THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENWOOD COUNTY

Greenwood County Court of Common Pleas

Hon. Donald B. Hocker, Circuit Court Judge, Presiding

Appellate Case No. 2020-000917

Trial Court Case No. 2017-CP-24-01343

Karen Petit ..... Appellant,

v.

Phyllis Jean Krohn, USAA Federal Savings Bank, and
USAA Investment Management Co., ... Respondents.

INITIAL BRIEF OF RESPONDENTS USAA FEDERAL SAVINGS BANK AND USAA INVESTMENT MANAGEMENT CO.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

INTRODUCTION AND SUMMARY

Appellant Karen Petit ("Appellant") brought this action against USAA Federal Savings Bank, and USAA Investment Management Co. (collectively, the "USAA Defendants") after Wells Fargo paid out the balance of her father's, Dr. Edward L. Petit ("Dr. Petit"), individual retirement account ("IRA") to Appellant's nieces after her father's death. Appellant claims that she should have been the beneficiary of her father's IRA account and that IRA beneficiaries were changed improperly by the co-defendant, Phyllis Krohn ("Krohn")[1] under an allegedly improper Power of Attorney. Appellant brought claims against the USAA Defendants for breach of contract, breach of fiduciary duty, and negligence.

Despite Appellant's allegations, discovery and Appellant's own admissions showed that Dr. Petit, himself, changed the beneficiaries of his IRA account from Appellant to his granddaughters. Appellant's claims were also legally defective. Appellant never had a vested interest in the IRA, and thus, she lacked standing to assert her causes of action. Further, the USAA Defendants did not owe any duty—fiduciary, contractual, or otherwise—to Appellant. Based on these inadequacies, and others discussed fully below, the trial court properly granted the USAA Defendants' Motion for Summary Judgment.

COUNTER-STATEMENT OF THE ISSUES ON APPEAL

1. Did the trial court properly grant summary judgment in favor of Respondents USAA Federal Savings Bank and USAA Investment Management Co.?

COUNTER-STATEMENT OF THE CASE

Appellant filed this action on November 8, 2017 against Krohn and the USAA Defendants. *See* Compl. (R. __) Appellant asserted breach of contract, breach of fiduciary duty, and negligence

[1] Krohn has gotten married since the initiation of this lawsuit, and her full name is now Phyllis Krohn Van Swol.

claims against the USAA Defendants based on the allegation that the beneficiaries of Appellant's father's IRA were improperly changed by Krohn as a Power of Attorney. *Id.* at ¶¶ 44, 49, 53 (R. ____) The USAA Defendants filed an answer denying these allegations on January 29, 2018. *See* Answer (R. __) After almost a year and a half of discovery, on May 5, 2019, the USAA Defendants filed a Motion for Summary Judgment. USAA Defendants Mtn. for Summ. J. (R. __) On August 7, 2019, the USAA Defendants filed a Memorandum in Support of their Motion for Summary Judgment. Memo. in Supp. of USAA Mtn. for Summ. J. (R. __) On September 3, 2019, Appellant filed her Memorandum in Opposition to the USAA Defendant's Motion for Summary Judgment. Plaintiff's Memo. in Opp. to the USAA Defendant's Mtn. for Summ. J. (R. __)

On September 4, 2019, a hearing on the USAA Defendant's Motion for Summary Judgment was held.[2] Transcript of September 4, 2019 Hearing (R. __) After the hearing, later in September, the trial court contacted the parties to confirm or clarify whether there was any dispute that Dr. Petit actually signed the change of beneficiary form. Sept. 26, 2019 Email from Appellant's Counsel to Trial Court (R.___) On January 15, 2020, the Court issued its Order Granting Summary Judgment. Order Granting Summ. J. (R.___) On January 27, 2020, Appellant moved the trial court to reconsider its Order Granting Summary Judgment. Mtn. for Reconsid. (R. ___) The USAA Defendants filed a Memorandum in Opposition to the Motion for Reconsideration on February 2, 2020. Memo. in Opp. to Mtn. for Reconsid. (R. __) On May 20, 2020, the trial court denied Appellant's Motion for Reconsideration. Order Denying Mtn. for Reconsid. (R. __) On June 17, 2020 Appellant filed her Notice of Appeal.

[2] Krohn had also moved for summary judgment, and her motion for summary judgment was also heard on September 4, 2020.

COUNTER-STATEMENT OF THE FACTS

On May 2, 2002, Dr. Petit transferred funds from an existing IRA to an IRA at USAA Federal Savings Bank (the "USAA IRA"). Traditional IRA Account Form; IRA Transfer Request (R. ___) In 2007, the USAA IRA was transferred from USAA Federal Savings Bank to USAA Investment Management Co. IRA Transfer Request (R. ___)[3] On January 15, 2007, Dr. Petit completed a designation of beneficiary form, naming his two daughters, Appellant and Kathy Elise Petit ("Kathy"), as his primary beneficiaries and his two granddaughters as secondary beneficiaries. January 15, 2007 Designation of Beneficiary Form (R. __)

On January 26, 2009, Dr. Petit completed a USAA Power of Attorney, naming Krohn as his Attorney-in-Fact. January 26, 2009 Power of Attorney; Compl. at ¶ 11 (R. __) Appellant claims that this Power of Attorney form was defective for having only one witness and expressly prohibited the Attorney-in-Fact from changing the beneficiaries of the USAA IRA. Compl. at ¶¶ 12, 14 (R. __) Krohn did not sign or execute any documents under the January 26, 2009 Power of Attorney. Petit Depo. at 151:11-20; *id.* at164:18 to 165:1 (R. __ to __); *id.* at 166:25 to 167:10 (R. __ to __) On November 9, 2010, Dr. Petit completed a subsequent form Power of Attorney, again naming Krohn as his Attorney-in-Fact. November 9, 2010 Power of Attorney (R. __) The November 9, 2010 Power of Attorney did not contain a provision which limited the Attorney-in-

[3] As an additional sustaining ground, it is undisputed that USAA Federal Savings Bank was not involved in the administration of the USAA IRA after 2007. IRA Transfer Request (R. ___); SCACR 220 ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal."). All of the allegations in the Complaint relate to alleged wrongdoing that occurred after 2007. Compl. (R. __) Accordingly, the trial court's order granting summary judgment to USAA Federal Savings Bank should be affirmed because USAA Federal Savings Bank was not involved in any of the alleged wrongdoing. IRA Transfer Request (R. __); Compl. (R. __)

Fact from changing the USAA IRA's beneficiaries. *Id.* (R. __)[4] Nevertheless, Krohn did not sign or execute any documents under the November 9, 2010 Power of Attorney. Petit Depo. at 151:11-20 (R. __); Krohn Depo. at 76:12-19. (R. __)

