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.

APPELLANTS' REPLY BRIEF

March 16, 2017

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REPLY TO RESPONDENT'S STATEMENT OF CASE

The Respondent states that the Master acquired jurisdiction of this case when: "Chief Administrative Judge Robin Stilwell ordered Appellants to appeal and show cause on May 18, 2016, and referred the case to the Honorable Charles B. Simmons, Jr." (Respondent's Brief at page 2. Whether such an Order does or does not exist—the appellants could not discover it despite considerable colloquy devoted to this topic at pages 308-309 of the Record on Appeal Vol. I. [transcript pages 10-11] At trial on June 14, 2016, the State asserted that such an Order existed and offered it to the Court as an exhibit, but to date, the appellants in this case have never seen the alleged Order of Reference because it was an *ex parte* Order attached to the State's petition for Rule To Show Cause. The legal issue is not whether the Order exists or not—Appellants have no doubt it exists—the legal issue is whether it is or is not a nullity.

Even though the Appellants' were not aware of the Order until the Solicitor offered it as an exhibit, its existence is of not the significant issue before this Court. The issue is that the trial court explained it was relying on an *ex parte* Order:

> Secondly, I have been provided with—and I don't' have it in 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 [tr. page 10].

The Solicitor then goes on to explain that Judge Sitlwell "initially granted to your Honor or directed to you" an Order of Reference. We have no doubt the Solicitor's office will produce a copy of this Order for inclusion in the Record on Appeal because even though so far the appellants have not seen it. According to the Solicitor, Judge Stilwell referred the case as part of the Solicitor's application for a Rule to Show Cause, which is, of course, impossible. This nuisance abatement action is a civil action, and Rule 53 of the *S.C.R.C.P.* governs references:

> In an action where the parties consent, in a default case, or an action for foreclosure,

> some or all of the causes of action in a case may be referred to a master or special referee by order of a circuit judge or the clerk of court. In all other actions, the circuit court may, upon application of any party or upon its own motion, direct a reference of some or all of the cause of action in a case. Any party may request a jury pursuant to Rule 38 on any or all issues triable of right by a jury and, upon the filing of a jury demand, the matter shall be returned to the circuit court.

Thus, it is inconsequential whether the Appellants could or could not find the alleged Order, for the lower court lacked the power to order a reference without affording both parties an opportunity for consultation and participation in the decision to refer the case.

There is one more necessary amplification to the Respondent's Statement of Case. The Respondent is correct; the Appellants did not go forward on their Motion for Reconsideration. However, the Solicitor omits to mention the pressure he brought to bear on Appellants by ordering the Greenville Sheriff's Office to impose the contempt sentence even though the trial court's Order was not final, and in desperation to save the business, Appellants filed a Notice of Appeal to obtain an automatic stay in an effort to prevent the padlocking of the building until Appellants could have judicial review. However, the Sheriff's Department did not obey the automatic stay of this appeal, and the business is now destroyed. This post-trial fact does not moot the case because there remain other penalties being imposed.

REPLY TO RESPONDENT'S STATEMENT OF FACTS

The Respondent makes the Appellant's case for them in its first sentence: "Appellants seek review of a lower court order finding Appellant EI in criminal **and** civil contempt." (Respondent's Brief at page 1, emphasis added) This is correct, and as far as Appellant can tell, this is the first case in South Carolina where a Court forced a party to face a simultaneous trial on both civil and criminal contempt. The position Respondent articulates in its brief is different from the position articulated at trial when the Solicitor announced the parties were before the Court on criminal contempt (See Record on Appeal Vol. I, page 314 [tr. page 16]). The

Appellants relied on this judicial admission in deciding to exercise their right to remain silent. Throughout the Respondent's brief, it acts as if seeking civil and criminal contempt at the same time is normal: "Respondent's Petition requested both criminal and civil contempt sanctions." (Respondent's Brief at page 14) In fact, civil and criminal contempt have different purposes, different standards of proof and require different penalties. In fact, the two are mutually exclusive since civil contempt is forward looking, providing a method to purge the contempt, while criminal contempt is backward looking, imposing punishment for acts against the Court's integrity. *Poston v. Poston*, 331 S.C. 106, 502 S.E.2d 86 (1998) Moreover, as discussed in Appellants' brief, the Appellants exercised their right to remain silent based on the Solicitor's representation that the parties were facing criminal contempt. The Respondent is not permitted to change this position on appeal.

Secondly, the Respondent asserts as a "fact" (in footnote 2) that the nuisance abatement action is predicated on "prostitution and lewd and lascivious conduct" as if such allegations vitiate the Appellants claim to be treated fairly. (Respondent's Brief at page 4) Leaving aside the obvious fact that the record is silent as to any proof of prostitution,[1] the record does contain evidence of lap dancing, including displaying the proscribed anatomical areas, which does constitute lewdness. Displaying the proscribed anatomical areas may be illegal in South Carolina, but it is not "prostitution." While the State takes every opportunity to cast Appellants in a bad light, no one mistakes "lap dances" for "prostitution," but the more important point is that the Appellants are entitled to be treated fairly regardless of the allegations against them, and the issue is not whether the dancers violated the Consent Order—they did—the question is whether the defendants knew about it and willfully violated the Consent Order.

