

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Robin B. Stilwell, Circuit Court Judge

Appellate Case No. 2019-001735

RECEIVED

Aug 10 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.

RECORD ON APPEAL
VOLUME I

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Frontage Road Associates Inc et al
PLAINTIFF(S)

Elephant Inc et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRCP; Rule 41(a), SCRCP (Vol. Nonsuit); Rule 43(k), SCRCP (Settled);
 Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRCP; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
 Other
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded;
 Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

This matter came before the Court on Defendant's Motion to move this matter to the Non-Jury docket. Defendant argues that Plaintiff failed provide notice of its demand for a jury trial pursuant to the SCRCP. Plaintiff, contends, and the file reflects, that he did specifically file this case as a "Jury Trial" in the electronic filing system. The case has been indexed as such since that time. Although a written notice was never served on the Defendant, the record reflects that Defendant is not caught unaware of the pendency of this case as a jury trial and is, thus, not prejudiced by a technical deficiency. The motion is, therefore, respectfully denied.

ORDER INFORMATION

This order ends does not end the case. See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 08/30/2019.

Frontage Road Inc

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ELECTRONICALLY FILED - 2019 Aug 30 2:08 PM - GREENVILLE - COMMON PLEAS - CASE#2017CP2302918



Greenville Common Pleas

Case Caption: Frontage Road Associates Inc , plaintiff, et al vs. Elephant Inc ,
defendant, et al
Case Number: 2017CP2302918
Type: Order/Electronic Form 4

So Ordered

s/ Robin B. Stilwell 2158

Electronically signed on 2019-08-30 12:11:36 page 3 of 3

ELECTRONICALLY FILED - 2019 Aug 30 2:06 PM - GREENVILLE COMMON PLEAS - CASE#2017CP2302918

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

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

Plaintiff,

vs.

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

Defendants.

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

C.A. No.: 2017-CP-23-_____

COMPLAINT

The Plaintiff Frontage Road Associates, Inc., also known as Frontage Road, Inc., (hereinafter "Plaintiff" or "Landlord"), by and through its undersigned counsel complaining of the Defendants Elephant, Inc. and Gregory Gaines also known as Ken Wood (hereinafter collectively referred to as "Defendants", "Gaines", or "Tenants"), would respectfully show unto the Court as follows:

1. Plaintiff is a corporation organized and existing under the laws of the State of South Carolina. Plaintiff is the owner of land and improvements in Greenville County commonly known as 805 Frontage Road, Greenville, South Carolina 29615 (hereinafter the "Property").

2. Defendant Elephant, Inc. is a corporation organized and existing in the State of South Carolina and authorized to do business in Greenville County, South Carolina. At all times material to this action Defendants were commercial tenants in possession of the Property under its Lease Agreement and subsequent Addendums, and was required to pay monthly rent to Landlord.

3. Defendant Gregory Gaines and Ken Wood (hereinafter "Gaines") are the same

person, and upon information and belief, a resident of South Carolina. At all times material to this action, Elephant, Inc., by and through its principal, Gaines, operated a business located at 805 Frontage Road known as Platinum Plus.

4. On or about November, 1999, the parties entered into a Lease Agreement (a copy of which is attached as Exhibit "A" and incorporated herein by reference). Said Agreement was to be valid for a period of three years with an option to renew.

5. On April 27, 2011, the parties entered into an Addendum to Lease Agreement which granted the Tenants an additional three 5-year options with the first option commencing January 1, 2015 and expiring December 31, 2019.

6. Options in the Lease Agreement were exercised at the appropriate time and on June 9, 2015 the parties entered into an Addendum to the Lease Agreement.

FOR A FIRST CAUSE OF ACTION
(Default/Breach of Contract)

7. Plaintiff adopts and realleges each and every allegation set forth above as if fully repeated herein, and further alleges as follows:

8. Defendants have breached the Lease Agreement by defaulting on lease payments beginning September 1, 2016.

9. Article XIV, Section 14.01 of the Lease Agreement provides, among other things, acts which constitute an "Event of Default", specifically, "failure of Tenant to make, within five (5) days after the date when due, any payment of rent, percentage rent, additional rent, or any other charge payable by Tenant hereunder or to timely discharge any other monetary obligation...".

10. Section 14.04 of the Lease Agreement provides for remedies upon the occurrence of an Event of Default, including:

...in addition to any other remedies it may have, [Landlord] may recover from Tenant all damages it may incur by reason of such breach, including the cost of recovering the leased premises, and the worth at the time of such termination of the excess, if any, of the amount of rent and changes equivalent to rent reserved in this Lease for the remainder of the stated term... all of which amounts shall be immediately due and payable from the Tenant to Landlord.

11. Landlord attempted to mitigate Tenants' default by reletting the premises.

12. As a result of Defendants' default under the Lease Agreement Plaintiff is entitled to recover from Defendant all rents due and owing in accordance with the terms of the Lease Agreement and any Addendum signed by the parties thereafter, including applicable interest and/or late fees, as well as additional past due rent, sales taxes, property taxes, maintenance and utility fees due under the Agreement to reflect any future increases in same, and any and all other expenses incurred by Plaintiff in taking possession of the Property.

13. Plaintiff is informed and believes and therefore alleges that it is entitled to an award of suit costs and attorney fees for the bringing of this action.

WHEREFORE, Plaintiff prays that it have judgment against the Defendants, jointly and severally, for the defaulted lease payments, expenses, and other outlays provided for in the Lease and Addendum Agreement; and for such other and further relief as the Court may deem just and proper.

