THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE COURT OF COMMON PLEAS
Spartanburg County

Shannon M. Phillips, Master-in-Equity

Appellate Case No. 2022-001420

Civil Action No. 2021-CP-42-00086
Civil Action No. 2021-CP-42-00504

Gibbs International, Inc.....Respondent,

v.

Vidalia Industrial Facilities, LLC.....Appellant.

AND

Vidalia Industrial Facilities, LLC and Indigo
Industrial Investments, LLC .....Appellants,

Gibbs, International, Inc.; Gregory Boozer; and
Jimmy Gibbs……. Respondents.

AND

GBPT, LLC.....Respondent,

v.

Rumsfeld Indigo, LLC. .....Appellant.

INITIAL BRIEF OF RESPONDENTS

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INTRODUCTION

This appeal arises from a settlement agreement negotiated directly between the parties. The parties' counsel were aware of and consented to these direct communications and negotiations, although neither parties' counsel participated directly in them. The parties reached an agreement that contemplated the execution of both a settlement agreement and a confession of judgment in Respondents' favor against Appellants. The parties executed the settlement agreement, but Appellants did not initially sign the agreed upon confession of judgment. A little over a week after the execution of the settlement agreement, counsel for the Gibbs parties (Respondents) reminded his client representative to resend the confession of judgment to the Indigo parties (Appellants) for execution. Respondents conveyed another copy of the confession of judgment to Appellants. Appellants had ample time and opportunity to review and, if they wished, discuss it with their counsel. Appellants signed and returned the confession of judgment.

After Appellants subsequently defaulted on their payment obligations under the settlement agreement, Respondents filed the confession of judgment, which was the negotiated remedy. Appellants moved to strike the confession of judgment, but did not in their motion provide any justification or explanation for why it should, in their view, be stricken. At the hearing, however, they asserted for the first time the novel argument that the document should be stricken because it was the result of improper or unethical contact between a lawyer and a represented, opposing party.

The lower court denied the Motion, correctly concluding that the relevant Rules, precedent, and persuasive authorities all permit the actions challenged in the Motion. *See* Order (Sept. 9, 2022) (the "Order") (R._____). Counsel's actions were consistent with the Rules of Professional Conduct and the guidance interpreting them; there is no evidence of any overreach by counsel; and it is undisputed that Respondent had the opportunity to consult with its own counsel. There is no

evidence of any impropriety. The Motion is just an attempt by Appellants to improperly avoid the consequences of their failure to meet their obligations under the settlement agreement. This Court should affirm.

COUNTER-STATEMENT OF THE ISSUES ON APPEAL

(1) Did the trial court properly rule that Appellants had not established a basis for the extraordinary remedy of striking the confession of judgment from the court record?

(2) Did the trial court properly rule that Appellants failed to present sufficient evidence to meet their burden of showing improper conduct related to the direct negotiations between the parties?

(3) Should the Court affirm on the additional sustaining ground that Appellants' motion to strike in the trial court did not state the grounds for the motion with particularity as required by Rule 7 of the South Carolina Rules of Civil Procedure?

COUNTER-STATEMENT OF THE CASE AND FACTS

In October 2021, Mr. Boozer and Mr. Feibus, representatives of the parties, began settlement negotiations to resolve multiple cases pending between several related entities. *See* Hr'g Tr. at 16:1-14 (R.___). Negotiations occurred directly between the parties' representatives—not counsel. *See* Hr'g Tr. at 16:9-25 (R._____). Upon learning of the settlement talks, counsel for Respondents reached out to counsel for Appellants. *See* Hr'g Tr. at 16:9 - 17:7 (R._____). After speaking with their respective clients, counsel for both parties agreed to suspend litigation to allow the parties time to negotiate a settlement agreement directly. *See* Hr'g Tr. at 16:19-25 (R. ____); Appellants' Brief at p. 4. In January 2022, the pending cases[1] appeared on a roster for a status conference. Hr'g Tr. at 17:1-13 (R._____). Because settlement discussions were still ongoing directly between the party representatives, counsel for both parties agreed to enter into Consent Orders to stay the pending cases for the express purpose of allowing the parties to directly negotiate

[1] The pending cases are Case Nos. 2021-CP-42-00086 and 2021-CP-42-00504.

a resolution of the cases. *See* Motions to Stay (R._____)*; see also* Orders Granting Motion to Stay (R. _____).

After the pending cases were stayed in January 2022, Mr. Boozer and Mr. Feibus, representatives of the parties, continued the direct settlement negotiations, with the knowledge and consent of counsel that these negotiations were occurring. *See* Hr'g Tr. at 17:10-13 (R._____).

