

RECEIVED

Nov 10 2021

SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Common Pleas

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Honorable Cynthia Graham Howe, Master-In-Equity

Appellate Case No.: 2018-001590

Andrew Waldo; Jane Zheng; and SC Coast Properties, LLC d/b/a
Keller Williams Realty Respondents

v.

Michael Cousins; Founders Five, LLC d/b/a Sperry Van Ness Founders
Group; and South Carolina Association of REALTORS Appellants,

**RESPONDENTS' PETITION FOR REHEARING AND
PETITION FOR REHEARING *EN BANC* OF
UNPUBLISHED OPINION No. 2021-UP-368
Heard April 15, 2021 – Filed October 27, 2021**

Holly M. Lusk

DOUGLAS M. ZAYICEK

HOLLY M. LUSK

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

Post Office Box 357

Myrtle Beach, South Carolina 29578-0357

843-448-2400

dzayicek@bellamylaw.com

hlusk@bellamylaw.com

*Counsel for Respondents, Andrew Waldo;
Jane Zheng; and SC Coast Properties, LLC
d/b/a Keller Williams Realty*

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUES FOR REHEARING OR REHEARING <i>EN BANC</i>	1
INTRODUCTION	2
ARGUMENT	3
1. The Court Erred Because, In Failing to Consider the Court of Appeals Has Previously Ruled A Realtor Could Not Recover Any Compensation In a Real Estate Transaction In the Absence of a Written Agreement In An Unpublished Decision in 2013, the Court Has Entered Inconsistent Rulings.....	3
2. The Court’s Opinion Fails to Consider or Render a Decision Regarding Respondents’ Law-of-the-Case Doctrine, <i>Res Judicata</i> , and Collateral Estoppel Arguments.....	4
A. The Circuit Court’s January 11, 2016 Order, Which Holds South Carolina’s Statutory Scheme Governing Real Estate Transactions Prohibits Oral or Implied Commission Agreements and That Any Common Law to the Contrary Is Superseded By the Statutory Scheme, Is Binding Upon Appellants.....	4
3. The Court’s Opinion Is Contrary to the South Carolina General Assembly’s Establishment of a Statutory Scheme Governing Real Estate Transactions Within the State of South Carolina, Which Requires Written Agreements Regarding: (a) Representation of Either the Buyer or Seller In a Real Estate Transaction; (b) Subagency and/or Co-Brokership; and (c) Dual Agency; and Which Supersedes Common Law to the Contrary.	8
4. The Court Erred In Reversing the Master’s Finding That the South Carolina Association of REALTORS Prejudiced Respondents’ Rights By Its Arbitration Panel Not Including Findings of Fact and Conclusions of Law With Its Award, Where the Association’s Own Policies and Procedures Required Findings of Fact and Conclusions of Law Be Made and the Effect of Such Failure Places an Arbitration Award Beyond Judicial Review.....	13
5. The Court Erred In Reversing the Master’s Finding That the South Carolina Association of REALTORS Prejudiced Respondents’ Rights By Its Failure to Allow Recording of the Procedural Review Hearing, Where Such Failure Insulates the Association’s Arbitration Panel From Compliance with South Carolina Law.....	15
6. The Court Erred In Reversing the Master’s Finding That the South Carolina Association of REALTORS’ Arbitration Panel Manifestly Disregarded South Carolina Law In Awarding Appellant Cousins a \$250,000.00 Commission In the Absence of Any Written Agreement Evidencing Appellant’s Right to Such Commission.	17
CONCLUSION.....	19

TABLE OF AUTHORITIES

Cases

<u>Batten v. Howell</u> , 300 S.C. 545, 389 S.E.2d 170 (Ct. App. 1990)	11
<u>Carolina Renewal, Inc. v. S.C. DOT</u> , 385 S.C. 550, 684 S.E.2d 779 (Ct. App. 2009).....	7
<u>Gissel v. Hart</u> , 382 S.C. 235, 676 S.E.2d 320 (2009)	19
<u>Hackler v. Earl Wiegard Real Est., Inc.</u> , 295 S.C. 396, 398, 368 S.E.2d 686, 687 (Ct. App. 1988)	11
<u>Hilton Head Island Realty, Inc. v. The Skull Creek Club</u> , 287 S.C. 530, 339 S.E.2d 890 (Ct. App. 1986)	12
<u>Judy v. Martin</u> , 381 S.C. 455, 674 S.E.2d 151 (2009)	6
<u>King v. Bennett</u> , No. 2013-UP-459, 2013 WL 8541636 (S.C. Ct. App. Dec. 11, 2013).....	2, 3, 4
<u>ML-Lee Acquisition Fund, L.P., v. Deloitte & Touche</u> , 327 S.C. 238, 489 S.E.2d 470 (1997)	6
<u>Nunnery v Brantley Constr. Co.</u> , 289 S.C. 205, 345 S.E.2d 740 (Ct. App. 1986).....	6, 7
<u>Plum Creek Dev. Co. v. City of Conway</u> , 334 S.C. 30, 512 S.E.2d 106 (1999)	6
<u>Shirley’s Iron Workers, Inc. v. City of Union</u> , 403 S.C. 560, 743 S.E.2d 778 (2013)	6
<u>Yelsen Land Company, Inc. v. The State of South Carolina, et. al.</u> , 397 S.C. 15, 723 S.E.2d 592 (2012)	6, 7

