THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Honorable William H. Seals, Jr., Circuit Court Judge

Appellate Case No. 2018-002009

Case No. 2015-CP-26-05573

K.A. Diehl and Associates, Inc., ... Respondent,

v.

James Perkins, Colleen Franke a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, and Errol Dos Santos, ... Defendants,

Of whom Mark Dos Santos is the ..... Appellant.

FINAL BRIEF OF RESPONDENT

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I. Whether Rule 43(k), which explicitly applies only to an agreement "between counsel," applies to an agreement between the parties, like the settlement agreement in this case.

II. Whether the requirements of Rule 43(k) were satisfied, when both dos Santos, through his agent, and his attorneys signed the settlement agreement.

III. Whether courts should readopt a substantial-compliance exception to Rule 43(k), to ensure that the parties' intentions are given effect.

INTRODUCTION

After mediating all day and into the night, the parties agreed just before midnight to settle their dispute. Then, Mark dos Santos apparently began having second thoughts about that agreement, and he claimed that he was not bound by it. His argument hinges on his contention that Rule 43(k) applies to his agreement with K.A. Diehl.

His contention, however, ignores the plain language of that rule. On its face, Rule 43(k) applies only to agreements "between counsel." The agreement here was between the parties, not between their lawyers. Therefore, Rule 43(k) does not apply, and the agreement—like any contract between parties who agree to certain terms—is enforceable.

And even if Rule 43(k) did somehow apply here, its requirements were satisfied. The agreement was signed by both dos Santos (through his agent) and his attorneys. dos Santos's argument that he could not sign the agreement through an agent ignores

well-established South Carolina law, which allows people to bind themselves legally in formal instruments (including contracts) through their agent.

The circuit court therefore did not abuse its discretion in enforcing the settlement agreement here, and none of its legal analysis in reaching that decision was flawed. Its decision should thus be affirmed.

STATEMENT OF THE CASE

dos Santos attacks K.A. Diehl after not being elected to a homeowners' association board of directors.

Two related community associations in Myrtle Beach hired K.A. Diehl to be their management company. (R. p. 038). In 2015, some members of those associations—including Mark dos Santos—sought to run for the board of directors of one of the associations. (R. p. 041). dos Santos lost. (R. p. 042).

After losing, dos Santos and others began accusing K.A. Diehl of a variety of wrongdoing. Among other things, they claimed that K.A. Diehl was not requiring a third party to comply with a contract, was negligent in hiring managers, was mismanaging elections, and was not paying homeowners their required commissions from real estate sales. (R. p. 043). These accusations were spread by email and via websites like Facebook and change.org. (R. pp. 044–47).

Multiple lawsuits are filed.

K.A. Diehl sued dos Santos and others in response to this online smear campaign. K.A. Diehl brought a five-count complaint, with claims for defamation, tortious interference with contract, intentional interference with prospective contractual relations, civil conspiracy, and injunctive relief. (R. pp. 038–52).

dos Santos and his co-defendants denied any wrongdoing and counterclaimed, asserting claims for abuse of process, unfair trade practices, civil conspiracy, breach of fiduciary duty, negligence, and fraud. (R. pp. 053–88). They also brought four separate but related lawsuits: a class action against the community associations, a class action against K.A. Diehl, and two derivative actions against the two associations.[1]

The lawsuits are mediated together.

On May 1, 2017, this case and the other four were all mediated together. (R. pp. 116–17). dos Santos, however, was not present, and he had not provided K.A. Deihl or the other parties advance notice that he would not be there. Despite his absence, dos Santos represented that his attorney had settlement authority. And throughout the day, dos Santos participated by phone. (R. p. 119).

The mediation lasted all day and into the evening, when shortly before midnight, the parties reached a settlement. (R. p. 119). Because dos Santos was not present, his attorney read the agreement to him over the phone. The parties then signed a Mediated Settlement Agreement. Given his physical absence from the mediation, dos Santos could not sign the agreement himself, so his attorney signed on his behalf. All of the other parties signed the agreement, whether personally or

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[1] These cases were all initially filed as counterclaims and third-party claims in this case. Eventually, the parties agreed that the claims in the third-party complaint would be dismissed from this action and brought in separate actions. (R. pp. 001–15). That led to the related cases No. 2016-CP-26-673, No. 2016-CP-26-674, No. 2016-CP-26-743, and No. 2016-CP-26-744, all of which were mediated together with this case and are now pending on appeal in this Court as No. 2018-000041.

through an agent, as did all three of the attorneys who were representing dos Santos at that time. (R. pp. 126–27).

The circuit court enforces the settlement agreement over dos Santos's opposition.