On April 4, 2022, the parties executed a settlement agreement resolving the cases between them. *See* Hr'g Tr. at 18:10-12 (R. _____); Settlement Agreement (R.___).[2] The terms of the settlement agreement were the result of several months of back-and-forth negotiations between the representatives of the parties. Contrary to the assertions of Appellants, the Settlement Agreement and its terms were mutually drafted by the parties, not unilaterally prepared by Respondents. Settlement Agreement ¶ 13 (R. ___). One term of the settlement agreement was for Appellants to provide a confession of judgment for $1,400,000, which was to be held by the Respondents and filed only if Appellants defaulted on their payment obligations under the settlement agreement. Settlement Agreement ¶ 4 (R.___). The settlement agreement required Appellants to sign the confession of judgment contemporaneously with the execution of the settlement agreement. Settlement Agreement ¶ 4 (R.___). However, Appellants failed to sign the confession of judgment at the time of the execution of the settlement agreement. Therefore, on April 13, 2022, a little over a week after the settlement agreement was executed by the parties, counsel for Respondents sent an email to his own client representative asking him to get the Appellants to execute the confession of judgment that they were contractually obligated to sign under the settlement agreement. Email Exchange dated April 13 and 14, 2022 (R.___). There was no pressure put on Appellants and

[2] The complete settlement agreement was not presented at the trial court for consideration in its ruling. Order at 3 (R. _____). It was the subject of an appellate motion to strike a portion of the designation of matter for the record because it was not considered in the trial court's opinion.

Appellants had time to discuss the confession of judgment with their counsel, if they chose to do so. Mr. Feibus, the representative of the Appellants, signed the confession of judgment and returned it to Mr. Boozer about a week later on April 21, 2022. Confession of Judgement (R.___).

The settlement agreement required Appellants to make a payment of $50,000 on a specified date in April and a payment of $150,000 on a specified date in June, but Appellants made two payments of $50,000[3], totaling $100,000, under the settlement agreement and defaulted on their payment obligations. Boozer June 21, 2022 Aff. ¶ 3 (R.___). On June 21, 2022, Respondents filed the confession of judgment in the pending cases, as provided for in the terms of the settlement agreement. *See* Notice and Confession of Judgment. (R._____).

On June 29, 2022, Appellants filed a motion to strike the confession of judgment. Mot. to Strike. (R. _____). By filing the motion, Appellants sought to eliminate the security they had agreed to provide in the settlement agreement, and they sought—after the fact—to alter the settlement agreement terms that they freely and voluntarily entered. The motion did not state with particularity the grounds for the motion and merely stated that the Confession of Judgment was obtained without the Appellants' "counsels' knowledge, participation, or consent." Mot. to Strike. (R. _____). The legal basis for the motion to strike was unknown to counsel for the Respondents until the hearing held via Webex on August 16, 2022 (the "Hearing"). Hr'g Tr. at 19:11-24 (R.____). On September 9, 2022, the Master-in-Equity, Hon. Shannon Phillips issued her Order denying the Appellants' Motion to Strike. Order. (R.____). On October 10, 2022, Appellants filed their Notice of Appeal.

[3] Neither payment was made by the required date and Appellants have made no additional payments.

STANDARD OF REVIEW

A ruling on a motion to strike is reviewed under the abuse of discretion standard. *See Totaro v. Turner*, 273 S.C. 134, 135, 254 S.E.2d 800, 801 (1979) ("It is well settled that a motion to strike is addressed to the sound discretion of the trial court. The trial court's decision will not be reversed absent an abuse of discretion.") (internal citations omitted). An abuse of discretion occurs when a trial court commits an error of law, makes a factual finding that lacks evidentiary support, or fails to exercise any of its vested discretion. *Flowers v. Giep*, 436 S.C. 281, 286, 871 S.E.2d 604, 607 (Ct. App. 2021). An abuse of discretion may be found when the appellant shows that the conclusion reached by the trial court was without reasonable factual support and resulted in prejudice to appellant, thereby amounting to an error of law. *Skywaves I Corp. v. Branch Banking & Tr. Co.*, 423 S.C. 432, 456–57, 814 S.E.2d 643, 656 (Ct. App. 2018). The burden is on the party appealing to demonstrate the trial court abused its discretion. *Halverson v. Yawn*, 328 S.C. 618, 621, 493 S.E.2d 883, 884 (Ct. App. 1997).

A motion to strike is a drastic remedy that should rarely be granted. *See Bell v. Forrest Paschal Machinery Co. and Engineering Associates, Inc.*, 277 S.C. 19, 20, 282 S.E.2d 232, 233 (1981) (the "striking of a defense from a pleading is a 'drastic remedy' rarely to be granted") (internal citations omitted).

ARGUMENT

I. The trial court's Order properly denied the motion to strike and is consistent with and correctly applied Rule 4.2 of the South Carolina Rules of Professional Conduct and the ABA Formal Opinion 11-46.

A. Parties have the right to communicate directly, and a lawyer may assist a client regarding the substance of any communication.