In late 2011, Dr. Petit stated that he wanted to change the beneficiaries of his USAA IRA account to his two granddaughters, Leaman Mosby ("Leaman") and Caroline Mosby ("Caroline"). Krohn Depo. at 51:15 to 52:16 (R. ___ to ___) Dr. Petit requested that the USAA Investment Management Co. send him a form so that he could change the beneficiaries of his USAA IRA. *See* USAA Defendant's Response to Plaintiff's Second Set of Discovery Requests (R. ___) On December 29, 2011, USAA Investment Management Co. sent Dr. Petit the requested designation of beneficiary form to the address listed in his file with a prepaid FedEx return envelope. *Id.* (R.); *see also* January 23, 2012 Designation of Beneficiary (R. ___) The requested designation of beneficiary form was completed and designated Leaman and Caroline as primary beneficiaries, and Appellant and her sister Kathy as secondary beneficiaries. *See* January 23, 2012 Designation of Beneficiary; Compl. at ¶ 6. (R. __) The Designation of Beneficiary Form was returned to USAA Investment Management Co. in the prepaid FedEx envelope from the same address to which it was sent—Dr. Petit's record address—and it was signed by Dr. Petit. *See* January 23, 2012 Designation of Beneficiary; *see also* USAA Defendant's Response to Plaintiff's Second Set of Discovery Requests; Krohn Depo. at 16:19-21. (R. __)

On February 27, 2012, Dr. Petit executed a Durable General Power of Attorney, naming his accountant Henry A. Dorn, ("Mr. Dorn") as his Attorney-in-Fact. February 27, 2012 Power of Attorney (R. ___). On May 15, 2013, the Probate Court of Greenwood County declared Dr. Petit incompetent. *In the Matter of Edward L. Petit*, 2013-GC-24-17 (2013) (R. __) The Probate Court

[4] There is no allegation in the Complaint regarding the November 9, 2010 Power of Attorney.

expressly found that the February 27, 2012 Power of Attorney granting Mr. Dorn power to make financial decision for Dr. Petit was valid, and that it would remain in effect. *Id.* (R. ___) The Appellant has not contested the validity of the Dorn Power of Attorney.

In the summer of 2014, Mr. Dorn transferred the entirety of the funds from the USAA IRA to a Wells Fargo IRA (the "Wells Fargo IRA"), and the USAA IRA was closed. Compl. at ¶ 10 (R. __); Petit Depo. at 96:13-24. (R. __) Mr. Dorn set the beneficiaries of the Wells Fargo IRA as Dr. Petit's granddaughters, Leaman and Caroline. Petit Depo. at 106:9-15. (R. ___) There is no dispute that Mr. Dorn had the authority to transfer the funds and to set the beneficiaries of the new Wells Fargo IRA.

On March 18, 2015, Dr. Petit passed away. Compl. at ¶ 4. (R. ___) He was survived by Appellant, and his two granddaughters, Leaman and Caroline. *Id.* at ¶ 6. (R. __) At the time of his death, Dr. Petit's Wells Fargo IRA was worth approximately $454,332, and his USAA IRA was closed. *Id.* at ¶ 10 (R. __); Petit Depo. at 96:13-24. (R. __) Wells Fargo released the funds to Leaman and Caroline, as they were the beneficiaries Mr. Dorn set on the Wells Fargo IRA. Compl. at ¶ 16 (R. __); Petit Depo. at 106:9-15. (R. __) Appellant has not alleged that the payment of the funds by Wells Fargo to Dr. Petit's granddaughters was improper or sought to challenge this disbursal of the funds.

LEGAL STANDARD/STANDARD OF REVIEW

"The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRCP. "When a plaintiff is faced with a defendant's motion for summary judgment that is supported by evidence, the plaintiff must show the court the existence of a genuine

issue of fact." *Dyer v. Moss*, 284 S.C. 208, 211, 325 S.E.2d 69, 70 (Ct. App. 1985). "In such a case, the plaintiff cannot defeat the defendant's motion by relying upon the mere allegations of [her] complaint but must disclose the facts [she] intends to rely on by affidavit or other proof." *Id.* "[I]t is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine." *Grimsley v. S.C. Law Enf't Div.*, 415 S.C. 33, 40, 780 S.E.2d 897, 900 (2015). "An appellate court reviews a grant of summary judgment by applying the same standard as the circuit court under Rule 56(c), SCRCP." *Easterling v. Burger King Corp.*, 416 S.C. 437, 445, 786 S.E.2d 443, 447 (Ct. App. 2016)

ARGUMENT

I. Appellant Lacked Standing to Assert Her Causes of Action.

A. Appellant Abandoned Any Argument that She has Standing to Assert Causes of Action Against the USAA Defendants.

The Trial Court found that Appellant lacked standing to pursue claims against the USAA Defendants. Order Granting Summ. J. at 4-6 (R. ___) Appellant did not argue in her initial brief that the trial court erred in finding that she lacked standing to pursue her causes of action against the USAA Defendants, and thus, she abandoned the issue. Arguments not presented in initial briefs are deemed abandoned on appeal. *Broom v. Jennifer J.*, 403 S.C. 96, 115, 742 S.E.2d 382, 391 (2013); *Savannah Bank, N.A. v. Stalliard*, 400 S.C. 246, 252, 734 S.E.2d 161, 164 (2012); *First Sav. Bank v. McLean*, 314 S.C. 361, 444 S.E.2d 513 (1994) (Appellant was deemed to have abandoned issue for which he failed to provide any argument or supporting authority); *Bluffton Towne Ctr., LLC v. Gilleland-Prince,* 412 S.C. 554, 573, 772 S.E.2d 882, 893 (Ct. App. 2015); *Teeter v. Teeter*, 408 S.C. 485, 500, 759 S.E.2d 144, 152 (Ct. App. 2014) (A party's failure to cite any authority to support an argument renders that argument abandoned on appeal.). The trial court held that Appellant lacked standing to bring these causes of action against the USAA Defendants

because she never had a vested right in the IRA funds. *See* Order Granting Summ. J. at 5 (R. __) Appellant's failure to present an argument that the Court erred in holding that she lacked standing to assert causes of action against the USAA Defendants,[5] dictates a finding that she abandoned any argument related to her standing to assert causes of action against the USAA Defendants and the trial court's Order Granting Summary Judgment must be affirmed.

B. The Trial Court Properly Determined that Appellant Lacks Standing to Assert Her Causes of Action.

1. The Trial Court's Standing Analysis Was Correct.

Even if the Appellant had properly raised an argument on standing which applies to the USAA Defendants, the trial court properly held that the Appellant lacked standing. The trial court found that the Appellant lacked standing to assert causes of action against the USAA Defendants because Appellant only had a mere expectancy in the USAA IRA, never a vested interest. In South Carolina, a beneficiary only has a right to sue for benefits if her rights to the funds have vested. *Shuler v. Equitable Life Assur. Soc. of U. S.*, 184 S.C. 485, 193 S.E. 46, 48 (1937) (holding that a beneficiary of a life insurance policy had a mere expectancy while the policy holder was still alive, and thus, could not bring a claim for damages). A beneficiary's rights are not vested unless or until, (1) the accountholder lacks the ability to freely change the beneficiaries, or (2) the accountholder's death. *Stribling v. Stribling*, 369 S.C. 400, 406, 632 S.E.2d 291, 294 (Ct. App. 2006) ("IRA beneficiary merely has an expectancy in the IRA until the owner's death."); *Horne v. Gulf Life Ins. Co.*, 277 S.C. 336, 338, 287 S.E.2d 144, 146 (1982) ("Where the insured has