After the mediation, the defendants largely performed under the settlement agreement. Most of them—including dos Santos—paid the settlement funds.[2] And all of them except dos Santos signed the "more comprehensive mutual release" that the agreement contemplated. K.A. Diehl, meanwhile, signed this release, and it turned over management of the association to a different company. (R. p. 119).

K.A. Diehl moved to enforce the agreement and to require dos Santos to sign the comprehensive release. (R. pp. 118–23). Before the circuit court heard the motion, dos Santos switched attorneys due to a conflict with his original counsel. (R. pp. 274–80). After dos Santos retained new counsel, the circuit court held a hearing on K.A. Diehl's motion, ultimately granting that motion and enforcing the agreement. (R. pp. 012–32).

dos Santos then moved to alter or amend that order, pursuant to Rule 59(e). (R. pp. 291–98). The circuit court denied that motion. (R. pp. 033–35).

dos Santos timely appealed.[3] (R. pp. 302–03).

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[2] The remaining settlement funds have not been paid only because those insurers require a copy of the fully executed release before disbursing the funds.

[3] Neither order that dos Santos appeals purports to be a final judgment, (R. pp. 009–11; 012–32; 033–35), and dos Santos never addressed any jurisdictional issues. Nevertheless, this Court has jurisdiction over this appeal. Nothing remains to be done in this case if the circuit court's enforcement of the settlement agreement is upheld. These orders are therefore immediately appealable because they "in effect determine[] the action and prevent[] a judgment from which an appeal might have

STANDARD OF REVIEW

Courts apply the same rules of construction to the South Carolina Rules of Civil Procedure as they do to statutes. *Maxwell v. Genez*, 356 S.C. 617, 620, 591 S.E.2d 26, 27 (2003). The interpretation of a statute is a question of law that is reviewed *de novo*. *Callawassie Island Members Club, Inc. v. Dennis*, 425 S.C. 193, 198, 821 S.E.2d 667, 669 (2018).

The decision whether to enforce a settlement agreement is within the sound discretion of the trial court. *Rock Smith Chevrolet, Inc. v. Smith*, 309 S.C. 91, 93, 419 S.E.2d 841, 842 (Ct. App. 1992).

ARGUMENT

I. Rule 43(k) does not apply to agreements between the parties, like the agreement in this case.

When discussing whether Rule 43(k) was satisfied in this case, dos Santos is quick to point out that "[i]f a rule's language is plain, unambiguous, and conveys a clear meaning, interpretation is unnecessary and the stated meaning should be enforced." Br. 9 (quoting *Fairchild v. S.C. Dep't of Transp.*, 398 S.C. 90, 107–08, 727 S.E.2d 407, 416 (2012)). Yet, when addressing the antecedent issue of whether Rule 43(k) applies at all to the settlement agreement here, dos Santos is silent about this rule of statutory construction. And with good reason, because applying this well-established canon of interpretation makes clear that Rule 43(k) does not apply.

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been taken." S.C. Code § 14-3-330(2)(a). All that remains if the circuit court's orders are affirmed is for dos Santos to sign the more comprehensive release, the remaining $20,000 to be paid, and the parties to file a stipulation of dismissal. (R. p. 126–27).

A. Rule 43(k), by its plain language, applies only to agreements between counsel.

Somewhat surprisingly, no appellate court in this State has analyzed the plain language of Rule 43(k). Such an undertaking is essential to understanding the scope of the rule. Indeed, without this analysis, a court has no way to give the rule's words "their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the rule." *Green By & Through Green v. Lewis Truck Lines, Inc.*, 314 S.C. 303, 304, 443 S.E.2d 906, 907 (1994).

Rule 43(k) provides:

> 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.

Rule 43(k), SCRCP (emphasis added).

Examining the plain language requires applying basic "rules of grammar" to Rule 43(k). *State v. Miles*, 421 S.C. 154, 163, 805 S.E.2d 204, 210 (Ct. App. 2017); *see also Nielsen v. Preap*, 139 S. Ct. 954, 965 (2019) (explaining that "the rules of grammar govern statutory interpretation unless they contradict legislative intent or purpose" (internal quotation marks omitted)). In his examination of the language of Rule 43(k), dos Santos rushes to focus on what follows the first "unless," a preposition that introduces four conditions, any one of which must be satisfied for an agreement to comply with Rule 43(k). *See* Br. 10–11. But before getting to those conditions, the first part of the rule warrants attention.

The subject of Rule 43(k) is "agreement," and its verb is "shall be binding." Surrounding these two foundational parts of the sentence are three words or phrases that modify Rule 43(k)'s subject.

First, the adjective "no" precedes "agreement," meaning "not any" agreement. *Compact Edition of the Oxford English Dictionary* 1931 (1971) (defining "no").

