THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No.: 2014-CP-26-07862
Appellate No.: 2016-000522

Karon Mitchell and Kyle Mitchell, ... Appellants,

vs.

Rabon & Rabon, Inc. ..... Respondent.

INITIAL BRIEF OF RESPONDENTS RABON & RABON, INC.

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STATEMENT OF THE CASE

This is a dispute between an brother and sister with respect to the family hotel and restaurant businesses which they inherited from their parents. On the one side are the sister, Karon Mitchell, her husband, Kyle Mitchell, and the limited liability company they control, MB Boardwalk Entertainment, LLC. Karon Mitchell and Kyle Mitchell are the defendants in the underlying case, and they are the Appellants in this matter. On the other side are Jack Rabon individually and as Personal Representative of the Estate of Peggy Jo Hardee Rabon (mother of Jack Rabon and Karon Mitchell), as well as the corporation that Jack Rabon controls, Rabon & Rabon, Inc. Rabon & Rabon, Inc. is the Respondent in this matter.

The disputes concern allegations of mismanagement and misappropriation that Jack Rabon and Rabon & Rabon, Inc. (collectively "Rabon") have against Karon Mitchell and Kyle Mitchell (collectively "Mitchells" or "Defendants"), and similar allegations by the Mitchells against Rabon. Both MB Boardwalk Entertainment, LLC ("LLC") and Rabon & Rabon, Inc. ("Corporation") have failed as businesses, and their real estate assets have been sold and/or foreclosed up. Neither business is operational. The dispute is acrimonious, and it gave rise to multiple civil actions, four of which were settled pursuant to the Mediation Settlement Agreement which is the subject of this appeal.[1]

The parties to this appeal reached a global settlement during mediation on October 30, 2015, on which date all parties and their attorneys signed a Mediation Settlement Agreement ("Agreement"). During mediation the two sides advocated

[1] A fifth civil action (No. 2015-CP-26-01628) was dismissed by the Mitchells after their previous attorney filed a motion to be relieved as counsel.

different business plans for the LLC and the Corporation. The parties agreed to let the Defendants try their business plan first (called "Plan A"), and if it failed, Plaintiff would implement "Plan B."

In order to provide the Defendants with sufficient time to attempt to attempt Plan A, while still providing Rabon with sufficient time implement Plan B if Plan A did not succeed, the Agreement provided for a thirty-day window in which the Defendants must achieve specific benchmarks in order for Plan A to continue. If those benchmarks were not achieved, then Plan B would be automatically triggered.

For thirty days, Defendants pursued Plan A pursuant to the Agreement. However, the Defendants failed to achieve the benchmarks within the thirty-day window. The parties do not dispute that the benchmarks were not met. Only when Plaintiff notified Defendants that Plan B had been triggered by the benchmarks not being met, did Defendants raise any objection or challenge to the Agreement. Plaintiff and Defendants filed cross-motions to respectively to enforce or dismiss the Agreement. Defendants' asserted Duress as the sole ground in support of their motion.

The Court conducted a hearing on January 20, 106 on both motions. Defendants did not introduce any evidence in support of their Duress argument during the hearing. Accordingly, an Order was issued denying Appellants' motion and granting Respondent's motion. The Order was signed February 4, 2016 and entered on February 8, 2016. Appellants filed a motion for reconsideration which was denied via an Order signed on February 8, 2016, and the Order was entered on February 10, 2016. Appellants filed their Appeal on March 10, 2016.

STATEMENT OF THE FACTS

On October 30, 2015, a mediation was held to resolve the disputes which underlie the four actions between Defendants and Rabon. **(Plaintiff's Memo in Opposition pp. 1-3).**

Defendants were represented during mediation by Rachael Dain of the law firm Attorney Dain, LLC. Rabon was represented by Lane D. Jefferies of the McNair Law Firm. The Mediator was Dalton Floyd, of the Floyd Law Firm. **(Plaintiff's Memo in Opposition pp. 1-3).**

Rabon and Lane Jefferies arrived first to mediation. The mediator later told Lane Jefferies that Defendants and their counsel had arrived. At no time during the mediation did Rabon or Lane Jefferies ever see or speak with Defendants. **(Plaintiff's Memo in Opposition pp. 1-3).**

Mediation lasted well over ten hours, and concluded successfully when Defendants and Rabon entered into the Agreement. **(Plaintiff's Memo in Opposition pp. 1-3).**

The Agreement is in writing, signed by the parties and their counsel, dated October 30, 2015, and filed with this Court.

