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

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SC Court of Appeals

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' FINAL BRIEF IN RESPONSE TO BRIEF OF APPELLANTS MICHAEL COUSINS; AND FOUNDERS FIVE, LLC D/B/A SPERRY VAN NESS FOUNDERS GROUP

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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 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 collectively, "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 Appellants did not have a written agency agreement with either the buyers or the seller. In fact, Appellants admit not having any knowledge about the multiple golf course deal until shortly before the closing occurred. (R. 337-338).[4]

On March 20, 2015, Appellants brought an action in Circuit Court against Keller Williams, Randy Wallace, Jane Zheng, National Golf Management, LLC,[5] Xian (Nick) Dou, Yang Wang, and Kang Xou.[6] (R. pp. 58-63). In its Complaint, Appellants alleged that it was the "procuring

[1] Appellant Cousins was the Broker-In-Charge of Sperry Van Ness.
[2] At the time of the transaction at issue, 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. (R. pp. 319-322, 810-813). 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?"
[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."

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. (R. pp. 58-63). However, during the pendency of the Circuit Court case, Cousins acknowledged 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 Appellants did not have a signed listing or commission agreement with Seller. (R. pp. 354, lines 16-17, p. 358, lines 3-7, 22-23, p. 359, lines 1-8). In sum, in the Circuit Court case, Cousins argued he was entitled to a commission from the ***Seller***. (R. p. 7, lines 4-8) (emphasis added).

In early May 2015, Keller Williams, Randy Wallace, Jane Zheng, and National Golf Management, LLC all moved to dismiss Appellants' Circuit Court action. On June 29, 2015, Appellants dismissed Randy Wallace from the case. (R. p. 11). 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 Appellants would be arbitrated by a panel chosen by the South Carolina Association of Realtors (hereinafter the "Association"), should there be any matters left to arbitrate pending the outcome of the Appellants' Circuit Court action. On or around September 2015, Andrew Waldo, submitted a Request and Agreement to Arbitrate to the Association on behalf of Keller Williams and Jane Zheng. (R. pp. 64-65).

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 Appellants never represented Seller

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

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. (R. p. 39). 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. (R. pp. 14-17). In its Order, the Court noted that Appellants' claims concerned an alleged representation of the ***Seller***[8] and stated, "No such written listing agreement has been alleged to exist, and [Appellants] concede[] that the nature of the alleged agreement arose orally and by implication." (R. p. 15) (emphasis added). 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 [Appellants'] argument. (R. pp. 16-17).[9] That Order was not appealed and is now the law of the case.

Therefore, as of January 11, 2016, only the arbitration between the Appellants and the Respondents remained. In preparation for arbitration, which was scheduled for February 2, 2016, Respondents provided the Association with a copy of the Court's January 11, 2016 Order specifying that without a written agency/listing agreement and/or without a writing dual agency agreement, of which there were none, 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 Appellants and any of the interested parties in the transaction, including Respondents,

[8] "[Appellants'] causes of action are each premised on ***[Seller's]*** alleged attempt to deprive [Appellants] of a brokerage commission alleged to have been earned in connection with [Appellants'] service as broker/agent for ***[Seller]*** during the sale of such real property." (R. pp. 14-15) (emphasis added).

[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. (R. pp. 14-17).

Seller, or the Buyers and/or their entity,[10] on February 2, 2016, the Association's Arbitration Panel found that Respondents owed Appellants a $250,000.00 commission on the real estate transactions at issue. (R. p. 18). The Arbitration Panel did not provide any findings of fact or conclusions of law relied upon as the basis for its decision, or provide any explanation why it completely disregarded the Circuit Court's January 11, 2016 Order dismissing Appellants' Circuit Court action.[11] (Id.). However, during the proceeding, the Chairman of the Panel stated 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., Audio of Arbitration Panel Hearing, 02:00:55-02:01.45).[12] While Appellants are correct in stating that the Panel questioned Mr. Waldo as to whether he believed the hearing was conducted fairly, they did so prior to the Panel's decision being made and Mr. Waldo responded to such questioning by stating, first and foremost, that he felt the issue of agency was an important issue for the Panel to consider, and that he believed the hearing to have been fair, ***with the exception of the agency issues***.[13] (Audio of Arbitration Panel Hearing, 2:26:26 – 2:27:10) (emphasis added).

