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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Unpublished Opinion No. 2021-UP-368 (S.C. Ct.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' RESPONSE IN OPPOSITION TO NATIONAL ASSOCIATION OF REALTORS® BRIEF OF *AMICUS CURIAE*

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STATEMENT OF ISSUES ON APPEAL

1. Did the Court of Appeals' err by ignoring the South Carolina General Assembly's requirement that a real estate agent have a written agency agreement before being entitled to a real estate commission, and that any common law to the contrary was superseded?
2. Did the Court of Appeals err by reversing the Master-in-Equity's finding that the South Carolina Association of REALTORS' Arbitration Panel manifestly disregarded South Carolina law by awarding a commission to Appellant Cousins in the absence of any written agency agreement?
3. Did the Court of Appeals err in reversing the Master-in-Equity's finding that the South Carolina Association of REALTORS prejudiced Petitioner's rights by not including findings of fact and conclusions of law in its award?
4. Did the Court of Appeals err by reversing the Master-in-Equity's finding that the South Carolina Association of REALTORS prejudiced Petitioners' rights by prohibiting a court reporter from recording of the Procedural Review Hearing, which is an integral part of the Association's arbitration process?

STATEMENT OF THE CASE

Petitioners, Andrew Waldo ("Waldo"), Jane Zheng ("Zheng"), and SC Coast Properties, LLC d/b/a Keller Williams Realty ("KW") (collectively, "Petitioners"), adopt and incorporate Petitioners' Statement of the Case from Petitioners' Brief, filed herein on October 7, 2022. However, it is important to re-emphasize five facts key for the Court's review of this matter on appeal:

1. Respondents, Michael Cousins[1] and Founders Five, LLC d/b/a Sperry Van Ness Founders Group (collectively, "Realtor Respondents") did not represent either the Buyers or the Seller in the real estate transaction at issue in this case; and, admittedly, did not have a written listing or representation agreement with any party to the subject real estate transaction.[2]

2. The Horry County Court of Common Pleas (the "Circuit Court"), where Realtor Respondents initiated this case, entered an Order on January 11, 2016, which held, in pertinent part: (a) Realtor Respondents conceded the nature of their alleged commission agreement for the subject transaction arose orally and by implication; (b) South Carolina statutory law prohibits oral and implied commission agreements; and (c) any common law

[1] Michael Cousins ("Cousins") was the Broker-In-Charge of Founders Five, LLC d/b/a Sperry Van Ness Founders Group ("SPV").

[2] The Circuit Court's January 11, 2016 Order holds Realtor Respondents did not represent the Seller in the subject real estate transaction. (R. pp. 14-17). Therefore, it must follow that Realtor Respondents could neither be a dual agent of both the Buyers and the Seller, nor could they be a co-broker representing the Seller. (Id.). There was no subagency agreement between Realtor Respondents and Petitioners 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, pp. 401-404). To the contrary, Petitioner Zheng was the Buyers' ***exclusive*** agent. (See R. pp. 319-322, 810-813). Realtor Respondents, admittedly, did not have any knowledge of the subject real estate transaction until shortly before the closing occurred. (R. pp. 337-338).

to the contrary is superseded by South Carolina statutory law. (R. pp. 14-17). The January 16, 2016 Circuit Court Order was never appealed and is the law of this case.[3]

3. During arbitration between Petitioners and Realtor Respondents, Respondent South Carolina Association of REALTORS' ("SCAR") Arbitration Panel was aware of both South Carolina's real estate statutory scheme requiring written commission agreements and the Circuit Court's January 11, 2016 Order holding the same; however, the Panel Chairman expressly stated the Panel was disregarding such law to focus on an implied/oral commission agreement theory. (Audio of Arbitration Panel Hearing, 02:00:55-02:01:45).[4]

4. Despite requiring its own legal counsel to prepare findings of facts and conclusions of law to support arbitration panel awards,[5] SCAR prohibits such information from being included in an arbitration panel's formal award. (R. p. 245, pp. 6-25). SCAR's policy thus obstructs a reviewing court's ability to determine whether a SCAR arbitration panel manifestly disregarded or perversely misconstrued law in issuing an award; and, SCAR admittedly seeks to prevent review of its panels' decisions. (Id., see also R. p. 253, lines 22-25, p. 254-lines 1-18).

5. Similarly, SCAR prohibits any record being made of a Procedural Review Hearing, which is the only time in SCAR's internal dispute resolution process where an arbitration panel provides its reasoning for its award. (R. p. 632).

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[3] See Judy v. Martin, 381 S.C. 455, 458-59, 674 S.E.2d 151, 153 (2009) (holding where an order is not appealed it becomes the law of the case).