Statutes

S.C. Code Ann. § 15-48-180.....	13, 14
S.C. Code Ann. § 15-48-50.....	15
S.C. Code Ann. § 40-57-5.....	9, 12, 13, 17
S.C. Code Ann. § 40-57-30.....	9
S.C. Code Ann. § 40-57-135.....	3, 4, 9, 10, 11, 18
S.C. Code Ann. § 40-57-137.....	8, 9, 11, 17
S.C. Code Ann. § 40-57-139.....	10, 17

STATEMENT OF ISSUES FOR REHEARING OR REHEARING *EN BANC*

1. Should the Court grant a rehearing, or a rehearing *en banc*, because it has entered inconsistent rulings in light of the fact that Court of Appeals has previously held, in an unpublished opinion issued in 2013, that a realtor cannot recover any compensation in a real estate transaction in the absence of a written agreement?
2. Should the Court grant a rehearing, or a rehearing *en banc*, because its Opinion failed to consider or render a decision with regard to Respondents' law-of-the-case doctrine, *res judicata*, and collateral estoppel arguments?
3. Should the Court grant a rehearing, or a rehearing *en banc*, because the Court's Opinion is contrary to the South Carolina General Assembly's establishment of a comprehensive statutory scheme governing real estate transactions within the State of South Carolina, which requires written agreements regarding: (a) representation of either the buyer or seller in a real estate transaction; (b) subagency and/or co-brokership; and (c) dual agency?
4. Did the Court err in reversing the Master's finding that the South Carolina Association of REALTORS prejudiced Respondents' rights in the manner of its award, where the South Carolina Association of REALTOR's own policies and procedures required findings of fact and conclusion of law be made in conjunction with its issuance of an arbitration award?
5. Did the Court err in reversing the Master's finding that the South Carolina Association of REALTORS prejudiced Respondents' rights by its failure to allow recording of the Procedural Review Hearing, where such failure insulates the South Carolina Association of REALTORS' arbitration panel from review of its decisions and compliance with South Carolina law?

6. Did the Court err in reversing the Master’s finding that the South Carolina Association of REALTORS’ arbitration panel manifestly disregarded South Carolina law in awarding Appellant, Michael Cousins, a \$250,000.00 commission in the absence of any written agreement evidencing his right to such commission?

INTRODUCTION

Pursuant to Rule 221 of the South Carolina Appellate Court Rules (“SCACR”), Respondents, Andrew Waldo, Jane Zheng, and SC Coast Properties, LLC d/b/a Keller Williams Realty (hereinafter collectively, “Respondents”), hereby petition this Court for rehearing, or rehearing *en banc*, of its decision in Andrew Waldo; Jane Zheng; and SC Coast Properties, LLC d/b/a Keller Williams Realty v. Michael Cousins; Founders Five, LLC d/b/a Sperry Van Ness Founders Group; and South Carolina Association of REALTORS, Unpublished Opinion No. 2021-UP-368 (October 27, 2021). This Petition for Rehearing or Rehearing *En Banc* should be granted on the grounds that the Court of Appeals has overlooked particular issues raised by Respondents and misapprehended material points of law and/or fact as set forth in detail herein. Respondent further requests that the Court vacate its prior Opinion.

Rehearing *en banc* is necessary in this case in order to maintain the uniformity of this Court’s decisions, especially in light of this Court’s prior ruling in King v. Bennett, No. 2013-UP-459, 2013 WL 8541636, 2013 S.C. App. Unpub. LEXIS 563 (S.C. Ct. App. Dec. 11, 2013). Further, the issues before this Court are of particular importance, as they greatly affect the real estate profession within this state, as well as the public interest concerning the standard upon which an arbitration proceeding may be vacated.

ARGUMENT¹

1. **The Court Erred Because, In Failing to Consider the Court of Appeals Has Previously Ruled A Realtor Could Not Recover Any Compensation In a Real Estate Transaction In the Absence of a Written Agreement In An Unpublished Decision in 2013, the Court Has Entered Inconsistent Rulings.**

This Court has erred in holding common law decided prior to the enactment of South Carolina's statutory scheme governing real estate transactions in the state has not been clearly and explicitly overruled because such holding is inconsistent with this Court's prior decision in King v. Bennett, No. 2013-UP-459, 2013 WL 8541636, 2013 S.C. App. Unpub. LEXIS 563 (S.C. Ct. App. Dec. 11, 2013). Therefore, rehearing, or rehearing *en banc*, should be granted accordingly.