BANNISTER, WYATT & STALVEY, LLC

s/ O. W. Bannister

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 Plaintiff

May 3, 2017

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

CIVIL ACTION NO: 2017-CP-23-02918

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

Plaintiff,

vs.

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

Defendants.

**DEFENDANTS' ANSWER TO
COMPLAINT**

Defendants, Elephant, Inc. and Gregory Gaines also known as Ken Wood (hereinafter, collectively the "Defendants"), answer the Complaint of Frontage Road Associates, Inc., also known as Frontage Road, Inc. (hereinafter "Plaintiff") generally that each and every allegation of the Complaint that is not expressly and specifically admitted herein is denied and expressly and specifically responds as follows:

FOR A FIRST DEFENSE

1. Defendants lacks knowledge and information sufficient to form a belief as to the truth of the allegations of paragraph 1 of the Complaint and, therefore, deny those allegations.

2. Defendants admit the allegations of paragraph 2 of the Complaint to the extent they allege that Defendant Elephant, Inc. is a corporation organized in South Carolina that has been authorized to conduct and has conducted business in Greenville County, South Carolina. Responding to the remaining allegations of paragraph 2 of the Complaint, Defendant Elephant, Inc. admits that it was a commercial tenant of the Property (as defined in the Complaint) under the Lease Agreement and subsequent addenda and its requirements and obligations were expressed in those documents. Defendant Gregory Gaines also known as Ken Wood ("Gaines") denies that he

was the tenant under any addenda to the Lease Agreement and denies that he is obligated to pay any rent to the Landlord.

3. Defendants admit the allegations of paragraph 3 of the Complaint to the extent they allege that Gregory Gaines and Ken Wood are the same person, and Defendant Elephant, Inc. operated a business located at the Property known as Platinum Plus. Further responding, Gaines is a resident of the state of Florida. The remaining allegations of paragraph 3 of the Complaint are denied.

4. Defendants admit the allegations of paragraph 4 of the Complaint to the extent they allege that the parties entered into a Lease Agreement dated November 5, 1999 that had an initial term of three years with an option to renew the lease. Further responding, Defendants admit, upon information and belief, that Exhibit A (to the extent it does not include the two addenda also attached to the Complaint) is a copy of the November 5, 1999 Lease Agreement, subject to a comparison to the original. Further responding, the terms of the Lease Agreement speak for themselves and any allegations in this paragraph or any other paragraph of the Complaint that are inconsistent with the express terms of the Lease Agreement are denied.

5. Defendants admit the allegations of paragraph 5 of the Complaint to the extent they allege that Plaintiff and Elephant, Inc. entered into an Addendum Lease Agreement an extension of Lease Agreement dated April 27, 2011, which extended the lease an additional 5 years between Plaintiff and Elephant, Inc. as "Tenant." Further responding, the terms of the referenced Addendum speak for themselves and any allegations in this paragraph or any other paragraph of the Complaint that are inconsistent with the express terms of the referenced Addendum are denied.

6. Defendants admit the allegations of paragraph 6 of the Complaint to the extent they allege that Plaintiff and Elephant, Inc. exercised an option under the April 27, 2011 Addendum.

Defendants further admit the allegations of paragraph 6 of the Complaint to the extent they allege that Plaintiff and Elephant, Inc. entered into an Addendum to Lease Agreement dated June 9, 2015. Defendants deny the remaining allegations of paragraph 6 of the Complaint.

7. In response to the allegations of paragraph 7 of the Complaint, Defendants reassert the responses set forth above as if fully repeated herein.

8. Defendants deny the allegations of paragraph 8 of the Complaint.

9. Responding to the allegations of paragraph 9 of the Complaint, Defendants crave reference to the Lease Agreement and the subsequent addenda and deny any allegations that are inconsistent with the language contained therein.

10. Responding to the allegations of paragraph 10 of the Complaint, Defendants crave reference to the Lease Agreement and the subsequent addenda and deny any allegations that are inconsistent with the language contained therein.

11. Defendants admit the allegations of paragraph 11 of the Complaint to the extent they allege that Plaintiff may have "attempted" to mitigate the alleged damages and have re-let the Property, but lack knowledge or information sufficient to form a belief as to the truth of whether Plaintiff's efforts were commercially reasonable.

12. Defendants lack knowledge or information sufficient to form a belief as to the truth of allegations of paragraph 12 of the Complaint as to Defendant Elephant, Inc. and, therefore, denies those allegations. Defendants deny the allegations of paragraph 12 of the Complaint to the extent they pertain to or relate to Defendant Gaines.

FOR A SECOND DEFENSE

13. Pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, Plaintiff's Complaint should be dismissed as to Defendant Gaines because Gaines was not the "tenant" on

either of the addenda executed after the initial term of the Lease Agreement had expired. Gaines also did not sign either addenda in his personal capacity as a tenant or otherwise. Therefore, the Lease Agreement as extended by the addenda cannot be enforced against Gaines as a tenant.

FOR A THIRD DEFENSE

14. Defendants are entitled to a set-off against any amounts owed based upon certain amounts owed to Defendants by Plaintiff. Defendants are entitled to a set off for the cost of a repair to the grease trap that cost \$70,000 that Plaintiff agreed to split with Defendants. Defendants are entitled to a set off for the entire value of all personal property Defendants left at the Property so that Plaintiff could re-let the Property immediately. The value of the personal property is significant and will be determined.

WHEREFORE, HAVING FULLY RESPONDED to the allegations of the Plaintiff's Complaint, Defendants request the Court enter its order for the following relief:

- A. Dismissing all claims against defendant Gregory Gaines also known as Ken Wood with prejudice.
- B. Determining the amount of setoff to which Defendants are entitled from Plaintiff and reducing any award due to Plaintiff by the amount of said setoff.
- C. Requiring Plaintiff to demonstrate that it has mitigated its damages in a commercially reasonable manner.
- D. Dismissing this action against Elephant, Inc.
- E. Awarding Defendants their costs and attorneys' fees in defending this action.
- F. For such other and further relief as the Court deems just and proper.

