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

RABON & RABON, INC.,

Respondent,

vs.

KARON MITCHELL AND KYLE MITCHELL,

Appellants.

APPELLANTS' FINAL BRIEF

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STATEMENT OF THE CASE

The parties to this appeal were involved in multiple cases in Horry County, all arising out of the operation of two family businesses. The parties engaged in a mediation in October 2015. A settlement agreement was signed at the conclusion of the mediation which is the focus of the matter before this Court.

This appeal arises from a hearing on two separate motions. Appellants made a motion to set aside the settlement agreement on the grounds of duress. Respondents made a motion to enforce the settlement agreement. The court conducted a hearing on January 20, 2016 on both motions. The court issued an Order denying Appellants' motion and granting Respondent's motion. That Order was signed February 4, 2016 and entered February 8, 2016. Appellants filed a motion for reconsideration which was denied via an order signed on February 8, 2016 Order and was entered on February 10, 2016. Appellants received written notice of the entry of these orders on February 10, 2016 and this timely appeal followed.

STATEMENT OF THE FACTS

A mediation was held on October 30, 2015 between the parties in an effort to resolve numerous disputes involving five separate lawsuits. The disputes were over the disposition of two family businesses that operated a hotel and a separate mini-golf/restaurant establishment. Jack Rabon[1] was the primary operator of the hotel and Appellants were the primary operators of the mini-golf/restaurant. However, all parties had ownership in both businesses.

There was a single loan on the real estate for both businesses in the approximate amount of $4 million. That loan was in default, with a judicial sale of all real estate owned by both businesses scheduled for early 2016. Appellants and Jack Rabon were personal guarantors of that $4 million debt and faced a deficiency judgment in their personal capacity if the foreclosure sale did not satisfy the entirety of the debt.

The mediation lasted more than 10 hours. During the mediation, the mediator only appeared once with Appellants. **R.p.32 lines 4-10**. In the 11th hour of the mediation, Appellants' attorney, Rachel Dain, told them that opposing counsel threatened to sue her pregnant daughter-in-law in order to put her under enough stress to miscarry her child. **R.p.22 line 19- R.p.23 line 14**. Appellants' daughter-in-law had already miscarried two previous children. Id. Appellants took this threat very seriously and were in substantial fear for the life of their unborn grandchild as there was a long history of violence and threats of violence from Jack Rabon. **R.p.21 lines 21-22**. Appellant Karon Mitchell was so emotionally distraught and hysterical because of the threat made against her grandchild that she was physically unable to read or understand the settlement agreement. **R.p.22 line 21 and R.p.31 lines 17-20.** Yet,

[1] Jack Rabon is not a named party in this action, but was a party in some of the 5 cases to be resolved via the mediation settlement. He is the brother of Karon Mitchell and was an active participant and primary beneficiary in the mediation at issue in this appeal.

Rachel Dain continued to pressure her and told Ms. Mitchell that she had to sign the settlement agreement or opposing counsel was "going to come after [her]." **R.p.31 lines 17-25**. Fearing for the life of her unborn grandchild, and being told by her own lawyer that she had no choice in the matter, Appellants signed the settlement agreement. They would not have signed the settlement agreement but for the threat conveyed to them from Rachel Dain. **R.p.22 line 19- R.p.23 line 14**.

The mediation settlement agreement that was signed by Appellants was lopsidedly in favor of Jack Rabon and Respondent. Under Plan A, Appellants were given the right to continue seeking a refinance of the loan, so long as they were able to remove Jack Rabon as a personal guarantor. Jack Rabon was required to transfer all interest in one company (MB Boardwalk Entertainment, LLC which owned the mini-golf/restaurant) to Appellants. **R.p.77**. Rabon would not be required to pay any money towards the $4 million dollar debt and Appellants were required to transfer all of their interest in Rabon & Rabon to Jack Rabon. **R.p.77**. In order to invoke Plan A, Appellants were required to compel West Town Bank, a third-party, to release Jack Rabon and the Estate of Peggy Jo Hardee Rabon from a commercial debt and mortgage in the amount of $ 4 million within 30 days. **R.p.75**. If Plan A was not invoked, Appellants were required to transfer all of their interest in both businesses, and transfer the title to a motorcycle and trailer, to Jack Rabon without any remuneration. **R.p.78**. Moreover, Appellants were required to execute the transfer all of their rights in both companies to Jack Rabon. The documents transferring all of Appellants' rights were to be signed immediately and held in trust. No similar requirement for the execution of the documents was placed on Jack Rabon or Respondent.