As a result of the foregoing, Respondent, Andrew Waldo, submitted a Request for Procedural Review of the arbitration with the Association on February 24, 2016. (R. pp. 67-68,

[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. (R. pp. 319-322, 810-813).

[11] The holdings in the January 11, 2016 Order include that Appellants claim they represented the Seller in this multiple golf course deal and that Appellants are not entitled to a commission with regard to this multiple golf course real estate transaction. (R. pp. 14-17).

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

[13] 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..." The Appellants misrepresent what Waldo actually said at the arbitration hearing multiple times within their Brief.

14-18). Andrew Waldo also filed a Notice of Appeal with the Circuit Court on March 1, 2016, Civil Action No. 2016-CP-26-01498. (R. pp. 69-71, 18, 14-17). The Association held a Procedural Review Hearing on May 2, 2016, during which Appellants were informed, for the first time, that the basis for the Association's award of a $250,000.00 commission to Cousins ***was the existence of an oral and implied agency agreement with Cousins***, which the Circuit Court had already ruled was illegal and unenforceable under South Carolina law in its January 11, 2016 Order. The Association affirmed the award of a $250,000.00 commission to Cousins, despite the Court's January 11, 2016 Order and applicable South Carolina law. (R. p. 19). Further, the Association refused to allow for the recording and/or transcription of the proceeding. (R. pp. 405-406). 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 encompassed the additional actions of the Association's Procedural Review Board. (R. pp. 83-87, 408, 19, 18, 14-17).

Subsequently, the two Circuit Court appeals concerning the 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. (R. pp. 34-36). On August 16, 2018, the Master-In-Equity entered an Order vacating the Association's Arbitration Panel Award on the grounds that the 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 Appellants' case. (R. pp. 43-55). The Master-In-Equity further held that the Respondents' rights were substantially prejudiced

by the Association's Arbitration Panel's failure to follow its own policies and procedures, as well as South Carolina law. (R. pp. 56-57). This appeal followed.

ARGUMENT

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

A. South Carolina Law, the Association's Specific Guidelines, and The National Association of Realtors' Code of Ethics and Arbitration Manual All Provide for An Appeal of An Arbitration Award.

In their Brief, Appellants argue that Respondents have absolutely no right to appeal an arbitration award. This is wholly without merit. Respondents have a right to appeal the Panel's arbitration award pursuant to South Carolina state law, the Association's specific guidelines, and the National Association of Realtors' Code of Ethics and Arbitration Manual. First, the South Carolina Uniform Arbitration Act (hereinafter the "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.[14]

[14] 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).

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 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.

(R. pp. 310-311) (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. (R. p. 308).

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 R. pp. 413, 428, 580-581, 590). 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. (R. p. 413). 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**." (R. p. 428) (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. 590) (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. 580-581). 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 provide for such right.

Appellants have misconstrued Waldo's Request and Agreement to Arbitrate by stating in their Brief that the parties "agreed that the arbitration award is not appealable." (Appellant's Brief, p. 3).[15] The section of the Agreement to arbitrate that Appellants cite to in support of this allegation in their Brief states that Waldo agrees to abide by and comply with the arbitration award. (R. p. 64). The right to judicial review of an arbitration award is established by statute and further confirmed in South Carolina case law. See S.C. Code Ann. § 15-48-130, 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). There is absolutely nothing within the Agreement that states Waldo has no right to appeal an award or that he has waived his statutory right to do so. (See R. pp. 64-65). To the

[15] It is important to note that Appellants are the one who first filed an action in Circuit Court against Respondents with regard to Appellants' alleged right to a commission. (R. p. 58-63).

contrary, the Agreement states that Waldo consents to arbitration **in accordance with the NAR Manual**, which, as outlined above, provides a procedure for the appeal of an award, as well as emphasizes that arbitration must strictly conform with the law. (See Id., R. pp. 413, 428, 580-581, 590) (emphasis added). Appellants, therefore, are asking this Court to write language into the agreement that simply does not exist, which is prohibited by South Carolina law. See Bruce v. Blalock, 241 S.C. 155, 127 S.E.2d 439 (1962) (holding that when contracts are capable of clear interpretation, the Court is confined to the enforcement thereof and cannot exercise its discretion as to the content or substitute its own construction for the agreement clearly entered into between the parties).