Respectfully submitted,

MCNAIR LAW FIRM, P.A.

Dated: July 7, 2017

By Paul D. Harrill
Paul D. Harrill
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P.O. Box 11390 (29211)
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Fax. (803) 753-3278

Attorneys for Defendants

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)
)
Frontage Road Associates, Inc.,)
also known as Frontage Road, Inc.,)
)
Plaintiff,)
)
v.)
)
Elephant, Inc., and Gregory Gaines)
also known as Kenwood Gaines,)
)
Defendants.)

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT
C. A. No. 2017-CP-23-02918

MOTION TO TRANSFER
CASE TO NON-JURY DOCKET

TO: O. W. BANNISTER, ATTORNEY FOR THE PLAINTIFF:

The Defendants hereby move that this case be transferred by the Court from the jury docket the to the non-jury trial docket.

The basis for this motion is that Plaintiff has never served upon the Defendants a written demand or request for a jury trial at any time in this litigation and certainly not within the time period set forth in Rule 38(b) SCRCivP: "not later than 10 days after the service of the last pleading directed to [an] issue [triable of right by a jury]." "The failure of a party to serve a demand [for jury trial] as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by him of trial by jury." Rule 38(d) SCRCivP.

Therefore, Defendants request that this matter be transferred to the non-jury trial docket where it should rightfully reside.

Respectfully submitted,
Burr & Forman, LLP
Post Office Box 11390
Columbia, South Carolina 29211
(803) 799-9800

By: s/ Paul D. Harrill
Paul D. Harrill (SC Bar No. 15268)
Attorneys for the Defendants

June 18, 2019
Columbia, South Carolina

AFFIRMATION OF CONSULTATION

I hereby affirm that I have communicated with Plaintiff's counsel prior to filing this motion and have attempted in good faith to resolve the matter contained in the motion.

s/ Paul D. Harrill

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STATE OF SOUTH CAROLINA,)
)
COUNTY OF GREENVILLE)
)
Frontage Road Associates, Inc.)
)
Plaintiff(s))
vs.)
)
Elephant, Inc. & Gregory Gaines a/k/a)
Ken Wood)
)
Defendant(s).)

IN THE COURT OF COMMON PLEAS

THIRTEENTH JUDICIAL CIRCUIT

AFFIDAVIT OF SERVICE

FILE NO: 2017-CP-23-02918

PERSONALLY PREPARED BEFORE ME, the undersigned deponent, who being duly sworn

says that (s)he served the Summons and Complaint in this action
(Describe document(s) served)
on Elephant, Inc., by delivery to
(Name of party served)
 Elephant, Inc. personally;
(Name of party served)
 _____ the _____ of the party served,
(Name of person served) (Note relationship to party)

and a person of discretion residing at the residence of the party served;

Scott Gaines, the Office Manager of Elephant, Inc.
(Name of person served) (Title) (Name of corporate party served)

and leaving with (him) (her) a copy at 800 Bush River Road, Suite B
(Street address)

in Columbia Lexington County, South Carolina,
(City or Town) County

on May 9, 2017 at 11:16 o'clock AM

that deponent knows the person so served, and that deponent is not a party of this action, is not less than eighteen (18) years of age and has no interest therein or connection therewith.

Unable to locate and serve the above process on the defendant after diligent efforts to do so.

The process is returned unexecuted.

Sworn to and Subscribed before me
this 10 day of May, 2017

[Signature]
Notary Public for South Carolina

[Signature]
Signature of Deponent

My Commission expires 5/18/22

Entered in the Sheriff's Service Book on

ELECTRONICALLY FILED - 2017 May 10 4:05 PM - GREENVILLE - COMMON PLEAS - CASE#2017CP2302918

STATE OF SOUTH CAROLINA,)
)
COUNTY OF GREENVILLE)
)
Frontage Road Associates, Inc.)
)
Plaintiff(s))
vs.)
)
Elephant, Inc. & Gregory Gaines a/k/a)
Ken Wood)
)
Defendant(s).)

IN THE COURT OF COMMON PLEAS

THIRTEENTH JUDICIAL CIRCUIT

AFFIDAVIT OF SERVICE

FILE NO: 2017-CP-23-02918

PERSONALLY PREPARED BEFORE ME, the undersigned deponent, who being duly sworn
says that (s)he served the Summons and Complaint in this action
(Describe document(s) served)
on Gregory Gaines a/k/a Ken Wood, by delivery to
(Name of party served)
 Gregory Gaines a/k/a Ken Wood personally;
(Name of party served)
 _____ the _____ of the party served,
(Name of person served) (Note relationship to party)
and a person of discretion residing at the residence of the party served;

Scott Gaines, the Office Manager of Elephant, Inc.
(Name of person served) (Title) (Name of corporate party served)
and leaving with (him) (her) a copy at 800 Bush River Road, Suite B
(Street address)

in Columbia Lexington County, South Carolina,
(City or Town) County
on May 9, 2017 at 11:16 o'clock AM

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Unable to locate and serve the above process on the defendant after diligent efforts to do so.
The process is returned unexecuted.

Sworn to and Subscribed before me
this 10 day of May, 2017
[Signature]
Notary Public for South Carolina
My Commission expires 5/18/22

[Signature]
Signature of Deponent

Entered in the Sheriff's Service Book on

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

) COURT OF COMMON PLEAS
) 2017-CP-23-02918

ORIGINAL

FRONTAGE ROAD ASSOCIATES, INC.)
PLAINTIFF)

vs.