Among other things, the Agreement disposed of:

i. Civil action no. 2014-CP-26-05740

ii. Civil action no. 2015-AD-26-00004

iii. Civil action no. 2015-CP-26-01628[2]

iv. Civil action no. 2014-ES-26-01933

[2] Recently dismissed ***without*** prejudice.

v. An *ex parte* Affidavit and Application for Involuntary Emergency Admission for Chemical Dependency filed on June 23, 2015 of unknown Civil Action Number. **(Plaintiff's Memo in Opposition pp. 1-3).**

The Agreement required, among other things, that the Defendants execute and place into escrow certain documents prior to November 30, 2015. **(Plaintiff's Memo in Opposition pp. 1-3).**

The Agreement provided that if Defendants achieved certain goals before November 30, 2015, then "Plan A" – which Defendants designed and preferred – would be executed. **(Plaintiff's Memo in Opposition pp. 1-3).**

The Agreement further provided that if "Plan A" was not triggered, then "Plan B" would be become effective. **(Plaintiff's Memo in Opposition pp. 1-3).**

Between the October 30, 2015 mediation and the November 30, 2015 deadline to trigger Plan A, Defendants repeatedly represented through emails from their attorney that Defendants accepted the Agreement as binding, and were performing under it. **(Plaintiff's Memo in Opposition pp. 1-3).**

On December 1, 2015, Rabon informed Defendants that Plan A had not been triggered because Defendants failed to meet the goals they agreed to, and that Plan B was therefore effective. Rabon further advised Defendants that Defendants had failed to place documents into Escrow as required. **(Plaintiff's Memo in Opposition pp. 1-3).**

Defendants did not perform under Plan B; therefore on December 10, 2015, Rabon filed their Motion to Compel Settlement. **(Plaintiff's Memo in Opposition pp. 1-3).**

On December 15, 2015, Defendants filed the instant Motion to Dismiss Mediation Settlement Agreement ("Defendants' Motion"), but did not serve Defendants' Motion on Rabon. **(Plaintiff's Memo in Opposition pp. 1-3).**

On January 11, 2016, Defendant Kyle Mitchell emailed a copy of Defendant's Motion to Rabon's counsel. **(Plaintiff's Memo in Opposition pp. 1-3).**

On January 20, 2016, a hearing on the two motions was held, at which Defendants did not introduce any evidence in support of their Duress argument. **(Transcript of January 20, 2016 Hearing (Transcript p. 1)).**

An Order denying Appellants/Defendants' motion and granting Respondent/Plaintiff's motion was signed February 4, 2016 and entered on February 8, 2016. **(February 8, 2016 Order).**

Appellants filed a motion for reconsideration on February 2, 2016 which was denied via an Order signed on February 8, 2016, and the Order was entered on February 10, 2016.

Appellants filed this Appeal on March 10, 2016.

STANDARD OF REVIEW

I. The Rachel Dain Issue

The Rachel Dain Issue concerns alleged exclusion of evidence as well as denial of a continuance. Accordingly, it is reviewed only for abuse of discretion. State v. Saltz, 346 S.C. 114, 121 (2001) ("admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion."); State v. Hill, 409 S.C. 50, 59 (S.C. 2014) (". . . denial of a continuance is within the sound discretion of the trial judge and is reviewable on appeal

only when an abuse of discretion appears from the record."). "An abuse of discretion occurs when the trial court's conclusions either lack evidentiary support or are controlled by an error of law." State v. Chisholm, 395 S.C. 259, 265, 717 S.E.2d 614, 617 (Ct. App. 2011).

II. The Rule 43 Issue

With respect to the Rule 43 Issue and the Duress Issue, even under an equitable standard of review, this court "is not required to disregard the findings of fact by the trial court nor ignore the fact that the trial judge is in the better position to assess the credibility of the witnesses." Oskin v. Johnson, 400 S.C. 390, 397, 735 S.E.2d 459, 463 (2012). Moreover, this Court's "right to make factual findings pursuant to an equitable standard of review is of no avail [to Appellants] since the record does not present evidence allowing [this Court] to find missing facts." S.C. DOT v. M & T Enters. of Mt. Pleasant, LLC, 379 S.C. 645, 669, 667 S.E.2d 7, 20 (Ct. App. 2008). As discussed below, Appellants did not present any evidence to the trial court.

ANALYSIS

Defendants raise four Issues on Appeal. None are preserved for appellate review. Even if they had been preserved, the Appeal should still be dismissed because Defendants are wrong on the merits. Defendants' Issues on Appeal are as follows:

(1) Whether the trial court erred in finding the Agreement was enforceable under rule 43(k), SCRCP. ("**The Rule 43 Issue**").

(2) Whether the trial court erred in ruling that Defendants failed to plead the elements of duress.

(3) Whether the trial court erred in ruling that Defendants did not present sufficient evidence to support their claim of duress. (together with Issue #2 above, "**The Duress Issue**").

(4) Whether the trial court erred in not granting Defendants' request to require Rachel Dain's presence at the January 20, 2016 hearing or continuing the hearing until she could appear. ("**The Rachel Dain Issue**").

I. Defendants' Issues on Appeal are Not Preserved.

Defendants' appeal should be dismissed, because the Issues on Appeal were not timely raised with specificity and ruled upon by the trial court. Defendants' Issues on Appeal are also abandoned due to Defendants' failure to provide any legal analysis.

