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Unpublished Opinion No. 2021-UP-454 (S.C. Ct.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.

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATION OF COUNSEL

By and through his undersigned counsel, pursuant to Rule 242(d)(1), SCACR, Mr. dos Santos[1] certifies that the Court of Appeals filed its opinion in this appeal on December 22, 2021 (the "Subject Opinion"); that he timely petitioned for rehearing; and that the Court of Appeals has finally ruled on that petition, which it denied by order filed March 23, 2022.

[1] "Mr. dos Santos" is Defendant/Petitioner, Mark dos Santos, identified in the case caption as "Mark Dos Santos."

QUESTIONS PRESENTED

In this appeal, Mr. dos Santos challenges the trial court's enforcement of a settlement agreement. In pertinent part, Rule 43(k), SCRCP, provides that a settlement agreement is not binding "unless . . . reduced to writing and signed by the parties and their counsel." Mr. dos Santos contends the settlement agreement does not comply with Rule 43(k), and is therefore unenforceable, because he, a party, did not personally sign it; however, the Court of Appeals affirmed the trial court's enforcement of the settlement agreement, ruling that it sufficed to comply with Rule 43(k) for Mr. dos Santos's attorney to sign the settlement agreement on his behalf.

The following questions are thus presented to this Court:

I. Did the Court of Appeals err in affirming the trial court's enforcement of the settlement agreement?

A. Did the Court of Appeals err in ruling that it sufficed to comply with Rule 43(k) for Mr. dos Santos's attorney to sign the settlement agreement on his behalf?[2]

B. Even on its own terms (i.e., even assuming, *arguendo*, its view of Rule 43(k) does not erroneously vitiate the plain and mandatory terms of the rule, as is raised/argued via Question/Argument I.A.), did the Court of Appeals misapply the authorities it cited regarding the ability of one person to sign for another?

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[2] To be clear, this question, and the corresponding argument below, includes Mr. dos Santos's challenge to the proposition that it sufficed to comply with Rule 43(k) for his attorney to sign the settlement agreement on his behalf because his attorney supposedly had his permission to do so and to the proposition that it sufficed to comply with Rule 43(k) for his attorney to sign the settlement agreement on his behalf because of any agency relationship attendant to the attorney-client relationship.

STATEMENT OF THE CASE

K.A. Diehl[3] is in the business of providing management services to community associations like Ocean Front Spa, which is a Myrtle Beach condominium community located within the larger community known as Myrtle Beach Resort. (*See* R. p. 38 ¶ 1.) Unit ownership in Ocean Front Spa comes with membership in 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* R. p. 39 ¶¶ 2–8, pp. 64–65 ¶¶ 96–100, pp. 94:24–95:7.) K.A. Diehl was the management company for the Associations. (*See* R. p. 38 ¶ 1, pp. 65–67 ¶¶ 101–115.)

K.A. Diehl filed this lawsuit against a number of Ocean Front Spa unit owners, i.e., Defendants[4], on July 23, 2015, in the Horry County Court of Common Pleas. (*See generally* R. pp. 36–52.) 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] . . . ,"[5] K.A. Diehl asserted claims against Defendants for defamation, tortious interference with a contractual relationship,

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[3] "K.A. Diehl" is Plaintiff/Respondent, K.A. Diehl and Associates, Inc.

[4] "Defendants" refers, collectively, to Mr. dos Santos and the other defendants identified in the above caption.

[5] (R. p. 39 ¶ 9.)

intentional interference with prospective contractual relations, and civil conspiracy, seeking both monetary and injunctive relief. (*See generally* R. pp. 38–52.)

Defendants denied K.A. Diehl's material allegations and counterclaimed for abuse of process, violation of the South Carolina Unfair Trade Practices Act (the "UTPA"), civil conspiracy, breach of fiduciary duty, negligence, and fraud. (*See generally* R. pp. 53–88.)

In addition to, and separate from, their counterclaims in the instant case (which is the only case involved in this appeal), Defendants asserted claims relating to their ownership in Ocean Front Spa/membership in the Associations in four other lawsuits 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* R. pp. 118–119.)

Mediation was held in all five cases, i.e., in the instant case and in the four 2016 Cases, on May 1, 2017. (*See* R. pp. 115–117, p. 119.) It went forward despite the known absence of several parties and adjusters involved in the cases, most notably Mr. dos Santos, who could be reached by telephone but was not physically present. (*See* R. p. 119.)

