THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM HORRY COUNTY
Court of Common Pleas



William H. Seals, Jr., Circuit Court Judge

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**Case No. 2016-CP-26-00674**
**Case No. 2016-CP-26-00743**
**Case No. 2016-CP-26-00744**
**Appellate Case No. 2018-000041**

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Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, on behalf of themselves and all other similarly situated, Plaintiffs,

v.

The Myrtle Beach resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Walter Jordan, Wayne Urban, Ken Perkins, and John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc., Defendants,

And

Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, and Errol Dos Santos, and Jeffrey Richardson, on behalf of themselves and all other similarly situated, Plaintiffs,

v.

K.A. Diehl and Associates, Inc., The Myrtle Beach resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Walter Jordan, Ken Perkins, and John Doe past board directors of The Myrtle Beach Resort Homeowners Association, Inc., Defendants,

And

Jim Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, Errol Dos Santos, and Jeffrey Richardson, individually in their capacity as derivative shareholders of Ocean Front Spa Horizontal Property Regime, Inc., Plaintiffs,

v.

Ocean Front Spa Horizontal Property Regime, Inc., Walter Jordan, Ralph Jump, Ray Coghill, John Doe past board directors of Ocean Front Spa Horizontal Regime, Inc., The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Ken Perkins, John Doe past board directors of the Myrtle Beach Resort Homeowners Association, Inc. and K.A. Diehl and Associates, Inc., Defendants,

Of whom Mark Dos Santos is the Appellant,

And

Ocean Front Spa Horizontal Property Regime, Inc., Walter Jordan, Ralph Jump, Ray Coghill, John Doe past board directors of Ocean Front Spa Horizontal Regime, Inc., The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Ken Perkins, John Doe past board directors of the Myrtle Beach Resort Homeowners Association, Inc. and K.A. Diehl and Associates, Inc. are the Respondents.

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# INITIAL REPLY BRIEF OF APPELLANT

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**



**Rules**

## ARGUMENTS

### I. APPELLANT'S ARGUMENTS ARE PRESERVED.

Respondents assert that two of Appellant's arguments are unpreserved. They claim that Appellant should have raised these issues in his Motion for Reconsideration. (Respondents' Initial Brief, pp. 15, 23). Specifically, Respondents' preservation claims pertain to the arguments that (1) compliance with Rule 43(k) requires the signature of a party (either on the party's own behalf or by its counsel) and the party's counsel; and (2) K.A. Diehl has no standing to enforce the Settlement Agreement. Neither contention is correct.

An appellant is not required to file a Rule 59(e), SCRCP motion to preserve issues for appeal if those issues have already been raised to and ruled upon by the trial court. "In matters of appeal, all that the appellate court has ever required is that the questions presented for its decision must first have been fairly and properly raised in the lower court and passed upon by that court." *Hubbard v. Rowe*, 192 S.C. 12, 16, 5 S.E.2d 187, 188 (1939).

With respect to Appellant's argument as to the required signatures on a settlement agreement, Respondents first mischaracterize Appellant's argument to this Court, while simultaneously suggesting that the argument is unpreserved. Appellant does not take the position on appeal that a party is precluded from directing his or her counsel to sign a settlement agreement on his or her behalf. Instead, Appellant asserts that if one's counsel signs a settlement agreement on his behalf, the attorney must also sign the agreement on the attorney's behalf to comply with Rule 43(k). *See* Appellant's Brief, p. 8. This argument was raised to the trial court in Plaintiffs' Amended Motion to Reconsider the Order and Final Judgment at page 3. The argument was rejected by the trial court in its order denying this motion.

With respect to Appellant's standing argument, this issue was indeed raised to the trial court in Appellant's Motion for Reconsideration. *See* Amended Motion to Reconsider the Order and Final Judgment, p. 4. Although Appellant did not use the term "standing" in his motion, it is clear that Appellant objected to the scope of the trial court's order, which purported to grant relief to K.A. Diehl as well as the other defendants. *Id.* A party need not use the exact name of a legal doctrine to preserve the issue for appellate review, but it must be clear the argument was presented on that ground. *State v. Brannon*, 388 S.C. 498, 697 S.E.2d 593 (2010).

Because the issues that Appellant raises were fairly and properly raised in the lower court, they are preserved for this Court's review.

## II. COLLATERAL ESTOPPEL DOES NOT APPLY TO INTERLOCUTORY ORDERS.

Respondents assert that the doctrine of collateral estoppel applies because the validity of the Settlement Agreement was previously "fully and finally determined" in the -673 action. (Respondents' Brief, p. 9). As the party asserting collateral estoppel, Respondents have the burden of showing that the issue sought to be estopped was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment. *Catawba Indian Nation v. State*, 407 S.C. 526, 529, 756 S.E.2d 900, 902 (2014). "When an issue of fact or law is actually litigated and determined by a *valid and final judgment*, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." *Id.* (emphasis added); *South Carolina Prop. & Cas. Ins. Guar. Ass'n v. Wal-Mart Stores*, 304 S.C. 210, 403 S.E.2d 625 (1991).