A. Defendants Failed to Timely Raise their Issues on Appeal to the Trial Court with Specificity.

"The first step in preserving an issue for appellate review is to actually raise it to the lower court." Jean Hoefer Toal, et al., *Appellate Practice in South Carolina* 66 (1999); see also Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731,733 (1998). The specific grounds for an objection must be stated. Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731,733 (1998). The lower court must also rule upon the issue for it to be preserved for review. Id. A party cannot use a Rule 59(e) motion to present an issue that could have been raised prior to the judgment but was not raised. Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 27, 609 S.E.2d 506, 510 (2005). Nor can a party make an objection to a ruling after the trial judge had an opportunity to address it; objections must be contemporaneous with the ruling at issue. State v. Aldert, 333 S.C. 307, 312, 509 S.E.2d 811, 813 (1999). "It 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." Regions Bank v. Schmauch, 354 S.C. 648, 662 (Ct. App. 2003).

The Rule 43 issue is not preserved because Defendants' did not object during the hearing and did not raise the issue in their Rule 59 Motion. Defendants Motion to Dismiss contains no mention of Rule 43, and Rule 43 arose at trial only tangentially, with the entire discussion contained in the following twenty-two lines:

> MS. MITCHELL: Yes, sir. Yes, sir. I also come to you with -- I also come to you with the Supreme Court Rule. I also come to you with the Supreme Court Rule Number -- Rule, Rule 43, conduct of trial, if you'll notice 14, and I have law document for you to look at.
>
> THE COURT: Right. That's agreements of counsel. That's what they're trying to enforce. They say they've got a written agreement between the parties that should be enforced because it was reduced to writing.
>
> MS. MITCHELL: But if you'll, if you'll read the, the case law on it, the, the second part, Farnsworth v. Davis.
>
> THE COURT: Yeah. That's just whether or not the parties adequately –
>
> MS. MITCHELL: I advised --
>
> THE COURT: -- placed an agreement on the record or reduced it to writing.
>
> MS. MITCHELL: It was not put on the record until I told Rachel I didn't want -- I was --
>
> THE COURT: It doesn't have to be. If it's reduced to writing, it's either or. You can either put it on the record or you can reduce it to writing. It doesn't have to do both.
>
> MS. MITCHELL: This is my livelihood.
> (GG p. 17 lines 4-25)

Defendants then abandoned the Rule 43 argument and moved on to argue that the terms of the Settlement Agreement were unfair and that their attorney represented them poorly. **(Transcript p. 17 line 25; p. 18 lines 10-11; 18-20)**. No objection was made with respect to Rule 43 during the hearing, and Defendants' Rule 59 Motion does not raise the issue. Instead, Defendants raised the Rule 43 issue for the first time in their Initial Brief. Accordingly, the Rule 43 issue is not preserved. Regions Bank v. Schmauch, 354 S.C. at 662.

The Rachel Dain Issue is not preserved because Defendants' did not raise the issue to the trial court, the trial court did not make a ruling on it, and Defendants did not raise the issue in their Rule 59 Motion. Defendants *pro se* Motion to Dismiss contains no mention of requiring Rachel Dain's attendance (as either an attorney or a witness). The only mention during the hearing of Rachel Dain's not being there occurred near the end (37 lines from the end of the 556-line transcript). In response to the trial court's question "Anything further?" **(Transcript p. 23, line 19)** Defendants replied:

> MR. MITCHELL: Well, Your Honor, it just kind of proves that she, she, she didn't represent us as well -- I'm sorry. She didn't represent us as well, she's not here. We asked her To come and she would not come.
> **(Transcript p. 23, ll. 20-23)**.

Defendants did not object to Rachel Dain's absence at any time during the hearing (let alone at the beginning), the trial court did not make any ruling with respect to Rachel Dain, and Defendants' Rule 59 Motion does not mention Rachel Dain. Instead, Defendants raised the Rachel Dain Issue for the first time in their Initial Brief. Accordingly, the Rachel Dain Issue is not preserved. Regions Bank v. Schmauch, 354 S.C. at 662.

The Duress Issue is not preserved because Defendants did not raise it with specificity. As described in greater detail below, Defendants' Rule 59 Motion does not point to any specific error in the trial court's order, nor does it present a legal argument. Instead, Defendants' Rule 59 Motion consists merely of block quotations of authority from California, Florida, Maryland, New York, North Carolina, Ohio, South Carolina, and Texas, along with a handful on conclusory statements. Defendants do not explain how the law of the various foreign jurisdictions is relevant to this well-settled issue of South Carolina law. Nor do Defendants do not offer any legal argument to connect the cited authority to the outcome they desire. Conclusory statements without supporting authority do not preserve an issue for appeal. State ex rel. Wilson v. Ortho-Mcneil-Janssen Pharms., 414 S.C. 33, 83 (2015). Likewise, block quotes of authority (especially foreign authority) without any legal argument must also fail to preserve an issue for appeal.