Mediation concluded at about 11:45 p.m. with an alleged written settlement agreement that was only actually signed by the following parties: K.A. Diehl (by its

president), James Perkins, Colleen Franke, Nancy Moore, and Errol dos Santos. Neither Mr. dos Santos nor Steven Dame actually signed the settlement agreement, but attorneys purportedly signed for them. (*See* R. p. 100:18–24, pp. 119–120, pp. 126–128.) 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 the settlement agreement. (*See generally* R. pp. 118–273.) The attorneys who had represented Mr. dos Santos at mediation were relieved as counsel and, through new counsel,[6] Mr. dos Santos opposed K.A. Diehl's motion. (*See generally* R. pp. 15–16, pp. 281–290.)[7]

The motion came on for hearing in the trial court on March 12, 2018, the Honorable William H. Seals, Jr. presiding. (*See generally* R. pp. 89–107.) After first filing a form order on March 19, 2018, indicating that it had decided the matter in K.A. Diehl's favor and that a formal order would follow,[8] the trial court granted K.A. Diehl's motion to enforce the settlement agreement by formal order filed March 21, 2018. (R. pp. 12–32.)

On March 31, 2018, Mr. dos Santos timely moved the trial court to alter, amend, and/or reconsider its decision pursuant to Rule 59(e), SCRCP. (R. pp. 12–

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6 (*See generally* R. pp. 6–11, pp. 274–280.)

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

8 (R. pp. 9–11.)

32, pp. 281–301.) The trial court heard the motion on October 8, 2018,[9] and thereafter denied it by order filed October 9, 2018. (R. pp. 33–35.)

This appeal timely followed by notice served November 8, 2018,[10] and in due course, it was fully briefed and made ready for decision by the Court of Appeals. (*See generally* Final Brief of Appellant; Final Brief of Respondent; Final Reply Brief of Appellant; Appellant's Supplemental Citation, submitted October 27, 2020.)

On November 15, 2021, K.A. Diehl moved the Court of Appeals to dismiss the appeal and Mr. dos Santos's remaining counterclaims. (Mot. to Dismiss the Appeal and Counterclaims.) Citing the fact that Mr. dos Santos had sold his unit in Ocean Front Spa in or about March 2021, K.A. Diehl argued that, even if Mr. dos Santos were successful in this appeal, he lacked standing to pursue his remaining claims against K.A. Diehl. (*See* Mot. to Dismiss the Appeal and Counterclaims.)

Mr. dos Santos responded in opposition to K.A. Diehl's motion, arguing that he had two remaining counterclaims against K.A. Diehl, civil conspiracy and violation of the UTPA; that he still has standing to pursue them; and that, in any event, he has standing to vindicate himself by successfully defending against and defeating the claims he believes K.A. Diehl has wrongfully asserted against him this action—and indeed that he must do so if he is to try to hold K.A. Diehl accountable

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[9] (*See generally* R. pp. 108–114.)

[10] (R. pp. 302–306.)

for what he believes is its malicious prosecution of this action. (*See* Appellant's Return to Respondent's Mot. to Dismiss the Appeal and Counterclaims.)

The Court of Appeals denied K.A. Diehl's motion by order filed December 22, 2021. (Court of Appeals Order Denying K.A. Diehl's Mot. to Dismiss the Appeal and Counterclaims.)

Also on December 22, 2021, however, the Court of Appeals filed the Subject Opinion, affirming the trial court as modified. Although it agreed with Mr. dos Santos that the trial court erred in holding that Rule 43(k) did not apply to the settlement agreement,[11] the Court of Appeals nonetheless affirmed the trial court's enforcement of the settlement agreement, disagreeing with Mr. dos Santos's argument that the settlement agreement was not executed in compliance with Rule 43(k) because he did not personally sign it. Noting that one of Mr. dos Santos's attorneys signed his (Mr. dos Santos's) name on the settlement agreement followed by the words "with permission," and stating that Mr. dos Santos had "provided no evidence [that] his attorney signed [his] name on the Agreement without [his] permission during the mediation," the Court of Appeals cited a string of authorities supposedly supporting its conclusion that the signing of Mr. dos Santos's name on the settlement agreement by someone else with permission (i.e., someone who is not

[11] It was in this respect that the Court of Appeals modified the trial court's decision.

