THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
Charles B. Simmons, Jr., Master-in-Equity

Case No. 2015-CP-23-02597

State of South Carolina on the relation of
Walter W. Wilkins, III, Solicitor of the Thirteenth Circuit.....Respondent,

vs.

Elephant Inc., Gregory Kenwood Gaines, and
Frontage Road Associates, Defendants,

of whom

Elephant Inc., and Gregory Kenwood Gaines are..... Appellants.

APPELLANTS' BRIEF

March 16, 2017

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STATEMENT OF ISSUES ON APPEAL

I. The lower court did not have subject matter jurisdiction over the State's application for contempt of court.

II. Did the lower court have subject matter jurisdiction over the State's application for contempt of court?

III. The lower court erred in refusing to grant appellants a continuance when the Solicitor disqualified their lawyer by serving a subpoena on him and appellants secured counsel three days before the hearing.

IV. The lower court erred and denied the appellants due process of law by trying criminal contempt and civil contempt in the same proceeding.

A) Criminal Contempt and Civil Contempt have different standards of proof.

B) Criminal Contempt allows a defendant to exercise his right to remain silent, yet the lower court used this right against appellant in finding it in contempt of court.

C) Criminal Contempt and Civil Contempt are mutually exclusive in that Criminal Contempt is for punishment for past wrongs and Civil Contempt must include a method for the defendant to purge his contempt.

D) Criminal Contempt that exposes a defendant to the potential for a punishment greater than one year entitles the defendant to trial by jury.

E) The lower court erred in failing to require notice to the defendants that they faced contempt as called for in the Consent Order.

F) By failing to grant the appellants a continuance, the Master deprived them of their Sixth Amendment right to counsel of their choice.

V. There is a complete failure of proof in this record of the Solicitor's office either notifying the defendants of alleged infractions as required by the Consent Order and giving them an opportunity to correct them to avoid being sanctioned for contempt of court or of proving the defendant knowingly violated the provisions of the Consent Order.

VI. The Master erred by imposing additional reporting requirements on the defendant, Ken Gaines, after finding him to be not guilty of contempt of court.

STATEMENT OF CASE

The appellant, Elephant, Inc., is a South Carolina corporation that leases property at 805 Frontage Road in Greenville, South Carolina. The Company operates an age-restricted nightclub, Platinum Plus, featuring live dancing and music. It holds a business license as a night club and a license from the South Carolina Department of Revenue to sell alcohol by the drink. The dancers do not display the so-called proscribed anatomical areas so the business is not required to be licensed as a sexually oriented business. Since it opened, the business has been fairly successful, but faces intense competition from three other clubs, Lust, Scores and Lady Godiva, operating under the same business model.

Since opening in 1999, Platinum Plus operated for years without incident. However, starting in 2015, the business began to attract intense scrutiny from law enforcement. For unknown reasons, the other three similarly situated clubs do not draw the concentrated examination that Platinum Plus does. As a result, on April 17, 2015, the County, through the Solicitor's Office, brought a nuisance abatement action under § 15-43-10, *et. seq.* against Platinum Plus. This civil action resulted in a consent Order filed June 3, 2015. It is this consent Order that is the center of the matter now before the Court because the County alleges the appellants violated the terms of the consent order and are, therefore, in criminal contempt.

The June 3, 2015, Consent Order (hereinafter "Consent Order") requires Platinum Plus to install monitoring cameras for a period of 12 months and to open up the business to in-person monitoring as well. The Consent Order's monitoring provision states:

> 2. The Monitor will visit the Subject Property no more than twenty (20) hours per month. No later than two weeks after each visit, the Monitor will provide the Solicitor with a report detailing: the days and times of his or her visit, a description of the areas he or she visited while on the Subject Property, and instances of non-compliance with this Consent Order, if any. **If there are any instances of non-compliance, then the Solicitor shall forward such reports to EI, which will include the date and time when the Monitor visited the Subject Property, the incident of non-compliance observed, and where such non-compliance occurred at the premises.**
> R.O.A. Vol. I, page 20 [Consent Order page 6, ¶ B Independent Monitoring, 2 (emphasis added)]

The Greenville County Solicitor's Office arranged for two undercover officers to visit Platinum Plus on March 25, 2016, and after spending some $3,000.00 dollars at the rate of $500.00 per hour, the independent monitors were able to induce dancers to violate the terms of the consent Order by removing their clothes and performing so-called "lap dances" on the monitors and on one another. The two "independent monitors" (undercover police officers) provided their reports to the Solicitor but the Solicitor did not provide them to the defendants/appellants as required the ¶ 2 provision of the Consent Order so that appellants might address deficiencies and avoid court action. The independence of the monitors is refuted by the fact that the two reports of two "independent" monitors are word-for-word identical, which demonstrates a coordinated plan.

As a result of the officers' observations on March 25, 2016, the County filed a petition for contempt of court on April 27, 2016. The record is not clear when the Solicitor served the defendants, but it must have been after May 11, 2016, because May 11, 2016, is when the Court signed the Rule To Show Cause. (The Clerk filed the rule on May 12, 2016.) Along with its petition for rule to show cause, the County also notified the defendants that it planned on issuing a subpoena to their counsel, Randy Hiller. This

forced the defendants to search for new counsel, who defendants retained three days before the scheduled hearing on June 14, 2016.

After the lower court refused to grant a continuance to allow new counsel to become familiar with the case, the Court called the case for a hearing on June 14, 2016. The State announced that it was calling the case as a criminal contempt (R.O.A. Vol. I, page 314 [tr. Page 16] and objected to the appellants' request for continuance even though appellants' counsel had been in the case for three days. The government's case consisted of its investigator, two undercover officers and a former dancer from Platinum Plus. Since the case was a criminal case, the appellants' exercised their right to remain silent. The Master-in-Equity took the matter under advisement and issued an Order on July 27, 2016, denying appellants' challenges to subject matter jurisdiction, their request for a continuance, and finding the appellant, Elephant, Inc., of criminal contempt of court. The Master-in-Equity found the defendant, Ken Gaines not guilty. (R.O.A. Vol. I, page 69 [order].

Even though the Master-in-Equity found appellant Gaines not guilty of criminal contempt, it imposed new reporting responsibilities on him. The appellants filed a motion for reconsideration on August 4, 2016, and thereafter a Notice of Appeal on August 10, 2016.

