

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

Appeal from Horry County
Court of Common Pleas

William H. Seals Jr., Circuit Court Judge

Case No. 2015-CP-26-05573

RECEIVED
APR 25 2019
SC Court of Appeals

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

Appellant.

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

Table of Authorities..... ii

Statement of the Issue on Appeal..... 1

Statement of the Case..... 1

Standard of Review 6

Argument..... 7

I. The circuit court erred in granting K.A. Diehl’s motion to enforce settlement—and in denying Mr. dos Santos’s corresponding motion to alter, amend, and/or reconsider that decision—because the subject settlement agreement is not binding under Rule 43(k). 7

A. The circuit court erred in finding Rule 43(k) inapplicable to the subject settlement agreement. 7

B. The circuit court erred in finding that, even assuming Rule 43(k) did apply, the subject settlement agreement complies with Rule 43(k). 9

(1) For there to be a binding settlement agreement, there must be strict compliance with Rule 43(k). 11

(2) Attorney execution is insufficient to comply with Rule 43(k). 11

(3) Partial performance has no bearing on enforceability under Rule 43(k). 12

Conclusion 13

TABLE OF AUTHORITIES

Cases

<i>Ashfort Corp. v. Palmetto Const. Grp., Inc.</i> , 318 S.C. 492, 458 S.E.2d 533 (1995)	7, 8, 12, 13
<i>Buckley v. Shealy</i> , 370 S.C. 317, 635 S.E.2d 76 (2006)	7, 11, 12, 13
<i>Fairchild v. S.C. Dep't of Transp.</i> , 398 S.C. 90, 727 S.E.2d 407 (2012)	6, 9
<i>Farnsworth v. Davis Heating & Air Conditioning, Inc.</i> , 367 S.C. 634, 627 S.E.2d 724 (2006)	7, 11, 13
<i>Hodges v. Rainey</i> , 341 S.C. 79, 533 S.E.2d 578 (2000)	10
<i>Lancaster Cnty. Bar Ass'n v. S.C. Comm'n on Indigent Def.</i> , 380 S.C. 219, 670 S.E.2d 371 (2008)	10
<i>Maxwell v. Genez</i> , 356 S.C. 617, 591 S.E.2d 26 (2003)	9
<i>Motley v. Williams</i> , 374 S.C. 107, 647 S.E.2d 244 (Ct. App. 2007).....	8
<i>Muci v. State Farm Mut. Auto. Ins. Co.</i> , 478 Mich. 178, 732 N.W.2d 88 (2007).....	6
<i>Smith v. Fedor</i> , 422 S.C. 118, 809 S.E.2d 612 (Ct. App. 2017).....	8, 11, 12
<i>Stark Truss Co. v. Superior Constr. Corp.</i> , 360 S.C. 503, 602 S.E.2d 99 (Ct. App. 2004).....	9, 10
<i>TNS Mills, Inc. v. S.C. Dep't of Revenue</i> , 331 S.C. 611, 503 S.E.2d 471 (1998)	10

Wade v. State,
348 S.C. 255, 559 S.E.2d 843 (2002) 10

Rules

Rule 43(k), SCRPC passim
Rule 43, Note to 2009 Amendment..... 8
Rule 59(e), SCRPC..... 6

STATEMENT OF THE ISSUE ON APPEAL

- I. Did the circuit court err in granting K.A. Diehl’s¹ motion to enforce settlement—and in denying Mr. dos Santos’s² corresponding motion to alter, amend, and/or reconsider that decision—because the subject settlement agreement is not binding under Rule 43(k), SCRC?**
- A. Did the circuit court err in finding Rule 43(k) inapplicable to the subject settlement agreement?**
- B. Did the circuit court err in finding that, even assuming Rule 43(k) did apply, the subject settlement agreement complies with Rule 43(k)?**

STATEMENT OF THE CASE

K.A. Diehl is a community association management company. (*See* Compl. ¶ 1.) Defendants are unit owners in a Myrtle Beach condominium complex known as Ocean Front Spa and, by virtue of their ownership, members of both the Myrtle Beach Resort, Ocean Front Spa Horizontal Property Regime, Inc., and its master association, the Myrtle Beach Resort Homeowners Association, Inc. (collectively, the “Associations”). (*See* Compl. ¶¶ 2–8; Defs.’ Am. Answer & Counterclaims [filed February 2, 2016] ¶¶ 96–100; March 12, 2018, Hr’g Tr. pp. 6:24–7:7.) K.A. Diehl was the Associations’ management company. (*See* Compl. ¶ 1; Defs.’ Am. Answer & Counterclaims [filed February 2, 2016] ¶¶ 101–115.)

