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

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.

BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This appeal arises from identical orders of the Horry County Court of Common Pleas in case numbers 2016-CP-26-00674, 2016-CP-26-00743 and 2016-CP-26-00744 granting Defendants' Motion to Enforce Settlement Agreement[1] and its December 7, 2017 orders denying Plaintiffs' Motions to Reconsider.

Two separate class action lawsuits were filed against certain Defendants in the trial court: *Jim Perkins, et al., v. Ocean Front Spa Horizontal Property Regime, Inc., et al.,* C.A. No. 2016-CP-26-00673; *Jim Perkins, et al., v. Myrtle Beach Resort Homeowners Association, Inc.,* C.A. No. 2016-CP-26-00674 (collectively, the "Class Actions"). Additionally, two separate derivative actions were filed against certain Defendants in the trial court: *Jim Perkins, et al., v. K.A. Diehl and Associates, Inc., et al.,* C.A. No. 2016-CP-26-00743; and *Jim Perkins, et al., v. Ocean Front Spa Horizontal Property Regime, Inc.,* C.A. No. 2016-CP-26-00744 (collectively, the "Derivative Actions"). The Class Actions and Derivative Actions include allegations of breach of fiduciary duty, breach of contract, negligence, and breach of contract accompanied by a

[1] The trial court filed orders granting Defendants' Motion to Enforce Settlement Agreement on September 21, 2017 in civil action numbers 2016-CP-26-00674 and 2016-CP-26-00743. An identical order was filed on September 29, 2017 in civil action number 2016-CP-26-00744.

fraudulent act with respect to the management of Myrtle Beach Resort Homeowners Association, Inc. and Ocean Front Spa Horizontal Property Regime, Inc. (R. pp. 101-410; 441, 504, 607, 630).

On May 1, 2017, the parties to the Class Actions and Derivative Actions participated in a court-mandated mediation conference. (R. pp. 441, 504, 607, 630). Appellant and Plaintiff Jeff Richardson participated in the mediation conference via telephone. (R. pp. 9, 27, 45, 63, ¶2). At this mediation, the parties and/or their attorneys negotiated a settlement of the Class Actions and Derivative Actions and reduced such settlement terms to writing (the "Settlement Agreement"). (R. pp. 442, 505, 608, 694).

A. Preston Brittain, Esquire signed the Settlement Agreement on behalf of Appellant and Plaintiff Jeff Richardson, but he did not sign it on his own behalf. (R. pp. 10, 28, 46, 64, ¶ 5; R. p. 428, lines 10-11; R. pp. 433-684). Several other parties' counsel signed the agreement on their behalf, but no attorney signed the agreement on his or her own behalf. (R. pp. 433-684; R. p. 428, lines 12-14). Defendant K.A. Diehl and Associates, Inc., a named Defendant in civil action numbers 2016-CP-26-00743 and 2016-CP-26-00744, did not sign the Settlement Agreement, and neither did its counsel.[2]

On July 3, 2017, Defendants in all four actions filed a Consolidated Motion for Preliminary Approval of Settlement Agreement.[3] The motion was opposed by all plaintiffs in all four cases on the grounds that it did not comply with Rule 43(k), SCRCP. (R. pp. 687, 704, 720, 737; R. pp. 986, 1002, 1018, 1034). The trial court held a hearing on August 22, 2017 and

[2] Curiously, K.A. Diehl and Associates, Inc. purports to have standing to seek the enforcement of the Settlement Agreement, as it jointly filed the Consolidated Motion for Preliminary Approval of Settlement Agreement and a Reply in Support of Defendants' Consolidated Motion for Preliminary Approval of Settlement Agreement with the other named Defendants in those cases. (R. pp. 449, 512, 575, 638; R. pp. 771, 829, 887, 945).

[3] Defendants contemplated that a final order approving the settlement would be entered only after the court had conducted a fairness hearing pursuant to Rule 23, SCRCP. (R. pp. 448, 511, 574, 637).

entered Orders Granting Defendants' Motion to Enforce Settlement Agreement on September 29, 2017.[4] The court noted:

> 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 Rule 43(k) in that all Parties[5] signed the Settlement Agreement (personally or through their designated agents), as did their attorneys.

(R. pp. 81, 87, 93, 99, footnote 2). The trial court contemplated entering orders approving the settlement only after any motions for reconsideration had been filed. (R. pp. 80-81, 86-87, 92-93, 98-99, footnotes 1 and 2).