Prior to the mediation, Appellants made numerous attempts to refinance the defaulted

loan. After the mediation, Appellants enlisted the help of Senator Lindsay Graham, the USDA, and had numerous meetings with the bank to refinance the defaulted loan. **R.p.17 line 20 – R.p.18 line 7**. It was impossible to force the Bank to refinance or release Jack Rabon from the personal guarantee. **R.p.27 lines 10-11**. At no point did Appellants ever demand or request that Jack Rabon, the Estate of Peggy Jo Hardee Rabon, or any other interested party comply with or act on Plan A in the settlement agreement.

With regards to the settlement agreement, it purported to apply to the following parties:

(a) Rabon & Rabon, Inc. –vs- Mitchells (2014-CP-26-7862)

(b) (Jack) Rabon as Personal Representative (of the Estate of Peggy Jo Hardee Rabon) –vs- Mitchells (2014-CP-26-5740)

(c) Mitchells v. Jack Rabon

(d) All existing probate matters (re: the Estate of Peggy Jo Hardee Rabon)

R.p.74. No mention of MB Boardwalk Entertainment, LLC was made as being a party to the agreement. Neither Jack Rabon nor the Estate of Peggy Jo Hardee Rabon signed the settlement agreement. It was only signed by Jack Rabon as the President of Rabon & Rabon, Inc. **R.p.76**.

In November, prior to the expiration of the 30 day deadline under Plan A, and prior to the filing of the settlement agreement, Karon Rabon expressed her belief that she was coerced into signing the mediation agreement and wanted to cancel the agreement. **R.p.85, and 193**.

On December 15, 2015, Appellants moved to set aside the settlement agreement on the grounds of duress. In their pro se motion, Appellants alleged that the settlement agreement was procured under coercion and duress **R.p.48**, that Karon Mitchell was under duress and "in no condition to sign" the settlement agreement **R.p.50**, that Appellants were threatened at the mediation that if they did not sign the agreement "Leigh Ann would or could lose her baby"

R.p.50, and that Karon Mitchell was "in no condition to sign anything" and all she could think about was the death of her grandchild **R.p.50**

A hearing was scheduled for January 20, 2016. On January 19, 2016, Appellants requested the lower court require their attorney of record, Rachel Dain, to appear at the hearing. **R.p.85.** Appellants argued that she was a crucial witness that was needed to properly present their motion. The court ignored this request.

At the hearing, counsel for Respondent agreed that the threat alleged by Karon Mitchell was a "highly improper threat" **R.p.28 line 20** and that he had no idea if Rachel Dain actually made such a threat to Karon Mitchell **R.p.28 lines 10-11**. Counsel denied he ever made such a threat. **R.p.28 lines 11-14**. The court stated that Appellants were attempting to enforce Plan A and that Appellants never objected to the settlement agreement prior to the November 30, 2015 deadline expiring. **R.p.33 lines 2-21**. The court further found that Appellants failed to comply with Plan A and Plan B would be enforced. **R.p.5-9**.

ARGUMENTS

Standard of Review

At issue in this case is the interpretation of Rule 43(k), SCRCP. The interpretation of a rule or statute is reviewed de novo. *Catawba Indian Tribe of S.C. v. State*, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007) (stating the interpretation of a statute is a question of law, which the appellate court is free to decide with no particular deference to the trial court). Moreover, it is an action to set aside a contract on the grounds of duress, which lies in equity. In such matters, the appellate court may resolve questions of fact in accordance with its own view of the preponderance of the evidence. *See Wilder Corp. v. Wilke*, 324 S.C. 570, 577, 479 S.E.2d 510, 513 (Ct. App. 1996).

