

**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 PETITION FOR REHEARING

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Feb 07 2022

SC Court of Appeals

NOW COMES Mr. dos Santos¹, by and through his undersigned counsel, pursuant to Rule 221(a), SCACR, timely following the filing of this Honorable Court’s unpublished opinion affirming the trial court as modified (the “Subject Opinion”),² and hereby petitions for rehearing of this matter, contending, most respectfully, that the Court misapprehended or overlooked the material points stated below (in the Argument section of this petition).

BACKGROUND

K.A. Diehl³ 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. pp. 39 ¶¶

¹ “Mr. dos Santos” is Defendant/Appellant, Mark dos Santos, identified in the case caption as “Mark Dos Santos.”

² The Subject Opinion was filed December 22, 2021, making the original deadline to petition for rehearing January 6, 2022, pursuant to Rule 221(a). By order filed January 6, 2022, in response to Mr. dos Santos’s motion of January 5, 2022, the Court extended the time for serving and filing the petition for rehearing until January 21, 2022. By order filed January 20, 2022, in response to Mr. dos Santos’s motion of January 19, 2022, the Court extended the time for serving and filing the petition for rehearing until today, February 7, 2022.

³ “K.A. Diehl” is Plaintiff/Respondent, K.A. Diehl and Associates, Inc.

2–8, pp. 64–65 ¶¶ 96–100, pp. 94:24–95:7.) K.A. Diehl was the management company for the Associations. (*See* R. pp. 38 ¶ 1, pp. 65–67 ¶¶ 101–115.)

K.A. Diehl filed this lawsuit against a number of Ocean Front Spa unit owners, i.e., Defendants⁴, 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, 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

⁴ “Defendants” refers, collectively, to Mr. dos Santos and the other defendants identified in the above caption.

⁵ (R. p. 39 ¶ 9.)

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 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 signed only by the following parties: K.A. Diehl (by its president), James Perkins, Colleen Franke, Nancy Moore, and Errol dos Santos. Of Defendants, neither Mr. dos Santos nor Steve Dame actually signed the 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 settlement. (*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, 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 it had decided the matter in K.A. Diehl's favor and a formal order would follow,⁸ the court granted K.A. Diehl's motion 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,⁹ the court heard the motion on October 8, 2018,¹⁰ and thereafter denied it by order filed October 9, 2018. (R. pp. 33–35.)

This appeal timely followed by notice served November 8, 2018,¹¹ and in due course, it was fully briefed and made ready for decision.

On November 15, 2021, K.A. Diehl moved to dismiss the appeal and Mr. dos Santos's remaining counterclaims. (*See* 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

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.)

⁹ (R. pp. 12–32, pp. 281–301.)

¹⁰ (*See generally* R. pp. 108–114.)

¹¹ (R. pp. 302–306.)

were successful in this appeal (which challenges the enforceability of the settlement agreement¹²), he did not have 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 to dismiss, 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 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 denied K.A. Diehl’s motion to dismiss by order filed December 22, 2021. (*See* Order Denying K.A. Diehl’s Mot. to Dismiss the Appeal and Counterclaims.)

¹² Mr. dos Santos contends that the settlement agreement is not enforceable because it does not comply with Rule 43(k), SCRCP, which, in pertinent part, provides as follows:

No agreement between counsel affecting the proceedings in an action shall be binding unless . . . reduced to writing and signed by *the parties and their counsel*.

(emphasis added).

Also on December 22, 2021, however, the Court filed the Subject Opinion, affirming the trial court as modified. Although it agreed with Mr. dos Santos's argument that the trial court erred in holding that Rule 43(k) did not apply to the settlement agreement,¹³ the Court 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 ("the part[y]") 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 cited a string of authorities that it appears to believe support its implicit 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 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 supported its affirmance of the trial court's enforcement of the settlement

¹³ It was in this respect that the Court modified the trial court's decision.

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.

ARGUMENT

1. Misapprehending or overlooking a number of material points, the Court has erroneously affirmed the trial court's enforcement of the settlement agreement, because the settlement agreement does not comply with Rule 43(k).

(a) For there to be a binding settlement agreement, there must be strict compliance with Rule 43(k)—substantial compliance is not sufficient. 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. The terms of Rule 43(k) are plain and mandatory and cannot be vitiated by turning to contract or equitable principles (or counter public policy arguments).

“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).

As our Supreme Court has explained, the terms of Rule 43(k) are plain¹⁴ and mandatory,¹⁵ their intended purpose is “to prevent disputes as to the *existence* and terms of agreements regarding pending litigation,”¹⁶ and they cannot be vitiated by

¹⁴ *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.”).

¹⁵ *Buckley v. Shealy*, 370 S.C. 317, 322, 635 S.E.2d 76, 78 n.2 (2006) (“Rule 43(k)’s terms are mandatory . . .”).

¹⁶ *S.C. Human Affairs Comm’n v. Chen*, 430 S.C. 509, 519, 846 S.E.2d 861, 866 (2020) (emphasis added). Please Note: Pursuant to Rule 208(b)(7),

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.”).

(i) Having someone sign the party’s name with permission is insufficient to comply with Rule 43(k).

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, for the Court 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.

SCACR, Mr. dos Santos cited this case to the Court via letter dated October 7, 2020.

¹⁷ *Buckley*, 370 S.C. at 322, 635 S.E.2d at 78 n.2 (“Rule 43(k)’s terms are mandatory . . .”).

(ii) Having the party’s attorney sign as the party’s agent is insufficient to comply with Rule 43(k).

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 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 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”¹⁸—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, for the Court allow

¹⁸ *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.”).

such surrogacy to satisfy Rule 43(k) is to turn to improper principles to vitiate the “mandatory”¹⁹ nature of its terms. *Chen*, 430 S.C. at 521, 846 S.E.2d at 866.

(b) Even on its own terms (i.e., besides the fact that it is untethered Rule 43(k), as explained above), the Court’s about the signature of one being done by the hand of another analysis is misguided.

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

¹⁹ *Buckley*, 370 S.C. at 322, 635 S.E.2d at 78 n.2 (“Rule 43(k)’s terms are mandatory . . .”).

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, along with any other or further reason(s) set forth in his appellate briefs already on file, the entirety of which he hereby adopts and incorporates herein by reference and reiterates/reasserts in support hereof, 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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February 7, 2022

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SC Court of Appeals

I, Russell G. Hines, of Clement Rivers, LLP, attorney for Appellant, hereby certify that **APPELLANT'S PETITION FOR REHEARING** was served on Respondent on February 7, 2022, via email (see attached) to Respondent's counsel of record:

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February 7, 2022

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From: Hines, Russell
Sent: Monday, February 7, 2022 4:56 PM
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 Petition for Rehearing
Attachments: K.A. Diehl v. Perkins (2018-002009) -- Petition for Rehearing.pdf

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

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