Mr. dos Santos but is said to have Mr. dos Santos's permission) satisfies Rule 43(k)'s mandate that the settlement agreement be signed by "the part[y]," i.e., by Mr. dos Santos. Moreover, citing *Crim v. E.F. Hutton, Inc.*, 298 S.C. 448, 450, 381 S.E.2d 492, 493 (1989), for the proposition that "[t]he authorized acts of an agent are binding on the principal," the Court of Appeals supported its affirmance of the trial court's enforcement of the settlement agreement on the additional ground that Rule 43(k)'s mandate that the settlement agreement be signed by "the part[y]," i.e., by Mr. dos Santos, was satisfied because his attorney had actual authority as an agent to sign the settlement agreement on his behalf.

STANDARD OF REVIEW

This appeal centers on the interpretation of Rule 43(k), which is a pure question of law that is subject to 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.")).

ARGUMENT

I. The Court of Appeals erred in affirming the trial court's enforcement of the settlement agreement.

A. The Court of Appeals erred in ruling that it sufficed to comply with Rule 43(k) for Mr. dos Santos's attorney to sign the settlement agreement on his behalf.

"'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 v. S.C. Dep't of Transp.*, 398 S.C. 90, 107, 727 S.E.2d 407, 416 (2012) (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 108–09, 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).

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[12] and mandatory,[13] their intended purpose is "to prevent disputes as to the *existence* and terms of agreements regarding pending litigation,"[14] 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.").

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[12] *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.").

[13] *Buckley v. Shealy*, 370 S.C. 317, 322, 635 S.E.2d 76, 78 n.2 (2006) ("Rule 43(k)'s terms are mandatory . . . .").

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

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 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"[15] 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

[15] *Buckley*, 370 S.C. at 322, 635 S.E.2d at78 n.2 ("Rule 43(k)'s terms are mandatory . . . .").

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 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"[16]—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"[17] nature of its terms. *Chen*, 430 S.C. at 521, 846 S.E.2d at 866.

B. Even on its own terms (i.e., even assuming, arguendo, its view of Rule 43(k) does not erroneously vitiate the plain and mandatory terms of the rule, as is raised/argued via Question/Argument I.A.), the Court of Appeals misapplied the authorities it cited regarding the ability of one person to sign for another.

The authorities that the Court of Appeals cites include the propositions that, for the signature of one person to be accomplished by the hand of another, the

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[16] *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.").

[17] *Buckley*, 370 S.C. at 322, 635 S.E.2d at78 n.2 ("Rule 43(k)'s terms are mandatory . . . .").

signature must be done at the contemporaneous direction or request of the person whose name is being signed, and even in that person's physical presence—indeed, the only South Carolina authority the Court of Appeals cites, *Sharpe v. Sharpe*, *speaks in terms of both physical present and contemporaneous direction*. (Subject Opinion ("*Signature, Black's Law Dictionary* (11th ed. 2019) (defining signature as 'a person's name or mark written by that person *or at the person's direction*); 80 C.J.S. *Signatures* § 13 (2000) ('Generally, a signature may be made for a person by the hand of another, *acting in the presence of such person*, *and at his direction, or request*, or with his acquiescence, unless a statute provides otherwise. A signature of this type becomes the signature of the person for whom it is made, and it has the same validity as though written by him. (footnotes omitted)); *Matter of Estate of Moore*, 390 P.3d 551, 557 (Kan. Ct. App. 2017) ('The amanuensis rule provides that '[a] signature to an instrument may be attached by . . . the hand of another, at *the request of a party* . . . .'' (alterations in original) (quoting *Kadota Fig Ass'n. of Producers v. Case-Swayne Co.*, 167 P.2d 523, 526 (Cal. Ct. App. 1946)), *aff'd*, 448 P.3d 425 (Kan. 2019); *Lukey v. Smith*, 365 P.2d 487, 488 (Nev. 1961) (recognizing the 'approval in virtually every jurisdiction of the United States of the [amanuensis] rule' and that the 'rule is so uniformly recognized that we would add nothing to the law by quoting or even citing the various texts and hundreds of cases'); *Sharpe v. Sharpe*, 105 S.C. 459, 465, 90 S.E. 34, 35 (1916) (noting that 'when Watson Justus

signed the name of Jefferson, *in the presence of Jefferson*, *and by his direction*, that was a signing by Jefferson'); *Kadota Fig Ass'n of Producers*, 167 P.2d at 527 (noting a 'signature is valid and binding when the authorization to sign the instrument is *conveyed directly* to the amanuensis by telephone')."") (emphasis added).) The mere and generalized (and supposed) permission with which Mr. dos Santos's name was signed to the settlement agreement was not accompanied by any contemporaneous direction or request of Mr. dos Santos, and certainly not in his physical presence.

CONCLUSION

For the foregoing reasons, 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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