STATEMENT OF FACTS

There are few material facts in dispute. The State contends that the defendants knowingly violated the conditions of the Consent Order, but there is no evidence of

knowing or **notice**. The facts that require reversal in this case involve the procedure, which are discussed in the preceding section. The single most important disputed fact is that the Solicitor contends that providing notice of the alleged violations of the Consent Order through the Petition for Rule Show Cause fulfilled the terms of ¶ 2 of the Consent Order, quoted above on page 7. The appellants reply that ¶ 2 is an important and material condition precedent, one that the appellants bargained for in order to avoid being subjected to contempt as in the present case. It is undisputed that the Solicitor did not give notice to E.I. regarding the "monitors'" observations in accordance with ¶ 2, and this is a fact that the Master-in-Equity resolved against the appellants and is a significant error of fact.

In addition, there is a serious dispute of fact that the State's contention that a lap dance is "simulated sex" or that what occurs within a private commercial establishment has an impact on the "public." The term "simulated sex" is a broad and ambiguous term that cannot serve as the basis for a criminal prosecution. Neither the pleadings nor the evidence shed light on how a lap dance fulfills the legal definition of "nuisance," and this will be discussed below. For purposes of setting forth the salient facts of this case, it will suffice to say here that the State has a peculiar—and broad—definition of "nuisance," that transforms erotic dancing inside a closed building as somehow affecting a "public" nuisance.

The government's view of "nuisance" is hypocritical at best, harmful at worst. The question of what alleged immoral behavior constitutes a nuisance must be more than a moral objection to erotic dancing. The fact of nuisance must be something more than a subjective dislike of a protected activity. By any objective definition of "harm," such august

institutions as the Catholic Church represent real harm to real victims—without drawing any objection from a Solicitor's office. For example, according to a Wikipedia summary of damages award for sexual abuse, the Catholic Church has paid out a sum approaching 3 billion dollars in damages for the abuse of children:

The Roman Catholic Diocese of Dallas paid $30.9 million in 1998 to twelve victims of one priest ($44.9 million in present-day terms).

In early 2002, the *Boston Globe* covered the criminal prosecutions of five Roman Catholic priests in an article that won an uncontested Pulitzer Prize. The issue of child rape and sexual assault of Roman Catholic children became a national scandal. The coverage of these cases encouraged others to come forward with allegations of abuse, resulting in more lawsuits and criminal cases.

In July 2003 the Roman Catholic Archdiocese of Louisville paid $25.7 million to "settle child sexual-abuse allegations made in 240 lawsuits naming 34 priests and other church workers." In 2003, the Roman Catholic Archdiocese of Boston settled a large case for $85 million with 552 alleged victims

In 2004, the Roman Catholic Diocese of Orange settled nearly 90 cases for $100 million.

In April 2007 the Roman Catholic Archdiocese of Portland in Oregon agreed to a $75 million settlement with 177 claimants and the Roman Catholic Archdiocese of Seattle agreed to a $48 million settlement with more than 160 victims. In July 2007 the Roman Catholic Archdiocese of Los Angeles reached a $660 million agreement with more than 500 alleged victims, in December 2006, the archdiocese had a settlement of 45 lawsuits for $60 million. In September 2007, the Roman Catholic Diocese of San Diego reached a $198.1 million agreement with 144 childhood sexual abuse victims.

In July 2008 the Roman Catholic Archdiocese of Denver agreed "to pay $5.5 million to settle 18 claims of childhood sexual abuse."

The Associated Press estimated the total from settlements of sex abuse cases from 1950–2007 to be more than $2 billion. Bishop Accountability reports that figure reached more than $3 billion in 2012.

Addressing "a flood of abuse claims" five dioceses (Tucson, Arizona; Spokane, Washington; Portland, Oregon.; Davenport, Iowa, and San Diego) got bankruptcy protection. Eight Catholic dioceses have declared bankruptcy due to bankruptcy due to sex abuse cases from 2004–2011.

(numerous citations omitted)

Closer to home, the Catholic Church in Charleston County has paid out approximately $11.2 million for 148 victims in the low country. Greenville County has not escaped attention focused on its religious leaders for abuse. On December 11, 2014, the *New York Times*, in an article by Richard Perez-Penadec, chronicled a long history of abuse suppressed by Bob Jones University, including one underage babysitter impregnated by a Bob Jones employee. Yet no government official has taken a step toward declaring such religious organizations as "nuisances" even though they have caused repeated and demonstrated harm to a large number of victims. This background serves as an important context for the present action in which the State alleges—but does not prove—any harm to any citizen. In other words, this action is predicated upon whether the defendants did or did not (and the Master found the defendant Gaines did not, which is the law of the case now) breach the terms of the Consent Order. It is disconcerting, therefore, to view the facts of this case against the more general milieu of governmentally tolerated real abuse and weigh these facts in the light of the State's power to institute criminal prosecution against a protected form of expression. Presumably, the Solicitor will argue that he seeks to combat the alleged "nuisance" of an adult-themed nightclub—which is not the issue in this case—in which age-restricted patrons voluntarily enter.

STANDARD OF REVIEW

Because of the challenge to the Master's jurisdiction, the standard of review is not clear. "A determination of contempt should be imposed sparingly and is subject to reversal when it is based on a finding that is without evidentiary support. *McCall v. Mcall*, 303 S.C,.

452, 401 S.E.2d 193 (Ct. App. 1991). This is the so-called "abuse of discretion" standard. However, because the parties dispute whether the case was properly before the Master, we cannot agree that abuse of discretion is the proper standard of review. The transcript reveals that the Solicitor made reference to an alleged Order of Reference signed by Judge Stilwell. (R.O.A. page Vol. I, page 309 [tr. page 11]). However, appellants cannot locate it on the Greenville County docket sheet and do not have a copy of it. (On September 22, 2016, appellants prepared and mailed a proposed Consent Order to the Solicitor to allow the Clerk of Court to release the exhibits so appellants could consult them in preparing this brief. However, to date, the Solicitor has not replied, putting the appellants at a disadvantage in preparing their initial brief.) If the case were properly referred to the Master—a point appellants dispute—and the Master were sitting as a circuit judge—the position advocated by the respondent, then the standard of review is that the appellate court has jurisdiction to find facts in accordance with its views of the preponderance of the evidence. *Stevenson v. Stevenson*, 276 S.C. 475, 279 S.E.2d 616 (1981)

ARGUMENT I

I. The lower court did not have subject matter jurisdiction over the State's application for contempt of court.

The Solicitor filed this action on April 27, 2016, and served the defendants sometime after May 11, 2016 for a criminal contempt hearing on June 14, 2016. The record does not reveal when the Solicitor served the defendants, but the Court signed the Order for them to appear on May 11, 2016, so the service must have been after that date. At no time during this criminal contempt process did the State ask that the matter be referred to the Master-in-

Equity. The government's choice of forum is troubling on two fronts.