¹ “K.A. Diehl” is Plaintiff/Respondent, K.A. Diehl and Associates, Inc.

² “Mr. dos Santos” is Defendant/Appellant, Mark dos Santos, identified in the case caption as “Mark Dos Santos.”

K.A. Diehl filed this action against Defendants on July 23, 2015, in the Horry County Court of Common Pleas. (*See generally* Summons & Compl.) Describing the suit as having “arise[n] out of the Defendants’ defamatory statements and unlawful conduct against [it] related to its management of the [Associations] . . . ,”³ K.A. Diehl asserted claims for defamation, tortious interference with a contractual relationship, intentional interference with prospective contractual relations, and civil conspiracy, seeking both monetary and injunctive relief. (*See generally* Compl.)

Defendants denied K.A. Diehl’s material allegations and counterclaimed for abuse of process, violation of the South Carolina Unfair Trade Practices Act, civil conspiracy, breach of fiduciary duty, negligence, and fraud. (*See generally* Defs.’ Am. Answer and Counterclaim [filed February 2, 2016].)

In addition to their counterclaims in the instant case, Defendants asserted claims relating to their ownership in Ocean Front Spa/membership in the Associations in four other lawsuits that they themselves commenced in Horry County in 2016: Cases No. 2016-CP-26-00673 and -00674, asserting class claims, and Cases No. 2016-CP-26-00743 and -00744, asserting derivative claims (collectively, the “2016 Cases”). (*See* Pl.’s Mot. to Enforce Settlement pp. 1–2.)

³ (Compl. ¶ 9.)

Mediation was held in all five cases, i.e., in the instant case and the four 2016 Cases, on May 1, 2017. (*See* Proof of ADR; Am. Proof of ADR; Pl.’s Mot. to Enforce Settlement p. 2.) It went forward despite the known absence of several parties and adjusters involved in the cases—most notably at present, it went forward despite Mr. dos Santos not being physically present but available via telephone. (*See* Pl.’s Mot. to Enforcement Settlement p. 2.)

Mediation concluded at roughly 11:45 p.m. with an alleged written settlement agreement that was signed only by the following parties: K.A. Diehl (by its president), James Perkins, Colleen Franke, Nancy Moore, and Errol dos Santos. Of Defendants, neither Mr. dos Santos nor Steve Dame actually signed the agreement, but attorneys purportedly signed it on their behalves. (*See* Pl.’s Mot. to Enforcement Settlement pp. 2–3; Mediated Settlement Agreement (attached as Exhibit A to Def. dos Santos’s Mem. in Opp’n to Pl.’s Mot. to Enforce Settlement); March 12, 2018, Hr’g Tr. p. 12:18–24.) Mr. dos Santos did not receive a copy of the agreement until sometime after mediation.

On October 18, 2017, K.A. Diehl moved to enforce settlement. (*See generally* Pl.’s Mot. to Enforce Settlement.) The attorneys who had represented Mr. dos Santos at mediation were relieved as counsel and, through new counsel,⁴

⁴ (*See generally* Mot. for Continuance filed January 2, 2018; Form 4 Order filed January 5, 2018, continuing hearing on Pl.’s Mot. to Enforce Settlement; Collins & Lacy Mot. to be Relieved filed January 26, 2018; Clawson and Staubes

Mr. dos Santos opposed K.A. Diehl's motion. (*See generally* Def. dos Santos's Mem. in Opp'n to Pl.'s Mot. to Enforce Settlement.)⁵