[1] "Prostitution is performing an act of sexual intercourse for hire, or offering or ageing to perform an act of sexual intercourse or any unlawful sexual act for hire." *Black's Law Dictionary*, Fifth Ed. The Solicitor is correct that South Carolina law prohibits "lewdness." § 16-15-90, but it is an overstatement to equate "lewdness" with "prostitution."

Finally, the Respondent invests a lot of effort in describing as "facts" the negotiations leading up to the 2015 Consent Order. These negotiations are not part of the record in this case and are not "facts" by any definition. Moreover, such "facts" played no part in the lower court's finding of contempt as to E.I., and play no part in this Court's analysis of the legal issues now under review. The Solicitor brought a contempt action for violation of the 2015 Consent Order. The 2015 Consent Order speaks for itself, and the issue below was whether the appellants did or did not willfully violate the terms of the 2015 Consent Order. At trial, the Solicitor announced the parties were facing criminal contempt. Now, for the first time, the Solicitor maintains the parties were facing criminal and civil contempt. Since the case went before the trial court on the issue of criminal contempt, the Solicitor cannot raise civil contempt for the first time on appeal. *Johnson v. Lloyd*, 407 S.C. 610, 757 S.E.2d 705 (2014), citing *State v. Hoffman*, 312 S.C., 386, 440 S.E.2d 869 (1994): "An issue not properly preserved cannot be raised for the first time on appeal."

REPLY TO RESPONDENT'S STANDARD OF REVIEW

The Respondent again blurs the distinction between civil and criminal contempt. The trial below was a criminal contempt trial. The State had the burden of proof beyond a reasonable doubt. The Respondent also glosses over the point that the defendants found themselves before the Master-in-Equity through an involuntary reference. While the Respondent sets forth the correct abuse of discretion standard in a normal case, this case is far from normal. Here, the parties found themselves before the Master, a court of equity, though an alleged Order of Reference obtained *ex parte*. Thus, the fairest way to characterize the procedural history of this case is to say that the Solicitor's Office obtained an Order of Reference without Appellants' knowledge or participation. Thus the determination of whether the parties were in equity or law is cloudy at best. In an action to determine allocation of partition proceeds held before a Master

In Equity, the Court of Appeals said:

> Moreover, a case with both legal and equitable issues presents a divided scope of review. thus, "a legal question in an equity case receives review as in law." *Sloan v. Greenville County*, 356 S.C. 531, 546, 590 S.E.2d 338, 346 (Ct. App. 2003) (citing *Gunter v. Fallow*, 78 S.C. 457, 59 S.E. 70 (1907)). Questions of law may be decided with no particular deference to the trial court. *Doe ex rel. Legal Guardian v. Barnwell School Dist.* 45, 369 S.C. 659, 662 S.E.2d 518, 519 (Ct. App. 2006) (citing *Moriartiy v. Garden Santcuary Church of God*, 341 S.C. 320, 327, 534 S.E.2d 672,675 (2000)). This court may correct errors of law in both legal and equity actions. *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 411, 526 S.E.2d 716, 719 (2000) (citing S.C. Code Ann. § 14-8-200 (Supp. 1998)).
> *S. C. Dept. of Transportation v. M & T Enterprises of Mt. Pleasant, L.L.C.*, 379 S.C. 645, 667 S.E.2d 7 (Ct. App. 2008)

Therefore, Appellants believe the better statement of the applicable standard of review is the one set forth in *Stevenson v. Stevenson*, 276 S.C. 475, 279 S.E.2d 616 (1981), citied at page 12 of Appellants' brief.

REPLY TO ARGUMENT 1
The Lower Court Lacked Subject Matter Jurisdiction

The Government's argument starts out with the assertion that all of appellants' arguments are "confused and unsupported," (Respondent's Brief at page 10.) but spends the next 34 pages challenging them. Appellant's arguments may not be as well written as Respondent's excellent counsel's work, but Courts do not decide cases based on who has the better lawyer. As for "unsupported," Appellants respectfully submit that the South Carolina Constitution, South Carolina and United States Supreme Court cases, and South Carolina statutes provide "support" for Appellants' legal arguments, which are not complex.

The Respondent's legal argument makes Appellants' legal argument for them. In titling Argument I "Subject Matter Jurisdiction Supported The Trial Judge's Contempt Findings," (Respondent's Brief at page 10), the Respondent inverts the analysis and begs the question being asked. "We can consider an argument to be viciously circular, and thus an instance of the fallacy of begging the question, if it contains a premise or employs an inference rule which is at least as doubtful as the conclusion of the argument." Howard Kahane, *Logic and Philosophy*, Wadsworth Publishing Co., 1973, page 237 As pointed out on pages 12 - 18 of Appellants' Brief and above at page 7, the trial court cannot make a finding of contempt (civil or criminal) if it lacks jurisdiction, and it is hardly a justification for jurisdiction to say that the court made a decision; therefore it has jurisdiction. The Respondent's entire argument is that the trial court, despite the limitations placed on it by the South Carolina Constitution and the General Assembly, acquired subject matter jurisdiction because Judge Stilwell gave it to the Court through an *ex parte* Order. That is a novel legal theory that is unsupported.

