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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Honorable Cynthia Graham Howe, Master-In-Equity

Opinion No. 2021-UP-368 (S.C. Ct. App. Oct. 27, 2021)
Appellate Case No. 2018-001590

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

v.

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

RETURN TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Should this Court grant a writ of certiorari when none of the considerations governing review under Rule 242(b) of the South Carolina Appellate Court Rules are present and the petition fails to articulate any significant, similar reason for granting the writ?

STATEMENT OF THE CASE

This case regards the strong public policy interest favoring the finality of arbitration decisions. Petitioner Andrew Waldo (“Waldo”) and Respondent Michael Cousins (“Cousins”) are both real estate brokers. Waldo and Cousins dispute whether a commission is due to Cousins on certain real estate transactions involving golf courses. The dispute resulted in an arbitration award in favor of Cousins.

Waldo submitted an application to the Coastal Carolinas Association of REALTORS[®], and became a member of that association on August 15, 2014. (R. pp. 386–99). Waldo agreed to abide by the Rules, Regulations, and Code of Ethics of the National Association of REALTORS[®], the South Carolina Association of REALTORS[®], and the Coastal Carolinas Association of REALTORS[®] (collectively, the “Associations”). (R. pp. 386–99). The National Association of REALTORS[®] Code of Ethics requires arbitration between realtors in any dispute arising out of their real-estate practice. (R. pp. 365–67, 370–72). Likewise, the Bylaws and Rules of both the South Carolina Association of REALTORS[®] and the Coastal Carolinas Association also require arbitration. (R. pp. 370–77).

The dispute over the commission due on the underlying real estate transactions originally led Cousins, via his brokerage, Founders Five, LLC d/b/a Sperry Van Ness Founders Group (“Founders Five”), to sue Waldo’s brokerage, SC Coast Properties, LLC d/b/a Keller Williams Realty (“Keller Williams”), and its agent, Jane Zheng, in circuit court on March 20, 2015. (R. pp.

58–63). On September 28, 2015, Waldo initiated an arbitration before South Carolina Association of REALTORS® (the “Association”), seeking a determination that the commission need not be split with Cousins. (R. pp. 64–65). No party challenged the arbitration requirement or enforceability. Waldo voluntarily submitted to the arbitration process by filing his request for arbitration on September 28, 2015. (R. pp. 64–65). Cousins submitted an agreement to arbitrate on November 20, 2015. (R. p. 66). The arbitration hearing was conducted on February 2, 2016, and the arbiters ruled in favor of Cousins and awarded him \$250,000.00, one-half of the commission (“Arbitration Award”). (R. p. 18). The main issue concerned whether Cousins was entitled to any commission. At the conclusion of the arbitration hearing, Waldo admitted the hearing had been fair and that he had an adequate opportunity to testify, present evidence and witnesses, and conduct cross examination. (R. pp. 409–10).

On February 24, 2016, Waldo submitted a Request for Procedural Review to the Association. (R. pp. 67–68). Almost simultaneously, Waldo filed a Notice of Appeal with the circuit court on March 1, 2016, against both the Association and Cousins. (R. pp. 69–71). The Association issued an Official Notice of Procedural Review on March 14, 2016. (R. p. 379). After continuances were filed, the Procedural Review Hearing Tribunal met on May 2, 2016. (R. pp. 381–85). The hearing was not recorded, nor is there any requirement that the Procedural Reviewing Hearing be recorded. The rules of the Association require a tape recording of the arbitration hearing, or but specifically states the procedural review hearing will not be recorded or transcribed. (R. at 462). Ultimately, the Procedural Review Hearing Tribunal affirmed the award, which concluded the arbitration process. (R. p. 19). On May 17, 2016, Waldo, alongside the other Petitioners, filed a second Notice of Appeal against both the Association and Cousins, as well as

Founders Five. (R. pp. 83–87). The two appeals were consolidated and referred to the Horry County Master-In-Equity. (R. pp. 34–36).

On August 16, 2018, the Master-in-Equity entered an Order vacating the Arbitration Award and finding the Association prejudiced the Petitioners’ rights in failing to allow recording of the Procedural Review Hearing. (R. pp. 37–57). Both the Association as well as Cousins and Founders Five appealed. (R. pp. 165–66); *Waldo v. Cousins*, No. 2018-001590, 2021 WL 4979956, at *1 (S.C. Ct. App. Oct. 27, 2021), *reh’g denied* (Jan. 11, 2022) (noting both appeals). On appeal, the Court of Appeals of South Carolina found “[s]everal cases have upheld the division of real estate commissions without written agreements.” *Waldo v. Cousins*, 2021 WL 4979956, at *1. “Because these cases have not been clearly and explicitly overruled,” the Court of Appeals held these cases “provide at least ‘barely colorable justification’ for the Arbitration Panel’s award.” *Id.* Second, the Court of Appeals also held the Master-In-Equity erred in finding the Association prejudiced Petitioners’ rights in its failure to allow recording of the Procedural Reviewing Hearing. *Id.* at *2. There was no dissent in the decision by the Court of Appeals. *Id.* at *1–2. A rehearing was denied.