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[5] Appellant argued that she had standing to assert causes of action against Krohn. (Appellant's Brief at 14-16) However, she did not argue that she had standing to assert causes of action against the USAA Defendants, and thus, she has abandoned any such arguments as to the USAA Defendants. *Broom*, 403 S.C.at 115, 742 S.E.2d at 391; *Savannah Bank, N.A.*, 400 S.C. at 252, 734 S.E.2d at 164; *First Sav. Bank*, 314 S.C. 361, 444 S.E.2d 513; *Bluffton Towne Ctr., LLC,* 412 S.C. at 573, 772 S.E.2d at 89; *Teeter*, 408 S.C. at 500, 759 S.E.2d at 152.

reserved the right in his policy to change the beneficiary, the named beneficiary does not have a vested right during the insured's lifetime."); *Prince v. Liberty Life Ins. Co.*, 390 S.C. 166, 171, 700 S.E.2d 280, 283 (Ct. App. 2010) ("[T]he rights of the existing beneficiary are inchoate and may be nullified by action on the part of the insured . . . .").

In this case, Appellant never had a vested right in the IRA funds. Appellant admitted that Dr. Petit had the right to freely change the beneficiaries of his IRAs during his lifetime.[6] Petit Depo. at 116:24 to 117:11 (R. __ to __); *id.* at 156:5 to 157:10 (R. __ to __) In fact, Appellant was not the initial beneficiary of the IRA, but Dr. Petit changed the beneficiary to Appellant and her sister in 2007. *See* January 15, 2007 Designation of Beneficiary Form; *see also* January 26, 2009 USAA Power of Attorney (R. __) Further, Mr. Dorn possessed a court-validated power-of-attorney for Dr. Petit. February 27, 2012 Power of Attorney (R. __) Therefore, even if Dr. Petit was declared incompetent, Mr. Dorn's ability to change the beneficiaries of the IRA prevented any expectancy from vesting into a right during Dr. Petit's lifetime. Dr. Petit or his Attorney-in-Fact always had the legal right to change the beneficiaries of his IRA, therefore no rights in the IRA vested during his lifetime.

Further, Appellant was not the beneficiary of the IRA at the time of Dr. Petit's death. Dr. Petit changed his beneficiaries in 2012, from Appellant and her sister, to his granddaughters, Leaman and Caroline. *See* January 23, 2012 Designation of Beneficiary (R. __) Then, in 2014, Mr. Dorn, Dr. Petit's Attorney-in-Fact, transferred the funds in the USAA IRA to the Wells Fargo IRA and closed the USAA IRA. Petit Depo. at 90:14-19 (R. __); *id.* at 96:13-24 (R. __); *id.* at 106:9-15 (R. __) In 2015, Dr. Petit passed away, and the rights to the Wells Fargo IRA vested in

[6] Additionally, Mr. Dorn had the ability to designate and change the beneficiaries of Dr. Petit's IRAs during Dr. Petit's lifetime. Petit Depo. at 156:5 to 157:10 (R. __ to __) Mr. Dorn actually exercised this power when he set the beneficiaries for the Wells Fargo IRA.

the beneficiaries of the Wells Fargo IRA, Leaman and Caroline. Compl. at ¶ 16; Petit Depo. at 106:9-15 (R. __) Thus, Appellant has no vested rights in the USAA IRA or the Wells Fargo IRA. Accordingly, Appellant lacked standing to bring this action, and the trial court properly granted summary judgment on this ground.

2. Appellant's Arguments Directed at Krohn are Incorrect.

Appellant's arguments related to the standing, which are only directed to Krohn, are incorrect, unavailing, and not applicable to the USAA Defendants.

First, Appellant's statement that Respondents stipulated at the summary judgment hearing that Appellant's standing as a contingent beneficiary of an IRA was an issue of first impression in South Carolina is false. The USAA Defendants brought the *Stribling* case to the Court's attention both in its briefing and at that hearing, explaining at the hearing that *Stribling* reasons that courts should "treat vesting of benefits of an IRA the same way you do with an insurance policy[,]" *i.e.*, a beneficiary merely has an expectancy interest in the IRA until the owner's death. *Stribling*, 369 S.C. at 406, 632 S.E.2d at 294 (emphasis added). Transcript of September 4, 2019 Hearing at 23:11-16 (R. __); Memo. in Supp. of USAA Mtn. for Summ. J. at 5 (R. __)

Second, Appellant incorrectly stated that the trial court cited cases from jurisdictions outside of South Carolina. The order granting summary judgment to the USAA Defendants relies on South Carolina law. *See* Order Granting Summ. J. at 4 (R. __)

Third, Appellant completely misreads the *Stribling* case in attempting to argue that it is inapplicable to the facts of this case, and that it actually supports Appellant's argument that she has standing, completely misreads the case. *Stribling* supports the trial court's order. Specifically, it states:

> **The beneficiary interest in a life insurance policy is analogous to the beneficiary interest in an IRA. Like the beneficiary in a life**

insurance policy, the IRA beneficiary merely has an expectancy interest in the IRA until the owner's death.

Stribling, 369 S.C. at 406, 632 S.E.2d at 294 (emphasis added). This is the same conclusion reached by the trial court that Appellant merely had an expectancy and not a vested interest, and supplemental support from the well-established law in the insurance context that an expectancy interest does not vest until the policy owner dies or becomes unable to change the beneficiaries. *See e.g., Horne*, 277 S.C. 336 at 338, 287 S.E.2d 144 at 146; *Prince*, 390 S.C. 166 at 171, 700 S.E.2d 280 at 283.

Fourth, Appellant's "closing the courthouse doors" argument misrepresents the reality of this case and undermines the established legal principle of standing. Appellant incorrectly claims that applying *Stribling* would lead to absurd results because wrongdoers who admit their bad acts would not be subject to lawsuits by litigants such as Appellant.[7] If there had been any wrongdoing, which there was not, the courthouse would not be closed to the correct legal party, Dr. Petit, the owner of the IRA, or his estate. Dr. Petit was the party that opened and held the IRA, not Appellant. Thus, he, or his estate, are the proper party to bring a claim, not a former beneficiary. Thus, the courthouse doors were not closed on a proper party.[8]

Finally, Appellant's reliance on *Mayer v. M.S. Bailey & Son*, 347 S.C. 353, 555 S.E.2d 406 (Ct. App. 2001) is misplaced. *Mayer* involved the contingent beneficiaries **of a trust, not an IRA**. *Id.* at 359, 555 S.E.2d at 409. Because *Mayer* dealt with a trust, statutory provisions under the probate code applied. Statutorily, any interested person, which includes contingent beneficiaries

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[7] The USAA Defendants are not wrongdoers and did not admit to any wrongdoing. Despite the misleading implication that USAA admitted wrong, the incorrect legal argument is really the point to consider.

