateral estoppel bars a party from re-litigating an issue fully litigated in another lawsuit if the prior action directly resolved the specific issue and the resolution of the issue was necessary to the prior judgment. Crosby v. Prysmian Communications Cables and Systems USA, LLC, 397 S.C. 101, 109, 723 S.E.2d 813, 817 (Ct. App. 2012). The Founders Five case determined that the seller of the property had no obligation to pay Cousins a commission. [R. pp. 14-17]. The Founders Five case did not address whether a relationship between Waldo and Cousins as REALTORS® bound Waldo to split the commission with Cousins. The court in Founders Five did not address the issue decided in arbitration and, therefore, the decision in Founders Five does not preclude the issue being decided in arbitration.

Nothing in § 40-57-137 (or § 40-57-139) requires written agreements between brokers/agents, and nothing prevents an injured broker/agent, such as Cousins, bringing an action against another broker/agent. Because the purpose of the statutory scheme is to protect buyers and sellers against unscrupulous agents, an agent such as Respondent Waldo should not be able to use as a shield a statute that was never meant to protect him or other agents. S.C. Code Ann. § 40-57-5. The arbitration panel heard the evidence in this broker-versus-broker dispute and found that Cousins had a claim against Waldo, and that Waldo had injured him. The panel correctly found that the circuit court's order in Founders Five, LLC v. The Real Estate Company et al., Case No. 2015-CP-26-2066, did not control, because that order ruled on a broker-versus-seller dispute, and did not involve the type of dispute that the arbitration panel heard.

The unappealed circuit court order cannot be the law of the case in the issues between Cousins and Waldo in this separate arbitration. The law of case doctrine applies only to the

same case, not a companion case or arbitration. Ross v. Med. Univ. of S.C., 328 S.C. 51, 62, 492 S.E.2d 62, 68 (1997). The doctrine of law of the case ". . . prohibits issues that have been decided in a prior appeal from being relitigated in the trial court in the same case." Id.; Atkins v. Wilson, 417 S.C. 3, 17, 788 S.E.2d 228, 235 (Ct. App. 2016). The law of the case doctrine has no application here in a different proceeding. Thus, the lower court's order vacating the arbitral award based on reasoning that an order in related circuit court litigation against the purchaser of the real estate barred the arbiters from reaching a different result in arbitration was made in error.

Applying the doctrines of res judicata, collateral estoppel, and law of the case as the Master did below, negates arbitration. All REALTORS® agree to arbitrate commission disputes in NAR's quick, time tested process, administered by SCAR. Clients are invited to arbitrate and can join, but not required to. Thus, a lawsuit between client and REALTOR® parallel to an arbitration between REALTOR®s will happen. The ruling below requires the arbitration to become a useless process with its misapplication of the doctrines essentially forcing the arbiters to reach the same conclusion as the court does in the REALTOR®/client litigation. Such a result ignores the favored, contractual status of arbitrations.

IV. THE REVIEWING COURT BELOW ERRED BY REQUIRING A DETAILED JUDGMENT WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW FROM THE ARBITERS WHEN THE RULES OF THE NATIONAL ASSOCIATION OF REALTORS® APPLIED BY THE SOUTH CAROLINA ASSOCIATION OF REALTORS® AND CONTRACTUALLY AGREED TO BY THE ARBITRATING PARTIES PROVIDED FOR A SIMPLE DECLARATION OF THE PREVAILING PARTY AND AMOUNT OF JUDGMENT, IF ANY, AND FORBADE DETAILED JUDGEMENTS.

Respondent Waldo voluntarily filed this case in arbitration pursuant to the Arbitration Rules of the South Carolina Association of REALTORS®. [R. pp. 64-65]. He chose this forum initially by contract with MLS and by virtue of his membership in the Association. [R. p. 387,

lines 5-14; R. pp. 389-391; R. pp. 393-395; R. pp. 397-399; R. p. 370, lines 1-5; R. pp. 342-345; and R. pp. 374-377]. He is bound by the Arbitration Rules of the South Carolina Association of REALTORS®.