I. THE SETTLEMENT AGREEMENT DOES NOT COMPLY WITH RULE 43(K), SCRCP AND CANNOT BE ENFORCED.

Rule 43(k), SCRCP states the following:

> (k) *Agreements of Counsel.* No agreement between counsel affecting the proceedings in an action shall be binding unless reduced to the form of a consent order or written stipulation signed by counsel and entered in the record, or unless made in open court and noted upon the record, or reduced to writing and signed by the parties and their counsel. Settlement agreements shall be handled in accordance with Rule 41.1, SCRCP.

The law in South Carolina is clear that unless all of the requirements of Rule 43(k) are met, the settlement agreement is not binding. *Farnsworth v. Davis Heating & Air Conditioning, Inc.*, 367 S.C. 634, 627 S.E.2d 724(2006). The settlement agreement was not reduced to a consent order or a written stipulation entered into the record, it was not made in open court and noted upon the record, nor was it reduced to writing and signed by the parties and their counsel. The

settlement agreement was not signed by Jack Rabon in his individual capacity nor as the personal representative of the Estate of Peggy Jo Hardee Rabon. The settlement agreement was not signed by MB Boardwalk Entertainment, LLC nor any attorney on its behalf. Karon Mitchell expressed rejection of the settlement agreement within 30 days of the mediation and Appellants filed their motion to rescind the settlement agreement before any motion to compel the settlement was filed by Respondents. Under South Carolina law, Appellants had an absolute right to rescind any assent to the settlement agreement. Therefore, the settlement was not binding under Rule 43(k), SCRCP and the lower court must be reversed. *Buckley v. Shealy*, 370 S.C. 317, 635 S.E.2d 76 (2006).

II. THE LOWER COURT ERRED IN RULING THAT APPELLANTS "FAILED TO PLEAD" THE ELEMENTS OF DURESS IN A PRO SE MOTION BEFORE THE COURT

The central question when determining whether a contract was executed under duress is whether, considering all the surrounding circumstances, one party to the transaction was prevented from exercising his free will by threats or the wrongful conduct of another. *Gainey v. Gainey*, 382 S.C. 414, 675 S.E.2d 792 (Ct. App. 2009) *citing* 17A Am. Jur. 2d *Contracts* § 218 (2004). Freedom of will is fundamental to the validity of an agreement. *Id.* A party claiming duress can prevail if she shows that she has been the victim of a wrongful act or threat that deprives her of free will, with the result that she was compelled to make a disproportionate exchange of values. *Id.*

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. *In re Nightingale's Estate,* 182 S.C. 527, 527, 189 S.E. 890, 897 (1937).

The lower court found that Appellants did not "plead" the elements of duress and were thus not entitled to relief. Counsel is unaware of any pleading requirements for motions other than stating the grounds upon which the motion is based. However, Appellants pled all the elements of duress outlined in the *Nightingale's Estate* case and its progeny. Appellants alleged that the settlement agreement was procured under coercion and duress **R.p.48**, that Karon Mitchell was under duress and "in no condition to sign" the settlement agreement **R.p.50**, that Appellants were threatened at the mediation that if they did not sign the agreement "Leigh Ann would or could lose her baby" **R.p.50**, and that Karon Mitchell was "in no condition to sign anything" and all she could think about was the death of her grandchild **R.p.50**. These allegations clearly satisfy the three stated elements of duress under South Carolina Law. Therefore, the lower court erred in ruling that Appellants failed to properly plead duress in their motion.

III. THE LOWER COURT ERRED IN RULING THAT APPELLANTS DID NOT PRESENT SUFFICIENT EVIDENCE TO SUPPORT THEIR CLAIM OF DURESS

The lower court found that Appellants presented no evidence of duress. This finding is completely unsupported by the law of South Carolina and the evidence in the record.

