

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

RECEIVED

Jan 09 2023

SC Court of Appeals

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.

RESPONDENT'S REPLY TO APPELLANT'S RETURN

Respondent K.A. Diehl and Associates, Inc. (hereinafter "K.A. Diehl" or "Respondent") submits the following Reply to Appellant Mark Dos Santos' (hereinafter "Appellant") Return to Respondent's Motion for Costs dated January 3, 2023.

PROCEDURAL HISTORY

This appeal resulted from Appellant's refusal to perform in accordance with a mediated settlement agreement. Appellant alone objected to the agreement, arguing it was not enforceable

pursuant to Rule 43(k), SCRCP. On October 18, 2017, K.A. Diehl filed a motion to enforce settlement. (R. pp. 118-273.)

The circuit court enforced the terms of the settlement, holding Rule 43(k), SCRCP, was not applicable to the current agreement because Rule 43(k) applied only to agreements “between counsel.” (R. p. 13.) The circuit court also held that even if the Rule did apply, the requirements were met because all parties signed the agreement, either personally or through a designated agent. (R. p. 13.) The court further found the agreement was reached after extensive negotiations wherein all parties and their counsel attended and participated, and Appellant presented no evidence that his permission was lacking or withdrawn. (R. pp. 12-13.)

Appellant filed a motion to reconsider on March 31, 2018, which was denied subsequent to a hearing on the motion. (R. pp. 108-114, 291-301.) Appellant appealed that decision to this Court on November 13, 2018.

On December 22, 2021, this Court affirmed as modified the circuit court’s holding. *K. A. Diehl & Assocs., Inc. v. Perkins*, No. 2021-CP-454, 2021 WL 6066793, at *1—2 (S.C. Ct. App. Dec. 22, 2021). In an unpublished opinion, this Court held Rule 43(k), SCRCP, was applicable to the settlement agreement at issue, and the Court held the agreement was enforceable. *Id.* Specifically, the Court noted Appellant attended the mediation by phone, and Appellant’s name was signed on the agreement with the words “with permission” following. *Id.* Further, the Court agreed Appellant presented no evidence his attorney signed without permission. *Id.* After citing to numerous authorities regarding the validity of signatures for one by another with permission, the Court added Appellant’s attorney had actual authority, and therefore, the circuit court did not err in enforcing the agreement. *Id.*

Nearly five years after the settlement agreement was signed, Appellant—who no longer owns a unit at this location—filed a petition for rehearing on February 7, 2022. The Court of Appeals denied the petition for rehearing on March 23, 2022, and Appellant filed a petition for writ of certiorari before the Supreme Court of South Carolina on May 12, 2022. By order dated December 15, 2022, the Supreme Court denied Appellant’s petition for writ, and Respondent timely filed a Motion for Costs with this Court on December 22, 2022.

ARGUMENT

A. Respondent is entitled to costs and attorney’s fees pursuant to Rule 222, SCACR.

Respondent concedes that it is not entitled to attorney’s fees pursuant to Rule 242(j), SCACR because Appellant’s writ of certiorari was denied. *See* Rule 222(e), SCACR (“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.”); Rule 242(j), SCACR (titled “Costs When a Writ of Certiorari Has Been Granted”). Accordingly, Respondent’s award of costs and fees should total \$2,597.40 pursuant to Rule 222(b), SCACR.¹

Respondent’s Motion for Costs was timely filed in the correct court—the Court of Appeals—on December 22, 2022. Although the case caption was titled “in the Supreme Court” and requested an attorney’s fee pursuant to Rule 242(j), SCACR, this scrivener’s error did not prejudice Appellant in any way given that the Motion was timely filed in the correct court with proper notice to Appellant. Indeed, Appellant does not assert that he was prejudiced in any way by this scrivener’s error, but rather, asks this Court to deny the Motion in its entirety on the basis of a mere technicality. *Cf. Sander v. Wal-Mart Stores, Inc.*, 379 S.C. 554, 561-62, 666

¹ Respondent has included a corrected Itemized Statement of Costs attached as **Exhibit A**.

S.E.2d 297, 301 (Ct. App. 2008) (holding an Appellate Panel’s citation to the wrong statutory provision was a scrivener’s error and was not prejudicial); *JKT Co. v. Hardwick*, 274 S.C. 413, 419, 265 S.E.2d 510, 513 (1980) (“An error not shown to be prejudicial does not constitute grounds for reversal.”).

B. The Court of Appeals’ order affirmed the circuit court’s decision, and Respondent is entitled to costs and attorney’s fees pursuant to Rule 222(a), SCACR.

Appellant contends the Court of Appeals’ order was reversed in part, and as such, Respondent is not entitled to costs or attorney’s fees. This argument is without merit.

Rule 222(a), SCACR provides in part, “[C]osts shall be taxed against the appellant when the appeal is dismissed or judgment on appeal is affirmed When an appeal is affirmed or reversed *in part* or is otherwise vacated, costs shall be allowed only as ordered by the appellate court.” (Emphasis added.) The disposition of the Court of Appeals was “Affirmed as Modified.” *K. A. Diehl & Assocs., Inc. v. Perkins*, No. 2021-CP-454, 2021 WL 6066793, at *2 (S.C. Ct. App. Dec. 22, 2021). The disposition of the appeal had the effect of affirming the circuit court’s decision while clarifying that Rule 43(k), SCRCP was applicable. The Court of Appeals’ order still affirmed that the settlement agreement was enforceable and complied with Rule 43(k), SCRCP. Thus, the order of the Court of Appeals was a true affirmance rather than an affirmance in part. Moreover, if the Court had intended to hold the decision was affirmed in part, it would have written the opinion accordingly.