The Association has adopted the Rules of the National Association of REALTORS®. [R. pp. 374-377]. The National Association has produced a manual entitled, "Code of Ethics and Arbitration Manual," which is a public document. [R. pp. 413-788]. Under Part Ten – Arbitration of Disputes, Section 44 sets forth the Duty and Privilege to Arbitrate. It says that the member (Mr. Waldo) agrees to arbitrate disputes with other REALTORS® using the Board's facilities and Rules, "as set forth in the provisions of this Manual." [R. p. 574].

The standard of appellate review for this arbitration is set forth in Section 53, "The Award." Subsection (a) states, "The award shall be in writing and signed by the arbitrators or a majority of them, shall state only the amount of the award, and, when so signed and transmitted to each of the parties, shall be valid and binding and shall not be subject to review or appeal." [R. p. 580].

This is absolutely consistent with the case law decided by the Court of Appeals of South Carolina under the South Carolina Uniform Arbitration Act. A case almost on point is Batten v. Howell, 300 S.C. 545, 389 S.E.2d 170 (Ct. App. 1990). In that case, REALTOR® Howell disputed whether he owed REALTOR® Batten a commission over a sale of real estate. Id. at 546, 389 S.E.2d at 171. The arbiters ruled in favor of Batten and awarded him $10,000. Id. at 547, 389 S.E.2d at 171. Howell challenged the award, claiming there was no legal or factual basis to support it, and that the arbiters had manifestly disregarded or perversely misconstrued the law. Id. at 547, 389 S.E.2d at 172. On appeal, the court found that there was evidence that Howell

invited Batten to sell the property and agreed to pay a commission if he produced a buyer. Id. at 549, 389 S.E.2d at 172. Although the buyer rejected the offer made through Batten, the buyer later bought the property. Id.

Importantly, the court noted that "[t]he arbitrators did not give reasons for their decision to award REALTOR® Batten a commission, but they are not required to do so." Id. at 549, 389 S.E.2d at 172 (emphasis added). So long as the factual inferences and legal conclusions supporting the award are "barely colorable," it should be confirmed. Because there was "at least an arguable ground for the award," the court affirmed the award. Id.; see also Weimer v. Jones, 364 S.C. 78, 610 S.E.2d 850 (Ct. App. 2005) ("The parties' vigorous debate regarding which defense is proper demonstrates the arbitrator did not disregard well-defined, explicit, and clearly applicable law in rendering his decision.").

While the lower court has stated that the statutes regarding a writing as a requirement for a real estate commission have changed since the Batten decision, nothing in the South Carolina Uniform Arbitration Act has changed. Arbitrators do not need to give reasoning, findings of fact, or conclusions of law in their decision. Batten v. Howell, 300 S.C. at 549, 389 S.E.2d at 172 (Ct. App. 1990). Indeed to do so in this case violates Rule 53 of the Arbitration Rules of the National Association of REALTORS®. [R. p. 580]. The parties agreed to abide by these rules in arbitration. [R. p. 387, lines 5-14; R. pp. 389-391; R. pp. 393-395; R. pp. 397-399; R. p. 371, lines 1-5; R. pp. 365-367; and R. pp. 374-377]. The Supreme Court of South Carolina has clearly stated that "Arbitrators need not specify their reasoning or the basis of the award so long as the factual inferences an the conclusions supporting the award are 'barely colorable.'" Pittman Mortgage Co., 327 S.C. 72, 76-77, 488 S.E.2d 335, 338 (1997).

The arbitration panel found that, based on the evidence, there was an agreement between Waldo and Cousins to split the commission. [R. p. 18]. Cousins's entitlement to half the commission was more than "barely colorable" and at least "arguable," which is all that is required. See Batten, 300 S.C. at 549, 389 S.E.2d at 172 (Ct. App. 1990).