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, 2013 S.C. App. Unpub. LEXIS 563 (S.C. Ct. App. Dec. 11, 2013).² Like Appellant 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 South Carolina 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. In doing so, the Court of Appeals relied upon South Carolina Code Annotated Section 40-57-135, stating that this section of South Carolina statutory law "requires numerous terms of a buyer's representation agreement to be in writing, including 'the amount of compensation to be paid...'" Id. at *2 (citing S.C. Code Ann. § 40-57-

¹ Respondents also reserve the arguments made in their Final Briefs in this matter, and incorporates those herein by reference.

² 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.

135(D)(4)(b) and (c)). The Court's Opinion in this case thus directly contradicts the Court of Appeals prior opinion in the King case in 2013. If this case is not reheard, and the Court's Opinion herein is not vacated, this Court will have entered inconsistent rulings, which cannot stand. For this reason, the Court should rehear this matter, or rehear this matter *en banc*.

2. The Court's Opinion Fails to Consider or Render a Decision Regarding Respondents' Law-of-the-Case Doctrine, *Res Judicata*, and Collateral Estoppel Arguments.

A. The Circuit Court's January 11, 2016 Order, Which Holds South Carolina's Statutory Scheme Governing Real Estate Transactions Prohibits Oral or Implied Commission Agreements and That Any Common Law to the Contrary Is Superseded By the Statutory Scheme, Is Binding Upon Appellants.

Appellants' re-litigation of issues previously decided in this case, and the Arbitration Panel's award in direct contravention of the law in this case, violated the law-of-the-case doctrine, and the doctrines of *res judicata* and collateral estoppel. This Honorable Court erred in failing to address Respondents' arguments regarding the foregoing. Therefore, a rehearing, or a rehearing *en banc*, should be granted in this matter.

This case arises out of a dispute over whether Appellants, Michael Cousins³ (hereinafter "Cousins") and Founders Five, LLC d/b/a Sperry Van Ness Founders Group (hereinafter collectively, "Realtor Appellants"), were due a commission on a real estate transaction involving multiple golf courses in the Myrtle Beach, South Carolina area. The buyers in the subject real estate transaction were represented by SC Coast Properties, LLC d/b/a Keller Williams⁴ (hereinafter "Keller Williams") and its agent, Jane Zheng.⁵ It is uncontested the Realtor Appellants did not have a written agency agreement with either the buyers or the seller in the subject real

³ Appellant Cousins was the Broker-In-Charge of Sperry Van Ness.

⁴ At the time of the transaction at issue, Respondent, Andrew Waldo, was the Broker-In-Charge for Keller Williams.

⁵ 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.*).

estate transaction; and the Realtor Appellants admittedly did not have any knowledge of the multiple golf course deal until shortly before the closing occurred. (R. pp. 337-338).⁶

On March 20, 2015, Appellants filed an action in the Horry County Circuit Court against the Respondents, the buyers, and the seller in the subject real estate transaction. (R. pp. 58-63). 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 January 11, 2016, the Circuit Court entered an Order dismissing Appellants’ claims against the seller in the transaction, finding: (1) Appellants conceded the nature of Realtor Appellants’ alleged agreement for the subject real estate transaction arose orally and by implication; and, 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) (emphasis added).⁷ In its January 11, 2016 Order, the Circuit Court concludes, “The South Carolina General Assembly has definitely spoken on the issue before this court,” South Carolina’s overhauled statutory scheme prohibits oral or implied commission agreements, and any common law to the contrary is superseded by the statutory scheme. (R. pp. 15-17) (internal citations omitted). The January 11, 2016 Order thus bars Realtor Appellants from seeking a commission from anyone involved in the underlying real estate transaction in the absence of a written agreement. (R. pp. 15-17) (emphasis added).

⁶ 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?”

⁷ The January 11, 2016 Order expressly references South Carolina’s entire statutory scheme governing real estate transactions in the state, and reviews multiple sections from within the statutory scheme. (R. pp. 15-16).

Appellants never appealed the Circuit Court's January 11, 2016 Order, and such order is the law of the case. See e.g., Shirley's Iron Workers, Inc. v. City of Union, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) ("An unappealed ruling is the law of the case..."), ML-Lee Acquisition Fund, L.P., v. Deloitte & Touche, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) ("This unappealed ruling is the law of the case..."). Therefore, the Arbitration Panel's award, and comments from the Panel Chairman expressly stating the agency issue was irrelevant to the Panel's decision, was an impermissible collateral attack on the Circuit Court's Order under the law-of-the-case doctrine. See e.g., Judy v. Martin, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009) (holding that a party may not seek alternate relief from an unappealed order of the circuit court).

