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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,

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RESPONDENTS' RESPONSE TO NATIONAL ASSOCIATION OF REALTORS® *AMICUS CURIAE* BRIEF

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STATEMENT OF THE ISSUES ON APPEAL

I. CAN THE SOUTH CAROLINA ASSOCIATION OF REALTORS, IN AN ARBITRATION, AWARD A COMMISSION TO AN AGENT THAT DID NOT HAVE A WRITTEN AGREEMENT WITH ANY PARTY TO A REAL ESTATE TRANSACTION AND ADMITS TO NOT KNOWING ANYTHING ABOUT THE TRANSACTION UNTIL SHORTLY BEFORE CLOSING?

STATEMENT OF THE CASE

For the purpose of brevity, Respondents, Andrew Waldo, Jane Zheng, and SC Coast Properties, LLC d/b/a Keller Williams Realty (hereinafter, "Respondents"), adopt and incorporate Respondents' Statement of the Case from their Final Brief in Response to Brief of Appellant South Carolina Association of REALTORS® (hereinafter, "SCAR"), filed on June 28, 2019 and received by the Court on July 1, 2019. Such Statement of the Case fully sets forth the pertinent facts in this appeal.

On September 17, 2020, more than a year after all Final Briefs in this matter were filed by the parties' herein, the National Association of REALTORS® (hereinafter, "NAR") filed a Motion for Leave to file an *amicus curiae* brief in support of Appellant, SCAR. NAR conditionally filed a copy of its *amicus curiae* brief with its Motion. Respondents opposed NAR's Motion for Leave to file an *amicus curiae* brief by the filing of Respondents' Return In Opposition, filed on October 8, 2020. On November 2, 2020, after consideration of the NAR's Motion, Respondents' Return, and NAR's Reply to Respondents' Return, the Court granted NAR's Motion and accepted the NAR's conditionally-filed *amicus curiae* brief. Respondents now file this Response to NAR's *amicus curiae* brief.

STANDARD OF REVIEW

The Standard of Review in NAR's *amicus curiae* brief is incomplete in that it omits South Carolina's legal standard for vacating an arbitration award. (See NAR Brief, p. 4). This case

directly concerns whether SCAR's Arbitration Panel manifestly disregarded the law in awarding Appellants, Michael Cousins[1] and Founders Five, LLC d/b/a Sperry Van Ness Founders Group (hereinafter collectively, "Realtor Appellants"), a $250,000.00 commission on a real estate transaction in which Realtor Appellants represented no party and had no knowledge of until shortly before the transaction closed. Therefore, it is appropriate to set forth the standard for vacating an arbitration award.

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

[1] Appellant Cousins was the Broker-In-Charge of Sperry Van Ness.

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 CIRCUIT COURT CORRECTLY VACATED THE ARBITRATION PANEL'S AWARD.

For purposes of brevity, Respondents adopt and incorporate herein the arguments set forth in Respondents' Final Brief in Response to Brief of SCAR, filed on June 28, 2019 and received by the Court on July 1, 2019. Such prior arguments outline, in detail, why the Circuit Court was correct in vacating SCAR's arbitration panel award on the grounds that the panel manifestly disregarded South Carolina law in the award at issue in this case. In addition to the arguments adopted from Respondents' prior Final Brief, Respondents assert the following arguments in response to NAR's *amicus curiae* brief.

A. NAR's Policies and Procedures, As Well As the Actions of Realtors, Are Not Beyond Judicial Review and Are Subject to South Carolina Law.

In its *amicus curiae* brief, the NAR states the reviewing court erred in vacating the arbitration award and substituted its judgment for that of the arbitrator. However, rather than provide any support for such conclusion, the NAR's brief does nothing more than extol the virtues of arbitration and the NAR's own policies and procedures with regard thereto. Then, the NAR 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, and because courts generally favor arbitration, this arbitration award should not be overturned. 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, to protect arbitration decisions regardless of South Carolina law.

The NAR's position further thwarts the application of South Carolina law by 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 most narrow of standards,[2] while simultaneously arguing the NAR's procedures prohibit arbitrators from providing any bases for their rulings.[3] 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. The NAR's *amicus curiae* brief does not discuss the clear and express South Carolina law that governs real estate transactions in South Carolina. The NAR's entire argument is centered on arbitration decisions being allowed to stand regardless of that 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

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[2] NAR *Amicus Curiae* Brief, p. 7.
[3] Id. at p. 9.

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 frustrate the proper application of South Carolina law, and demonstrates why it is necessary to have a safeguard for the arbitration process. 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. Such statutory scheme contains express requirements for realtors regarding signed representation agreements and agency. Id. Appellant Michael 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. (Respondents' Final Brief In Resp. to SCAR, pp. 15-17). 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. (Audio of Arbitration Panel Hearing, 02:00:55-02:01:45). 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 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). This case is thus a clear example of an arbitration panel that manifestly disregard and/or perversely misconstrued South Carolina law in issuing its award.

Under NAR's position, however, 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 findings of fact included with the arbitration 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 upheld the lower court's ruling.

B. The NAR's Own Policy Manual Obligates State Realtor Associations to Establish Their Own Arbitration Procedures Consistent with Applicable State Law.

In its *amicus curiae* brief, the NAR argues extensively in support of the application of its policies and procedures with regard to arbitration. 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. 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 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 Respondents' Final Brief in Response to Brief of SCAR, filed on June 28, 2019 and received by the Court on July 1, 2019, and for the additional reasons

set forth herein, the Circuit Court did not err in vacating the Arbitration Panel's arbitration award. Therefore, Respondents respectfully request the Court reject NAR's arguments and uphold the Circuit Court's August 16, 2018 Order Vacating the Arbitration Panel's Award.

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December 1, 2020

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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' Response to National Association of REALTORS *Amicus Curiae* Brief and Proof of Service to counsel listed below this 1st day of December, 2020, with property postage attached thereto.

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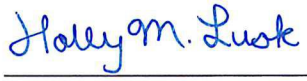

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December 1, 2020

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Re: Andrew Waldo; Jane Zheng; and SC Coast Properties, LLC d/b/a Keller Williams Realty, *Respondents* v. Michael Cousins; Founders Fiver, LLC d/b/a Sperry Van Ness Founders Group; and South Carolina Association of REALTORS, *Appellants*
APPELLATE CASE NO.: 2018-001590

Dear Ms. Kitchings:

Enclosed for filing please find Respondents' Response to National Association of Realtors® Amicus Curiae Brief in the above referenced matter. By copy of this letter as evidenced on the Proof of Service, I am serving counsel for Appellants with a copy of the above-referenced documents.

With kindest regards, I am

Yours very truly,

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

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