[8] The statute of limitations ran on Dr. Petit's estate's ability to bring these claims. However, that does not change Appellant's lack of standing.

under the probate code, had standing to bring suit. *Id.* The question of whether statutory standing exists is different from whether constitutional standing does, and is a matter of statutory interpretation. *S.C. Dep't of Soc. Servs. v. Boulware*, 422 S.C. 1, 7, 809 S.E.2d 223, 226 (2018). In our case, the probate code is not applicable and there is no other statutory scheme that confers standing upon Appellant, and thus, *Mayer* is inapplicable.

Appellant's arguments are misplaced and incorrect. Thus, the trial court's Order Granting Summary Judgment should be affirmed.

II. The Court Used the Appropriate Standard for Summary Judgment.

Appellant's argument that the trial court used an incorrect standard in deciding summary judgment is erroneous. While at the summary judgment stage, "the evidence and all inferences which can *reasonably* be drawn therefrom must be viewed in the light most favorable to the nonmoving party[,]" "it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine." *Grimsley*, 415 S.C. at 40, 780 S.E.2d at 900 (internal citations omitted); *Evans*, 370 S.C. at 526, 636 S.E.2d at 635.

Appellant claims that the trial court improperly weighed evidence, however, the trial court actually found that she failed to make a proper showing of the required elements of her claims, and thus, dismissed her claims. *King v. Oxford*, 282 S.C. 307, 311, 318 S.E.2d 125, 127 (Ct. App. 1984) (affirming the trial court's grant of summary judgment where the evidence presented was insufficient, as a matter of law, to establish several necessary elements of the cause of action).

For example, Appellant cites, as an alleged "glaring example" of improper evidence weighing, the trial court's note that a court order finding Dr. Petit competent was "some evidence" that Dr. Petit was competent. (Appellant's Brief at 23) There is no stretch of imagination required for the court to find that a Probate Court order declaring Dr. Petit competent was some evidence

that he was competent one month earlier. There is no requirement that a court must ignore facts that do not support the nonmoving party on summary judgment. *Bloom v. Ravoira,* 339 S.C. 417, 423, 529 S.E.2d 710, 713 (2000) ("[A] court cannot ignore facts unfavorable to that party and it must determine whether a verdict for the party opposing the motion would be reasonably possible under the facts") (internal citations omitted). On the other hand, Appellant attempts to dress up Dr. Petit's alleged hospitalization as evidence of incompetence. The trial court, however, did not hold that a hospitalization was not enough evidence, it held, rather, that it was not evidence of incompetence. Incompetence and medical issues are not interchangeable. "Mental incompetency in its ordinary meaning imports mental deficiency so great as to render one unable to comprehend or transact the ordinary affairs of life." *Rogers v. Rogers*, No. 2017-002091, 2020 WL 6154306, at *3 (S.C. Ct. App. Oct. 21, 2020); *see also Zaragoza v. Zaragoza,* 309 S.C. 149, 152, 420 S.E.2d 516, 518 (Ct. App. 1992) (declining to equate a party's disability with incompetence). Incompetence focusses on and requires great mental deficiencies and lack of comprehension, not just some physical infirmity. No medical evidence of incompetence was presented. In fact, no witness testified that Dr. Petit was incompetent when he changed beneficiaries in 2012. *See generally* Petit Depo. (R. __); Krohn Depo. (R. __).[9] Appellant's failure to present evidence of incompetence was a proper basis for granting summary judgment.

Further, in another argument regarding an unreasonable inference, related to an immaterial fact, Appellant references Krohn's purported apology to Appellant as a reason the Court should not have granted summary judgment for the USAA Defendants. (Appellant's Brief at 23) However, this argument carries no context about how this would have affected the USAA

[9] Moreover, there was no evidence in the record that the USAA Defendants were ever informed of Dr. Petit's hospitalization, and thus, they would have no reason to question any forms signed by Dr. Petit. *See* Order Granting Summ. J. at 4 n.1 (R. __)

Defendants or the trial court's reasoning to the USAA Defendants' motion. Whether Krohn apologized for her own actions has no bearing on whether the USAA Defendants acted properly. Conclusory allegations are not accepted in an appellant's brief, and thus, the Court should disregard that argument. *Savannah Bank, N.A.*, 400 S.C. at 252, 734 S.E.2d at 164 (deeming conclusory and unsupported claims abandoned on appeal).

Appellant's only complaints in her brief ask the Court to draw unreasonable inference, or seek to inject issues regarding non-material facts, which is not sufficient to defeat summary judgment. *Grimsley*, 415 S.C. at 40, 780 S.E.2d at 900 (internal citations omitted); *Evans*, 370 S.C. at 526, 636 S.E.2d at 635. The trial Court properly viewed the record and did not improperly weigh evidence. The evidence simply did not favor Appellant. Appellant failed to show specific facts showing any genuine issue for trial. Accordingly, the trial court properly granted summary judgment.

III. Appellant Failed to Establish that the USAA Defendants Breached any Contract.

A. Appellant Abandoned any Argument that the Court Erred in Dismissing her Claim for Breach of Contract.

Appellant argues that the trial court erred in granting summary judgment to the USAA Defendants on her breach of contract claim. However, her "argument" consists of all conclusory statements and no law. Issues raised in a brief but not supported by authority may be deemed abandoned and not considered on appeal. *Broom*, 403 S.C.at 115, 742 S.E.2d at 391; *Savannah Bank, N.A.*, 400 S.C. at 252, 734 S.E.2d at 164; *First Sav. Bank*, 314 S.C. 361, 444 S.E.2d 513 (Appellant was deemed to have abandoned issue for which he failed to provide any argument or supporting authority); *Bluffton Towne Ctr., LLC,* 412 S.C. at 573, 772 S.E.2d at 89; *Teeter*, 408 S.C. at 500, 759 S.E.2d at 152 (A party's failure to cite any authority to support an argument renders that argument abandoned on appeal.). Because Appellant failed to make a proper argument and

support her conclusory allegation with any jurisprudence, she has abandoned her argument. Accordingly, her argument should be disregarded, and the trial court's order dismissing her breach of contract claim should be affirmed.

B. The Trial Court Correctly Dismissed Appellant's Breach of Contract Claim.

If the Court considers Appellant's argument on breach of contract, it will find that the trial court properly granted the USAA Defendants' Motion for Summary Judgment. Appellant alleged that the USAA Defendants breached a contract that Dr. Petit entered into with the USAA Defendants by using "a Power of Attorney that did not comply with South Carolina Law"; "permitting Defendant Krohn to access and make changes to Dr. Petit's IRA account without valid or legal authorization"; and, "permitting Defendant Krohn to improperly and illegally change the beneficiaries of Dr. Petit's IRA." [10] (Appellant's Brief at 24); Compl. at ¶¶ 43-44. (R. __)

"To establish breach of contract, Plaintiff must allege and prove: (1) a binding contract entered into by the parties; (2) breach or unjustifiable failure to perform the contract, and; (3) damages." *Fuller v. E. Fire & Cas. Ins. Co.*, 240 S.C. 75, 124 S.E.2d 602, 610 (1962).