The doctrine of *res judicata* similarly bars Realtor Appellants from raising issues which were adjudicated in the Circuit Court action and any issues which may have been raised in that action. See Plum Creek Dev. Co. v. City of Conway, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999). To establish *res judicata*, the following elements must be shown: "(1) The parties must be the same *or their privities*; (2) the subject matter must be the same; and (3) while generally the precise point must be ruled, yet where the parties are the same or are in privity the judgment is an absolute bar not only of what was decided but of what might have been decided." Nunnery v Brantley Constr. Co., 289 S.C. 205, 209, 345 S.E.2d 740, 743 (Ct. App. 1986) (emphasis added). "Where an action has been so dismissed [with prejudice], the judgment operates, in a subsequent action involving the same subject matter, 'so as to conclusively settle not only all matters litigated in the earlier proceedings, but also all matters which might have been litigated therein.'" Id. (internal citations omitted). Therefore, the parties do not have to be identical in two proceedings for *res judicata* to apply. Rather, the party raising *res judicata* needs only to be in privity as to the subject matter previously decided. See Yelsen Land Company, Inc. v. The State of South Carolina, et. al., 397

S.C. 15, 723 S.E.2d 592 (2012), Nunnery v. Brantley Constr. Co., 289 S.C. 205, 209, 345 S.E.2d 740, 742-43 (Ct. App. 1986). The law as it relates to privity is, in pertinent part, as follows: “For purpose of *res judicata*, however, the concept of privity rests ***not on the relationship between the parties asserting it, but rather on each party’s relationship to the subject matter of the litigation.***” Yelsen, 397 S.C. 15, 22, 723 S.E.2d 592, 596 (emphasis added).

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

Here, the issue is Realtor Appellants’ right to a commission in a multiple golf course transaction in which Appellant Cousins admits not having any written representation agreement and admits knowing nothing about until shortly before closing, and where the seller, buyers, and buyer’s exclusive agent, all vehemently deny Cousins’ involvement and right to a commission. Realtor Appellants chose to initiate a Circuit Court action against the seller, buyers, and Respondents. (R. pp. 58-63). The Circuit Court’s January 11, 2016 explicitly holds that Realtor Appellants are not entitled to a commission in the absence of a written agreement, ***period.*** (R. pp. 14-17) (emphasis added). The January 11, 2016 also clearly and expressly holds that any common

law regarding oral or implied commission split agreements is superseded by South Carolina statutory law. (*Id.*). These holdings directly govern the very issues addressed in arbitration. Therefore, the “law of the case” doctrine, *res judica*, and collateral estoppel all apply to anyone who challenges Appellant Cousins’ right to a commission in the absence of a written agreement in the underlying transaction, regardless of the forum (Circuit Court, Master-In-Equity, or arbitration). By failing to address Respondents’ law-of-the-case, *res judicata*, and collateral estoppel arguments, the Court of Appeals has overlooked and/or misapprehended the concept of judicial review and has effectively placed the arbitration process beyond judicial review. Simply because arbitration is favored within the state does not mean that arbitrators can wholly disregard South Carolina law in making a decision – especially the law of the very case they are deciding. If this were the case, the manifest disregard standard of vacating a judgment would not exist. For these reasons, the Court of Appeals should grant a rehearing, or a rehearing *en banc*, of this matter.

3. The Court’s Opinion Is Contrary to the South Carolina General Assembly’s Establishment of a Statutory Scheme Governing Real Estate Transactions Within the State of South Carolina, Which Requires Written Agreements Regarding: (a) Representation of Either the Buyer or Seller In a Real Estate Transaction; (b) Subagency and/or Co-Brokership; and (c) Dual Agency; and Which Supersedes Common Law to the Contrary.

This Honorable Court’s Opinion reverses the Master’s finding that the Arbitration Panel manifestly disregarded South Carolina law in awarding Appellant Cousins a commission on the grounds that several cases have upheld the division of real estate commissions without written agreements. Respectfully, the Court of Appeals has erred in reaching such conclusion because the South Carolina statutory scheme governing real estate transactions, enacted in 1997 (and effective January 1, 1998), supersedes all such case law relied upon by Appellants throughout this case and by this Honorable Court in its Opinion. See 40-57-137(Q) (“The provisions of this section which

are inconsistent with applicable principles of common law supersede the common law...”). For this reason, the Court of Appeals should grant a rehearing, or a rehearing *en banc*, in this matter.

The South Carolina legislature enacted a statutory scheme that governs the real estate profession in South Carolina, which became effective on January 1, 1998. See S.C. Code Ann. § 40-57-5, et. seq.⁸ The statutory scheme governs a full range of real estate transactions and relationships between parties involved in real estate transactions, including: seller and buyer agency, dual agency, sub-agency/co-broker relationships, and commission splits between cooperating brokers. See Id.⁹ Title 40, Chapter 57 of the South Carolina Code thus applies to the real estate transaction at issue herein, and *prohibits Realtor Appellants from receiving a commission*, regardless of whether Appellants argue Appellant Cousins represented the seller or the buyers, or acted as a dual agent, or a co-broker (i.e. a broker-to-broker dispute), all of which are positions Realtor Appellants have taken at some point throughout litigation and arbitration of this matter. (emphasis added). South Carolina Code Annotated Section 40-57-137, which sets forth realtors’ duties to parties in a real estate transaction and defines permissible agency relationships also expressly states that it supersedes common law contrary to such section. See S.C. Code Ann. § 40-57-137(Q).