Appellants have cited to two sections within the NAR Manual's appendix, which contain language stating that arbitration awards are not subject to appeal. (R. pp. 600, 604). However, the NAR Manual's appendix also expressly states that "[a]ll arbitration hearings must be conducted in a manner consistent with state law" and that there is a "necessity to know the applicable state statutes or case law governing arbitration and to conform the Board's arbitration procedures to the law." (Id. at p. 601). The NAR Manual specifically states that state law controls and nowhere does the NAR Manual state that it is intended to supplant and/or supersede state law. Appellants' seek to have this Court write requirements into the Agreement to Arbitrate that do not exist and would violate state law. The Court cannot enforce provisions of a document that directly contravene South Carolina law. See Jackson v. Bi-Lo Stores, Inc., 313 S.C. 272, 437 S.E.2d 168 (Ct. App. 1993) (citing Berkabile v. Outen, 311 S.C. 50, 426 S.E.2d 760 (1993) (holding that South Carolina courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution)). Here, South Carolina statutory law, the Association's own

guidelines, and the NAR Manual clearly provide for a right to appeal an arbitration award. Therefore, Respondent's appeal of the arbitration award was properly heard by the Circuit Court.

B. After Losing Their Original Circuit Court Action, Appellants Are Estopped From Re-Classifying This Matter As A Broker-To-Broker Dispute.

Throughout the initial Circuit Court action, arbitration hearing, and Respondents' subsequent appeal of the arbitration award to the Circuit Court, Appellants have continually changed their allegations as to what role they played in the multiple golf course deal. During Appellants' original Circuit Court action, Appellants asserted that their relationship was with the ***Seller*** and that they were entitled to a commission from the ***Seller***. (R. p. 358, lines 3-7, p. 359, lines 1-8) (emphasis added). The Court's January 11, 2016 Order, which dismissed Appellants' action, confirmed this when it stated that Appellants' causes of action "are each premised on [***Seller's***] alleged attempt to deprive [Appellants] of a brokerage commission alleged to have been earned in connection with [Appellants'] service as a broker/agent for [***Seller***] during the sale of such real property." (R. p. 15). (emphasis added).

After losing in Circuit Court, Appellants changed their allegations as to whom they represented and/or the nature of this dispute numerous times. At times Appellants allege their relationship was with Seller,[16] and at other times they were duel agents or co-brokers.[17] At one point during the arbitration hearing, Cousins even testified that it did not matter whom he represented in the real estate transaction because he was the procuring cause of the deal. (Audio of Arbitration Panel Hearing, 1:51:10-1:51:35). The Circuit Court addressed Cousins' conflicting positions as to which party he represented in its August 16, 2018 Order, wherein it stated that

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[16] (R. p. 358, lines 18-23, p. 359, lines 1-8, Audio of Arbitration Panel Hearing, 01:44:35-01:44:55).

[17] (Audio of Arbitration Panel Hearing, 01:44:35-01:45:38) (wherein Cousins states that he could be characterized as representing both parties). This is the very reason why South Carolina's statutory scheme mandates that all agreements must be in writing.

Cousins is barred by judicial estoppel, collateral estoppel, and res judicata from alleging he represented anyone but the Seller in the underlying transaction, which was previously decided by the Circuit Court [in Appellants' action]. (R. p. 54, fn 23).