) TRANSCRIPT OF RECORD
)

ELEPHANT, INC., ET AL
DEFENDANTS)

August 28, 2019
Greenville, South Carolina

B E F O R E:

THE HONORABLE ROBIN B. STILWELL, Judge.

A P P E A R A N C E S:

OSCAR W. BANNISTER, ESQ.
Attorney for the Plaintiff

PAUL D. HARRILL, ESQ.
Attorney for the Defendants

APRIL HERRON
Official Court Reporter

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There were no witnesses.

There were no exhibits.

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Certificate of Reporter 14

1 THE COURT: Good afternoon, hope everybody is
2 well. Okay, let's call to bar the case of Frontage
3 Road Associates vs. Elephant, Inc., that's
4 2017-CP-23-2218. It appears to be a motion to
5 transfer the case to the nonjury roster; is that
6 correct?

7 MR. HARRILL: That's correct, Your Honor.

8 THE COURT: Okay, yes, sir.

9 MR. HARRILL: Whenever you're ready.

10 THE COURT: I'll be happy to hear from you. I'm
11 sitting on go.

12 MR. HARRILL: All right then, we'll do it. Your
13 Honor, I'm Paul Harrill, I represent the Defendants
14 in the case. And it's our motion to transfer to the
15 nonjury roster. This is really a very simple motion
16 so I really won't take very long. Your Honor, Rule
17 38, you know, provides everyone in a civil case the
18 right to a jury trial. But importantly, if you
19 read -- and I got a copy of the rule, I know you know
20 them but if you'd like to have a copy of the rule to
21 look at, I can hand it up.

22 THE COURT: I'm good for now.

23 MR. HARRILL: Okay.

24 THE COURT: I'm good for now. I might take you
25 up on it later, though.

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MR. HARRILL: Yes, sir. Rule 38 says everybody has a right to a jury trial for those triable by a jury. But critically, 38(a) says, Unless a jury trial be waived.

Then Subsection(d) of Rule 38 talks about waiver. And it says, The failure to do what is required in Section 38(b), constitutes a waiver.

And the requirement is very simple. In order to demand a jury trial, you must serve upon the other party, a written demand for a jury trial. And you can do -- it needs to be done at the commencement of the action, as it says in the rule there. And you can, you know, as usual, put it in a pleading. You can file it as a separate document if you want to. Just call it demand for jury trial. But the rule requires that it be served on the other party, no later than ten days after the service of the last pleading directed to such issue. So, the pleadings have been closed for a long time in this case, Your Honor. And there has never been a written demand for a jury trial served in the case.

The interesting thing in this case, I guess, in our involving time, we now use the electronic filing. I'm not sure we're positive how the case got on the jury docket but we believe that Mr. Bannister's

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assistant, when she was filing the case to initiate it, there may be a box somewhere that says jury or nonjury. That's a ministerial act, Your Honor. And that document and that notice is not served on the Defendant.

The rules relating to -- and the policy and procedure rules relating to electronic filing, number four, talks about electronic service. And it's very clear, just like in the filing of the summons and complaint, the simple filing of a summons and complaint, electronically, is not service on the other party. And that makes sense because the other party hasn't made an appearance yet so they don't get it. You still got to -- just like in the old days, go out and serve the party, pursuant to Rule 4, with the summons and complaint.

In this case, the summons and complaint were served, no other document were served that contained any demand for a jury trial. So, there's been no written demand for a jury trial ever made in this case. And certainly, not a timely one made. Which would have been within ten days of the service of the last pleading.

So, Your Honor -- and I've got the summons and complaint here but I don't think it's contested that

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there's no demand--

THE COURT: Yeah, I was just looking at it.

MR. HARRILL: -- in the complaint or my answer to the complaint.

So, Your Honor, since there was no demand served and no written demand for jury trial served, this case should properly be transferred to the nonjury trial roster.

THE COURT: Okay.

MR. HARRILL: Thank you.

THE COURT: Mr. Bannister.

MR. BANNISTER: Thank you, Your Honor. May it please the court, Judge?

THE COURT: Yes, sir.

MR. BANNISTER: It's kind of a new wrinkle because after the civil rules were passed, we went into mandatory e-filing. E-filing there are designations to be on jury or nonjury. I have a copy of the pertinent portions, which I have marked. Which destinate with the filing, that it was selected and put on the jury. Mr. Harrill was served, Mr. Harrill's client was served with the complaint and this matter has been on the jury roster, since as far as I can tell, over a year. We've had an order that both agreed to then and admitted a scheduling

1 order for the jury terms. So, if the purpose of the
 2 rule is to put him on notice that it's on the jury
 3 roster, he has certainly had much notice that it's on
 4 the jury roster.

5 There is case law, Judge, that the fact that he
 6 did not get notice, particularly according to the
 7 rule, does not give him a right to a nonjury trial.
 8 And I'll hand up the case of Larry M. Patterson vs.
 9 McNeill-Patterson, which is 2012-417. Although, it
 10 was not designated in the Rule 38 manner, the
 11 Patterson case says, A party's failure to make a
 12 timely demand for a jury trial does not mean the
 13 opposing party requires the right to have, as a
 14 matter of law, a nonjury trial. So, he doesn't have
 15 a right to it.

