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**Jan 03 2023**

**SC Court of Appeals**

**THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS**

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Appeal from Horry County  
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

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Case No. 2015-CP-26-05573  
Court of Appeals Case No. 2018-002009

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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.

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**RETURN TO MOTION FOR COSTS**

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CLEMENT RIVERS, LLP  
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*Attorneys for Appellant*

By and through his undersigned counsel, Appellant submits this return in opposition to Respondent's motion for costs.

### **BACKGROUND**

In this appeal, Appellant challenged the trial court's enforcement of a settlement agreement that Appellant contended did not comply with Rule 43(k), SCRPC.

This Court decided the appeal by opinion filed December 22, 2021, affirming the trial court as modified. Although the Court agreed with Appellant's argument that the trial court erred in holding that Rule 43(k) did not apply to the settlement agreement, it nonetheless affirmed the trial court's enforcement of the settlement agreement, disagreeing with Appellant's argument that the settlement agreement was not executed in compliance with Rule 43(k).

Following this Court's denial of Appellant's timely petition for rehearing, Appellant timely petitioned the Supreme Court for a writ of certiorari.

The Supreme Court denied Appellant's petition for a writ of certiorari on December 15, 2022, and this Court remitted the matter to the trial court on December 16, 2022.

Filed by Respondent on December 22, 2022, the instant motion for costs (the "Subject Motion") follows.

## ARGUMENT

1. **The Subject Motion should be denied because it is directed to the wrong court, and Respondent has not made a timely motion for costs directed to the proper court.**

As is plain on the face of the Subject Motion, it is directed to the Supreme Court. (*See* Subject Motion (captioned “In the Supreme Court”); *id.* (referencing “Appellate Case No. 2022-000498,” the Supreme Court’s appellate case number for this matter); *id.* (referring to Mark Dos Santos as “Petitioner”); *id.* (moving “pursuant to Rules 222 and 242(j), SCACR”) (emphasis added); Respondent’s Itemized Statement of Costs (captioned “In the Supreme Court”); *id.* (referencing “Appellate Case No. 2022-000498,” the Supreme Court’s appellate case number for this matter); *id.* (referring to Mark Dos Santos as “Petitioner”); *id.* (seeking recovery of “\$2,500.00” for the “Attorney’s fee provided by Rule 242(j)(2), SCACR”).

The cost recovery provisions of Rule 242(j) apply only “When a Writ of Certiorari Has Been Granted.” (Bold print in original omitted); *see also* Rule 222(e) (“If a petition for a writ of certiorari is sought under Rule 242, the Court of Appeals shall tax costs only in those cases in which the petition for a writ of certiorari is denied. In all cases in which a writ of certiorari is granted, costs shall be awarded in the manner provided by Rule 242(j).”).

Where, as here, the petition for a writ of certiorari is denied, only the cost recovery provisions of Rule 222 are applicable, not the cost recovery provisions of

Rule 242(j), and to be proper, a motion for costs must be directed to this Court, not the Supreme Court, and such a motion must be timely served and filed within 15 days of the issuance of the remittitur. Rule 222(d) (“A party desiring costs to be taxed shall, within fifteen (15) days of the issuance of the remittitur, serve and file a motion requesting that costs be assessed under this Rule.”).

While Appellant recognizes that the Subject Motion was filed in this Court, not in the Supreme Court—and, accordingly, Appellant has captioned this return as filed in this Court, not in the Supreme Court—the actual language of the Subject Motion is such that the Subject Motion is not in fact directed to this Court, i.e., it does not in fact ask this Court for relief but rather asks the Supreme Court for relief, and this is evidenced not only by the caption of the Subject Motion but also by Subject Motion’s reliance on the cost recovery provisions of Rule 242(j), which exclusively apply to motions for costs to the Supreme Court, and the Subject Motion’s express request for relief (a \$2,500 attorney fee under Rule 242(j)(2)) that even in an appropriate case (which this is not) can only ever be granted by the Supreme Court.

Accordingly, the Subject Motion should be denied because it is directed to the wrong court, and Respondent has not made a timely motion for costs directed to the proper court within 15 days of the issuance of the remitter on December 16, 2022.

**2. The Subject Motion should be denied because it wrongly seeks to recover a \$2,500 attorney fee under Rule 242(j)(2).**

As explained above, where, as here, the petition for a writ of certiorari is denied, only the cost recovery provisions of Rule 222 are applicable, not the cost recovery provisions of Rule 242(j). Accordingly, the Subject Motion should be denied because it unduly seeks recovery of a \$2,500 attorney fee under Rule 242(j)(2) to which Respondent is plainly not entitled.

**3. The Subject Motion should be denied because the Court agreed with Appellant in part.**

In pertinent part, Rule 222(a) provides, “When an appeal is affirmed or reversed in part or is vacated, costs shall be allowed only as ordered by the appellate court.” While the Court’s decision affirmed the trial court, the affirmance was not without qualification, because the Court agreed with Appellant that the trial court erred in holding that Rule 43(k) did not apply to the settlement agreement. Accordingly, the circumstances are such—even more so in consideration of the circumstances addressed in 1 and 2 above—that the Subject Motion should be denied and the parties simply left to bear their own respective costs.

## CONCLUSION

For the foregoing reasons, the Subject Motion should be denied in its entirety or, alternatively, at a minimum, the Subject Motion should be denied to the extent of the plainly improper \$2,500 attorney fee Respondent seeks to recover under Rule 242(j)(2).

Respectfully submitted,  
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January 3, 2023

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Of whom Mark Dos Santos is the

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**PROOF OF SERVICE**

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*Attorneys for Appellant*

I, Russell G. Hines, of Clement Rivers, LLP, attorneys for Appellant, hereby certify that Appellant's **RETURN TO MOTION FOR COSTS** was served on all other parties to this appeal on January 3, 2023, via email (see attached) to their following counsel of record:

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Respectfully submitted,  
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January 3, 2023

**From:** [Hines, Russell](#)  
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**Subject:** K.A. Diehl v. Dos Santos (Appellate Case No. 2018-002009) -- Return to Motion for Costs  
**Date:** Tuesday, January 3, 2023 11:07:35 PM  
**Attachments:** [image001.png](#)  
[K.A. Diehl v. Perkins \(2018-002009\) -- Return to Motion for Costs.pdf](#)

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Attached regarding the above-referenced matter, please find Appellant's **Return to Motion for Costs**.

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