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**S.C. SUPREME COURT**

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

**Unpublished Opinion No. 2021-UP-368 (S.C. Ct.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.

**REPLY TO RESPONDENT SOUTH CAROLINA ASSOCIATION OF REALTORS’  
RETURN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI**

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## ARGUMENT IN REPLY

Petitioners, Andrew Waldo, Jane Zheng, and SC Coast Properties, LLC d/b/a Keller Williams Realty, hereby submit this Reply to Respondent South Carolina Association of Realtors' ("SCAR") Return in Opposition to Petitioners' Petition for Writ of Certiorari to review Unpublished Opinion No. 2021-UP-368 of the Court of Appeals. In its Return, Respondent SCAR has failed to demonstrate why this Court should not grant certiorari on the grounds set forth in Petitioners' Petition for Writ of Certiorari. Contrary to Respondent SCAR's arguments, this case is appropriate for consideration by the South Carolina Supreme Court, pursuant to Rules 242(b)(1), (2), and (3), of the South Carolina Appellate Court Rules ("SCACR") and Rule 242(b), SCACR, generally, as is shown in Petitioners' Petition for Writ of Certiorari and will be shown herein.

Moreover, Respondent SCAR's Return only further demonstrates the need for this Court's review, as Respondent SCAR's Return effectively argues SCAR's arbitration panel should be placed beyond judicial review and South Carolina law need not be considered on appeal of an arbitration decision. Like its prior briefs in this matter, Respondent SCAR's Return makes clear Respondent SCAR simply does not believe its arbitration panel should be required to comply with South Carolina's comprehensive statutory scheme governing the real estate profession.

1. **This Case Presents Novel Questions of Law Ripe for the Supreme Court's Consideration Pursuant to Rule 242(b)(1), SCACR.**

The issues Petitioners present in their Petition for Writ of Certiorari are clearly and unequivocally encompassed under Rule 242(b)(1), SCACR. Rule 242(b)(1), SCACR, states the Supreme Court may grant a writ of certiorari where there are novel questions of law. This case involves one question encompassing all of the issues herein, which is whether common law that

directly conflicts with South Carolina’s comprehensive statutory scheme governing the real estate profession, and was decided well-prior to the enactment of such scheme, has been overruled.

Petitioners’ Petition for Writ of Certiorari outlines, in detail, Petitioners’ argument that such common law has been both expressly and impliedly overruled by the enactment of South Carolina Code Annotated Section 40-57-5, et. seq. Petitioners will not belabor this point. However, it is important to reiterate that South Carolina’s General Assembly enacted a specific statute, South Carolina Code Annotated Section 40-57-137(Q), which requires written buyer and seller knowledge and consent to any compensation/commission split, and such statute provides that its provisions ***supersede contradicting common law***. See S.C. Code Ann. § 40-57-137(Q) (“The provisions of this section which are inconsistent with applicable principles of common law supersede the common law...”) (emphasis added). Here, SCAR’s arbitration panel awarded a commission to Respondent Cousins, who did not represent any party to the subject real estate transaction and did not obtain written buyer or seller knowledge or consent to such compensation/commission.<sup>1</sup> Despite the foregoing, the Court of Appeals’ Opinion holds that common law allowing oral representation agreements, decided prior to the enactment of South Carolina’s statutory scheme governing real estate transactions, which conflicts with such statutory law, renders Respondent SCAR’s arbitration panel’s decision at least “barely colorable” under the law. Waldo, et. al. v. Cousins, et. al., Unpub. Op. 2021-UP-368, at p. 3 (S.C. Ct. App. dated Oct. 27, 2021). This creates a novel issue necessary for the Supreme Court to address – whether South Carolina Code Annotated Sections 40-57-5, et. seq. overrule common law that conflicts with such

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<sup>1</sup> Respondent Cousins admittedly did not even have any knowledge of the subject real estate transaction until shortly before the closing occurred. (R. pp. 337-338) (wherein Respondent Cousins emails Petitioner Jane Zheng stating “I do not understand what is happening here. What is the 13 [golf course] deal you refer to with Bob?”).

statutory scheme and whether realtors can have oral commission agreements pursuant to Court of Appeals' decisions in direct contravention of South Carolina statutory law.<sup>2</sup>

2. **The Court of Appeals Has Issued A Prior Opinion That Directly Conflicts With Its Opinion In This Matter, Which Renders This Case Ripe for the Supreme Court's Consideration In a Manner Substantially Similar to Those Scenarios Set Forth In Rules 242(b)(2) and (3), SCACR.**

Rule 242(b)(2), SCACR, states the Supreme Court may grant a writ of certiorari where there is a dissent in the decision of the Court of Appeals. Rule 242(b)(3), SCACR, states the Supreme Court may grant a writ of certiorari where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court. While neither of these grounds for granting a writ of certiorari presents the exact factual scenario in this case, this case is appropriate for consideration for reasons substantially similar to those set forth in Rule 242(b)(2) and (3), SCACR.