16 I would point out, Your Honor, that Rule 39 has
 17 a provision that allows the court in its discretion,
 18 even though a jury trial has not been requested,
 19 according to Rule 38, to request a jury trial and
 20 then it's up to the discretion of the Judge to put it
 21 on the jury. And that's in Rule 38. I did not file
 22 a motion to put it on the jury roster because it's
 23 already on the jury roster. But we may be marching
 24 up the hill and marching back down again because if
 25 you rule in his favor, then I would file a motion,

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under the circumstances, to put it back on the jury roster.

Your Honor, what he is saying is that we have waived, in effect, our right to demand a jury trial. Which is our right. A waiver, as the Court well knows, is an intentional act. Certainly designated in the e-filing to have it on the jury roster, does not indicate that the Plaintiff waived its right to have a jury trial.

So, I would say, Your Honor, it's kind of a question of first impression regarding e-filing and designated e-filing. But I don't think Mr. Harrill would seriously argue that he's not been made aware that it's been on the jury roster for a year.

THE COURT: Okay. All right. Fair enough.

Now, in getting ready for this hearing, you know, I can't see what you've shown me on the e-filing because I've never e-filed a summons and compliant. Other than in -- well, actually, I've filed pleadings in federal court but never summons and compliant in state court. As I looked at it and I couldn't find any reference to a request for a jury trial. And, you know, I thought, well, maybe that consent scheduling order is going to tell the story. Because generally speaking, parties don't enter a

1 consent scheduling order on a nonjury trial with the
2 chief administrative judge. Although, that has
3 happened from time to time.

4 So, I'm going to ask y'all, as officers of the
5 court, and that is, what did you contemplate at the
6 time that you entered into a consent scheduling
7 order? That it would be a jury trial or that it
8 would be a nonjury trial? And again, as officers of
9 the court, not as posturing.

10 MR. HARRILL: Sure, Your Honor. Your Honor, I'm
11 not sure, honestly. And I'm not sure that's
12 relevant. But I don't know if I thought it was
13 nonjury or jury at that time. Certainly, later when
14 I realized it was definitely on the jury roster and
15 realized there was no demand, then that's when I
16 looked at the rule and said, wait a minute, they've
17 waived the right. Whether it is or isn't. So, it
18 should not be on the jury roster. But I cannot tell
19 you that I knew it was a jury trial. But I'm not
20 going to say that I looked at it and thought for sure
21 it was a nonjury either. I'm not sure I paid much
22 attention to that, quite honestly, as far as what
23 roster it was on.

24 THE COURT: Okay. So, tell me this then, both
25 of you and I'll ask you, what's the respective

1 prejudice to the Defendant for going to a jury trial
2 as opposed to the prejudice to the Plaintiff for not
3 having a jury trial?

4 MR. HARRILL: Well, Your Honor, one of the
5 things that became, I think, relevant is there was
6 some comment made at some point that made it clear
7 that, to me, that maybe it was unintentional or I
8 took it the way it wasn't intended. But I understood
9 they were going to try to play on the passion and
10 prejudice of the jury because, you know, some might
11 say my client is a little bit unsavory. They may
12 say the same about the Plaintiff. You know, this
13 case involves an adult entertainment business that
14 was renting property from the Plaintiff. And so, I
15 think they're going to try to use that to their
16 advantage. Of course, I'll fight it if that becomes
17 the case. But, you know, the prejudice to us would
18 be that they never demanded it and now they're trying
19 to get a jury trial at this late stage. And they
20 never demanded a jury trial.

21 THE COURT: Okay, Mr. Bannister, what's the
22 prejudice to the Plaintiff?

23 MR. BANNISTER: Well, Judge, let me ask you
24 first. My recollection is it has always been on the
25 jury roster. So, it would have been teed up as a

1 jury trial. Second, is the prejudice. The case is
2 going to involve some nonjury issues which will be
3 decided by the court anyway. It's a contract case,
4 which we allege is ambiguous, which it is. And
5 therefore, there will be evidence presented outside
6 of the very terms of the contract as to the intention
7 of the parties.

8 As to his client being unsavory, you know, I
9 mean, he is what he is.

10 THE COURT: Well, he's probably no more unsavory
11 than your client's attorney.

12 MR. BANNISTER: I would certainly like to think
13 so, Judge. I would like to think so. But as far as
14 it would be relevant, then that's an issue that comes
15 before the Court on the proper objection. I don't
16 know of any prejudice he would have. I mean, his. .

17
18 THE COURT: Okay.

19 MR. BANNISTER: There are other issues that
20 probably will have to be decided -- if it remains on
21 the jury roster, would have to be decided by the jury
22 because there's a lot of conflict about the
23 appropriate measure of damages.

24 THE COURT: Okay.

25 MR. HARRILL: Your Honor, if I can just add--

1 THE COURT: Yes, sir.

2 MR. HARRILL: Mr. Bannister's gratuitous comment
3 that this is an ambiguous contract, we would disagree
4 with that. Frankly, we think the critical issue in
5 this case is a legal issue and a law issue. But, you
6 know, I've taken two runs at it and two of your
7 colleagues have told me, no, not yet, without any
8 explanation. And I understand how the system works,
9 Your Honor. It's difficult to get summary judgment.
10 But there's some issues on that. And it's not
11 ambiguous. But, you know, I don't know that -- this
12 is a very simple case. There's been no demand made
13 and, I think, that it's appropriate to be heard
14 nonjury. You know. And for them now to come in and
15 say we want a jury trial without having asked for it
16 properly and having, by the language of the rule,
17 waived it, I think it's prejudicial to us.