Now, conveniently, Appellants allege this is a broker-to-broker dispute that does not implicate ***any*** of the clear and unambiguous South Carolina statutory law that governs real estate transactions. (See Appellants' Brief, pp. 14-16). First, in doing so, Appellants have not set forth even a shred of evidence that Jane Zheng was a broker, or had the authority, as an independent contractor for Keller Williams, to enter into a ***broker-to-broker*** agreement with Cousins. Second, under the doctrine of judicial estoppel, when a party has formally asserted a certain version of facts in litigation, he cannot later change those facts when the initial version no longer suits him. Hayne Federal Credit Union v. Bailey, 327 S.C. 242, 489 S.E.2d 472 (1997). As a result, Cousins is barred from taking any position other than that which he has taken in Appellants' original litigation (i.e. that he represented the Seller and was owed a commission by the Seller).

Nonetheless, it is uncontested that Cousins has no written agreement with any party to the real estate transaction at issue, nor did he even have knowledge of the real estate transaction for which he seeks a commission. (Audio of Arbitration Panel Hearing, 01:44:35-01:45:38, R. p. 357, lines 12-19, p. 358, lines 22-23, p. 359, lines 1-3, R. p. 338).[18] As outlined below, without a written agreement with either the Buyers or the Seller, Cousins is not entitled to a commission. See supra Section I(D). None of Appellants' numerous changing positions as to the nature of Cousins' relationship to the parties in the real estate transaction at issue entitle Cousins to a commission in the absence of a written agreement showing Buyers' or Seller's knowledge and consent to such

[18] It is axiomatic that someone cannot be the procuring cause of a transaction that they admit knowing nothing about.

relationship(s). Therefore, the Circuit Court properly held that the Arbitration Panel's award of a commission to Cousins was a manifest disregard of South Carolina law.

C. The Circuit Court Applied the Proper Standard of Review In Its Order Vacating the Arbitration Award.

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

> [U]nder certain circumstances, such as when the arbitrator manifestly disregards or perversely misconstrues the law, a court can vacate an arbitration award. [Gissel v. Hart, 382 S.C. 235, 676 S.E.2d 320 (2009) (citing Technical College v. Lucas and Stubbs, 286 S.C. 98, 333 S.E.2d 781 (1985) and S.C. Code Ann. § 15-480-130(a)). For a South Carolina court to vacate an arbitration award on the grounds that the arbitrator manifestly disregarded or perversely misconstrued the law, the governing law must be 'well defined, explicit, and clearly applicable.' Gissel, 403 S.C. at 241 (citations omitted). Further, "'[a]n arbitrator's manifest disregard for the law' as a basis for vacating an arbitration award occurs when the arbitrator knew of a governing legal principal yet refused to apply it." Gissel, [382 S.C.] at 241 (citing Weimer v. Jones, 364 S.C. 78, 610 S.E.2d 850 (Ct. App. 2005)); [s]ee also C-Sculptures, LLC v. Brown, 403 S.C. 53, 742 S.E.2d 359 (2013) (holding the manifest disregard standard is not insurmountable and vacating an arbitrator's award where the arbitrator was apprised of unambiguous, clearly applicable South Carolina statutory law and did not apply that law). Likewise, the Fourth Circuit will also vacate an arbitration award where an arbitrator acts in manifest disregard of the law. See Apex Plumbing Supply, Inc. v. U.S. Supply Co., Inc., 142 F.3d 188 (4th Cir. 1998) ("Federal courts may vacate an arbitration award only upon a showing of one of the grounds listed in the Federal Arbitration Act, or if the arbitrator acted in manifest disregard of the law.").

(R. pp. 42-43). This is the very standard that Appellants argue should be applied within their Brief. (Appellants' Brief, pp. 7-8). Respondents do not dispute that this is the proper standard of review. Moreover, the Circuit Court's August 16, 2018 Order sets forth, in great detail, its grounds for vacating the arbitration award pursuant to the aforementioned standard. Therefore, regardless of whether the SC UAA applies or the FAA applies to this matter, the Circuit Court clearly applied

the proper standard of review on Respondent's appeal of the arbitration award, as both Acts provide 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).[19]

D. The Circuit Court Properly Held That The Arbitration Panel Manifestly Disregarded the Law When It Awarded A $250,000.00 Commission to Appellants.