The executed settlement agreement, including the confession of judgment as security for the payment obligations, involved in this appeal was negotiated through direct communications between representatives of the parties. *See* Hr'g Tr. at 16:2-11 (R.____); Settlement Agreement ¶ 4 (R.___). Appellants do not suggest or argue direct communication by parties for settlement negotiations is improper. Appellants also do not and cannot argue that their own counsel was unaware of the direct communications for months or that the express purpose of the direct party communications was to reach a settlement agreement. Rather, in support of their attempt to strike the confession of judgment, Appellants merely cited at the trial court to a single communication in which Respondents' counsel spoke to his own client to remind Appellants to sign a document that they were contractually obligated to execute to suggest that the confession of judgment should be stricken.

At the Hearing, Appellants cited to carefully selected portions of Rule 4.2 of the South Carolina Rules of Professional Conduct and the ABA Formal Opinion 11-461 ("ABA Opinion") (R._____) to attempt to suggest that Respondents' counsel's communications or actions were not proper. *See* Hr'g Tr. at 8:10 – 9:6; 10:19 – 12:21 (R.____). Even now, Appellants fail to cite portions of Rule 4.2 and its comments or address portions of the ABA Formal Opinion, which directly contradict their position.

Rule 4.2, comment 4 expressly acknowledges that "[p]arties to a matter may communicate directly with each other, and a **lawyer is not prohibited from advising a client** concerning a

communication that the client is legally entitled to make." Rules of Professional Conduct, Rule 4.2 cmt. 4, RPC, Rule 407, SCACR (emphasis added). Appellants attempted to ignore the portion of the comments to Rule 4.2 which directly addressed the issue before the Court. The only evidence in the record is that counsel for Respondents advised his own clients regarding the direct communication—an act which is expressly permitted by comment 4 to Rule 4.2.

Appellants also rely upon selected language from the ABA Opinion and ignore both the format of the ABA Opinion and its overall conclusion which is contrary to Appellants' argument. An understanding of the ABA Opinion starts with its basic format. The format of an ABA Opinion provides the conclusion or synopsis of the opinion in italics at the top, which in this case provides:

> Parties to a legal matter have the right to communicate directly with each other. **A lawyer may advise a client of that right and may assist the client regarding the substance of any proposed communications**. The lawyer's assistance need not be prompted by a request from the client. Such assistance may not, however, result in overreaching by the lawyer.

ABA Opinion p. 1 (emphasis added) (R._____). The ABA Opinion states as an example of the types of direct communications between parties which can be allowed—and even may be "desirable"—is "where the parties wish to cement a settlement or break an impasse in settlement negotiations." *Id*. (R._____). In that same paragraph, the ABA Opinion states that "a lawyer may be reasonably expected to advise or assist the client regarding communications the client desires to have with a represented person." *Id*. (R. _____). Therefore, the ABA Opinion relied upon by Appellants expressly allows for the actions which occurred in this case, direct communications between parties and lawyer assistance to his own client.

The ABA Opinion notes and relies upon the language from Comment 4, discussed above, in finding that lawyers may advise a client concerning direct communications with an opposing party. ABA Opinion p. 3 (R.___). It notes that any contrary position would "unduly inhibit

permissible and proper advice to the client regarding the content of the communications . . . ." *Id.* (R.____).

The ABA Opinion states that the goal of Rule 4.2 is to prevent undue pressure from opposing counsel. ABA Opinion p. 4 (R.____). There is no evidence in this case that any undue pressure occurred at any point during the more than 5 months of direct negotiations between the parties' representatives.[4] The ABA Opinion envisions permissible activity by counsel significantly more involved than is demonstrated by the record to have occurred in this case. The ABA Opinion provides that "without violating Rules 4.2 or 8.4(a), a lawyer may give substantial assistance to a client regarding substantive communications with a represented adversary." ABA Opinion p. 4 (R.____). That advice could include, for example, "the subjects or topics to be addressed, issues to be raised, and strategies to be used." *Id.* (R.____). The ABA Opinion also states it is permissible for "**the lawyer [to] review, redraft and approve a letter or a set of talking points that the client has drafted**" and the "**client also could request that the lawyer draft the basic terms of a proposed settlement agreement**." ABA Opinion pp. 4-5 (emphasis added). (R.____).[5]

At the Hearing, Appellants showed a single email regarding the ministerial function of a reminder by counsel to his client to ask the Appellants to sign and notarize a confession of judgment that they had already agreed to provide in the previously executed settlement agreement.

[4] The extended period of time over which negotiations occurred is an indication that there was no undue pressure. Appellants had ample opportunity to evaluate, assess, and discuss terms of the settlement, including but not limited to the confession of judgment.

[5] Contrary to Appellants' unsupported assertion, the settlement agreement and confession of judgment were not unilaterally prepared, but mutually drafted through lengthy negotiations. Settlement Agreement ¶ 13 (R.___); *See* Section I.C., *infra*. But, even if the unsupported assertion was true, drafting terms of settlement documents is permitted by the ABA Opinion.

