

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

Robin B. Stilwell, Circuit Court Judge

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Appellate Case No. 2019-001735  
Case No. 2017-CP-23-02918

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**RECEIVED**  
JUN 19 2020  
SC Court of Appeals

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

v.

Elephant, Inc. and Gregory Gaines, also known as  
Kenwood Gaines, ..... Appellants.

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INITIAL REPLY BRIEF

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## REPLY ARGUMENT

### I. Owner falsely accuses Tenant of wrongdoing.

The Respondent (Owner) falsely accuses the Appellant (Tenant) of “*mis-portraying* [the] facts of the case” and falsely asserts that Tenant “was *willfully blind* and was *aware from the beginning* of this matter that [Owner] sought a Jury Trial.” (Init. Resp. Br. 1) (emphasis added). The basis for this false assertion is the equally false assertion that “Appellant, upon receiving service notifying a pending lawsuit (sic), would have had the full capability of reviewing the filings and identifying *that a jury trial was demanded in the E-filing system.*” (Init. Resp. Br. 3) (emphasis added). This false assertion is based on Owner’s mistaken belief that the data entry screen used by Owner to file the complaint and denote a jury trial would be visible to Tenant in the Electronic Filing System (EFS) file. (Init. Resp. Br. 2-3, *passim*). Owner is simply wrong. The data entry screen is not visible when one pulls up the EFS file. Therefore, and contrary to Owner’s false assertions otherwise, the data entry screen could not and did not give Tenant notice that Owner desired a jury trial. Moreover, it is not the duty of any defendant to search the record to determine whether the plaintiff desires a jury trial. Rather, it is the duty of the plaintiff to give notice of that desire by complying with the plain and mandatory requirements of Rule 38, SCRPC.

### II. Owner concedes that it violated the plain and mandatory requirements of Rule 38(b), SCRPC.

Owner concedes on appeal that it did not serve and file any demand for jury trial as required by Rule 38(b), SCRPC: “[Owner] will *contend* (sic: concede) *that it failed to properly serve notice of the demand* to [Tenant].” (Init. Resp. Br. 2) (emphasis added). This admission is binding on appeal. *Thomas v. Dootson*, 659 S.E.2d 253, 254 (S.C. App. 2008) (party is bound by concessions made in an appellate brief).

Owner mistakenly believes that this admission “does not amount to a waiver.” (Init. Resp. Br. 2). It is a waiver under the plain and ordinary meaning of Rule 38(d), SCRCPP, which specifically mandates that “[t]he *failure* of a party to *serve* a demand as required by this rule and to *file* it as required by Rule 5(d) **constitutes a waiver** by him of trial by jury.” (All emphasis added). Accordingly, as a matter of law under Owner’s binding appellate concession and the plain meaning of the mandate in Rule 38(d), SCRCPP, Owner waived its right to a jury trial by failing to comply with Rule 38(b), SCRCPP.

**III. Owner concedes that the circuit court clerk violated the mandatory requirements of Rule 39(a), SCRCPP.**

Rule 39(a), SCRCPP, specifically provides that “[w]hen trial by jury has been demanded *as provided in Rule 38*, the action shall be designated upon the calendar and the clerk's filebook as a jury action.” (Emphasis added). Owner has conceded on appeal that it did not demand a jury trial “as provided in Rule 38” and, therefore, Owner has necessarily conceded that the circuit court clerk had no authority to place the case on the jury roster. To the contrary, the circuit court clerk was duty-bound under Rule 39(a) to place the case on the non-jury roster. Owner (and the circuit court) cannot rely on the circuit court clerk’s unauthorized action to justify the circuit court’s erroneous ruling – the two wrongs by the Owner and the clerk do not and cannot justify the third wrong by the circuit court in failing to transfer this case to the non-jury roster.

