STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenwood County
Donald B. Hocker, Circuit Court Judge
Appellate Case Tracking No. 2020-000917

KAREN PETIT,

APPELLANT,

-v-

PHYLLIS JEAN VAN SWOL, USAA FEDERAL SAVINGS BANK, and USAA INVESTMENT MANAGEMENT, CO.,

RESPONDENTS

INITIAL BRIEF OF RESPONDENT PHYLLIS JEAN KROHN

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STATEMENT OF ISSUES PRESENTED

Summary judgment was properly granted by the trial court where the Appellant could not demonstrate any nexus between the decedent's USAA IRA and his final Wells Fargo IRA and was unable to prove most of the elements for each cause of action insofar as they concerned just the USAA account.

STATEMENT OF THE CASE

Procedural Facts

On November 8, 2017, the Plaintiff-Appellant initiated the underlying lawsuit with the filing of the summons and complaint, alleging against the Defendant-Respondent causes of action for tortious interference with contractual relations, breach of fiduciary duty, negligence, and undue influence. On August 5, 2019, the Respondent filed a motion for summary judgement which was heard before the Honorable Donald B. Hocker on September 4, 2019. The Court of Common Pleas granted summary judgment in favor of the Respondent on all causes of action in its order dated and entered on January 15, 2020.

The Appellant timely filed her motion to reconsider the Court's decisions[1] on January 27, 2020, which was denied by the Court on May 20, 2020. The Appellant filed her notice of intent to appeal the lower Court's orders on June 17, 2020.

Factual History

On February 27, 2012, the decedent Dr. Edward Petit executed a durable power of attorney and established his accountant Henry Dorn as his lawful attorney in fact. ROA ___. Durable Power of Attorney. Approximately a month-and-a-half earlier, while on a cruise with the Respondent Phyllis Krohn, the decedent had suffered a serious cardiac event, which resulted in his being rushed to shore and hospitalized first in Key West and then in Miami. ROA ___. In the days and weeks following his discharge from the hospital on January 22, 2012, executed several documents relating to the administration of his personal affairs, including the Dorn POA. ROA ___. Petit Dep. 83:18-21 (Mar. 14,

[1] Summary judgment had also been granted in favor of the Respondent's co-Defendants/Respondents USAA Federal Savings Banks and USAA Investment Management Company (hereinafter "USAA") in a separate order entered by the Court of Common Pleas on January 15, 2020.

2019). Nevertheless, Dr. Petit's health continued to deteriorate and, in early 2014, the Appellant Karen Petit and Mr. Dorn initiated proceedings in the Probate Court for Greenwood County to protect Dr. Petit's interests. ROA ___.

On February 18, 2014, the Probate Court issued its Protective Order, recognizing Mr. Dorn as the "duly appointed and acting attorney-in-fact for Edward L. Petit, without specific limitation except as to his [Dr. Petit's] healthcare decisions." ROA ___. Protective Order at ¶ 1. Mr. Dorn was directed to investigate all accounts held in the decedent's name. ROA ___. *Id.* at ¶ 2. The court further ordered that USAA release any and all information regarding account's held by Dr. Petit to Mr. Dorn. ROA ___. *Id.* at ¶ 3. Finally, Mr. Dorn was "further authorized to transfer all funds in the name of Edward L. Petit . . . with USAA to another banking or investment institution in his discretion and to close those accounts held at USAA." ROA ___. *Id.* at ¶ 4. Pursuant to this order, Mr. Dorn obtained information from USAA Investment Management Company regarding an IRA owned by Dr. Petit. ROA ___. USAA Power of Attorney. Mr. Dorn then liquidated the USAA IRA and set up an IRA with Wells Fargo N.A. using the funds from the USAA account. ROA ___.

When establishing the Wells Fargo IRA, Mr. Dorn designated Dr. Petit's grandchildren as primary beneficiaries. ROA ___. The Appellant and a trust for her sister were designated as secondary beneficiaries. ROA ___. Individual Retirement Account Designation of Beneficiaries. As such, when Dr. Petit passed away on March 18, 2017, the Wells Fargo IRA balance—approximately $450,000—was distributed to the Appellant's nieces. ROA ___. Complaint at ¶ 4; Van Swol Dep. 65:20-21 (Feb. 26, 2019); Petit Dep. 109:6-7, 159:5. None of the foregoing series of facts is in dispute.

Neither Mr. Dorn, Wells Fargo N.A., Dr. Petit's estate, nor Dr. Petit's granddaughters have ever been parties to this litigation.

