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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Honorable Cynthia Graham Howe, Master-In-Equity

Unpublished Opinion No. 2021-UP-368 (S.C. Ct. App. filed October 27, 2021)

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,

Of Whom Andrew Waldo; Jane Zheng; and SC Coast Properties, LLC d/b/a
Keller Williams Realty are the.....Petitioners.

**PETITIONERS' RETURN IN OPPOSITION TO NATIONAL ASSOCIATION OF
REALTORS® MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF**

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INTRODUCTION

On November 28, 2022, the National Association of REALTORS® (hereinafter, “NAR”) filed a Motion for Leave to file an *amicus curiae* brief in support of the Respondent, South Carolina Association of REALTORS® (hereinafter, “SCAR”). NAR conditionally filed a copy of its *amicus curiae* brief with its Motion. Petitioners, Andrew Waldo, Jane Zheng, and SC Coast Properties, LLC d/b/a Keller Williams Realty (“Petitioners”) oppose NAR’s Motion for Leave to file an *amicus curiae* brief in this matter on the grounds there is no need for the NAR’s *amicus curiae* brief herein, and such brief only confuses the real issues on appeal in this case.

THERE IS NO NEED OR DESIRABILITY FOR THE NAR TO FILE AN *AMICUS CURIAE* BRIEF IN THIS CASE

The NAR’s Motion for Leave to file an *amicus curiae* brief should be denied as unnecessary and not beneficial to this appeal because: (1) the NAR’s sole basis for filing an *amicus curiae* brief, and its entire argument therein, is to advocate for the position that realtors’ actions, and NAR policies and procedures, should never be subject to judicial review; (2) the NAR’s arguments confuse and mischaracterize the real issues in this appeal; (3) the NAR’s policies and procedures require state associations, such as the SCAR, to establish their own arbitration procedures that are consistent with applicable state law; and (4) the NAR’s arguments and interests are already fully represented by the SCAR in this matter.

1. **The Sole Basis Upon Which the NAR Seeks to File An *Amicus Curiae* Brief Herein Is To Be Afforded An Opportunity to Assert NAR Policies and Procedures, As Well As the Actions of Realtors, Are Beyond Judicial Review and Not Subject to South Carolina Law.**

The NAR’s Motion for Leave to file an *amicus curiae* brief herein should be denied because review of the NAR’s Motion, and the *amicus curiae* brief it attached thereto, reveals the only reason the NAR seeks to file a brief in this appeal is to be afforded an opportunity to argue

the NAR's policies and procedures, as well as realtors' actions, are not subject to South Carolina law and should not be subject to any meaningful judicial review. The NAR's Motion does nothing more than extol the virtues of arbitration. Then, suggests because the NAR supports arbitration of realtor disputes, its voice will be useful in advising the Court as to why the lower court should not have overturned the specific arbitration award at issue here. In sum, the NAR argues because its policies require realtor disputes be decided by arbitration, it has special insight as to why this arbitration award should not be overturned. On its very face, this stance displays the NAR's bias and desire to shield its procedures from any meaningful judicial review.

The aforementioned position of the NAR cannot be of benefit to the Court in this matter because it does nothing to further proper application of South Carolina law. In fact, the NAR's position does the exact opposite – advocates for allowing its procedures not only to supplant South Carolina law, but also that such procedures and results thereof be deemed unreviewable by the court, no matter how much they may run afoul of the law. Without diving deep into the merits and contents of the *amicus curiae* brief the NAR attached to its Motion, even a quick review demonstrates the NAR seeks to argue that an arbitration award cannot be overturned unless a court manifestly disregards or perversely misconstrues the law – i.e., the most narrow of standards, while simultaneously arguing the NAR's procedures prohibit arbitrators from providing any bases for their rulings. Therefore, the NAR conveniently prohibits the arbitrators deciding its realtors' disputes from providing the very information that assists a court in determining whether or not the arbitrator manifestly disregarded or perversely misconstrued law. The NAR then relies on such procedures to argue South Carolina courts could not possibly be correct in finding that an arbitration award manifestly disregards or perversely misconstrues South Carolina law. In plain terms, the NAR prohibits arbitrators from providing any details about their decisions (presumably

to shield their panels from judicial review) but then attacks a reviewing court, such as the Horry County Master-in-Equity, for reviewing what evidence it does have before it on review.

The NAR frames its position under the guise of upholding consistency and due process. However, it is apparent the NAR is not concerned with ensuring arbiters' decisions are correct and just; rather, the NAR seeks to ensure that whatever decisions are made by its arbitrators, regardless of whether such decisions comport with the law, are final and beyond judicial review. The NAR's policies thus do the opposite of what it argues they do – they allow for perverse misconstruction of the law, manifest disregard of the law, and erode due process by eliminating judicial review.

