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

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 REPLY BRIEF OF APPELLANT

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Mr. dos Santos[1] makes the following points in reply to K.A. Diehl.

ARGUMENT IN REPLY

1. Again, as argued in Mr. dos Santos's principal brief (*see* Br. of Appellant at Argument I.A.), the circuit court erred in finding Rule 43(k) inapplicable to the subject settlement agreement.

(a) The subject settlement agreement is, of course, a "settlement agreement."

To be clear, all parties agree this appeal is about the enforceability of a "settlement agreement." (*Compare* Br. of Appellant p. 1 (stating the following issue on appeal: "I. Did the circuit court err in granting K.A. Diehl's motion to enforce settlement . . . because the subject *settlement agreement* is not binding under Rule 43(k), SCRCP?") (emphasis added) *with* Br. of Resp't p. 1 (stating the following issues on appeal: "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*[?]") (emphasis added).)

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[1] Shorthand references defined in Mr. dos Santos's principal brief (e.g., "Mr. dos Santos" for Defendant/Appellant, Mark dos Santos, identified in the case caption as "Mark Dos Santos") are continued in this reply.

(b) Without question, Rule 43(k) applies to "settlement agreements."

In *Ashfort Corporation v. Palmetto Construction Group, Inc.*, our Supreme Court expressly held that "Rule 43(k) is applicable to settlement agreements." 318 S.C. 492, 494, 458 S.E.2d 533, 534 (1995); *see also Farnsworth v. Davis Heating & Air Conditioning, Inc.*, 367 S.C. 634, 637, 627 S.E.2d 724, 726 (2006) ("We have held in the past that Rule 43(k) applies to settlement agreements.") (citing *Ashfort*, 318 S.C. at 494, 458 S.E.2d at 534); *Smith v. Fedor*, 422 S.C. 118, 125, 809 S.E.2d 612, 615 (Ct. App. 2017) ("'Rule 43(k) applies to settlement agreements.'") (quoting *Farnsworth*, 367 S.C. at 637, 627 S.E.2d at 726); *Motley v. Williams*, 374 S.C. 107, 110, 647 S.E.2d 244, 246 (Ct. App. 2007) ("To be enforceable, *settlement agreements* must either be entered into the court's record or acknowledged in open court and placed upon the record. *This requirement is provided by Rule 43(k)* . . . .") (citations omitted) (emphasis added); Rule 43, Note to 2009 Amendment ("The amendment to Rule 43(k) provides a *settlement agreement* is also binding *if* the agreement is reduced to writing *and* signed by the parties *and* their counsel.") (emphasis added); *cf. In re Estate of Brown*, 2019 WL 2202813 *5 (Ct. App. Filed May 22, 2019) ("Settlements such as the ones here are therefore guided by Rule 43(k) . . . which the skilled circuit judge properly relied upon.").

(c) According to the circuit court and K.A. Diehl, Rule 43(k) only applies to settlement agreements between counsel, not settlement agreements between the parties themselves. This is incorrect. Rule 43(k)'s applicability does not turn on whether an agreement is between counsel or between the parties, but whether it regards pending litigation, which, of course, the subject settlement agreement does.

Rule 43(k)'s applicability is not limited to settlement agreements. It apples to "*all agreements regarding pending litigation*." *Ashfort*, 318 S.C. at 495, 458 S.E.2d at 535 (emphasis added) ("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."); *see also id.* at 493–94, 458 S.E.2d at 534 ("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*.") (emphasis added); *Smith*, 422 S.C. at 125, 809 S.E.2d at 615 ("Rule 43(k) . . . 'is intended to prevent disputes as to the existence and terms of *agreements regarding pending litigation*.'") (quoting *Ashfort*, 318 S.C. at 493–94, 458 S.E.2d at 534). What brings an agreement within the purview of Rule 43(k) is not that it is between counsel, as opposed to between the parties themselves, but that it regards pending litigation, as the subject settlement agreement obviously does.

(d) Even before the 2009 amendment to Rule 43(k), our Supreme Court rejected substantially the same type of narrow reading of the rule as that endorsed by the circuit court and K.A. Diehl.