Email Exchange dated April 13 and 14, 2022 (R.___). This was well within the scope of activity expressly permitted by the ABA Opinion and in no way rises to the level of undue pressure or overreaching that the ABA Opinion identifies as the reason for Rule 4.2.

The suggestion by the Appellants that the Court should overturn the lower court's Order, which denied the drastic remedy of striking the Confession of Judgment, based upon the limited activity of counsel established in the record by the Appellants is not supported by the language of Rule 4.2 or the ABA Opinion.

B. There is no overreach when (as here) the other party has the opportunity to consult with its lawyer and counsel for that party has agreed to allow direct settlement discussions.

The ABA Opinion provides that a lawyer may advise and assist a client regarding direct communications with an opposing party, so long as there is no overreaching by the lawyer. ABA Opinion p. 1. (R.____). Although Appellants ask the Court to reverse the trial Court's finding there was no "overreach", Appellants failed to present any evidence of "overreach" by counsel for Respondents in their Motion to Strike or at the Hearing. As noted previously, the only evidence asserted by Appellants to exist is a single email from counsel for Respondents to his own client reminding his client to ask Appellants to sign and notarize a confession of judgment that they had already agreed to provide. Email Exchange dated April 13 and 14, 2022 (R.___). Appellants did not contest at the Hearing that the confession of judgment was a mere follow-up document to the negotiated settlement agreement. *See* Hr'g Tr. at 8:3-9 (R.___).

Appellants, as the moving party, had the burden to provide evidence that overreach occurred to support the drastic remedy of striking the confession of judgment. *Smith v. Smith,* 50 S.C. 54, 54, 27 S.E. 545, 550 (the burden of proof was on the moving party for a motion to strike); *see also George v. Florence One Schools*, No. 4:21-cv-2787-JD-KDW, 2022 WL 2195383, at *3

(D.S.C. May 12, 2022). If Appellants believed that there existed evidence of overreaching, they were required to present evidence to the lower court. They did not.

Nor do the facts of this case parallel the examples of overreach described in the ABA Opinion. The ABA Opinion states that the "[p]rime examples of overreaching include assisting the client in securing from the represented person an enforceable obligation . . . **without the opportunity to seek advice of counsel**." ABA Opinion p. 5 (emphasis added). (R.___).[6] Appellants presented no argument or evidence that they did not have the **opportunity** to seek advice of counsel. Appellants would like to redact the "without the opportunity to seek advice of counsel" language from the ABA Opinion, and they argue that the Court should not evaluate their motion to strike applying this language. Appellants' Brief at 7. However, "opportunity to seek advice of counsel" is an important part of the protections under Rule 4.2. Under the ABA Opinion, overreach cannot occur when a party has the opportunity to protect itself. A party cannot claim harm when it had the ability to prevent the harm itself. *Cf. Chastain v. Owens Carolina, Inc.*, 310 S.C. 417, 419, 426 S.E.2d 834, 835 (Ct. App. 1993) (finding the doctrine of avoidable consequences prohibits recovery for harm that the exercise of due diligence would have avoided); *Tri-Cont'l Leasing Corp. v. Stevens, Stevens & Thomas, P.A.*, 287 S.C. 338, 342, 338 S.E.2d 343, 346 (Ct. App. 1985) ("As a general rule, one who is injured by the acts of another is required to do those things an ordinary prudent person would do under similar circumstances to avoid damages which are reasonably avoidable.").

The parties' direct communications regarding settlement negotiations lasted from October 2021 until April 2022. Hr'g Tr. at 16:9-11; 18:10-12 (R.___). There is no evidence that Appellants

[6] Appellants rely on language from the ABA opinion regarding advising the other party to consult with counsel. Appellants' Brief at. 5. However, this is to ensure there is an "opportunity to seek advice of counsel."

did not have an opportunity to seek counsel during this time and no evidence that Appellants did not in fact seek advice of counsel during that period of more than five months. Additionally, the parties executed the settlement agreement on April 4, 2022. Settlement Agreement (R.___). The Confession of Judgment was executed on April 21, 2022. Confession of Judgment. (R._____). There is no evidence that Appellants did not have an opportunity to seek counsel regarding the confession of judgment between April 4 and April 21.

There is also no assertion that Respondents did or said anything to deprive Appellants of the opportunity to seek advice of counsel. In fact, to the contrary, Respondents fully expected that Appellants were communicating with their counsel. *See* Hr'g Tr. at 18:12-25 (R.__). There can be no overreaching when, as here, Appellants had full opportunity to seek advice of counsel. The lower court correctly found there was ample time and opportunity for Appellants to seek advice of counsel.

C. Appellants improperly attempt to re-write the language of Rule 4.2.

Appellants' discussion of Rule 4.2 entirely misapprehends the proper analysis and, without explanation or justification, invites the Court instead to apply a four-part test of Appellants' own making. *See* Appellants' Brief at 8-9. They make this invitation without citation to any authority or even to the language of Rule 4.2. Their attempt to re-write Rule 4.2 is contrary to the comments to Rule 4.2 and the ABA Opinion, on which they purport to rely.