B. Defendants' Conclusory Statements without Argument are Abandoned.

"Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide [the appellate court] with a platform for meaningful appellate review." Herron v. Century BMW, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) (quoting Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006))). Accordingly, issues must be raised with enough specificity for the lower court and the opposing party to understand the point, and have the opportunity to correct the alleged error. Broom v. Southeastern Highway Contracting Co., 291 S.C. 93, 105 (Ct. App. 1986). As a result, "short, conclusory statements made without supporting authority are deemed abandoned on

appeal and therefore not presented for review." Glasscock, Inc. v. United States Fid. & Guar. Co., 348 S.C. 76, 81 (S.C. Ct. App. 2001)."

Defendants' Rule 59 Motion does not point to any specific error in the trial court's order, nor does it present a legal argument. Instead, Defendants' argument in their Rule 59 Motion consists of solely of block quotations of authority, and the following ten conclusory statements:

1. "In October 2015, the parties allegedly agreed to a settlement of this matter. In December 2015, the Defendants requested that the purported Mediated Settlement Agreement be vacated and declared null and void. The matter is currently before the Court on Defendant's Motion for Reconsideration of the purported Mediated Settlement Agreement." **(Defendants' Memo in Support of Rule 59 Motion p. 2)**
2. "Defendants have given notice of their request for rescission of the mediated settlement agreement. " **(Defendants' Memo in Support of Rule 59 Motion p. 2)**
3. "The purported mediated settlement agreement is conditioned upon court approval." **(Defendants' Memo in Support of Rule 59 Motion p. 3)**
4. "This court has the authority to set aside the mediated settlement agreement." **(Defendants' Memo in Support of Rule 59 Motion p. 3)**
5. "Defendants Lacked Understanding of the mediation settlement

agreement." **(Defendants' Memo in Support of Rule 59 Motion p. 4)**

6. "Defendants did not consent to the material terms of the mediated settlement agreement." **(Defendants' Memo in Support of Rule 59 Motion p. 5)**

7. "The terms of the purported mediated settlement agreement are unconscionable and therefore unlawful." **(Defendants' Memo in Support of Rule 59 Motion p. 6)**.

8. "Defendant Karon Mitchell was under a doctor's care at the time of the mediated settlement conference due to the events involving the plaintiff leading up to the mediation and, therefore, the purported mediated settlement agreement is invalid and unenforceable based on coercion, duress, and undue influence." **(Defendants' Memo in Support of Rule 59 Motion p. 9)**.

9. "Defendants' counsel was ineffective at the purported mediation conference by persuading Karon Mitchell to sign the purported mediation settlement agreement despite defendants' indication that Karon Mitchell did not wish to sign the document." **(Defendants' Memo in Support of Rule 59 Motion p. 10)**.

10. "Based upon the authorities cited, the Defendants respectfully request that the Court reconsider its previous ruling regarding the Mediated Settlement Agreement." **(Defendants' Memo in Support of Rule 59 Motion p. 10)**.

In addition to the above ten conclusory statements, Defendants Rule 59 motion contains block quotations of authority from the following jurisdictions:

1. California (22 citations)
2. Florida (1 citation)
3. Maryland (1 citation)
4. New York (1 citation)
5. North Carolina (1 citation)
6. Ohio (1 citation)
7. South Carolina (4 citations)
8. Texas (1 citation)

However, Defendants Rule 59 Motion does not contain any argument as to how or why the twenty-eight citations of foreign authority are relevant to the defense of duress under South Carolina law.

Because each of Defendants' Issues on Appeal were either not raised to the trial court at all, or not raised with sufficient specificity for the trial court to have a fair opportunity to understand and correct the alleged error, none of the Issues on Appeal are preserved for this Court's review. Accordingly, Defendants' Appeal should be dismissed.

II. The Trial Court did not commit reversible error.

Even if Defendants' Issues on Appeal were preserved for appellate review, the Appeal should still be dismissed because the trial court did not commit reversible error.

A. The trial court was correct in not requiring Rachel Dain to appear and testify at the January 20, 2016 hearing.

As described above, the fact that trial court did not continue the January 20, 2016 hearing or compel Rachel Dain to appear and testify was not raised as an issue to the trial court and as a result is not preserved. Even had it been raised, this argument would still fail, because the "admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." State v. Saltz, 346 S.C. 114, 121 (2001). Likewise, denial of a continuance is also

reviewed only for abuse of discretion. State v. Hill, 409 S.C. 50, 59 (S.C. 2014) (". . . denial of a continuance is within the sound discretion of the trial judge and is reviewable on appeal only when an abuse of discretion appears from the record.") The Initial Brief does not identify where in the record any abuse of discretion by the trial court in either (a) not compelling Ms. Dain to testify or (b) not granting a continuance.

Instead, the Initial Brief sets forth three unsupported, irrelevant, and mutually incompatible reasons that the trial court should have compelled Rachel Dain to testify at the January 20, 2016 hearing, or in the alternative, continue the matter until such time as Ms. Dain's testimony could be compelled. Defendants do not, nor can they, cite to the record for any instance where they actually moved the trial court for such relief. Rather, Defendants argue without support that the trial court erred in not compelling Rachel Dain's attendance because:

(1) Ms. Dain was the Defendants' counsel of record (**Appellants' Initial Brief p. 14**);

(2) Ms. Dain was "the critical witness" (**Appellants' Initial Brief p. 14**) who would offer testimony of "critical importance" (**Appellants' Initial Brief p. 15**);

(3) Defendants emailed the trial court regarding Ms. Dain (**Appellants' Initial Brief pp. 14-15**).