Second, the present participle "affecting" introduces the clause "the proceedings in an action." This clause requires the agreement to "have an effect on" the particular lawsuit for Rule 43(k) to apply. *Id.* at 38 (defining "affect").

Third, and most importantly for this case, "between" is a preposition introducing an adjective phrase "between counsel." *Id.* at 209 (defining "between" as "[e]xpressing reciprocal action or relations maintained, by two (or more) agents towards each other"). This phrase requires that the agreement be between the lawyers to trigger Rule 43(k).

Here, Rule 43(k) does not apply because the agreement was *not* between the lawyers. Rather, it was between the parties themselves. This is apparent from the agreement's opening sentence, which provides that "the *parties* have agreed," and then all of the *parties* signed the agreement.[4] (R. pp. 126–27 (emphasis added)). This

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[4] dos Santos argues that Rule 43(k) requires that he sign the agreement himself. *See* Br. 11–12. The question here, however, is not what Rule 43(k) requires, as that rule does not apply to an agreement between the parties. Instead, the question is whether dos Santos could sign any agreement through an agent.

That question is easily answered in the affirmative. An agent with authority may sign a contract for a principal. *See S.C. Ins. Co. v. James C. Greene & Co.*, 290 S.C. 171, 183, 348 S.E.2d 617, 624 (Ct. App. 1986). Here, dos Santos's absence at mediation was unexpected, but everyone agreed to proceed only because dos Santos

makes sense because, after all, the parties—not their lawyers—have the ultimate authority "to make or accept an offer of settlement of a matter," Rule 407, SCACR, Rules of Prof. Conduct, Rule 1.2, and the parties themselves were engaged in the negotiations in this case.

When confronted with this agreement between the parties, the circuit court did not abuse its discretion in enforcing it. That court found that the agreement was "the result of extensive negotiations following a lengthy period of contested litigation," after mediation attended by all of the parties (whether physically or by telephone). The agreement was then signed by the parties, either themselves or through their agents. (R. p. 013). The Record on Appeal therefore provides more than sufficient evidence to support the circuit court's conclusion that the parties agreed to settle their dispute in the Mediated Settlement Agreement. C*f. Coakley v. Horace Mann Ins. Co.*, 376 S.C. 2, 6, 656 S.E.2d 17, 19 (2007) (noting the great deference given to a judge as the factfinder in an action at law).

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was available by phone and gave authority to his attorney who, as his agent, signed the contract. (R. p. 119).

To the extent dos Santos claims his lawyer at the mediation did not have actual authority to execute this settlement agreement on his behalf, his remedy is a malpractice suit against his lawyer. He is nevertheless still bound by the agreement because his lawyer had apparent authority to execute that agreement, given the fact that the parties agreed to proceed with the mediation only because dos Santos said his lawyer had authority to settle the case. (R. p. 013); *see also Town of Kingstree v. Chapman*, 405 S.C. 282, 314, 747 S.E.2d 494, 510 (Ct. App. 2013) ("The proper focus in determining a claim of apparent authority is not on the relationship between the principal and the agent, but on that between the principal and the third party.").

B. A review of Circuit Court Rule 14, the predecessor to Rule 43(k), reinforces this conclusion.

South Carolina did not adopt its Rules of Civil Procedure until 1985. Prior to that, procedure in circuit court was governed by the Circuit Court Rules. *See State v. Beaty*, 423 S.C. 26, 41, 813 S.E.2d 502, 510 (2018).

The predecessor to Rule 43(k) was Circuit Court Rule 14. That rule provided:

> No agreement or consent *between the parties, or their attorneys*, in respect to the proceedings in a cause, shall be binding, unless the same shall have been reduced to the form of an order by consent and entered; or unless the evidence shall be in writing, subscribed by the party against whom same shall be alleged, or by his attorney or counsel; or unless made in open court and noted by the presiding judge or the stenographer on his minutes by the direction of the presiding judge.

Circuit Court Rule 14 (emphasis added).

At first glance, the similarities between Circuit Court Rule 14 and Rule 43(k) are obvious. They have a similar sentence structure and use similar language. Moreover, they share the same purpose. *See Ashfort Corp. v. Palmetto Constr. Grp., Inc.*, 318 S.C. 492, 493–94, 458 S.E.2d 533, 534 (1995) (per curiam) ("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." (citing *Ex parte Pearson*, 79 S.C. 302, 60 S.E. 706 (1908))).

But yet these two rules are not identical. Circuit Court Rule 14 applied to an "agreement or consent between the parties, or their attorneys." Rule 43(k), on the other hand, applies only to an "agreement between counsel."