The dispute in this appeal centers on a separate but related series of facts that long predate those events described above. In 2002, Dr. Petit rolled over an existing IRA into an account he established with USAA Federal Savings Bank and then later transferred that account in 2007 to USAA Investment Management Company. ROA ___. Traditional IRA Account Form; IRA Transfer Request Form; IRA Transfer Request. For both of these USAA accounts, Dr. Petit designated the Appellant and the Appellant's sister as the account's primary beneficiaries and his granddaughters as their secondary beneficiaries. ROA ___. Jan. 15, 2007 Designation of Beneficiary Form.[2] Aside from being a beneficiary to these accounts, the Appellant was never a party to these accounts. ROA ___. Around the same time, somewhere in the early to mid-2000s, Dr. Petit formed a "close friendship" with the Respondent. ROA ___. Van Swol Dep. 14:2-15:1. As a result, in the intervening years, Dr. Petit would appoint the Respondent his power of attorney with regard to some his affairs, including his account with USAA Investment Management Company. ROA ___. Jan. 26, 2009 Power of Attorney; Nov. 9, 2011 Power of Attorney. As far as can be discerned from the record, the Respondent never acted under the USAA powers of attorney granted to her by the decedent. ROA ___. Petit Dep. 151:11-20; 164:18-23; Van Swol Dep. 76:12-19.

Prior to the cardiac event he suffered in early 2012, Dr. Petit had displayed a desire to make changes to the beneficiaries of the USAA account, going so far as to request forms to make such changes in late 2011. ROA ___. Van Swol Dep. 50:17-52:16.

[2] Later, Dr. Petit would substitute a trust established for the benefit of the Appellant's sister in place of the Appellant's sister. ROA ___.

On January 23, 2012, a day after the decedent returned home from his two-week hospitalization in Florida, the Respondent completed these forms at Dr. Petit's request and he executed the same. ROA ___. Van Swol Dep. 50:5-51:14. Other than the fact that the decedent's signature appeared "wobbly and . . . shaky," no evidence was presented proving or tending to prove that anyone other than Dr. Petit signed the forms in question. ROA ___. Petit Dep. 76:7-11, 77:21-78:9. At the same time, the decedent had recently suffered a significant heart affliction, resulting in hospitalization and subsequent medication, leading to the decedent's having good days and bad days. ROA ___. Petit Dep. 78:11-18. Still, no evidence was presented to show that the decedent was incapacitated on January 23, 2012, or that his condition or the medication he was taking or a combination of the two could have rendered Dr. Petit incapacitated on January 23, 2012. In any case, the forms were submitted to USAA and the primary beneficiaries of that account were changed to Dr. Petit's granddaughters. ROA ___. Again, no evidence was presented demonstrating or tending to demonstrate that the Respondent herself, acting alone rather than at the direction of Dr. Petit, changed the IRA's primary beneficiaries.

Standard of Review

Summary judgment is appropriate "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 a judgment as a matter of law." Rule 56(c), SCRCP. In determining whether summary judgment is appropriate, the court must view the evidence and the reasonable inferences drawn therefrom in the light most favorable to the non-moving party. *Fleming v. Rose*,

350 S.C. 488, 493-94, 567 S.E.2d 857, 860 (2002)(citing *Summer v. Carpenter,* 328 S.C. 36, 492 S.E.2d 55 (1997)). Where more than one reasonable inference can be drawn from the facts of a case, summary judgment must be denied and the issue submitted to the trier of fact. *See Jackson v. Bermuda Sands, Inc.*, 383 S.C. 11, 17, 677 S.E. 2d 612, 616(Ct. App. 2009)(citing *Small v. Pioneer Mach., Inc.,* 329 S.C. 448, 494 S.E.2d 835 (Ct. App. 1997))("A jury issue is created when there is material evidence tending to establish the issue in the mind of a reasonable juror."). "However, this rule does not authorize submission of speculative, theoretical, and hypothetical views to the jury." *Small*, 329 S.C. 448, 461, 494 S.E.2d 835, 841 (Ct. App. 1997)(citing *Hanahan v. Simpson,* 326 S.C. 140, 485 S.E. 2d 903 (1997)). On review of a summary judgment order, the appellate courts will apply the same standard as the trial court. *Fleming*, 350 S.C. at 493(citing *Peterson v. West Am. Ins. Co.,* 336 S.C. 89, 94, 518 S.E.2d 608, 610 (Ct. App. 1999)).

ARGUMENTS

1. Summary judgment was properly granted because the Appellant could never explain how any of the allegations complained of shared a nexus with the Wells Fargo IRA that ultimately disbursed funds to the decedent's granddaughters.

The entirety of the Appellant's argument both in the lower court and now on appeal focuses solely on a discreet portion of all the pertinent issues. Specifically, the Appellant concentrates all of her attention on the events involving the USAA IRA, completely ignoring the existence of the Wells Fargo account set up by Mr. Dorn. In this way, even giving her every benefit of the doubt, the Appellant stops short of making a case against summary judgment.

a. Tortious Interference with Contractual Relations

Without addressing any possible connection between the USAA and Wells Fargo accounts, the Appellant cannot possibly prove tortious interference with contractual relations. In order to prove this claim, the Appellant must show "1) the existence of a contract; 2) knowledge of the contract; 3) intentional procurement of its breach; 4) the absence of justification; and 5) resulting damages." *Edeco, Inc. v. Charleston Cnty. School Dist.*, 372 S.C. 470, 479, 642 S.E.2d 726, 731(2007)(citing *Kinard v. Crosby,* 315 S.C. 237, 240, 433 S.E.2d 835, 837 (1993)).

