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Feb 28 2022

SC Court of Appeals

**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
Appellate Case No. 2018-002009

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.

**APPELLANT'S REPLY
TO RESPONDENT'S RETURN
TO APPELLANT'S PETITION FOR REHEARING**

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Attorneys for Appellant

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

1. K.A. Diehl ignores the purpose of Rule 43(k).

As explained in Mr. dos Santos's petition, the purpose of Rule 43(k) is "to prevent disputes as to the existence and terms of agreements regarding pending litigation." *S.C. Human Affairs Comm'n v. Chen*, 430 S.C. 509, 519, 846 S.E.2d 861, 866 (2020); *see also id.* at 521, 846 S.E.2d at 867 ("As a matter of public policy and to avoid disputes over settlements, Rule 43(k) sets forth several methods for making a settlement agreement binding and enforceable. . . . The purpose of Rule 43(k) and its predecessors is the avoidance of uncertainty."). Nowhere in its return does K.A. Diehl even acknowledge the purpose of Rule 43(k), much less reconcile it with the interpretation of the rule it urges; nor, indeed, could it have done so. Again, 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.

¹ Shorthand references already defined in the petition for rehearing are continued in this reply (e.g., "Mr. dos Santos" is Defendant/Appellant, 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.).

The purpose of Rule 43(k) is to *prevent* the very sort of disputes that K.A. Diehl's interpretation of the rule *invites*.

2. To interpret Rule 43(k) as K.A. Diehl does is to do what our Supreme Court expressly instructs may not be done: to vitiate the mandatory terms of the rule by turning to contract or equitable principles (or counter public policy arguments).

As explained in Mr. dos Santos's petition, the terms of Rule 43(k) are plain² and mandatory³ and they cannot be vitiated by turning to contract or equitable principles (or counter public policy arguments); nor by substantial compliance. *Chen*, 430 S.C. 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.”). Yet this sort of improper turning to other areas of law is essentially all K.A. Diehl does. (*See, e.g.*, Return p. 6 (turning to equitable principles and/or counter public policy arguments: “Appellant’s application of Rule 43(k) is incorrect, as it leads to a plainly absurd result of vitiating a settlement agreement that was agreed to by all parties at a fifteen-hour mediation in which Appellant fully participated.”); p. 10 (turning to contract and/or

² *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.”).

³ *Buckley v. Shealy*, 370 S.C. 317, 322, 635 S.E.2d 76, 78 n.2 (2006) (“Rule 43(k)’s terms are mandatory . . .”).

agency principles: “A settlement agreement is simply a contract, and an agent can sign a contract for a principal.”.)

CONCLUSION

For the foregoing reasons, together with those already set forth in his petition (to include his prior adoption of any other or further reason(s) set forth in his appellate briefs already on file), Mr. dos Santos asks this Honorable Court to grant the instant petition, to rehear this matter, to withdraw the Subject Opinion, and to decide this appeal anew via an opinion that reverses the trial court, finds that the subject settlement agreement is not enforceable because it is not binding under Rule 43(k), and remands this matter for further proceedings consistent with the same.

Respectfully submitted,
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Attorneys for Appellant

I, Russell G. Hines, of Clement Rivers, LLP, attorney for Appellant, hereby certify that **APPELLANT’S REPLY TO RESPONDENT’S RETURN TO APPELLANT’S PETITION FOR REHEARING** was served on Respondent on February 28, 2022, via email (see attached) to Respondent’s counsel of record:

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Respectfully submitted,
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February 28, 2022

From: [Hines, Russell](#)
To: ["Golding, Henrietta"; "Thompson, Alicia"](#)
Cc: [Davis, Jay](#); [Bell, Pollyana \(Polly\)](#); ["Voegel, Taylor"](#); ["Evans, Sheila"](#); [Justman, Aimee](#)
Subject: K.A. Diehl v. Perkins (Appellate Case No. 2018-002009) -- Appellant's Reply to Return to Petition for Rehearing
Date: Monday, February 28, 2022 11:21:32 PM
Attachments: [image001.png](#)
[K.A. Diehl v. Perkins \(2018-002009\) -- Reply in Supp. of Petition for Rehearing.pdf](#)

Attached regarding the above-referenced matter please find **Appellant's Reply to Respondent's Return to Appellant's Petition for Rehearing.**

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