As set forth in Appellants' initial brief, subject matter jurisdiction is serious business. It is so serious that a court can raise the issue at any time on its own motion and even on appeal for the first time and even by the Court on its own: *South Carolina D.S.S. v. Tran*, 418 S.C.308, 792 S.E.2d 254 (Ct. App. 2016) The Respondent asserts three reasons why the trial court had jurisdiction:

A.
The Supreme Court Did Not Assign This Case To The Master-In-Equity

At the call of the case, appellants objected to jurisdiction. At the call of the case, the Solicitor did not produce the two Supreme Court Orders it now claims conferred jurisdiction on the trial court until after the call of the case. Appellants had never seen or received either of the two orders until standing before the trial court, having been in the case for 72 hours. Respondent questions whether Appellants have or have not received the Orders in question while being able to quote from them. The answer to both questions is easy as the Transcript of the Hearing (R.O.A. Vol. I, page 314 [tr. page 16] (emphasis added) explains:

MR. GOLDSTEIN: Well, I just want—for the record, I want to be sure that the Orders

> that the Court is relying upon for continued jurisdiction are the Orders dated December 16th, 2014 and December 9th, 2015, signed by the Chief Justice of the South Carolina Supreme Court, **which have just been handed to me**.

These two Orders are in the Record of Appeal (Vol. II, pages 629 and 630) and speak for themselves, but they do not confer jurisdiction upon the Master-in-Equity to conduct a criminal contempt hearing, a point driven home by the Consent Order itself because the 2015 Consent Order sets forth the mechanism for further court involvement as a basis for contempt, which were not met in this case. As for the Supreme Court Orders, ¶ 2 says:

> In civil nonjury mattes from the date of filing, unless otherwise directed by the Chief Judge for Administrative Purposes (Civil) for the Circuit, to hear and dispose of any or all motions and pretrial proceedings, and to perform all administrative duties necessary to prepare these cases for trial or other disposition, including sounding the trial roster and docket, and to try these matters to conclusion, but excepting those matters and/or proceedings reserved to the Chief Judge for Administrative Purposes (Civil) for the Circuit. . . .
> R.O.A. Vol. II, page 629 [Order]

The matter now before the Court is an appeal from a finding of criminal contempt. These Orders do not convey subject matter jurisdiction to the Master-in-Equity on such matters because the 2015 Consent Order specifically reserves jurisdiction to "the court of common pleas." See Consent Order ¶ IX(B) at page 22[Consent Order page 8] of the R.O.A, Vol. I, quoted below at page 13.

B.
The Court Of Common Pleas Cannot Refer A Case Except As Provided By Rule 53.

Again, the Respondent makes Appellants' arguments for them. As set forth above on page 6, the *Rules of Civil Procedure* prescribe the method in which the Court refers a case. It is undisputed—as this record confirms—that the case did not follow the path required by Rule 53. What the Government is really saying is: This category of Appellant is not deserving of the procedure that we afford everyone else.

The Government conflates the Appellants' statement that it could not locate Judge Stilwell's Order with the legal issue before the Court. As set forth above, the Solicitor solves this dilemma when it explains that the Order of Reference is part of its *ex parte* application for the defendants to appear and show cause. See Respondent's Brief at page 12: "On April 29, 2016, chief Administrative Judge Robin Stilwell issued an Order to Show cause . . . subsequent to the filing of the Solicitor's petition." While this explains why Appellants' counsel (who were hired just hours before the hearing) could not find the Order of Reference, it—more importantly—confuses the factual issue (Was there an Order of Reference?) with the legal issue (Did the Court have authority to issue an *ex parte* Order of Reference?). When the Government filed its application to the circuit court for an Order for Rule to Show Cause, the *Rules of Civil Procedure* do not permit the Government to include an *ex parte* Order of Reference. Because it is undisputed that the Order referring the case resulted from an *ex parte* application, it cannot support a reference to the Master-In-Equity. "We take this opportunity to advise the Bench and Bar of the disfavor with which we regard *ex parte* orders and the stringent standards of necessity we demand of their issuance on review. Not only do such orders deprive this Court of adequate records on appeal but they deny to those deprived an opportunity to be heard in matters which affect them." *Herring v. Retail Credit Co.*, 266 S.C. 455, 224 S.E.2d 663 (1976) See also *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed. 556 (1972) discussed at page 20 of Appellants' brief.

Here, the Government admits it obtained the Order of Reference *ex parte* when it presented its application for a rule to show cause, and under the well-established rules of procedure, the Government cannot choose a forum for the opposing party.

C.

The Original Consent Order Does Not Confer Unlimited Jurisdiction In The Master-In-

Equity

As before, the Government makes Appellants' arguments for them. The Respondent lists 5 bullet points on pages 14 and 15, and Appellants adopt them and wish to place an exclamation point on them. They all say the same thing: "All undersigned signatories hereto stipulate and agree that the **Greenville County Court of Common Pleas** possesses personal jurisdiction over them as well as subject matter jurisdiction to hear this matter and enter this Consent Order." (Respondent's Brief page 15, quoting the Consent Order at page 8, emphasis added.) The agreement between the parties is a contract, and the most basic rule of contract interpretation is to give the words used in the contract their plain and ordinary meaning. When a contract is clear and unequivocal, its meaning must be determined by its contents alone. *Dibble v. Dibble*, 246 S.C. 165, 181, 149 S.E.2d 355, 364 (1966)." *State v. Cochran*, 358 S.C. 24, 594 S.E.2d 844 (2004) Here, the contract could not be clearer, and it is undisputed that the "Court of Common Pleas" is not the "Master-In-Equity." Therefore the Master lacked personal and subject matter jurisdiction by the plain terms of Consent Order.