There was no dissent in the Court of Appeals' October 27, 2021 opinion. However, in 2013, under a similar set of facts, the Court of Appeals issued an opinion that conflicts with its October 27, 2021 Opinion in this matter. Petitioners' Petition for Writ of Certiorari, and briefings in the Court of Appeals, discuss this comparable case, King v. Bennett, No. 2013-UP-459, 2013 WL 8541636, 2013 S.C. App. Unpub. LEXIS 563 (S.C. Ct. App. Dec. 11, 2013), in detail. For purposes of brevity, Petitioners will not rehash those details herein. However, it is important to note that the Court of Appeals held, in King, that a realtor cannot recover any compensation in the absence of a written agreement. See King v. Bennett, No. 2013-UP-459, 2013 WL 8541636, 2013

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<sup>2</sup> Additionally, the questions Petitioners have presented to the Supreme Court regarding the inclusion of findings of fact and conclusions of law within an arbitration award and regarding the recording of SCAR's Procedural Review Hearing are also novel. Petitioners will not belabor these issues, as they are briefed in detail within Petitioners' Petition. However, it is worth repeating that it is not only necessary, but crucial, that these issues be considered. If an arbitration panel does not include any bases for its decision within such decision and then, in appellate proceedings where such bases may be disclosed verbally to the parties, the reviewing board prohibits recording or transcription of the appellate proceedings, an appealing party is prejudiced in its ability to demonstrate evidence of what has occurred. Moreover, a reviewing court is significantly deprived of its ability to make a determination regarding whether the arbitrators manifestly disregarded the law in reaching their decision.

S.C. App. Unpub. LEXIS 563, at \*1 (S.C. Ct. App. Dec. 11, 2013). The Court of Appeals' Opinion in this case holds the exact opposite, allowing the award of a commission where a realtor obtained no written agreement with any party to the subject real estate transaction. As a result, conflicting Court of Appeals decisions exist in the state.

Petitioners acknowledge this conflicting opinion is not a Supreme Court decision, which would trigger application of Rule 242(b)(3), SCACR. However, it is still important to consider that a conflict exists between South Carolina common law and the Court of Appeals' Opinion in this case, resulting in significant confusion regarding whether realtors must comply with South Carolina statutory law, or whether they may be allowed to skirt the rules because of outdated common law, as was greenlighted by Respondent SCAR's arbitration panel's award of a commission in manifest disregard of such statutory law.

3. **The Supreme Court Should Grant Petitioner's Petition For Writ of Certiorari Because The Issues At Stake In This Case Are Extremely Important to the Practice of Real Estate In South Carolina and Will Highly Impact South Carolina Realtors and Citizens.**

Rule 242(b), SCACR, provides that a writ of certiorari is a matter of sound judicial discretion that may be granted where there are "special and important reasons." Although Rule 242(b), SCACR, does provide five (5) specific grounds upon which a writ of certiorari may be granted, the Rule states that such grounds are neither controlling, nor fully measuring the Supreme Court's discretion or power to grant review in general. Rule 242(b), SCACR. When reviewed in its entirety, Rule 242(b), SCACR, does not limit the Supreme Court's discretion to grant a petition for writ of certiorari to only the five (5) grounds listed within the rule; rather, the Rule allows the Supreme Court, in its sound discretion, to grant a writ of certiorari, as it deems necessary, depending upon the circumstances of each case. See Id.

Here, it is imperative the Supreme Court grant Petitioner’s Petition for Writ of Certiorari because, if not reversed, the Court of Appeals’ Opinion will establish a dangerous precedent that licensed realtors do not have to comply with South Carolina’s statutory law governing the real estate profession, as codified in South Carolina Code Annotated Section 40-57-5, et. seq. As discussed in detail within Petitioners’ Petition for Writ of Certiorari, the Court of Appeals’ Opinion takes the position that case law decided *prior* to the enactment of South Carolina’s overhauled statutory scheme, wherein oral commission agreements were upheld at that time, is somehow still valid even though such case law directly conflicts with present South Carolina statutory law.<sup>3</sup> Waldo, et. al. v. Cousins, et. al., Unpub. Op. 2021-UP-368, at p. 3 (S.C. Ct. App. dated Oct. 27, 2021). In doing so, the Court of Appeals excuses Respondent SCAR’s arbitration panel’s manifest disregard for applicable South Carolina statutory law in awarding a real estate commission to a realtor who admittedly violated such law in failing to obtain any written agreement with any party to the real estate transaction at issue. If allowed to stand, the Court of Appeals’ Opinion will set a precedent that realtors do not have to comply with South Carolina’s statutory law and such realtors may still obtain real estate commissions. This harms both South Carolina realtors and the very citizens South Carolina’s comprehensive statutory scheme seeks to protect. See S.C. Code Ann. § 40-57-10 (“The purpose of this commission is to regulate the real estate industry so as to protect the public’s interest when involved in real estate transactions.”).