The first is that the Master-in-Equity is a statutorily created court of limited jurisdiction. § 14-11-80, S. C. Code, "General Duties of Master." While the Solicitor points to language in the Consent Order (R.O.A. Vol. I, page 22 [Order pg. 8]) to confer perpetual jurisdiction on the Master-in-Equity, this language does not mention the Master-in-Equity:

> E. Notwithstanding any other term and condition of this Order, the Greenville County Court of Common Pleas shall perpetually retain continuing jurisdiction to enforce the terms and conditions of this Consent Order.

There is a significant difference between "Court of Common Pleas" and "Master-in-Equity," and of course subject matter jurisdiction cannot be determined by agreement of parties:

> "Subject matter jurisdiction is 'the power to hear and determine cases of the general class to which the proceedings in question belong.'" *Dove v. Gold Kist, Inc.*, 314 S.C. 235, 237-38, 442 S.E.2d 598, 600 (1994) (quoting Bank of *Babylon v. Quirk*, 192 Conn. 447, 472 A.2d 21, 22 (1984)). A court without subject matter jurisdiction does not have authority to act. *Id.* At 238, 442 S.E.2d at 600. "A judgment of a court without subject-matter jurisdiction is void." *Coon v. Coon*, 364 S.C. 563, 566, 614 S.E.2d 616, 617 (2005).
>
> "Lack of subject matter jurisdiction can be raised at any time, can be raised for the first time on appeal, and can be raised *sua sponte* by the court." *Badeaux v. Davis*, 337 S.C. 195, 205, 522 S.E.2d 835, 840 (Ct. App. 1999 (quoting *Lake v. Reeder Constr. Co.*, 330 S.C. 242, 248, 498 S.E.2d 650, 653 (Ct. App. 1998)). "Lack of subject matter jurisdiction may not be waived, even by consent of the parties, and should be taken notice of by this [c]ourt." *Id.* "[I] is the duty of this court to take notice and determine if the [f]amily [c]ourt had proper jurisdiction for its actions." *Id.*
>
> *South Carolina D.S.S. v. Tran*, 418 S.C.308, 792 S.E.2d 254 (Ct. App. 2016)

Moreover (as discussed more fully below), when cited for criminal contempt in which the defendants faced potential penalties in excess of one year in prison, the defendants were entitled to trial by jury.

The Court of Appeals dealt with a similar procedural question in *Bunkum v. Manor Properties*, 321 S.C. 95, 467 S.E.2d 758 (Ct. App. 1995, *cert. den.* October. 17, 1996) Just like here, the plaintiff filed post-trial motions under Rule 60(b) and 65(b) before the Master in Equity, and the Court of Appeals held: Because we concluded the master in equity lacked subject matter jurisdiction to enter the supplemental order, and the judgment is therefore void, we reverse the order of the circuit court on appeal." The reasoning from the Court of Appeals applies to almost identical facts as here:

> The order of reference in this case did not specifically authorize the master to conduct hearings or enter orders after he entered final judgment. The rules of civil procedure would have permitted him to entertain a post-trial motion to amend his order since he was the trial judge. Also, the appellate court rules permitted him to entertain the motion for supersedeas and to set the appeal bond. However, the master had no authority over the case once the remittitur was issued by this court, and the case returned to the circuit court. Rather, subject matter jurisdiction was in the circuit court proper. Cf. *Milgroom v. McDaniel*, 308 S.C. 5, 416 S.E.2d 626 (19992) (circuit court's order of reference, vesting master in equity with authority to enter final judgment and providing for direct appeal to Supreme court, did not divest circuit court of jurisdiction when master issued report and recommendation that a party be held in contempt, and then returned the matter to the circuit court for independent finding because report did not constitute final judgment). Since the master ha entered final judgment in this case, and therefore had no subject matter jurisdiction to hear the motion for assessment of costs, fees, expenses and damages against the appeal bond, is order ending judgment against Bunkum on the appeal bond is void. See *DeWttt v. S. C. Dept. of Highways & Public Transp.*, 274 S.C. 184, 262 S.E.2d 28 (1980) (all proceedings of a court lacking subject matter jurisdiction are a nullity, and its judgment has no effect).
>
> *Bunkum* at pages 760-761.

The second front is that the record demonstrates that Greenville County has adopted an aggressive prosecution of Platinum Plus, blurring the line between use of the police power to stamp out crime versus use of police power to stamp out what Greenville County regards as immoral behavior. Viewed against a backdrop of demonstrated harm by the most

powerful organizations against the most vulnerable of victims makes the Government's preoccupation with Platinum Plus odd. As discussed throughout this brief, the government deployed considerable public resources and money to set up and execute a five-hundred-dollar-an-hour sting operation that at its core represents the government's desire to control erotic expression between adults that has no impact on anyone other than patrons who wish to view it. It smacks of government suppression and an obsession with harmless behavior between consenting adults out of the view of anyone who might be offended. The legal issue of whether erotic messages are or are not protected by the Constitution is settled, and when faced with imprisonment over the dissemination of a constitutionally protected adult message, the defendant is entitled to be heard before a neutral and detached magistrate. It is important, therefore, that the Solicitor not be seen as picking the judge who hears the case. For this reason, the South Carolina Constitution adopted a circuit system In order to promote a maximum of fairness. In implementing judicial circuits, the Constitution deploys a system of rotating circuit judges who preside over the circuits. By doing so, the Constitution intends to prevent lawyers from picking the judge to hear a given case. See Article V, § 14: "Judges of the circuit Court shall interchange circuits and all judges shall be systematically rotated throughout the State as directed by the Chief Justice." The Constitution designs the system to prevent a judge from becoming too involved in local affairs to lose her independence, and thus, the Government's suppression of the appellants' right to have a hearing with someone not invested in local affairs is a constitutionally protected right. This is especially true when the subject matter of the case involves the dissemination of a mild erotic message as this subject engenders powerful religious based emotion, or as the Court of Appeals says:

In terms of those considerations which make the right to jury trial fundamental in criminal cases, there is no substantial difference between serious contempts and other serious crimes. Indeed, in contempt cases an even more compelling argument can be made for provide a right to jury trial as a protection against the arbitrary exercise of official power. Contemptuous conduct, though a public wrong, often strikes at the most vulnerable and human qualities of a judge's temperament. Even when the contempt is not a direct insult to the court or the judge, it frequently represents a rejection of judicial authority, or an interference with the judicial process or with the duties of officers of the court.