ARGUMENT

I. THE COURT OF APPEALS APPLIED THE CORRECT LEGAL STANDARD.

“South Carolina has a strong policy favoring resolution of disputes through alternative dispute resolution, including arbitration.” *C-Sculptures, LLC v. Brown*, 403 S.C. 53, 56, 742 S.E.2d 359, 360 (2013). The legal standard in reviewing an arbitration award is whether “the arbitrator exceeds his or her powers and/or manifestly disregards or perversely misconstrues the law.” *Id.* (quoting *Gissel v. Hart*, 382 S.C. 235, 241, 676 S.E.2d 320, 323 (2009)). This standard incorporates the strong policy preference in favor of arbitration results, and the Court of Appeals

applied this standard. *Waldo v. Cousins*, 2021 WL 4979956, at *1. Because the Court of Appeals applied the correct legal standard, Petitioners must resort to other arguments, none of which support granting certiorari.

II. PETITIONERS HAVE NOT RAISED A SUFFICIENT BASIS UNDER RULE 242(b) TO WARRANT A WRIT OF CERTIORARI.

Petitioners present six different questions for review. None of the questions presented, however, meet any of the standards in Rule 242(b) warranting a writ of certiorari. Therefore, the Petition for Writ of Certiorari should be denied.

“A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons.” Rule 242(b), SCACR. There are five grounds that indicate the “character of reasons” for the South Carolina Supreme Court to grant certiorari:

- (1) Where there are novel questions of law.
- (2) Where there is a dissent in the decision of the Court of Appeals.
- (3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.
- (4) Where substantial constitutional issues are directly involved.
- (5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

Id. Although Petitioners have not asserted the applicability of subparagraphs (2) through (5), it is important to note that none of these grounds are present. First, there was no dissenting opinion in the Court of Appeals’ decision. *Waldo v. Cousins*, 2021 WL 4979956, at *1–2. Next, the Court of Appeals’ decision does not conflict with any prior Supreme Court decision. *Id.* Further, this case is resolved by common law and statutory law; no constitutional issues are involved, much less *substantial* constitutional issues. *Id.* Lastly and likewise, no federal question is presented and there is no conflict with a decision of the United States Supreme Court. *Id.* The Associations

argued the applicability of the Federal Arbitration Act (FAA) at every stage of this case as an alternative basis to confirm the Arbitration Award. (R. pp. 77, 99, & 156–58; Final Br. of Appellant S.C. Ass’n of REALTORS® at 7, 12–13, & 21–24). Waldo does not deny that the FAA standard of review would be even more favorable to the Associations and Cousins and resulting in reversal of the court below. *MCI Constructors, LLC v. City of Greensboro*, 610 F.3d 849, 857 (4th Cir. 2010); *Apex Plumbing Supply, Inc. v. U.S. Supply Co., Inc.*, 142 F.3d 188, 193 (4th Cir. 1998). Regardless, no federal question is presented, and none of the reasons in subparagraphs (2) through (5) favor or justify this Court granting certiorari in this case.

Instead, Petitioners rely upon subparagraph (1) to warrant certiorari. (Petition, p. 8). However, no novel questions of law have been presented either. As the Court of Appeals found—“after careful consideration of the petition for rehearing”—there was no material fact or principle of law that was either overlooked or disregarded. (Order, p. 1). Nevertheless, each of Petitioners’ questions presented will be analyzed in turn, albeit in different order.

A. Question Presented #2, 4, 5, and 6 State No Basis for Certiorari Review.

Four out of six questions presented concern whether the Court of Appeals erred in applying the law to the facts. None of the questions presented raise a novel question of law. Instead, the questions presented seek to re-litigate the application of the law to the facts. Even assuming *arguendo* the Court of Appeals erred in applying the law to the facts—which is denied by Respondents—such errors do not create a novel question of law. As previously held, the Supreme Court “will not generally accept matters on a writ of certiorari that can be entertained in the trial court or on appeal.” *In re Breast Implant Prod. Liab. Litig.*, 331 S.C. 540, 543 n.2, 503 S.E.2d 445, 447 n.2 (1998). The four questions presented are as follows:

2. Should the Court grant certiorari to consider whether the Court of Appeals erred in reversing the Master-in-Equity’s finding that the

South Carolina Association of REALTORS®' Arbitration Panel manifestly disregarded South Carolina law in awarding a \$250,000.00 commission to Appellant Cousins in the absence of any written agreement evidencing his right to such commission?

...