[4] "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.***" (emphasis added).

[5] (R. p. 311).

STANDARD OF REVIEW

Although, "[g]enerally, an arbitration award is conclusive and courts will refuse to review the merits of an award[,]" under certain circumstances, such as when the arbitrator manifestly disregards or perversely misconstrues the law, the court may vacate an arbitration award. Gissel v. Hart, 382 S.C. 235, 241, 676 S.E.2d 320, 323 (2009) (internal citations omitted). For a South Carolina court to vacate an arbitration award on the grounds that the arbitrator manifestly disregarded the law, the governing law ignored by the arbitrator must be "well defined, explicit, and clearly applicable." Id. (internal citations omitted). Further, "'[a]n arbitrator's manifest disregard for the law' as a basis for vacating an arbitration award occurs when the arbitrator knew of a governing legal principal yet refused to apply it." Gissel, 403 at 241 (citing Weimer v. Jones, 364 S.C. 78, 610 S.E.2d 850 (S.C. Ct. App. 2005)); See also C-Sculptures, LLC v. Brown, 403 S.C. 53, 58, 742 S.E.2d 359, 361-62 (2013) (holding that the manifest disregard standard is not insurmountable and vacating an arbitrator's award where the arbitrator was apprised of unambiguous, clearly applicable South Carolina statutory law and did not apply that law). An arbitration award may be vacated pursuant to this common law standard regardless of whether the Federal Arbitration Act ("FAA") or the South Carolina Uniform Arbitration Act ("SC UAA") applies to a particular arbitration. See Apex Plumbing Supply, Inc. v. U.S. Supply Co., Inc., 142 F.3d 188 (4th Cir. 1998), Swentor v. Swentor, 336 S.C. 472, 486, 520 S.E.2d 330, 336 (Ct. App. 1999).

ARGUMENT

I. THE COURT OF APPEALS ERRED IN REVERSING THE HORRY COUNTY MASTER-IN-EQUITY'S AUGUST 16, 2018 ORDER.

For purposes of brevity, Petitioners adopt and incorporate herein the arguments set forth in all of their prior briefs in this matter, including, without limitation, Petitioners' Brief, filed October

7, 2022, and Petitioners' Reply to SCAR's Response in Opposition to Petitioners' Brief, filed December 7, 2022. Such arguments outline, in detail, why the Horry County Master-in-Equity (the "Master") was correct in vacating SCAR's Arbitration Panel's award on the grounds that the Panel manifestly disregarded South Carolina law in issuing such award. In addition to the arguments adopted from Petitioners' prior briefs, Petitioners respond to the National Association of REALTORS' ("NAR") *Amicus Curiae* Brief as follows.

A. The Master Properly Vacated the Arbitration Award Because the Arbitration Panel Manifestly Disregarded Well-Defined, Explicit, and Clearly Applicable South Carolina Law When It Awarded Cousins A Commission In the Absence of Any Written Agreement.

In its *Amicus Curiae* brief, the NAR asserts, "The real question before this Court is...whether the...Arbitration Panel [] manifestly disregarded or perversely misconstrued the law such that the [Master] was justified in vacating the Arbitration Award." (NAR Brief, p. 7). Petitioners agree. However, while the NAR asserts the Arbitration Panel did not manifestly disregard South Carolina law in issuing the arbitration award, Petitioners strongly assert that it did, and that the Court of Appeals erred in concluding otherwise.

As stated above, Petitioners have already extensively argued why the Master was correct in vacating the Arbitration Panel's award and why the Court of Appeals erred in reversing such decision. (See Petitioners' October 7, 2022 Brief, Petitioners' December 2, 2022 Reply). Nonetheless, it bears repeating that this case is a striking example of a scenario where vacating an arbitration award is proper under the manifest disregard standard. See C-Sculptures, LLC, 403 S.C. at 56-58, 742 S.E.2d at 360-62, Gissel, 382 S.C. at 241, 676 S.E.2d at 323-24.

Pertinent to this case, in 1998, South Carolina's legislature has enacted a comprehensive statutory scheme that governs the real estate profession in South Carolina. See S.C. Code Ann. § 40-57-5, et. seq. South Carolina Code Annotated Sections 40-57-5 and 40-57-10 both expressly

state the statutory scheme governs the real estate profession in South Carolina. The statutory scheme contains express requirements for realtors regarding signed representation agreements and agency. See S.C. Code Ann. § 40-57-5, et. seq.; (see also Petitioners' October 7, 2022 Brief, pp. 10-15). South Carolina Code Annotated Section 40-57-137(Q) plainly states its provisions, which require buyer and seller ***knowledge and written consent*** to any compensation/commission splits, ***supersede contradicting common law***.[6] Additionally, the Circuit Court's January 11, 2016 Order holds that common law decided prior to the enactment of the statutory scheme, which previously allowed oral and/or implied commission agreements, was superseded by the statutory scheme. (R. pp. 14-17).