Courts in other jurisdictions adopting the Uniform Arbitration Act agree that arbiters need not set out any reasoning or explanation for an award under the statute. Umana v. Swidler & Berlin, Chartered, 745 A.2d 334, 343 (D.C. App. 2000) (Arbiter not required to set out reasons for award); Lisbon School Committee v. Lisbon Ed. Ass'n, 438 A.2d 239, 244 (Me. 1981) ("Arbitrators have no obligation to the court to give their reasons for an award.").[4] And similar to South Carolina law, under the FAA an arbiter does not need to post his or her reasoning. "It is well settled that an arbitrators are not required to disclose the basis upon which their awards are made and courts will not look behind a lump-sum award in an attempt to analyze their reasoning process." MCI Constructors, LLC v. City of Greensboro, 610 F.3d 849, 862 (4th Cir. 2010); see also, United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960) ("Arbitrators have no obligation to the court to give their reasons for an award."). Thus, the reviewing court below erred by requiring a detailed judgment with findings of fact and conclusions of law.

[4] The District of Columbia adopted the 2000 Uniform Arbitration Act, but Section 23 of that act on vacating awards is substantively identical to the 1956 Uniform Arbitration Act adopted by South Carolina. Uniform Arbitration Act (2000), 7 U.L.A. Table of Adopting Jurisdiction and § 23 at 1 and 77-78 (West 2009). Maine adopted the exact same provision as South Carolina. Uniform Arbitration Act (1956), 7 U.L.A. Table of Adopting Jurisdiction at 99 (West 2009).

V. THE REVIEWING COURT BELOW ERRED BY REQUIRING THE ARBITERS ALLOW A COURT REPORTER AND TRANSCRIPT OF THE PROCEDURAL REVIEW ARBITRATION WHEN THE RULES OF THE NATIONAL ASSOCIATION OF REALTORS® APPLIED BY THE SOUTH CAROLINA ASSOCIATION OF REALTORS® AND CONTRACTUALLY AGREED TO BY THE ARBITRATING PARTIES FORBID TRANSCRIPTS OF THE ARBITRATION PROCEEDINGS.

The arbiters "are not required" to give reasons for a decision to award a REALTOR® a commission. Batten v. Howell, 300 S.C. 545, 549, 389 S.E.2d 170, 172 (Ct. App. 1990). For similar reasons, there is no requirement that the arbitration provide for a court reporter. Arbitration is a matter of contract and controlled by contract law. South Carolina Pub. Serv. Auth. v. Great W. Coal, 312 S.C. 559, 563, 437 S.E.2d 22, 25 (1993). The rules contractually agreed to by Respondent Waldo and Appellant Cousins do not provide for a court reporter to be present. The rules provide that at the initial hearing a tape is made. [R. p. 462]. The contractual rules between the parties state that at the appellate level hearing there will not be a record. [Id.]. Because arbitration is governed by contract and the contractually agreed rules forbid a court reporter at the arbitration, the lower court's ruling was made in error and should be reversed.

VI. THE REVIEWING COURT BELOW ERRED IN APPLYING THE SOUTH CAROLINA UNIFORM ARBITRATION ACT RATHER THAN THE FEDERAL ARBITRATION ACT TO THE CONTRACTUAL ARBITRATION PROVISION BETWEEN TWO REALTORS® WHO AGREED TO ARBITRATE ALL COMMISSION DISPUTES, WHO WORKED FOR BROKERAGES WITH NATIONAL AFFILIATIONS, INVOLVING AN OUT-OF-STATE PURCHASER, AND WHOSE ACTIVITIES INVOLVE INTERSTATE/INTERNATIONAL COMMUNICATION AND COMMERCE, WHERE THE DISPUTE ONLY INVOLVES THE COMMISSION AND NOT TITLE TO OR RIGHT TO USE THE REAL ESTATE.

When the FAA governs a dispute, it preempts conflicting state law. Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265, 269 (1995); Soil Remediation Co. v. Nu-Way Environmental, Inc., 323 S.C. 454, 459, 476 S.E.2d 149, 152 (1996). Section 2 of the FAA states that a "contract evidencing a transaction involving commerce to settle by arbitration . . . shall

be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. "To ascertain whether a transaction involves interstate commerce within the meaning of the FAA, the court must examine the agreement, the complaint, and the surrounding facts." Zabrinsky v. Bright Acres Associates, 346 S.C. 580, 594, 553 S.E.2d 110, 117 (2001).