Each of Defendants' arguments is wholly without merit. First, although Rachel Daine represented Defendants in other respects, Defendants do not, nor can they, cite to any portion of the record which shows that Rachel Dain was or is counsel of record for Defendants in this action. Instead, the record indicates the opposite. For example:

1. Ms. Dain does not appear in the Horry County Public Index as counsel in this matter;
2. Ms. Dain has not appeared in court in this matter;
3. Ms. Dain did not sign Defendants' Motion for Dismissal of the Mediation Settlement Agreement, which Defendants describe as a "pro se" motion (**Appellants' Initial Brief p. 10**);
4. Ms. Dain did not sign Defendants' Motion for Reconsideration of the Purported Mediated Settlement Agreement (construed as a Rule 59 Motion);
5. Ms. Dain has not signed any other pleadings in this matter.

Defendants are either represented by counsel in this matter, or they are pro se – they cannot be both simultaneously. And indeed, Defendants' conceded that they were representing themselves in this action during the January 20, 2016 hearing by stating "I don't have any money to hire an attorney." (**Transcript p. 12, line 16**). In addition, when the trial court instructed the parties to "give the court reporter your name and who you represent," Defendants did not mention the absence of Rachel Dain, instead they responded simply "Karon Mitchell" and "Kyle Mitchell." Indeed the only mention of Rachel Dain's absence from the January 20, 2016 hearing occurred within moments of the end of the hearing when, in answer to the trial court's question "Anything further?" Defendants responded "Well, Your Honor, it just kind of proves that she, she, she didn't represent us as well – I'm sorry. She didn't represent us as well, she's not here. We asked her to come and she would not come." (**Transcript p. 23, ll. 20-23**).

Second, Defendants do not, nor can they, cite to any portion of the record where they informed the trial court of their belief that Ms. Dain was "the critical witness for the issues as to whether Defendants were under duress when they signed the meditation [*sic*] agreement." (**Appellants' Initial Brief p. 14**). Defendants do not cite to any portion of the record where they informed the trial court of their belief that Ms. Dain "was required to appear at [the January 20, 2016] hearing under our Rules as the attorney of record" as they now claim. (**Appellants' Initial Brief p. 15**). Neither do Defendants offer any explanation, either to the trial court or to this court, as to how Ms. Dain could simultaneously be both the attorney of record as well as a witness in the case in light of Rule 3.7, South Carolina Rules of Professional Conduct, Rule 407, South Carolina Appellate Court Rules. In re Crews, 389 S.C. 322, 336 (S.C. 2010) ("Rule 3.7 prohibits a lawyer from acting as an advocate at a trial in which the lawyer is likely to be a necessary witness unless certain exceptions are met."); Collins Entm't, Inc. v. White, 363 S.C. 546, 564 (Ct. App. 2005) ("The roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively.").

Moreover, even if Rule 3.7 did not prevent Ms. Dain's testimony, Defendants do not offer any argument, either to the trial court or to this court, as to how Ms. Dain's could testify as to statements made during mediation in light of Rule 408, South Carolina Rules of Evidence ("Evidence of conduct or statements made in compromise negotiations is likewise not admissible"); Rule 8(a), South Carolina Alternative Dispute Resolution Rules ("Communications during a mediation settlement conference shall be confidential."); and the Agreement to Mediate signed by the parties prior to mediation on

October 30, 2016 ("All statements made during the course of mediation are confidential and privileged, are made without prejudice to any party's legal position, and are non-discoverable and inadmissible for any purpose in any legal proceeding." **(Agreement to Mediate dated October 30, 2015)**.

Third, Defendants' January 19, 2016 email should not "be construed as a request for a subpoena to be issued to Ms. Dain's presence [*sic*] or . . . a request for a continuance to compel Ms. Dain's presence at the hearing." **(Appellants' Initial Brief p. 15)**. As an initial matter, the email was never before the trial court and is not properly part of the record on appeal. As a result, this Court should not consider the email at all.

Even if the email were properly considered by this Court, it is neither a proper request for a subpoena nor for a continuance. By Defendants' own theory, such "requests" would need to come from Rachel Dain, whom Defendants now insist is their counsel of record. On the other hand, if Defendants were *pro se*, then their request should have been directed to the Clerk of Court, pursuant to Rule 45(a)(3), SCRCP ("The clerk shall issue a subpoena . . . to a party requesting it") and their "request" for a continuance would need to be in the form of a motion either made in open court, or filed with the Clerk of Court along with the appropriate filing fee. Defendants do not, nor can they, cite to anything in the record showing that this occurred.

