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**Aug 04 2025**

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM PICKENS COUNTY  
Court of Common Pleas

Jessica A. Salvini, Circuit Court Judge

Case No. 2021-CP-39-00329  
Court of Appeals Case No. 2025-001327

Michael and Mary Smith

Appellants,

v.

King Asphalt, Inc.

Respondent.

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**APPELLANTS' REPLY TO RESPONDENT'S RETURN TO MOTION  
AND AFFIDAVIT TO PROCEED IN FORMA PAUPERIS**

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**APPELLANTS' REPLY TO RESPONDENT'S RETURN TO MOTION  
AND AFFIDAVIT TO PROCEED IN FORMA PAUPERIS**

Appellants, appearing pro se, respectfully submit this Reply to Respondent King Asphalt Inc.'s Return filed July 24, 2025, opposing their Motion to Proceed In Forma Pauperis ("IFP").

Appellants have not received service by email from Respondents; but, did receive by US Mail on July 30, 2025 a printed copy of Respondents return. Therefore this response is within five days of that service by mail and timely. [Rule 240(f) SCACR and Rule 263, SCACR (computation of time for deadlines by service via mail)]

**I. Appellants' Motion Is Procedurally Proper and Timely**

Respondent incorrectly argues that IFP relief must be sought at the outset of litigation in the trial court and not on appeal. However:

- Rule 3(b), SCRCP (cited by Respondent) governs initial filings at the trial court level only.
- Rule 205, SCACR explicitly vests jurisdiction for appellate motions and associated fees exclusively in the appellate court upon service of the notice of appeal.
- The Circuit Court's order of June 24, 2025, attached as Exhibit B to Appellants' original motion, expressly acknowledged the lack of trial court jurisdiction to grant appellate relief sought by Appellants, and the denial of IFP at that stage was based solely on that jurisdictional limitation—not on any evaluation or rejection of Appellants' financial affidavit or the merits of their indigency claim [Motion and Affidavit to Proceed IN FORMA PAUPERIS, Exhibit B, p. 1].

Therefore, Appellants' presentation of their IFP motion before the Court of Appeals is procedurally correct.

## **II. Respondent Misapplies the Legal Standard for IFP Determinations**

Respondent attempts to undermine Appellants' credibility by referencing prior settlement amounts "[RESPONDENT'S RETURN TO APPELLANTS' MOTION TO PROCEED In Forma Pauperis, p. 2 "despite having collected significant sums in settlement of their claims against King Asphalt's co-defendant, Themistoklis Economou"]. Such tactics misapply the standard governing IFP determinations, which clearly focuses on current financial status, not past compensatory recoveries.

Appellants have submitted a sworn affidavit of indigency, establishing their inability to pay appellate costs, and Respondent has not alleged fraud or otherwise impeached the truthfulness of the affidavit. See Rule 3(b), SCRCF, and analogous federal authorities (e.g., *Adkins v. E.I. DuPont de Nemours & Co.*, 335 U.S. 331, 339 (1948)) (indigency is a matter of present ability to pay, not prior receipt of funds). Appellants have exhausted their limited financial resources in the diligent pursuit of this appeal, including the payment of the circuit court costs, the appellate filing fee, and the substantial costs for five hearing transcripts. While a motion fee may be within appellant's reach the significant costs of retaining counsel without a contingency arrangement or appointment by the Court, is far beyond their means. The "significant sums in settlement", after appellant's attorney took his generous share, didn't amount to 20% of the specials, and as Respondent's counsel is well aware, was settled to the detriment of appellant while appellant was on a course of prescription narcotics for an erupted hernia. The financial capacity that enabled these initial payments has since been depleted, primarily from covering the costs of living over the 6.5 years since the accident for which the defendants are responsible, leaving Appellants with no available funds to retain counsel or cover the remaining essential expenses of this appeal.

The distinction between compensatory damages (received in the past for injury) and present income or assets (the basis for indigency) is fundamental to IFP determinations. It is improper to conflate these concepts when assessing a party's eligibility to proceed in forma pauperis. This is a deliberate misapplication of the legal standard, as the IFP determination is properly governed by a party's current "income," not a past settlement intended as compensation for injuries. This tactic is a clear attempt to create a credibility issue and is a continuation of the larger strategy to deny Appellants access to the Court and a fair opportunity for legal representation.

The Respondent has not contested the truthfulness or accuracy of the affidavit nor alleged fraud or misrepresentation. Appellants assert that the Respondent's references to prior compensatory damages are irrelevant and improper, intended solely to prejudice the Court and prevent Appellants from securing appellate review.