Under South Carolina Code Annotated Sections 40-57-135 (C)(4) and (D)(4), a written representation agreement is **required by law** before a broker/agent is entitled to a commission in

⁸ The statutory scheme’s legislative history reveals it was created by 1997 S.C. Act No. 24, and became effective January 1, 1998.

⁹ Multiple sections of Title 40, Chapter 57 were amended, effective January 1, 2017. In this Petition (and in Respondents’ Final Briefs filed previously), 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.

a real estate transaction. See also S.C. Code Ann. § 40-57-139(E) (emphasis added).¹⁰ South Carolina Code Annotated Section 40-57-30(3) specifically defines a “Broker” **as someone who has the intent or expectation of receiving a commission.** (emphasis added). Therefore, 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).

South Carolina statutory law is well defined, explicit, and clear that in all real estate transactions, an agency relationship is only created with a buyer or seller by written agreement. See S.C. Code Ann. § 40-57-139(G) (prohibiting oral agreements and stating, *“No type of agency relationship may be assumed by a buyer, seller, landlord, tenant, or licensee or created orally or by implication.”*) (emphasis added). A licensee may not “advertise, market, or offer to conduct a real estate transaction involving real estate owned in whole or in part by another person without *first obtaining a written listing agreement from the owner...*”. S.C. Code Ann. § 40-57-135(C)(4) (1997) (emphasis added). The legislature goes a step further by requiring that a *“listing or buyer’s representation agreement must be in writing and must set forth all material terms of the parties’ agency relationship including, but not limited to...an explanation of how compensation will be divided among participating or cooperating brokers, if applicable.”* S.C. Code Ann. § 40-57-135(D)(4)(d) (emphasis added). Therefore, to be compensated in a real estate transaction, a real estate agent must have a written agreement with the party he/she represents.

¹⁰ “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).

S.C. Code Ann. § 40-57-135 also directly addresses co-broker situations by specifying where co-brokers intend to share a commission, such division of compensation must be explained, *in writing and executed by one of the parties*. (Id.) (emphasis added). 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. S.C. Code Ann. § 40-57-135(D)(4)(d). South Carolina Code Annotated 40-57-137, Subsections E, J, M(1), and Q similarly prohibit subagency/co-broker and/or dual agency agreements between agents/brokers without buyer and/or seller knowledge and consent.

It is undisputed none of the requisite written agreements exist in this case. Therefore, under clear South Carolina statutory law, Realtor Appellants are not entitled to a commission for the subject real estate transaction. Despite the foregoing, the Court's Opinion finds, because the cases of Batten v. Howell, 300 S.C. 545, 549, 389 S.E.2d 170, 172 (Ct. App. 1990) and Hackler v. Earl Wiegard Real Est., Inc., 295 S.C. 396, 398, 368 S.E.2d 686, 687 (Ct. App. 1988), wherein oral or implied agreements regarding real estate commission were upheld, have not been clearly and explicitly overruled, they provide at least "barely colorable" justification for the Arbitration Panel's award. Respectfully, these cases *have* been explicitly overruled by the South Carolina General Assembly's enactment of a comprehensive statutory scheme governing real estate transactions within the state, and by the Court's January 11, 2016 Order, both of which the Arbitration Panel had knowledge of during the arbitration hearing. (emphasis added).

First, as stated above, South Carolina Code Section 40-57-137, which requires buyer and seller knowledge and consent to any compensation/commission splits states that its provisions supersede contradicting common law. (emphasis added). Therefore, South Carolina statutory law clearly and explicitly provides that it supersedes contradictory common law with regard to its

writing requirements. Second, the Circuit Court's January 11, 2016 Order expressly states, as follows:

A review of the legislative history of the [South Carolina statutory scheme governing real estate transactions] reveals that the operative amendments became effective on January 1, 1998 (twelve years following the South Carolina Court of Appeals decision in [Hilton Head Island Realty, Inc. v. The] Skull Creek [Club, 287 S.C. 530, 339 S.E.2d 890 (Ct. App. 1986)]. Pursuant to the 1997 S.C. Act No. 24 (the "1997 Act"), each of Sections 40-57-135 and 40-57-139 was codified into law for the first time. In addition, beginning with the 1997 Act, and as further amended by 2000 S.C. Act Nos. 285 and 218, the following provision was added to Section 40-57-135:

The provisions of this Section which are inconsistent with applicable principles of common law supersede the common law, and the common law may be used to aid in interpreting or clarifying the duties described in this section.