Appellant submits that none of the trial court's Orders Granting Defendants' Motion to Enforce Settlement Agreement is final, which precludes the application of collateral estoppel. "As a general rule, only final judgments are appealable. Any judgment or decree, leaving some further act to be done by the court before the rights of the parties are determined, is interlocutory and not final." *Ex parte Wilson*, 367 S.C. 7, 10, 625 S.E.2d 205, 206 (2005); *and see Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health & Envtl. Control*, 387 S.C. 265, 267, 692 S.E.2d 894, 894 (2010); *citing Hooper v. Rockwell*, 334 S.C. 281, 513 S.E.2d 358 (1999); *Mid-State Distributors, Inc. v. Century Importers, Inc.*, 310 S.C. 330, 426 S.E.2d 777 (1993); *Adickes v. Allison & Bratton,* 21 S.C. 245 (1884).

Appellant submits that the trial court's Orders to Enforce the Settlement Agreement are not final orders involving the merits, because they anticipate that final orders approving the settlement will be issued after the fairness hearings that are required by Rule 23, SCRCP. *See* Orders Granting Defendants' Motion to Enforce Settlement Agreement, p. 4, footnote 1 ("Defendants also seek preliminary approval of the proposed class settlement described in the Settlement Agreement. The Court will issue a subsequent, separate order regarding such approval as described below."); p. 5 (...[T]he Court will resolve such motion before entering a subsequent order regarding the Court's approval of the proposed class settlement."). By their own terms, each of the trial court's Orders is interlocutory, and collateral estoppel cannot apply as a result.

All four of the actions sought to be resolved by the Settlement Agreement implicate Rule 23, SCRCP, because two of them purport to be class actions and two purport to be derivative actions. It is undisputed that a hearing must be conducted, after appropriate notice has been given to all those whose rights may be affected by the resolution of the actions, to determine if

the proposed settlement is fair and reasonable. *See generally*, Rule 23(b)(1), (c) and (d), SCRCP; Orders Granting Defendants Motion to Enforce Settlement, p. 4, footnote 4 and p. 5. After such a hearing, the trial court is empowered to modify or reject the proposed settlement outright. Given this circumstance, it cannot be said that any issue has been finally determined in of the four actions that the Settlement Agreement purports to resolve.[1]

## III. K.A. DIEHL AND ASSOCIATES, INC. IS NOT A THIRD PARTY BENEFICIARY OF THE SETTLEMENT AGREEMENT.

Respondents contend that K.A. Diehl and Associates, Inc. ("K.A. Diehl") has standing to enforce the Settlement Agreement because it is a third-party beneficiary to the Settlement Agreement (Respondents' Initial Brief, p. 23). "A third-party beneficiary is a party that the contracting parties intend to directly benefit." *Helms Realty, Inc. v. Gibson-Wall Co.*, 363 S.C. 334, 340, 611 S.E.2d 485, 488 (2005). Absent evidence of the clear intent to benefit the third party, it cannot sue on the contract. *TC X, Inc. v. Commonwealth Land Title Ins. Co.*, 928 F. Supp. 618 (D.S.C. 1995), *aff'd* 86 F.3d 1152 (4th Cir. 1996).

Respondents offer no evidence or other explanation for K.A. Diehl's absence from the Settlement Agreement. The fact that it was a party to the -743 and -744 actions, but that it was not mentioned in the Settlement Agreement at all militates against any finding of a "clear intent" for it to be a third-party beneficiary. Rather, the Settlement Agreement's omission of K.A. Diehl is some indication that the parties *did not* intend for K.A. Diehl to be bound by or to benefit from it.

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[1] Appellant further notes that Respondents' reference to the "law of the case" doctrine in inapposite to the present procedural posture, as that doctrine only applies to matters that were "either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court." *Judy v. Martin*, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009). The doctrine has no application outside the bounds of a single lawsuit between the same parties. Furthermore, because there has been no determination as to the merits of the appeal of the Orders in the -673 action, it remains to be seen whether the "law of the case" doctrine will have any impact in that case as well.

## CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court reject Respondents' arguments and grant the relief he requests.

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May 14, 2018.

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Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Ken Perkins, John Doe past board directors of the Myrtle Beach Resort Homeowners Association, Inc. and K.A. Diehl and Associates, Inc., Defendants,

Of whom Mark Dos Santos is the Appellant,

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Ocean Front Spa Horizontal Property Regime, Inc., Walter Jordan, Ralph Jump, Ray Coghill, John Doe past board directors of Ocean Front Spa Horizontal Regime, Inc., The Myrtle Beach Resort Homeowners Association, Inc., Phil Cox, Bill Cameron, Stanley Jordan, Wayne Urban, Ken Perkins, John Doe past board directors of the Myrtle Beach Resort Homeowners Association, Inc. and K.A. Diehl and Associates, Inc. are the Respondents.

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AMENDED PROOF OF SERVICE

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I certify that I have served **Appellant's Initial Reply Brief** on Respondents by depositing a copy of said documents in the United States Mail, postage prepaid, on **May 14, 2018**, addressed to Respondents' attorneys of record as follows:

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May 14, 2018



*VIA HAND DELIVERY*
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RE: *Jim Perkins, et. al., v. Ocean Front Spa Horizontal Property Regime, Inc., et. al.*
Appellate Case No.: 2018-000041

Dear Ms. Kitchings:

Enclosed for filing in the above-referenced matter are the original and one copy of the Appellant's Initial Reply Brief. Please file the original and return the clocked-in copy to my courier delivering same. By copy of this letter, I am serving all counsel of record with the brief as set forth in the enclosed Proof of Service. Please call me if you have questions.

Sincerely,

Kirby D. Shealy III

KDS/vmc
Enclosures
cc: Phillip Arthur Kilgore, Esq.
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