The basic purpose of the FAA "is to overcome courts' refusal to enforce agreements to arbitrate." Allied-Bruce, 513 U.S. at 270. Because the FAA was intended to enforce arbitration agreements and put them on "the same footing as other contracts," Congress intended the FAA to have a broad scope and for courts to interpret it liberally. Id. at 270, 275. The language of the FAA evidences a strong federal policy favoring arbitration. Mastrobouno v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 62 (1995).

Prior to the Supreme Court's decision in Allied-Bruce, many courts refused to apply the FAA to contracts where the parties did not contemplate an interstate transaction, or where the interstate transaction was "too slight." Allied-Bruce, 513 U.S. at 269. In Allied-Bruce, a homeowner had signed a termite-prevention contract containing an arbitration clause. The defendant was a multistate company that used termite-treating and house-repairing materials that came from out of state. The Supreme Court of Alabama upheld a denial of a motion to compel arbitration, finding that, although there was an interstate connection, the connection between the termite contract and interstate commerce was too slight. The Alabama court had held that the FAA applies only if the parties "contemplated substantial interstate activity." Id. at 269.

The United States Supreme Court rejected this narrow interpretation. It held that the FAA applies to transactions that "in fact" involve interstate commerce, "even if the parties did not contemplate an interstate commerce connection." Id. at 281. The FAA's phrase "involving commerce" evidenced "an intent to exercise Congress' commerce power to the full." Id. at 277. There is no requirement that the transaction substantially involve interstate commerce.

Allied-Bruce is significant because since that opinion a decided majority of published opinions in South Carolina have upheld the application of the FAA. Significantly, in Munoz v. Green Tree Financial Corp., 343 S.C. 531, 539 n.3, 542 S.E.2d 360, 363 n.3 (2001), the Court overruled its prior precedent to the extent it considered whether the parties contemplated interstate commerce as a factor in applying the FAA. In that case, the Munoz family signed an installment contract and security agreement with the builder to finance $15,000 in home improvements. Id. at 536, 542 S.E.2d at 362. Both the Munoz family and the builder were from South Carolina. Id. at 539, 542 S.E.2d at 364. However, the builder assigned the agreement to a creditor on the same day. Id. at 536, 542 S.E.2d at 362. The creditor, a Delaware corporation with a principal place of business in Minnesota, had prepared the agreement in Minnesota and forwarded it to the builder in South Carolina. Id., at 539, 542 S.E.2d at 364. The loan proceeds were disbursed from a bank in Minnesota. Id. "Although the Munozes may not have contemplated an interstate transaction, their contractual relationship with Creditor in fact involves interstate commerce and therefore the FAA applies." Id. at 539, 542 S.E.2d at 364 (emphasis added).

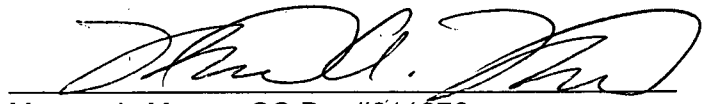
In Zabrinsky v. Bright Acres Associates, the Court cited Allied-Bruce and held that the FAA applied to a partnership dispute involving a South Carolina partnership selling and developing land located entirely in South Carolina. 346 S.C. at 595, 553 S.E.2d at 117-18. Although developing South Carolina land is typically an intrastate activity, "the transaction involved interstate commerce as contemplated by the FAA because the partnership utilized out-of-state materials, contractors, and investors." Id.; see also Soil Remediation, 323 S.C. at 461, 476 S.E.2d at 153 (holding contract to remove water and sludge materials from a South Carolina property involved interstate commerce because one party subcontracted with a third-party who would remove the materials to a North Carolina facility).

Here, REALTOR® Waldo and REALTOR® Zheng worked for a brokerage with national affiliations in the underlying transaction. [Supplemental Exhibit A attached]. It is clear that the transaction at issue "in fact" involved interstate commerce. This case is not about title or deed to land, but a commission split for a large commercial sale of golf courses. Thus, the FAA applies and the lower court erred in applying the South Carolina Uniform Arbitration Act.

CONCLUSION

Nowhere in the record in the reviewing court below is there any evidence that the arbiters exceeded their powers or acted in manifest disregard of the law. The court below went beyond their limited scope of authority in reviewing the arbitral award and substituted its judgment for that of the arbiters. The order vacating the arbitral award was made in error and should be reversed.