The appellants in *Ashfort* argued against Rule 43(k)'s applicability on the basis that the agreement they were attempting to enforce was not an agreement between counsel; specifically, they argued that the agreement they were attempting to enforce "[wa]s between [the] respondent and [their] insurer and that this agreement was merely confirmed by the parties' counsel." 318 S.C. at 495, 458 S.E.2d at 535. Rejecting this argument, the Court explained, "To take such a narrow reading of Rule 43(k) would defeat its purpose of preventing disputes such as this one. 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." *Id.* (emphasis added).

(e) In the wake of the 2009 amendment to Rule 43(k), the narrow reading endorsed by the circuit court and K.A. Diehl is irreconcilable with the plain language of the rule and the policy sought to be advanced thereby.

In 2009, Rule 43(k) was amended to add language providing that an agreement within the purview of rule (i.e., an agreement regarding pending litigation) may be made binding by reducing it to writing and having it "signed by the *parties and their counsel*." Rule 43(k) (emphasis added); *see also id.*, Note to 2009 Amendment (explaining, "The [2009] amendment to Rule 43(k) provides a

settlement agreement is also binding if the agreement is reduced to writing and signed by the *parties and their counsel.*") (emphasis added). The view of Rule 43(k) endorsed by the circuit court and K.A. Diehl is to the effect that a written settlement agreement need not be signed by the parties' counsel to be binding, i.e., that a binding settlement agreement requires only the signatures of the parties themselves. This view is irreconcilable with the plain language of Rule 43(k), effectively editing the "and their counsel" language out of the rule and thwarting the purpose for which this language was included to promote.

2. Again, as argued in Mr. dos Santos's principal brief (*see* Br. of Appellant at Argument I.B.), the circuit court erred in finding that, even assuming Rule 43(k) did apply, the subject settlement agreement complies with Rule 43(k).

As stated in 1(e) above, the circuit court and K.A. Diehl's reading of Rule 43(k) to find it inapplicable to the subject settlement agreement is irreconcilable with the plain language of the rule and the policy sought to be advanced thereby. The finding that the subject settlement agreement complies with Rule 43(k) suffers from the same problem. The rule plainly requires the signatures of both the *parties and their counsel.* The view that compliance can be had by counsel signing for the party (as the party's agent) is the converse of the view that a binding settlement agreement requires only the signatures of the *parties*: it is the view that a binding settlement agreement requires only the signatures of *counsel.* The particular edits are different—as opposed to removing the "and their counsel" language, the "the

parties and their" language is excised—but the error (and frustration to the rule's aim of promoting bright line clarity and thereby avoiding the need to devote court time to resolving controversies over the existence and terms of agreements regarding pending litigation) is all the same.

3. This Court should not—indeed, it cannot—adopt a substantial-compliance exception to Rule 43(k).

In a footnote, the *Ashfort* Court stated, "The rule [(i.e., Rule 43(k))] does not apply where the agreement is admitted or has been carried into effect." 318 S.C. 494, 458 S.E.2d at 534 n.1. About a decade later, however, the *Farnsworth* Court expressly rejected this language as "dictum [that] does not comport with the language of Rule 43(k)." 367 S.C. at 638, 627 S.E.2d at 726; *see also Buckley v. Shealy*, 370 S.C. 317, 322, 635 S.E.2d 76, 78 (2006) ([W]e recently held that *Rule 43(k)'s terms are mandatory* and that *Ashfort's* recitation was misguided dicta.") (citing *Farnsworth*, 367 S.C. at 638, 627 S.E.2d at 726) (emphasis added). A substantial-compliance exception to Rule 43(k) no better comports with the language and purpose of Rule 43(k) today than it did when *Farnsworth* was decided. No such exception should be adopted, but most respectfully, given existing Supreme Court precedent holds that Rule 43(k)'s terms are mandatory, this Court must yield to that holding in any event.

CONCLUSION

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

Respectfully submitted,
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APPELLANT'S CERTIFICATION FOR FINAL BRIEF

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I, Russell G. Hines, do hereby certify that the Final Brief of Appellant and the Final Reply Brief of Appellant comply with Rule 211(b), SCACR. Additionally, the undersigned hereby certifies that the both of Appellant's Final Briefs comply with the Supreme Court order of April 15, 2014.

Respectfully submitted,
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