This case is the perfect example of how NAR's policies thwart the proper application of South Carolina law. South Carolina's legislature has enacted an entire statutory scheme that governs the real estate profession in South Carolina. See S.C. Code Ann. § 40-57-5, et. seq. Such statutory scheme contains express requirements for realtors regarding signed, written representation agreements and agency. Id. The arbitration panel at issue in this case not only had knowledge of South Carolina's real estate statutory scheme, but also had a copy of the Horry County Circuit Court's January 11, 2016 Order, which expressly held South Carolina's statutory scheme superseded common law that previously allowed oral commission agreements. (R. pp. 15-17). Although the arbitration panel here did not issue specific findings of fact, as outlined extensively in Petitioners' Brief, there is an audio recording of the original arbitration proceeding. In such recording, the arbitration panel's chairman blatantly states, despite discussion of representation of the parties in the real estate transaction (e.g., issues directly governed by South Carolina statutory law), the panel was going to focus on an oral commission argument contrary to South Carolina statutory law. (Audio of Arbitration Panel Hearing, 02:00:55-02:01.45).

The foregoing reveals this is not a matter where an arbitrator made a minor, immaterial mistake, which Petitioners have sought to overturn. Here, the panel expressly chose to ignore South Carolina law, and to rule how it wanted, despite acknowledging and understanding South Carolina law contradicting its decision. Now, the NAR seeks to insert its voice into this matter in an effort to insulate the arbitration panel, and realtors, from judicial review and application of South Carolina law, where manifest disregard for the law was clearly present. If the NAR truly believed in fairness and due process, it would not seek shield its arbitration procedure from the proper application of South Carolina law. It would, instead, encourage meaningful judicial review in order to ensure the arbitration award at issue in this case was not issued in manifest disregard for or perverse misconstruction of South Carolina law.

Unfortunately, the NAR's Motion for Leave to File an *amicus curiae* brief in this appeal makes it clear the NAR will not stand for even one arbitration award to be vacated – no matter how badly the arbitration panel perverted South Carolina law in issuing its award. The NAR should not be allowed to file an *amicus curiae* brief in this matter simply to argue that the NAR's arbitration process is not subject to judicial review and neither arbitrators, nor realtors, should be required to comply with South Carolina law. In sum, the NAR's position is of no benefit to this Court because the NAR's position does not, in any way, shape, or form, seek that South Carolina law be properly applied in this matter. Rather, the NAR seeks to thwart the Court's ability to do exactly what the Court is intended to do in a case such as this – review and apply South Carolina law appropriately. Therefore, the NAR's Motion for Leave to file an *amicus curiae* brief should be denied.

2. **The NAR's Proposed *Amicus Curiae* Brief Is Not Beneficial To This Court Because the NAR Confuses and Mischaracterizes the Issues In This Case.**

The NAR's Motion for Leave to file an *amicus curiae* brief should be denied because the NAR seeks to confuse and mischaracterize the issues in this case. The NAR's entire *amicus curiae* brief focuses upon the benefits and expediency of requiring realtors to arbitrate, rather than litigate, their disputes. As outlined extensively in Section 1 above, the NAR extols the virtues of arbitration while seeking to insulate all decisions made by realtor association arbitration panels from judicial review. In doing so, the NAR mischaracterizes this appeal as an attack on the NAR's and SCAR's arbitration process as a whole. That is simply untrue.

The NAR's proposed *amicus curiae* brief states, "This matter stems from an NAR member's effort to avoid the context of arbitration..." (NAR *Amicus Curiae* Brief, p. 11). The NAR's framing of this appeal is inaccurate, misleading, and is of no benefit to this Court because it confuses the real issues in this matter. This case was originally filed in the Horry County Court of Common Pleas by Respondents, Michael Cousins and Founders Five, LLC d/b/a Sperry Van Ness Founders Group. (R. pp. 58-63). Mr. Cousins and his brokerage firm chose to litigate this commission dispute, rather than to arbitrate. (*Id.*). It was Petitioners who reminded Respondent Cousins of the parties' obligation to arbitrate the dispute and it was upon Petitioner Andrew Waldo's request that arbitration was conducted herein. (R. pp. 64-65). It could not be clearer that Petitioners voluntarily complied with SCAR's arbitration requirement and participated in the arbitration process from start to finish. Only upon receipt of an arbitration decision that completely disregarded South Carolina law did Petitioners file an appeal, as they had every right to do, pursuant to South Carolina law. See *C-Sculptures v. LLC v. Brown*, 403 S.C. 53, 56, 742 S.E.2d 359, 360 (2013), *Gissel v. Hart*, 382 S.C. 235, 241, 676 S.E.2d 320, 323 (2009).

Therefore, despite the NAR's framing of this appeal as an attack on arbitrating realtor disputes, this appeal actually concerns review of a single arbitration panel's award, and whether in issuing such award, the arbitration panel manifestly disregarded South Carolina law. As previously mentioned, by virtue of seeking to insert its voice into this appeal, the NAR has made clear it will not stand for **even a single arbitration decision by a state realtor association to be overturned by a court, no matter how much it runs afoul of the law.** The NAR would like for this Court to believe Petitioners' appeal concerns overthrowing the entire arbitration process for every realtor in South Carolina, when, in reality, Petitioners have only sought to vacate what was a clear manifest disregard for South Carolina law by the arbitration panel who decided the issue in this particular case. If the NAR truly believed its arbitration processes were fair, it would not be fighting a proper judicial review of SCAR's arbitration panel's award in this matter.

