

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS  
APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

Robin B. Stillwell, Circuit Court Judge

APPELLATE CASE NO.: 2019-001735

**RECEIVED**  
APR 30 2020  
SC Court of Appeals

Frontage Road Associates, Inc., also known as  
Frontage Road, Inc., .....Respondent

vs.

Elephant, Inc. and Gregory Gaines also known as  
Ken Wood, .....Appellant

---

---

**RESPONDENT'S  
INITIAL BRIEF**

---

---

O. W. Bannister (S.C. Bar No. 00506)  
BANNISTER, WYATT & STALVEY, LLC  
P.O. Box 10007  
Greenville, SC 29603  
Ph: 864-298-0084; Fax: 864-298-0146  
Attorney for Respondent

April 27, 2020

Other Counsel of Record:

Paul D. Harrill, Esq.  
P.O. Box 11390  
Columbia, SC 29211

**TABLE OF CONTENTS**

Table of Authorities ..... ii

Statement of Issues on Appeal ..... 1

Statement of the Case ..... 1

Argument:

**I.     RULE 39 SUPPORTS THE HOLDING .....2**

**II.    APPELLANT ACTED WITH WILLFUL BLINDNESS .....2**

**III.   CASE LAW SUPPORTS RESPONDENT .....3**

Conclusion .....6

**TABLE OF AUTHORITIES**

**Cases:**

*Malbon v. Pennsylvania Millers Mut. Ins. Co.*, 636 F.2d 936, 940 (4th Cir. 1980).....4

*Patterson v. McNeill-Patterson*, 312 S.C. 471, 472, 441 S.E.2d 328, 329 (Ct. App. 1994)  
(citing *Hannah v. United Refrigeration Services, Inc.*, 305 S.C. 394, 394, 409 S.E.2d 360,  
361 (1991)).....4

*Ray v. Caroline Collection, Inc.*, 2006 WL 7287883, 2 (Cir. Ct. 2006) (citing *King v. Shorter*,  
291 S.C. 501-03, 354 S.E.2d 402, 403 (Ct. App. 1987)).....5

*Swofford v. B&W Incorporated*, C.A.5th, 1964, 336 F.2d 406, *certiorari denied* 85 S.Ct.  
653, 379 U.S. 962, 13 L.Ed.2d 557.....5

*Thompson v. Ashpes*, 2012 WL 12127218, 2 (Cir. Ct. 2012).....4

**Court Rules:**

Rule 38, SCRCP.....1

Rule 39, SCRCP.....1

Rule 40(b), SCRCP.....1

**Other Authorities:**

9 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE §  
2334 at 113 (1971).....4

Attorney Reference Guide in ARG-06: Initiating a Case, a “Jury Demand option” .....3

## STATEMENT OF THE ISSUES ON APPEAL

The lower court did not abuse its discretion in refusing to transfer the method of trial by jury as indicated on the E-Filing System information sheet to the non-jury trial roster because Rule 40(b), SCRPC. provides the court with the discretion to order a trial by jury even if not initially demanded.

## STATEMENT OF THE CASE

The Respondent leased its building to the Appellants who violated the lease agreement. Respondent sued the Appellants and designated on the E-Filing System required information sheet that the suit was to be on the jury roster. The pleadings themselves did not indicate the demand for a jury trial under Rule 38, SCRPC. The Appellants moved to transfer the trial to the non-jury roster which the lower court denied. This appeal followed.

## ARGUMENT

In response to Appellant's Initial Brief, Respondent submits the following arguments to request denial of Appellant's requested relief. Appellant seeks to use misinterpreted facets of South Carolina Statutory law in order to deny Respondent his constitutionally protected right to a jury trial by mis-portraying facts of the case and ignore clearly cited laws of South Carolina. In response, Respondent will present three arguments to refute this conjecture. First, Rule 39 of the South Carolina Rules of Civil Procedure supports the prior holding. Second, Appellant was willfully blind and was aware from the beginning of this matter that Respondent sought a Jury Trial. Third, South Carolina case law provides clear support in favor of Respondents position and the need to support the lower court's ruling. As such, Respondent respectfully requests this Court affirm the prior holding.

