

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Appeal from Horry County
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

Case No. 2015-CP-26-05573
Court of Appeals Case No. 2018-002009
Unpublished Opinion No. 2021-UP-454 (S.C. Ct. App. filed Dec. 22, 2021)
Supreme Court Case No. 2022-000498

K.A. Diehl and Associates, Inc.,

Respondent,

v.

James Perkins, Colleen Franke a/k/a Colleen Franke Perkins,
Mark Dos Santos, William Moore, Steven Dame
and Errol Dos Santos,

Defendants,

Of whom Mark Dos Santos is the

Petitioner.

REPLY TO RETURN TO PETITION FOR A WRIT OF CERTIORARI

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ARGUMENT IN REPLY1

1. K.A. Diehl’s first argument (that no special and important reasons exist to justify granting certiorari) is really no argument at all.1

2. Contrary to K.A. Diehl’s assertion, Mr. dos Santos’s view of Rule 43(k) is not “extreme” but rather extremely simple and exactly in accord with the very purpose of the rule (which is to avoid uncertainty) and the directives of the relevant precedent.3

CONCLUSION6

In further support of his petition for a writ of certiorari, Mr. dos Santos¹ makes the following points in reply to K.A. Diehl's return to the petition.

ARGUMENT IN REPLY

1. K.A. Diehl's first argument (that no special and important reasons exist to justify granting certiorari) is really no argument at all.

Why is it that the first thing K.A. Diehl wants is for the Court to ignore the merits? Simple. Because the last thing it wants is for the Court to reach them.

What K.A. Diehl is saying here is more like a suggestion than an actual argument. In essence, what K.A. Diehl is saying here is, "You know, you don't *have* to take this case." This is a good point as far as it goes (i.e., it is legally correct), but it does not go far—nor should it.

As Rule 242(b), SCACR, makes expressly clear, "A writ of certiorari is not a matter of right, but of sound judicial discretion" To be sure, the Court is empowered to deny this or any other cert petition for no reason at all, merits be darned. In practice, however, it does not appear as though the Court is in the habit of turning a blind eye to erroneous results for no better reason than because it can. To the contrary, it appears that, where prejudicial error is duly shown, the Court will not hesitate to correct it, even when no precedential value is to be gained by doing

¹ Shorthand references already defined in Mr. dos Santos's petition are continued in this reply (e.g., "Mr. dos Santos" is Defendant/Petitioner, Mark dos Santos, identified in the case caption as "Mark Dos Santos," and "K.A. Diehl" is Plaintiff/Respondent, K.A. Diehl and Associates, Inc.).

so. *See, e.g., Sheep Island Plantation, LLC v. Bar-Pen Investments, LLC*, Memorandum Op. No. 2012-MO-055, 2012 WL 10907981 (S.C. Sup. Ct. filed Dec. 19, 2012) (reversing, via unpublished memorandum opinion, error in the Court of Appeals’ Unpublished Op. No. 2010-UP-382, 2010 WL 10080192 (S.C. Ct. App. filed Aug. 4, 2010)). The fact that this Court regularly issues unpublished memorandum opinions, which, of course, have no precedential value, and indeed the very existence of Rule 220(b)(1), SCACR (restricting unpublished memorandum opinions to circumstances where a published opinion would have no precedential value), shows that, as the ultimate custodian of our state’s judicial system, the Court’s interests are not confined solely to the development of our law-giving jurisprudence, but in fact encompass a broader concern for the quality of justice that the system produces. The lack of reference to—or even the existence of—a reason(s) set forth in Rule 242(b)(1)–(5) does not doom a cert petition. Indeed, Rule 242(b) itself makes clear that these reasons are by no means exhaustive, as they “neither control[] nor fully measure[] the Supreme Court’s discretion or power to grant review”

2. Contrary to K.A. Diehl’s assertion, Mr. dos Santos’s view of Rule 43(k) is not “extreme”² but rather extremely simple and exactly in accord with the very purpose of the rule (which is to avoid uncertainty) and the directives of the relevant precedent.

Again, as explained in Mr. dos Santos’s petition, for there to be a binding settlement agreement, there must be strict compliance with Rule 43(k)—*substantial compliance is not sufficient*. As this Court has explained, the terms of Rule 43(k) are *plain*³ and *mandatory*,⁴ their intended purpose is “to prevent disputes as to the *existence* and terms of agreements regarding pending litigation,”⁵ and they cannot be vitiated by turning to contract or equitable principles (or counter public policy arguments); nor by substantial compliance. *Id.* at 521, 846 S.E.2d at 867 (“Where Rule 43(k) applies, this Court has held its terms are mandatory, which precludes a party from turning to contract or equitable principles (or counter public policy arguments) to vitiate those terms. Substantial compliance is not sufficient. The purpose of Rule 43(k) and its predecessors is the avoidance of uncertainty.”).