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<sup>3</sup> Petitioners incorporate herein all arguments set forth within their Petition for Writ of Certiorari concerning why the Court of Appeals erred in reversing the Master’s decision in this matter. Despite Respondent SCAR’s arguments to the contrary, it is extremely important that the underlying law in this case be analyzed in conjunction with the standard for vacating an arbitration award. If such underlying law is not considered, it begs the question of how any court can determine whether an arbitrator has manifestly disregarded the law applicable to the questions at issue. Any arguments made by Respondent SCAR asserting that the underlying law need not or should not be considered only further demonstrate Respondent SCAR’s ultimate goal of placing its arbitration panels beyond judicial review such that they are free to do as they please, without recourse, and without regard to the statutory law enacted by the State of South Carolina.

To argue no harm will come from the Court of Appeals' Opinion is to argue that the South Carolina legislature had no purpose in establishing the comprehensive real estate statutory scheme to begin with. This argument is especially confounding in light of the fact that South Carolina's General Assembly enacted South Carolina Code Annotated Section 40-57-137(Q), which expressly states that the statutory law supersedes contradicting common law. See S.C. Code Ann. § 40-57-137(Q) (emphasis added). The statutory scheme requires written agreements between realtors and the parties they represent, which outline the terms of such representation, in order for a realtor to be entitled to a commission. See S.C. Code Ann. § 40-57-5, et. seq. The purpose of the statutory scheme is plain and clear – it was meant to protect the public from the very scenario in this case, where a realtor who admittedly does not represent any party to a real estate transaction, and has no written agreement with any party, claims a right to a commission for the transaction.

Moreover, the Court of Appeals' Opinion significantly affects the standard for vacating an arbitration award. The fact that South Carolina statutory law contains a manifest disregard standard indicates arbitrators are not meant to have free rein to completely disregard South Carolina law in reaching their decisions. In this case, Respondent SCAR's arbitration panel Chairman expressly admitted the panel should disregard applicable state statutory law in reaching a decision. (Audio of Arbitration Panel Hearing, 02:00:55-02:01:45). This case thus presents an exceptionally clear example of a manifest disregard for the law in rendering an arbitration decision. As stated in Petitioners' Petition, to find that the arbitration panel did not manifest disregard the law in this case effectively renders South Carolina's "manifest disregard of the law" standard for vacating an arbitration insurmountable.

Respondent SCAR's Return attempts to characterize Petitioners as individuals and an entity that are angry about having to arbitrate a real estate dispute. That is simply untrue.

Petitioners followed Respondent SCAR's rules regarding arbitration. Petitioners are the ones who reminded Respondents, *after Respondents initiated litigation concerning the issues in dispute*, that the parties were required to arbitrate, not litigate their dispute. (R. pp. 64-65). However, submitting to arbitration does not render the parties in this case exempt from compliance with South Carolina law, nor does it prohibit Petitioners from appealing an award that is in direct conflict with South Carolina law.<sup>4</sup> Nonetheless, since the very first brief Respondents have filed in this case, Respondents have sought to shield SCAR's arbitration panel from *any* review. Placing any individual or body beyond judicial review is dangerous and encourages lawlessness.

In sum, the underlying law in this case *does matter*, no matter how strongly Respondent SCAR may argue it does not. Without review and clarification of this Court, conflicting decisions will remain standing, the Court of Appeals' October 27, 2021 Opinion will indicate a public policy that realtors do not have to comply with South Carolina statutory law in order to receive commissions in real estate transactions, and the very purpose of the South Carolina legislature's enactment of a comprehensive statutory scheme governing the real estate profession will be thwarted.

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<sup>4</sup> Respondent SCAR has repeatedly argued Petitioner Waldo acknowledged the arbitration hearing was conducted fairly. (Respondent SCAR's Return, p. 2). However, Respondent consistently misrepresents Petitioner Waldo's statement in that regard. Towards the end of the arbitration hearing, the arbitration panel asked, "Do each of you feel that this hearing has been conducted fairly?" (Audio of Arbitration Panel Hearing, 2:26:26 – 2:27:10). In response, Petitioner Waldo stated, "I do believe that agency does play a part in this discussion so, I, uh, *other than that I feel like it was*. But I feel that that is a large part of what we do as real estate agents and a big part of the National Association of Realtors following the ethics standards and practices so in my opinion that is a large part of it..." (*Id.*) (emphasis added). Petitioner Waldo thus emphasized the importance of the arbitration panel considering South Carolina statutory law in reaching its decision and stated he felt the hearing had been fair with the exception of the panel's disregard for such statutory law. (*See Id.*).

For the reasons set forth herein and in Petitioners' Petition for Writ of Certiorari, Petitioners respectfully request the Supreme Court grant their Petition for Writ of Certiorari in this case and reverse the Court of Appeals' October 27, 2021 Opinion.

Respectfully submitted,

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