This omission of "the parties" in Rule 43(k) cannot be glossed over. Words in

a statute or rule are presumed to have been chosen deliberately. *See Pee v. AVM, Inc.*, 344 S.C. 162, 168, 543 S.E.2d 232, 235 (Ct. App. 2001). And courts have routinely attached significance to a decision to omit words from a statute or rule. *See Smith v. Fulmer*, 198 S.C. 91, 15 S.E.2d 681, 684 (1941); *see also Dep't of Homeland Sec. v. MacLean*, 135 S. Ct. 913, 919 (2015).

Thus, the omission of "the parties" in Rule 43(k) matters. It makes the scope of agreements subject to that rule narrower than the scope of agreements subject to Circuit Court Rule 14. Any other conclusion would impermissibly add words to Rule 43(k). *See Consumer Advocate for State v. S.C. Dep't of Ins.*, 397 S.C. 599, 602, 725 S.E.2d 708, 710 (Ct. App. 2012) ("The court has no right to add the words the legislature omitted, nor to interpolate them on conceits of symmetry and policy." (internal alteration omitted)).

This difference between Rule 43(k) and Circuit Court Rule 14 should not be alarming. Despite their similar structure and purpose, our Supreme Court has noted at least one other difference between them. Rule 43(k) requires a written agreement between counsel be entered into the record, while Circuit Court Rule 14 did not. *See Farnsworth v. Davis Heating & Air Conditioning, Inc.*, 367 S.C. 634, 638 n.3, 627 S.E.2d 724, 726 n.3 (2006).

C. The cases that dos Santos cites do not compel a different result.

Rather than delve into any analysis of the plain language of Rule 43(k), dos Santos simply cites five cases and a note to that rule in one long citation to claim that "Rule 43(k) applies to *all* settlement agreements." Br. 7. None of this authority,

however, overcomes the rule's plain language that it applies only to agreements "between counsel."

First, dos Santos cites *Farnsworth v. Davis Heating & Air Conditioning, Inc.* There, the plaintiff's attorney sent a letter to the defendant's attorney, offering to settle the case for $22,000. The defendant's lawyer supposedly accepted by signing the letter, but the agreement was never put on the record. The Supreme Court held that the agreement was not enforceable. In its analysis, the court emphasized "between counsel" when quoting Rule 43(k), 367 S.C. at 637, 627 S.E.2d at 725, and it reiterated, near the very end of the opinion, that "Rule 43(k) plainly applies to all settlement agreements signed by counsel," *id.* at 638, 627 S.E.2d at 726. Nowhere did the court imply, much less say, that Rule 43(k) applies when settlement agreements were reached by the parties directly, rather than through their attorneys.

Second, dos Santos points to *Buckley v. Shealy*, 370 S.C. 317, 635 S.E.2d 76 (2006), a case involving long-running litigation over child-support payments. Whatever initial appeal this case may have for dos Santos's position, that support fades away upon closer inspection. For one thing, the court there never engaged with the language of Rule 43(k). For a second, the court actually omitted the "between counsel" language of the rule when quoting it, so the court could not have been addressing the question of the rule's scope. *See id.* at 322, 635 S.E.2d at 78. And for a third, the parties never even briefed this issue to put it squarely before the court.[5]

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[5] These briefs are available from the Clerk of the Supreme Court, and counsel for K.A. Diehl has reviewed all six of the briefs filed by the parties in *Buckley*.

Third, dos Santos relies on *Ashfort Corp. v. Palmetto Construction Group, Inc.* The lawyers in that case told the circuit court that the case was settled, but a dispute subsequently arose over the terms of the settlement agreement, none of which appear to have ever been written down. The Supreme Court rejected an argument that the lawyers were "merely confirm[ing]" an agreement between the plaintiff and the defendant's insurer. 318 S.C. at 495, 458 S.E.2d at 535.

This Court, however, should be wary about putting too much weight on *Ashfort*. The facts of that opinion are sparse, so important context is missing. And this decision was reached without examining the language of Rule 43(k) (and particularly its differences with Circuit Court Rule 14, which the court invoked twice in its short opinion). In any event, to the extent that decision might require "all agreements regarding pending litigation" to comply with Rule 43(k), *id.*, that conclusion is clearly contrary to the plain language of that rule, as it ignores "between counsel," *see Hinton v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 357 S.C. 327, 342, 592 S.E.2d 335, 343 (Ct. App. 2004) (holding that courts "should seek a construction that gives effect to every word of a statute rather than adopting an interpretation that renders some portion meaningless"). Finally, in more recent decisions, such as *Farnsworth*, the Supreme Court has never embraced such a sweeping view that every agreement in any litigation is subject to Rule 43(k).

Fourth, dos Santos invokes *Smith v. Fedor*, 422 S.C. 118, 809 S.E.2d 612 (Ct. App. 2017), in which the parties were litigating the meaning of a confession of judgment and how much, if any, the defendant still had to pay to satisfy that

judgment. The court's decision in *Smith* never distinguished between settlement agreements negotiated between counsel and between the parties. *See id.* at 124–26, 809 S.E.2d at 615–16. That case is therefore of no help to dos Santos here.

