

**RECEIVED**

**Jun 13 2022**

**S.C. SUPREME COURT**

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

---

APPEAL FROM HORRY COUNTY  
Court of Common Pleas

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

Appellate Case No. 2022-000498  
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, William Moore, Steven Dame  
and Errol Dos Santos,

Defendants,

Of whom Mark Dos Santos is the

Petitioner.

---

**RESPONDENT'S RETURN TO PETITION FOR WRIT OF CERTIORARI**

---

James K. Gilliam  
BURR & FORMAN LLP  
Post Office Box 447  
Greenville, SC 29602

Henrietta U. Golding  
BURR & FORMAN LLP  
2411 North Oak Street, Suite 206  
Myrtle Beach, SC 29577

*Counsel for Respondent*

## INDEX

QUESTIONS PRESENTED.....	3
STATEMENT OF THE CASE.....	4
ARGUMENTS.....	6
I.    NO SPECIAL AND IMPORTANT REASONS EXIST TO JUSTIFY GRANTING CERTIORARI .....	6
II.   THE COURT OF APPEALS CORRECTLY HELD THE AGREEMENT COMPLIES WITH RULE 43(K).....	8
III.  THE COURT OF APPEALS’ ANALYSIS IS CORRECT REGARDING SIGNATURES BY ONE FOR ANOTHER .....	10
CONCLUSION.....	11

## **QUESTIONS PRESENTED**

- I. Whether Any Special and Important Reasons Exist to Justify Granting Certiorari.
- II. Whether the Court of Appeals Correctly Held the Agreement Complies with Rule 43(k).
- III. Whether the Court of Appeals Analysis is Correct Regarding Signatures by One for Another.

## STATEMENT OF THE CASE

The parties in this case attended mediation for approximately fifteen hours on May 1, 2017. (R. p. 115). All Defendants and their counsel were physically present at mediation, with the exception of Mark Dos Santos (“Petitioner”), whose absence was unexpected. (R. p. 119). At the very beginning of mediation, the mediator, Karl A. Folkens, asked all parties and counsel if they desired to proceed with Petitioner participating by telephone, and all parties and counsel—including Petitioner and his three attorneys—agreed. (R. p. 119).

Petitioner actively participated in all aspects of mediation, including joint sessions with all parties and closed sessions with only his co-Defendants. (R. p. 119). After fifteen hours, the parties reached an agreement. (R. p. 119). The parties reduced their mediated settlement agreement (“Agreement”) to writing and counsel for Petitioner read the operative provisions of the Agreement to Petitioner over the telephone. (R. p. 120). One of Petitioner’s three attorneys executed the Agreement on Petitioner’s behalf, signing it “with permission.” (R. pp. 16, 120).

The parties intended for the Agreement to be enforceable as a standalone document. This is clear from the language in the Agreement, which states, “The parties intend for this Agreement to be enforceable by the Court, and if any material term is omitted, the Court shall determine what is reasonable rather than voiding this Agreement.” (R. p. 126). The Agreement contemplated that the parties would execute a “more comprehensive mutual release” following mediation. (*Id.*). In accord with this provision, the attorneys circulated a “more comprehensive mutual release” for execution by the parties. (R. pp. 118-23, 134-83). Petitioner alone refused to sign it. (*Id.*). Petitioner argued the Agreement was unenforceable because it did not comply with Rule 43(k) of the South Carolina Rules of Civil Procedure.

On October 18, 2017, Respondent K.A. Diehl and Associates, Inc. (“K.A. Diehl”) filed a Motion to Enforce Settlement. (R. pp. 118-273). The circuit court granted the motion and articulated two reasons for its ruling: (1) Rule 43(k) was inapplicable to the Agreement because Rule 43(k) applied only to agreements “between counsel”; and (2) Even if Rule 43(k) applied, the Rule was satisfied because all parties signed the Agreement, either personally or through a designated agent. (R. p. 13). The circuit court further observed that Petitioner presented no evidence that the permission he gave to his counsel to execute the Agreement was lacking or withdrawn. (R. pp. 12-13).