State v. Passmore, 363 S.C. 568, 611 S.E.2d 273 (2005)

Masters-in-Equity do not ride circuits for the reason that their jurisdiction is limited to the specific matters as set by statute. See § 14-11-80, "General Duties." Any party can agree to refer a case to a Master-in-Equity (Rule 53, *South Carolina Rules of Civil Procedure*), but no party can be forced to appear before a Master against his will when the court of common pleas has constitutional jurisdiction over the subject of the case. In this case, the Master erred in taking jurisdiction of the case over the objection of the appellants. The Master exercised jurisdiction based on two alleged documents: (1) an alleged Order of Reference signed by Judge Stillwell, and (2) an Order of the Supreme Court dated December 16, 2014.

With regard to the first, the Master announced he was "under the impression," but had not seen, and did not have, an Order of Reference:

THE COURT: All right. I'm denying that motion [to dismiss for lack of subject matter jurisdiction] for two reasons. Number one, be it as a Circuit Judge or the Master, I think inherent in the Orders that have been entered thus far, including the Consent Order, the Court retained jurisdiction.

Secondly, I have been provide with—and I don't' have it in front of me; I have the clerk's file here in the courtroom—that an Order of Reference has been filed. Mr. Culbreath, is that correct?

R.O.A. Vol. I, page 308 [transcript page 10]

As to the alleged Order of Reference, no one can find it. It is not listed on the Greenville County docket sheet, and the appellants have never seen it. It is listed as "Exhibit 1" to the transcript, but the transcript does not contain Exhibit 1, or any other exhibit. In an effort to obtain the exhibits, appellants sent a proposed consent order to the Solicitor on September 15, 2016, to authorize the Clerk of Court to release the exhibits to appellants. To date, the Solicitor has not responded. Whether there is or is not an alleged Order of Reference, one thing is clear. It has not been filed in this case as may be seen by reference to the Greenville County Clerk of Court's docket sheet. (R.O.A. Vol. II, page 679 [docket sheet] As demonstrated above, the Court's statement that it can "retain" jurisdiction is an error of law requiring reversal. *Bunkum v. Manor Properties*, 321 S.C. 95, 467 S.E.2d 758 (Ct. App. 1995, *cert. den.* October. 17, 1996)

As the Solicitor announced at the call of the case—technically, the day before in a conference call (R.O.A. Vol. I, page 309-310 [tr. Pages 11-12]—the matter before the Court was a criminal one. There is no order of reference in the file, and even if there were, there is no such thing as an Order of Reference in a criminal case. Second, the Solicitor's reliance upon the Supreme Court's December 16, 2014, Administrative Order (R.O.A. Vol. II, page 629-630 [Order]) does not give the Master-in-Equity jurisdiction over this case. The Order

grants to the Master jurisdiction to hear "all motions and pretrial proceedings and to perform all administrative duties necessary to prepare these cases for trial or other disposition." In criminal matters, the Order grants to the Master leave to "preside over guilty pleas, bond hearings, and probation revocations; to hear and dispose of any or all motions and pretrial proceedings and non-jury trials; to issue search warrants, and to perform all other nonjury criminal matters unless otherwise directed by the Chief Judge for administrative Purposes (Criminal for the Circuit . . ." (R.O.A. Vol. II, page 629 [Order])

Thus, it is clear that the Master operated under an erroneous statement of fact and law and did not have subject matter jurisdiction in this case. The Master's Order of contempt is void. "A judgment of a court without subject matter jurisdiction is void and constitutes grounds for the court to vacate the judgment under Rule 60(b)(4) [S.C.R.C.P]." *Gainey v. Gainey*, 382 S.C. 414, 424, 675 S.E.2d 792, 797 (Ct. App. 2009)

ARGUMENT II

The lower court erred in refusing to grant appellants a continuance when the Solicitor disqualified their lawyer by serving a subpoena on him and appellants secured counsel three days before the hearing.

As the record demonstrates, the Solicitor filed an application with the Court on April 29, 2016. The record does not reveal when the Solicitor served the defendants, but the Master signed the Order to Show Cause on May 11, 2016, and the Clerk filed it the next day. So the earliest the Solicitor could have served the defendants was May 12, 2016. The parties were before the Court 33 days later on June 14th. In between that time, the Solicitor issued and served a subpoena for appellants' counsel on June 8, 2016, which required appellants to seek substitute counsel. They chose an out-of-state lawyer experienced in First

Amendment cases, who then, in turn, had to find in-state counsel to allow him to participate in the case and who would sponsor his admission *pro hac vice*. The appellants' present counsel had no opportunity to review the evidence being presented and only a minimal period to review the prior pleadings. The lower court erred in refusing to allow appellants' counsel an adequate period to prepare because it conflated what appellants knew and when they knew it with what their counsel knew and when they knew it:

> THE COURT: Whether or not you [appellants' counsel] knew it, your client was on notice six weeks ago.[fn.1] I'm denying your motion and we can move on to your next motion. (R.O.A. Vol. I, page 307 [tr. of hearing page 9])

Thus the lower court commits legal error by failing to use discretion to allow counsel adequate time to prepare. First, because appellants' counsel did not have sufficient time to obtain permission to appear in the case, the court denied appellants their Sixth Amendment right to choice of counsel. Second, four weeks, not six, is not a lot of time—especially where the government had been setting up the case for months. The *Rules of Civil Procedure* afford lawyers four weeks to answer a complaint. Clients, whether civil or criminal clients, are entitled to have competent legal representation, and 72 hours is not sufficient time for any lawyer to become familiar with a large record, let alone discover and review evidence, especially where the State had been preparing the case for trial for months. The appearance before the Court on June 14th was so one-sided as to deny the appellants any opportunity to be prepared properly, which is a denial of a meaningful hearing. "For more than a century