Fifth, dos Santos looks to *Motley v. Williams*, 374 S.C. 107, 647 S.E.2d 244 (Ct. App. 2007). This land-dispute case involved a challenge to a settlement that had been read into the record in open court. Like *Smith*, *Motley* did not address how the settlement was negotiated or finalized, and it plainly complied with Rule 43(k), whether or not it had to do so. *See id.* at 109–10, 647 S.E.2d at 245. It is therefore also of no relevance here.

Sixth, dos Santos cites the Note to the 2009 Amendment to Rule 43(k), which provides, "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." Rule 43, SCRCP, Note to 2009 Amendment. This comment does not mean that Rule 43(k) applies to *all* settlement agreements. Rather, it simply observes that Rule 43(k) now offers lawyers and litigants an additional way to comply, and one type of agreement that may benefit from this new method is a settlement agreement. (After all, few other types of litigation agreements would generally require a client's involvement or approval.) The comment does not, however, extend the scope of agreements that are subject to that rule. Nor could it, given that the language of the rule (and not the comment) controls. *Cf. United States v. Jones*, 818 F.3d 1091, 1100 (10th Cir. 2016) ("Courts give weight to the advisory committee notes unless they contradict the plain language of the rule." (citing *Schiavone v. Fortune*, 477 U.S. 21,

31 (1986))).

D. Rule 43(k)'s plain language does not lead to absurd results.

dos Santos has not made any argument that Rule 43(k)'s plain meaning leads to any absurd results, but even if he had (or could on reply, *see Crawford v. Henderson*, 356 S.C. 389, 409, 589 S.E.2d 204, 215 (Ct. App. 2003) (explaining that arguments not raised in an opening brief are waived)), those arguments would have no merit, *cf. TNS Mills, Inc. v. S.C. Dep't of Revenue*, 331 S.C. 611, 624, 503 S.E.2d 471, 478 (1998) ("Statutes, as a whole, must receive practical, reasonable, and fair interpretation, consonant with the purpose, design, and policy of lawmakers.").

Although litigants always have ultimate authority to decide whether to settle a case, how settlement agreements are reached varies. Some cases settle at mediation, where the parties are present (either literally or through an agent), engage directly with the mediator (and maybe even each other), and then sign an agreement. In that moment, everyone involved in that case knows that the parties agreed to the terms of the settlement.

Other cases might be settled by the parties, without any mediator or their attorneys. The parties might have met privately and reached a resolution. That agreement would be enforceable, and both parties would know the terms, whether written or not (although the better practice would certainly be to write them down).

And still other cases are settled after negotiations between the lawyers alone. The lawyers go back and forth with offers and counteroffers, all while relaying the developments to and receiving instructions from their clients. In this situation, the

lawyers reach an agreement (presumably to which their clients have consented), but upon the lawyers' agreement, neither party has manifested his assent to anyone other than his own lawyer.

The difference in these ways of reaching settlement agreements shows how some, but not all, settlement agreements might be subject to Rule 43(k). For those agreements in which the parties are present (whether physically or through an agent), the agreement can be consummated in that moment, just like any contract. *See, e.g.*, *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891, 893 (1989) ("South Carolina common law requires that, in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with required to all essential and material terms of the agreement." (emphasis omitted)). These cases present relatively little risk of a dispute over the terms, which is what Rule 43(k) is designed to avoid.

Agreements negotiated between counsel, on the other hand, carry a greater risk of confusion or dispute. To avoid fights over those terms, Rule 43(k) provides four ways that lawyers and litigants can confirm a settlement agreement.[6]

Of course, settlement agreements do not necessarily have to be treated differently because of the way they are reached. The Rules of Civil Procedure *could* require all settlement agreements to comply with Rule 43(k). That would require

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[6] Given this path to settlement, it should be no surprise that Form 4 includes a box for "Rule 43(k) (Settled)." Contrary to dos Santos's contention, *see* Br. 8, this does not mean that all settlement agreements are subject to Rule 43(k). A settled case could also be dismissed by a stipulation of dismissal, pursuant to Rule 41(a), SCRCP, which is another box on the Form 4.

either adding two words or deleting two words from the rule. To add two words, the rule could insert "parties or" between "between counsel." To delete two words, "between counsel" could be removed. In either case, all settlement agreements would then have to comply with Rule 43(k).

But Rule 43(k) says what it does: "between counsel." Courts cannot add words, and courts cannot take words away. *See Consumer Advocate for State*, 397 S.C. at 602, 725 S.E.2d at 710; *Hinton*, 357 S.C. at 342, 592 S.E.2d at 343. The rule must be applied as written. And as written, it does not apply to the agreement here, which was between the parties, not between their counsel.