S.C. Code Ann § 40-47-13[7](Q) (Supp. 2014). Moreover, the Court in Skull Creek premised its decision on the fact that "the evidence and the reasonable inferences drawn therefrom support the finding that an implied contract to pay a commission existed between the parties..." Skull Creek, 287 S.C. at 536, 339 S.E.2d at 894. Clearly, the same finding could not be made in light of today's statutory environment. See S.C. Code Ann. § 40-57-139(G) (stating "No type of agency relationship may be assumed by a buyer, seller, landlord, tenant, or licensee or created orally or by implication."). The South Carolina General Assembly has definitely spoken on the issue before this court, and such statement is dispositive...

(R. pp. 16). Therefore, the Circuit Court's January 11, 2016 Order makes clear that common law decisions prior to the enactment of South Carolina's statutory scheme governing real estate transactions in the state are superseded by such statutory law. Based upon the express language of the statutes within S.C. Code Ann. § 40-57-5, et. seq. and the Circuit Court's January 11, 2016 Order, common law that was decided prior to enactment of the General Assembly's statutory scheme cannot form the basis of the Arbitration Panel's decision and does not make such decision colorable in any way, shape, or form. Even if this Court believes the language contained in S.C.

Code Ann. §§ 40-57-5, et. seq and the Circuit Court's January 11, 2016 Order are not explicit enough to overrule common law decided prior in time to the enactment of S.C Code Ann. §§ 40-57-5, et. seq., it is incumbent upon this Court to clarify that the enactment of such statutory scheme overrules the common law decided prior in time to the South Carolina General Assembly making it abundantly clear that, absent a written agreement, a commission should not be awarded in a real estate transaction in South Carolina. For the foregoing reasons, the Court of Appeals should grant a rehearing, or a rehearing *en banc* in this matter.

4. The Court Erred In Reversing the Master's Finding That the South Carolina Association of REALTORS Prejudiced Respondents' Rights By Its Arbitration Panel Not Including Findings of Fact and Conclusions of Law With Its Award, Where the Association's Own Policies and Procedures Required Findings of Fact and Conclusions of Law Be Made and the Effect of Such Failure Places an Arbitration Award Beyond Judicial Review.

Rehearing, or rehearing *en banc*, should be granted in this case because this Honorable Court erred in finding Respondents were not prejudiced by the Association's failure to provide findings of fact and conclusions of law with its Arbitration Panel's award. According to the Association's own Policy, "*Association Counsel, if present, shall prepare for review of the Panel Chairman and/or the President any statement of facts or a summary of the reasons supporting any decision made by the Panel.*" (R. p. 311) (emphasis added). Therefore, the Association, itself, requires its counsel to prepare a statement of facts or summary of reasons supporting an arbitration panel decision.¹¹ *Id.* Likewise, South Carolina statutory law requires the Arbitration Panel *to decide questions of law and fact.* *See* S.C. Code Ann. § 15-48-180 (emphasis added). Therefore, not only do the Association's own policies and procedure require the Association to draft a statement of facts or a summary of reasons supporting the Arbitration Panel's decision, but

¹¹ If the Association is not required to present findings of fact and conclusions of law, it begs the question of why it requires its own counsel to do so.

it is also incumbent upon the arbitrators to actually provide some type of findings of fact and conclusions of law so not only the parties know the basis of the decision, but also a reviewing court can determine whether the arbitrators actually complied with South Carolina Code Section 15-48-180.

This Court's Opinion states generally that the Association's policies only require the Arbitration Panel's counsel to draft findings of fact and conclusions of law – not that such findings of fact and conclusions of law are included in the public award. However, as the Master stated at the hearing on Respondent's Motion to Vacate the Arbitration Award on June 21, 2017: *“If [an arbitration award is only required to say who prevailed and if there is an amount, what that amount is] then how does anybody ever determine if in fact the award that the arbitrators perversely misconstrued or manifestly disregarded the law?...How does a reviewing court ever do that if all the court has in front of it is an award that says we decide that Mr. Cousins should have \$250,000?”* (R. p. 245) (emphasis added). Such failure to make findings of fact and conclusions of law serves only to insulate the Arbitration Panel from judicial review, and to further insulate the Association from compliance with South Carolina law. As such, Respondents are greatly prejudiced by this failure, and, respectfully, the Court of Appeals has erred in reversing the Master's finding on this issue. For the foregoing reasons, this Court should grant a rehearing, or rehearing *en banc*.

5. The Court Erred In Reversing the Master’s Finding That the South Carolina Association of REALTORS Prejudiced Respondents’ Rights By Its Failure to Allow Recording of the Procedural Review Hearing, Where Such Failure Insulates the Association’s Arbitration Panel From Compliance with South Carolina Law.