1 The affidavit of service is not in the Clerk of Court's file, but the Master set the hearing 33 days after he signed the Rule to Show Cause. (R.O.A. Vol. I, page 67 [Order for Rule To Show Cause, May 11, 2016])

the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must be notified.' [citations omitted] It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.'" *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972). This record demonstrates a denial of due process, and thus the lower court erred in not using sound discretion to allow appellants' attorneys a minimal period of time to prepare. "It is an equal abuse of discretion to refuse to exercise discretionary authority when it is warranted as it is to exercise the discretion improperly." *Balloon Plantation, Inc. v. Head Balloon, Inc.*, 303 S.C. 152, 399 S.E.2d 439 (Ct. App. 1990) (Greenville County circuit court struck a counterclaim and ordered default when lawyer mailed discovery responses the day before they were due and opposing counsel received them the next day a few hours after the noon deadline.)

The lower court's refusal of sufficient time for out of state counsel to be admitted or to allow in state counsel to become familiar with the file is an abuse of discretion. Taken alone it may not seem significant, but taken as part of what the record shows was an accumulation of error creates an almost complete denial of due process. The Master's failure to allow appellants to be prepared properly is reversible error. In deciding whether a welfare recipient received a "meaningful" hearing, the United States Supreme Court in *Goldberg v. Kelly*, 397 U.S. 254 (1970) identified seven factors courts must weigh in deciding whether the appellant did or did not receive a meaningful hearing:

1. timely and adequate notice detailing the reasons for the proposed action;
2. an opportunity to defend by confronting and cross-examining any adverse witnesses relied on by the agency;

3. an opportunity to present one's own arguments and evidence orally (as opposed to written submissions);
4. assistance of retained counsel if the recipient so desires;
5. a decision that is based on legal rules and on evidence produced at the hearing;
6. a decision stating the evidence relied on and the reasons for the determination; and;
7. an impartial decision maker.

This record shows that the Master deprived the appellants of six out of the seven. The appellants did not receive timely notice; they could not be prepared for proper cross examination; they had no time to gather evidence; the lack of time deprived them of their constitutional right to the counsel of their choice; the evidence shows no notice to the defendants that the Solicitor contended they were in violation of the Consent Order as required by the terms of that Order, and finally, the Solicitor engaged in impressible judge shopping by setting the case before the Master without the defendants' consent. Any or all of these violations require reversal.

Argument III

The lower court cannot impose criminal contempt of court for an alleged violation of a contractual agreement.

It is undisputed that this case began with the Solicitor's commencement of his abatement of nuisance action in 2015, which is a civil action. Thereafter the parties agreed to resolve the matter and entered into a Consent Order on June 4, 2015. (R.O.A. Vol. I, page 15) The Consent Order contains the following language under Paragraph VIII: "Willful violations of the terms and conditions set forth in this Consent Order shall be punishable as contempt of Court." (R.O.A. Vol. I, page 22 [pg. 8 of Order])

After the Solicitor sent in undercover police officers to "monitor" the appellants'

compliance, the Solicitor then filed a petition for Rule to Show Cause as to why the appellants should not be in contempt of court. As argued below in the discussion of the evidence, the undercover officers did a lot more than "monitor." They enticed dancers with $3,000.00 to perform for them! By analogy, this is like an undercover officer purchasing marijuana, smoking it, and then arresting the seller:

Q You work for the Simpsonville Police, but you agreed to act as the monitor in this case?

A. Correct.

Q. And the other monitor, is she a friend of yours?

A. She is—actually works with me. She is an undercover investigator with me.

Q. Okay. And so the two of y'all would go together?

A. Correct.

Q. All right. And it looks like, if my math is correct, on y'all' s three visits, y'all spent two thousand nine hundred and twenty-two dollars. Does that sound about right?

A. Yes sir.

R. O. A. Vol. I, page 384 [transcript page 86, lines 3 - 14])

The day before the June 14th hearing, the Solicitor announced for the first time that he was seeking a finding of criminal contempt, a backward looking remedy, which allows a court to punish a defendant for past violations of an Order. (This is discussed in detail below.) However, the Consent Order that gives the Solicitor the right to bring a contempt petition and

the action in which the agreement arose are both civil matters. The question then becomes can the Court of Common Pleas, or in this case the Master-in-Equity, impose criminal contempt for the breach of a civil agreement? The well-developed canon of law on criminal contempt in South Carolina (discussed in detail below on pages 28 - 29) has never authorized the use of criminal contempt as a remedy available for breach of contract:

> The purpose of civil contempt is "to coerce the defendant to do the thing required by the order for the benefit of the complainant." [citations omitted] The primary purposes of criminal contempt are to preserve the court's authority and to punish for disobedience of its orders. "If it's for civil contempt the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court." [citations omitted]
>
> *Poston v. Poston*, 331 S.C. 106, 502 S.E.2d 86 (1998)

In fact, using even the threat of criminal prosecution to affect an outcome in a civil matter gives rise to the classic abuse of process case in which the essential element is use of lawful process for an ulterior motive. In its order finding Elephant, Inc., in contempt of court, the lower court errs by finding Elephant, Inc. guilty of both civil and criminal contempt! It is undisputed that the Order under review does not provide a method for the appellant, Elephant, Inc., to purge its contempt, so the finding can only be criminal. Thus, if criminal prosecution exists to vindicate the authority of the Court, it cannot be deployed in a civil action to obtain an outcome without raising the specter of the ultimate police state. This is especially true in this case because the Consent Order contains a provision requiring the Solicitor to notify the defendants if he becomes aware of violations. This provision is quoted above on page 7 in the "Statement of Case" and is a bargained for "condition precedent,"

without which, no action will lie. See *33 Flavors Stores of Virginia, Inc. v. Hoffman's Candies*, Inc., 296 S.C. 37, 370 S.E.2d 293 (1988): "Where a lessee has a right to renew upon giving notice to the lessor at or before a specified time, in the absence of waiver, the giving of notice is a condition precedent which must be complied with within the stipulated time; and, absent special circumstances warranting relief from a court of equity, the right of renewal is lost if notice is not given in accordance with the provisions of the lease."