If allowed to stand, the result below will significantly change the contract of arbitration between REALTORS® enforced across the United States for decades with successful, efficient, and speedy resolution of commission disputes. Such a result undermines both the state and federal policies of favoring arbitration as an alternative to full-blown litigation.



Marcus A. Manos, SC Bar #011876
Christopher R. Hampton, SC Bar #102262
NEXSEN PRUET, LLC
Post Office Drawer 2426
Columbia, South Carolina 29202
(803) 771-8900
MManos@nexsenpruet.com
Champton@nexsenpruet.com

Attorneys for Appellant South Carolina Association of REALTORS®

July 2, 2019

EXHIBIT A

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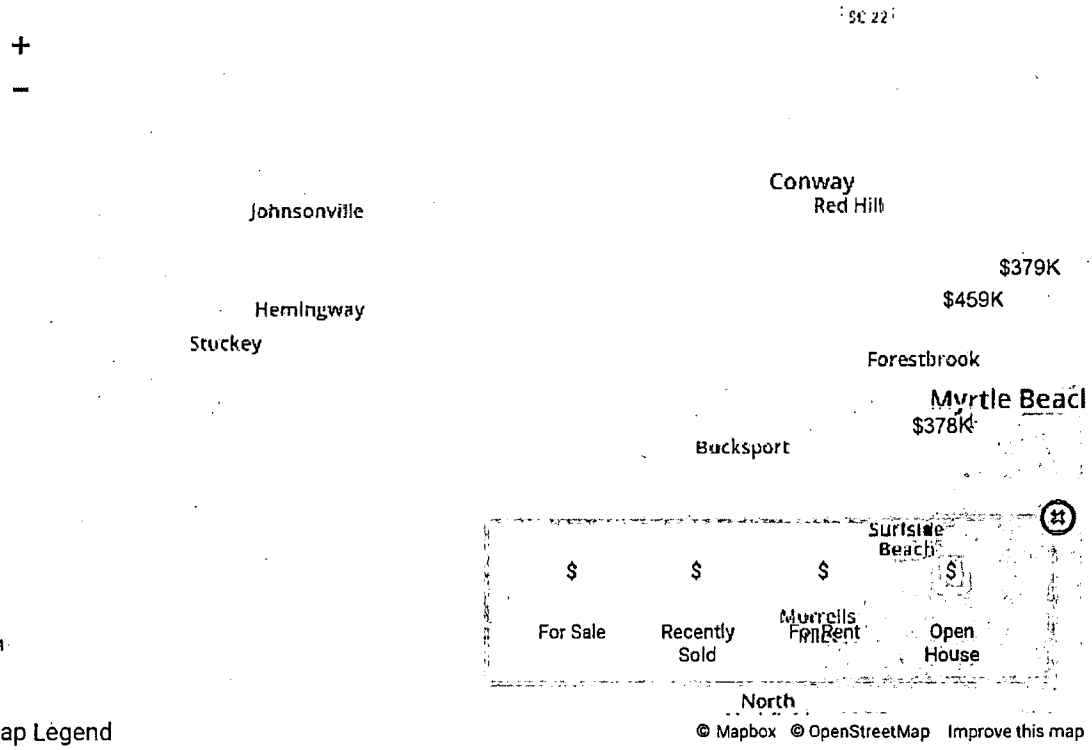

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APPEAL FROM HORRY COUNTY
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Appellate Case No. 2018-001590

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.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the **Final Brief Of Appellant South Carolina Association Of REALTORS®** complies with Rule 211(b), SCACR..

Marcus A. Manos, SC Bar No. 011876
Christopher R. Hampton, SC Bar No. 102262
NEXSEN PRUET, LLC
1230 Main Street, Suite 700 (29201-6220)
Post Office Drawer 2426
Columbia, South Carolina 29202-2426
(803) 771-8900 Phone
mmanos@nexsenpruet.com
champton@nexsenpruet.com

Attorneys for Appellant South Carolina Association of Realtors®

July 2, 2019