D.
Since The Court Of Common Pleas Issued An *Ex Parte* Order Of Reference, Appellant's Arguments About Such Order Are Necessarily Inference

The Appellants did not participate in the presentation of the Petition for Rule to Show Cause to the circuit court and thus have no information, one way or the other, about how such an Order of Reference came to be. Because the Order of Reference is *ex parte*, all of Appellants' arguments are necessarily limited to inference. What we do know is that: 1) The Solicitor prepared a Petition for Rule to Show Cause, and 2) The Solicitor presented it to the Court for signature. We now know that either the Petition for Rule to Show Cause contained an Order of Reference as part of the package, or Judge Stilwell typed up the Order of Reference and signed it *sua sponte*. Given the workload of circuit court judges, the first inference is more likely. Of course, this debate is not important because the point is not who typed the Order of Reference; rather, the point is that it sprang into being through a process that did not include the Appellants, and thus there is an insufficient record because Appellants did not participate. See reference to *Herring v. Retail Credit*, cited above on page 11. The proper method to obtain a reference is either by consent or by a motion filed with the Court. The manner in which the Government obtained an Order of Reference is not proper and is a nullity.

The rest of the Government's argument in this section is poke at Appellants for pointing out what should be obvious. The concept of a "neutral and detached magistrate" is a bulwark of the English common law dating back to before the creation of the United States. Before obtaining a warrant for arrest or a warrant to search premises, a police officer must present probable cause before a "neutral and detached magistrate" as a precondition of making the arrest or performing the search. The Solicitor's Office may be unaware of its own power, but any fair assessment of the procedural history of this case illuminates the fact that the Solicitor's office has harnessed enormous power to bring a civil abatement action when the only members of the "public" affected by the alleged nuisance are a couple of members of the local police departments who parlayed five hundred dollars an hour of taxpayer's money into a night of drinking and lap dances. At the heart of this case is an alleged violation of a contract between two parties calling for the Solicitor to "monitor" Platinum Plus. What this record demonstrates is that the "monitors" did far more than "monitor." Webster defines "monitor" as "to watch, observe, check." The contract—the 2015 Consent Order—provides that the Solicitor's office will notify the defendants of any violations. It does not say the "monitors" will pay $2,900.00 to induce dancers to break the rules. Instead of monitoring or notifying, the Solicitor obtained an *ex parte* Order of reference, and the defendants found themselves facing criminal contempt on short notice. When efforts to hire local counsel proved unsuccessful, the defendants had to cast a wider net to obtain representation, finding counsel hours before the trial. Only the most jaundiced view of "fair" finds these circumstances fair. As the United States Supreme Court said in *Ward v. Village of Monroeville*, 409 U.S. 57, 93 S.Ct. 80, 34 L.Ed.2d 267 1972) where the Supreme Court held that a mayor's participation in traffic court was too unfair: "If this [procedure for filing for disqualification] means that an accused must show special prejudice in his particular case, the statute requires too much and protects too little." Here, the State's failure to adhere to the notice requirements of the Consent Order, the short notice afforded Appellants, the reference *ex parte*, the use of large amounts of taxpayer money to induce dancers to break the rules, combine to deprive the Appellants of any meaningful opportunity to be heard.

The Solicitor misapprehends the Appellants' point. The Appellants' point is that the numerous points addressed in Appellants' initial brief show an accumulation of effects, which when taken together, demonstrate how unfair the process was. Even in its brief, the Respondent obliquely makes this point for Appellants by equating lap dances with "prostitution." It is quite a stretch to contort the definition of prostitution enough to include lap dances, and here not only does the Solicitor give away the game, but also is on a slippery slope. As that hilarious defender of the First Amendment, Howard Stern, often observes, all dating is a form of prostitution. Charles Darwin expressed it more scientifically: "Men compete and women choose." However, this case is not a referendum on morality; this case involves the parties asking the Court to determine if the Solicitor proved beyond a reasonable doubt that the defendants did or did not willfully breach a contract, and if so, what is the proper remedy? (Obviously, the lower court found one defendant did not, and that is an unappealed finding and the law of the case.) This record proves that the Appellants had no notice of alleged violations until they found themselves hauled into court and thereby deprived of the very thing they bargained for: notice. Notice is the one thing the Appellants had to shield themselves against allegations of contempt, and the State deprived them of it in violation of the terms of the Consent Order, and the record contains no evidence of notice, without which there can be no contempt.

Reply to Argument II
The Appellants Did Not Have Adequate Time To Prepare And Were Denied Counsel Of Their Choice

The Respondent's arguments II(a), II(b), and II(c), are variations of the same argument, and can be treated in one reply (and must be treated in one reply due to page limitations). There is much less a legal argument here than a factual argument, and the facts are undisputed. Here is all three arguments in a nutshell: The Solicitor thinks the Appellants had plenty of time to prepare; the Appellants think they had no time to prepare. The question is: from which perspective does the Court evaluate the issue? The facts are undisputed:

The Solicitor's office had been working on its rule to show cause for months. It arranged for undercover officers to visit the Appellant, and it provided money for them to purchase alcohol and "lap dances."

On April 29, 2016, the Solicitor provided to the Court a Petition for Rule to Show Cause, which we now know included an Order of Reference. (R.O.A. Vol I, page 303 [tr. page 5]) It did not provide notice of the alleged violations except through its pleadings and prior to serving the defendants, the Respondent never advised them of violations or give them an opportunity to correct deficiencies even though the parties' negotiated Settlement Agreement required notice and an opportunity to address the problem:

> 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)]

On May 13, 2016, the served the defendants. (R.O.A. Vol. I, page 431 [affidavit of service]) At that time or shortly thereafter, the Solicitor informed the appellants that it would be calling their lawyer as a witness.