Cousins admittedly did not follow South Carolina's statutory requirements for realtors in obtaining a written agency agreement, and had absolutely nothing to do with the real estate transaction at issue. (See Petitioners' October 7, 2022 Brief, pp. 3-5). Although the Arbitration Panel did not issue specific findings of fact and conclusions of law with its award, 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., agency issues directly governed by South Carolina statutory law), the Panel was to focus on an implied/oral commission agreement theory[7] – a theory averse to South Carolina statutory law and that the Circuit Court's January 11, 2016 Order held is superseded by South Carolina statutory law. (R. pp. 14-17). The Arbitration Panel was apprised of the governing, applicable South Carolina statutory law and the Circuit Court's January 11, 2016 Order;

[6] The NAR argues South Carolina Code Annotated Section 40-57-137 is silent regarding agreements between agents when buyers or sellers are not affected. (NAR Brief, p. 9, fn 3). This is simply untrue. Section 40-57-137 clearly and expressly prohibits subagency/co-broker and/or dual agency agreements between agents/brokers without buyer and/or seller knowledge and consent. South Carolina's comprehensive real estate statutory scheme clearly governs all aspects of real estate transactions within the state, whether it be between agents/brokers and buyers/sellers or between the agents/brokers, as all of these aspects are part of the overall transaction.

[7] (Audio of Arbitration Panel Hearing, 02:00:55-02:01:45).

acknowledged its knowledge of such law; and then, expressly stated it was going to ignore it in favor of a theory superseded by such statutory law. (Audio of Arbitration Panel Hearing, 02:00:55-02:01:45).

The NAR is correct that the standard for vacating an arbitration award is narrow. "Indeed, manifest disregard is an exacting standard, ***but it is not insurmountable***." C-Sculptures, LLC, 403 S.C. at 58, 742 S.E.2d at 361 (internal citations omitted) (emphasis added). In C-Sculptures, LLC, the arbitrator had been presented with clearly applicable statutory law, which should have necessitated dismissal of the plaintiff's claims, and chose to ignore such law, eventually rendering a decision in favor of the plaintiff. Id., 403 S.C. at 55, 742 S.E.2d at 360. The South Carolina Supreme Court ultimately vacated the arbitrator's award in the C-Sculptures, LLC case, finding that the arbitrator had manifestly disregarded well defined, explicit, and clearly applicable South Carolina law. Id., 403 S.C. at 58-59, 742 S.E.2d at 362. In doing so, the Supreme Court makes clear that an arbitrator cannot know of a governing legal principle, yet refuse to apply it, which is precisely what occurred in this case. Id. 403 S.C. at 56, 742 S.E.2d at 360.

Despite how the NAR and SCAR have tried to characterize this appeal, 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 a Circuit Court Order directly on point in this very case, and to rule how it wanted, despite acknowledging and understanding South Carolina law contradicting its decision***. (See R. pp. 14-17) (emphasis added). The NAR, following the lead of SCAR, has pointed only to common law decided ***prior*** to the enactment of South Carolina's comprehensive real estate statutory scheme as a means of justifying the Arbitration Panel's award. (NAR Brief, pp. 8-9) (citing Batten v. Howell, 300 S.C. 545, 389 S.E.2d 170 (Ct. App. 1990), Hackler v. Earl Wiegand Real Est., Inc., 295 S.C. 396, 398, 368 S.E.2d

686, 687 (Ct. App. 1988). It is important to note neither Respondents, nor the NAR, has provided or can provide a case decided ***after*** the enactment of the governing South Carolina statutory scheme, which permits an oral and/or implied commission agreements. As the Circuit Court stated in its January 11, 2016 Order, "Clearly, the same finding could not be made in light of today's statutory environment." (R. p. 16). Such case law is expressly superseded by South Carolina Code Annotated Section 40-57-137(Q) and by the Circuit Court's January 11, 2016 holding as such. This case is thus a clear example of an Arbitration Panel that knew the governing law and simply chose to ignore it in issuing its award (i.e., the Panel manifestly disregarded and/or perversely misconstrued South Carolina law).