II. The requirements of Rule 43(k) were satisfied.

dos Santos's argument that Rule 43(k) was not satisfied here is simple: He must have literally signed the agreement himself, and because he did not, the agreement is not enforceable. *See* Br. 11–12.

This argument wrongly demands that this Court cast aside all of agency law. South Carolina law has long held that a person may act through an agent. *See, e.g.*, *State Bank v. Johnson*, 8 S.C.L. 404, 203 (S.C. Const. App. 1817) ("The agent has authority to bind the principal . . . ."); *Commissioners of Pub. Accounts v. Rose*, 1 S.C. Eq. 461, 470 (S.C. Ch. 1795) (observing that "the principal is civilly responsible for the acts of his agent"). Individuals act through agents in all kinds of legally binding ways, from buying and selling real estate, to a power of attorney to run or sell a business, to a living will that allows an agent to terminate the principle's life, to signing contracts. Moreover, entities have to act through an agent in everything they

do. *See Travelers Ins. Co. (NC) v. Roof Doctor, Inc.*, 325 S.C. 614, 615, 481 S.E.2d 451, 452 (Ct. App. 1997) ("Being an artificial entity it cannot appear or act in person. It must act in all its affairs through agents or representatives.").

Nothing in Rule 43(k) prohibits a party from acting through an agent. And nothing about a settlement agreement is more significant or special than many of the things that an agent can do for a principal. Indeed, a settlement agreement is simply a contract, and an agent can sign a contract for a principal. *See S.C. Ins. Co.*, 290 S.C. at 183, 348 S.E.2d at 624 ("An agent contracting with the authority of his principal binds him to the same extent as if the principal personally made the contract.").

Thus, dos Santos is mistaken when he argues that whether he had given permission to his agent to sign the settlement agreement is irrelevant here. *See* Br. 12 n.9. That question is critical to the inquiry. And the trial court, based on the evidence in the Record on Appeal, found that dos Santos had given that permission. (*See* R. pp. 013; 119).

With dos Santos having signed through his agent, that requirement of Rule 43(k) is satisfied. Additionally, his lawyers also signed the agreement. In fact, all three of them—Chris Nichols, Christian Stegmaier, and Preston Brittain—signed it, even though Rule 43(k) does not expressly require multiple counsel to sign. (*See* R. pp. 126–27).[7]

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[7] Nowhere in his brief does dos Santos argue that the agreement is invalid because K.A. Diehl's attorney did not sign it. That argument is now waived. *See Crawford*, 356 S.C. at 409, 589 S.E.2d at 215. But in any event, it would have been

Ultimately, dos Santos's "belt and suspenders" analogy is misplaced. The certainty of the agreement is established by the written terms and the signatures on the agreement, whether those signatures are by the party himself or through his agent. In this case, the terms of the agreement are clear, and dos Santos and his lawyers signed the agreement. Thus, the circuit court properly enforced the agreement.[8]

III. Courts should readopt a substantial-compliance exception to Rule 43(k).

In *Ashfort*, the Supreme Court explained that Rule 43(k) "does not apply where the agreement is admitted or has been carried into effect." 318 S.C. at 493–94 & n.1, 458 S.E.2d at 534 & n.1. But a decade later in *Farnsworth*, that court called this exception "dictum" and held the requirements of Rule 43(k) must always be satisfied for an agreement to be enforceable. 367 S.C. at 637–38, 627 S.E.2d at 726. Rejecting this substantial-compliance exception was a mistake, and the exception should be readopted.[9]

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meritless, even if dos Santos had raised it. The requirement that a party's lawyer sign a settlement agreement (assuming it applies at all here) is designed to protect that party by ensuring its lawyer has read and approved the agreement, not to be a weapon for another party to attack the agreement. Thus, dos Santos does not have the right to assert that argument. *Cf. State v. Robinson*, 410 S.C. 519, 527–28, 765 S.E.2d 564, 568–69 (2014) (discussing how not every defendant has standing to assert a Fourth Amendment violation).

[8] To the extent dos Santos believes the circuit court mistakenly found he had given authority to his agent, his recourse is (again, *see supra* n.2) a malpractice suit against the agent who exceeded his authority, not being relieved from the agreement.

[9] This Court is obviously bound by the Supreme Court's decision in *Farnsworth*. *See Am. Fast Print Ltd. v. Design Prints of Hickory*, 288 S.C. 46, 47, 339 S.E.2d 516,

A. Courts have recognized substantial-compliance exceptions in many areas of law.

The analysis in *Farnsworth* is short, but it boils down to the fact that Rule 43(k) says "no agreement" and that "no" is absolute. *See id.* This logic, however, ignores the myriad areas of law in which courts have recognized exceptions to rules that are seemingly absolute in order to promote justice and equity.