The analysis of the aforementioned factors is straightforward. While the Appellant may argue that she was a third-party beneficiary with vested rights under the USAA IRA, there is no evidence in the record at all that she held any such status with regard to the Wells Fargo IRA. More to the point, any contractual rights that the Appellant had with regard to the USAA account ceased to exist in 2014 when Mr. Dorn lawfully closed that account and transferred funds to Wells Fargo N.A. Furthermore, there is no evidence in the record that the Respondent even knew about the existence of the Wells Fargo account.

The existence of the Wells Fargo IRA also obviates the third element of this claim: intentional procurement of a breach. On the one hand, the only claim the Appellant has with regard to the USAA account (or any account for that matter) are as a beneficiary of the account. Again, any agreement between Dr. Petit and USAA to disburse funds on his passing had been terminated some three years prior to the decedent's death. Moreover, the Wells Fargo IRA, which was lawfully and independently established, was disbursed in accordance with the terms as agreed upon by Mr. Dorn as attorney-in-fact

for Dr. Petit. This leads into the question of resulting damages. With the establishment of the Wells Fargo IRA and the liquidation of the USAA account, the Appellant received exactly from USAA what she would have had Dr. Petit never changed beneficiaries in 2012: nothing.

b. Negligence and Breach of Fiduciary Duty

Just the same, the existence of the Wells Fargo account is fatal to the Appellant's causes of action for negligence and breach of fiduciary duty in that it obviates the existence of proximate cause.[3] *See RFT Mngmt Co. Tinsley & Adams*, 399 S.C. 322, 336, 732 S.E.2d 166, 173 (2012)(citing *Moore v. Moore,* 360 S.C. 241, 599 S.E.2d 467 (Ct. App. 2004))("To establish a claim for breach of fiduciary duty, the plaintiff must prove (1) the existence of a fiduciary duty, (2) a breach of that duty owed to the plaintiff by the defendant, and (3) *damages proximately resulting from the wrongful conduct of the defendant* (emphasis supplied)."); *Bloom v. Ravoira*, 339 S.C. 417, 422, 529 S.E.2d 710, 712 (2000)(citing *Bishop v. S.C. Dep't of Mental Health,* 331 S.C. 79, 502 S.E.2d 78 (1998))(holding that the elements of negligence are "(1) a duty of care owed by defendant to plaintiff; (2) breach of that duty by a negligent act or omission; and (3) *damage proximately resulting from the breach of duty* (emphasis supplied)"). Proximate cause requires the Appellant to show both causation in fact and legal cause. *Small*, 329 S.C. at 463(citing *Rush v. Blanchard,* 310 S.C. 375, 426 S.E.2d 802 (1993); *Oliver v. S.C. Dep't of Hwys. and Pub. Transp.,* 309 S.C. 313, 422 S.E.2d 128 (1992); *Vinson v. Hartley,*324 S.C. 389, 477 S.E.2d 715 (Ct. App. 1996)). To show causation in fact, the Appellant must show that "but for" the Respondent's actions, the injury would not have been sustained.

[3] For the reasons set forth in subsequent sections, the Respondent does not concede that *any* of the elements of these causes of action have been met by the Appellant.

Small, 329 S.C. at 463(citing *Rush*, 310 S.C. at 804; *Thomas v. S.C. Dep't of Hwys. and Pub. Transp.,* 320 S.C. 400, 465 S.E.2d 578 (Ct. App. 1995)). "Legal cause is proved by establishing foreseeability . . . A plaintiff therefore proves legal cause by establishing the injury in question occurred as a natural and probable consequence of the defendant's act." *Small*, 329 S.C. at 463(citing *Oliver*, 309 S.C. at 317; *Bramlette v. Charter-Medical-Columbia,* 302 S.C. 68, 393 S.E.2d 914 (1990); *Greenville Memorial Auditorium v. Martin,* 301 S.C. 242, 391 S.E.2d 546 (1990)). Here, the Appellant provided no evidence whatsoever showing how Mr. Dorn's actions were the "natural and probable consequences" of the Respondent's conduct on January 23, 2012.

Assuming that the Appellant could prove every element of every claim against the Respondent with regard to the USAA account, she has failed to show how any of this conduct carried over into the facts surrounding the Wells Fargo account. The only thing in the record that shows any nexus between the two accounts is the beneficiary designation received by Mr. Dorn from USAA. While we do know that Mr. Dorn had received this information from USAA, no evidence exists as to the extent to which Mr. Dorn relied on this information and whether Mr. Dorn would have acted differently under a separate set of circumstances is completely unknown. The Appellant conceded as much at her deposition:

> Q. Okay. And you're saying – your testimony today is, as best you understand it, the information came from USAA account had been transferred over to Wells Fargo.
>
> A. That is my understanding
>
> Q. Okay. So, at some point, Mr. Dorn became aware of these beneficiaries.
>
> A. I suppose he did.