On September 29, 2017, Plaintiffs filed Motions to Reconsider the Orders and Final Judgments pursuant to Rule 59(e), SCRCP. On October 2, 2017, Plaintiffs filed Amended Motions to Reconsider the Orders and Final Judgment pursuant to Rule 59(e), SCRCP. On December 5, 2017, The Honorable William H. Seals, Jr. entered an Order Denying Plaintiffs' Motions to Reconsider and Granting Defendants' Motion to Enforce Settlement Agreement entered on September 21, 2017 in case number 2016-CP-26-00673. Thereafter, on December 7, 2017, Judge Seals entered identical orders in case numbers 2016-CP-26-00674, 2016-CP-26-00743 and 2016-CP-26-00744.

On January 8, 2018, Appellant filed and served a Notice of Appeal of the Orders Granting Defendants' Motion to Enforce Settlement Agreement and Orders Denying Plaintiffs' Motions to Reconsider. Thereafter, Respondents filed a Motion to Dismiss Appeal on January 30, 2018, submitting that Appellant's January 8, 2018 Notice of Appeal was untimely. On March 1, 2018, this Court issued an Order granting Respondents' Motion to Dismiss Appeal only as to

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[4] The trial court converted the Defendants' Motion for Preliminary Approval of the Settlement Agreement into a Motion to Enforce the Settlement Agreement.

[5] The trial court made no distinction between the parties that had signed the Settlement Agreement and K.A. Diehl and Associates, Inc., which had not.

case number 2016-CP-00673 and denying Respondents' Motion to Dismiss Appeal as to 2016-CP-26-00674, 2016-CP-26-00743 and 2016-CP-26-00744.[6] Therefore, the appeal of case number 2016-CP-00673 is not before this Court.

LEGAL STANDARD

In reviewing the lower court's interpretation of a statute or rule, the appellate court applies the de novo standard of review. *Limehouse v. Hulsey*, 397 S.C. 49, 723 S.E.2d 211 (Ct. App. 2011), *rev'd on other grounds,* 404 S.C. 93, 744 S.E.2d 566 (2013); *citing Catawba Indian Tribe of S.C. v. State*, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007) (interpretation of a statute is a question of law, which the appellate court is free to decide with no particular deference to the trial court).

ARGUMENTS

I. RULE 43(K), SCRCP, APPLIES TO THE SETTLEMENT AGREEMENT.

Rule 43(k), SCRCP provides:

> (k) Agreements of Counsel. No agreement between counsel affecting the proceedings in an action shall be binding unless reduced to the form of a consent order or written stipulation signed by counsel and entered in the record, or unless made in open court and noted upon the record, or reduced to writing and signed by the parties and their counsel. Settlement agreements shall be handled in accordance with Rule 41.1, SCRCP.[7]

Rule 43(k), SCRCP.

In *Ashfort Corp. v. Palmetto Constr. Grp.*, 318 S.C. 492, 494, 458 S.E.2d 533, 534 (1995) (clarified by *Buckley v. Shealy*, 370 S.C. 317, 635 S.E.2d 76 (2006)), the Supreme Court

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[6] In its response to Respondents' Motion to Dismiss, Appellant raised the question of whether the appeal in all four cases may be interlocutory, but the Court did not address this question in its March 1, 2018 Order.

[7] Rule 41.1, SCRCP deals with sealing settlement agreements. It has no application here.

of South Carolina made it clear that "Rule 43(k) is applicable to settlement agreements." "The intent of Rule 43(k) is to require *all agreements regarding pending litigation* to either be announced in open court or to be reduced to a consent order or written stipulation and entered." 318 S.C. at 495 (emphasis added). "Like former Circuit Court Rule 14 on which it is based, Rule 43(k) is intended to prevent disputes as to the existence and terms of agreements regarding pending litigation." *Id.* at 494.

In its Orders Granting Defendants' Motion to Enforce Settlement Agreement, the trial court incorrectly concluded that "SCRCP Rule 43(k) is inapplicable to the Settlement Agreement, as the Settlement Agreement did not involve an agreement between counsel." (R. pp. 81, 87, 93, 99, footnote 2). However, its conclusion is not consistent with South Carolina law; whether a settlement agreement is "between counsel" is not the driving factor in determining whether or not Rule 43(k), SCRCP applies to a settlement agreement.

The trial court attempted to justify its determination that Rule 43(k), SCRCP is inapplicable to the Settlement Agreement by trying to discern the legislative intent behind the differences in the language in old Circuit Court Rule 14, Rule 43(k)'s predecessor, and the current language in Rule 43(k), SCRCP. (R. pp. 9, 35, 53, 71). While the trial court surmised that the legislature clearly intended to limit the applicability of Rule 43(k) only to agreements between counsel, the court cited no evidence to demonstrate or prove such intent, nor are there any notes to the amendments of Rule 43(k) that provide such insight into the General Assembly's intent. Indeed, in *Ashfort* the Supreme Court of South Carolina expressly held that Rule 43(k), SCRCP applies to settlement agreements, and nowhere did it limit that application to settlement agreements reached between counsel. In fact, the appellants in *Ashfort* argued that the agreement in that case had been reached between the respondent and appellants' insurer, taking

the agreement outside of Rule 43(k)'s reach, but the Supreme Court rejected that argument out of hand. 318 S.C. 492 at 495. Therefore, the trial court's conclusion that Rule 43(k), SCRCP only applies to settlement agreements between counsel is unfounded, and this Court should reverse.