The reason this case has far-reaching effects on the public in South Carolina is that if the arbitration panel's decision is upheld, and the Court of Appeals' decision is affirmed, this Court will effectively be greenlighting SCAR's arbitration panels to do whatever they want, without any regard for South Carolina law because, even if the decisions they make disregard such law, they are not subject to any meaningful review. Alternatively, if this Court finds the arbitration panel in this matter manifestly disregarded the law in issuing its award, it will simply be following the proper standard for reviewing and vacating arbitration awards, as set forth by this Court in Gisele v. Hart, 382 S.C. 235, 676 S.E.2d 320 (2009). Vacating the arbitration award at issue in this case further clarifies that South Carolina statutory law governs realtors in this state and realtors must comply with such law.

In sum, the NAR wants to confuse the issues herein by making it appear that Petitioners are trying to escape the arbitration process, when the exact opposite is true. The only thing

Petitioners have attacked throughout this appeal has been the arbitration panel's disregard for South Carolina law in issuing their decision and SCAR's attempts to shield its arbitration process from any meaningful judicial review. Proper review of the arbitration panel's award, pursuant to the standard set forth in Gisele v. Hart, is imperative in this matter. The NAR should support meaningful judicial review of the award at issue in this case if it truly believes all of the praise it has extolled upon its arbitration policies and procedures. Unfortunately, that does not appear to be the case upon review of the NAR's Motion and proposed *amicus curiae* brief.

Based upon the foregoing, the Court should deny the NAR's Motion for Leave to File an *amicus curiae* brief herein, as the NAR's *amicus curiae* brief is unnecessary and seeks only to confuse the issues in this case.

3. **The NAR's Position Is Irrelevant In This Matter Because Its Own Policy Manual Obligates State Realtor Associations to Establish Their Own Arbitration Procedures Consistent with Applicable State Law.**

The NAR's Motion for Leave to file an *amicus curiae* brief should be denied because the NAR has delegated authority to its state associations to establish their own arbitration procedures. The NAR Manual, which is a part of the Record in this case, states, in pertinent part, "The State Association as a Member Board of the National Association has the obligation to establish arbitration procedures and facilities consistent with applicable state law..." (R. p. 146). The SCAR has established its own policies with regard to arbitration and review of arbitration proceedings. According to SCAR's policies and procedures, "Association Counsel, if present, shall prepare for review of the Panel Chairman and/or the President any statement of facts or summary of the reasons supporting any decision made by the Panel. (R. p. 311). This requirement makes sense because South Carolina statutory law requires an arbitrator to decide questions of law and fact. See S.C. Code Ann. § 15-48-180. As outlined in depth within Petitioner's Brief, SCAR's policies

state that recordings and transcripts are to be used for the purpose of appeals and/or applications to vacate arbitration awards. (R. pp. 310-311). Therefore, SCAR's policies clearly provide both for findings of fact and for a right to appeal an arbitration award. Therefore, the NAR's position with regard to the arbitration procedure and award at issue in this case is both irrelevant and of no benefit to the Court, as NAR has imparted upon SCAR the obligation to create its own policies and procedures regarding arbitration that are consistent with South Carolina law. The NAR cannot, on one hand delegate to SCAR the obligation to create its own state law specific arbitration procedures, and then, on the other hand attempt to insert itself into a state dispute and assert its own policies and procedures. For this reason, NAR's Motion for Leave to file an *amicus curiae* brief should be denied.

4. **The NAR's Interests Are Represented by the SCAR.**

Finally, the NAR's Motion for Leave to file an *amicus curiae* brief should be denied because if the NAR has any interest in this matter, such interest is represented by the SCAR, who holds the same interest in shielding its arbitration panel as the NAR. As stated above, the NAR has obligated the SCAR to create its own policies and procedures with regard to arbitration of realtor disputes. Therefore, the NAR has no interest in a state-law specific realtor dispute such as this. However, even if the NAR had an interest in this matter, the arguments the NAR has set forth in the *amicus curiae* brief it submitted with its Motion are the same arguments SCAR has already set forth in this appeal – (1) that the lower court exceeded its authority in finding the arbitrators manifestly disregarded South Carolina law and (2) that arbitrators are prohibited from including findings of fact or reasoning with their awards. As a result, there is nothing new or additional the NAR's proposed *amicus curiae* brief adds that is of benefit to the Court. Further, the NAR's

interests, if any exist, have been wholly represented by SCAR. Therefore, NAR's Motion for Leave to file an *amicus curiae* brief should be denied.

CONCLUSION

The NAR's Motion for Leave to file an *amicus curiae* brief in this case should be denied because: (1) the NAR only seeks to assert its opinion herein for the purpose of insulating its policies and procedures, and realtors, from the application of South Carolina law; (2) the NAR's *amicus curiae* brief confuses and mischaracterize the real issues in this case; (3) the NAR's voice is irrelevant because it requires SCAR to make its own rules with regard to arbitration procedures in South Carolina; and (4) the NAR's position is already wholly represented by SCAR. Therefore, Petitioners respectfully request NAR's Motion be denied.

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