Q. Okay. And Mr. Dorn did not feel it necessary to change the beneficiaries?

…

As best you can tell.

A. I don't know – as to what he felt, I don't know. But ---

Q. Do you have any evidence – did Mr. Dorn reach out to you and say, "I have a problem with this?"

A. He did not.

Q. Okay. Do you have any evidence indicating that Mr. Dorn had particular issues with the beneficiary designations?

A. I don't know that he did.

Q. Okay. So you have no evidence that he did anything other than leave things the way they were.

A. That's my understanding.

ROA ___. Petit Dep. 110:15-111:13. Mr. Dorn had been the decedent's accountant for thirty years and was very familiar with Dr. Petit's accounts. ROA ___. Petit Dep. 90:3-8. Still, in the two-plus years of this litigation, Mr. Dorn's deposition was never taken and at no point did he provide an affidavit, letter, memorandum, or any other statement commenting on his decision-making process when opening the Wells Fargo IRA and designating beneficiaries as he did. *Cf. Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101,112-14, 410 S.E. 2D 537, 543-44 (1991)(finding that summary judgment was premature where further discovery was likely to uncover additional evidence, the Plaintiffs had not been dilatory in seeking discovery, and recognizing the complexity in of the case). To this end, we can only speculate as to the import this document had on Mr.

Dorn's thinking at the time. Otherwise, the Court has no information regarding the impact of change of the USAA beneficiaries and the Wells Fargo IRA.

c. Undue Influence

Of all of the claims presented by the Appellant, her claim for undue influence is the one which is most contradicted by the existence of the Wells Fargo IRA. As such, not only is there a dearth of evidence supporting this claim, the evidence in the record renders such a claim squarely impossible. In order to prevail on this claim, the Appellant was required to show influence by the Respondent of

> the kind of mental coercion which destroys the free agency of the creator and constrains him to do things which are against his free will, and that he would not have done if he had been left to his own judgment and volition. The influence must be of such a degree that it prevents the grantor's exercise of judgment and free choice. Moreover, a showing of general influence is not tantamount to undue influence.

Dixon v. Dixon, 362 S.C. 388, 398-99, 608 S.E.2d 849, 854(2005)(citing *Russell v. Wachovia Bank, N.A.*, 353 S.C. 208, 217-19, 578 S.E.2d 329, 333 (2003); *Calhoun v. Calhoun,* 277 S.C. 527, 531, 290 S.E.2d 415, 418 (1982)).

Here, it is undisputed that the Wells Fargo IRA was the account that ultimately distributed funds to the decedent's granddaughters. ROA ___. It is also undisputed that this account was established by the decedent's lawful attorney-in-fact and pursuant to a court order. ROA ___. Petit Dep. 90:14-16. There is no evidence in the record that the Respondent coerced the decedent into directing Mr. Dorn with regard to the establishment of the new account. Moreover, there is no evidence that the Respondent had any contact whatsoever with Mr. Dorn or any transaction involving Dr. Petit and Wells Fargo N.A. The Respondent even testified that she was wholly unaware that Mr. Dorn was Dr. Petit's power of

attorney. ROA ___. Van Swol Dep. 69:20-24. In this way, the Appellant's arguments for undue influence with regard to just the USAA account (discussed below), it is difficult to understand what influence if any the Appellant had with regard to the final disbursement of funds from Dr. Petit's IRA.

2. **Even if there were a direct connection between the two IRAs at issue, the Appellant still could not provide even a scintilla of evidence supporting her causes of action.**

Assuming for the sake of argument that the Wells Fargo IRA constitutes a logical next step in the series of events outlined above, the Appellant still cannot make a case for any of the causes of action that she brings.

a. Tortious Interference with a Contractual Relationship

As stated above, the elements of tortious interference with a contractual relationship are "(1) existence of a valid contract; (2) the wrongdoer's knowledge thereof; (3) his intentional procurement of its breach; (4) the absence of justification; and (5) resulting damages." *Camp v. Springs Mortgage Corp.,* 310 S.C. 514, 517, 426 S.E.2d 304, 305 (1993). This cause of action is designed to protect "the property rights of the parties to a contract against unlawful interference by third parties." *Threlkeld v. Christoph,* 280 S.C. 225, 227, 312 S.E.2d 14, 15 (Ct. App. 1984). While South Carolina law does recognize certain instances of third-party beneficiaries having enforceable rights under a contract, *see Helms Realty, Inc. v. Gibson-Wall Co.*, 363 S.C. 334, 340, 611 S.E.2d 485, 488 (2005)(citing *Touchberry v. City of Florence,* 295 S.C. 47, 48-49, 367 S.E.2d 149, 150 (1988))("A third-party beneficiary is a party that the contracting parties intend to directly benefit."), an "IRA beneficiary merely has an expectancy interest in the