Thereafter, Petitioner filed a Rule 59(e) motion on March 31, 2018. (R. pp. 108-114, 291-301). The circuit court denied the motion, and then, Petitioner appealed.

On December 22, 2021, the Court of Appeals issued an unpublished opinion affirming the circuit court’s order as modified. *K.A. Diehl & Assocs., Inc. v. Perkins*, Op. No. 2021-UP-454 (S.C. Ct. App. filed Dec. 22, 2021). The Court of Appeals determined the Agreement complied with Rule 43(k). Specifically, the Court observed that Petitioner attended the mediation by telephone, and Petitioner’s name was signed on the Agreement by his attorney with the words “with permission” following the signature. Further, the Court found Petitioner presented no evidence that his attorney signed the Agreement without permission. After citing to numerous authorities regarding the validity of signatures for one by another with permission, the Court determined Petitioner’s attorney had actual authority to sign the Agreement, and therefore, the Court concluded that the circuit court correctly granted Petitioner’s Motion to Enforce Settlement. Petitioner filed a Petition for Rehearing on February 9, 2022, which the Court denied on March 23, 2022. This petition for writ of certiorari followed.

## STANDARD OF REVIEW

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). When interpreting the South Carolina Rules of Civil Procedure, courts apply the same rules of construction as they do to statutes. *Maxwell v. Genez*, 356 S.C. 617, 620, 591 S.E.2d 26, 27 (2003). 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).

## ARGUMENT

### **I. No Special and Important Reasons Exist to Justify Granting Certiorari.**

There are no “special and important” reasons to grant certiorari.

A writ of certiorari “is not a matter of right,” and it “will be granted *only* where there are *special and important reasons*.” Rule 242(b), SCACR (emphasis added). While the Rule does not attempt to list all of the “special and important reasons” that might exist to justify granting certiorari, the Rule identifies five examples to illustrate the “character of reasons” “which will be considered” when determining whether to grant certiorari. *Id.* Those five reasons are:

1. Where there are novel questions of law.
2. Where there is a dissent in the decision of the Court of Appeals.
3. Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.
4. Where substantial constitutional issues are directly involved.

5. Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

*Id.*

None of the reasons identified by Rule 242(b) as special and important are present here. This case involves a question of whether the circuit court, in its sound discretion, erred when it enforced a settlement agreement signed by a party's attorney with the party's express permission. In the petition, Petitioner argues the Agreement violates Rule 43(k) because the Petitioner did not physically sign the Agreement by his own hand. Petitioner claims his attorney could not execute the Agreement for him and comply with Rule 43(k). Essentially, Petitioner argues the law of agency does not apply to Rule 43(k).

This case does not involve a novel question of law. At first blush, it seems to be about Rule 43(k), but that is only nominally true. This case is really about agency law, and what powers an attorney has to settle a case on behalf of his client. This is a settled area of the law. *See Crowley v. Harvey & Battey, P.A.*, 327 S.C. 68, 70, 488 S.E.2d 334, 334–35 (1997) (“In South Carolina, an attorney may settle litigation on behalf of his client, and absent fraud or mistake, such a settlement is binding on the client .... This rule is based on principles of agency law.”).

The Court of Appeals' opinion fits neatly with established precedent about agency law. While there have been a number of cases dealing with Rule 43(k) over the last several years, the Court of Appeals' decision does nothing to conflict with any of those decisions. For example, Petitioner places much emphasis on this Court's recent opinion in *S.C. Human Affairs Commission v. Zeyi Chen*. 430 S.C. 509, 846 S.E.2d 861 (2020). However, *Zeyi Chen* does not hold that one's attorney is unable to sign a settlement agreement for him. Thus, contrary to the

assertions by Petitioner, neither *Zeyi Chen*, nor any other case dealing with Rule 43(k) demand a different result here.