On May 6, 2016, the Master-in-Equity granted a 39 day continuance until June 14, 2016. (R.O.A. page 303 [tr. page 5]) On May 15, 2016, the Solicitor filed an Amended Petition, naming the individual defendants. The Appellants hired Ohio attorney, Louis Sirkin, to represent their interests, who, in turn, associated Thomas Goldstein as local counsel. Thus, the Appellants were able to locate substitute counsel approximate three days before the hearing, and Mr. Sirkin did not get admitted in the case until July 5, 2016, 21 days after the hearing. The best summary of this situation came from the State:

> MR. CULBREATH: Your Honor, thank you. First, I'd like to point out with regard to the Sixth Amendment argument, they may well be entitled to the attorney of their choice, but they made their choice last Wednesday. This has been pending for five weeks. They've had more than enough time to select counsel; either outside the state or in South Carolina, and make appropriate application. But I believe under Rule 404 of the Appellate Court Rules, the motion to be admitted *pro hac vice* needs to go to the Supreme Court, along with two hundred and fifty dollars and then the Court forwards it to Your Honor for consideration. And at the same time, a copy needs to be served on opposing counsel. None of that has occurred. So I believe it wouldn't be properly before the Court to allow him to participate in this hearing. But if, in fact, it is found that he is, we would object to his participation in this matter.
> R.O.A. Vol. I, page 307 [tr. page 9]

There can be no dispute that by whatever measure this Court accepts: "last Wednesday," or "five weeks"[2] combined with an objection to the Appellants either 1) being represented by counsel of their choice, or 2) having additional time to get counsel of their choice admitted *pro*

[2] The hearing on June 14, 2016, was 29 days after the Amended Petition.

hac vice, it is impossible to conclude anything but the Court below abused its discretion by failing to use any discretion, especially when a fair minded assessment of the facts adjusts for the bargained for notice provision of ¶ 2 of the Consent Order quoted above on page 16. The parties were before the Court on a criminal contempt and even looking at the facts in the light most favorable to the Solicitor, five weeks is not an adequate period of time to prepare to meet such serious allegations. This record reveals that the defendant's secured counsel approximately 72 hours before the hearing, had not been provided with the evidence against them, and were excluded from the process that led to the reference. Clearly the lower court denied the Appellants adequate time to prepare and denied them their right to be represented by counsel of their choice, especially where the defendants never knew until the call of the case whether they were facing civil or criminal contempt.

Reply to Argument III
The Standard For Interpreting A Consent Order And A Contract Are The Same

The Solicitor's Argument III mocks the Appellants for lacking the capacity to understand the issues. It may be true that Appellants' counsel lacks the capacity to understand the issues. Appellants confess they do not comprehend how they faced criminal contempt and civil contempt in the same proceeding since one invokes the right against self-incrimination from which no adverse inference is permitted. The Order under review construes Appellants' silence against them! (See R.O.A. Vol. I, page 81 [Order page 13]) Criminal and civil contempt have different standards of proof; Criminal Contempt provides Constitutional guarantees that civil contempt does not, including the right to remain silent. Each has a different purpose as set forth on page 28 of Appellants' initial brief:

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)

Civil Contempt **must** provide for a method to purge the contempt; criminal contempt is punitive only and does not include a means of purging. Civil Contempt is to exact compliance with a Court Order; Criminal Contempt is to punish for an affront to the Court's integrity. Civil Contempt is forward looking; criminal contempt is backward looking. As Respondent's brief shows, the Solicitor still has not made up his mind which he is seeking. Before the trial Court, he announced he was seeking criminal contempt (R.O.A. Vol I, page 304 [tr. page 6]), and Appellants relied on that in-court representation in choosing to remain silent. And it is beyond dispute that the record on appeal lacks any evidence of the essential element of knowledge. Realizing that the record is silent as to knowledge, the Respond hedges his bets by saying he is seeking both. There is an undeniable irony in the absence of the essential element of knowledge to support a finding of criminal contempt because had the Solicitor complied with the requirements of ¶ 2 of the 2015 Consent Order (quoted above on page 16), one of two things would have followed: Either 1) the defendants would have responded to the notice provision and ameliorated the need for a court appearance at all, or 2) if they did not, then the Solicitor would have obtained the necessary proof for his essential element of notice to sustain a finding of criminal contempt against E.I. (Even though the Order under review did not find the defendant, Gaines, in contempt of court, it still placed addition reporting burdens on him, which it could not do if he were acquitted. His acquittal is not challenged on appeal.) By not adhering to the agreement, and by announcing at the call of the case that he was seeking a finding of criminal contempt, he finds himself now grasping at straws to stay afloat on a charge of civil contempt because this record does not sustain a finding of criminal contempt. This brings us back to our starting point, which is a disagreement between the parties as to whether the Solicitor can try the defendants on simultaneous charges of civil and criminal contempt.

As Respondent suggests, perhaps Appellants lawyers are too dim to comprehend that their clients were facing two types of mutually exclusive contempt at the same time. Perhaps Appellants lawyers are too naïve to accept the Solicitor's representations on the record that they were facing criminal contempt. If this is the case, then so be it. However, at least the legal issue is crystallized for the Appellate Court: Can a defendant be compelled to defend against simultaneous allegations of criminal and civil contempt?