IRA until the owner's death." *Stribling v. Stribling*, 369 S.C. 400, 406, 632 S.E.2d 291, 294 (Ct. App. 2006)(citing *Luszcz v. Lavoie,* 787 So.2d 245, 248 (Fla. 2d Dist. Ct. App. 2001); *Rishel v. Estate of Rishel,* 781 N.E.2d 735, 742 (Ind. Ct. App. 2003)). As such, this expectation does not vest and become an actual, enforceable interest until the decedent passes away. *See Stribling*, 369 S.C. at 406("The beneficiary interest in a life insurance policy is analogous to the beneficiary interest in an IRA."); *Babb v. Paul Revere Life Ins. Co.,* 224 S.C. 1, 9, 77 S.E.2d 267, 271 (1953)(quoting 45 C.J.S. *Insurance* § 465(b))("An action for damages for wrongful cancellation or repudiation of an insurance policy may be maintained by either insured or the beneficiary during the lifetime of insured, but the beneficiary cannot maintain the action during insured's lifetime if he does not have a vested interest in the policy, or if his interest is in the nature of a mere expectancy and does not become absolute and indefeasible until the death of insured . . . After the death of insured, the action may be maintained by the beneficiary."); *Waters v. S. Farm Bureau Life Ins. Co.,* 365 S.C. 519, 523, 617 S.E.2d 385, 387 (Ct. App. 2005)(quoting *Antley v. New York Life Ins. Co.,* 139 S.C. 23, 27, 137 S.E. 199, 200 (1927))("When an insurance policy does not reserve to the insured the right to change the beneficiary, 'the beneficiary, upon the issuance of the policy, acquires a vested interest in the proceeds of the insurance when available according to the terms of the policy, which cannot be divested by any act of the insured.'").

At the outset, the Respondent concedes that here she combines the concept of legal standing into the first element stated above. Legal standing is a necessary component of any lawsuit: "It is fundamental that one without interest in the subject matter of a law suit has no legal standing to prosecute it." *Furman University v.*

Livingston, 244 S.C. 200, 204, 136 S.E.2d 254, 256 (1964). As a separate yet highly related issue to the first element of tortious interference, the Appellant has no legal standing to bring this cause of action because, for reasons stated below, she has no vested interest in any of the IRAs at bar. *See Rice v. Palmetto State Life Ins. Co.*, 196 S.C. 410, 412, 13 S.E.2d 493, 494 (1941)(holding that where an insured reserves the right to change the beneficiary of a policy, a former beneficiary cannot challenge the change). Yet, despite the Appellant's hyperbole of "clos[ing] the courthouse doors," the Respondent does not take the position *only* the contracting parties may avail themselves of this particular cause of action. Rather, given this Court's own statements in *Threlkeld*, stated above, a non-party with vested interests under the contract could potentially bring a tortious interference cause of action to protect their property rights. In the Respondent's view, this would be a factor going towards the first element of the claim. In any case, as discussed in the following paragraphs, the Appellant has failed to prove either standing or the existence of a vested interest in the USAA IRA.

All the same, without a vested interest in Dr. Petit's IRA, the Appellant cannot satisfy the first element in her tortious interference claim, *i.e.*, that she has any enforceable rights under the USAA account. In the lower court, the Appellant offered no evidence at all that she had any vested rights under the USAA contract. Furthermore, the record is clear that the decedent reserved the right to change his beneficiaries under all applicable IRAs at will. ROA ___. This Court in its *Stribling* decision makes clear that, without more, the Appellant only had a mere expectancy interest in the account.[4] The

[4] The Appellant argues in her brief that the Respondent "stipulated" at the hearing on Respondent's motion for summary judgment that this case was a matter of first impression for South Carolina courts. The Respondent made no such stipulation. Rather, counsel for the Respondent was unaware of *Stribling* and, instead, relied on precedent involving insurance beneficiaries to advance the same legal premise delivered

Appellant, however, argues that *Stribling's* clear declaration is not only "mere dicta" but also advances *her* theory of the case. First, the precedent at issue is contained in a section of this Court's order entitled "Expectancy Interest," so it is difficult to understand how this is "mere dicta." *Stribling*, 369 S.C. at 405. Second, the principle enunciated in *Stribling* is that the beneficiary of an IRA, like beneficiaries of insurance contracts, have no vested interests in the underlying agreement. *Id.* at 406. Without a vested interest in the contract, the Appellant is not a third-party beneficiary and has no enforceable rights under the contract.