None of the other reasons identified in Rule 242 are present either. There was no dissent in the Court of Appeals' decision; there are no constitutional issues; and there are no federal questions.

As a result, this case does not raise the "special and important reasons" necessary to grant certiorari. Accordingly, this Court should deny the petition.

## **II. The Court of Appeals Correctly Held the Agreement Complies with Rule 43(k).**

Rule 43(k) governs agreements between counsel. According to the Rule, one way for such an agreement to be binding is for it to be "signed by the parties and their counsel." Rule 43(k), SCRCP. The issue here is whether a party's attorney can sign a settlement agreement for him and comply with Rule 43(k).

Petitioner takes an extreme view of Rule 43(k). He argues Rule 43(k) compliance can only occur by a party's physical signature made by his hand. Petitioner argues, "Proper Rule 43(k) analysis leaves no room for any consideration of whether [Petitioner's] name was signed on the settlement agreement with or without permission." (Pet. for Writ of Cert., p. 12). In Petitioner's view, an attorney could never sign for a party pursuant to Rule 43(k) because to do so would "effectively rewrite the rule so as only to require counsel's signature." (Pet. for Writ of Cert., p. 13).

The plain language of Rule 43(k) does not support Petitioner's extreme view of the Rule. Nothing in the Rule prohibits a party from acting through an agent, and nothing about a settlement agreement is more significant or special than many of the acts an agent can complete for a principal. A settlement agreement is simply a contract, and an agent can sign a contract

for a principal.<sup>1</sup> See *Koutsogiannis v. BB & T*, 365 S.C. 145, 149-50, 616 S.E.2d 425, 428 (2005) (holding a client could be held liable for its attorney-agent’s “actions taken within his scope of representation, including possible torts committed by him.”); *Miller v. Dillon*, 432 S.C. 197, 206, 851 S.E.2d 462, 467 (Ct. App. 2020) (“In South Carolina jurisprudence, settlement agreements are viewed as contracts.”); *S.C. Ins. Co. v. James C. Greene & Co.*, 290 S.C. 171, 183, 348 S.E.2d 617, 624 (Ct. App. 1986) (“An agent contracting with the authority of his principal binds him to the same extent as if the principal personally made the contract.”); *State Bank v. Johnson*, 8 S.C.L. 404, 203 (S.C. Const. App. 1817) (“The agent has authority to bind the principal...”).<sup>2</sup> Recognizing these principles, the Court of Appeals correctly found Petitioner did “sign” the agreement—through his counsel.

There is no evidence in the record to demonstrate that Petitioner’s attorney lacked permission to sign his name to the Agreement, so that point is not at issue; the only issue before this Court is whether the method of Petitioner’s signature was valid in order to satisfy the requirements of Rule 43(k). Stated differently, if certiorari were granted, the ultimate issue would be whether an attorney can sign an agreement on behalf of his client with the express permission of his client. The law of agency answers this question in the affirmative, and Rule 43(k) does not do anything to obviate the rules of agency.

---

<sup>1</sup> Petitioner conceded in his Memorandum in Opposition to K.A. Diehl’s Motion to Enforce Settlement that “an attorney’s role is, by definition, one of agency alone.” (R. p. 294).

<sup>2</sup> Furthermore, if Rule 43(k) were intended to eviscerate the law of agency, it would also nullify any import behind Rule 6(b), SCADR, which permits parties to attend a mediation in some way other than being physically present when agreed to by the mediator and all parties. See Rule 6(b), SCADR (“The following persons shall physically attend a mediation settlement conference *unless otherwise agreed to by the mediator and all parties....*”) (emphasis added).

Accordingly, the Court of Appeals correctly found the Agreement complied with Rule 43(k).