The Circuit Court did not err in vacating the Arbitration Panel's award because the Panel manifestly disregarded South Carolina law by awarding Appellant Cousins a $250,000.00 commission on a real estate transaction where he, admittedly, did not represent any party and had no written agreement with any party or party's representative.

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] South Carolina statutory law is well defined, explicit, and clear that in all real estate transactions, an agency relationship is

[19] 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.

[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 enactment of the Code amendments.

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), S.C. Code Ann. § 40-57-139, Subsections (B) and (C) (stating that a licensee who becomes either a seller's or a buyer's agent shall provide an agency disclosure form to the respective seller or buyer at the time an agency agreement is signed and that there must be an acknowledgment of receipt of that form in the agency agreement).[21]

South Carolina statutory law provides that a licensee may not "advertise, market, or offer to conduct a real estate transaction involving real estate owned in whole or in part by another person without ***first obtaining a written listing agreement from the owner…"***. S.C. Code Ann. § 40-57-135(C)(4) (1997) (emphasis added); See also S.C. Code Ann. § 40-57-135(D)(4)(d) (***"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."***). (emphasis added).

South Carolina statutory law also prohibits subagency 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.

[21] Certain South Carolina Code sections within Title 40, Chapter 57, which pertains to the real estate industry, were amended, effective January 1, 2017. S.C. Code Ann. § 40-57-135 (in its former form), 40-57-137, and 40-57-139 were all effective through December 31, 2016 and apply to this case, where the transaction at issue and the arbitration occurred prior to January 1, 2017.

> (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). These statutes unequivocally bar Appellants' argument that they can have any agreement with another agent behind the backs of the Buyers and Seller, and without their knowledge and consent. The Arbitration Panel not only had knowledge of this clearly applicable South Carolina laws 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.[22] This law does not distinguish between commercial and residential real estate transactions. See S.C. Code Ann. § 40-57-10. Thus, the Circuit Court properly held that, in light of South Carolina statutory law, the Arbitration Panel's award was a manifest disregard for such law.

1. Appellants Did Not Have a Written Listing/Agency Agreement With the Buyers or the Seller.

First, Appellant, Cousins, admitted in an affidavit he filed in Appellants' Circuit Court action: (1) that Respondents were the Buyers' agent and (2) that no written agreement existed

[22] The January 11, 2016 Order also explicitly holds that Appellants did not represent the Seller in the transactions at issue; therefore, pursuant to the aforementioned South Carolina statutory law, they were not entitled to a commission under either an agency theory or a dual agency theory. (R. pp. 14-17).

between Cousins and the Seller. (See R. p. 354, lines 16-17, p. 358, lines 3-7, p. 359, lines 1-3). 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). 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 he is 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.[23] (See R. pp. 14-17, R. pp. 368-369, R. pp. 400, 13-17, R. pp. 401-404) (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 R. pp. 319-322,

[23] Again, the Court's January 11, 2016 Order explicitly states that 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, with the Seller. (See R. pp. 14-17). 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 Appellants did not represent the Buyers, as there is no written agency agreement between 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 R. pp. 319-322, 810-813) (emphasis added).

810-813) (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 R. pp. 14-17).

As previously outlined, under S.C. Code Ann. §§ 40-37-135 (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).[24] Appellants also repeatedly refer to themselves as brokers in an attempt to characterize this matter as a "broker-to-broker" dispute. (See Appellants' Brief, pp. 9-11). S.C. Code Ann. § 40-57-30(3) specifically defines a "Broker" as someone who has the intent or expectation of receiving a commission. However, in order to receive a commission a "Broker" must comply with all statutory requirements of Title 40, Chapter 57, which include obtaining a written representation agreement (including how compensation is to be determined). See S.C. Code Ann. § 40-57-139(E).

For this reason, Cousins cannot establish as a matter of law that he represented any party to the real estate transactions in this case, as he has admitted that there was no requisite written agreement between himself and either the Buyers or Seller. (See R. p. 358, lines 22-23, p. 359, lines 1-3). Accordingly, Cousins has no legal right to a commission. The Arbitration Panel had knowledge of all of the above, as well as the clear and explicit South Carolina statutory law governing this matter. Therefore, the Circuit Court properly vacated the Panel's award, as it was made in manifest disregard of South Carolina law.