In addition, the January 20, 2016 email is an email; it is not a Motion. Defendants do not cite any authority for the proposition that an unfiled and unserved email may be treated as a motion. The record reveals that Defendants did not file the email with the Clerk of Court; Defendants did not send the email through the U.S. Mail; Defendants did not file an affidavit or certificate of service; and Defendants did not serve the email on

opposing counsel in the manner required by Rule 5, SCRCP. Indeed, Defendants have not, nor can they, cite to anything in the record showing that the email they sent at 10:30 p.m. the night before the hearing was even received by the Court or opposing counsel prior to the hearing.[3] And during the hearing Defendants never raised the issue. Neither did Defendants raise the email issue in their Rule 59 Motion.

As described above, there is support for the trial court's not compelling Rachel Dain to attend the January 20, 2016 hearing. As a result, the trial court cannot have abused its discretion. State v. Chisholm, 395 S.C. 259, 265, 717 S.E.2d 614, 617 (Ct. App. 2011) ("An abuse of discretion occurs when the trial court's conclusions either lack evidentiary support or are controlled by an error of law.).

B. The Trial Court Correctly Held that Defendants Did Not Plead or Prove the Affirmative Defense of Duress

Defendants do not, nor can they, show where in the record they introduced any evidence to support a finding of Duress. The Initial Brief argues that the trial court erred in holding that Defendants did not offer evidence of duress, and that "undisputed evidence" supports Defendants' position (**Appellants' Initial Brief p. 12**).[4] However, the Initial Brief does not contain any references to the transcript, pleadings, orders, exhibits, or other materials as required by Rule 208(b)(4), SCACR, showing where Defendants introduced this "undisputed evidence" of duress. This is for good reason, as Defendants did not introduce any evidence at all, let alone "undisputed evidence." The Transcript reflects that:

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[3] At the risk of gilding the lily, if the email were a motion, it would also violate Rule 6(d)'s ten-day requirement, as well as the Supreme Court's Order dated September 10, 2015 which requires contemporaneous filing of supporting memoranda.

[4] Defendants also argue that the trial court erred in holding that Defendants did not plead the elements of Duress. The holding is not in error, but even if it were, the error would be harmless because the trial court proceeded with the hearing despite Defendants' deficient pleading.

1) No one was sworn in;

2) Defendants did not testify;

3) Defendants did not call any witnesses to testify;

4) Defendants did not enter any documents into evidence; and

5) Defendants did not file any affidavits.

Duress is an affirmative defense, and the burden to plead and prove it lies on Defendants. Strode v. Barnes, 124 S.C. 403, 412 (1923). Because Defendants did not introduce any evidence at all, it is axiomatic that Defendants failed to meet their burden of proof. On this basis alone, the trial court should be upheld.

In addition, even if this Court were to construe Defendants' unsworn and unsubstantiated allegations to be evidence, Defendants' argument still fails because Defendants' allegations (even if accepted as true) do not satisfy any, let alone all, of the three elements of duress. "Three factors must be proved in order to establish that a contract was procured through duress: (1) that the person was coerced to enter into the contract; (2) that the person was put in such fear that he was bereft of the quality of mind essential to the making of a contract, and (3) that the contract was thereby obtained as a result of this state of mind." Gainey v. Gainey, 382 S.C. 414, 428 (2009) (citing In re Nightingale's Estate, 182 S.C. 527 (1937)).

As to the first element, coercion may be either (a) compulsion by physical force or threat of physical force, or (b) the improper use of economic power to compel another to submit. Black's Law Dictionary 124 (4th Pocket Ed. 2011). Defendants did not allege the use of any physical force, or threats of physical force. Neither did Defendants allege

that anyone improperly used their alleged economic power. Instead, the Initial Brief argues without evidence or citation that:

- Defendants "were told by Rachel Dain that [Plaintiff] and its lawyer intended to initiate a lawsuit against [Defendants'] pregnant daughter-in-law for the sole purpose of placing her under stress to induce a miscarriage of her unborn child." **(Appellants' Initial Brief p. 12)**.
- Defendants "believe that [Plaintiff] and its lawyer would intentionally put Appellants' daughter-in-law and [Defendants'] unborn grandchild in physical peril unless she signed the settlement agreement." **(Appellants' Initial Brief p. 12-13)**.

Defendants do not cite any authority for the proposition that filing a lawsuit constitutes the use or threat of physical force, and such a tortured interpretation is contrary to the plain, ordinary, and popular meaning of the words "physical" and "force." As a result, even if Defendants' unsworn and unsubstantiated allegations were treated as evidence, Defendants still fail to establish the first element of duress. On this basis alone, this Court should uphold the trial court's ruling.

As to the second element, Defendants did not allege that they were in "such fear that [they were] bereft of the quality of mind essential to the making of a contract." Gainey at 428. In Nightingale's Estate, our Supreme Court described the requisite level of fear as the "fear which makes it impossible for a person to exercise his own free will." Nightingale's Estate at 547. Defendants did not allege that they were in such fear that it was impossible for them to exercise their own free will. Instead, Defendants allege that Defendant "Karon Mitchell was so distraught and hysterical that she could not physically

read the settlement agreement and could not understand it." (**Appellants' Initial Brief p. 13**).