The motion came on for hearing in the circuit court on March 12, 2018, the Honorable William H. Seals Jr., presiding. (*See generally* March 12, 2018, Hr'g Tr.) On March 19, 2018, the court filed a form order indicating it had decided the matter in K.A. Diehl's favor and a formal order would follow. (Form 4 Order filed March 19, 2018.) The formal order granting K.A. Diehl's motion was filed on March 21, 2018. (Order filed March 21, 2018.) The substance of the order is brief enough to present here in full:

THIS MATTER COMES BEFORE THE COURT upon the Motion of the Plaintiff, K.A. Diehl and Associates, Inc., to enforce the settlement agreement dated May 1, 2017 The only Defendant that opposes the Motion is Mark dos Santos ("dos Santos").

The Court has reviewed the Settlement Agreement, held a hearing on the Motion, considered dos Santos' opposition to the Motion, and is familiar with the facts, legal issues, and procedural history of this action.

At the hearing, and in his legal memorandum, dos Santos asserted that the Settlement Agreement is unenforceable under SCRPC, Rule 43(k), because he was not present at the mediation and did not read the Settlement Agreement before his attorney signed on his

Mot. to be Relieved filed February 13, 2018; Brittain Mot. to be Relieved filed February 14, 2018; Form 4 Order filed March 19, 2018, granting mots. to relieve counsel.)

⁵ Of Defendants, only Mr. dos Santos opposed the motion.

behalf.⁶] The Settlement Agreement was signed with dos Santos's name with the statement that it was signed on his behalf with permission. Each of the three attorneys representing dos Santos also signed the Settlement Agreement. No evidence was presented that his permission was lacking or withdrawn. Furthermore, all Parties to this action, with the exception of dos Santos, personally signed the Settlement Agreement and the corresponding release contemplated by the Settlement Agreement and drafted by dos Santos' attorney Furthermore, a significant portion of the settlement terms have been performed.

First, the Court concludes that SCRCP Rule 43(k) is inapplicable to the Settlement Agreement, as the Settlement Agreement did not involve an agreement between counsel. Moreover, even if Rule 43(k) did apply, the Court finds that the Settlement Agreement complies with 43(k) in that all Parties signed the Settlement Agreement (personally or through a designated agent), as did the attorneys for dos Santos.

The Court further finds that the Settlement Agreement is the result of extensive negotiations following a lengthy period of contested litigation between the Parties. The Court finds that all Parties and their counsel attended and participated in the mediation conference resulting in the Settlement (in person or via

⁶ Though not essential to the court's holding, in point of fact, and as further explained below, Mr. dos Santos's argument is/was not that the subject settlement agreement was unenforceable under Rule 43(k) because he was not present at the mediation and had not read it before his attorney signed it on his behalf. While this is true (that Mr. dos Santos was not present at the mediation and had not read the subject settlement agreement before his attorney signed it on his behalf), Mr. dos Santos's argument is/has been that the subject settlement agreement is unenforceable under Rule 43(k) because he never signed it and thus cannot be bound by its terms—and none of the other provisions of Rule 43(k) that would allow it to be binding in the absence of his signature are applicable.

telephone, by agreement of the Parties), which concluded with all Parties signing the Settlement Agreement (personally or through their designated agents).

Based on these findings, and for good cause shown,

IT IS ORDERED that the Plaintiff's Motion to enforce the Settlement Agreement is **GRANTED**.

(Order filed March 21, 2018, pp. 1–2 (emphasis in original).)

On March 31, 2018, Mr. dos Santos timely moved the circuit court to alter, amend, and/or reconsider its decision pursuant to Rule 59(e), SCRPC. (Def. dos Santos's Rule 59(e) Mot.) The court heard the motion on October 8, 2018,⁷ and denied it by order filed the next day. (Form 4 Order filed October 9, 2018.)

This appeal timely follows by notice served November 8, 2018. (Notice of Appeal.)