1. Appellant Did Not Allege Any Clause in Any Contract Between Dr. Petit and the USAA Defendants that was Breached.

The complaint did not specify a particular contract or any contractual provisions setting forth a duty on the USAA Defendants' part which she contends was breached. Compl. at ¶¶ 42-45. (R. __)[11]; *see Fuller*, 240 S.C. at 124 S.E.2d at 610 (stating that the existence of a contract and

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[10] Appellant never amended these allegations or sought to amend them to assert any other basis for this cause of action. Appellant is bound by her pleading. 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. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). She cannot assert additional grounds that were not pled to be heard on appeal. *Id.*

[11] As an additional sustaining ground, USAA Federal Savings Bank was not involved in the administration of the USAA IRA after 2007. IRA Transfer Request (R. __); SCACR 220 ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing

breach thereof are necessary elements of a breach of contract claim). Dr. Petit's only agreement with the USAA Defendants, which is set forth in the Traditional IRA Account Form, was for the USAA Defendants to hold Dr. Petit's funds. IRA Transfer Request Form; January 15, 2007 Designation of Beneficiary Form (R. ___) Rather than citing any language in the Traditional IRA Account Form, the complaint actually cites to the January 26, 2009 Power of Attorney between Dr. Petit and Krohn. "A power of attorney is an instrument in writing by which one person, as principal, appoints another as his agent and confers upon him the authority to perform certain specified acts or kinds of acts on behalf of the principal." *Watson v. Underwood*, 407 S.C. 443, 454, 756 S.E.2d 155, 161 (Ct. App. 2014). Thus, the January 26, 2009 Power of Attorney is not a contract between Dr. Petit and the USAA Defendants, but an instrument purporting to confer authority on Krohn to perform tasks for Dr. Petit. Appellant cannot claim that the USAA Defendants breached an agreement to hold Dr. Petit's IRA funds by pointing to the provision in a Power of Attorney between Dr. Petit and a third party. The Power of Attorney bears no relation to the USAA Defendants holding Dr. Petit's funds. Further, there is no provision in the Traditional IRA Account Form that even mentions a Power of Attorney. In fact, the only provisions in the Traditional IRA Account Form concern periodic distributions, payment instructions, and income tax withholding. Appellant does not allege that any provisions of any agreement between the USAA Defendants and Dr. Petit were breached, and therefore, there is no genuine issue as to material fact that there is no breach of contract.

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in the Record on Appeal."). All the allegations in the Complaint relate to alleged wrongdoing that occurred after 2007. Complaint (R. ___) Accordingly, the trial court's order granting summary judgment to USAA Federal Savings Bank should be affirmed because USAA Federal Savings Bank was not involved in any of the alleged wrongdoing. IRA Transfer Request (R. __)

2. The Conduct Alleged to Have Breached the Contract Could Not Cause Any Damages Because it is Not Related to the Change of Beneficiaries.

Appellant alleged that the USAA Defendants breached a contract that Dr. Petit entered into with the USAA Defendants by using "a Power of Attorney that did not comply with South Carolina Law"; "permitting Defendant Krohn to access and make changes to Dr. Petit's IRA account without valid or legal authorization"; and, "permitting Defendant Krohn to improperly and illegally change the beneficiaries of Dr. Petit's IRA." (Appellant's Brief at 24); Compl. at ¶¶ 43-44. (R. ___) As set forth above, the allegedly invalid Power of Attorney Form was not used to change the beneficiaries of the USAA IRA. It was never used, and an undisputedly valid Power of Attorney, that also was not used, superseded the allegedly invalid Power of Attorney. Petit Depo. at 151:11-20 (R. __); *id.* at 164:18 to 165:1 (R. __ to __); *id.* at 166:25 to 167:10. (R. __ to __); November 9, 2010 Power of Attorney (R. __); Krohn Depo. at 76:12-19 (R. __) Further, Dr. Petti himself, not Krohn, changed the beneficiaries of his IRA account. Sept. 26, 2019 Email from Appellant's Counsel to Trial Court (R. __) Because the allegedly invalid Power of Attorney was never used, and Dr. Petit, not Krohn, changed the beneficiaries to his granddaughters, the conduct complained of could not have caused any damage to Appellant. *See Fuller*, 240 S.C. at 124 S.E.2d at 610 (stating that proof of damages is a necessary element of a breach of contract claim). Accordingly, the trial court properly granted summary judgment.

3. Appellant is not a Party to the Contract.

Appellant's claim further failed because she was not a party to the contract. "[A]n action on a contract must be brought by the party in whom the legal interest is vested, and this legal interest is ordinarily vested only in the promisee or promisor." *Prof'l Bankers Corp. v. Floyd*, 285 S.C. 607, 612, 331 S.E.2d 362, 364 (Ct. App. 1985). Here, Dr. Petit, not Appellant, opened the account with the USAA Defendants. Any contract was between Dr. Petit and the USAA

Defendants.[12] As set forth above in Section I.B, Appellant never had a vested interest in the USAA IRA, and thus, she cannot assert a claim for breach of contract. Any such claim must have been brought by Dr. Petit or his estate, but it was not. Accordingly, the trial court's Order Granting Summary Judgment should be affirmed.

C. Even if There is a Contract or Contract Term that Exists, the Trial Court Correctly Held that Appellant Failed to Show the USAA Defendants Breached Any Term.

Even assuming there was a contract between Dr. Petit and the USAA Defendants preventing Krohn from changing the IRA beneficiaries, the USAA Defendants did not breach any such purported contract. *See Fuller*, 240 S.C. at 124 S.E.2d at 610 (stating that the existence of a contract and breach thereof are necessary elements of a breach of contract claim). Appellant admits (and the evidence is undisputed) that Dr. Petit, himself, changed the beneficiaries of the USAA IRA. Sept. 26, 2019 Email from Appellant's Counsel to Trial Court (R. __); Krohn Depo. at 16:19-21. (R. ___) Further, the evidence shows that after expressing his desire to have his beneficiaries changed to Leaman and Caroline in late 2011, Dr. Petit requested a designation of beneficiary form; the USAA Defendants sent the form to his record address; the form came back from the record address, and; it was signed Dr. Petit. USAA Defendants' Response to Plaintiff's Second Set of Discovery Requests (R.___); Krohn Depo. at 16:19-21 (R. __); *id.* at 51:15 to 52:16 (R.___ to ___); *see also* January 23, 2012 Designation of Beneficiary. (R. ___) Therefore, the evidence shows that Dr. Petit, and not an Attorney-in-Fact, changed the beneficiaries of his IRA

[12] Dr. Petit's contractual relationship at the time pertinent to this appeal was with USAA Investment Management Co., not USAA Federal Savings Bank, as the USAA IRA had been transferred from USAA Federal Savings Bank to USAA Investment Management Co. in 2007.

account.[13] Finally, it must be noted that the USAA Defendants did not pay the IRA funds. Mr. Dorn lawfully, as Dr. Petit's Attorney-in-Fact, transferred the IRA from USAA to Wells Fargo, and Wells Fargo paid the IRA funds.[14] Compl. at ¶ 10 (R. __); Petit Depo. at 96:13-24. (R. __); Sept. 26, 2019 Email from Appellant's Counsel to Trial Court (R. __)

The only evidence in this case showed that Dr. Petit changed the beneficiaries of his IRA, and that the USAA Defendants properly transferred funds based upon the legal request of Mr. Dorn in 2014. Thus, the trial court correctly granted the USAA Defendants' motion to summary judgment.