In its Brief, the NAR does nothing more than recite the standard of review for vacating an arbitration award, then, concludes the Master incorrectly vacated the Arbitration Panel's award. (NAR Brief, pp. 7-12). The NAR's Brief is unpersuasive and its arguments therein are without merit. Petitioners opposed the NAR's Motion for Leave to File an *Amicus Curiae* Brief in this appeal and continue to oppose the NAR's Brief on its merits because review of such Brief reveals the NAR has no interest in South Carolina law being properly applied to this case. Rather, the NAR seeks only to insulate its and SCAR's arbitration process from meaningful judicial review. In sum, the NAR argues because its policies require realtor disputes be decided by arbitration, and because courts generally favor arbitration, this arbitration award should not be overturned. NAR attempts to couch 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, 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.

Ultimately, the NAR is advocating for allowing NAR's 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 run afoul of the law. The NAR's position creates a serious problem, as the NAR is impliedly asserting it has the right to put itself, and realtors, above the law and above the Court's review. This is apparent because NAR argues an arbitration award cannot be overturned unless a court manifestly disregards or perversely misconstrues the law – i.e., the narrowest of standards,[8] while simultaneously arguing the NAR's procedures prohibit arbitrators from providing any bases for their rulings.[9] Therefore, while Petitioners do not disagree the standard for vacating an arbitration award is narrow, it is disingenuous for the NAR to assert it supports fairness and justice when the NAR conveniently prohibits the arbitrators deciding its realtors' disputes from providing the very information that aids a court in determining whether or not the arbitrator manifestly disregarded or perversely misconstrued law. It is not surprising the NAR's Brief almost entirely ignores the clear and express South Carolina law that governs real estate transactions in South Carolina. Such law is inconvenient to the NAR and the NAR's entire argument is centered on arbitration decisions being allowed to stand regardless of that law.

Under NAR's position, there is no means by which a Court can properly vacate an arbitration award, no matter how completely contrary to South Carolina law such award may be. The NAR seeks 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, by arguing that the Court could not have been correct in finding a manifest disregard for law where there were no

[8] NAR Brief, pp. 7-9.
[9] NAR Brief, p. 12.

findings of fact included with the arbitration award. In plain terms, the NAR forbids the public disclosure of its arbitration panels' bases for their awards, then uses the lack of such disclosure to argue the Court has no right to dig into the merits of a case to determine the bases for an arbitration award. The NAR even goes so far as to argue that it would be "too complex and difficult" to require its arbitration panels to provide the bases for their awards. (NAR Brief, p. 13). First, this assertion makes no sense because SCAR's own policies and procedure require SCAR's legal counsel to draft findings of fact and conclusions of law for its arbitration panels. (R. p. 311). How then, can it be too difficult for an arbitration panel to provide findings of fact and/or conclusions of law that, by its own requirements, the panel already has in its possession? Second, if the basis for an arbitration award is so complex it cannot be reduced to writing, as the NAR asserts in its Brief, how can such award conceivably be based upon and compliant with South Carolina law? If an award is properly grounded in the law, the law should clearly be the basis for such award. In sum, 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 impede 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.

Nothing within South Carolina law gives SCAR or the NAR the right to put themselves above the law or to deprive realtors of their rights under South Carolina law. South Carolina's statutory scheme for realtors is in place to govern the real estate profession. South Carolina's legal standard for vacating arbitration awards safeguards against a panel's manifest disregard and perverse misconstruction of South Carolina law. Therefore, allowing an arbitration panel to manifestly disregard and perversely misconstrue South Carolina law in awarding a commission without complying with South Carolina law would be legally wrong and wholly unjust. While the

arbitration process may be largely undisturbed by the Court, an arbitration panel is not beyond judicial review as the NAR impliedly argues. For this reason, the Court should reject NAR's arguments and reverse the Court of Appeals' ruling in this case.

B. The NAR's Own Policy Manual Obligates State Realtor Associations Such As SCAR To Establish Their Own Arbitration Procedures Consistent With Applicable State Law.

The NAR argues extensively in support of the application of its policies and procedures with regard to arbitration. (NAR Brief, pp. 12-16). However, such policies and procedures are irrelevant in this case because the NAR has delegated authority to its state associations to establish their own arbitration procedures. The NAR Manual 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) (emphasis added). 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. 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 wholly irrelevant, 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 had 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, the Court should reject NAR's arguments and uphold the lower Court's rulings.

CONCLUSION

For the reasons argued within Petitioners' Brief, filed on October 7, 2022, Petitioners' Reply Brief, filed December 2, 2022, and for the additional reasons set forth herein, the Court of Appeals erred in reversing the Master's August 16, 2018 Order, which vacated the Arbitration Panel's award in this case. Further, the NAR's position is of no value to this case or this Court's review on appeal. Therefore, Petitioners respectfully request the Court reject NAR's arguments and reverse the Court of Appeals' Order reversing the Master's August 16, 2018 Decision.

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