Rule 4.2 and its comments address (and set limitations on) *communications* between a lawyer and another represented party. *See* Rules of Professional Conduct, Rule 4.2, RPC, Rule 407, SCACR (". . . a lawyer shall not communicate. . ."). The ABA Opinion on which Appellants rely likewise contemplates *communications*. ABA Opinion p. 1 (R.___). Both Rule 4.2 and the ABA Opinion focus on communications, not documents. There is no assertion or evidence that

counsel for Respondents ever communicated directly with any representative of Appellants. *See* Hr'g Tr. at 9:6-9; 20:24 - 21:4 (R.____). There is no evidence that counsel for Respondents controlled or directed Respondents' communications with Appellants. The only evidence Appellants rely on is an email between Respondents' counsel and Respondents. Email Exchange dated April 13 and 14, 2022 (R. ____). But this communication is permitted by both Rule 4.2 and the ABA Opinion. Rule 4.2, comment 4 expressly acknowledges that ". . . a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make." Rules of Professional Conduct, Rule 4.2 cmt. 4, RPC, Rule 407, SCACR. The ABA Opinion also allows a lawyer to assist a client regarding the substance of any proposed communication parties may have directly with each other. ABA Opinion p. 1 (R.___). Appellants' position fails because it is inconsistent with the express provisions of Rule 4.2 and the ABA Opinion.

Even if Appellants' rewriting of Rule 4.2 had any merit (which it does not), their argument still fails. The first inquiry Appellants created asks the court to ascertain whether the settlement agreement and confession of judgment were drafted by counsel for the Respondents. However, Appellants presented no evidence to the trial court to support a finding that any document was drafted by counsel for the Respondents. Appellants suggest, without citation or evidentiary support, that counsel for Respondents unilaterally drafted the terms of the settlement agreement, with the confession of judgment, and presented it for signature Appellants. *See* Appellants' Brief at p. 1 (statement of issue 1), 9 (claiming without evidence or citation that it is "uncontroverted" that the confession was drafted by counsel for Respondents); 10 ("documents drafted by Gibbs Parties' counsel"). In fact, there is no evidence in the record which demonstrates who drafted the settlement agreement or the confession of judgment. The only evidence in the record on this point

is the statement in the settlement agreement that it should be deemed to have been mutually drafted. Settlement Agreement ¶ 13 (R.___). The terms of the documents at issue were negotiated over a lengthy period of time. Contrary to Appellants' unsupported assertions, they were not unilaterally prepared by one party and presented for signature to the other party.

If Appellants wanted the trial court to strike a document in the court record on the basis that it was drafted by counsel for Respondents, Appellants were required to present evidence in the record to support such a finding. *Smith*, 50 S.C. at 54, 27 S.E. at 550 (finding that the burden of proof was on the moving party for a motion to strike). The trial court's Order cannot be an abuse of discretion when Appellants failed to present evidence to support their position. *Halverson*, 328 S.C. at 621, 493 S.E.2d at 884. (finding the burden of proof is on the moving party to show abuse of discretion).

D. Appellants' Counsel was aware of and consented to the direct settlement negotiations between the parties.

Appellants' arguments seek to minimize the reality that their counsel was aware of the direct communications between the parties and consented to have settlement agreement negotiations directly between the parties. Appellants' Brief at 4 ("In this case, counsel [for both parties] agreed to step back and allow their clients to **negotiate directly toward a potential settlement**.") (emphasis added); *see* Hr'g Tr. at 16:19-25 (R.____).

When Respondents' counsel learned in October 2021 that some direct communications had begun between the parties, he immediately contacted counsel for the Appellants to confirm that Appellants' counsel was aware of and had no objection to this communication. Hr'g Tr. *See* at 16:9-25 (R.___). At the Hearing, counsel for the Respondents recited the chronology of facts. *See* Hr'g Tr. at 16:1 -17:13 (R.____). Appellants agreed that the recitation of the chronology was correct. *See* Hr'g Tr. at 21:12-14 (R.____). The comments of counsel for Appellants suggest that

he was informed about the settlement negotiations and the progress being made on coming to an agreement on the terms for that settlement. Even though counsel for Appellants knew for months that the parties were directly communicating **for the purpose of negotiating terms of a settlement**, at no time did he object to the direct negotiations; at no time did he express any concern that lawyers needed to be more involved in the process; and at no time did he contend that he did not consent to the direct communications.

