

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM HORRY COUNTY  
Court of Common Pleas

Benjamin H. Culbertson, Presiding Judge  
Fifteenth Judicial Circuit

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CASE NO. 2011-CP-26-5044

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DIANE W. JOHNSON ..... Appellant

vs.

SOUTH CAROLINA BANK & TRUST  
DOUG HOLMAN, GLENN BULLARD, AND  
THE ESTATE OF WADEUS W. WEST, ..... Respondents

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APPELLANT'S INITIAL BRIEF

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OCT 28 2013

**SC Court of Appeals**

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1. Pee Dee Stores, Inc. v. Doyle, 381 S.C. 234, 672 S.E.2d 799 (S.C. App. 2009).....3
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## STATEMENT OF ISSUES ON APPEAL

- I. DID THE TRIAL COURT ERR IN GRANTING THE RESPONDENTS' MOTION TO ENFORCE MEDIATION SETTLEMENT AGREEMENT?

### I. STATEMENT OF THE CASE

The Plaintiff filed a Summons and Complaint against the Defendant on June 17, 2011 alleging claims for Breach of Fiduciary Duty, Negligence, Conspiracy, Conversion, Accounting, Legal and Equitable Lien, and Injunctive Relief. The Defendant answered on August 12, 2011. The Plaintiff filed an Amended Complaint on August 12, 2011 and the Defendant answered the Amended Complaint on September 1, 2011. The parties mediated the case before a court certified mediator on May 9, 2012, resulting in a written Mediation Settlement Agreement which is a part of the record. Respondent filed a Motion to Enforce the Mediation Settlement Agreement on June 10, 2013. Respondents' Motion to Enforce the Settlement Agreement was heard before the Honorable Benjamin H. Culbertson at the Horry County Courthouse on June 4, 2013. Judge Culbertson issued an order granting the Motion to Enforce Settlement June 10, 2013. Appellant made a Motion for Reconsideration on June 26, 2013 which was denied by the Court by Order August 6, 2013 and received the Appellant on September 17, 2013. Appellant then timely filed this Notice of Appeal on September 17, 2013.

### II. BACKGROUND FACTS

The Appellants father, Wadeus W. West, passed away on March 31, 2007. In his Will he devised the bulk of his Estate to a Trust primarily for the benefit of his daughter Diane Johnson, the Appellant herein.

The Respondents, South Carolina Bank & Trust (SCB&T) was named as the Trustee of

the Trust. The Trust held substantial real estate. The bank had the real estate appraised and the appraisal indicated a value in excess of \$15,000,000. The appraisal was conducted at the height of the real estate market and just before the real estate crash.

The bank, as Trustee, caused the Trust to enter into a loan relationship with SCB&T for the purpose of borrowing money and using a portion of the real estate as collateral in order to pay estate taxes of several million dollars. Only a portion of the real estate was used as collateral. Within eighteen (18) months, the Note became due but there were no funds to pay the Note. Therefore, the bank extended the loan and demanded that all of the real estate be used as collateral. At that time, the real estate market had already collapsed and the value of the real estate had plummeted so that the value of the real estate may not have been sufficient to cover the new loan. The net result of this unfortunate series of events was that the Trust essentially became insolvent with insufficient real estate assets to pay off the Note to SCB&T.

The Appellant, Diane Johnson, had the right to obtain 5% of the value of the Trust at the end of each calendar year. The Appellant properly notified the Trust of her intention to be paid the 5% distribution, but the Trust refused to make said payment in the appropriate amount. Through various hearings in the Probate Court, the Probate Court ruled that Diane Johnson was entitled to a 5% distribution from the gross assets of the Trust as opposed to the net assets after deducting the loan amounts to SCB&T. By the time this ruling had been made, however, the Trust was insolvent.

The Appellant brought this action against the bank and bank officers for breach of fiduciary duties, self-dealing and conflicts of interest, and failure to pay distributions when

requested.

