

STATE OF SOUTH CAROLINA
In the Court of Common Pleas

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Oct 08 2020

SC Court of Appeals

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

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INTRODUCTION

On September 17, 2020, the National Association of REALTORS® (hereinafter, “NAR”) filed a Motion for Leave to file an *amicus curiae* brief in support of Appellant, South Carolina Association of REALTORS® (hereinafter, “SCAR”). NAR conditionally filed a copy of its *amicus curiae* brief with its Motion. Respondents, Andrew Waldo, Jane Zheng, and SC Coast Properties, LLC d/b/a Keller Williams Realty oppose NAR’s Motion for Leave to file an *amicus curiae* brief for the reasons set forth herein this Return.

THERE IS NO NEED OR DESIRABILITY FOR THE NAR TO FILE AN AMICUS CURIAE BRIEF HEREIN

The NAR’s Motion for Leave to file an *amicus curiae* brief should be denied 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, are beyond judicial review; (2) the NAR’s policies and procedures require state associations, such as SCAR, to establish their own arbitration procedures that are consistent with applicable state law; (3) the NAR’s interests are already represented by the SCAR herein; and (4) the NAR’s Motion is untimely.

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.**

Review of the NAR’s Motion, and the *amicus curiae* brief it attached thereto, clearly reveals the only reason the NAR seeks to file a brief in this appeal is so that the NAR may be afforded an opportunity to argue its policies and procedures, as well as realtors’ actions, are not subject to South Carolina law. The NAR’s Motion does nothing more than extol the virtues of arbitration. Then, suggests because the NAR supports arbitration of realtor disputes, it can provide

a useful voice in advising the Court as to why the lower court should not have overturned the 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; and therefore, should be allowed to file an *amicus curiae* brief herein. On its very face, this stance indicates the NAR's desire to shield its procedures from judicial analysis; and, ultimately, as applied to this case, NAR's desire to protect realtors from compliance with South Carolina law.

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 a court would need to determine whether or not the arbitrator manifestly disregarded or perversely misconstrued law. The NAR then relies on such procedure to argue South Carolina courts could not possibly be correct in finding that an arbitration award manifestly disregards or perversely misconstrues South Carolina law. 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.

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 representation agreements and agency. Id. Although the arbitration panel that issued the award disputed herein did not issue specific findings of fact, as outlined extensively in Respondents' Final Briefs, 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 alternative argument. Thus, this is not a matter where an arbitrator made a minor, immaterial mistake, which Respondents 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 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 findings of fact included with the arbitration 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 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 Respondents' Final Briefs, 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.

3. The NAR's Interests Are Represented by the SCAR.

The NAR's Motion for Leave to file an *amicus curiae* brief should likewise be denied because if the NAR has any interest in this matter, such interest is represented by the SCAR, who has already extensively briefed the issues herein. 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 on 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 brief adds that is of benefit to the Court. Further, 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.

4. The NAR's Motion For Leave to File An Amicus Curiae Brief Is Untimely.

The NAR's Motion for Leave to file an *amicus curiae* brief should be denied because the NAR has waited in excess of two years to file its Motion and seek to assert its position in this appeal. This dispute has been ongoing since early 2015, when Appellants Michael Cousins and

Founders Five, LLC d/b/a Sperry Van Ness Founders Group, filed an action against Respondents, and others, in the Horry County Court of Common Pleas. Respondents sought to arbitrate the matter and then appealed the arbitration panel's award to the Circuit Court in 2016. After being referred to the Horry County Master-In-Equity, the Master-In-Equity issued her Order in this matter on August 16, 2018. Appellants' Notices of Appeal followed shortly thereafter. Therefore, this case has been pending before the South Carolina Court of Appeals for more than two years. The parties extensively briefed the issues in this case, and all Final Briefs were submitted more than a year ago, in July 2019. The NAR has thus waited more than two years since the filing of this appeal, and more than fourteen months after the finalization of all parties' briefs in this appeal, before moving for to leave to file an *amicus curiae* brief herein. The NAR provides no excuses or bases for such a lengthy delay in filing its Motion, or why, after such a long period of time, it now believes its position is desirable by the Court in this matter. The timing of the NAR's Motion only serves to further suspend and unreasonably delay the Court's ruling in this case, after all of the issues have been extensively briefed, and after the parties' have already been in limbo since 2015 with regard to the disbursement of the real estate commission at issue herein. Therefore, the NAR's Motion for Leave to file an *amicus curiae* brief should be denied accordingly.

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 requires SCAR to make its own rules with regard to arbitration procedures in South Carolina; (3) the NAR's position is already wholly represented by SCAR; and (4) the NAR's Motion is

unreasonable in its timing. Therefore, Respondents' respectfully request NAR's Motion be denied.

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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' Return In Opposition to National Association of REALTORS Motion For Leave to File An *Amicus Curiae* Brief and Proof of Service to counsel listed below this 8th day of October, 2020, with property postage attached thereto.

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