It does not suffice to comply with Rule 43(k) for Mr. dos Santos’s attorney to sign the settlement agreement on his behalf because he supposedly had Mr. dos

² (Return p. 8.)

³ *Farnsworth v. Davis Heating & Air Conditioning, Inc.*, 367 S.C. 634, 638, 627 S.E.2d 724, 726 (2006) (“[Rule 43(k)] is plainly worded: “No agreement . . . shall be binding unless” one of the . . . requirements is met.”).

⁴ *Buckley v. Shealy*, 370 S.C. 317, 322, 635 S.E.2d 76, 78 n.2 (2006) (“Rule 43(k)’s terms are mandatory . . .”).

⁵ *S.C. Human Affairs Comm’n v. Chen*, 430 S.C. 509, 519, 846 S.E.2d 861, 866 (2020) (emphasis added).

Santos’s permission to do so. Proper Rule 43(k) analysis leaves no room for any consideration of whether Mr. dos Santos’s name was signed on the settlement agreement with or without permission. To impose any evidentiary burden on Mr. dos Santos (or even engage in any inquiry) in this regard would plainly frustrate the clarifying purpose (the avoidance of uncertainty) that Rule 43(k) seeks achieve (the requirements of rule being designed to eliminate the need disputes as to the existence of settlement agreements). Moreover, even assuming, *arguendo*, that Mr. dos Santos’s name was signed on the settlement agreement with permission, to allow such surrogacy to satisfy Rule 43(k) is to turn to improper principles to vitiate the “mandatory”⁶ nature of its terms. *Chen*, 430 S.C. at 521, 846 S.E.2d at 866.

It does not suffice to comply with Rule 43(k) for Mr. dos Santos’s attorney to sign the settlement agreement on his behalf because of any agency relationship attendant to the attorney-client relationship. The language in Rule 43(k) allowing for a settlement agreement to be binding if “signed by the parties and their counsel” was added via a 2009 amendment to the South Carolina Rules of Civil Procedure. *See Smith v. Fedor*, 422 S.C. 118, 125, 809 S.E.2d 612, 615 (Ct. App. 2017). In this regard, the plain and unambiguous language of the rule (as well as of the Note to the 2009 Amendment) expressly requires both all *parties and their counsel* to sign an

⁶ *Buckley*, 370 S.C. at 322, 635 S.E.2d at 78 n.2 (“Rule 43(k)’s terms are mandatory . . .”).

agreement before it is binding. To deem this provision of Rule 43(k) satisfied by an attorney's signature "on behalf of" the client as agent is to effectively rewrite the rule so as only to require counsel's signature. The attorney for a party will of course always be the party's agent. Consistent with its purpose—which is "to prevent disputes as to the existence and terms of agreements regarding pending litigation"⁷—the Rule 43(k) plainly calls for the "belt and suspenders" approach here, i.e., it calls for the agreement (if it is to be binding) to be signed for *both* by the party's counsel *and* by the party themselves. Here again, to allow such surrogacy to satisfy Rule 43(k) is to turn to improper principles to vitiate the "mandatory"⁸ nature of its terms. *Chen*, 430 S.C. at 521, 846 S.E.2d at 866.⁹

⁷ *Chen*, 430 S.C. at 519, 846 S.E.2d at 866; *see also id.* at 521, 846 S.E.2d at 867 ("The purpose of Rule 43(k) and its predecessors is the avoidance of uncertainty.").

⁸ *Buckley*, 370 S.C. at 322, 635 S.E.2d at 78 n.2 ("Rule 43(k)'s terms are mandatory . . .").

⁹ Mr. dos Santos would note here that K.A. Diehl's argument (in footnote 2 on page 9 of its return) about his (Mr. dos Santos's) view of Rule 43(k) supposedly eviscerating Rule 6(b), SCADR, which permits parties to attend mediation in some way other than being physically present, is clearly mistaken, as K.A. Diehl plainly overlooks the widespread availability of technology allowing for remote parties to transmit signatures electronically.

CONCLUSION

For the foregoing reasons, in addition to those already set forth in his petition, Mr. dos Santos asks this Honorable Court to grant the instant petition, reverse the Subject Opinion, render its own decision finding that the settlement agreement is unenforceable and reversing the trial court's enforcement thereof, and remanding this case to the trial court for further proceedings consistent with the same.

Respectfully submitted,
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