IV. The Trial Court Properly Granted Summary Judgment on Appellant's Breach of Fiduciary Duty Claim.

Appellant alleged that a fiduciary relationship was created when the USAA Defendants sent a Power of Attorney form to Dr. Petit and that the USAA Defendants breached that duty. However, no fiduciary duty was created or breached.

A. The Relationship Between the USAA Defendants and Dr. Petit was Not a Fiduciary Relationship.

Under South Carolina law, a "fiduciary relationship exists when one reposes special confidence in another, so that the latter, in equity and good conscience, is bound to act in good

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[13] The Power of Attorney that Appellant claims was violated and allegedly led to a breach by the USAA Defendants was not the Power of Attorney that was in effect at the time the beneficiaries of the IRA were changed. In fact, Krohn was named Attorney-in-Fact in a subsequent Power of Attorney dated November 9, 2010. *See* November 9, 2010 Power of Attorney (R. ___) This November 9, 2010 Power of Attorney did not include any language barring the Attorney-in-Fact from changing beneficiaries. Therefore, the February 26, 2009 Power of Attorney and its provisions are irrelevant, as they were superseded by a subsequent Power of Attorney.

[14] The USAA Defendants did not distribute the funds of the USAA IRA to the Appellant's nieces. The funds from the USAA IRA were transferred to the Wells Fargo IRA, the USAA IRA was then closed, and upon Dr. Petit's death, Wells Fargo distributed the funds to the beneficiaries of the Wells Fargo IRA, Leaman and Caroline. Petit Depo. at 96:13-24 (R. __); *id.* at 106:9-15. (R. __)

faith and with due regard to the interests of the one reposing confidence." *O'Shea v. Lesser*, 308 S.C. 10, 15, 416 S.E.2d 629, 631 (1992). Yet no fiduciary relationship exists between a bank and its depositor when the bank is unaware of any special trust reposed in it. *Regions Bank v. Schmauch*, 354 S.C. 648, 671, 582 S.E.2d 432, 444 (Ct. App. 2003).

Dr. Petit deposited money with the USAA Defendants in an Individual Retirement Account. "The normal bank-depositor arrangement creates a creditor-debtor relationship rather than a fiduciary one." *Burwell v. S.C. Nat. Bank*, 288 S.C. 34, 40, 340 S.E.2d 786, 790 (1986). "In limited circumstances, however, a fiduciary relationship may be created between a bank and a customer if the bank undertakes to advise the customer as a part of the services the bank offers." *Cowburn*, 366 S.C. at 42, 619 S.E.2d at 449 (citing *Rush v. South Carolina Natl. Bank*, 288 S.C. 560, 562, 343 S.E.2d 667, 668 (Ct. App. 1986); *In re Int'l Payment Grp., Inc.*, 733 F. App'x 98, 102 (4th Cir. 2018). A bank is not a fiduciary unless it: (1) intentionally separates a customer's funds into a special account, or; (2) "undertakes to advise the customer as part of the services the bank offers." *Rush*, 288 S.C. at 562, 343 S.E.2d at 668. The court makes the determination regarding the equitable issue of whether a fiduciary relationship exists. *Cowburn*, 366 S.C. at 37, 619 S.E.2d at 447.

Appellant's only argument raised on appeal related to the existence of a fiduciary duty is that the USAA Defendants undertook to advise Dr. Petit, (Appellant's Brief at 25) and thus, she has abandoned any argument that the USAA Defendants created a fiduciary duty by placing his funds into a special account.[15] Although Appellant did not allege in her complaint that the USAA Defendants undertook to advise Dr. Petit, she does raise that on appeal. Compl. at ¶¶ 46-50 (R.___)

[15] Further, Appellant did not allege in her complaint that the USAA Defendants held Dr. Petit's funds in trust or separated Dr. Petit's funds into a special account. Compl. at ¶¶ 46-50 (R. __)

Her arguments are unavailing. Appellant again reiterates the "scintilla of evidence mantra", but the existence of a duty is a question of law, not for the jury, but for the judge. *See Spence v. Wingate*, 395 S.C. 148, 160, 716 S.E.2d 920, 926 (2011). Appellant argues the USAA Defendants undertook to advise Dr. Petit because they sent forms to his home and a representative visited his house on one occasion. Although true, this does not begin to suggest that the USAA Defendants undertook to advise Dr. Petit, and Appellant offers no legal authority suggesting such.

Even if the USAA Defendants had a duty to advise Dr. Petit, the breach of fiduciary duty must flow from the duty itself, and Appellant does not claim that the breach of fiduciary duty arose out of improper advising regarding the IRA funds, but rather administration of the USAA IRA. Compl. at ¶¶ 46-50 (R. __) Thus, any alleged breach is outside the scope of the alleged fiduciary duty. *Robinson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 337 F. Supp. 107, 111 (N.D. Ala. 1971), aff'd, 453 F.2d 417 (5th Cir. 1972) ("The relationship of agent and principal only existed between plaintiff and defendant when an order to buy or sell was placed, and terminated when the transaction was complete."); *see also Hill v. Bache Halsey Stuart Shields Inc.*, 790 F.2d 817, 824–25 (10th Cir. 1986) (holding that even where a broker gives advice, it is outside the scope of the fiduciary duty, and stating: "[t]he jury should not, under the evocative phrase fiduciary duty, be given carte blanche to decide any and all perceived transgressions, regardless of the law"). Accordingly, the trial court properly granted the USAA Defendants' Motion for Summary Judgment.

B. The USAA Defendants Did Not Owe a Fiduciary Duty to Appellant.

Even if a fiduciary duty was owed to Dr. Petit, neither Dr. Petit nor his estate brought this suit against the USAA Defendants. Appellant has not cited any case law suggesting that she was owed a vicarious or third party fiduciary duty. Any such argument would be contrary to the well-

established law that discusses the special nature of a fiduciary relationship, *i.e.*, that the relationship is such that one party reposes special confidence in another due to their relationship. *Regions Bank*, 354 S.C. at 670, 582 S.E.2d at 444; *Cowburn v. Leventis*, 366 S.C. at 37, 619 S.E.2d at 447. A relationship that requires such a special trust be created between two people cannot have a vicarious nature. Accordingly, the trial court properly held that the USAA Defendants did not owe Appellant a fiduciary duty, and thus, properly dismissed her claim.