If Appellants' assent was induced by an improper threat that caused them to believe they had no reasonable alternative, the contract was voidable. *Willms Trucking Co., Inc. v. JW Constr. Co. Inc.,* 314 S.C. 170, 179, 442 S.E.2d 197, 202 (Ct. App. 1994). Whether duress exists in a particular case is a question of fact to be determined according to the circumstances of each case,

such as the age, sex, and capacity of the party influenced. *See Santee Portland Cement Corp. v. Mid-State Redi-Mix Concrete Co.*, 273 S.C. 784, 786, 260 S.E.2d 178, 179 (1979) (stating whether or not duress was present is a question ordinarily determined on a case-by-case basis). *Gainey v. Gainey*, 382 S.C. 414, 675 S.E.2d 792 (Ct. App. 2009). The fear which makes it impossible for a person to exercise his own free will is not so much to be tested by the means employed to accomplish the act, as by the state of mind produced by the means invoked. If one of the parties to an agreement is in a position to dictate its terms to such an extent as to substitute his will for the will of the other party thereto, it is not a mutual, voluntary agreement, but becomes an agreement emanating entirely from his own mind. *In re Nightingale's Estate*, 182 S.C. 527, 189 S.E. 890(1936). Duress is viewed with a subjective test which looks at the individual characteristics of the person allegedly influenced. *Holler v. Holler*, 364 S.C. 256, 612 S.E.2d 469, (Ct. App. 2005).

The undisputed evidence in this case and before the lower court is as follows:

(a) Appellants were told by Rachel Dain that Respondent and its lawyer intended to initiate a lawsuit against her pregnant daughter-in-law for the sole purpose of placing her under stress to induce a miscarriage of her unborn child;

(b) Appellants were particularly susceptible to panic and fear with regard to a miscarriage as their daughter-in-law had two previous miscarriages and they constantly lived in fear of Jack Rabon;

(c) Appellant Karon Mitchell believed that Respondent and its lawyer would intentionally put Appellants' daughter-in-law and Appellants' unborn grandchild in physical peril unless she signed the settlement agreement;

(d) Appellants would not have signed the settlement agreement but for the threat made against their daughter-in-law and unborn grandchild.

(e) Appellants were told by their own lawyer that unless they signed the settlement agreement, Respondent and its lawyer would intentionally put Appellants' daughter-in-law and Appellants unborn grandchild in physical peril; and

(f) Appellant Karon Mitchell was so distraught and hysterical that she could not physically read the settlement agreement and could not understand it.

This evidence is undisputed. Counsel for Respondent declared at the hearing that he had no idea what Rachel Dain may have said and was never even in the same room with Appellants at the mediation. No affidavit from the mediator or anyone else who interacted with Appellants was provided to attest that they were of sound mind or emotionally stable at the time they executed the settlement agreement. Thus, the undisputed evidence conclusively demonstrates that an improper threat of physical harm(the miscarriage of an unborn child) and improper use of economic power (pursuing a lawsuit for the sole purpose of extorting money) was made and that Appellants were bereft of the quality of mind essential to making a contract.

As to the third element, the substitution of Rabon's will for that of Appellants, a brief glance at the settlement agreement reveals the lopsided benefits accorded to the parties. Under Plan A, Rabon is removed as a personal guarantor for a debt of $4 million and gets to keep his hotel without paying any consideration to Appellants for their shares of Rabon & Rabon. Appellants have to compel a third-party bank to refinance a $4 million loan and release 2 of the 4 personal guarantors on that note within 30 days. They also have to sign over their interest in Respondent without any remuneration. Finally, neither Jack Rabon nor The Estate of Peggy Jo Hardee Rabon are required to sign any documents to be held in trust, nor do they have to sign the

settlement agreement. Under Plan B, Jack Rabon (who is not a party and did not even sign the settlement agreement) gets everything. He gets all the voting rights for all shares of all the companies, plus a motorcycle and trailer that personally belong to Appellants, without having to pay anything to Appellants. He gets to dispose of all the assets "in his own discretion" without any duty or responsibility to Appellants. In addition, Appellants are required to sign the documents transferring their voting rights to be held in trust. Under both scenarios, Jack Rabon gets the far better deal. Yet, he doesn't even sign the settlement agreement. Clearly, Jack Rabon's will was substituted for that of Appellants and the lower court must be reversed.

