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 REPLY BRIEF

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1. All issues were properly preserved for appeal

Appellee argues that Appellants failed to preserve issues on appeal by quoting the transcript of the hearing in which Appellants specifically mentions the issues that were allegedly not preserved for appeal. For example, Appellee quotes the dialogue between the Judge Culbertson and Karon Mitchell wherein she cites to Rule 43(k) and the legal precedent relied upon in this appeal, followed by Judge Culbertson responding with the specific language of Rule 43(k) that this appeal is based on, yet Appellee argues that the issue was not before the lower court. Appellants are at a loss as to what else could have been done to bring the issue to the lower court's attention.

With regards to the issue of Rachel Dain's absence from the hearing, the email submitted to Judge Culbertson, and copied to Mr. Jeffries, was clear and unambiguous in its request and objection that Ms. Dain would not attend the hearing. Rule 5(e), SCRCP is identical to the language of the same Federal Rule. Rule 5(e) provides that a judge may permit pleadings and other papers to be filed initially with him prior to their transmission to the clerk's office. Under this procedure, filing is complete when the judge has custody of the papers. The judge's failure to forward the papers forthwith or to enter a necessary date does not prejudice the party attempting to comply with the filing requirement. 4 Wright & Miller, *Federal Practice and Procedure: Civil* § 1153 (1969). Appellants' submission to Judge Culbertson was proper, provided notice to opposing counsel, and clearly put the matter before the lower court for determination. Moreover, as quoted by Appellee, Karon Mitchell raised the issue directly during the hearing with Judge Culbertson. His response was to specifically recognize that the "major dispute" was between Ms. Mitchell and her attorney. **R.p.32 lines**

24-25. Clearly, the issue of Ms. Dain's absence was before the lower court and preserved for appeal.

The entirety of Appellee's argument that the issues involving Appellants' claims of duress were not preserved is based on the Motion for Reconsideration. The issues of duress were preserved at the initial hearing with Judge Culbertson. During the hearing, Appellants stated numerous facts that established their claim of duress. The mediation lasted more than 10 hours. During the mediation, the mediator only appeared at the opening statements and never actually caucused 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. **Id.** Yet, 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**. In this single paragraph, there are seven specific references to the transcript of the hearing that allege Appellant Karon Mitchell was in fear for the life of

her unborn grandchild when she felt she was forced to sign the mediation agreement. The issues and elements of duress were pled and properly presented to the lower court and therefore preserved for this appeal.

2. The lower court erred in failing to require Rachel Dain's presence at the hearing.

Appellee makes lots of arguments as to why Rachel Dain was not required to be at the hearing or could not testify if she had appeared. None of the arguments have merit. What is telling is the argument of Appellant based on the governing rule, Rule 11, SCRCP, is not addressed by Appellee in any way.

First, Appellee argues that Rachel Dain was not counsel for Appellants. In doing so, Appellee points to materials outside of the record and pleadings filed after Ms. Dain attempted to abandon Appellants. However, Appellee's own argument in this appeal necessitates Rachel Dain be the counsel of record for Appellants. Rule 43(k), SCRCP can only be satisfied if Rachel Dain is the attorney for Appellants. In fact, Appellee argues that Rachel Dain was the attorney for Appellants in Section II.C. of its own brief. More importantly, MB Boardwalk Entertainment, LLC could not represent itself in a legal proceeding in any capacity if it was not represented by an attorney under South Carolina law. Thus, Rachel Dain was, and remains, the attorney of record for Appellants until she is properly released by order of the court as required by Rule 11, SCRCP.

Next, Appellee rehashes its argument that Appellants did not object or raise the issue of Ms. Dain's absence from the hearing. This is addressed above. Appellee goes further to argue that Rule 3.7, SCRPR would prevent Ms. Dain from testifying. This is simply not accurate. Rule 3.7 would require the withdrawal of an attorney who becomes a material

witness (a withdrawal under Rule 11, SCRCP) not some privilege against testifying in a court proceeding. Close on the heels of Appellee's misapplication of Rule 3.7 comes the misapplication of Rule 408, SCRE and Rule 8(a), ADRR. Appellee claims Rule 408, SCRE provides a blanket exclusion for any conduct or statements made in mediation. This is inaccurate. Rule 408, SCRE specifically limits the inadmissibility of such conduct to issues of liability in the underlying case, not the use of duress to force a settlement agreement. Rule 8, ADRR specifically excludes the application of confidentiality to threats of harm made during mediation sessions (Rule 8(b)(4), ADRR), which is exactly what was alleged by Appellants.

What is not addressed by Appellee or the lower court is the violation of Rule 11, SCRCP. Rachel Dain was never relieved as counsel as required under the rule. No inquiry was made as to why she did not appear. At the hearing, Appellee declared numerous times that Rachel Dain was the attorney for Defendants and that, as their attorney, she bound them by her representations. In fact, Appellee admitted into evidence 126 pages of emails from Rachel Dain on behalf of Appellants to support its position that Rachel Dain bound Appellants by her representations. **R.p.17 line 7-14**. Moreover, the only explanation given for her absence is given by counsel for Appellee on page 10 of the hearing transcript. Mr. Jeffries stated "At that stage, Attorney Dane(sic) informed me that the Mitchells might try to avoid the agreement and that she couldn't – was reluctant to represent them in that and I was kind of on my own in dealing with the Mitchells." That is not the way attorney representation works in South Carolina. The only way to be relieved as counsel is through an order of the presiding court "and not otherwise." Ms. Dain's alleged discomfort or misgivings do not justify her abandonment of Appellants and both opposing counsel and the lower court should have been

aware of the Rule. Therefore, the lower court erred and this matter should be reversed.