As for the word "no" not being absolute, consider the First Amendment: "Congress shall make *no* law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances." U.S. Const. amend. I (emphasis added). Yet First Amendment jurisprudence is littered with decisions that allow government to restrict these freedoms in certain circumstances. *See, e.g.*, *Van Orden v. Perry*, 545 U.S. 677 (2005) (upholding a Ten Commandments display against an Establishment Clause challenge); *Hill v. Colorado*, 530 U.S. 703 (2000) (upholding a restriction on speech); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (upholding a restriction on the free exercise of religion). Just as the "no" in the First Amendment is not absolute, the "no" in Rule 43(k) does not necessarily prohibit a substantial-compliance exception.

Such an exception is prevalent throughout our State's law. *See, e.g.*, *Stephens v. CSX Transp., Inc.*, 415 S.C. 182, 201, 781 S.E.2d 534, 544 (2015) (requirements for

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517 (Ct. App. 1986). Nevertheless, K.A. Diehl raises this issue here to preserve it for the Supreme Court's review. *See* Rule 242(d)(2), SCACR.

railroad signage); *Charleston Trident Home Builders, Inc. v. Town Council of Town of Summerville*, 369 S.C. 498, 505, 632 S.E.2d 864, 868 (2006) (Development Impact Fee Act); *State v. Charron*, 351 S.C. 319, 323, 569 S.E.2d 388, 390 (Ct. App. 2002) (Article III, § 16 of the South Carolina Constitution); *Davis v. NationsCredit Fin. Servs. Corp.*, 326 S.C. 83, 86, 484 S.E.2d 471, 472 (1997) (Consumer Protection Code); *Multimedia, Inc. v. Greenville Airport Comm'n*, 287 S.C. 521, 525, 339 S.E.2d 884, 887 (Ct. App. 1986) (FOIA); *Bledsoe v. Metts*, 258 S.C. 500, 504, 189 S.E.2d 291, 293 (1972) (Circuit Court Rules); *Brown v. Mims*, 250 S.C. 546, 549, 159 S.E.2d 247, 248 (1968) (Supreme Court Rules).[10]

Significantly, courts have even applied this exception to contracts—which is exactly what a settlement agreement is. *See, e.g.*, *Clardy v. Bodolosky*, 383 S.C. 418, 427, 679 S.E.2d 527, 531 (Ct. App. 2009); *Elliott v. Snyder*, 246 S.C. 186, 191, 143 S.E.2d 374, 376 (1965); *Dryman v. Liberty Life Ins. Co.*, 216 S.C. 177, 180, 57 S.E.2d 163, 164 (1950). This rule allows courts to fulfill contract law's basic goal of "giv[ing] effect to the intention of the parties." *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 93, 594 S.E.2d 485, 493 (Ct. App. 2004).

A substantial-compliance exception to Rule 43(k) gives courts the ability to give effect to the parties' intention in the context of a settlement agreement. It prevents a technicality from thwarting the agreement to which the parties agreed and under

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[10] Of course, courts have not always approved of such an exception. When they have not, they typically reason that allowing that exception would be inconsistent with both the language and purpose of the statute. *See, e.g.*, *Brown v. Baby Girl Harper*, 410 S.C. 446, 454, 766 S.E.2d 375, 379 (2014); *King v. Am. Gen. Fin., Inc.*, 386 S.C. 82, 90, 687 S.E.2d 321, 325 (2009).

which they have already started (or perhaps even finished) performing.

B. This exception, which existed for almost a century, promotes just results.

For ninety-eight years, South Carolina recognized a substantial-compliance exception to Circuit Court Rule 14 and then to Rule 43(k).

In 1908, the Supreme Court decided *Ex parte Pearson*. There, land was sold to satisfy the debts of an estate. Some of the decedent's heirs later challenged the sale on multiple grounds, including the fact that the case was tried in chambers, rather than in open court. The Supreme Court rejected this argument, explaining that the parties had an "unwritten agreement to try a case at chambers." 79 S.C. at 309, 60 S.E. at 708. Even though this agreement did not comply with Circuit Rule 14, the court refused to hold that it was unenforceable because "the agreement was actually carried into effect." *Id.*

The court's logic was straightforward. Circuit Court Rule 14 was "adopted to prevent disputes as to the existence and terms of agreements." *Id.* But when the agreement had already been given effect, there was no dispute as to its existence or its terms. *Id.* ("[I]t is generally held such rules have no application when the agreement is admitted, or where it has been carried into effect.").