## **I. Rule 39 Supports the Holding**

Rule 39 of the South Carolina Rules of Civil Procedure provides for when the Court may order a trial by jury. “notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by jury of any or all issues.” Rule 39(b), SCRPC. Appellant alleges that Respondent waived its right to a jury trial for failing to serve a demand upon Appellant and to properly file the demand. Respondent will contend that it failed to properly serve notice of the demand to Appellant; however, this does not amount to waiver or preclude Respondent from having the opportunity for a jury trial.

First, as required by Rule 39 and admitted by Appellant, Respondent utilized the E-filing system to file its summons and complaint under the SCEF. Within that section, there exists a portion for the E-filer to denote the case as jury or non-jury. Respondent denoted the case as a jury case, which is why the county clerk of court treated the aforementioned case as one seeking a jury trial. As such, Respondent did in fact demand a jury trial. The issue is that Appellant would attempt to use a procedural technicality in order to argue waiver has occurred. Regardless, this issue has become immaterial. As stated in Rule 39, “notwithstanding the failure of a party to demand a jury in an action” is the requirement for the Court to exercise its discretion. Had Respondent failed to make any such demand, then Rule 39(b) may have become inapplicable; however, the rule makes no reference to inadequacy of service. Wherefore, it became the Court’s discretion whether to grant the jury trial, and the Court did in fact grant said jury trial.

## **II. Appellant Acted with Willful Blindness.**

Appellant would state that prejudice resulted from the granting of the jury trial; however, this is far from the truth. The electronic filing system is accessible by all

attorneys practicing within South Carolina. As such, Appellant would have had access to view the case from the moment of service for the Summons and Complaint. As outlined within the Attorney Reference Guide in ARG-06: Initiating a Case, a “Jury Demand option” is present. Whereby, Appellant, upon receiving service notifying a pending lawsuit, would have had the full capability of reviewing the filings and identifying that a jury trial was demanded in the E-filing system.

Unfortunately, Appellant would contend they never received notice. The clerk of court was aware a jury trial was demanded, and Appellant had full access to that information. As noted in Appellant’s brief, “[t]he circuit court ruled that Tenant was not prejudiced by the denial of the motion to transfer, because the court found ‘the record reflects that [T]enant is not caught unaware of the pendency of this case as a jury trial.’” Either Appellant realized a jury trial had been demanded but chose to attempt this procedural technicality instead, or Appellant failed to perform due diligence by reviewing the filings. Regardless, willful blindness does not amount to prejudice in a case. Just because Appellant willfully or negligently failed to review the accessible information, does not mean that Respondent should lose his constitutional right to a jury trial. In the light best favoring Appellant, Appellant made a simple mistake which would be no different than Respondent’s mistake in providing proper service of the Jury Demand.

Wherefore, Appellant had the means to gain notice of the Jury Demand and acted with willful blindness to the information, and the lower Courts ruling should be affirmed.

### **III. Case Law Supports Respondent**

In addition to the aforementioned reasons to affirm the judgment, South Carolina case law supports such a ruling. The primary rationale is that “[a] trial court’s ruling on a party’s request for a jury trial will not be reversed on appeal absent an abuse of discretion.”

*Ray v. Caroline Collection, Inc.*, 2006 WL 7287883, 2 (Cir. Ct. 2006) (citing *King v. Shorter*, 291 S.C. 501-03, 354 S.E.2d 402, 403 (Ct. App. 1987)). As stated in Rule 39(b), the court has the discretion to grant a jury trial; whereby, Appellant has provided no evidence to support an abuse of discretion having occurred.

The only factor Appellant contends caused prejudice was that the court found that appellant was not caught unaware that this case was allotted a jury trial. This factor is insufficient to prove an abuse of discretion. “A party’s failure to make a timely demand for a jury trial does not mean the opposing party acquires a right to have, as a matter of law, a non-jury trial.” *Patterson v. McNeill-Patterson*, 312 S.C. 471, 472, 441 S.E.2d 328, 329 (Ct. App. 1994) (citing *Hannah v. United Refrigeration Services, Inc.*, 305 S.C. 394, 394, 409 S.E.2d 360, 361 (1991)). In *Thompson v. Ashpes*, the Court noted “that the Thompsons argument of prejudice, expense, or delay is not sufficient to deny the request,” when explaining its rationale for granting an untimely demand for a Jury Trial. 2012 WL 12127218, 2 (Cir. Ct. 2012).