STANDARD OF REVIEW

This appeal centers on the circuit court's interpretation of Rule 43(k), which is a purely legal matter that is subject to this Court's de novo review. *See Fairchild v. S.C. Dep't of Transp.*, 398 S.C. 90, 108, 727 S.E.2d 407, 416 (2012) (citing *Muci v. State Farm Mut. Auto. Ins. Co.*, 478 Mich. 178, 732 N.W.2d 88, 93 (2007) ("The interpretation of court rules and statutes presents an issue of law that is reviewed de novo.")).

⁷ (*See generally* October 8, 2012, Hr'g Tr.)

ARGUMENT

- I. The circuit court erred in granting K.A. Diehl’s motion to enforce settlement—and in denying Mr. dos Santos’s corresponding motion to alter, amend, and/or reconsider that decision—because the subject settlement agreement is not binding under Rule 43(k).**
- A. The circuit court erred in finding Rule 43(k) inapplicable to the subject settlement agreement.**

The circuit court “conclude[d] that SCRCP Rule 43(k) is inapplicable to the Settlement Agreement, as the Settlement Agreement did not involve an agreement between counsel.” (Order filed March 21, 2018, p. 2.) Respectfully, this is erroneous. Rule 43(k) is applicable to the subject settlement agreement.

Rule 43(k) applies to *all* settlement agreements. *See Farnsworth v. Davis Heating & Air Conditioning, Inc.*, 367 S.C. 634, 638, 627 S.E.2d 724, 726 (2006) (“Because Rule 43(k) plainly applies to all settlement agreements signed by counsel, we find no merit in [the defendant’s] argument that the rule does not apply in this case.”); *Buckley v. Shealy*, 370 S.C. 317, 322, 635 S.E.2d 76, 78 (2006) (“Because the purported agreement the parties reached following mediation was neither entered into the court’s record nor acknowledged in open court and placed upon the record, Rule 43(k), SCRCP, plainly provides that the agreement is unenforceable. Accordingly, we uphold the family court’s decision not to enforce the agreement.”); *id.* at n.2 (“Rule 43(k)’s terms are mandatory”); *Ashfort Corp. v. Palmetto Const. Grp., Inc.*, 318 S.C. 492, 494, 458 S.E.2d 533, 534 (1995)

(“In our opinion, Rule 43(k) is applicable to settlement agreements.”); *Smith v. Fedor*, 422 S.C. 118, 125, 809 S.E.2d 612, 615 (Ct. App. 2017) (“[A]n agreement is non-binding until a condition is satisfied. Until a party is bound, she is entitled to withdraw her assent. Rule 43(k) applies to settlement agreements. The rule is intended to prevent disputes as to the existence and terms of agreements regarding pending litigation.”) (internal citations and quotation marks omitted); *Motley v. Williams*, 374 S.C. 107, 110, 647 S.E.2d 244, 246 (Ct. App. 2007) (“To be enforceable, settlement agreements must either be entered into the court’s record or acknowledged in open court and placed upon the record. This requirement is provided by Rule 43(k) of the South Carolina Rules of Civil Procedure.”) (internal citations omitted); Rule 43, Note to 2009 Amendment (“The amendment to Rule 43(k) provides a *settlement agreement* is also binding *if* the agreement is reduced to writing *and* signed by the parties *and* their counsel.”) (emphasis added).

Indeed, the standard South Carolina “Form 4 Judgment in a Civil Case” implicitly recognizes the above point (i.e., that all settlement agreements are governed by the requirements of Rule 43(k)), where it sets forth the methods by which a civil action can be dismissed: “[1] Rule 12(b), SCRCPP; [2] Rule 41(a), SCRCPP (Vol. Nonsuit); [3] *Rule 43(k), SCRCPP (Settled)*; [4] Other.” (*See, e.g.,* Form 4 Order filed October 9, 2018 (emphasis added).)

B. The circuit court erred in finding that, even assuming Rule 43(k) did apply, the subject settlement agreement complies with Rule 43(k).