[24] "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).

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

The Circuit Court properly held that an award presumptively based upon Cousins' "procuring cause" argument was likewise in manifest disregard of South Carolina law. Cousins' 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).[25] See S.C. Code Ann. § 40-37-139 (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),[26] Hobbs v. Hudgens, 223 S.C. 88, 74 S.E.2d 425 (1953) ("[T]he broker must not only show that his efforts were the procuring cause of the sale but must further show that his intervention was during the continuance ***of an agency to sell or find a purchaser***."), Smith v. Peeples, 177 S.C. 479, 181 S.E. 653 ("A broker is entitled to his commissions, if during the ***continuance of his agency***, he is the...procuring cause of the sale."),

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

[26] 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.

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 buyers. See King v. Bennett, No. 2013-UP-459, 2013 WL 8541636 (S.C. Ct. App. Dec. 11, 2013).[27] 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. Thus, the Arbitration Panel's award of a commission to Cousins on the basis of his alleged implied, oral agreement directly contravenes South Carolina law, is not even "barely colorable,"[28] and was made in manifest disregard of such clearly applicable law.

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

Directly comparable to the non-existence of a written agency/listing agreement between Cousins and the Buyers or Seller, there was also no dual agency agreement involving Cousins regarding the real estate transactions at issue. Pursuant to South Carolina law, "A licensee may

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[27] 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.
[28] A court may choose to vacate an arbitration award if the basis of such award is not at least "barely colorable." See Harris v. Bennett, 332 S.C. 238, 503 S.E.2d 782 (S.C. Ct. App. 1998) (holding that courts are allowed to intrude upon an arbitrator's decision when the arbitrator commits error that was obvious and capable of being instantly perceived by the average person qualified to be an arbitrator and/or when the arbitrator appreciates the existence of a clearly governing legal principle, but decides to ignore or pay no attention to it).

act as a disclosed dual agent ***only with the prior informed and written consent of all parties [and] the informed consent must be evidenced by a dual agency agreement[.]***" S.C. Code Ann. § 40-57-137(M)(1) (emphasis added). Neither Seller nor the Buyers gave prior informed, written consent to such an agreement and Cousins has to produce that written agreement, which he has not done. See Id. Additionally, the Circuit Court held Cousins had no agency relationship with Seller; therefore, it must follow that Respondents cannot be a dual agent of both the Buyers and Seller. (See R. pp. 14-17). As a result, pursuant to South Carolina law, Cousins is not entitled to a commission under a dual agency argument.

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

Cousins has argued that this matter concerned a co-broker dispute, rather than a dispute between himself and the Buyers or Seller. This argument similarly fails under South Carolina statutory law.

Prior to brokers establishing any type of co-broker agreement on behalf of a buyer or seller, the buyer and/or the seller, respectively, ***must: (1) have knowledge of the subagency agreement and (2) must consent to such an agreement.*** See S.C. Code Ann. §§ 40-37-137 (E) and (J) (stating that before a subagency agreement can exist between agents/brokers, a buyer and/or a seller must have knowledge of and consent to any such subagency agreements) (emphasis added). Therefore, regardless of whether Cousins argues his alleged oral agreement to split a commission for the transactions at issue was with Appellants, rather than with the Buyers or Seller, the Buyers and/or the Seller must still have knowledge of and consent to any such alleged agreement. Additionally, S.C. Code Ann. § 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.

Here, prior to the arbitration, the Circuit Court already held Appellants did not represent the Seller in the transactions at issue. (R. pp. 14-17). Therefore, Appellants could not be a co-broker representing the Seller. 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 R., pp. 368-369, R. pp. 400, 13-17, R., pp. 401-404).

Contrary to Cousins' alleged "co-broker" argument, the Buyers had a written agency agreement with Jane Zheng specifying that Ms. Zheng was their ***exclusive*** agent.[29] There is also nothing in writing setting forth any agreement between Respondents and Cousins to split a commission for the transactions at issue, as required by South Carolina law. As a result, without the Buyers' written knowledge and consent to a subagency or co-broker agreement, and without written documentation of how compensation is to be divided, as required by S.C. Code Ann. § 40-57-135(D)(4)(d), there can be no such agreement between brokers.