3. The lower court erred in finding there was no evidence of duress

The specific evidence submitted by Appellants pertaining to duress is provided in Appellants' Brief. Appellee claims there were no citations for that evidence, despite the citations provided for the exact factual allegations in the Statement of Fact. In order to clarify the issue, the undisputed evidence submitted to the lower court will be restated here with citations;

(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; **R.p.22 line 19- R.p.23 line 14**;

(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; **R.p.21 line 2- R.p.23 line 14**;

(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; **R.p.21 line 2- R.p.23 line 14**;

(d) Appellants would not have signed the settlement agreement but for the threat made against their daughter-in-law and unborn grandchild. **R.p.22 line 19- R.p.23 line 14**.

(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; **Id.**; and

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

Appellee did not dispute these facts at the hearing or now on appeal. In fact, Counsel for Appellee agreed at the hearing that it was a "highly improper threat" but he had no idea what Ms. Dain told Appellants. **R.p.28 line 20**. Furthermore, neither counsel nor Appellee even saw or conversed with Appellants on the day of the mediation. **R.p.28 lines 10-11**. By their own admission, they do not possess the personal knowledge to discount or disprove the statements of Appellants.

Appellee's primary argument is that the threat to Appellants' unborn grandchild was insufficient to induce duress. Appellee focuses on the means of the threat (the filing of a lawsuit) to argue that it was insufficiently severe to legally constitute duress. However, South Carolina law clearly states that the means of the threat is not important, it is the end result on the person to whom the threat is directed. "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." *Willms Trucking Co., Inc. v. JW Constr. Co. Inc.*, 314 S.C. 170, 179, 442 S.E.2d 197, 202 (Ct. App. 1994) *quoting In re Nightingale's Estate*, 182 S.C. 527, 189 S.E. 890(1936). The fact that Appellants' daughter experienced two previous miscarriages demonstrates just how real and terrifying the potential for the stress of a lawsuit could be to Appellants. Despite Appellee's claim to the contrary, courts have long understood and recognized the potential harm that can

be caused by the stress of litigation to unborn children. *United States v. McGuire*, 307 F.3d 1192 (9th Cir. 2002)(" A pregnancy in its seventh month poses special risks for a mother and her ***unborn child*** that may be exacerbated by the ***stress*** of trial.") (Emphasis added); *B.C. v. T.G.*, 430 N.J. Supp. 435 (N.J. 2013)(Recognizing that stress is a medically recognized risk factor in bringing on premature labor and birth and that the "negative anticipation" of appearing in court "may itself be harmful to an expectant mother and unborn child"); *Anselmo v. Anselmo*, 2001 Conn. Supp. Lexis 863 ("That it is equitable and appropriate that the ***stress*** of litigation upon the mother and ***unborn child*** be suspended during this obviously critical phase of the pregnancy") (emphasis added).

Appellee makes an argument that the lower court's failure to place Appellants under oath forecloses the use of their statements in open court as evidence to support their motion. No objection was made at the hearing and the statements made by Appellants were in response to the request from the court. The lower court made no indication that the testimony provided by Karon Mitchell was disregarded for its own omission. This argument is without merit.

4. The settlement agreement does not comply with rule 43(k), SCRCP and cannot be enforced.

Appellee cites to a single case in support of its position that the signatures of Karen Mitchell, Kyle Mitchell, and "Jack Rabon as the President of Rabon & Rabon, Inc." was sufficient to bind six separate legal entities. *Firestone Fin. Corp. v. Owens*, 309 S.C. 73, 419 S.E. 2d 830 (Ct. App. 1992), cited by Appellee, is based on a statute with absolutely no application to the case on appeal. First, *Firestone* is based on a partnership (none of the applicable parties to this case are a partnership) and, more specifically, S.C. Code § 33-41-

310. That particular statute would not apply to the matters on appeal even if one of the parties were an actual partnership, as it contains a specific exception for execution of a confession of a judgment.

More importantly, Jack Rabon was never bound by the settlement agreement as he did not execute the agreement in any capacity other than as president of Rabon & Rabon, Inc. MB Boardwalk Entertainment, LLC is never named anywhere in the document. Ever. An LLC is a separate legal entity with its own legal rights. It is impossible to find that an LLC that is not mentioned in a document can be bound by that document. The South Carolina Rules of Civil Procedure are not guidelines to be followed in spirit. They are written prescriptions of law that must be followed, especially when they are clear and unambiguous. Rule 43(k), SCRCP requires ALL parties and ALL counsel to sign the settlement agreement before it becomes irrevocable. That did not happen in this case and the agreement was properly revoked by Appellants.

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: December 19, 2016.

Respectfully submitted,

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CERTIFICATION OF COUNSEL

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

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