For many of the reasons stated in Respondent USAA's brief, the Appellant's reliance on *Mayer v. M.S. Bailey & Son*, 347 S.C. 353, 555 S.E.2d 406 (Ct. App. 2001), is misplaced. This Court in *Mayer* held that contingent remaindermen were statutory beneficiaries pursuant to S.C. Code Ann. § 62-1-201(2) and therefore constituted "interested parties" for the purposes of S.C. Code Ann. § 62-7-201(a). *Id.* at 359. In this way, the Appellant asks this Court to not only disregard its decision in *Stribling* (in addition to the well-settled law on which *Stribling* is premised) but to apply a wholly unrelated statutory framework. This, of all things, would produce an "absurd result." Pet'r Br. at 15.

Even if this Court disregarded *Stribling* and found the Appellant to be a third-party beneficiary of the IRA, the "stranger doctrine" precludes the maintenance of this lawsuit by her. While not explicitly called such, this Court in *Threlkeld* and our Supreme Court in *Dutch Fork* recognized an iteration of what other courts have termed the "stranger doctrine." *See Atlanta Market Center Management Co. v. McLane*, 269 Ga.

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in *Stribling*. ROA ___. At the exact same hearing, Counsel for USAA brought *Stribling* to the trial court's attention. ROA ___.

604, 503 S.E.2d. 278 (Ga. 1998)(citing *Jet Air v. National Union Fire Ins. Co.,* 189 Ga.App. 399, 375 S.E.2d 873 (1988); *Hyre v. Denise,* 214 Ga.App. 552, 449 S.E.2d 120 (1994); *Nexus Services v. Manning Tronics,* 201 Ga.App. 255(1), 410 S.E.2d 810 (1991))("After proving the existence of a contract, it is essential to a claim of tortious interference with contractual relations that the plaintiff establish that the defendant is a "third party," i.e., a "stranger" to the contract with which the defendant allegedly interfered."); *Threlkeld*, 280 S.C. at 227(holding that an action for tortious interference "does not protect a party to a contract from actions of the other party"); " *Dutch Fork Dev. Grp. II, LLC v. SEL Properties, LLC*, 406 S.C. 596, 604-05, 753 S.E.2d 840, 844 (2012)(citing *Threlkeld*, 280 S.C. at 227; *Bradburn v. Colonial Stores, Inc.,* 273 S.C. 186, 188, 255 S.E.2d 453, 455 (1979); *CGB Occupational Therapy, Inc. v. RHA Health Servs., Inc.,*357 F.3d 375, 385 (3d Cir. 2004); Thomas G. Fischer, Annotation, *Liability of Corporate Director, Officer, or Employee for Tortious Interference with Corporation's Contract with Another,* 72 A.L.R.4th 492, §§ 3-8 (1989 & Supp.2012); *Kia v. Imaging Scis. Int'l, Inc.,* 735 F.Supp.2d 256, 268 (E.D. Pa. 2010); 3A William Meade Fletcher, *Fletcher Cyclopedia of the Law of Corporations,* Chapter 11, XXVIII, § 1117 (West 2012))(holding that an agent of a contracting party has limited tortious interference liability as it would be akin to holding the principal liable for interfering with its own contract).

In the case at bar, the Respondent was Dr. Petit's power of attorney and thus an agent for the decedent with regard to USAA. Again, the only known actions that the Respondent took with regard to the USAA account was filling out the change of beneficiaries form for the decedent and returning it to USAA. The statements by the

Appellant that the Respondent herself changed the beneficiaries to the USAA are without support in the record. Specific to this point, the Appellant testified at her deposition to the following:

> Q. Do you have any evidence that USAA ever made any change to an – to the IRA account at the direction of Phyllis Krohn?
>
> A. No, not to my knowledge. The e-mails were going to her regarding the account, so she could have. But I don't know that for certain.

ROA ___. Petit Dep. 164:18-23. Therefore, as an agent to Dr. Petit, acting within the scope of her authority, the "stranger doctrine" would preclude a tortious interference claim against the Respondent.

For all of these reasons, the lower court's granting of summary judgment for the Respondent should be affirmed.

b. Breach of Fiduciary Duty

Summary judgment was properly granted with regard to the Appellant's breach of fiduciary duty claim because, as succinctly stated in the Appellant's brief, if the Respondent had any fiduciary duty it was to Dr. Petit. As stated above, a breach of fiduciary duty is proved when the plaintiff can show "(1) the existence of a fiduciary duty, (2) a breach of that duty owed to the plaintiff by the defendant, and (3) damages proximately resulting from the wrongful conduct of the defendant." *RFT Mngmt Co.*, 399 S.C. at 336 (citing *Moore v. Moore,* 360 S.C. 241, 599 S.E.2d 467 (Ct. App. 2004)). After conceding that that any duty owed was to Dr. Petit, the Appellant fails to provide any legal or factual support for her contention that *she* should recover damages for any alleged misconduct towards her late father. *See Broom v. Jennifer*, 403 S.C. 96, 115, 742

S.E.2d 382, 391(2013)(citing *Hunt v. Forestry Comm'n,* 358 S.C. 564, 573, 595 S.E.2d 846, 851 (Ct. App. 2004))("Issues raised in a brief but not supported by authority may be deemed abandoned and not considered on appeal.")