Rehearing, or rehearing *en banc*, should be granted in this case because this Honorable Court erred in finding Respondents were not prejudiced by the Association’s failure to allow a court reporter to transcribe the Procedural Review Hearing of the Arbitration Panel’s decision.

South Carolina law, public policy, and the Policy of the South Carolina Realtors Governing State Professional Standards Procedures allow for records to be made of arbitration proceedings. S.C. Code Ann. § 15-48-50 states that “upon the request of any party or arbitrator, the arbitrators shall cause to be made a record of the testimony and evidence introduced at the hearing.” The Association’s Policy states that “All Professional Standards Panel hearings shall be recorded and the recording retained until after the prescribed date for any appeal or procedural review or ratification by the Executive Committee.” (R. p. 310). Further, the copy of the National Association of Realtors Manual (“NAR Manual”) provided to Respondents *does not state* that court reporters and/or transcription is not allowed. (See R. p. 462) (emphasis added). Therefore, there are no limitations that only an original arbitration hearing may be recorded.

Contrary to South Carolina statutory law, public policy, and its own policies and procedures, the Association failed to allow Respondents to have a court reporter present to transcribe the Procedural Review Hearing, despite Respondents’ requests prior to and on the day of such hearing. Therefore, as there is no formal documentation of the Association’s basis for its decision, there is also no record of the Procedural Review Hearing that can be submitted on appeal. This prohibition similarly reeks of the Association’s attempt to place its arbitration decisions

beyond judicial review and this case is a prime example of exactly why recordings and/or transcripts are a necessary component of these types of proceedings.

In addition to the above, public policy dictates that any proceeding that may be appealed to the Circuit Court, and therefore this Court, should have a court reporter present should any party desire to pay for such expense. The NAR Manual provides that during a Procedural Review Hearing, “the original arbitration Hearing Panel Chairperson will have an opportunity to explain why the Award of Arbitrators should be upheld by [the] Procedural Review Hearing Tribunal.” (R. p. 632). This is the only time that the arbitrators themselves explain what they did and why. Yet, the Court’s Opinion holds the Master erred in finding a lack of recording of this proceeding prejudiced Respondents.

Disallowing the transcription of directly relevant proceedings creates the very scenario that is occurring in this case, where at least part of the proceedings below were not recorded, and Appellants attempt to assert their own bases for the Arbitration Panel’s decision without any support therefor. Without a full and complete record of what actually occurred in the original proceedings, parties are left to assert their own unsupported conclusions. This also creates unnecessary difficulty for a reviewing court that is attempting to determine whether an arbitration panel manifestly disregarded the law. Respectfully, the Court has erred in reversing the Master’s Decision that the Association substantially prejudiced Respondents by failing to allow for the transcription of the Procedural Review Hearing. For these reasons, rehearing, or rehearing *en banc*, should be granted.

6. **The Court Erred In Reversing the Master’s Finding That the South Carolina Association of REALTORS’ Arbitration Panel Manifestly Disregarded South Carolina Law In Awarding Appellant Cousins a \$250,000.00 Commission In the Absence of Any Written Agreement Evidencing Appellant’s Right to Such Commission.**

Rehearing, or rehearing *en banc*, should be granted because this Court misapprehended the facts in this case and South Carolina law in reversing the Master’s finding that the Arbitration Panel manifestly disregarded South Carolina law in awarding Appellant Cousins a commission in the absence of any written agreement in the real estate transaction at issue. For purposes of brevity, Respondents adopt and incorporate all prior arguments made herein and in their Final Briefs in this matter. However, in short, South Carolina statutory law makes it explicitly clear that, a written representation agreement is required before a broker/agent is entitled to a commission in a real estate transaction. See S.C. Code Ann. § 40-57-5, et. seq., see also 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), and S.C. Code Ann. § 40-57-137, Subsections E, J, M(1), and Q (holding South Carolina statutory law also prohibits subagency/co-broker and/or dual agency agreements between agents/brokers without buyer and/or seller knowledge and consent).

The Circuit Court’s January 11, 2016 Order expressly holds Realtor Appellants did not represent the seller. (R. pp. 14-17). Therefore, it must follow that Realtor Appellants could neither be a dual agent of both the buyers and the seller, nor can they be a co-broker representing the seller. (*Id.*). Likewise, there was no subagency agreement between Appellants and Respondents as to representing the buyers, nor is there any evidence whatsoever that the buyers had knowledge of and provided written consent to such a subagency or co-broker agreement. (See R. pp. 368-369, R. pp. 400, 14-17, R. pp. 401-404). To the contrary, the buyers had a written agency agreement

with Jane Zheng, which specifies that Ms. Zheng was the Buyers *exclusive* agent. (See R. pp. 319-322, 810-813) (emphasis added).