Regardless, this Court has discretion to award costs and attorney’s fees, and given the significant costs incurred by Respondent prior to and during the appeal—including Respondent’s Motion to Enforce the Settlement Agreement at the circuit court level, Respondent’s preparation of briefs on appeal before this Court, and Respondent’s preparation of its brief in response to Appellant’s Petition for Writ of Certiorari before the Supreme Court—

the \$2,597.40 Respondent seeks is more than owing Respondent in the interest of justice and in accordance with South Carolina's Appellate Court Rules.

CONCLUSION

Appellant is entitled to costs and attorney's fees pursuant to Rule 222, SCACR, and therefore, Appellant's Motion for Costs should be granted in the amount of \$2,597.40.

BURR & FORMAN LLP



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Attorneys for the Respondent

Myrtle Beach, South Carolina

January 9, 2023

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ITEMIZED STATEMENT OF COSTS


The Appellate Court Clerk is requested to tax the following costs against the participating Appellant in this case:

COSTS TAXABLE UNDER RULE 222, SCACR	NO. OF PAGES	RATE	REQUESTED	ALLOWED (For Court Use Only)
Cost of Printing or Copying Final Brief	714	\$0.10 per page, twenty-one copies of thirty-four pages	\$71.40	

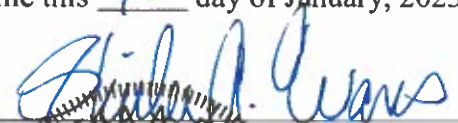
EXHIBIT A

Cost of Printing or Copying Final Reply Briefs				
Cost of Printing or Copying Record on Appeal				
Filing Fee Paid Under Rule 203(d), SCACR				
Cost of Court Reporter's Transcript		Grace L. Hurley - Motion to Compel Settlement 3.12.2018 Kay H. Richardson - Motion for Reconsideration 10.8.2018	\$26.00	
Attorney's Fee Provided By Rule 222(b), SCACR			\$2,500.00	
Other (specify and explain):				
		TOTAL	\$2,597.40	

I, Henrietta U. Golding, do swear that the foregoing costs are correct and were necessarily incurred in this action. A copy of this statement was served upon opposing counsel.


 Henrietta U. Golding, Attorney for Respondent
 K.A. Diehl & Associates, Inc.

Subscribed and sworn before me
 me this 9th day of January, 2023.


 Notary Public for the State of South Carolina
 My Commission Expires: 9/24/2029
 NOTARY PUBLIC
 September 24, 2029
 SOUTH CAROLINA

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Of whom Mark Dos Santos is the

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PROOF OF SERVICE

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Attorneys for the Respondent

I, Henrietta U. Golding, of Burr & Forman LLP, attorney for the Respondent, hereby certify that the foregoing **RESPONDENT'S REPLY TO APPELLANT'S RETURN** was served on Appellant on January 9, 2023, via email (see attached), to counsel of Record for Appellant:

Russell G. Hines, Esquire
D. Jay Davis, Jr., Esquire
Clement Rivers, LLP
Post Office Box 993
Charleston, SC 29401
Email: rhines@ycrlaw.com
jdavis@ycrlaw.com

Respectfully submitted,

BURR & FORMAN LLP

By: 
Henrietta U. Golding, SC Bar #2173
James K. Gilliam, SC Bar #76695

Attorneys for the Respondent

Myrtle Beach, South Carolina

January 9, 2023

Evans, Sheila

From: Evans, Sheila
Sent: Monday, January 9, 2023 3:39 PM
To: Hines, Russell
Cc: jdavis@ycrlaw.com; 'pbell@ycrlaw.com'; Voegel, Taylor; Gilliam, James; Golding, Henrietta
Subject: K.A. Diehl v. Perkins; Appellate Case No. 2018-002009/2063741.0000002
Attachments: 230109 Ltr to COA re Respondent's Reply to Appellant's Return to Motion for Costs.pdf; 230109 Respondent's Reply to Appellant's Return to Motion for Costs.pdf; 230109 POS (Respondent's Reply to Appellant's Return to Motion for Costs).pdf

Good Afternoon Mr. Hines,

Attached please find the following documents:

1. Copy of letter to the Court of Appeals of today's date.
2. Respondent's Reply to Appellant's Return to Motion for Costs and Ex A - Itemized Statement of Costs.
3. Proof of Service.

Sheila

Henrietta Golding
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January 9, 2023

VIA EMAIL: CTAPPFILINGS@SCCOURTS.ORG

Jenny Abbott Kitchings, Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

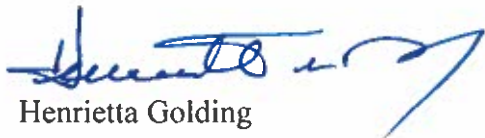
Re: K.A. Diehl and Associates, Inc. v. James Perkins, Colleen Franke a/k/a Colleen Franke Perkins, Mark Dos Santos, Nancy Moore, William Moore, Steven Danne, and Errol Dos Santos, of Whom Mark Dos Santos is the Appellant
Appellate Case No. 2018-002009
Case No. 2015-CP-26-05573
Our Client Matter No. 2063741.0000002

Dear Ms. Kitchings:

Please find attached for filing Respondent's Reply to Appellant's Return to Respondent's Motion for Costs with attached Exhibit A – Itemized Statement of Costs, and Proof of Service with regard to the above referenced appeal. Should you have any questions, please do not hesitate to contact me.

Very truly yours,

Burr & Forman LLP



Henrietta Golding

HUG/sae
Enclosures

Jenny Abbott Kitchings, Clerk of Court
January 9, 2023
Page 2

cc: Client (*via email only*)
Russell G. Hines, Esquire (*via email only*)
D. Jay Davis, Jr., Esquire (*via email only*)