Defendants do not cite any authority, and Plaintiff is not aware of any, for the proposition that hysteria resulting in an inability to read or understand a document is the legal equivalent of fear which makes it impossible for Defendants to exercise their own free will. On the contrary, a "person who signs a contract or other written document cannot avoid the effect of the document by claiming he did not read it. A person signing a document is responsible for reading the document and making sure of its contents." Regions Bank v. Schmauch, 354 S.C. 648, 663, 582 S.E.2d 432, 440 (Ct. App. 2003) (internal citations omitted). As a result, even if Defendants' unsworn and unsubstantiated allegations were treated as evidence, Defendants still fail to establish the second element of duress. On this basis alone, this Court should uphold the trial court's ruling.

It also bears mentioning that Defendants do not claim that Defendant Kyle Mitchell was hysterical or in fear when he signed the document. Accordingly, the defense of Duress must fail with respect to Defendant Kyle Mitchell.

As to the third element, Defendants do not allege that the Agreement was obtained as a result of a fearful state of mind which made them unable to voluntarily form a contract. "Duress is a condition of mind produced by improper external pressure or influence that practically destroys the free agency of a party and causes him to do an act or form a contract not of his own volition." Willms Trucking Co. V. Jw Constr. Co., 314 S.C. 170, 179 (Ct. App. 1994). The Nightingale's Estate Court described the state of mind as one where one party "substitute[s] his will for the will of the other party." Nightingale at 547.

Defendants did not allege that their free agency was practically destroyed. Nor do Defendants allege that signing the Agreement was not of their own violation. At most, a single unidentified Defendant alleged that "I did not want to sign this." **(Defendants' Motion to Dismiss p. 3)** However, not ***wanting*** to sign a document is not the standard for duress – being ***forced*** to sign is the standard. Neither did Defendants allege that they signed the Agreement because Rabon "substituted his will" for theirs.[5] As a result, even if Defendants' unsworn and unsubstantiated allegations were treated as evidence, Defendants still fail to establish the third element of duress. On this basis alone, this Court should uphold the trial court's ruling.

As an additional sustaining ground, even if Defendants had alleged the above elements, duress does not occur if the purported victim "has a reasonable alternative to succumbing and fails to take advantage of it. " Holler at 267. Here, going to trial instead of signing the Agreement was a reasonable alternative. See Blejski v. Blejski, 325 S.C. 491, 500 (Ct. App. 1997) (holding that although by not accepting a settlement, wife "potentially could have lost custody of her children[, the] wife had the reasonable alternative of taking her chances with a trial.") Defendants failed to take advantage of this reasonable alternative. As a result, even if Defendants had established all three elements of duress, they would still be unable to avail themselves of duress as a defense.

Finally, Defendants conceded that duress was not the cause of their signing the settlement agreement. Instead, during oral argument, Defendants stated that "we were not

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[5] Nor could they, as Rabon and the Defendants never saw one another during mediation, much less spoke to each other. Instead, only the mediator and Defendants' counsel ever saw or spoke with Defendants during mediation. **(Transcript p. 19, l. 10; p. 20, l. 10)** Defendants concede as much, stating at oral argument "I told [Rachel Dane] over and over, 'I'm not signing it.' She said, 'You have to sign it, Karen. You have to sign it. Lane's going to come after you." **(Transcript p. 22, ll. 22-25)**. Because the "Acts of an attorney are directly attributable to and binding upon the client," (Motley v. Williams, 374 S.C. 107, 112, 647 S.E.2d 244, 247 (Ct. App. 2007)), Defendants argue, in essence, that they put themselves under duress.

represented the way we should have been done. We were under a lot of stress. We were advised the wrong way." **(Transcript p. 18, ll. 19-21)**. Defendants further state that Rachel Dain "was the person that relayed or fabricated the statements that placed [Defendants] in fear for the life of their unborn grandchild." **(Appellants' Initial Brief, p. 14)**.

C. The Trial Court Correctly Held that Enforcement of the Agreement is not Barred by Rule 43(k), SCRCP.

As described above, Defendants did not properly raise the Rule 43 issue to the trial in the first instance, and neither does Defendants Rule 59 Motion mention Rule 43. Accordingly, the Rule 43 issues is not preserved for appellate review. However, even if it were preserved, Defendants still lose for the following reasons.

First, the purpose of Rule 43(k) is to "prevent fraudulent claims of oral stipulations, and to prevent disputes as to the existence and terms of agreement and to relieve the court of the necessity of determining such disputes." Ashfort Corp. v. Palmetto Constr. Grp., 318 S.C. 492, 495, 458 S.E.2d 533, 535 (1995). None of the policy concerns which Rule 43(k) was designed to address are present here – no party has claimed that any oral stipulations exist; no party has denied the existence of the Agreement; and no party disputes the terms of the Agreement. Indeed, the trial court held that the pivotal term – that which triggered Plan B rather than Plan A – was "unambiguously set forth" **(Order Denying Defendants' Motion, Granting Plaintiff's Motion, Ordering Defendants to Perform Pursuant to Mediation Settlement Agreement, and Enjoining Defendants from Taking Actions Inconsistent with Medication Settlement Agreement dated February 4, 2016 and filed February 8, 2016 (February 8, Order p. 4)**. Defendants did not challenge this holding, and

accordingly it is the law of the case. This dispute did not arise because of confusion as to the existence or terms of the Agreement. On the contrary, this dispute arose because the Defendants no longer like the terms of the Agreement. As a result, Rule 43(k) has no application here.