A jury trial is preserved in those cases in which the parties were entitled to it under the law or practice existing at the time of the constitution's adoption. *Pelfrey v. Bank of Greer*, 244 S.E.2d 315, 316 (S.C. 1978). Under the common law, legal actions for the recovery of money were triable by a jury; thus, under the South Carolina Constitution such legal actions are entitled to a jury trial today. *See, Cooper v. Poston*, 483 S.E.2d 750, 751 (S.C. 1997); *Collier v. Green*, 137 S.E.2d 277 (S.C. 1964). Jury trial waivers are a substantial right and must be strictly construed. *Beach Co. v. Twillman, Ltd.*, 566 S.E.2d 863, 866 (S.C. Ct. App. 2002). Moreover, the right to a jury trial is a fundamental right. *Lane v. Gilbert Construction Co.*, 681 S.E.2d 879, 884 (S.C. 2009) (citations omitted). Consequently, any abridgement of that right is subject to strict scrutiny. *Id.* Initial Brief of Appellant, 2, *First National Bank of Spartanburg v. Liberty Village, LLC*, No. 2009-CP-08-3652 (Cir. Ct. 2013).

Many courts hold that a motion under Rule 39(b) should be granted in the absence of strong and compelling reasons to the contrary. 9 CHARLES A. WRIGHT & ARTHUR R.

MILLER, FEDERAL PRACTICE AND PROCEDURE § 2334 at 113 (1971). Moreover, as several courts have contended, technical insistence upon imposing a penalty for failing to follow the demand procedure by denying a jury trial is not in the spirit of the rules of procedure. See, e.g. *Swofford v. B&W Incorporated*, C.A. 5th, 1964, 336 F.2d 406, *certiorari denied* 85 S. Ct. 653, 379 U.S. 962, 13 L.Ed.2d 557 (“the right to jury trial in federal court is a ‘basic and fundamental feature’ of the jurisprudence system.”). The factors which courts have weighed when deciding whether to grant a jury trial under Rule 39(b) include (1) whether the issues are more appropriate for determination by a judge or jury (i.e. factual versus legal, legal versus equitable, simple versus complex); (2) the timing of the motion (early or late in the proceedings); (3) any effect a jury trial would have on the court's docket and the orderly administration of justice. *Malbon v. Pennsylvania Millers Mut. Ins. Co.*, 636 F.2d 936, 940 (4th Cir. 1980) (internal citations omitted).

As the aforementioned case law clearly shows, this is a matter appropriate for a jury trial and shows that Appellant’s alleged prejudice is insufficient to defeat such facts. First, this case is of the nature traditionally granted a jury trial. Second, the issues are more appropriately determined by a jury. Third, Appellant had knowledge of a jury trial during the pleading phase of this case, and no trial has occurred as of yet. Fourth, this trial will not affect the court’s docket or the orderly administration of justice, as it is already scheduled on the docket. As stated in *Swofford*, technicalities within the demand procedure is an insufficient reason for denying a jury trial. Likewise, in *Thompson*, prejudice, expense, and delay were found to be insufficient. Wherefore, no prejudice, additional expense, or delay will occur in the present case.

Therefore, Respondent respectfully requests this Court affirm the lower Court’s holding.

**IV. The Issue will be Moot**

In addition to filing this response, Respondent will also file a Motion for a Jury Trial in the case, which should be sufficient to rectify Appellant's alleged prejudice from the alleged lack of notice. At which point, the lower Court will have the discretion to rule upon the Motion, and the issue will be moot. Wherefore, Respondent respectfully requests this Court affirm the lower Court's holding.

**CONCLUSION**

For the aforementioned facts, Respondent believes that the lower court's ruling should be affirmed; whereby, Rule 39(b) grants the lower Court discretion when a jury trial is demanded, Appellant acted with willful blindness, case law supports the lower Court's rationale, case law supports the finding that Appellant has not been prejudiced, and the issue will soon be moot. Wherefore, Respondent respectfully requests this Court affirm the lower Court's holding.

Respectfully submitted,

BANNISTER, WYATT & STALVEY, LLC



O. W. Bannister (SC Bar No. 506)

401 Pettigru Street (29601)

Post Office Box 10007 (29603)

Greenville, South Carolina

Phone: (864) 298-0084

Fax: (864) 298-0146

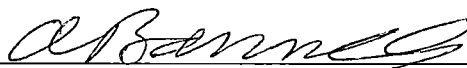
*Attorney for the Respondent*

April 27, 2020

**CERTIFICATE OF COUNSEL**

The undersigned certifies that this Initial Reply Brief complies with Rule 211(b), SCACR and, further, complies with Supreme Court Order dated August 13, 2007, regarding personal identifiers and sensitive information.