The Respondent sidesteps the issue by citing a line of cases that hold "It is within the circuit court's discretion to punish by fine or imprisonment every act of contempt before the court." *Ex parte Cannon*, 385 S.C. 643, 660, 685 S.E.2d 814, 823 (Ct. App. 2009). Here, the parties arrive at common ground, and there is no dispute that courts can punish by fine or imprisonment **every act of contempt before the court**. This record does not contain any evidence of acts of contempt. We have evidence of undercover officers drinking and inducing dancers for lap dances. We have allegations of breach of a settlement agreement/court order. What we do not have is any evidence that either Appellant was on notice of the alleged infractions or any evidence that the Appellant, E.I., willfully violated the court order. The first sentence of *Ex parte Cannon*, is a neat summary of the conflict between the parties here: "David Cannon appeals the circuit court's order finding him in contempt of court and imposing a sanction of a six-month imprisonment sentence **with the ability to purge the confinement upon the payment of specified fees and a fine.**" (emphasis added) Even though the defendant in *Cannon* stole $373,000.00 from the Estate he was managing, the Court of Appeals made absolutely clear that the sentence imposed on Cannon was a civil contempt punishment, not a criminal contempt punishment: "As we previously discussed, we find the present contempt proceedings to be civil in nature, **meaning the additional constitutional safeguards required in criminal contempt proceedings were not triggered**." *Ex parte Cannon* at page 828, emphasis added. This is powerful "support" that Appellant's legal assertions are correct; since the trial court did not provide a means of purge, the defendants faced criminal contempt, and, as held by *Ex parte Cannon*, and every case cited by the Respondent, the Government had to prove each and every element of its case beyond a reasonable doubt, including willfulness. Or, as the Court of Appeals says the same thing in *Ex parte Cannon*: "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, 571-72, 611 S.E.2d 273, 275 (Ct. App. 2005). Additionally, civil contempt must be proven by clear and convincing evidence, while criminal contempt must be proven beyond a reasonable doubt. *Poston v. Poston*, 331 S.C. 106, 113, 502 S.E.2d 86, 89 (1998). *Ex parte Cannon* at page 824. A thousand scholars could comb this record for a thousand years and not be able to identify a scintilla of evidence of willfulness. Instead, the record shows the Solicitor did not comply with the following notice provision of the 2015 Consent Order:

> **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)]

As the numerous citations in the Solicitor's well written and well researched brief make clear, "Intent for purposes of criminal contempt is subjective, not objective, and must necessarily be ascertained from all the acts, words, and circumstance surrounding the occurrence." *State v. Passmore*, 363 S.C. 568, 571-72, 611 S.E.2d 273, 275 (Ct. App. 2005). *Ex parte Cannon* at page 824. There is no evidence here of the Appellants' "acts, words, and circumstances." Instead, the record here demonstrates that the Greenville County sent in police officers who, using taxpayer money at the rate of $500.00 an hour, managed to drink with some dancers and induce some dancers, who are independent contractors, to break the rules. Not once did the Government offer any evidence that defendants **knew** about this conduct. The Government made no effort to call the conduct to the attention of the defendants even though the 2015 Consent Order required them to do just that. In fact, the State proved that when the defendants did learn about one of the instances of misconduct, they responded by immediately terminating the independent contractor dancer who violated the rules:

Q. Now, you [Ashton Padgett] were terminated by the – I know it's called Platinum Plus, but the holding company is called Elephant, Inc. So what name do 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 on the video?

A. Correct.

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

This is testimony elicited from the State's witness, who went on to explain that she is an independent contractor, and thus her subjective mental impressions are not attributable to the Appellants. The point is that in evaluating the defendants' "subjective" intent, all the evidence produced by the State demonstrates that they took corrective action even without the Solicitor's required notification. Not to put too fine a point on it, but this record contains not even a scintilla of evidence of notice or of subjective intent to violate a court order, which is the essential element of willfulness.

Thus, the Respondent's third argument fails to address the essential issue before the

Court: to wit, whether the State can announce a case as a criminal case, fail to provide any proof at all on the essential elements of criminal contempt, and then hope to save the decision by asserting for the first time on appeal that it proved a civil contempt case. Thus, the Respondent's argument IIIB that a "Consent Order" and a "Contract" are synonymous requires no response. The Appellants have never questioned the fact that the 2015 Consent Agreement is a court order. That is undisputed. The issue before the Court is that the State contends the Appellants should be held in criminal contempt when the State failed to profile any evidence of willfulness, which would have existed had the State conform to the condition precedent of notice in the Consent Order by providing notice of violations. In short, the State failed to produce any evidence that defendants knowingly violated a court order. Thus when the State asserts that "Courts are not reduced to approving Consent Orders only to hope for [their] compliance," (Respondent's brief at page 26, citing *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 440), the Solicitor is leaving out the part of the Consent Order that required the Solicitor to provide notice of infractions to the defendants in order to prevent the needless consumption of judicial resources when such matters could have been resolved through proper adherence to the notice provisions of the Consent Order. The Appellants agree with Respondent's assertion that "Consent decrees have attributes both of contracts and judicial decrees." (Respondent's Brief at page 26, citing 46 Am Jr. 2d § 186) This is precisely how the trial court abused its discretion in finding Appellants in contempt of court. Not only did the Solicitor's office fail to provide the requisite notice as required by the Consent Order, but also the record contains no evidence—let alone evidence beyond a reasonable doubt—that the Appellants **knowingly** violated the terms of the agreement.