IV. THE LOWER COURT ERRED IN NOT GRANTING APPELLANTS' REQUEST TO REQUIRE RACHEL DAIN'S PRESENCE AT THE HEARING OR POSTPONING THE HEARING UNTIL SHE COULD APPEAR BEFORE THE COURT

Rachel Dain made an appearance in this matter on behalf of Appellants at the mediation. She signed the mediation agreement and participated in the post-mediation negotiations with Counsel for Respondent for more than 30 days, as demonstrated by Exhibit C to Respondent's Motion to Enforce Settlement. She even requested that Counsel coordinate any court hearing dates with her so she could attend. **R.p.110, and 205**. Appellants requested the lower court to force Mr. Dain's attendance at the hearing and argued that her presence was required for a full determination of the issues in the motions. **R.p.85**. She was the critical witness for the issue as to whether Defendants were under duress when they signed the meditation agreement. She was the person that relayed or fabricated the statements that placed Appellants in fear for the life of their unborn grandchild. She was the person that reiterated in written correspondence that she believed counsel for Plaintiff acted inappropriately and unprofessionally during the mediation. **R.p., 83, 193 and 205**. Finally, and most importantly, she was the counsel of record for

Appellants. There is nothing in the record that relieved her of that status as is required by Rule 11(b), SCRCP. Pursuant to South Carolina law, she was still the only attorney for Appellants on January 21, 2016 when the lower Court heard the motions concerning the validity of the mediation agreement. *Ex Parte Strom*, 343 S.C. 257; 539 S.E.2d 699 (2000). Yet, both Respondent and the lower court proceeded without hesitation to bind Appellants to the mediation settlement agreement that purported to pay Ms. Dain $10,000.00 for a single mediation and gave Appellants a mere 30 days to restructure a $4 million loan. Ms. Dain actually admitted that she was "invested to make this work" in an email to Mr. Jeffries, clearly demonstrating that she had an incentive to force a settlement at mediation, regardless of the terms binding her clients. **R.p.99**.

Rachel Dain was the only person who could affirm or refute the central allegation of Appellants with regard to coercion and distress at the hearing on January 20, 2016. She was required to appear at that hearing under our Rules as the attorney of record. She was the attorney who reviewed and drafted the documents that were supposed to be signed as part of the mediation agreement, according to Mr. Jeffries. But both Respondent and the lower court proceeded without a moment of pause, despite Karon Mitchell's plea to make Rachel Dain appear at the hearing. The January 19, 2016 email should be construed as a request for a subpoena to be issued to Ms. Dain's presence or, at the very least, a request for a continuance to compel Ms. Dain's presence at the hearing. Considering the critical importance of Ms. Dain's testimony, the lower court erred and should have required Ms. Dain to be present at the hearing. Therefore, this Court should reverse and remand this matter for a rehearing with a specific instruction that Ms. Dain be compelled to appear and testify.

CONCLUSION

The lower court erred in finding that the settlement agreement was enforceable under Rule 43(k), SCRCP and that Appellants neither plead nor presented sufficient facts to demonstrate that they were coerced into executing the settlement agreement. Therefore, this matter should be reversed and remanded with instructions to enter an order granting Appellants' motion to set aside the settlement agreement. If this Court disagrees with the argument that Appellants were coerced into executing the settlement agreement, this Court should remand for a new hearing at which Rachel Dain shall be compelled to appear.

Date: June 12, 2017.

Respectfully submitted,

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CERTIFICATION OF COUNSEL

Counsel for appellant hereby certifies that Appellant's Final Brief complies with Rule 211(b), SCACR.

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