The language of Rule 4.2 indicates that there can be no violation of its provisions if "the lawyer has the consent of the other lawyer . . ." In this case, counsel for Appellants was informed about and consented to the communications and direct negotiations about which Appellants complained. Appellants' counsel knew that the purpose of the direct communications was "to negotiate directly toward a potential settlement." Appellants' Brief at 4. After the fact, Appellants want to claim harm when the known and agreed-upon purpose of the negotiations was achieved[7]. Appellants' counsel cannot complain about communications they knew were occurring and consented to allow. *See Townsend v. Townsend*, 323 S.C. 309, 474 S.E.2d 424 (1996) (holding that once a lawyer consented to an issue, "we cannot see how Lawyer can now complain" about the consequences of that position).

II. Appellants failed to meet their burden because they presented no evidence demonstrating they were entitled to relief.

A. The drastic remedy of striking a pleading should rarely be granted.

A motion to strike is a drastic remedy that should rarely be granted. *See Bell*, 277 S.C. at 20, 282 S.E.2d at 233 (the "striking of a defense from a pleading is a 'drastic remedy' rarely to be

[7] The focus of Rule 4.2 is communications with represented parties. The settlement negotiations are the "communications" at issue in this case. Appellants cite no authority to suggest the rule allows an attorney to consent to direct communications but object to documents which result from these direct communications.

granted") (internal citations omitted). Appellants, as the movants, had the burden to present evidence to demonstrate they were entitled to relief. *Smith*, 50 S.C. at 54, 27 S.E. at 550 (finding that the burden of proof was on the moving party for a motion to strike); *see also George*, 2022 WL 2195383, *3 ("[t]he moving party bears a 'sizable burden' to show" that striking a portion of a pleading is necessary "and would cause significant prejudice if not stricken.") (internal quotations omitted).[8] Appellants failed to meet this burden.

B. Appellants fail to show any error in the lower court's ruling.

As the movants, Appellants have the burden of showing that the trial court abused its discretion. *Halverson*, 328 S.C. at 621, 493 S.E.2d at 884. To meet their burden, Appellants must demonstrate that the lower court's ruling erred as a matter of law, failed to exercise its vested discretion, or lacked evidentiary support. *Flowers*, 436 S.C. at 286, 871 S.E.2d at 607 (Ct. App. 2021). Appellants do not assert or argue that there was an error of law[9] or that the lower court failed to exercise its discretion. As such, Appellants seek to meet their burden by showing that the lower court's Order is inconsistent with the evidence presented to the lower court and application of law to the evidence. As explained in the next section, they do not.

C. Appellants failed to submit evidence to meet their sizable burden.

The heart of Appellants' argument is an assertion that counsel for the Respondents "overreached" in assisting and advising his own client about settlement negotiations or settlement documents. The evidence presented to the trial court does not support this assertion. Appellants,

[8] South Carolina's Rule 12(f) on Motions to Strike is nearly identical to the federal rule. Federal case law therefore is relevant to and instructive in interpreting the South Carolina Rule. *See Maybank v. BB&T Corp.*, 416 S.C. 541, 566, 787 S.E.2d 498, 510 (2016).

[9] The Appellants do not argue that the trial court applied the incorrect law. The trial court applied the rules and law asserted by Appellants.

as the movants, had the burden to present evidence to demonstrate they were entitled to relief. *Smith*, 50 S.C. at 54, 27 S.E. at 550.

Appellants, as the moving party, had the burden to provide evidence that overreach occurred to support the drastic remedy of striking the confession of judgment. *Smith*, 50 S.C. at 54, 27 S.E. at 550 (the burden of proof was on the moving party for a motion to strike); *see also George*, 2022 WL 2195383, at *3. If Appellants believed that there existed evidence of overreaching, they were required to present evidence to the lower court. They did not.

Appellants presented no evidence by affidavit or otherwise from any representative of the Appellant entities. They presented no affidavit or evidence stating, or even suggesting, that the Appellants were deprived of counsel or coerced in any way. Appellants provided no affidavit from counsel regarding the scope of counsel's knowledge of the settlement negotiations.[10]

There is no evidence of abuse or overreaching in the record. The only document shown at the Hearing was a single email dated little over a week after the settlement agreement was executed in which counsel for Respondents reminded his client to have Appellants sign and notarize the Confession of Judgment, which was required by the terms of the executed settlement agreement. *See* Hr'g Tr. at 7:14 - 8:9; 17:14 – 18:4 (R._____); Email Exchange dated April 13 and 14, 2022 (R.___).[11] The email communication was sent from counsel for Respondent to Greg Boozer, who was the individual representative of Respondent who had negotiated the settlement agreement.

[10] Appellant's counsel merely made statements on the record at the Hearing that his client did not show him the settlement document prior to executing them *See* Hr'g Tr. at 6:6-12 (R.____). Appellant's counsel did not say that he did not discuss the progress of negotiations with his client during the more than five months of negotiations.

[11] Appellants admitted that there was no direct communication from counsel for Respondents to any representative for Appellants. *See* Hr'g Tr. at 9:6-9; 20:24 – 21:4 (R._____). The only issue is whether the communication between the client representatives can be deemed an action by counsel.