18 THE COURT: Okay. All right. Here's what I'm
19 going to do. I'm going to go back and look at the
20 rule and look at it very precisely. And this is how
21 I'm going to look at it. Understanding that
22 statutory law is strictly construed and those rules
23 are not strictly construed. So, there's a great
24 amount of discretion afforded to the court in
25 interpreting those rules. So, I'm going to look at

1 it determine, okay, was the Plaintiff -- was the
2 Defendant on notice that it would be a jury trial by
3 and through operation and conduct of the case? And
4 if, in fact, you weren't on proper notice or
5 constructive notice, in the very least, what
6 prejudice is served on each party by either having a
7 jury trial or not a jury trial?

8 And I'll tell you, I'll project a little bit in
9 regard to that issue. I think that there's a time
10 honored right to jury trial guaranteed under the law
11 and guaranteed under the rules. And probably, the
12 tie goes to the jury trial, probably. But I'm going
13 to look at it a little bit more closely and I'll rule
14 by the end of the week, okay. Thank you very much, I
15 appreciate it.

16 MR. BANNISTER: Thank you, Your Honor.

17 MR. HARRILL: Thank you, Your Honor.

18 (WHEREUPON, the proceedings were concluded.)

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CERTIFICATE OF REPORTER

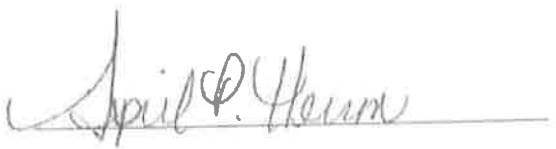
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STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

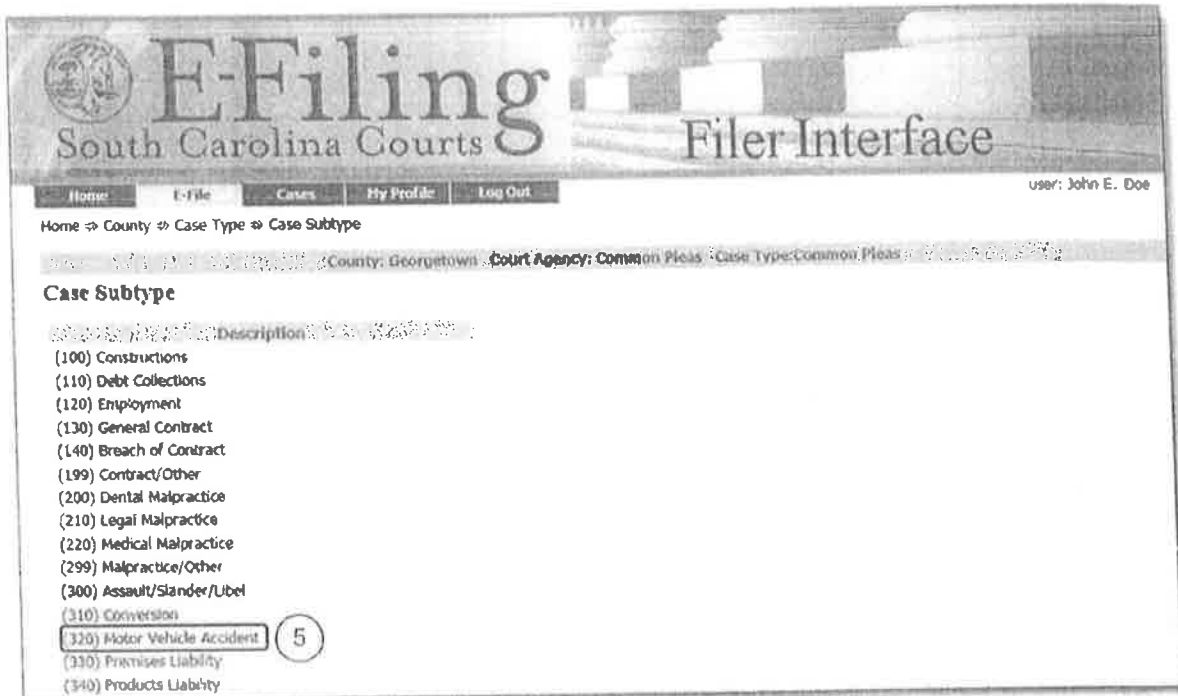
I, APRIL P. HERRON, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for Greenville County, South Carolina, on the 28th day of August, 2019.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