4. Should the Court grant certiorari to consider whether the Court of Appeals erred in failing to consider or render a decision regarding Petitioners' law-of-the-case doctrine, *res judicata*, and collateral estoppel arguments?

5. Should the Court grant certiorari to consider whether the Court of Appeals erred in reversing the Master-in-Equity's finding that the South Carolina Association of REALTORS® prejudiced Petitioners' rights in the manner of its award?

6. Should the Court grant certiorari to consider whether the Court of Appeals erred in reversing the Master-in-Equity's finding that the South Carolina Association of REALTORS® prejudiced Petitioners' rights by its failure to allow recording of the Procedural Review Hearing, where such failure insulates the Association's arbitration panel from review of its decisions and compliance with South Carolina law?

(Petition, pp. 2–3).

In support of Question Presented #2, Petitioners argue on the facts: “It is nearly impossible to imagine a scenario that more clearly evidences a manifest disregard of the law. To find, under this set of facts, that a manifest disregard of the law did not occur, effectively guts the manifest disregard standard and places arbitration awards beyond judicial review.” (Petition, p. 15). Petitioners fail to demonstrate how the Court of Appeals' treatment of the facts, using the applicable “manifest disregard” standard, presents a novel question of law. Because Petitioners here are merely arguing facts, this Court should refuse to grant certiorari on this question presented.

Regarding Question Presented #4, it is quite clear from the Court of Appeals' opinion why it did not render a decision regarding these arguments from Petitioners: it “need not address the

remaining issues as the prior issues are dispositive.” *Waldo v. Cousins*, 2021 WL 4979956, at *2, n.1 (citing *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999)). Ruling on prior, dispositive issues, does not create a novel question of law. An appellate may dispose of a case without addressing all issues raised by the parties, when the disposition of an issue is dispositive. *See, e.g., Futch*, 335 S.C. at 613, 518 S.E.2d at 598; *Whiteside v. Cherokee County School Dist. No. One*, 311 S.C. 335, 428 S.E.2d 886 (1993). Therefore, Petitioners have not raised a sufficient reason for this Court to grant certiorari on this question presented.

Petitioners argue in support of Question Presented #5 that the Arbitration Panel failed to include findings of fact and conclusions of law in its Arbitration Award. (Petition, pp. 20–21). However, Petitioners have not cited to any legal authority requiring, or even suggesting, the Arbitration Panel must include such findings and conclusions. If there is no express requirement for the Association to include such findings and conclusions, then it is axiomatic there can be no prejudice if the Association does not include such findings and conclusions. The standard is the opposite of what Petitioners argue. “Arbitrators need not specify their reasoning or the basis of the award so long as the factual inferences and the conclusions supporting the award are ‘barely colorable.’” *Pittman Mortg. Co., Inc., v. Edwards*, 327 S.C. 72, 76–77, 488 S.E.2d 335, 338 (1997) (citing *Batten v. Howell*, 300 S.C. 545, 549, 389 S.E.2d 170, 172 (Ct. App. 1990)). Thus, Petitioners’ arguments on this ground are without merit.

Petitioners’ failure under Question Presented #6 is very similar to the prior question presented, in that Petitioners have not cited to any legal authority requiring, or even suggesting, the Arbitration Panel must record the Procedural Review Hearing (as opposed to an evidentiary hearing, wherein recordings are allowed under S.C. Code Ann. § 15-48-50(d)). Because

Petitioners are again re-litigating the application of the law to the facts, they have failed to demonstrate a novel question of law, warranting the denial of certiorari on this question presented.

B. Questions Presented #1 and 3 On Their Face Fail to Establish Any Conflict Between Cases or Writ Statutes.

These two questions presented differ from the four discussed above. They do not complain of a misapplication of law to the facts. Instead, they attempt to create a conflict of law, to create a fictitious novel question of law. Both questions presented fail.

Question Presented #1 reads as follows:

1. Should the Court grant certiorari to consider whether the Court of Appeals' Opinion is contrary to the South Carolina General Assembly's requirement that a realtor have a written agency agreement before being entitled to a real estate commission?

(Petition, p. 2). Petitioners argue that the Court of Appeals' decision conflicts with South Carolina Code Ann. §§ 40-57-5 to -810, which require a written agreement before being entitled to a real estate commission. However, Petitioners fail to acknowledge that the Court of Appeals reviewed an arbitration award. Its task was *not* to take a position necessarily on the merits of whether South Carolina law requires a realtor to have a written agency agreement before being entitled to a real estate commission. Rather, the Court of Appeals was tasked with determining whether the Arbitration Panel exceeded its powers and/or manifestly disregarded or perversely misconstrued the law. The Court of Appeals undertook the requisite review and stated: "Factual and legal errors by arbitrators do not constitute an abuse of powers, and *a court is not required to review the merits of a decision* so long as the arbitrators do not exceed their powers." *Waldo v. Cousins*, 2021 WL 4979956, at *1 (emphasis added) (quoting *Grp. III Mgmt., Inc. v. Suncrete of Carolina, Inc.*, 425 S.C. 141, 153, 819 S.E.2d 781, 787 (Ct. App. 2018)).