Here, we are not dealing with a lease, but we are dealing with its legal equivalent: a civil consent Order resolving a pending civil action. Thus, under the law, without a waiver of the condition precedent, the Solicitor is required to conform to ¶ 2 of the parties' contract, and it is undisputed he did not. Since the Solicitor did not do this, which makes him in just as much breach as the appellant, he cannot invoke the enormous power of the Court to incarcerate citizens. The South Carolina Constitution explicitly rejects any use of criminal procedure in a civil matter. See Article I § 19. The lower court should never have considered criminal contempt in this matter, let alone impose it.

Argument IV

The lower court erred and denied the appellants due process of law by trying criminal contempt and civil contempt in the same proceeding.

A) Criminal Contempt and Civil Contempt have different standards of proof.

B) Criminal Contempt allows a defendant to exercise his right to remain silent, yet the lower court used this right against appellant in finding it in contempt of court.

C) Criminal Contempt and Civil Contempt are mutually exclusive in that Criminal Contempt is for punishment for past wrongs and Civil Contempt must include a method for the defendant to purge his contempt.

D) Criminal Contempt that exposes a defendant to the potential for a punishment greater than one year entitles the defendant to trial by jury.

E) The lower court erred in failing to require notice to the defendants that they faced contempt as called for in the Consent Order.

F) By failing to grant the appellants a continuance, the Master deprived them of their Sixth Amendment right to counsel of their choice.

The order under review finds the appellant, Elephant, Inc., of both criminal and civil contempt. The order under review finds the appellant, Ken Gaines, not guilty of contempt but imposes new contractual obligations on him without his consent. These are palpable errors of law.

A

Criminal Contempt and Civil Contempt have different standards of proof.

B

Criminal Contempt allows a defendant to exercise his right to remain silent, yet the lower court used this right against appellant in finding it in contempt of court.

The Order under review finds Elephant, Inc. guilty and criminal and civil contempt even though the Solicitor announced that the case was one for criminal contempt:

The next matter, Your Honor, is the case law on criminal contempt. And again, Judge, let me say, I was very surprised to learn yesterday that we're facing criminal contempt. That's surprising to me. A criminal contempt can only be instituted by filing with the Court a verified Petition or a Petition supported by Affidavits. The petition in this case is not verified and the affidavits that were filed are redacted so that the identity of the Affiant is withheld from us. That is a fundamental denial of procedural and substantive due process and does not comport with the minimum requirements of South Carolina law that an application for

criminal contempt can only be instituted upon filing of a verified Petition or supported by Affidavits.

. . .

If they want to go forward on civil contempt, that's a different matter. (R.O.A. Vol, I, pages 309-310 [tr. pages 11-12])

It turned out the Petition was verified—the appellants were unaware of it. The relief prayed for in the Petition asks for:

16. Based on the Defendants" willful, continuous, and unabated violations of relevant provisions of the 2015 Consent Order, the Solicitor requests that this Court issue an Order directing Defendants Elephant, Inc., and Gregory Kenwood Gaines to appear before the Court to show cause as to why they should not be found in violation of the Court's 2015 Consent Order, and, if found in contempt, **that they be sanctioned to the maximum extent allowed by law** and in a manner that will ensure the defendants permanently abate all conduct creating a nuisance. (R.O.A. Vol. I, page 219 [Petition April 27, 2016, page 6]) (emphasis added)

The difference between civil and criminal contempt is significant. In order to prove a case for criminal contempt, the Solicitor is required to prove, beyond a reasonable doubt, each element of contempt:

"A willful act is one which is 'done voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or disregard the law." . . . "Before a court may find a person in contempt, the record must clearly and specifically reflect that contemptuous conduct." However a charge of constructive contempt brought by a rule to show cause must be based on an affidavit or verified petition. "The failure to support the rule to show cause by an affidavit or verified petition is a fatal defect."

Intent for purposes of criminal contempt is subjective, not objective, and must be

necessarily be ascertained from all the acts, words, and circumstances surrounding the occurrence. *Miller v. Miller*, 375 S.C. 443, 652 S.E.2d 754 (Ct. App. 2007)

The burden of proof is the same as in a criminal case:

In a criminal contempt proceeding, the burden of proof is beyond a reasonable doubt *Floyd*, 365 S.C. at 76, 615 S.E.2d at 476. Intent for purposes of criminal contempt is subjective, not objective, and must necessarily be ascertained from all the acts, words, and circumstances surrounding the occurrence. *State v. Passmore*, 363 S.C. 568, 572, 611 S.E.2d 273, 275 (Ct. App. 2005) (citing *State v. Bevilacqua*, 316 S.C. 122, 129, 447 S.E.2d 213, 217 (Ct. App. 1994)).

Miller, ibid.

Here, not only did the Solicitor not provide the mandatory contractual notice that is a condition precedent, but also the defendants had no idea they were facing criminal contempt until the day before trial (discussed above in the section on the lower court's error in not granting a continuance). In addition, as set forth above, the record is silent as to even a scintilla—let alone the standard of proof beyond a reasonable doubt—that the Solicitor provided any notice to the defendants that they were in violation of the Consent Order (discussed in more detail below). More importantly, the Solicitor's decision to seek criminal contempt invoked the defendants' Fifth Amendment right to remain silent. However, when they exercised their right to remain silent, the lower court construed their silence against them in finding Elephant Inc. guilty of criminal contempt! "The Court does not mean to suggest the Solicitor shouldered a burden to prove the State's compliance with the Order. If Defendants wished to raise such issues as a defense, they had the opportunity to present such evidence but elected not to do so." (R.O.A. Vol. I, page 81 [Order page 13, footnote 23]) This is a fundamental error of law and demonstrates the lower court failed to apply the proper standard of proof or to grasp the dilemma of requiring a defendant to defend against criminal

and civil contempt in the same proceeding. No criminal defendant is required to assert his innocence, and furthermore, the lower court erred in construing the defendant's silence against him and then compounded the error by relieving the Solicitor of his Constitutional duty to prove every element of his case. There has never been a criminal decision in the annals of American jurisprudence that allowed a criminal conviction to stand because the defendant elected to remain silent. This error requires reversal of the conviction.

C

Criminal Contempt and Civil Contempt are mutually exclusive in that Criminal Contempt is for punishment for past wrongs and Civil Contempt must include a method for the defendant to purge his contempt.