Additionally, South Carolina Code Annotated Section 40-57-135(D)(4)(d) provides that the buyer's representation agreement *must be in writing and must set forth "an explanation of how compensation will be divided among participating or cooperating brokers."* (emphasis added). Thus, any alleged co-broker agreement regarding division of compensation must: (1) not only be known by and consented to by the buyer, (2) it must also be documented in writing within the buyer's representation agreement. S.C. Code Ann. § 40-57-135(D)(4)(d). No such agreement exists in this matter.

The Arbitration Panel received a copy of the January 11, 2016 Order, which explains, in detail, South Carolina's statutory scheme, and it was uncontested that Realtor Appellants had no written agreements with any party to the real estate transaction at issue. (Audio of Arbitration Panel Hearing, 01:44:35-01:45:38). However, the Panel Chairman expressly stated:

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

(Audio of Arbitration Panel Hearing, 02:00:55-02:01.45) (emphasis added). Based upon the foregoing, it could not be clearer that the arbitration panel knew the law governing this real estate transaction dispute, knew that Realtor Appellants did not have a written agreement with any party to the transaction, and wholly disregarded such law when issuing the award to Realtor Appellants.

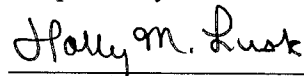
South Carolina law allows for the vacation of an arbitration award where an arbitrator manifestly disregards and/or perversely misconstrues well-defined, explicit, and clearly applicable

law. See Gissel v. Hart, 382 S.C. 235, 241, 676 S.E.2d 320, 323 (2009) (internal citations omitted). In this case, the Arbitration Panel admittedly had direct knowledge of South Carolina statutory law prohibiting oral and/or implied commission agreements and the Circuit Court's January 11, 2016 Order, which made it clear common law decided well-prior to the enactment of such statutory law had been superseded by such law, and still chose to disregard such law. It is nearly impossible to imagine a scenario that demonstrates a more clear manifest disregard of the law. To find, under this set of facts, that a manifest disregard of the law did not occur, effectively places all arbitration decisions beyond judicial review. Therefore, Respondents respectfully request this Court grant a rehearing, or a rehearing *en banc*, in this matter.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests this Court reconsider its Opinion via either a rehearing, or rehearing *en banc*, and affirm the Master's Order.

Respectfully submitted,



DOUGLAS M. ZAYICEK

HOLLY M. LUSK

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

Post Office Box 357

Myrtle Beach, South Carolina 29578-0357
843-448-2400

dzayicek@bellamylaw.com

hlusk@bellamylaw.com

*Counsel for Respondents, Andrew Waldo;
Jane Zheng; and SC Coast Properties, LLC
d/b/a Keller Williams Realty*

RECEIVED

Nov 10 2021

SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Common Pleas

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Honorable Cynthia Graham Howe, Master-In-Equity

Appellate Case No.: 2018-001590

Andrew Waldo; Jane Zheng; and SC Coast Properties, LLC d/b/a
Keller Williams Realty Respondents

v.

Michael Cousins; Founders Five, LLC d/b/a Sperry Van Ness Founders
Group; and South Carolina Association of REALTORS Appellants,

PROOF OF SERVICE

The undersigned certifies that she is employed by the law firm of Bellamy, Rutenberg, Copeland, Epps, Gravely & Bowers, P.A., attorneys for the Respondents, Andrew Waldo, Jane Zheng, and SC Coast Properties, LLC d/b/a Keller Williams Realty, that she has mailed a copy of the Respondents' Petition for Rehearing and Petition for Rehearing *En Banc* and Proof of Service to counsel listed below this 10th day of November, 2021, with proper postage attached thereto.

L. Sidney Connor, IV, Esq.
Kelaher, Connell & Connor, P.C.
Post Office Drawer 14547
Surfside Beach, SC 29587-4547
sconner@classactlaw.com

*Attorney for Appellants, Michael Cousins; Founders Five, LLC d/b/a
Sperry Van Ness Founders Group*

Marcos A. Manos, Esq.
Christopher R. Hampton, Esq.
Nexson Pruet, LLC
Post Office Box 2426
Columbia, SC 29202
mmanos@nexsenpruet.com
champton@nexsenpruet.com

Attorneys for Appellant, South Carolina Association of REALTORS®

Elizabeth Van Doren Gray, Esq.
Vordman Carlisle Traywick, III, Esq.
Robinson Gray Stepp & Laffitte, LLC
1310 Gadson Street
Post Office Box 11449
Columbia, South Carolina 29211
egray@robinsongray.com
ltraywick@robinsongray.com
Attorneys for National Association of REALTORS®

Holly M. Lusk

Douglas M. Zayicek, Esq. SC Bar No. 11304
Holly M. Lusk, Esq., SC Bar No. 102307
BELLAMY, RUTENBERG, COPELAND,
EPPS, GRAVELY & BOWERS, P.A.
P.O. Box 357
Myrtle Beach, SC 29578
(843)448-2400
dzayicek@bellamylaw.com
hlusk@bellamylaw.com
Attorneys for Respondents