To this end, the Appellant fails to demonstrate how she has any right whatsoever to prosecute a claim against the Respondent for damages incurred by someone else. It is worth noting that the Appellant was never appointed as the personal representative of the decedent's estate, ROA ___, and brought this lawsuit in her individual capacity. As such, she has failed to demonstrate how she has any legal interest the subject matter of this particular claim. *See Furman University*, 244 S.C. at 204.

As such, this Court should affirm the lower Court's grant of summary judgment.

c. Negligence

The Appellant argues that the Respondent owed her a legal duty merely by virtue of being the decedent's attorney-in-fact. The Appellant, however, does not offer any legal support this conclusory statement. *See Broom*, 403 S.C. at 115 (citing *Hunt,* 358 S.C. at 573)("Issues raised in a brief but not supported by authority may be deemed abandoned and not considered on appeal."). As such, "[a]n essential element in a cause of action for negligence is the existence of a legal duty of care owed by the defendant to the plaintiff. Without a duty, there is no actionable negligence." *Bishop*, 331 S.C. at 86 (citing *Rogers v. S.C. Dep't of Parole & Community Corrections,*320 S.C. 253, 464 S.E.2d 330 (1995)). And, here, the Appellant cannot have her cake and eat it to. If the Appellant is, as she asserts, a third-party beneficiary of the IRA with enforceable rights, she cannot maintain a claim for negligence because "a negligence action will not lie when the parties are in privity of contract." *Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*,

320 S.C. 49, 55, 463 S.E.2d 85, 88 (1995). Otherwise, the Appellant must show some relationship between herself and the Respondent as a result of the Respondent's relationship to Dr. Petit. *See State Ports Auth. v. Booz-Allen,* 289 S.C. 373, 377, 346 S.E.2d 324, 325 (1986)(citing *Barker v. Sauls*, 289 S.C. 121, 345 S.E.2d 244 (1986))(holding that a tort-feasor's duty may arise from a contractual relationship with a third-party). In any event, the Appellant has failed to demonstrate what legal duty, if any, the Respondent owed her.

Still, even if the Appellant could provide supporting authority for the proposition that a legal duty exists between an attorney-in-fact and a beneficiary of an IRA, the Appellant failed to explain how the Respondent, in her capacity as Dr. Petit's power of attorney, breached any such duty with "negligent, reckless willful or wanton acts of mismanaging the IRA account, and changing the beneficiaries without proper authorization from the holder of the account, Dr. Petit." ROA ___. Petitioner's Brief at 17-18. The evidence in this case clearly demonstrates that the Respondent never made any changes to the USAA account. ROA ___. Petit Dep. At 164:18-23. Furthermore, there is no evidence in the record that the Respondent "mismanaged" any IRA belonging to Dr. Petit. All of the evidence in this case points to the fact that the Respondent filled out the change of beneficiaries form at the request of Dr. Petit, who subsequently executed the form and returned it to USAA. Furthermore, the facts of this case further demonstrate that Dr. Petit was free to change the beneficiaries of the IRA at will.

d. Undue Influence

Finally, the lower court properly granted summary judgment in favor the Respondent with regard to the Appellant's undue influence claim.[5] In this regard, the Appellant spends a great deal of time focusing on Dr. Petit's condition following his cardiac event in January 2012. The standard for showing undue influence is high. *See Dixon,* 362 S.C. at 398-99("[T]he influence must be the kind of mental coercion which destroys the free agency of the creator and constrains him to do things which are against his free will, and that he would not have done if he had been left to his own judgment and volition.")(citing *Rusell*, 353 S.C. at 217). "General influence is not enough. A mere showing of opportunity and even of a motive to exercise undue influence does not justify a submission of that issue to a jury, unless there is additional evidence that such influence was actually utilized." *Calhoun v. Calhoun*, 277 S.C. 527, 531, 290 S.E.2d 415, 418 (1982)(citing *Mock v. Dowling*, 266 S.C. 274, 222 S.E.2d 773 (1976)). But there is nothing in the record that shows that, despite the decedent's condition, such undue influence was applied to him on January 23, 2012.

Viewed in the light most favorable to the Appellant, all of the facts recited by her with regard to Dr. Petit's health amounts to, at best, general influence. The Appellant maintains that following the events of January 2012, her father was incapacitated and never regained either his ability to either sign his name or give assent to legal documents.