More specifically, Petitioners attempt to create a conflict of law between South Carolina Code Annex §§ 40-57-5 to -810, which became effective on January 1, 1998, and two cases preceding this statutory regime: *Batten v. Howell*, 300 S.C. 545, 389 S.E.2d 170 (Ct. App. 1990), and *Hackler v. Earl Wiegand Real Estate, Inc.*, 295 S.C. 396, 368 S.E.2d 686 (Ct. App. 1988). These two cases stand for the proposition that an oral or implied agreement can entitle a broker to a commission, which Petitioners argue cannot stand in light of the later-enacted statutes. Again, however, the Court of Appeals decision in this case did *not* take a position on whether South Carolina Code §§ 40-57-5 to -810 overrule *Batten* and *Hackler*, or whether the latter two cases still constitute good law. Instead, the Court of Appeals only needed to review whether there was a “barely colorable justification” for the Arbitration Panel’s award. *Waldo v. Cousins*, 2021 WL 4979956, at *1 (quoting *Grp. III Mgmt.*). Had a South Carolina court analyzed and ruled upon the continuing viability of *Batten* and *Hackler* in light of South Carolina Code §§ 40-57-5 to -810, the merits of Petitioners’ arguments and the underlying procedural posture would be different—that did not happen in this case. Thus, even to the extent there might be some conflict between the *Batten/Hackler* case law and South Carolina statutory law, review of that issue was not before the Court of Appeals, not ruled on by the trial court, and, therefore, it is not before this Court at this time. Certiorari should be denied on this question presented as well.

Question Presented #3 reads as follows:

3. Should the Court grant certiorari to consider whether the Court of Appeals’ Opinion is inconsistent with a previous unpublished Court of Appeals opinion entered in 2013, where the Court of Appeals held that a realtor cannot recover any compensation in a real estate transaction in the absence of a written agreement?

(Petition, p. 2). Petitioners attempt to create a conflict between the Court of Appeals decision in this case and an earlier unpublished Court of Appeals case. (Petition, pp. 15–16) (citing *King v.*

Bennett, No. 2013-UP-459, 2013 WL 8541636, at *1 (S.C. Ct. App. Dec. 11, 2013)). Under this Court's rules, *King* created no precedent. Rule 268(d)(2), SCACR ("Memorandum opinions and unpublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved."). The Court of Appeals' opinion in this case is also unpublished. As neither case has precedential effect, this Court cannot resolve a conflict between panels of the Court of Appeals. Further, when read the cases do not present the same issue—*King* involved a real estate professional's claim for compensation against a seller of real estate in court; this case involves an arbitration between two real estate professionals. Therefore, certiorari should be denied on this ground.

III. PETITIONERS HAVE FAILED TO DEMONSTRATE HOW THIS CASE WILL SIGNIFICANTLY AFFECT REALTORS' COMPLIANCE WITH SOUTH CAROLINA LAW AND THE STANDARD FOR VACATING ARBITRATIONS IN SOUTH CAROLINA.

Petitioners also argue the outcome of this case "will significantly affect realtors' compliance with South Carolina law and the standard for vacating arbitrations in South Carolina." (Petition, p. 8). Importantly, this rationale is *not* one of the express standards listed in Rule 242(b). To be sure, the reasons provided in Rule 242(b) are "neither controlling nor fully measuring the Supreme Court's discretion or power to grant review in general." Rule 242(b), SCACR. However, from a legal standpoint, the express standards in Rule 242(b) exemplify when there might be a significant effect for South Carolinians and for the legal standards in the state. Petitioners do not attempt to demonstrate how their "significant effect" standard is similar with any of the listed standards in Rule 242(b). Further, from a factual standpoint, Petitioners also fail to establish there would be a significant effect. After all, the Court of Appeals' decision is an unpublished one, which, as previously discussed, holds no precedential value.

Had the decision affirmed the trial court, there might be a basis to argue the decision would change the real estate profession. The arbitration process of the Associations has for over five decades resulted in quick, inexpensive resolution of disputes between real estate professionals regarding commissions. The existence of a possibility to litigate again in court after losing in an arbitration, the true relief Petitioners seek, would completely undermine the effectiveness and cost of the arbitration process.

Petitioners conclusory allegations of a slippery slope not proven anywhere in the records do not support granting certiorari.

CONCLUSION

Based on the foregoing, Respondent South Carolina Association of REALTORS® respectfully request the Court to deny the petition for a writ of certiorari.

Respectfully submitted,

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