Second, the Agreement complies with the requirements of Rule 43(k), because everyone who was required to sign the Agreement actually signed it. The Agreement settled several lawsuits. The litigants in these lawsuits are (a) Karon Mitchell, (b) Kyle Mitchell, (c) a limited liability company controlled by Karon Mitchell and Kyle Mitchell, (d) Jack Rabon; (e) a corporation controlled by Jack Rabon, and (f) Jack Rabon as the personal representative of an estate. To the extent they were represented by counsel at all, Karon Mitchell, Kyle Mitchell, and the limited liability company were represented by Rachel Dain. Lane Jefferies represents Jack Rabon, the corporation controlled by Jack Rabon, and Jack Rabon in his role as the personal representative of the estate.

Rule 43(k) does not bar enforcement of settlement agreements which are "reduced to writing and signed by the parties and their counsel." Inglese v. Beal, 403 S.C. 290, 304, 742 S.E.2d 687, 694 (Ct. App. 2013). Here, Jack Rabon – who controls the corporation and the estate – signed the Agreement binding himself, the corporation, and the estate. Likewise, Defendants Karon Mitchell and Kyle Mitchell – who control the LLC – signed the Agreement binding themselves and the LLC. Lane Jefferies signed the Agreement, and Rachel Dain signed the Agreement.

Defendants do not dispute that these five people signed the Agreement. In fact, Defendants' argument during the hearing was that the Agreement "was not put on the record." (**Transcript p. 17, l. 20**). Now, Defendants appear to have abandoned that

argument, and present a new one – that because each of the five people did not sign separately in each of their separate capacities, Rule 43(k) is not satisfied. (**Appellants' Initial Brief pp. 9-10**). Defendants' argument is without merit – the Agreement binds three people, two entities, and an estate, and the three people who have the authority and power to bind the two entities and the estate each signed the Agreement. See Firestone Fin. Corp. v. Owens, 309 S.C. 73, 75, 419 S.E.2d 830, 831 (Ct. App. 1992) (holding that a person with the authority to bind a partnership does in fact bind it with her signature, without the necessity of including her title). Defendants' apparent argument that each person's title must be written on the signature page impermissibly elevates form well above substance.

CONCLUSION

For the foregoing reasons, this Court should dismiss this Appeal and affirm the Order Denying Defendants' Motion, Granting Plaintiff's Motion, Ordering Defendants to Perform Pursuant to the Mediation Settlement Agreement, and Enjoining Defendants from Taking Actions Inconsistent with Mediation Settlement Agreement and granting injunctive relief.

SIGNATURE BLOCK – NEXT PAGE

Respectfully submitted,

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Myrtle Beach, South Carolina
Date: November 23, 2016

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No.: 2014-CP-26-07862
Appellate No.: 2016-000522

Karon Mitchell and Kyle Mitchell, ... Appellants,

vs.

Rabon & Rabon, Inc. ..... Respondent.

PROOF OF SERVICE

I, Donna M. Brady, an employee of McNair Law Firm, P.A., certify that I have served Respondent's Initial Brief, Designation of Matter, Certificate of Counsel, and Proof of Service on all parties to this matter by depositing a copy in the United States Mail, first class postage prepaid on the 23rd day of November, 2016.

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November 23, 2016

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RE: *Karon Mitchell v. Rabon & Rabon, Inc.*
Appellate Case No.: 2016-000522
Our File No.: 062992.00001

Dear Ms. Kitchings:

With regard to the above matter, enclosed please find a copy of the following:

- Original (unbound) and one copy of the Initial Brief of Respondents Rabon & Rabon, Inc.;
- Original and one copy of the Designation of Matters of Respondents Rabon & Rabon, Inc.; and
- Proof of Service.

By copy of this letter to parties of record, and as shown on the Proof of Service, I hereby serve a copy of the aforementioned documents to the parties of record.

Please return to me one clocked copy of the enclosed documents in the enclosed self-addressed envelope.

Best regards,

McNair Law Firm, P.A.

Lane D. Jefferies

LDJ:dmb
Enclosures
cc: Tucker S. Player, Esq. (via email - tucker@playerlawfirm.com)
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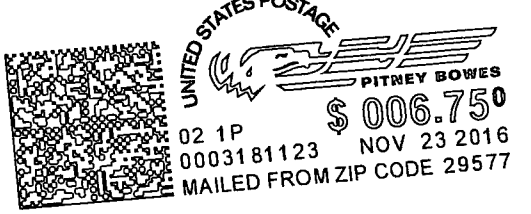

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