**IV. Owner’s “discretion” argument puts the cart before the horse, and no evidence supports any “discretion” to order a jury trial.**

Throughout its brief, Owner correctly notes that Rule 39(b), SCRCPP, gives the circuit court discretion to order a jury trial “upon motion” and proper showing when a party has waived the right to a jury trial by failing to comply with Rule 38, SCRCPP. Owner did not

make a motion under Rule 39(b), despite its admission that it failed to make a proper demand for a jury trial under Rule 38 and, therefore, waived its right to a jury trial. The circuit court therefore erred as a matter of law in refusing to transfer the case to the non-jury roster. It would thereafter be incumbent upon Owner to make a motion under Rule 39(b) and make a proper showing.

Here, Owner did not make any such motion, though it has made arguments that sound like a Rule 39(b) motion. Owner, however, has made no evidentiary showing in support of the motion, to-wit: Owner has not presented any evidence on who failed to comply with Rule 38, why that person failed to do so, and why that failure should be excused by the court. Simply arguing that “I want a jury trial” is not and cannot be sufficient under Rule 39(b), SCRCF. If such an argument is sufficient, then the waiver provision of Rule 38(d), SCRCF, is meaningless. At the very least, it was incumbent upon Owner to make an evidentiary showing of good cause or some other explanation to justify any discretionary ruling that there should be a jury trial. Owner, however, has not made any such showing. The circuit court, therefore, abused any discretion to grant Owner a jury trial, because Owner did not submit any evidence on the matter. *Ray v. City of Rock Hill*, 843 S.E.2d 464, 470 (S.C. App. 2019) (trial court abuses its discretion when its ruling has no evidentiary support).

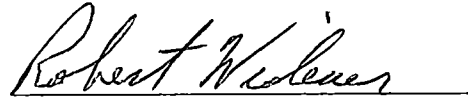
**V. Owner’s “mootness” argument is manifestly without merit.**

Owner argues that this appeal is moot because, after the commencement of this appeal, it filed a motion for jury trial with the circuit court. Owner’s argument is manifestly without merit. The circuit court does not have jurisdiction to entertain Owner’s motion, because it is a matter affected by this appeal. See Rule 205, SCACR.

**CONCLUSION**

For all of the foregoing reasons, it is respectfully submitted that this Court should reverse the appealed order and remand for the entry of an order placing this matter on the non-jury roster.

Respectfully Submitted,



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June 18, 2020  
Columbia, SC

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In the Court of Appeals

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Court of Common Pleas

The Honorable Robin B. Stilwell

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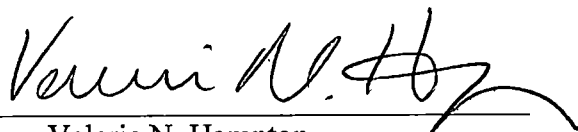
Elephant, Inc., and Gregory Gains,  
also known as Kenwood Gaines, ..... Appellants.

PROOF OF SERVICE

I, Valerie Hampton, an employee of Burr & Forman, LLP, hereby certify that a true and correct copy of the **Appellants' Initial Reply Brief** was served upon counsel for the Respondent in the above-captioned matter, by causing a copy of same to be deposited in the United States Mail, first class postage prepaid, this 18th day of June, 2020, addressed as follows:

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June 18, 2020

Honorable Jenny Abbott Kitchings  
Clerk of Court  
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**Re: Frontage Road Associates, Inc. -v- Elephant, Inc.  
Appellate Case No. 2019-001735**

Dear Ms. Kitchings:

Enclosed for filing please find Appellants' Initial Reply Brief and Proof of Service. By copy of this letter we are serving this brief upon counsel for Respondent.

Please file stamp and return the enclosed extra copies of this brief and proof of service in the enclosed, self-addressed, and self-stamped envelope.

Very truly yours,

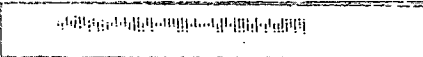
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Enclosures

cc: O. W. Bannister Esquire



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