See Hr'g Tr. at 7:22-8:6 (R. ____) The email was then forwarded to a representative of Appellants and noted to be a mere follow-up document to the already negotiated settlement agreement. *See* Hr'g Tr. at 8:3-9 (R. ____); Email Exchange dated April 13 and 14, 2022 (R.___). Appellants do not cite to any authority which holds that an attorney's reminder to his client to ask that a document be signed is improper. A single email from counsel reminding his client to ask Appellants to sign and notarize a confession of judgment they already agreed to provide in a previously negotiated settlement agreement was not enough to carry Appellants' burden. The lower court correctly found there was no evidence of abuse or overreaching in the record.

III. The *Weckesser* case does not support Appellants' position.

Appellants incorrectly asserted that *Weckesser v. Knight Enterprises S.E. LLC*, 392 F. Supp. 3d 631 (D.S.C 2019) supports their position. *See* Appellants' Br. At 6-7. Appellants' reliance on *Weckesser* fails because that case is both factually distinguishable and was decided on the basis of analytical factors not present in this case.

Weckesser involved settlement offers that were sent to members of a class. Defense counsel initially sent individual settlement offers for each of 34 plaintiffs to plaintiffs' counsel. *Id.* at 632. An officer of the defendant corporation was concerned that plaintiffs' counsel did not deliver the offer letters to the plaintiffs, so without the knowledge or consent of plaintiffs' counsel, the officer of the defendant corporation instructed an employee to contact some plaintiffs directly and sent some of the plaintiffs an email copy of the settlement offer letters. *Id.* at 633. These letters contained false, misleading, and confusing language. *Id.* at 635.

The court in *Weckesser* noted that any finding of improper communications must be made on a "clear record" with "specific findings that weigh the need for limitation and the potential interference with the rights of the parties." *Id.* at 634 (internal citations omitted). In *Weckesser*,

the parties had submitted briefs supported by extensive documentary evidence and signed affidavits. *Id.* In contrast to *Weckesser*, there is no such "clear record" here, which is required to support the drastic remedy of striking a document from the court records.

That is not the only distinction between this case and *Weckesser*. Contrary to Appellants' representations here,[12] the analysis and outcome in *Weckesser* was also driven by the need in that case to protect against "unequal bargaining power . . .". *Id.* at 635. The *Weckesser* court specifically noted that the communication in that case highlighted the unequal bargaining power between the employer defendant and the current or former employee plaintiffs. *Id.* The risk of coercion and a misleading statement was enhanced under those circumstances of unequal bargaining power. This factor does not apply in our case, which involves an arms-length negotiation between experienced businessmen. There was no unequal bargaining power.

The court in *Weckesser* also found that the communications would be deemed wrongful only if they were "abusive and threaten the proper functioning of [the] litigation." *Id.* Appellants did not present any evidence (or even allegations) that could support such a finding—because they could not do so. The lower court correctly found nothing abusive, coercive, or misleading about that communication at issue in this case.

Finally, the court in *Weckesser* found that the defendants' repeated attempts to circumvent plaintiffs' chosen counsel, even after being informed of the objection to those communications, supported or necessitated a finding that the communications were abusive. *Id.* at 636-37. This is the opposite of the current case. The counsel for Appellants knew of the direct settlement negotiation communications at all relevant times and made no objection to the communications.

[12] Appellants' Brief at 8.

See Section I. D., *supra*. Respondents took no action which prevented or discouraged Appellants from seeking advice of counsel.

There was also no assertion, or basis to assert, that any communication made by Respondents was abusive, coercive, false, misleading, or confusing. Likewise, the lower court correctly found that the grounds supporting relief in *Weckesser* were not present in this case.

IV. Appellants' reliance on *San Francisco Unified*—a California Court of Appeals case—is unpreserved and, in any event, incorrect.

At the trial court, Appellants relied upon the standard set forth in Rule 4.2 and the ABA Opinion. Appellants now seek the application of a different standard which was never presented to the trial court for consideration. This issue is not preserved for appeal. *Miller v. Dillon*, 432 S.C. 197, 206–07, 851 S.E.2d 462, 467 (Ct. App. 2020) ("[I]t is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."). *Lucas v. Rawl Family Ltd. P'ship*, 359 S.C. 505, 510-11, 598 S.E.2d 712, 715 (2004) ("It is well settled that, but for a very few exceptional circumstances, an appellate court cannot address an issue unless it was raised to and ruled upon by the trial court."). *Shealy v. Aiken County*, 341 S.C. 448, 459-60, 535 S.E.2d 438, 444 (2000) (explaining that where the trial judge does not explicitly rule on argument and no Rule 59 motion is filed, the appellate court may not address the issue); *Great Games, Inc. v. S.C. Dep't of Revenue*, 339 S.C. 79, 85, 529 S.E.2d 6, 9 (2000) (same).