The final argument Respondent makes is that the Appellants do not understand a condition precedent. It is sufficient to say in reply that ¶ 2 of the Consent Agreement speaks for itself, and the Solicitor fails to provide evidence of compliance, and this failure guarantees the absence of the necessary elements of contempt. Appellants agree that the Consent Order says "**Willful** violation of the terms and conditions set forth in this Consent Order shall be punishable as contempt of Court." (Respondent's Brief at page 29, emphasis added). However, the record does not contain evidence beyond a reasonable doubt of the necessary element of willfulness because the only persons who knew about the lap dances were the participants. This is why the trial court acquitted the individual defendant, and since the evidence against each defendant is identical, the acquittal of one requires the acquittal of the other. Willfulness means with a specific intent and must be shown by evidence beyond a reasonable doubt. To try to make a case for willfulness on appeal, the best the Solicitor can muster is the double hearsay argument III(C)(2) that "someone" told Officer Crumpton that the Solicitor put the Appellants on notice:

Q. Do you [Jorge Crumpton] know if the Solicitor forwarded those reports to E.I. or not?

A. Yes.

Q. You do know?

A. They told me they did.

Record on Appeal Vol. I, page 386 [tr. 88]

The above colloquy is on cross examination and represents the most powerful evidence the Solicitor mustered at trial. Aside from being double hearsay and self-serving, even if it were true, it would not rise to the level of proof beyond a reasonable doubt, and the testimony itself is undercut by the fact that there is no corroborating evidence in the record. The Solicitor concedes this deficiency and offers to correct it by supplementing the record for the Court of Appeals! "Respondent is glad to furnish such corresponded to their Court—at any time—if Appellants desire to press their unfounded representations in this regard." (Respondent's Brief at page 30) The Appellants decline this generous offer and reply that the case is before this Court on the record made at trial. Even more interesting that Officer Crumpton's testimony in the above colloquy followed shortly thereafter when he testified that the two girls he observed violating the rules were immediately fired:

Q. Okay. And as result the two women that you just told us about have been terminated and no longer are allowed to work at Platinum Plus; correct?

A. I believe so.

Record on Appeal Vol. I, page 386 [tr. 88]

In essence, Officer Crumpton's evidence reveals that he paid a couple of girls $2,900.00 to break the rules (R.O.A. Vol. I, page 384 [tr. page 86]), he told the Solicitor, and the Appellant, E.I. immediately fired them. Based on this testimony, it is a clear abuse of discretion to hold the Appellant, E.I., in contempt of Court because there is no evidence to sustain such a finding.

Finally, at page 30 under the rubric III(C)(2), we get to the real heart of the case, a this is where the parties are like electrons whose positions are controlled by the Pauli Exclusion Principle: only one of us can occupy this portion of the legal universe. The Respondent's assertion is so important that Appellants set it out in boldface and large font. On page 30, Respondent asserts, citing the trial court, and highlighting the overarching error below:

. . . as the lower court noted (discussed further *infra*), if Appellants wished to present a defense to respondent's *prima facie* contempt showing, they had the opportunity to present such evidence but elected not to do so.

We agree. As Respondent points out, the trial court did used the Appellants' choice not to testify as a basis for sustaining contempt, which is the best possible statement of the controlling legal error below. First, as argued throughout all the briefs, Appellants faced a criminal contempt action. They were not required to give evidence. Second, because Appellants faced a criminal contempt action, the Solicitor had the burden to produce evidence beyond a reasonable doubt proving the Appellants' willfulness. Based on the record of evidence produced in this trial, no trial lawyer would have provided the Solicitor an opportunity to correct the deficiencies in proof, and in fact, the trial court erred in failing to grant Appellants' motion for an involuntary nonsuit. There is not a scintilla of evidence of willfulness or notice in this record. What this record shows is how far and how much the Government was willing to go and to spend to put Platinum Plus out of business. Not only does the trial court abuse its discretion by finding one of the Appellants in contempt, but also it compounds the error—as cited above in boldface—by construing the Appellants' constitutional right to silence against them. In a perfect world, the Appellants' brief would be one sentence long, and it would be the Respondent's boldfaced sentence above.

Reply to Argument IV

The Trial Court Deprived Appellants Of Due Process For The Very Reason Set Forth In Respondent's Brief As Quoted Above