According to the circuit court, “even if Rule 43(k) did apply, . . . the Settlement Agreement complies with Rule 43(k) in that all Parties signed the Settlement Agreement (personally or through a designated agent), as did the attorneys for dos Santos.” (Order filed March 21, 2018, p. 2.) Respectfully, this too is erroneous. The subject settlement agreement does not comply with Rule 43(k).

Rule 43(k) provides, in relevant part, as follows:

No agreement between counsel affecting the proceedings in an action shall be binding unless [1] reduced to the form of a consent order or [2] written stipulation signed by counsel and entered in the record, or [3] unless made in open court and noted upon the record, or [4] *reduced to writing and signed by the parties and their counsel.*

(emphasis added).

“In interpreting the meaning of the South Carolina Rules of Civil Procedure, the Court applies the same rules of construction used to interpret statutes.” *Fairchild*, 398 S.C. at 107, 727 S.E.2d at 416 (quoting *Maxwell v. Genez*, 356 S.C. 617, 620, 591 S.E.2d 26, 27 (2003). “If a rule’s language is plain, unambiguous, and conveys a clear meaning, interpretation is unnecessary and the stated meaning should be enforced.” *Id.* at 108–08, 727 S.E.2d at 416 (quoting *Maxwell*, 356 S.C. at 620, 591 S.E.2d at 27); *see also Stark Truss Co. v.*

Superior Constr. Corp., 360 S.C. 503, 508, 602 S.E.2d 99, 102 (Ct. App. 2004) (stating where the language of a court rule is clear and unambiguous, the court is obligated to follow its plain and ordinary meaning without resort to forced construction to limit or expand the rule). “Statutes, as a whole, must receive practical, reasonable, and fair interpretation, consonant with the purpose, design, and policy of lawmakers.” *TNS Mills, Inc. v. S.C. Dep’t of Revenue*, 331 S.C. 611, 624, 503 S.E.2d 471, 478 (1998). An appellate court will reject the interpretation of a statute that would lead to an absurd result the legislature could not have intended. *Lancaster Cnty. Bar Ass’n v. S.C. Comm’n on Indigent Def.*, 380 S.C. 219, 222, 670 S.E.2d 371, 373 (2008). “The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature.” *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). The best evidence of legislative intent is the text of the statute. *Wade v. State*, 348 S.C. 255, 259, 559 S.E.2d 843, 844 (2002).

The express terms of Rule 43(k) provide four methods by which parties to a civil action can be bound to the terms of a settlement agreement. We (like, it would appear, the circuit court itself) can dispense with the first three quickly. No consent settlement order or written stipulation was entered into the record, and the purported settlement was not made in open court and noted on the record.

As for the fourth method (i.e., “reduced to writing and signed by the parties and their counsel”), on which the circuit court relied here, it is likewise unavailing. The circuit court improperly applied the unambiguous language of Rule 43(k) to find that the subject settlement agreement is binding despite the absence of Mr. dos Santos’s signature.

(1) For there to be a binding settlement agreement, there must be strict compliance with Rule 43(k).

There is no substantial compliance exception when examining the enforceability of settlements under Rule 43(k). To the contrary, “Rule 43(k)’s terms are mandatory” *Buckley*, 370 S.C. at 322, 635 S.E.2d at 78 n.2; *see also Farnsworth*, 367 S.C. at 638, 627 S.E.2d at 726 (“[Rule 43(k)] is plainly worded: “No agreement . . . shall be binding unless” one of the . . . requirements is met.”).

(2) Attorney execution is insufficient to comply with Rule 43(k).

The provision of 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*, 422 S.C. at 125, 809 S.E.2d at 615. 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 agreement before it is binding. To do, as the circuit court did here, and deem this provision of Rule 43(k) satisfied by an attorney’s signature “on behalf of” the client as “designated 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”⁸—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. And if the rule’s intent was to allow something other than the party’s personal signature, certainly it would have said so.⁹

(3) Partial performance has no bearing on enforceability under Rule 43(k).

To the extent that the circuit court also found the subject settlement agreement binding because a portion of its terms had previously been performed by other parties, this notion has already been rejected by our Supreme Court.