5. The Arbitration Panel Had Knowledge of the Aforementioned Well Defined, Explicit, and Clearly Applicable South Carolina Law When it Awarded Appellants a Commission, in Manifest Disregard of that Law.

Further evidencing the Association's manifest disregard for South Carolina law, when arbitration was held, the Association was in possession of a copy of the Court's January 11, 2016 Order. In its Order, the Circuit Court, which considered these very arguments, held that without a written agreement, which Cousins admits he did not have, his argument that he is due a commission

[29] (See R. pp. 319-322, 810-813).

must fail. (See R. pp. 14-17). The Order explicitly outlines directly applicable South Carolina statutory law on this issue, which supports the Court's dismissal of Cousins' claims in Circuit Court. (Id.). 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. 15-16).

Therefore, when the Arbitration Panel made its decision, it had actual knowledge of both the Circuit Court's Order and of the clearly-governing law on the subject matter at issue. The Panel's 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 Arbitration Panel's award was not simply an erroneous application of the law, it was a complete and manifest disregard of South Carolina law and an Order of this 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. 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 R. pp. 368-369, R. pp. 400, 13-17, R. pp. 401-404).

6. Batton v. Howell, 300 S.C. 545, 389 S.E.2d 170 (S.C. Ct. App. 1990), Relied Upon By Appellants In Their Brief, Is Not Applicable.

The Batton v. Howell case, which Appellants rely upon in their Brief, is not comparable to this matter because it was decided prior to the enactment of the current South Carolina statutory provisions requiring written agreements, outlined hereinabove, on January 1, 1998. (See R. pp. 16-17).[30] In the Circuit Court actions, Appellants sought to characterize Batton as a case almost on point, because, in Batton, the appellant challenged an arbitration award to the respondent of a $10,000.00 real estate commission, and the award was upheld, seemingly absent of any written agreement between the agents, buyer, and/or seller.[31] However, like the Skull Creek case, Batton was decided prior to the General Assembly's significant overhaul of the statutory framework governing the creation of agency relationships in the context of real estate transactions. As such, the case cannot be compared to this matter and is irrelevant to the Panel's manifest disregard of current governing South Carolina statutory law.

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[30] In support of its argument in opposition to the dismissal of Appellants' Circuit Court action against the Buyers and National Golf Management, LLC, Cousins 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." (R. pp. 15-16) (citations omitted).

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

7. The Association's Failure To Decide All Matters of Law and Fact Further Evidences Its Manifest Disregard For Governing South Carolina Law On the Disputed Issues.

The Association's failure to decide and/or consider all matters of law and fact when it awarded a $250,000.00 commission to Cousins further evidences the fact that it manifestly disregarded governing South Carolina law. "[W]hen a dispute is submitted to arbitration, the arbitrators shall determine questions of both law and fact." S.C. Code Ann. § 15-48-180; See also Gissel v. Hart, 382 S.C. at 241. As argued hereinabove, an arbitration panel cannot know of a governing legal principle, yet, refuse to apply it. Id. Nor can a court enforce an illegal contract. See Mason, 412 S.C. 28, 770 S.E.2d 405 and Twillman, 365 S.C. 178, 617 S.E.2d 125. In the matter at hand, the Arbitration Panel had knowledge of clear and explicit South Carolina statutory law (i.e. the very law that governs the real estate profession in South Carolina), was provided a copy of the Court's January 11, 2016 Order, and chose not to address or decide issues of agency between the parties, instead enforcing an illegal alleged oral contract which directly contravenes South Carolina statutory law.