The reply to Argument IV need not be long because Respondent's Argument IV is refuted by the boldfaced quote on the preceding page. The burden of proof NEVER shifts to a criminal defendant to prove his innocence. Moreover, even if the trial court did have the discretion to try the defendants on simultaneous charges of criminal and civil contempt, the trial court found them guilty of criminal contempt, not civil contempt, no matter what the Order under review says. This is because the Order under review does not provide a method of purging the contempt. The Respondent helpfully explains the purpose of civil contempt, which contains statements of law with which the appellants have no quarrel. Respondent cites, for example *Curlee v. Howle*, 277 S.C. 377, 287 S.E.2d 915 (1982), an instructive case. In *Curlee*, the Supreme Court took up the question of how to punish a father who took his children to Nevada for three weeks as part of his right to court ordered visitation, started a new action in Nevada while he had the children for visitation, and refused to return them to South Carolina. As the Supreme Court pointed out in finding Mr. Howle in contempt: "Contempt results from the willful disobedience of an order of the court, and before a person may be held in contempt, **the record must be clear and specific as to the acts or conduct upon which finding is based**." [internal citations omitted, emphasis added] In deciding that Mr. Howle was not entitled to a jury trial, the Supreme Court explained: "The purpose of the sentence was obviously to compel appellant to pay the expenses, not for punishment." The Court went on to explain further that the damage award was compensatory only: "Therefore, the compensatory award should be limited to the complainant's actual loss." The analysis is in *Curlee* shines a powerful light on the error of law in this case. No one can look at the Order under review here and conclude it is compensatory. The extraordinary fine here--$80,000.00—combined with the lock out is designed to put the Appellants out of business, which it did. No one can mistake the punishment meted out here with the purely compensatory award of *Curlee*. Here the order to padlock the building and the Order to pay $80,000.00 to the County was punishment pure and simple, and it is nothing short of extraordinary that the Solicitor attempts to make any argument to the contrary.

Likewise the Solicitor can find no refuge in citing *State ex rel Love v. Howell*, 285 S.C,. 53, 328 S.E.2d 77 (1985), which stands for the identical proposition in *Curlee*. The Solicitor even helpfully underlines the significant language: "The trial judge has fully authority to imprison him or fine him or both <u>or close up his entire business operation if nessceary to assure full compliance with the injunctive orders</u> herfore issued by the Court of Common Pleas. (Respondent's brief at page 34, emphasis in Respondent's brief) Once again, a case cited by Respondent turns out to be persuasive authority for Appellants. As the Supreme Court reversed the trial court's failure to find an architectural draftsman in contempt of court, the Supreme Court said: "It was error for the trial judge to treat the matter as one for criminal contempt when only civil contempt was sought." This holding explodes the Respondent's arguments—throughout its brief—that the trial court here could try defendants on both civil and criminal contempt. The Supreme Court remanded the case against Mr. Howell for the imposition of civil contempt penalties. This means that whatever penalty the circuit court ultimately imposed on remand could be purged by the simple expedient of Mr. Howell ceasing to sign documents as an architect. Thus Appellants are in the dark as to what proposition of law enunciated in *Howell* is applicable to this situation. If the trial court had tried the Appellants on civil contempt and ordered penalties that could be purged by compliance with the Consent Order, then, and only then, would *Howell* be authoritative or relevant. As the Respondent helpfully points out on page 35 of its brief, the lower court impose only punishment and nothing more. Therefore, this is a criminal contempt case.

As explained above, the Appellants withdrew their motion for reconsideration in an effort to obtain the automatic stay provided by Rule 241. Even the clear holding of this rule did not prevent the Solicitor's office from shutting down the business, which destroyed it. Likewise, there is not a shred of evidence in the record to justify the imposition of such a crippling fine, and, obviously, now that Platinum Plus no longer exists, it has no ability to pay the fine.

As to the Appellants not having the right to trial by jury, this legal issue is fully briefed. It is sufficient to say in reply that the Solicitor saying he would be satisfied with a six month sentence did not bind the trial judge to a sixth month sentence. The Appellants faced up to a year in jail, and thus had a Constitutional right to trial by jury.

The remainder of Respondent's Argument IV is a repetition of the issues previously briefed in Appellants' brief and above and page limitations on reply briefs prevents a point by point refutation here.

Reply to Argument V
The Record does not Establish Proof Beyond A Reasonable Doubt As To Appellants' Willful Violation Of The 2015 Consent Order

The rest of Respondent's brief is a repetition of the arguments contained in Appellants' 1 brief and above. The rest of Respondent's brief is a rehash of the evidence of violations of the 2015 Consent Order, which, of course, has never been the issue. The issue was, and is, was there any evidence in this record to support a knowing violation by the two named defendants? Obviously, the trial court thought there was insufficient evidence to find one of the two in contempt, and that finding is not on appeal. There is no doubt that the Solicitor produced evidence of infractions, but all of the infractions were between independent contractors and undercover officers who were plying dancers with alcohol and paying large sums of money to induce them to break the rules. This record is silent as to any <u>knowing</u> violation.

Reply to Argument VI
The Trial Court Imposed Additional Reporting Requirements On Gaines While Finding Him Not Guilty Of Contempt

The Solicitor quotes the applicable portion of the Order under review at page 43 of his Brief. The Respondent need not address this issue, however, as the penalties imposed upon the business had the desired effect and put Platinum Plus out of business. As a result, the Appellant, Gaines, has nothing left to report under the 2015 Consent Order, although to the extent that he faces potential liability for the penalties imposed, the Appellants' involvement in the remaining issues is not moot.

Conclusion

For the reasons stated in Appellants' brief and above, the trial court erred in finding the Appellant, Elephant, Inc., in contempt of court and in imposing penalties against it. Since Platinum Plus has been destroyed in the process and no longer exists, there is no purpose in remanding this case to address the constitutional infirmities of the trial below. Rather, the Court should reverse the finding of criminal contempt against the defendant, E.I., and vacate the reporting duties placed on the defendants since Platinum Plus no longer exists. Finally, the Court should vacate the enormous fine imposed on E.I. since it was predicated upon the ability of the business to generate income to pay the fine, and the business no longer exists.

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 Reply Brief complies with Rule 211(b), *South Carolina Appellate Court Rules*.

March 16, 2017

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