### **III. In Forma Pauperis Relief Extends Beyond Filing Fees**

Respondent incorrectly argues that IFP status would not cover costs related to transcripts or appellate records. Appellants respectfully submit:

- Due Process and Equal Protection under both the U.S. and South Carolina Constitutions mandate meaningful access to appellate review regardless of financial capacity.
- While *Quillian v. Evatt*, 308 S.C. 555, 419 S.E.2d 783 (1992), acknowledges limits, it also confirms appellate court discretion to waive fees beyond mere filing costs to ensure meaningful review for indigent appellants.

Appellants have diligently mitigated some appellate costs by obtaining electronic service orders from this Court. Nevertheless, Appellants request the waiver of all remaining fees under

appellate court authority, including but not limited to motion fees and record preparation costs. Appellants respectfully request a waiver of such fees to the extent authorized and deemed appropriate by this Court in its discretion, in furtherance of constitutional guarantees of access to the courts.

#### **IV. Appeal Is in Good Faith and Non-Frivolous**

Respondent has neither contested nor challenged the substance of Appellants' appeal as frivolous. The Appellants' appeal is based on two primary issues: the trial court's legal error in granting summary judgment and a pattern of systemic procedural unfairness. The trial court erred by improperly granting summary judgment to King Asphalt, Inc., misapplying the law of negligence per se, and imposing an expert testimony requirement despite direct evidence of statutory and regulatory violations and genuine disputes of material fact. Furthermore, the trial court's conduct, including its acceptance of late filings, disregard of material evidence, and failure to address the pro se disadvantages, resulted in systemic procedural unfairness, a denial of due process, and an abuse of discretion. These are not frivolous grounds, but substantial and legitimate claims that warrant meaningful appellate consideration and implicate core constitutional rights, including access to the courts and due process protections under the Fourteenth Amendment and the South Carolina Constitution.

#### **V. Protective Statement**

Appellants respectfully submit this protective statement under Rule 608, SCACR, to preserve all rights regarding potential appointment of counsel. Appellants request—should the Court find it appropriate in the interest of justice—that such appointment be made sua sponte to ensure

Appellants' access to a fair process. Appellants affirmatively state their intention to file a formal Motion for Appointment of Counsel, supported by record evidence of indigency, inability to secure representation despite diligent effort, and procedural unfairness arising from opposing counsel's litigation conduct. See Rule 608, SCACR (permitting appointment of counsel in civil appeals when justice so requires); see also *In re Ex Parte Brown*, 393 S.C. 214, 711 S.E.2d 899 (2011) (recognizing discretionary appointment of counsel for indigent litigants in exceptional civil circumstances).

Additionally, Appellants object, under Rule 56(e), SCRCR, to any evidentiary materials cited by Respondent or in future filings that lack proper foundation, and expressly preserve the right to move to strike or supplement the record as necessary. No waiver of any right or objection is intended by the submission of this statement. This statement is submitted without waiver of any right and should be construed to preserve all claims of error, evidentiary challenge, or procedural irregularity for further appellate consideration.

## **VI. Conclusion**

Granting IFP status is essential to preserve Appellants' constitutional rights of equal access and due process. Respondent's attempt to deny IFP status by highlighting past settlement funds misapplies the proper standard of present indigency and aims to obstruct Appellants' right to appellate review. Denying Appellants the ability to proceed in forma pauperis effectively rewards Respondent's procedural attrition and denies fundamental fairness to indigent parties.

**WHEREFORE**, Appellants respectfully request that the Court:

- Grant their motion for leave to proceed in forma pauperis for all aspects of this appeal, including waiver of filing, service, transcript, record, and copy fees.
- Alternatively, grant such relief as the Court deems necessary and proper to ensure Appellants' access to appellate review on the merits.

**Respectfully submitted,**

/s/ Michael Smith  
Michael Smith, Appellant (pro se)

/s/ Mary Smith  
Mary Smith, Appellant (pro se)

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Dated: August 4, 2025

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**CERTIFICATE OF SERVICE**

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the APPELLANTS' REPLY TO RESPONDENT'S RETURN TO MOTION AND AFFIDAVIT TO PROCEED IN FORMA PAUPERIS in **Smith v. King Asphalt, Inc.**, Case No. 2021-CP-39-00329 **Court of Appeals Case No. 2025-001327** was served upon the following counsel of record:

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The document was served via the following methods:

By Email to: CGriffin@brblegal.com  
Date of email service: August 4, 2025

To the above address by U.S. Mail with correct postage attached,  
Date of Mailing: August 4, 2025

**Respectfully submitted,**

/s/ Michael Smith                      August 4, 2025  
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