During the arbitration, the Association's Panel Chairman stated that he wanted to remind everyone that the proceeding was not a grievance hearing and that although he understood what the issues before the Panel were, the Panel was not going to get into the real estate transaction agency analysis. (See Audio of Arbitration Panel Hearing, 02:02:20-02:01.45).[32] He further stated that the focus should be on whether Cousins was the "procuring cause" of the real estate transactions. Id. As a result, it is clear that the Panel knew what the issues of fact and law before

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

it were (i.e. issues of the creation of an agency, subagency, and/or dual agency relationship in the real estate transaction context) and had knowledge of South Carolina's governing law on those issues. However, the Panel manifestly disregarded governing law by awarding Cousins a commission based upon a "procuring cause" theory and/or oral/implied commission theory, all of which directly contravene South Carolina law.[33] Thus, by failing to consider **all** matters of fact and law before it, the Arbitration Panel manifestly disregarded South Carolina law. Accordingly, the Circuit Court's decision to vacate the Panel's award should be upheld.

E. The Record Reflects That Appellants Did Not Have a Written Agreement With Either the Buyers, the Seller, or Respondents With Regard to the Real Estate Transaction At Issue.

In Their Brief, Appellants argue that there is no record to support Respondent Waldo's contention that there is an absence of a written agreement between Waldo and Cousins. This is false. An audio recording of the Arbitration Panel's arbitration of this matter was made part of the record in the Circuit Court. (See Audio of Arbitration Panel Hearing). In addition to the audio recording, which contains Cousins' own verbal testimony, the Affidavit Cousins' executed as part of the Appellants' Circuit Court action was also made part of the Circuit Court record. Both Cousins' verbal and written testimony contain statements as to the existence and/or non-existence of written and oral agreements in this matter.[34] Further, had Cousins actually had a written agreement with ***any*** of the parties at issue in this matter, the true question is, why would he have not presented it to the Circuit Court in Appellants' action, the Arbitration Panel, or the Circuit

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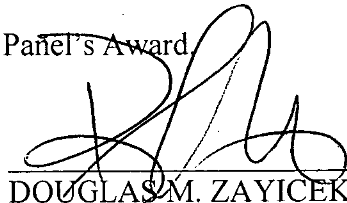
[33] As previously argued in Section I(D)(2), Cousins could not be a procuring case of the real estate transactions at issue when he neither represented anyone involved in the transaction, nor knew anything about the transaction. See S.C. Code Ann. §§ 40-57-135, 139; Malanuk, 284 S.C. 382, 325 S.E.2d 544 (1985), Hobbs, 223 S.C. 88, 74 S.E.2d 425 (1953), Peeples, 173 S.C. 479, 181 S.E. 653 (1935), and Gaskins, 327 S.C. 478, 486 S.E.2d 771 (Ct. App. 1997). Cousins admitted having no knowledge of the thirteen (13) golf course deal negotiated between Jane Zheng and/or Keller Williams and Seller. (See R. p. 357, lines 12-19, R. p. 338). Further, no written agreements exist to create any type agency relationship between Cousins and ***any*** of the parties for the real estate transactions at issue.

[34] Cousins admitted at the arbitration hearing that he did not have a written agreement with anyone regarding the real estate transaction at issue. (Audio of Arbitration Panel Hearing, 00:25:25-00:25:45).

Court on appeal of the arbitration award? Simply put, such written agreement does not exist, as admitted by Cousins. (See R. p. 354, lines 16-17, p. 358, lines 22-23, p. 359, lines 1-8, Audio of Arbitration Panel Hearing, 01:44:35-01:45:38 (wherein Cousins states that he never had contact with the Buyers and that the only person who had written representation with anyone was Jane Zheng), R. p. 15 (stating that no written agreement has been alleged to exist and that Cousins conceded the nature of the alleged agreement arose orally and be implication).

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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Myrtle Beach, South Carolina

June 27, 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

RECEIVED
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SC Court of Appeals

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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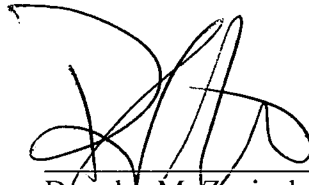
CERTIFICATE OF COUNSEL

The undersigned certifies that Respondents' Final Brief in Response to Brief of Appellants Michael Cousins, and Founders Five, LLC d/b/a Sperry Van Ness Founders Group complies with Rule 211(b), SCACR.



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