The Supreme Court reaffirmed this exception in *Ashfort*. Although not essential to the holding there, the court did not simply reference this exception in a footnote without any reason. Rather, as the court was discussing Rule 43(k) and its connection to Circuit Court Rule 14, the court included this footnote to explain the limitations on the scope of Rule 43(k).

When the Supreme Court rejected this rule in *Farnsworth*, it did so in two paragraphs. Moreover, it did so without any consideration of *stare decisis*. That doctrine shows "far more a respect for a body of decisions as opposed to a single case standing alone." *McLeod v. Starnes*, 396 S.C. 647, 654, 723 S.E.2d 198, 203 (2012). And it takes into account the soundness of the decisions being challenged. *See Joseph v. S.C. Dep't of Labor, Licensing & Regulation*, 417 S.C. 436, 451, 790 S.E.2d 763, 770 (2016) (noting that "adherence to precedent that is wrong serves no such laudable purpose"); *see also Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31*, 138 S. Ct. 2448, 2479 (2018) ("An important factor in determining whether a precedent should be overruled is the quality of its reasoning . . . .").

The *stare decisis* analysis cuts strongly against having overruled the substantial-compliance exception. First, the exception was adopted in 1908, and the court still looked approvingly upon it in 1995. Thus, the exception had stood the test of time.

Second, the exception is well-founded. The major supposed benefit of the bright-line approach from *Farnsworth* is reducing litigation over whether a settlement agreement was reached and what its terms were. But as this case proves, even this bright-line approach does not eliminate all disputes over settlement agreements.

Given that some litigation is inevitable, the exception allows courts to reach just results by enforcing an agreement to which the parties have already demonstrated their assent. If the parties have begun (or even finished) performing

under an agreement, they presumably consented to it. Otherwise, they would have had no reason to perform. In essence, the rule treats the settlement agreement as voidable, rather than void, and the parties' performance ratifies their assent to the agreement. *Cf. Parks v. Lyons*, 219 S.C. 40, 48, 64 S.E.2d 123, 126 (1951) (discussing how a voidable contract can become enforceable by performance).

Nor does this exception burden the judicial system. Disputes over settlement agreements are already infrequent. Plus, the exception itself requires a party to show substantial compliance with the terms of the agreement. That means that this party must put forward evidence of both the agreement and the other party's fulfillment of at least some of the terms of that agreement. The evidence therefore will typically either corroborate itself or show that no agreement was reached. Thus, this exception will not be significantly harder to apply than a strict, check-all-of-the-boxes approach to Rule 43(k).

C. This exception applies here.

This case is a quintessential example of when the substantial-compliance exception should apply. The settlement agreement the parties negotiated required four primary things: (1) the defendants would pay K.A. Diehl $100,000; (2) the association would pay K.A. Diehl $15,000 to cover fees for K.A. Diehl's last few weeks of property management and to compensate K.A. Diehl for terminating the management contract early; (3) K.A. Diehl would turn over management of the association; and (4) the parties would execute mutual releases. (R. pp. 126–27).

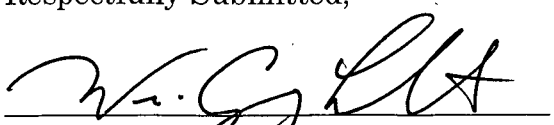
These requirements have been almost completely met. On the first obligation, the defendants have already paid about $80,000 (and the remaining part has not been paid only because those insurers will not disburse funds until the release is executed by all parties). Part of the $80,000 that has already been paid is for dos Santos's share. On the second, the association has paid all of the $15,000. On the third, K.A. Diehl has turned over management to a new company. And on the fourth, every party except dos Santos has executed the releases. (R. pp. 120–22).

All that is left here is for dos Santos to sign the mutual release (which will cause the rest of the $100,000 to be paid). The vast majority of the parties' obligations under the agreement therefore have already been performed, including, significantly, dos Santos's payment obligation. The circuit court recognized as much, and the Record on Appeal amply supports that conclusion. (R. pp. 012–32). Therefore, even if all of the requirements of Rule 43(k) were not met, the circuit court did not abuse its discretion in enforcing the settlement agreement.

CONCLUSION

The circuit court's order should be affirmed.

Respectfully Submitted,



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August 6, 2019
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THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Honorable William H. Seals, Jr., Circuit Court Judge

Appellate Case No. 2018-002009

Case No. 2015-CP-26-05573

K.A. Diehl and Associates, Inc., ... Respondent,

v.

James Perkins, Colleen Franke a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Dame, and Errol Dos Santos, ... Defendants,

Of whom Mark dos Santos is the ..... Appellant.

CERTIFICATE OF COUNSEL

I certify that this FINAL BRIEF OF RESPONDENT complies with Rule 211(b), SCACR.

Wm. Grayson Lambert