C. The USAA Defendants Did Not Breach any Purported Fiduciary Duty.

Even assuming a fiduciary duty did exist between the USAA Defendants and Dr. Petit, the USAA Defendants did not breach such duty. Appellant asserted that the USAA Defendants should be held liable for allowing an Attorney-in-Fact to change the beneficiary of Dr. Petit's IRA. (Appellant's Brief at 25) However, there is no evidence that an Attorney-in-Fact signed any document submitted to the USAA Defendants and Appellant admits that it was Dr. Petit, himself, that changed the beneficiaries of the USAA IRA. Sept. 26, 2019 Email from Appellant's Counsel to Trial Court (R. ___) Dr. Petit signed the operative Change of Beneficiary Form. *Id.* (R. ___) Therefore, the evidence shows that Dr. Petit, and not an Attorney-in-Fact, changed the beneficiaries of his IRA account.[16] Accordingly, the Court properly granted the USAA Defendants' Motion for Summary Judgment.

Appellant's arguments in this section also contains several red herrings that do not fit within any legal argument and amount to a disjointed effort to smear the well-reasoned opinion of the trial court. These arguments are meritless.

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[16] As stated above, the USAA Defendants did not distribute the funds of the USAA IRA to the Appellant's nieces. The funds from the USAA IRA were transferred to the Wells Fargo IRA; the USAA IRA was then closed, and upon Dr. Petit's death, Wells Fargo, not the USAA Defendants, distributed the funds to the beneficiaries of the Wells Fargo IRA. Petit Depo. at 96:13-24 (R. ___); *id.* at 106:9-15. (R. ___)

First, Appellant argues it is squarely "for the jury to decide" the significance of a Power of Attorney that was never used to execute any document. (*See* Appellant's Brief at 25) To avoid summary judgment, there must be a genuine dispute of material fact, not "an inference that is not reasonable or an issue of fact that is not genuine." *See Grimsley*, 415 S.C. at 40, 780 S.E.2d at 900. It is undisputed that the Power of Attorney to which Appellant refers was never used, (Petit Depo. at 151:11-20 (R. __); *id.* at 164:18 to 165:1 (R. __ to __); *id.* at 166:25 to 167:10. (R. __ to))[17] and that the allegedly invalid Power of Attorney was superseded prior the relevant change of beneficiary. November 9, 2010 Power of Attorney (R. ___)[18] Further, Dr. Petit, himself, signed the Designation of Beneficiary form that changed the beneficiaries of the IRA from Appellant and her sister to Appellant's nieces. Sept. 26, 2019 Email from Appellant's Counsel to Trial Court (R. ___) Therefore, the Powers of Attorneys are not relevant in determining whether there was wrongdoing in the change of beneficiaries.

Second, Appellant's argument regarding the FedEx label reads as more of a conspiracy theory than a legal argument. USAA sent Dr. Petit a prepaid FedEx label with which he could use to return the Designation of Beneficiary Form he signed. However, Appellant finds significance in the argument that the Designation of Beneficiary Form contains a different address than the prepaid label and contends that a discrepancy as to who paid for the FedEx label exists, and is

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[17] Appellant's argument on this point also suffers from a flaw in the chronology of events. Appellant's brief asserts that the Power of Attorney was "executed following the visit from the USAA Agent from Texas." (Appellant's Brief at 25) There is nothing in the record to support this statement. In fact, the Power of Attorney that Appellant references was executed on January 26, 2009. January 26, 2009 USAA Power of Attorney (R.___) The change of the beneficiary form was executed by Dr. Petit in January of 2012, about three (3) years after the Power of Attorney. If the visit of the USAA representative was in 2009, it had no reasonable connection to the change of beneficiaries which was the focus of the claims in this matter.

[18] The subsequent Power of Attorney was similarly not used. Petit Depo. at 151:11-20 (R. ___); Krohn Depo. at 76:12-19. (R. ___).

significant. This argument lacks all merit, as Appellant admits that Dr. Petit executed the Designation of Beneficiary Form. Sept. 26, 2019 Email from Appellant's Counsel to Trial Court (R. __) The exact address to which this completed form was sent and/or who paid for the shipping label is of no consequence and does not constitute the breach of a fiduciary duty. Accordingly, the Court should affirm the trial court's Order Granting Summary Judgment.

V. The Trial Court Correctly Granted Summary Judgment of Appellant's Negligence Claim.

A. Appellant Abandoned any Argument that the Court Erred in Dismissing Her Negligence Claim.

Appellant argues that the trial court erred in granting summary judgment to the USAA Defendants are her negligence claim, however, she her "argument" consists of all conclusory statements and no law. Issues raised in a brief but not supported by authority may be deemed abandoned and not considered on appeal. *Broom*, 403 S.C. at 115, 742 S.E.2d at 391; *First Sav. Bank*, 314 S.C. 361, 444 S.E.2d 513 (Appellant was deemed to have abandoned issue for which he failed to provide any argument or supporting authority). *Bluffton Towne Ctr., LLC*, 412 S.C. at 573, 772 S.E.2d at 892; *Teeter*, 408 S.C. at 500, 759 S.E.2d at 152 (party's failure to cite any authority to support an argument renders that argument abandoned on appeal.). Because the Appellant has failed to make a proper argument and support her conclusory allegation with any citations, she has abandoned her argument. Accordingly, her argument should be disregarding, and the trial court's order dismissing her negligence claim should be affirmed.

B. Appellant cannot, as a matter of law, establish that the USAA Defendants were negligent.

Even if the court considers the Appellant's arguments on negligence, the trial court's order granting summary judgment should be affirmed. In order to succeed on her negligence claim, Appellant must establish: (1) a duty of care owed by the USAA Defendants to Dr. Petit and his

beneficiaries; (2) a breach of that duty by a negligent act or omission; and (3) injury proximately caused by the breach. *Savannah Bank, N.A. v. Stalliard*, 400 S.C. 246, 251, 734 S.E.2d 161, 163-64 (2012).

1. The USAA Defendants did not owe a duty to Appellant.

Appellant claims that the USAA Defendants owed a common law duty to Dr. Petit and his beneficiaries, including Appellant. Although unclear from the complaint, Appellant appears to contend that the USAA Defendants had a duty to ensure that Dr. Petit was the person signing his designation of beneficiary forms.[19] In South Carolina, "the relationship between a general depositor and his bank is that of creditor and debtor[.]" *Owens v. Andrews Bank & Trust Co.*, 265 S.C. 490, 220 S.E.2d 116, 119 (1975). As such, a bank owes depositors no duty of care unless it is "created by statute, contract, relationship, status, property interest or some other special circumstance." *Cowburn v. Leventis*, 366 S.C. 20, 46, 619 S.E.2d 437, 451 (Ct. App. 2005). It is incumbent upon "[t]he Court . . . to determine, as a matter of law, whether the law recognizes a particular duty." *Huggins v. Citibank, N.A.*, 355 S.C. 329, 332, 585 S.E.2d 275, 276 (2003).