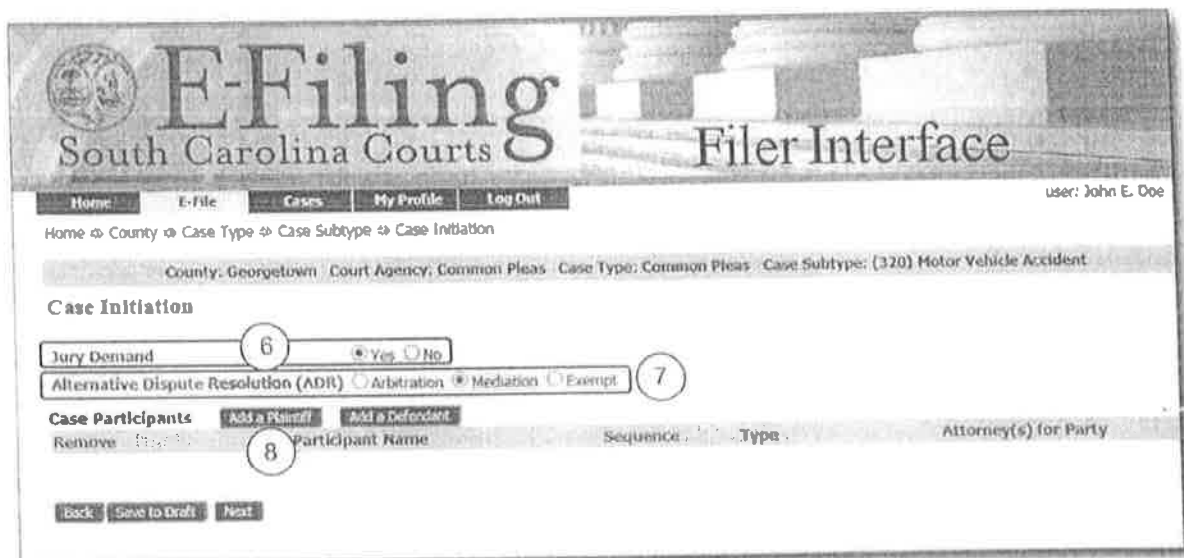
December 27, 2019



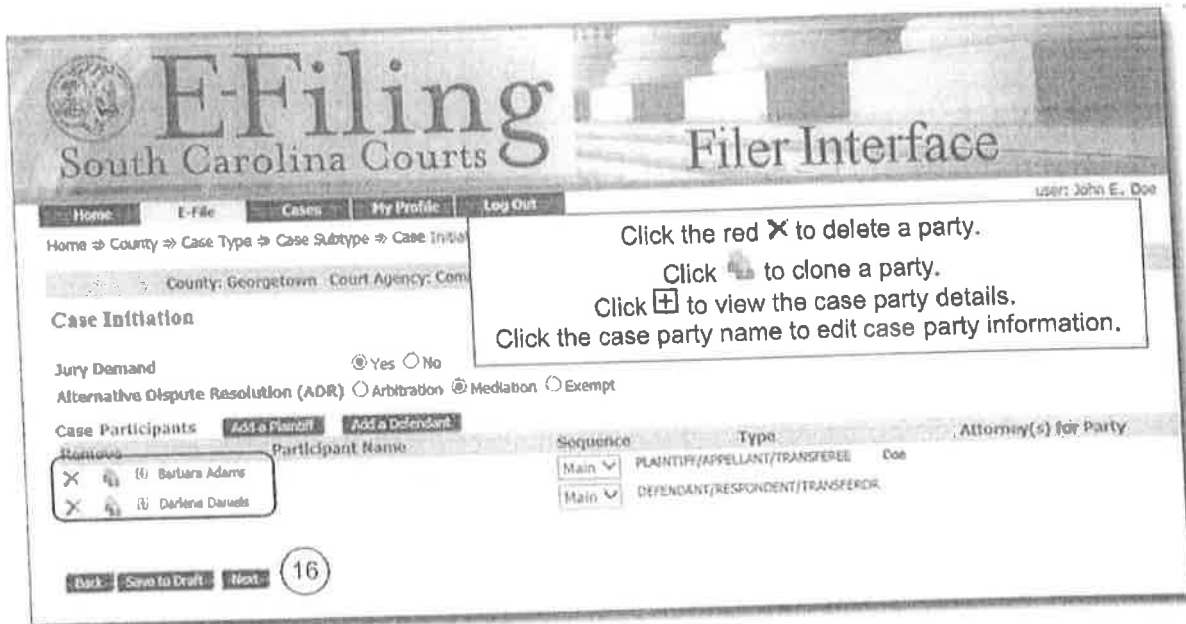
APRIL P. HERRON, Court Reporter



5. Click to select the **Case Subtype**, which in this example is (320) Motor Vehicle Accident. The Case Initiation screen opens for adding a plaintiff and defendant.



6. Click to select the **Jury Demand** option.
7. Click to choose the appropriate **ADR** option.
8. Click **Add a Plaintiff** and the Add a Party window opens.



South Carolina Courts E-Filing Filer Interface

Home E-File Cases My Profile Log Out user: John E. Doe

Home > County > Case Type > Case Subtype > Case Initiation

County: Georgetown Court Agency: Com

Case Initiation

Jury Demand Yes No

Alternative Dispute Resolution (ADR) Arbitration Mediation Exempt

Case Participants **Add a Plaintiff** **Add a Defendant**

Remove	Participant Name	Sequence	Type	Attorney(s) for Party
X	Barbara Adams	Main	PLAINTIFF/APPELLANT/TRANSFEREE	Doe
X	Darlene Daniels	Main	DEFENDANT/RESPONDENT/TRANSFEROR	

Back Save to Draft **Next** 16

16. Click **Next** to continue to the Add a Document screen.



Case Number 2017CP2302918
Case Subtype Breach of Cont 140
Filed Date 05-04-2017
Status Pending

Plaintiff Frontage Road Associates Inc et al
Defendant Elephant Inc et al
Assigned Judge
File Type Jury