II. THE SETTLEMENT AGREEMENT DOES NOT COMPLY WITH RULE 43(K), SCRCP.

In *Farnsworth v. Davis Heating & Air Conditioning, Inc.*, 367 S.C. 634, 636, 627 S.E.2d 724, 725 (2006), the Supreme Court of South Carolina upheld the trial court's holding that Rule 43(k) outlines three means by which agreements regarding pending litigation become binding on the parties. Such agreements must be (1) reduced to the form of a consent order, or (2) memorialized in a written stipulation, signed by counsel, and entered in the record; or (3) made in open court and noted upon the record.[8] "Under S.C. R. Civ. P. 43(k), an agreement is non-binding until a condition is satisfied." *Farnsworth,* 367 S.C. 634; *see also Buckley v. Shealy*, 370 S.C. 317, 635 S.E.2d 76 (2006) (Rule 43(k)'s terms are mandatory). It should be noted, however, that *Farnsworth* predates the 2009 amendment to Rule 43(k), which added language indicating that a settlement agreement can also be binding if it is "reduced to writing and signed by the parties and their counsel." Thus, there is now a fourth avenue by which settlement agreements may become binding on the parties.[9]

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[8] In its Orders Denying Plaintiffs' Motions to Reconsider, the trial court incorrectly stated that Rule 43(k), SCRCP, includes a requirement that attorneys "take overt action" before a settlement agreement becomes enforceable, even though no such requirement is found in the rule or the common law. The trial court further concluded that an example of such an overt action is "where the 'agreement between counsel' is later 'reduced to writing and signed by the parties and their counsel'."(R. pp. 16, 34, 54, 70). There is no such categorization of overt acts found in Rule 43(k).

[9] As discussed more fully herein, while the language contained in this Note provides another avenue by which settlement agreements can be binding, it does not change the analysis of the facts or the conclusion here that the Settlement Agreement is not binding on the parties. The Note to 2009 Amendment still requires that the settlement agreement be "signed by the parties

Here, the record does not indicate that the Settlement Agreement was reduced to the form of a consent order, nor was it made in open court, as it was negotiated during a court-mandated mediation conference between counsel of the parties to the Class Actions and Derivative Actions. (R. pp. 441, 504, 607, 630). Therefore, there are only two means by which the Settlement Agreement could have become binding on the parties pursuant to Rule 43(k), SCRCP: (1) memorialized in a written stipulation, signed by counsel, and entered in the record or (2) reduced to writing and signed by the parties and their counsel.

In its Order Granting Defendants' Motion to Enforce Settlement Agreement, the trial court incorrectly concluded that: "the Settlement Agreement complies with Rule 43(k) in that all Parties signed the Settlement Agreement (personally or through their designated agents), as did their attorneys." (R. pp. 81, 87, 93, 99, footnote 2). Unquestionably, the Settlement Agreement bears signatures of the parties'[10] counsel, all of whom signed it on behalf of at least some of their respective clients. Appellant does not take issue with the well-settled principle that an attorney can settle a case on behalf of his client. *See, e.g., Crowley v. Harvey & Battey, P.A.*, 327 S.C. 68, 488 S.E.2d 334 (1997); *Arnold v. Yarborough*, 281 S.C. 570, 316 S.E.2d 416 (Ct. App. 1984). However, Appellant would submit that Rule 43(k), SCRCP, was not satisfied, and he is therefore not bound by the Settlement Agreement that his counsel signed, as neither condition outlined above occurred before Appellant repudiated the Settlement Agreement.

If the signatures on the Settlement Agreement are to be construed as signatures of counsel, then the Settlement Agreement is not binding until is "entered in the record," and a

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and their counsel" and all counsel has not signed the Settlement Agreement. Therefore, the requirement in the Note to 2009 Amendment that the settlement agreement be signed by all parties and their counsel still has not been met and therefore, analyzing the facts of this case under such requirements, the Settlement Agreement still remains unbinding on the parties.

[10] Except for K.A. Diehl and Associates, Inc., which is not a party to the Settlement Agreement.

repudiation of the agreement by one or more of the parties before the agreement is "entered in the record" renders the agreement unenforceable. If the signatures on the Settlement Agreement are to be construed as signatures of the parties themselves (whether on the own behalf or by authorized agents), then there must be signatures of counsel as well to meet the requirements of the 2009 amendment to Rule 43(k).[11] There are no such signatures in this instance.