BANNISTER, WYATT & STALVEY, LLC



---

O. W. Bannister  
SC Bar No. 506; Fed. ID No. 1184  
401 Pettigru Street (29601)  
P. O. Box 10007 (29603)  
Greenville, South Carolina  
Phone: (864) 298-0084; Fax: (864) 298-0146  
*Attorney for Respondent*

April 27, 2020

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

Robin B. Stillwell, Circuit Court Judge

APPELLATE CASE NO.: 2019-001735

**RECEIVED**

APR 30 2020

SC Court of Appeals

Frontage Road Associates, Inc., also known as  
Frontage Road, Inc.,.....Respondent

vs.

Elephant, Inc. and Gregory Gaines also known as  
Ken Wood, .....Appellant

---

---

**PROOF OF SERVICE**

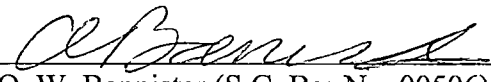
---

---

The undersigned hereby certifies that on April 28, 2020 the Respondent's Initial Brief and Designation of Matter to be Included in the Record on Appeal in the above-captioned matter was served upon counsel of record by electronic mail and by placing a copy of same in the U.S. Mail, sufficient postage affixed thereto, addressed as follows:

PHarrill@burr.com

Paul D. Harrill, Esq.  
PO Box 11390  
Columbia, SC 29211

  
O. W. Bannister (S.C. Bar No. 00506)  
BANNISTER, WYATT & STALVEY, LLC  
P.O. Box 10007  
Greenville, SC 29603  
Ph: 864-298-0084; Fax: 864-298-0146  
Attorney for Respondent

April 27, 2020

BANNISTER, WYATT & STALVEY, LLC  
ATTORNEYS AT LAW

O.W. BANNISTER | JOHN F. WYATT | JAMES W. BANNISTER | BRUCE W. BANNISTER | ALEX R. STALVEY  
WILLIAM J. McDONALD | LUKE A. BURKE | MARCELO TORRICOS | J. ELIZABETH MCCOOL | R. CHRISTIAN CAPPS  
401 PETTIGRU STREET - 29601 | PO BOX 10007 - 29603 | GREENVILLE, SC | PHONE: (864) 298-0084 | FAX: (864) 298-0146

April 28, 2020

VIA FAX TO 803-734-1839  
& U.S. First Class Mail

V. Claire Allen, Deputy Clerk  
S.C. Court of Appeals  
P. O. Box 11629  
Columbia, SC 29211

RECEIVED  
APR 30 2020  
SC Court of Appeals

**RE: Frontage Road Associates, Inc., also known as Frontage Road, Inc.,  
Respondent v. Elephant, Inc., and Gregory Gaines also known as Ken Wood,  
Appellant  
Appellate Case No.: 2019-001735**

Dear Ms. Allen:

Enclosed please find the original and one copy of the Respondent's Initial Brief and the original and one copy of the Designation of Matter to be Included in the Record on Appeal, along with our Proof of Service of the same.

By copy of this letter and the enclosed Proof of Service, I am serving the Respondent's Initial Brief and the Designation of Matter to be Included in the Record on Appeal upon opposing counsel via electronic mail in accordance with Supreme Court's Order regarding the Operation of the Appellate Courts During the Coronavirus Emergency.

Yours truly,

BANNISTER, WYATT & STALVEY, LLC



O. W. Bannister

OWB/tjc  
Enclosures

cc: Paul D. Harrill, Esq., w/enclosures, via email  
Thomas Schweitzer, w/enclosures, via email

NEOPOST FIRST CLASS MAIL

04/28/2020 **NEOPOSTAGE** \$002.00<sup>9</sup>

ZIP 29601  
04111257247

**RECEIVED**  
APR 30 2020  
SC Court of Appeals

LAW OFFICES  
BANNISTER, WYATT & STALVEY, LLC  
ATTORNEYS AT LAW  
401 PETTIGRU STREET  
P.O. BOX 10007  
GREENVILLE, SOUTH CAROLINA 29603

---

To:  
V. Claire Allen, Deputy Clerk  
S.C. Court of Appeals  
P. O. Box 11629  
Columbia, SC 29211