Appellant offers no facts to support her assertion that the USAA Defendants owed Dr. Petit a duty. A bank offering services to facilitate a contractual banking relationship does not create a duty of care in negligence, just as it does not create a fiduciary duty, as discussed above. *Int'l Payment Grp.* at *10 (holding that there was no duty created as a matter of law because the bank did not separate the depositor's funds, or advise the depositor). In this case, the USAA Defendants

[19] Appellant's Brief indicates that the alleged breaches related to the use of an improper Power of Attorney. (Appellant's Brief at 27-28) However, it is not disputed these Powers of Attorney were not used. Petit Depo. at 151:11-20 (R. __); *id.* at 164:18 to 165:1 (R. __ to __); *id.* at 166:25 to 167:10. (R. __ to __); November 9, 2010 Power of Attorney (R. __); Krohn Depo. at 76:12-19. (R.__)

facilitated the management of Dr. Petit's IRA by sending him forms. Thus, no duty was created as a result of the banking relationship.

Further, Appellant's argument that the USAA Defendants had a duty to ensure the forms were completed and signed by Dr. Petit cannot be supported. Initially, placing this burden on banks would be unsustainable and impractical, as banks are not in a position to verify whether every signed document they receive bears a genuine signature. Additionally, there is no South Carolina law that places this burden on banks; in fact, the law is to the contrary.[20] *Cowburn*, 366 S.C. at 46, 619 S.E.2d at 451 (A bank owes general depositors no duty of care unless it is "created by statute, contract, relationship, status, property interest or some other special circumstance.") Therefore, because no duty was created by virtue of the parties' relationship, and because there is no evidence of a duty created otherwise, the USAA Defendants are entitled to judgment as a matter of law. "If there is no duty, the defendant is entitled to judgment as a matter of law." *Id.* Further, if that is the duty claimed, then there is no breach, as Dr. Petit, himself, undisputedly signed the Designation of Beneficiary Form. Sept. 26, 2019 Email from Appellant's Counsel to Trial Court (R. __)

2. If Any Duty Existed, it was Owed to Dr. Petit and Any Claim Must have been Brought by His Estate.

Even if a duty was owed to Dr. Petit, neither Dr. Petit nor his estate brought this suit against the USAA Defendants. Compl. (R. __) As discussed above, Dr. Petit, not appellant owned the USAA IRA. IRA Transfer Request (R. __) Appellant does not cite any law that shows that the USAA Defendants owed a duty to Appellant, as the holder of a mere expectancy interest in an IRA

[20] Nevertheless, there is no evidence that the beneficiary designation was signed by anyone other than Dr. Petit. *See* January 23, 2012 Designation of Beneficiary, attached as January 23, 2012 Designation of Beneficiary. (R. __); Sept. 26, 2019 Email from Appellant's Counsel to Trial Court (R. __)

account, and thus, Appellant has abandoned any right to make such an argument. *Broom*, 403 S.C.at 115, 742 S.E.2d at 391; *Savannah Bank, N.A.*, 400 S.C. at 252, 734 S.E.2d at 164; *First Sav. Bank*, 314 S.C. 361, 444 S.E.2d 513; *Bluffton Towne Ctr., LLC,* 412 S.C. at 573, 772 S.E.2d at 89; *Teeter*, 408 S.C. at 500, 759 S.E.2d at 152. Accordingly, the trial court's Order Granting Summary Judgment must be affirmed.

3. The USAA Defendants did not breach any purported duty.

Because the USAA Defendants owed no common law duty to conduct a forensic analysis of every document submitted by its customers, Appellant cannot maintain a claim for negligence. However, even assuming a duty existed, the USAA Defendants did not breach such duty.

Appellant asserts that the USAA Defendants breached the alleged duty by using an improper power of attorney and improperly allowing an Attorney-in-Fact to change the beneficiary of Dr. Petit's IRA. Unlike Appellant's suggestion in her initial brief that an invalid Power of Attorney was used, she has already conceded that it was not used, that it was superseded, and that Dr. Petit signed the Designation of Beneficiary Form. Sept. 26, 2019 Email from Appellant's Counsel to Trial Court (R. __)

C. The Trial Court Did Not Base its Order Granting Summary Judgment to the USAA Defendants on the Economic Loss Rule.

Lastly, Appellant's Initial Brief incorrectly states that the trial court granted summary judgment to the USAA Defendants based on the economic loss rule. Appellant Initial Brief at 27-28. The trial court did not base its ruling on the economic loss rule, and thus, Appellant's argument regarding the economic loss rule is of no moment and should not be considered by this Court. *See* Order Granting Summ. J. (R. __)

CONCLUSION

For the reasons set forth above, the USAA Defendants respectfully requests that the Court affirm the well-reasoned Order of the trial court granting their Motion to Summary Judgment.

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Greenville, South Carolina
November 23, 2020

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Greenwood County Court of Common Pleas
Hon. Judge Donald B. Hocker, Family Court Judge, Presiding

Appellate Case No. 2020-000917
Trial Court Case No. 2017-CP-01343

Karen Petit..... Appellant,

v.

Phyllis Jean Krohn, USAA Federal Savings Bank, and
USAA Investment Management Co.,..... Respondent.

PROOF OF SERVICE

Undersigned counsel hereby certifies that counsel in this action has been served with a copy of the pleadings specified below to the following addresses by electronic mail:

Pleadings:

Initial Brief of Respondents USAA Federal Savings Bank and USAA Investment Management Co.

Respondents USAA Federal Savings Bank and USAA Investment Management Co.'s Designation of Matter to be Included in the Record on Appeal

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November 23, 2020
Greenville, South Carolina

William Brown

From:	William Brown
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Cc:	Jake Taylor
Subject:	Karen Petit v. Phyllis Krohn et al. (2020-000917)
Attachments:	USAA Defendants' Initial Brief.pdf; USAA Defendants' DOM.pdf

Counsel:

Pursuant to Rule 208(a)(2), SCACR, and section (g)(3) the Supreme Court's Order dated May 29, 2020, please find attached for service upon you (1) a copy of the Initial Brief of the USAA Respondents and (2) the USAA Respondents' Designation of Matter to be Included in the Record on Appeal. These documents will be filed with the Court of Appeals by electronic mail later today.

William

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November 23, 2020

VIA ELECTRONIC FILING
The Honorable Jenny Abbott Kitchings
Clerk of Court
The South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201
ctappfilings@sccourts.org

RE: *Karen Petit v. Phyllis Krohn, USAA Federal Savings Bank, et al.*
C.A. No.: 2017-CP-24-01343
NMRS File No.: 000125.02237

Dear Ms. Kitchings:

Pursuant to Rule 208(a)(2), SCACR, and sections (c)(6), (d), (f), and (g) of the Supreme Court's Amended Order dated May 29, 2020, please find enclosed the Initial Brief of Respondents USAA Federal Savings Bank and USAA Investment Management Co., Respondents' Designation of Matter, and a Certificate of Service of same, all of which are submitted for electronic filing in the above-referenced matter. Pursuant to the aforementioned Supreme Court Amended Order, only a single copy of each PDF is being electronically filed, and no additional copies will be filed unless the Court requests otherwise.

We ask also that, at your convenience, you return a copy of the attached documents to us bearing the Court's file stamp. Should you have any questions pertaining to these filings, or if we can provide any other information, please do not hesitate to let us know.

Very truly yours,

William S. Brown

WSB:cs

Enclosures
cc: Scarlett B. Moore, Esq.
Jane H. Merrill, Esq.
Josh Nasrollahi, Esq.