Neither the Solicitor nor the lower court appreciated the difference between civil and criminal contempt. (See *Poston, op cit.*) One is forward looking and must contain a method of purging the contempt by compliance, and the other is purely backward looking, designed to punish a contumacious litigant for not respecting the authority of the Court.

> Courts look to what is primarily sought to be accomplished by the sentence to determine whether to consider the contempt civil or criminal. If the purpose of a sentence is to vindicate the dignity or authority of the court, the proceeding is criminal. ***If, on the other hand, the sentence is intended to protect and enforce the rights of private parties by compelling obedience to court orders and decrees, the proceeding is deemed to be civil.*** A sentence imposed in a criminal contempt proceeding is punitive in nature.
>
> *17 Am. Jur.2d,* "Contempt" § 147 (emphasis added)

The sentence imposed is obviously designed to "enforce the rights of private parties by compelling obedience to court orders and decrees," and therefore had to contain a method of purging the contempt. In fact, the Order under review is a hopeless mashup of

both criminal and civil contempt, and this mashup deprived the appellants of a fundamental right and must be reversed with instructions to try the defendant, Elephant, Inc., on either civil or criminal contempt, but not both.

D

Criminal Contempt that exposes a defendant to the potential for a punishment greater than one year entitles the defendant to trial by jury.

There is no disagreement that an action against a litigant seeking a finding of criminal contempt triggers the defendants' rights to trial by jury. In another Greenville County case, the Court of Appeals analyzed the law of contempt in South Carolina and held, citing the United States Supreme Court in *Bloom v. Illinois*, 391 U.S. 194, 88 S.Ct. 1477, 20 L.Ed. 522 (1968):

> Our deliberations have convinced us, however, that serious contempts are so nearly like other serious crimes that they are subject to the jury trial provision of the constitution, now binding on the States, and that the traditional rule is constitutionally infirm insofar as it permits other than petty contempts to be tried without honoring a demand for jury trial.
> *State v. Passamore*, 363 S.C. 568, 611 S.E.2d 273 (2005)

Here, the record shows that the Solicitor's April 27th petition prayed for the **maximum penalty to be imposed**, which is one year in South Carolina, unless the Master found each violation a separate contempt in which case the defendant, Elephant, Inc., was facing a long prison sentence. Thus, the Solicitor's petition clearly triggered the defendants' right to trial by jury, which they demanded. However, the Solicitor attempted to deflect the defendants' right to exercise their constitutional rights by telling the Court that he would be satisfied with a

sentence of six months:

THE COURT: And Mr. Culbreath, I understand from our conference call yesterday that if, in fact, this is a criminal contempt as opposed to a civil contempt and if, in fact, the evidence supports the State's request, then the State has agreed to limit any relief sought to no more than six months?

MR. CULBREATH: That's correct, Your Honor. **To the extent that we have a say in the matter, we wouldn't seek anything more than six months.** And if I may, I'll hand up some case law to that effect. I know that the Sixth Amendment had been touched on, too. This case law addresses that.

R.O.A. Vol. I, pages 314 -315 [Tr. pgs. 16, line 15—page 17, line 7] (emphasis added)

Of course, the Solicitor has no say in sentencing. He is constitutionally prohibited from having a say. The Solicitor has no power to sentence the defendants. However, he has the right to request a punishment, and in his petition, he asked for punishment in "the maximum extent allowed by law." (R.O.A. Vol. I, page 219 [petition page 6]). Since the Solicitor's pleadings brought the defendants before the Court, they were facing much more than one year in prison. The Solicitor cannot deprive the defendants of their constitutional right to trial by jury by the expedient of telling the Court that he would be satisfied with a six-month sentence. Thus the lower court erred in denying the defendants the right to trial by jury. The Solicitor has no power to bind the Court to a sentence, and for this reason, the defendants were entitled to trial by jury.

E

The lower court erred in failing to require notice to the defendants that they faced contempt as called for in the Consent Order.

As set forth above, the Master used the defendants' right to remain silent against

them even though they were facing criminal contempt. However, as set forth above, the Consent Order requires that the Solicitor give the defendants notice of violations and afford them an opportunity to correct them, and this is a bargained for condition precedent. (The provision mirrors the statutory requirement that the Solicitor provide notice prior to commencing a nuisance abatement action. See § 15-43-120, S. C. Code: "No proceeding against the owner of the real estate shall be commenced hereunder unless ten days' written notice be given by the prosecuting attorney to such owner or his agent and upon his failure thereafter to abate the nuisance." The Master erroneously circumvented this problem by concluding—and this is error—that the defendants could have raised the notice issue but did not by remaining silent! A defendant's right to remain silent never relieves the government of proving each element of a criminal prosecution. The Master's decision is a significant violation of the rule governing criminal contempt and its standard of proof. Not only did the monitors deviate from their duties spelled out in the Consent Order, but this record is devoid of even a scintilla of evidence that either defendant received notice of any alleged infraction before the Solicitor moved for contempt, which is not only a violation of the parties' settlement agreement but also a condition precedent and an essential element of prosecution lacking in this case. The omission is fatal to the State's case. The Order under review concedes this important point because the Master found the defendant, Gaines, not to be in contempt of court even though the failure of notice applied equally to both defendants. Even without the requirement of notice in the Consent Order, the law requires notice to targets of contempt, § 15-43-120, in order that they can avoid punishment by taking corrective action:

> The imposition of a contempt sanction is often held unjustified when the court fails to give fair warning that the continuance of certain conduct would risk contempt. *17 Am. Jur.2d,* "Contempt," § 157

Here, the Solicitor breached his contractual duty to notify the defendants in accordance with the settlement agreement, and the lower court compounded the error by holding that the defendants waived the defense by exercising their right to silence. At pages 341, 342, and 343 R.O.A. Vol. I [tr. pages 43, 44, 45], Investigator Smith testified he never put any defendant on notice of any alleged infraction. The standard of proof in criminal contempt is beyond a reasonable doubt, and the State's allegation is that the defendants knowingly, willfully and intentionally violated the parties' settlement agreement, but the record is silent as to their knowledge, a fatal omission. There is no such thing as accidental criminal contempt. The State's burden is beyond a reasonable doubt, but the State did not offer, let alone prove, that either Elephant Inc. or Ken Gaines was aware of the violations of the settlement agreement, and for that reason, the Master acquitted Gaines but found Elephant guilty on the same deficient evidence. The purpose of the settlement agreement, and its monitoring provisions, are to make sure that both sides are on the same level playing field, not to set up a trap so that the defendants can receive a life sentence, which is possible because the State argues every violation is a separate act of contempt, exposing the defendants to a literal life sentence.