⁸ See *Smith*, 422 S.C. at 125, 809 S.E.2d at 615 (quoting *Ashfort*, 318 S.C. 493–94, 458 S.E.2d at 534.)

⁹ To be clear, the language in the circuit court’s order that “[n]o evidence was presented that [Mr. dos Santos’s] permission was lacking or withdrawn [when his attorneys signed the Settlement Agreement on his behalf],” (Order filed March 21, 2018, p. 2), is irrelevant to the proper Rule 43(k) analysis. As explained above, proper Rule 43(k) analysis leaves no room for such considerations—the rule is either followed or it is not. To impose any evidentiary burden on Mr. dos Santos in this regard would plainly contradict not only the point (purpose) that Rule 43(k) aims achieve in terms of clarity (the rule of course establishing requirements that, if met, negate the need to engage in any evidentiary contests) but also the proposition already enshrined in our Supreme Court’s jurisprudence that “Rule 43(k)’s terms are mandatory” *Buckley*, 370 S.C. at 322, 635 S.E.2d at 78 n. 2.

Buckley, 370 S.C. at 322, 635 S.E.2d at 78 n. 2 (“Husband argues that Rule 43(k), SCRPC, does not apply where an agreement is admitted or has been carried into effect. Although Husband’s argument draws directly from our precedent, *see Ashfort Corp. v. Palmetto Constr. Group, Inc.*, 318 S.C. 492, 494, 458 S.E.2d 533, 534 (1995), we recently held that Rule 43(k)’s terms are mandatory and that Ashfort’s recitation was misguided dicta. *Farnsworth v. Davis Heating & Air Conditioning, Inc.*, 367 S.C. 634, 638, 627 S.E.2d 724, 726 (2006). Accordingly, we adhere to the view we adopted in *Farnsworth*.”).

CONCLUSION

For the foregoing reasons, Mr. dos Santos asks this Honorable Court to reverse the circuit court and find that the subject settlement agreement is not enforceable because it is not binding under Rule 43(k) and remand this matter for further proceedings consistent with the same.

<SIGNED ON THE FOLLOWING PAGE>

Respectfully submitted,
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Dated: 4/22/19

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IN THE COURT OF APPEALS**

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William H. Seals Jr., Circuit Court Judge

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Defendants,

Of whom Mark Dos Santos is the

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I, Russell G. Hines, of Young Clement Rivers, LLP, attorney for Appellant, hereby certify that the foregoing **INITIAL BRIEF OF APPELLANT** was served on all other parties to this matter by depositing a copy of same in the U.S. Mail on April 22, 2019, properly posted for delivery to the following addressees:

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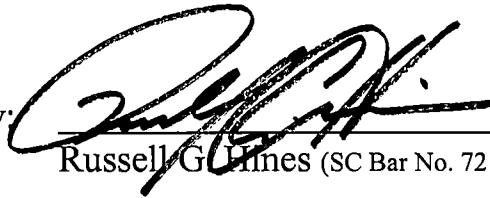
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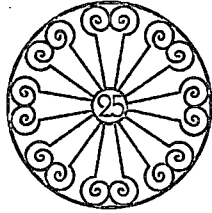
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April 22, 2019

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APR 25 2019

SC Court of Appeals

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Re: K.A. Diehl and Associates, Inc. v. James Perkins, Colleen Franke, a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, and Errol Dos Santos
Appellate Case No.: 2018-002009
Case No.: 2015-CP-26-05573
YCR File: 14168-20180194

Dear Ms. Kitchings:

Enclosed herewith for filing in the above-referenced matter, please find the original and One (1) copy of the Initial Brief of Appellant and the original and One (1) copy of the Proof of Service of same. Please file the originals and return one court-stamped copy of each to me in the pre-stamped envelope provided.

As always, thank you for your assistance. If you have any questions or concerns, please do not hesitate to contact me. With best wishes and kindest regards, I am

Sincerely,

YCR LAW, LLP

Kathleen B. Barnes
Secretary

Enclosures

cc: Henrietta U. Golding, Esquire, Burr & Forman, LLP
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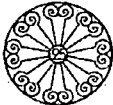
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