In this case, Plaintiffs' counsel, A. Preston Brittain, Esquire executed the Settlement Agreement on behalf of Appellant and Mr. Richardson. (R. pp. 10, 28, 46, 64; R, p. 428, lines 10-11; R. pp. 433-684). However, Mr. Brittain did not sign in his own capacity as counsel. Philip Kilgore, Esquire, attorney for The Myrtle Beach Resort Homeowners Association, Inc. and other Defendants, signed on behalf of The Myrtle Beach Resort Homeowners Association, Inc., Ocean Front Spa Horizontal Property Regime, Inc., Bill Cameron, Stanley Jordan and Ray Coghill. (R. pp. 453-454, 516-517, 579-580, 642-643). However, Mr. Kilgore did not sign in his own capacity as counsel.

In *Farnsworth*, the respondent's attorney signed a letter from Farnsworth's attorney that included terms of a settlement agreement among the parties. By his signature, the attorney purportedly accepted the settlement agreement on behalf of his client. 367 S.C. at 636. Thereafter, Farnsworth wished to take the case to trial instead of settling and notified Respondent that she was rescinding the settlement agreement. *Id.* The Supreme Court held that Farnsworth's rescission of the agreement was proper because she was entitled to withdraw her assent until the agreement was binding. *Id.* at 637. "Under S.C. R. Civ. P. 43(k), an agreement is non-binding until a condition is satisfied." *Id.* The Supreme Court further held that: "Farnsworth rescinded

[11] Appellant notes that the 2009 amendment to Rule 43(k) comports with Rule 6(f) of the South Carolina Alternative Dispute Resolution Rules, which requires a mediated settlement agreement to be signed by both the parties and their respective counsel.

the agreement before Davis filed the motion to compel. As soon as Respondent received notice of the rescission, the letter signed by counsel ceased representing an agreement." *Id.*

The case at bar is akin to *Farnsworth*. Here, Appellant rescinded the Settlement Agreement after the mediation conference and before the Defendants filed their Consolidated Motion for Preliminary Approval of Settlement Agreement. (R. pp. 437, 500, 563, 626). In fact, Defendants acknowledge as much in the Consolidated Motion: "Plaintiffs' counsel has indicated that two Plaintiffs, Jeff Richardson and Mark dos Santos, believe they are not bound by the Settlement Agreement."

Appellant was entitled to rescind the Settlement Agreement, and such rescission was proper, because it happened before the Settlement Agreement was binding on the parties. The trial court therefore erred in finding that Settlement Agreement complies with Rule 43(k), SCRCP and should be reversed.

III. K.A. DIEHL AND ASSOCIATES, INC. DOES NOT HAVE STANDING TO ENFORCE THE SETTLEMENT AGREEMENT.

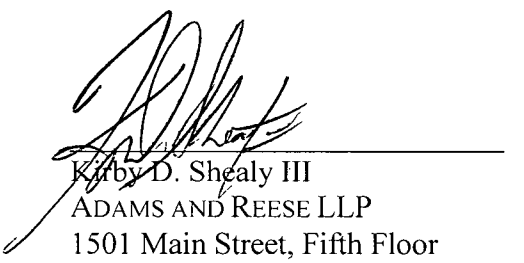
In the event that the Court affirms the trial court's orders, Appellant would request that they be modified to reflect that the Settlement Agreement is not binding as between Appellant and Defendant K.A. Diehl and Associates, Inc.

K.A. Diehl and Associations, Inc. purports to have standing to seek the enforcement of the Settlement Agreement, as it jointly filed the Consolidated Motion for Preliminary Approval of Settlement Agreement and a Reply in Support of Defendants' Consolidated Motion for Preliminary Approval of Settlement Agreement with the other named Defendants in those cases. (R. pp. 449, 512, 575, 638; R. pp. 771, 829, 887, 945). The trial court's orders can be read to grant the relief K.A. Diehl seeks, as they make no distinction between the parties to the lawsuits

and the parties to the Settlement Agreement. However, K.A. Diehl and Associates, Inc. does not have standing to enforce the Settlement Agreement because it is not a party to it. Accordingly, Appellant's claims as against K.A. Diehl and Associates, Inc. in civil action numbers 2016-CP-26-00743 and 2016-CP-26-00744 remain pending. Therefore, Appellant respectfully requests that this Court modify the Orders to reflect that K.A. Diehl and Associates, Inc. is not a party to the Settlement Agreement and has no standing to seek its enforcement.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court reverse the trial court's orders Granting Defendants' Motion to Enforce Settlement Agreement and orders Denying Plaintiffs' Motions to Reconsider. In the alternative, Appellant seeks a modification of those orders to clarify that they are not binding with respect to Appellants' claims against K.A. Diehl and Associates, Inc.



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