F

The lower court erred in failing to grant appellant's request for a continuance because the refusal to grant a continuance denied appellants' their right to counsel of their choice.

The facts surrounding the Master's refusal to grant a continuance is discussed fully above at pages 18 - 21 and does not need to be repeated here. However, the Master's error

is compounded by the fact that by refusing to allow appellants a reasonable time to secure counsel, the Master denied them the opportunity to be represented by the counsel of their choice. This is a right guaranteed to them by the Sixth Amendment and by the South Carolina Constitution, Article I § 14. The United States Supreme Court made clear that when a court deprives a defendant of counsel of his choice, a conviction must be reversed without resort to determining whether the deprivation was harmless error. *United States Gonzalez-Lopez, 548 U.S. 140, 126 S.Ct. 2357 (2006)* In other words, it is a bright line test, and here, it is undisputed that the Master denied the appellants their right to counsel of their choice, and under the holding of *United States v. Gonzalez-Lopez*, the Master's error requires reversal.

Argument V

There is a complete failure of proof in this record of the Solicitor's office either notifying the defendants of alleged infractions as required by the Consent Order and giving them an opportunity to correct them to avoid being sanctioned for contempt of court or of proving the defendant knowingly violated the provisions of the Consent Order.

As pointed out in the preceding section (IV E), the record in this case is missing any proof that the State gave notice to the defendants as required by the Consent Order. In addition to this fatal error of proof, the State also proved that Elephant, Inc. did exactly what the Consent Order requires. The State called Jeffrey John Smith, "criminal investigator for the Thirteenth Circuit Solicitor's Office working directly for Walt Wilkins." (R.O.A. Vol. I, page 320 [tr. page 22]) After extensive direct and cross examination, Investigator Smith conceded that the reason the parties were before the Court was

because of an allegation that the Platinum Plus dancers got too close to patrons:

Q. All right. Well, we're okay on the breasts [being properly covered]; right?

A. Yeah.

Q. We're okay on the thong, although you had an opinion that one of the dancers in one of the videos, it may not have been two inches in width?

A. I believe there was more than one example, but that is the—that was my argument; it's not two inches.

Q. It's not two inches; all right. And your entire testimony—basis for that testimony is the view of the videos that you just showed us?

A. Correct.

Q. Nowhere in the video did you see any actual sexual activity; correct?

A. The caressing and fondling of breasts and buttocks would be up for determination.

Q. Okay. We're going to get there.

A. Okay. I'll wait.

R.O.A. Vol. I, page 351 [tr. page 53]

The above quoted testimony is representative of the entire trial. Distilled down to its essence, the State's case is that the defendants violated the Consent Order by allowing dancers to touch patrons.

However, the State proved the defendants' innocence for them. The State called Ashley Taylor Padgett, a former dancer at Platinum Plus. After establishing that Ms.

Padgett was the dancer captured on video in the girl-on-girl dance that is the centerpiece of the State's evidence, Ms. Padgett revealed that Platinum Plus fired her after the encounter that forms the basis of the State's case:

Q. Now, you were terminated by the – I know it's called Platinum Plus, but the holding company is called Elephant, Inc. So what name to you want to use? Platinum Plus, is that okay?

A. That's fine.

Q. Who terminated you.

A. I was actually told over the phone when I was talking to someone I know that works there told me that I wasn't' allowed to come back; I was on the fired list.

Q. Okay. Because of the –some of the activities that we've seen in the video?

A. Correct.

Q. Okay. And you already told us earlier when you told us about your agreement with Platinum Plus, you were an independent contractor; correct?

A. Right.

Q. You file your own 1099 form, correct?

A. Yes, sir.

R.O.A. Vol. I, page 410 [transcript page 112])

In fact, one can turn to almost any page of the transcript and find that: A) the record is silent as to any knowing violation by any defiant, and B) contains evidence that the

defendant dealt with infractions by summarily terminating the relationship with the independent contractor who breached the rules of what is or is not allowed. Thus, the record does not contain a *scintilla* of evidence that sustains the Master's finding that the defendant, Elephant, Inc., knowingly violated the terms of the Consent Order. Moreover, the record shows it is undisputed that the State never provided the requisite notice to the defendants as required by the Consent Order.

Argument VI

The lower court erred by imposing additional reporting requirements on the defendant, Ken Gaines, after finding him to be not guilty of contempt.

The Order under review finds the appellant, Ken Gaines, to be not guilty of contempt. That finding is not being appealed. However, despite finding the appellant, Gaines, not guilty, the Master imposed additional reporting requirements on him and warned him of enhanced penalties. It is impossible to find a party not guilty and then punish the same defendant by adding to his burdens. The Master has no authority to re-write the parties' bargained for agreement, which was reduced to an Order of the Court. Thus, the extra reporting requirements on Gaines should be vacated.

Conclusion

For the reasons set forth above, the appellants respectfully ask this Court to vacate the finding of contempt and remand, with instructions, to the circuit court for trial as to the defendant, Elephant, Inc. Prior to calling the case for trial, the Solicitor should notify the defendant, Elephant, Inc. whether it faces civil or criminal contempt. Since the Master found

the defendant, Ken Gaines, to be not in contempt of Court, the additional reporting requirements placed on him should be vacated.

Respectfully submitted,

March 16, 2017

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
Charles B. Simmons, Jr., Master-in-Equity

RECEIVED
MAR 20 2017
SC Court of Appeals

Case No. 2015-CP-23-02597

State of South Carolina on the relation of
Walter W. Wilkins, III, Solicitor of the Thirteenth Circuit.....Respondent,

vs.

Elephant Inc., Gregory Kenwood Gaines, and
Frontage Road Associates, Defendants,

of whom

Elephant Inc., and Gregory Kenwood Gaines are..... Appellants.

CERTIFICATE OF COUNSEL

I certify that this Final Brief complies with Rule 211(b), South Carolina Appellate Court Rules.

March 16, 2017

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