(*) Show/Hide Participants

Name	Description	Type	File Date
Oscar W. Bannister	8/26/2019_MOTION_Roster/Notice of Motions Roster Publication	Action	07-15-2019 10:51:47 AM
Paul D. Harrill	8/26/2019_MOTION_Roster/Notice of Motions Roster Publication	Action	07-15-2019 10:51:47 AM
Oscar W. Bannister	7/29/2019_MOTION_Roster/Notice of Motions Roster Publication	Action	06-19-2019 11:32:25 AM
Paul D. Harrill	7/29/2019_MOTION_Roster/Notice of Motions Roster Publication	Action	06-19-2019 11:32:25 AM
Elephant Inc	NEF(06-18-2019 02:24:19 PM) Motion/Transfer to Non-Jury	Filing	06-18-2019 03:48:18 PM
Elephant Inc	Defs/Elephant Inc Motion/Transfer to Non-Jury	Motion	06-18-2019 02:24:19 PM
Frontage Road Associates Inc	NEF(02-22-2019 02:19:54 PM) Order/Electronic Form 4	Filing	02-22-2019 02:20:14 PM
Frontage Road Associates Inc	Order/Electronic Form 4-Motions Denied	Order	02-22-2019 02:19:54 PM
Frontage Road Associates Inc	NEF(02-20-2019 12:05:23 PM) Memo/Memo in Opposition	Filing	02-20-2019 12:09:34 PM
Frontage Road Associates Inc	Memo/Memo in Opposition to Motion for Summary Judgment	Filing	02-20-2019 12:05:23 PM
Frontage Road Associates Inc	Memo/Memo in Opposition to Motion for Summary Judgment-EX_1	Filing	02-20-2019 12:05:23 PM
Frontage Road Associates Inc	Memo/Memo in Opposition to Motion for Summary Judgment-EX_2	Filing	02-20-2019 12:05:23 PM
Elephant Inc	NEF(02-19-2019 03:30:04 PM) Affidavit/Affidavit of	Filing	02-19-2019 04:25:52 PM
Elephant Inc	Affidavit/Affidavit of Harry Heizer	Filing	02-19-2019 03:30:04 PM
Oscar W. Bannister	2/19/2019_MOTION_Roster/Notice of Motions Roster Publication	Action	02-07-2019 04:30:13 PM
Paul D. Harrill	2/19/2019_MOTION_Roster/Notice of Motions Roster Publication	Action	02-07-2019 04:30:13 PM
Oscar W. Bannister	2/15/2019_JT_Roster/Notice of Case Roster Publication Sent	Action	02-07-2019 02:33:30 PM
Paul D. Harrill	2/15/2019_JT_Roster/Notice of Case Roster Publication Sent	Action	02-07-2019 02:33:30 PM
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Frontage Road Associates Inc	NEF(01-31-2019 09:37:51 AM) Amended/Other	Filing	01-31-2019 10:27:54 AM
Frontage Road Associates Inc	Amended Summons	Filing	01-31-2019 09:37:51 AM
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Paul D. Harrill	2/19/2019_MOTION_Roster/Notice of Motions Roster Publication	Action	01-23-2019 04:09:23 PM
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Paul D. Harrill	2/15/2019_JT_Roster/Notice of Case Roster Publication Sent	Action	01-22-2019 01:54:51 PM
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Paul D. Harrill	2/15/2019_JT_Roster/Notice of Case Roster Publication Sent	Action	01-22-2019 01:26:32 PM
Oscar W. Bannister	11/12/2018_MOTION_Roster/Notice of Motions Roster Publicatio	Action	09-24-2018 07:58:14 AM
Paul D. Harrill	11/12/2018_MOTION_Roster/Notice of Motions Roster Publicatio	Action	09-24-2018 07:58:14 AM
Frontage Road Associates Inc	NEF(09-14-2018 11:52:33 AM) Order/Scheduling Order	Filing	09-14-2018 11:52:47 AM
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Paul D. Harrill	8/27/2018_MOTION_Roster/Notice of Motions Roster Publication	Action	07-13-2018 04:46:24 PM
Gregory Gaines	NEF(07-11-2018 05:13:40 PM) Motion/Summary Judgment	Filing	07-12-2018 10:20:20 AM
Gregory Gaines	Defs/Gregory Gaines Motion/Summary Judgment	Motion	07-11-2018 05:13:40 PM
Gregory Gaines	Affidavit/Affidavit of Gregory Gaines/Ken Wood In Support of	Filing	07-11-2018 05:13:40 PM
Gregory Gaines	Affidavit/Affidavit of Harry Heizer In Support of Sum Judg	Filing	07-11-2018 05:13:40 PM
Oscar W. Bannister	5/17/2018_JT_Roster/Notice of Case Roster Publication Sent	Action	05-08-2018 09:07:46 AM
Paul D. Harrill	5/17/2018_JT_Roster/Notice of Case Roster Publication Sent	Action	05-08-2018 09:07:46 AM
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Paul D. Harrill	5/17/2018_JT_Roster/Notice of Case Roster Publication Sent	Action	04-03-2018 02:00:13 PM
Frontage Road Associates Inc	ADR/Alternative Dispute Resolution (Workflow)	Action	11-30-2017 10:11:19 AM
Elephant Inc	Order/Form 4/Ruling on Def's Motion Judgment on Pleadings	Order	08-14-2017 09:25:43 AM
Oscar W. Bannister	8/7/2017_MOTION_Roster/Notice of Motions Roster Publication	Action	07-14-2017 09:24:01 AM

Paul D. Harrill	8/7/2017_MOTION_Roster/Notice of Motions Roster Publication	Action	07-14-2017	09:24:01 AM
Gregory Gaines	Def/Gregory Gaines Motlon/Judgment on the Pleadings	Motion	07-13-2017	04:44:44 PM
Elephant Inc	Notice/Notice of Appearance	Filing	07-07-2017	05:03:16 PM
Elephant Inc	Answer/Answer	Filing	07-07-2017	05:03:16 PM
Frontage Road Associates Inc	Verification/Verified	Filing	06-30-2017	10:36:07 AM
Frontage Road Associates Inc	Service/Affidavit Of Service	Filing	05-10-2017	04:05:06 PM
Frontage Road Associates Inc	Service/Affidavit Of Service	Filing	05-10-2017	04:05:06 PM
Frontage Road Associates Inc	Summons & Complaint	Filing	05-04-2017	10:11:19 AM
Frontage Road Associates Inc	Summons & Complaint-EX_1	Filing	05-04-2017	10:11:19 AM

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material. I also certify that this Record is in compliance with the August 13, 2007 order of the South Carolina Supreme Court.



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ATTORNEYS FOR APPELLANTS

July 20, 2020

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