The case was mediated on May 9, 2012 with court certified mediator Willard D. Hanna presiding. The Appellant signed a Mediation Settlement Agreement. The Bank sought to have the agreement approved by the Probate Court. The Appellants two children are the remainder beneficiaries of the trust. The children were not parties to the Circuit Court action. The children had filed their own action against the bank in Probate Court. Arguably, the Mediation Settlement Agreement signed by their mother, Diane Johnson, affects the interests of her two children, as remainder beneficiaries.

### III. ARGUMENT

#### I. THE COURT ERRED IN GRANTING RESPONDENTS' MOTION TO ENFORCE THE MEDIATION SETTLEMENT AGREEMENT.

In South Carolina, Settlement Agreements are viewed as contracts and are interpreted according to the rules of contract construction. Pee Dee Stores, Inc. v. Doyle, 381 S.C. 234, 672 S.E.2d 799 (S.C. App. 2009). Duress is a defense to the enforcement of 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." Holler v. Holler, 364 S.C. 256, 612 S.E.2d 469 (S.C. App. 2005). "Whether or not 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 compact of the party influenced." Id at 612 S.E.2d at 475.

The Appellant states in her Affidavit that she "was under a tremendous amount of stress due to the mismanagement of [her] father's estate...". Johnson Affidavit, Paragraph 5. She further states that "during the mediation process, I was under duress due to the intense pressure of the

process. I was told I had no choice but to take the bank's offer." Johnson Affidavit, Paragraph 6. She further states "I was intimidated and pressured by the mediator to sign the Settlement Agreement after about eight (8) hours of intense deliberation." Affidavit of Johnson, Paragraph 7. Finally, at Paragraph 11 of her Affidavit, Johnson states "Being forced to sign the Settlement Agreement has caused intense problems with my relationship with both of my children because they are the remainder beneficiaries of the trust. My children think that I have sold them out because of the mediation. I request that the court recognize the tremendous stress and pressure that I was under to sign this agreement and allow me to proceed with the case."

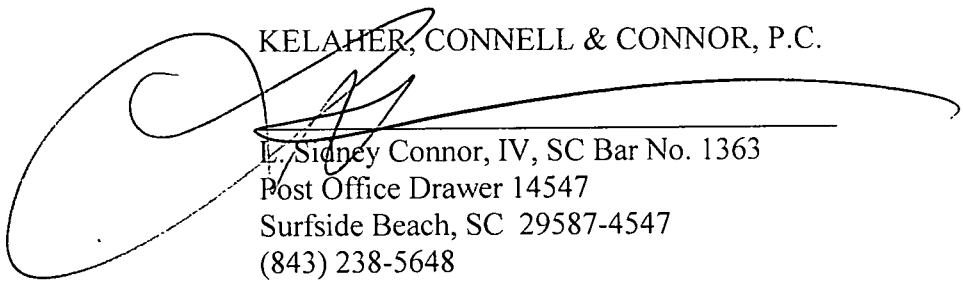
The Appellant's position is that even though her signature appears on the Mediation Settlement Agreement, this court should disregard the document because of duress.

### CONCLUSION

Appellant requests the court to reverse the finding of the trial court and hold that the Mediation Settlement Agreement is not enforceable.

Respectfully submitted,

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October 24, 2013

The Honorable Jenny Abbot Kitchings  
Clerk, South Carolina Court of Appeals  
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RE: Diane W. Johnson v. South Carolina Bank & Trust  
Case Tracking No. 2013-001975  
Appellate Case No. 2013-001975

Dear Ms. Kitchings:

Enclosed please find the following for filing in the above-captioned matter:

- (1) Original and one copy of Initial Brief of Appellants, with Proof of Service;
- (2) Original and one copy of Designation of Matter to be Included in Record on Appeal, with Proof of Service;
- (3) Self-addressed, stamped envelope for return of a filed copy of each to this office.

By copy of this letter, we hereby serve copies of the Initial Brief and Designation of Matter on counsel of record.

With best wishes, I remain

Very truly yours,

L. Sidney Connor, IV

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OCT 28 2013

**SC Court of Appeals**

LSCIV:lb  
Enclosures  
cc w/enc.:

R. Wayne Byrd, Esquire  
Jeffrey L. Payne, Esquire