Appellants erroneously rely on *San Francisco Unified School Dist. ex rel Contreras v. First Student, Inc.*, 213 Cal.App.4th 1212 (Cal. Ct. App. 2013) ("*San Francisco Unified*") to set the standard for what qualifies as improper attorney conduct in advising a client about party-to-party communications. *San Francisco Unified* relies on the California State Bar Rules of Professional Conduct barring *ex parte* communications with represented parties (Rules of Prof. Conduct, rule

2-100) and a Formal Opinion issued by the California State Bar Standing Committee on Professional Responsibility and Conduct interpreting Rule 2-100 (Formal Opinion No. 1993-131). *S.F. Unified Sch. Dist. ex rel. Contreras, v. First Student, Inc.*, 213 Cal. App. 4th 1212, 1216, 1234 (Cal. Ct. App. 2013). The court in *San Francisco Unified* noted that the ABA Opinion—the same one relied on by Appellants at the trial court stage here—was more permissive regarding attorney's involvement in party-to-party communications than Formal Opinion No. 1933-131, which the court used to reach its holding. *Id.* at 1235. Specifically, the court found that the ABA Opinion "states a more liberal approach. . . allowing attorneys to actively counsel their clients about planned communications with represented parties and to draft some documents for use in the communications." *Id.* South Carolina Rule 4.2 and the comments to the rule are consistent with the ABA Opinion, not California law. Rule 4.2, comment 4 expressly acknowledges that "[p]arties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make." Rules of Professional Conduct, Rule 4.2 cmt. 4, RPC, Rule 407, SCACR (emphasis added).

However, even under the more restrictive standard outlined in *San Francisco Unified*, the conduct of Respondents' counsel here was proper. In *San Francisco Unified,* the court noted the general principle is that attorneys should not advise their clients regarding party communications "in a manner that violates the underlying purpose of the rule: preparing legally binding documents for an opposing party to sign takes advantage of the fact that the party is being contacted without knowledge, consent or presence of her legal representative." *S.F. Unified Sch. Dist. ex rel. Contreras*, 13 Cal. App. 4th at 1235-36. Counsel for Appellants knew direct communications were occurring for the purposes of negotiations toward a settlement. *See* Hr'g Tr. at 16:9-25 (R.___); Appellants' Brief at 4. There is no evidence that the settlement negotiation

communications took place without the knowledge and consent of counsel for Appellants or that Appellants were prevented from consulting with counsel in the over five months of settlement negotiations. Accordingly, even the more restrictive standard provided in *San Francisco United* does not support reversing the lower court's Order.

V. The Court should also affirm the lower court's ruling for the additional reason that Appellants' Motion to Strike did not state the grounds for the motion with particularity as required by Rule 7 of the South Carolina Rules of Civil Procedure.

Rule 7(b)(1) of the South Carolina Rules of Civil Procedure ("SCRCP") provides that "[a]n application to the court for an order shall be by motion which, unless made during a hearing or trial in open court with a court reporter present, shall be made in writing, **shall state with particularity the grounds therefor**, and shall set forth the relief or order sought." Rule 7(b)(1), SCRCP (emphasis added). Rule 7(b)(1), SCRCP, advances the policies of reducing prejudice to either party and assuring the court can comprehend the basis for the motion. *Lucey v. Meyer*, 401 S.C. 122, 131, 736 S.E.2d 274, 279 (Ct. App. 2012). Appellants' Motion to Strike Confession of Judgment did not state with particularity the grounds for the motion, as required by 7(b)(1), SCRCP. The Motion to Strike Confession of Judgment merely stated that the confession of judgment was obtained without Appellants' "counsels' knowledge, participation, or consent." *See* Mot. to Strike Confession of Judgment (R.____). The legal basis for the motion to strike was unknown to Respondents until the Hearing. *See* Hr'g Tr. at 19:11-24 (R.___). Respondents fully expected that Appellants were communicating with their counsel. *See* Hr'g Tr. at 18:10-25 (R.__). Accordingly, Respondents did not know on what ground Appellants made their motion. Appellants' failure to comply with Rule 7(b)(1), SCRCP, prevented counsel for Respondents from fully preparing for the Hearing. This failure is an additional sustain ground on which the Court can and should uphold the Order. *See* Rule 220(c), SCACR; *see also Equivest Fin., LLC v.*

Ravenel, 422 S.C. 499, 507–08, 812 S.E.2d 438, 442 (Ct. App. 2018) ("Under the present rules, a respondent—the 'winner' in the lower court—may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court.") (citing *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000)).

CONCLUSION

The Trial Court found that Appellants had not met their burden to prove there was improper conduct under Rule 4.2 of the South Carolina Rules of Professional Conduct and the ABA Formal Opinion 11-46, and, in fact, counsel for Respondent's conduct was proper under such authority. Because Appellants have failed to show an abuse of discretion by the trial court and the Order is consistent with existing authority, the appeal does not set forth any grounds warranting a reversal. Accordingly, the lower court's Order should be affirmed.

Respectfully submitted,

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