[5] In her complaint, the Appellant requests as relief that "[a]ny such documents and/or transactions should be set aside because of Defendant Krohn's undue influence." ROA ___. Complaint ¶ 41. Even if the Appellant were successful with this particular cause of action, the end result would remain the same. Specifically, even if the change of beneficiaries form executed by Dr. Petit on January 23, 2012, were set aside and the Appellant were reinstated as a primary beneficiary of the USAA IRA, that account ceased to exist in 2014 when it was closed by Mr. Dorn. As Mr. Dorn, Wells Fargo N.A., the Estate of Edward Petit, and Dr. Petit's grandchildren were never involved in this lawsuit, which has passed the Statute of Limitations, there is no relief to which the Appellant would be entitled even if she is successful on appeal as to this issue.

ROA ___. Petit Dep. 83:7-17. But the facts show that, in February 2012, Dr. Petit executed two powers of attorney, the first being the Dorn POA and the second being a healthcare power of attorney in favor of the Appellant's sister. ROA ___. Durable Power of Attorney; Petit Dep. 83:18-21. The former was validated by the Greenwood County Probate Court and the latter was never challenged by the Appellant. ROA ___. Protective Order ¶1; Petit Dep. 83:22-84:6. So while the Appellant may *believe* that her father was incapacitated at the time in question, the evidence shows that there were several instances where Dr. Petit clearly had capacity and exerted his will independent of the Respondent. Moreover, the Appellant was not present when Dr. Petit signed the Janaury 23, 2012, change of beneficiaries form and therefore any beliefs she has regarding any undue influence applied to her father are pure speculation. ROA ___. Petit Dep. 76:12-17.

Also, the Appellant's reliance on the Respondent's "admission" is less than helpful. The Respondent's testimony with regard to this "admission" is clear:

> A. And another time I was at the farmers market and she told me about the legal situation that she was in with her father's money, and she was very upset with me.
>
> Q. What do you mean by legal situation that she was in with her father's money?
>
> A. Well, the fact that the power of attorney did not allow her to have access to the USAA funds.
>
> Q. And you said the power of attorney didn't allow her to have...
>
> A. Yes.
>
> Q. Okay. How did you respond to Karen that day at the farmers market?
>
> A. That I was sorry for the situation she was in.

. . .

Q. And you -- and you said you told her you were sorry about the situation she was in. Do you recall what else you told her that day?

A. I think I might've said I wish that I had never been involved with all of this.

Q. And what you mean? What part do you wish you would have never been involved with?

A. To be his power of attorney.

Van Swol Dep. 66:1-17. This is hardly an "admission." Furthermore, the "curious" reasons for the Respondent's apologizing to the Appellant are explained in the exchange set out above. In the Appellant's version of the Respondent's "admission," the Respondent tells her the following:

> And I said, "You did it? You changed the beneficiaries?" And she said, "Yes." Well, I was stunned, quite honestly. And I asked her why. And she said, "Well, your father wanted to do something nice for your nieces, so I decided" – and those words just hit me like hot water – "I decided that he could change the IRA and give the funds to them."

ROA ___. Petit Dep. 121:12-19.[6] This statement is consistent with earlier testimony presented that Dr. Petit had expressed an interest in changing his USAA beneficiaries to his granddaughters several months prior to the January 2012 cardiac event. ROA ___. Van Swol Dep. 50:17-52:16. Again, the allegations put forth by the Appellant show some kind of general influence but do not tend to show that the decedent's will was destroyed.

All this being the case, the Appellant cannot rest on a general allegation that Dr. Petit was incapacitated at the time the change of beneficiaries was signed. This is so

[6] The Affidavit of Wallace Dorn was presented at the hearing on Respondent's motion for summary judgment. Arguably, this affidavit presents no new first-hand information and, instead, merely recites the Appellant's recitation of the Respondent's comments.

because are there are several instances having capacity in the month following the decedent's release from the hospital. Furthermore, the Appellant cannot rest on general allegations of the decedent's poor health following the January 2012 cruise because (1) he had expressed an interest in changing his beneficiaries at the end of 2011 and (2) he continued to exercise his own will on at least two other occasions following his hospitalizations. Instead, what the Appellant must show is something concrete demonstrating that on January 23, 2012, the Respondent overcame Dr. Petit's will and caused him to change the beneficiaries of the USAA account. She has presented no evidence of this.

For this reason, this Court should uphold the lower court's decision and affirm summary judgment.

Conclusion

For the foregoing reasons this Court should affirm the lower courts order granting of summary judgment.

January 4, 2021

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Attorney for
Phyllis Jean Van Swol

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Jan 04 2021
SC Court of Appeals

Appeal from Greenwood County
Donald B. Hocker, Circuit Court Judge
Appellate Case Tracking No. 2020-000917

KAREN PETIT,

APPELLANT,

-v-

PHYLLIS JEAN VAN SWOL, USAA FEDERAL SAVINGS BANK, and USAA INVESTMENT MANAGEMENT, CO.,

RESPONDENTS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has served the Respondent's Initial Brief and Designation of Matters on Appeal on the attorney's of record in the above-captioned case by emailing copies of the same in PDF format.

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