### **III. The Court of Appeals' Analysis is Correct Regarding Signatures by One for Another.**

Petitioner next questions the cases cited by the Court of Appeals regarding one signing for another. Petitioner argues the cases cited by the Court of Appeals require the signature to be completed at the contemporaneous direction of one, and likely also only in his physical presence, in order for another to be able to sign on his behalf. (Pet. for Writ of Cert., pp. 13-15). Petitioner's arguments reflect a misapprehension of the law and a misunderstanding of the facts.

First and foremost, the Court of Appeals held Petitioner failed to provide any evidence that his attorney signed Petitioner's name without his permission during the mediation. Thus, the Court found there was no evidence that Petitioner's consent was not contemporaneous with his attorney's signature of Petitioner's name. Furthermore, the authorities to which the Court of Appeals cited stand for the simple proposition that when one signs for and with the permission of another, that signature is valid. *See, e.g., Signature, Black's Law Dictionary* (11th ed. 2019) (defining "signature" as "a person's name or mark written...at the person's direction"); 80 C.J.S. *Signatures* § 13 (2000) (noting "a signature may be made for a person by the hand of another...with his acquiescence...."). Petitioner's attempt to emphasize different language in the cases cited by the Court is of no significance and does not add to this commonly accepted rule.

Without citing to any evidence in the record, Petitioner asserts, "The mere and generalized (and supposed) permission with which [Petitioner's] name was signed to the settlement agreement was not accompanied by any contemporaneous direction or request of

[Petitioner], and certainly not in his physical presence.” (Pet. for Writ of Cert., p. 15). As much as Petitioner may wish to insinuate a lack of permission to sign his name now, Petitioner never raised this issue to the circuit court, and Petitioner never offered any evidence to support this assertion.<sup>3</sup> See *Crawford v. Henderson*, 356 S.C. 389, 409, 589 S.E.2d 204, 215 (Ct. App. 2003) (holding an argument not presented to the trial judge was unpreserved for appellate review); see also *Encore Tech. Grp., LLC v. Trask*, Op. No. 5871 (S.C. Ct. App. Filed Nov. 24, 2021) (Howard Adv. Sh. No. 41 at 28) (“[A]rguments of counsel are not evidence....”).

Also, Petitioner’s arguments disregards the facts. After all, Petitioner *was* present at the mediation by telephone, and Petitioner provided his attorney permission to sign on his behalf. This is all expressly permitted under the South Carolina Alternative Dispute Resolution Rules. See Rule 6(b), SCADR (allowing physical attendance of parties to be waived if agreed to by the mediator and all parties); Rule 2(m), SCADR (“For purposes of these rules, the reference to sign or signing shall include...*electronic consent*.”) (emphasis added).

### CONCLUSION

For the foregoing reasons, this Court should deny the petition for writ of certiorari.

*[signature to follow]*

---

<sup>3</sup> In fact, Petitioner asserted the contrary in his Memorandum in Opposition to K.A. Diehl’s Motion to Enforce Settlement: “It is undisputed that [Petitioner] did not attend mediation in person. The mediation was attended by his attorneys, *acting on his behalf*.” (R. p. 285) (emphasis added.)

**BURR & FORMAN LLP**

*/s/ James K. Gilliam*

---

James K. Gilliam, SC Bar #0076695  
104 South Main St., Suite 700 (29601)  
Post Office Box 447  
Greenville, SC 29602  
864.271.4940 (Telephone)  
864.271.4015 (Facsimile)  
[jgilliam@burr.com](mailto:jgilliam@burr.com)

Henrietta U. Golding, SC Bar #2173  
2411 N. Oak Street, Suite 206 (29577)  
Post Office Box 336  
Myrtle Beach, SC 29578-0336  
Ph: 843.444.1107  
Fax: 843.443.9137  
[hgolding@burr.com](mailto:hgolding@burr.com)

*Counsel for Respondent*

June 13, 2022  
Greenville, South Carolina